



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 673 of 2002

MWAURA NDEGWA.....APPELLANT

VERSUS

ISAIH NJUGUNA.....RESPONDENT

JUDGMENT

The appellants herein were sued by the Respondent in Thika CMCC 1324 of 1999. The cause of action in paragraph 7 of the plaint averred that the appellants in consent with other un identified persons violently and without lawful cause or excuse beat the Respondent with sticks, hands, blows and kicks thereby occasioning him serious injuries on the head limbs and body generally. As a result of the said assault the Respondent sustained injuries particularized in the same paragraph namely Bruises on the forehead, face and upper lips, Bruises on the chest, pain in the shoulder and upper hands, loss of consciousness and bodily numbness. In consequence of the afore mentioned matters the appellants were arrested and charged with the offence of assault causing actual bodily harm c/s 251 of the penal code in Kandara District Court criminal case No.294 of 1998. They were tried but acquitted under Section 215 Civil Procedure Code. But the Respondent contended that the discharge under the criminal procedure code is not a bar to civil liability for the harm caused to the respondent. As a result of the aforesaid assault the plaintiff incurred special damages in the form of cost of medical report, police abstract and medical expenses. He had been admitted at Thika District Hospital for two days. In consequence of the matters aforesaid the Respondent sought special damages, general damage's costs of the suit interest and any other relief that the court may deem fit to grant.

The appellants defended the claim by denying beating the Respondent on 23rd November, 1998 and inflicting serious injuries as claimed in paragraph 7 of the plaint and put the Respondent to strict proof. They admitted they had been charged with the offence of assault causing actual harm to the Respondent but contended that the said prosecution was brought in bad faith and sheer malice on the part of the plaintiff and the same criminal case No.294/1998 was dismissed for lack of evidence. That the suit was just filed to pre-empt any action that may be brought against the Respondent for malicious prosecution. On that account they prayed for the suit to be dismissed with costs.

The Record of the proceedings shows that the appellants were represented by Counsel who attended court and participated in the cross-examination of P.W.1, 2 and 3. There after the matter was adjourned to another date taken by consent for hearing on 7.5.2002. On this date Counsel for the appellants did not turn up but the hearing proceeded in his absence. P.W.4 and 5 gave evidence. The Court gave an opportunity to the appellants to ask questions and those who had questions to put, to the witnesses did so. On 21.5.2002 Counsel for the appellant attended and cross-examined P.W.6 and thereafter the case was adjourned for the defence evidence. There is no evidence that the Counsel for the appellants applied to recall the witnesses who had given evidence in his absence for cross-examination.

On 9.7.2002 when the case came up for defence, it is noted that the defence lawyer was held up at the Chief Justice's office and he was given up to 12.00 noon to attend. When he did not show up the defence, case was deemed as closed.

The lower Court wrote a judgment and after summarizing the plaintiffs evidence made findings to the effect that the plaintiffs evidence had not been rebutted by the defence and on that account found that the plaintiff had proved his case on a balance of probability and on that account found the appellants 100% liable.

Upon establishing liability the learned trial magistrate went ahead and found that Dr. Kales medical report supported the respondents claim as to injuries and on that account assessed general damages for pain suffering and loss of amenities at Kshs 70,000.00.

The appellants became aggrieved and have appealed to this court citing six grounds of appeal namely that the learned magistrate erred in law and fact.

- (1) In not giving the defendants a hearing where as they were present in court on 9th July, 2002 when the defence was to be heard
- (2) In making an order that there was no evidence for the defence whereas all the defendants were in court on 9th July, 2002 when the suit was set down for defence hearing.
- (3) In treating the Counsels absence as if it meant that the defendants were also not present in court.
- (4) In refusing to indulge the defendants counsel application for adjournment where as the court had been informed in advance and on 9th that Counsel was notified to appear before the Honourable the Chief Justice subsequent to the defence hearing date being set
- (5) By holding that the plaintiff had proved his case on a balance of probability.
- (6) The award of damages is manifestly excessive.

