



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 139 of 2003

DAVID MUGO MWANGI APPELLANT

VERSUS

ELVIS KINYANJUI MBURU RESPONDENT

[An Appeal from the Judgment and decree of the Senior Principal Magistrate Hon. J. Kaburu at Nakuru dated 8th August, 2003 WHEREBY the appellant was ordered to pay kshs.68,000/- plus costs of the suit]

JUDGEMENT

The appellant David Mugo Mwangi was sued in CMCC Nakuru Case No.763 of 2001 for a claim of general and special damages. The claim arose as a result of an alleged medical malpractice. The respondent claimed that the appellant was running a medical clinic called Euvan Medical Clinic at kabazi where he held himself as a qualified dentist. On the 15th April, 2000, the respondent was experiencing a tooth ache and he sought the medical services of the appellant. The appellant injected the respondent on the cheek and extracted his lower right tooth.

As a result of that extraction and injection, the respondent developed severe abscess and swelling in the mouth. The next day the respondent reported the swelling to the appellant who administered to him some pain killers and was advised to use hot water and salt. The pain and swelling persisted. The respondent sought the services of **Dr.Noah Mukasa** who treated the respondent for two weeks for the abscess. **Dr. Mukasa** also gave evidence in court and said that the respondent's injury was as a result of a use of wrong injection which was administered in the cheek instead of the gum and the injection must have been unsterile. As a result of the said injury which the respondent attributed to the negligence of the appellant he sought for special and general damages and gave the particulars of the negligence as failure by the appellant to adhere to the medical practice, failure to use sterilized equipment while extracting the tooth and subjecting the respondent to pain and exposing him to other diseases. The respondent also relied on the doctrine of **res-ipsa loquitor** in his claim.

The appellant denied liability in total in his written statement of defence. This matter had started as a criminal complaint where the respondent was the complainant and the appellant was charged in **CMCR.C.No.1168 of 2000** with the offence of Assault and causing actual bodily harm contrary to section 251 of the Penal Code.

The particulars of the charge stated that on the 15th day of April, 2000 at Euvan Medical Clinic Kabazi in Nakuru District within the Rift Valley Province, the appellant unlawfully assaulted the respondent by injecting him with a dirty injecting needle thereby occasioning him actual bodily harm.

After hearing the prosecutions case, the trial court found that there was no case to answer and the appellant was discharged under Section 210 of the Criminal Procedure Code. That is when the respondent filed the civil case the subject of this appeal. The trial court found that the respondent was able to prove the particulars of negligence. The appellant was ordered to pay a sum of kshs.50,000/= being general damages, kshs.18,000/- being special damages and costs of the suit.

Being aggrieved with the said judgment, the appellant challenged the said judgment on the grounds that the holding on liability was not based on the evidence. The Trial court was also faulted for relying on circumstantial evidence and for awarding excessive damages in the circumstances.

In further argument, Learned Counsel for the appellant **Ms Njagua** urged this court to consider that there were contradictions and there was no documentary evidence to support the fact that the respondent was indeed treated as a patient at the appellant's clinic on the material day. She challenged the evidence of **Dr. Masira Mukasa** and also the evidence of the respondent for lacking credibility and contradicting the proceedings in the criminal case.

This appeal was opposed Learned Counsel for the respondent argued that the standards of proof in a criminal case are different from a civil suit and the mere fact that the criminal case was dismissed does not mean that the trial magistrate erred by awarding damages in a civil suit. The assessment of damages was also not excessive considering the injuries suffered by the respondent.

This being the first appeal, this court is mandated to re-evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowance for that. The principles to take into consideration have been well set out in numerous cases particularly in the case of **Kirunga Vs Kirunga and Another [1988 KLR page 348]** where the court of Appeal held:

“An appeal court cannot properly substitute its own finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

The principle issue for determination in this appeal is whether the respondent proved his case on a balance of probability. The trial court considered the evidence in support of the respondent's case and believed the evidence by the respondent and his witness **Dr. Mukasa**. The trial court dismissed the evidence by the appellant as lacking in merit. This touches on the credibility of the witnesses which is a matter of perception better evaluated by the trial court that saw the witnesses as they testified. In the case of **Peter Vs Sunday (1958) E.A page 429**, the Court of Appeal held that:

“It is a strong thing for an appellate court to defer from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

I find that the trial court properly analyzed the evidence before arriving at its decision. The trial court considered the defence and especially the record of patient which the trial Magistrate found was made up by the appellant and found that failure by the respondent to produce the treatment card was not a good reason not to believe his evidence for reasons that treatment cards are issued by the appellant.

Regarding the issue that the court should have noted the same complaint was dismissed as a criminal complaint, it is trite law that the standards of prove in both criminal and civil are different. I have gone through the criminal proceedings and I have not noted any material inconsistencies in the testimonies of the same witnesses who testified in the civil case.

The final issue is in regard to the assessment of general damages. The assessment of general damages is

also a matter of the exercise of the trial magistrate's discretion and unless the assessment is high or too low as to represent an error it is undesirable for this court to interfere. The trial court awarded Kshs 50,000 for general damages and Kshs 18000, for the special damages which were also pleaded and proved during the hearing. Taking the totality of the evidence, I find no reason why this court should interfere with the findings of facts and the assessment of damages by the trial court.

This appeal lacks merit and it is hereby dismissed with costs to the respondent.

Signed and delivered on 25th day of May, 2007.

M. KOOME

JUDGE