In consequence there of Counsel prayed for all the proceedings of the lower Court as from 9th July 2002 be set aside, that the judgment be also set aside, that the defence be allowed to call evidence on its own merit and that costs be borne by the Respondent in any event.

In his unwritten oral submissions in court Counsel for the appellant reiterated the grounds of appeal and stressed the following points:-

- (1) That on a previous occasion in the absence of the defence Counsel the learned trial magistrate had given the appellant opportunity to ask questions. On the date they are supposed to have given their defence the learned trial magistrate should also have called them out and asked them if they had any defence to offer as opposed to shutting them out the way the court did.
- (2) Finding by the lower court that the plaintiffs evidence had not been rebutted does not arise as the appellants were not given a chance to make their defence.
- (3) They maintain that since the court and the respondents Counsel knew that the defence Counsel was before the Honourable the Chief Justice an adjournment should have been given and the appellants allowed some other time to give their defence.
- (4) The case in the lower court was not proved on a balance of probability because the defence were not given a hearing.
- (5) There was contradiction as regards the nature of injuries given in the evidence and that testified on

by the Doctor who gave evidence.

(6) The Doctor who examined the Respondent did not come to give evidence and instead another doctor who had not examined the respondent gave evidence and that evidence is nothing but hearsay. More so when the court had made an order that the maker of the medical report be called to give evidence and no leave was sought from the court to vary that order.

(7) The judgment of the criminal proceeding showing why the appellants were acquitted was not produced in evidence and in the absence of that the court cannot be said to have proved its case on a balance of probability.

(8) Mere calling of witnesses who gave evidence in the criminal proceeding was not sufficient to tilt the balance of probability in favour of the plaintiff.

(9) They maintain that there was contradiction between the evidence of P.W.3 and 6 and so the same should have been rejected by the lower court.

(10) Lastly that in view of the fact that no injuries were visible the award of 70,000/= was excessive.

On the basis of that submissions Counsel asked the court to set aside the lower court judgment and grant prayers sought with costs.

The Respondents counsel on the other hand both in his written and oral submission submitted that the appeal is incompetent as it seeks the relief of setting aside of the judgment which should have been addressed to the lower court.

(2) That the appellants had an opportunity to apply to the lower court to allow them an opportunity to be heard but they did not avail themselves of this opportunity.

(3) The appellate court is urged not to exercise its discretion in favour of the appellant because.

(i) issues relied upon were not properly demonstrated before the lower court.

(ii) The plaintiffs witnesses were not controverted.

(iii) The injuries complained of were proved and were viewed by the court.

(iv) The Doctor who produced the medical report worked with the Doctor who had examined the Respondent and a basis was duly laid for the production of that evidence.

(4) They contend that the award given by the court is reasonable and commensurate with the injuries sustained and it should not be upset.

(5) They maintain that the grounds relied upon by the appellant are not supported by the lower court. On the basis of the foregoing submissions Counsel for the Respondent urged the court to dismiss the appeal.

In response to the Respondents sub missions Counsel for the appellant reiterated his earlier submissions and then added that since the proceedings were not entirely exparte order 9 A Civil Procedure Rules does not apply and an appeal was the proper procedure to be followed.

(2) They maintain that the court was aware of the reasons for the defence Counsels absence and the defence should have been indulged

(3) That no basis was laid for the production of the medical evidence by a Doctor other than the one who had examined the Respondent.

(4) It is their stand that this is a proper case for the exercise of the courts discretion in favour of the appellant.

The powers of an appellate court are clearly set out in Section 78 of the Civil Procedure Act. These are: power;

- To determine a case finally
- Remand a case
- To frame issues and refer them for trial
- To take additional evidence or to require the evidence to be taken
- To order a new trial

(2) subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

These powers are to be employed to resolve the complaints raised by the appellant using the evidence on record. These complaints are:-

(1) The Respondent only produced proceedings of the traffic case but not the judgment. The judgment would have shown the reasons as to why the appellants were acquitted.

(2) That the witnesses gave contradictory evidence giving rise to doubt as to whether they witnessed the incident.

(3) The medical report was produced by a stranger who did not treat the Respondent and without laying the basis and so that evidence is hearsay and it should not have been acted upon.

(4) The defence Counsel notified the Court of his absence when the defence case was to come up as he was attending the honourable the Chief Justice and when he delayed in showing up the matter, should have been adjourned to another date.

(5) Alternatively on previous occasions when he did not show up the Court should have given the appellants an opportunity to state their case.

(6) It was wrong for the learned trial magistrate to make a finding that the Respondent had proved his case on a balance of probability when there was no evidence from the defence and that holding is wrong.

Concerning the failure to produce the judgment of the criminal proceedings it is on record that that Counsel did not ask the Plaintiff to produce the same. Failure to produce the same has not occasioned any miscarriage of justice as the trial Court in the lower court proceedings giving rise to this appeal was not subordinate to the criminal court that had tried the appellants so as to be bound by that decision. The civil court was entitled to evaluate the evidence on the record and then arrive at its own decision and so was the civil court as it did. It is therefore not open to the appellant to complain that, that judgment was not considered more so when it was pleaded that they appellants had been tried and acquitted of the criminal charges. It was however rightfully pleaded that the acquittal in the criminal proceedings was not a bar to civil proceedings. All that the appellants should concern themselves with is whether on the facts the respondent has proved his case on a balance of probability or not.

As regards contradiction of evidence by witnesses called, all that the learned trial magistrate was required to do, was to determine whether from the evidence before her, there is sufficient evidence to show that the appellants are the persons who inflicted the injuries complained of. This court takes judicial notice of the

fact that contradiction in testimonies do occur and when they occur it depends on the classification given to them. Those classified minor do not vitiate the proceedings. Those that are classified major go to the root of the proceedings and usually vitiate them. Any proceedings where all witnesses give evidence in the same style and manner is a rehearsed proceeding which cannot be allowed to stand.

The testimony of P.W.1 is that he was in the Boardroom with 2 other elders when appellants stormed in with employees when the appellants ordered to leave but when they failed to leave, the 3rd defendant in the lower court pulled the seat the respondent was seated on and he fell down. Then the 1st defendant kicked the respondent on the face till he started bleeding from the mouth and nose. The second defendant started beating him while he was still lying down using his hands. He sustained injuries on the face, nose and mouth. He was hit on the right shoulder and chest. He was then dragged to the gate from here police were called by his son and then he was taken to the police station where he was issued with a P3. He was taken to Thika District hospital where he was admitted for two days.

P.W.2 claims to have been in the vicinity when the appellants allegedly came and broke doors and stormed into the Board Room where the Respondent was and they started beating him up. They were five of them in the Board Room. She also says that the appellant dragged the respondent outside. She heard the three appellants ask for the office keys. When cross-examined she confirmed that she saw the three beat the Respondent. One K. then slapped the Respondent while the 3rd defendant hit the respondent on the head with a hand and pulled the chair so he fell down. That the 3rd defendant pulled the seat and the respondent fell down. That there were five employees in the Board Room when the respondent was assaulted.

P.W.3 saw a crowd of people and when 3 jumped on the balcony. He followed to find out what was happening and he found the respondent lying on the ground being beaten. On inquiring they said that they wanted the plaintiff to give them the keys. He saw the plaintiff in great pain and assisted to lift him to another floor from where he was taken to the hospital. In cross-examination he said he saw 10-15 climbing the stairs.

This court's assessment of the above evidence is that P.W.1 did not mention that the keys were demanded. It is also to be noted that the figure of those present in the Board Room differed as between the testimony of P.W.1 and P.W.2 while P.W.3 said the number he saw were those who were climbing the stairs. He did not enter the Board Room. Issues of numbers does not go to the root of the proceedings as events happened suddenly and nobody can expect those present to have been keen on counting those who were present. Of importance here is that the three witnesses knew the appellants, they saw them break the door to the Board Room where the respondent was and they saw them assault the respondent. They also confirm that the respondent was injured as he was in great pain. It is the finding of this court that that evidence was sufficient to be acted upon to found liability on a balance of probability.

The appellants Counsel annexed to his written submissions a copy of the decisions in the case of **ABASI KIBASO VERSUS UGANDA (1965] E.A.507**. In this case the appellant was convicted of rape mainly on the evidence of the complainant. It was held inter alia that the trial judge placed a far greater reliance on the evidence of the complainant than was described in view of the contradiction and falsehoods in her evidence.

This decision refers to criminal proceedings where the standard of proof is beyond reasonable doubt as opposed to one a balance of probability. Further no falsehoods are alleged in this case. On this account the complaint on material contradictions of evidence is ousted.

The 3rd complaint relates to medical evidence. This was produced by **DR. WAIHENYA GITHIACA**. In his testimony he clearly stated that he had come to give evidence on behalf of **DR. KALE** who had since been transferred to Mombasa. The witness also confirms that it is, Doctor Kale who treated the respondent. The witness confirmed P.W.'s evidence that he was admitted at Thika District Hospital for two days and the injuries sustained were a swollen left eye, cut upper lip, soft tissue injury of chest and abdomen, swollen and tender lefts shoulder and bruised left knee which are the same injuries pleaded in

the plaintiff at paragraph 7. Swollen left eye, and cut upper lip are covered under item (1). Soft tissue injuries on the abdomen are covered under item (b). Swollen and SStender left shoulder is covered under item (c). Bruised left knee is not covered, loss of conclusions and bodily numbness are a condition which did not persist and that is why they do not appear in the medical report.

It is noted from the court record that when medical evidence was given the Counsel was not in and only one appellant cross-examined the Doctor. These proceedings were on 7.5.2002 when the matter came up again on 21.5.2002, Counsel was in court. When the plaintiffs last witness gave evidence the plaintiffs case was marked closed in his presence. He did not apply to recall the medical Doctor to attack the medical evidence. Since he raised no compliant then, the presumption is that he had no objection to that evidence. Having had an opportunity in the lower court to raise complaint and him having failed to raise the same, he cannot be heard on appeal raising such complaints. He either acquiesced or waived the right to object to medical evidence and the same is dismissed. This court finds nothing wrong in the manner it was tendered as a basis was laid that the maker had worked at the hospital where the witnesses was working and that he had since left on transfer to another station.

As for complaints about the proceedings of 9.7.2002 it is true that the lower court was aware that the appellants counsel was attending the Honourable the Chief. Indeed he had no control over the Chief Justice's diary and had to wait to be attended. This court agrees that in the circumstances of this case the matter should have been adjourned to another date or alternatively the appellants should have been called upon to tender their evidence in person. That notwithstanding the door was not closed for the defence. The defence Counsel had an opportunity to move the court either formally or informally to have the matter reopened for the defence case.

It is noted from the record that the matter was adjourned to 22.7.2002 for submissions. Only the Plaintiff filed written s submissions on 22.7.2002. There is an entry for 22.7.2002 when the court fixed judgment for 20.8.2002. The learned Counsel appearing for the appellants is silent as to what he did between 9.7.2002 to 22.7.2002 after he learned that the case had been closed without the defence evidence. The appellants were also in court and they are silent as to what steps they took to impress upon their Counsel to move the court to have the matter re-opened for them to tender their evidence. The judgment was on 30.10.2002 a period of about 4 months from 9.7.2002. Both the appellants and their counsel have not told this court what efforts were made to have the matter re-opened for them to be heard.

Even after judgment was entered there was no application to set aside that judgment which was ex parte by virtue of the defence not having tendered evidence.

It is in the light of the foregoing omissions that this court is now being asked to set aside the lower court judgment and order a retrial. As pointed out earlier on Section 78 Civil Procedure Act this court has power to assume the role of the lower court and finally determine the matter. This court is being asked to set aside the lower court judgment and order a retrial. The principles that the lower court would have applied had it been appreciated to set aside are the same principles that this appellate court will apply to determine whether the appellants have brought themselves within the principles governing setting aside of ex parte orders or proceedings. These principles are laid down in the land mark case of **SHAH VERSUS MBOGO AND ANOTHER [1967] E.A. 116**. At page 123 paragraph BC Harris J. as he then was set out the cardinal principle as "*I have carefully considered in relation to the present application the principles governing the exercise of the courts discretion to set aside a judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice*". This is pronounciation formed the holding of the case in holding hummer iv.

Since the date of that decision, that principle has been applied and upheld in numerous decisions both by the High Court and the Court of appeal in this jurisdiction. **KHAMONI J. IN THE CASE OF JOHN KAMAU KIHARA VERSUS PAUL NJIRU AND ANOTHER NAIROBI HCCC. 1774/94** traced the growth of that principle and added more into that baggage of "*The courts discretion*" At page 8 of the ruling quoting Apaloo JA.as he then was in the case of **PHILIP KELP TO CHEMOLO AND**

MUMIAS/ SUGAR CO. LTD VERSUS AUGUSTINE KIBENDE CIVIL APPEAL NO.103 OF 1984 the learned judge stated *“I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the right of the parties and not for the purposes of imposing discipline”* at page 9 of the ruling quoting Kneller J.A. as he then was the learned judge stated this the nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly should be considered. The question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court”. At page 10 of the same ruling the learned judge added a list by Bosire J. as he then was (now J.A.) in the case of **KIMANI KIGANO AND COMPANY ADVOCATES VERSUS JIMBA CREDIT COOPERATION LTD** namely:-

1. The power to set aside is discretionary.
2. The discretion is unlimited provided it is properly exercised.
3. It being a judicial discretion must be exercised on the basis of evidence and sound legal principles.
4. The court has power under order 1XA Rule 10 of the Civil Procedure Rules to set aside on terms as are just.
5. The court is obliged to look at the defence the applicant/defendant may be having to the claim.
6. If a party establishes that he has a reasonable defence which appears on the face of the pleadings to contain considerable merit the court ought to be inclined towards setting aside.

This Court has applied these principles to the facts of this appeal and applied them to the appellant’s complaints as set out both in the grounds of appeal and oral submissions in court. The issues that this court has to deal with in determining whether the appellants have brought themselves within the ambit of principles governing setting aside are.

- (1) Whether the judgment entered into can be termed as irregular or regular.?
- (2) On the basis of the evidence on record does the applicants defence raise triable issues.?
- (3) Is the conduct of the defence that occasioned the ex parte judgment being entered against them excusable or does it amount to an obstruction of justice?
- (4) Supposing that the said judgment is to be set aside are there any other considerations that this court need to look at before making the final orders on the appeal.

On regularity or irregularity of the judgment, this court of the opinion that the same was arrived at after trial of the plaintiff’s case. The defence was shut out due to non attendance of Counsel. As submitted by the appellants Counsel and this court agrees with this that non attendance of the defence Counsel should not have deprived the appellants of their right to defence. They should have been called upon to give their defence if they so wished. Since they also had their defence on record the same should not have been ignored. The learned trial magistrate simply remarked at line 8 from the bottom of the judgment at page 1 that “the defendants on the other hand did not tender any evidence in court”. It is now trite law that a court of law cannot afford to ignore a pleading of a party which is on record where the rights of both parties are under consideration. It is the finding of this court that the learned trial magistrate should have considered that defence in her judgment. However failure to so consider does not make the judgment irregular. It remains regular save for considered on as to whether despite it being regular there are other grounds on the basis of which it can be set aside to have the matter reopened for the plaintiff to be heard on the same.

Under the principles for setting aside as well as provisions of Section 78 Civil Procedure Act this court is entitled to revisit the defence on record and then determine whether it raises triable issues. Especially when the defence is already on record. The defence is at page 8 -9 of the record. In paragraph 3 the appellant defendants deny the assault while in paragraph 4 they deny any knowledge of the alleged injuries sustained by the respondent/plaintiff. When considered in the light of the evidence of P.W.2, 3 and 6 the Court finds that there were eye witnesses, they knew the disputants and witnessed the incident. The cross examination did not go to uproot their presence at the scene. There is no suggestion of any conspiracy or collusion with the Respondent to fix the appellants. It is therefore unlikely that any evidence that is likely to be offered by the defence will uproot or shake that evidence. This evidence corroborated that of the respondent.

Paragraph 5 of the defence pleads the acquittal in the criminal proceedings. As stated earlier on and as pleaded by the plaintiff the acquittal of the appellants is not a bar to civil proceedings against them. Further that the judgment or ruling containing the acquittal is not binding on the court seized of the civil proceedings. A civil court faced with evidence similar to that of the criminal proceedings is entitled to make its own assessment of the same and then arrive at its own conclusion. Further the standard of proof required is different. In a criminal trial the standard is beyond reasonable doubt while in a civil proceedings it is on a balance of probability. This being the case it is not surprising that evidence that fails to secure a conviction can secure a finding of a liability. This standard of proof in civil matters has to be established even where it is only the evidence of the plaintiff which is being considered like in this case. I have no doubt the learned trial magistrate had this in mind when doing the assessment. The learned trial magistrate drew strength from the fact that the plaintiffs witnesses knew the appellants, the incident was in broad day light and that they witnessed the incident. She therefore applied the principles of proof on a balance of probability.

Paragraph 6 of the defence pleads bad faith and malice but particulars of malice were not given. In the absence of particulars being given that paragraph in not withstand the test. Paragraph 7 on the other hand pleads that the respondents/ plaintiffs filing of the suit was to prompt any cause of action arising from the malicious prosecution. Despite this, they appellants did not put in a counterclaim. It therefore follows that even if evidence is given along the lines pleaded the same will not be of use to the appellants as no finding will be made on it in the absence of a counter claim. Nothing prevented the appellants from putting in a counter claim and seek a set off. On the basis of the foregoing assessment it is the finding of this court that it is doubtful whether the defence evidence would have or will seriously if allowed to be taken to overturn the tables of the plaintiffs evidence.

As regards the conduct of the defence that occasioned the ex parte judgment being entered it is already ruled upon in this judgment that neither the appellant nor their counsel has explained to this court why they did not move immediately upon return from attending to the Chief Justice to apply to have the defence give their testimony before judgment. They have not also explained why immediately after judgment was delivered no move was made to have that judgment set aside conditionally or unconditionally so that they can give their defence.

The ingredients for setting aside are:-

- (i) avoidance of injustice. No serious injustice has been pointed out to be suffered by them. More so when this court has ruled that the acquittal in the criminal proceedings was not a benefit absolute. It was conditional to a civil suit revisiting that matter.
- (ii) To avoid hardship no hardship has been shown to be suffered by them if it is due to the issue of carrying the burden of a judgment they must have anticipated a civil liability as a possible consequence of their action.
- (iii) They have not put forward evidence or facts to show accident, inadvertence or excusable mistake or error.

Even if it can be taken that the court made an error in not calling upon the defence to present the defence

or by failing to adjourn the matter no reasonable excuse exists for failing to take remedial measures to avoid delay. Though an appeal is an option open to the appellants in the circumstances of this application for setting aside would have sufficed.

Other consideration to be considered herein is the issue of in justice, hardship and unreasonableness of the orders to be made. The hardship and injustice to be considered should be in respect to both parties. Weighing these on account of both parties it is the plaintiff who is going to suffer undue hardship and in justice by shouldering the burden of suffering the consequences for the applicants and their Counsels indolence and in action. In the absence of any reasonable explanation, the appeal is calculated to obstruct the cause of justice in favour of the respondent. This being the case the appellant though they have a genuine grievance here by their conduct became disentitled to the courts vindication of that complaint in their favour.

Other consideration to be made are to the effect that having found that the plaintiffs evidence cannot be dislodged by the defence evidence even if room existed for tendering it as they will not be expected to tender evidence outside their pleading. Also considering the fact that complaint about reception of medical evidence does not hold because it was not challenged in cross-examination.

As regards whether the award is to be interfered with or not the court takes judicial notice of the fact that assessment of an award is an exercise of each courts discretion. In order to justify interference this court has to bear in mind established principles. Some of these are those set out in the case cited to this court by the respondents Counsel. The case of **MAKUBE VERSUS NYAMURO [1983] KLR 403**. In this case it was held inter alia that a Court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence or on a apprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion. Other guiding principles is that interference will arise where the award is either too low or too high. Relating these principles to the complaints herein, the complaint on appeal was firstly an attack on the mode of reception of medical evidence which evidence this court has stated that the same was proper. The second complaint was lack of evidence to support a finding of assault and causation of injuries. This court has already ruled that there was sufficient evidence on record to enable the learned magistrate make a finding of liability on a balance of probability. Further that the injuries set out by the plaintiff in the plaint and narrated by the plaintiff were confirmed by the witnesses and the medical documents.

Having found that the injuries were confirmed what is left by this court is a determination whether the award is excessive. It is not in doubt that the injuries were soft tissue injuries. The award made was Kshs 70,000.00. The learned trial magistrate is on record as saying that she was referred to the case of **PATRICK K. NGULI VERSUS STEPHEN KARANJA AND ALLAN S.M. MAINA T/a QUALITY MILLERS, NAIROBI HCCC NO. 2907/1987**. In this case the Plaintiff suffered Bruising of the head, bruising of the neck, left ear, right shoulder, left hip and laceration of the forehead. The laceration on the forehead had been stitched and analgesics administered. The Plaintiff complained of headaches, giddiness forgetfulness pain in the left ear, difficulty in hearing in the left ear, pain in the neck, pain in the right shoulder, inability to do heavy work with the right hand, pain in the left hip and inability to walk long distance permanent disability was assessed at 90%. The Court awarded kshs 150,000/= for pain and suffering. The decision was on 28.9.89. No other authorities were referred to the court.

In exercising its jurisdiction under Section 78 Civil procedure Act on the award herein the court has to bear in mind the following principles of law and practice.

- (1) An award of damages is not meant to enrich a party but compensate him for the injuries suffered.
- (2) An award of damages should not be inordinately too high too low.
- (3) Awards in decided cases are mere guides and each case should be taken to depend on its own facts.
- (4) Where possible inflationary trends should be taken into consideration. This Court has considered all the relevant factors herein and applied the above principles on the same and find that considering the

manner the injuries were caused the award is not excessive and it does not merit interference. The same is confirmed.

For the reasons given in the assessment the conclusion of this court on appeal is that the appeal cannot stand because of the following reasons:-

- (1) Failure to produce judgment in the criminal case proceedings would not alter the finding of liability on a balance of probability because the civil court is not subordinate to the criminal court. The decision of the criminal court is not binding on the civil court. The civil court is entitled to re-evaluate the evidence before it on its own and then arrive at its own independent decision. More so when the standard in criminal proceeding is one of proof beyond reasonable doubt where as that of the civil proceedings is one of proof on a balance of probability.
- (2) Contradictions in the plaintiffs evidence was only on numbers of people present which does not go to the root of the case as the point in issue was whether the appellants assaulted the respondent on the material date and whether the respondent sustained injuries complained of.
- (3) Concerning proof of injuries sustained by the Respondent there is sufficient evidence on record to prove the same from the evidence of P.W.1, 2 and 3 and medical evidence.
- (4) Reception of medical evidence cannot be attacked on appeal as the defence Counsel had an opportunity to challenge it in the lower court as it was tendered before the matter was adjourned for defence but the did not challenge the same. This court has found that the same was properly received in evidence.
- (5) Although the court agrees that he matter should have been adjourned to accommodate the defence counsel, no explanation has been offered by the defence as to why they did not move to court immediately to have the matter reopened for them in order to tender evidence considering that it took about 3 months from 9 .7.2002 to the date of the judgment of 30.10.2002. Further no efforts were made after delivery of judgment to have it reviewed and set aside to reopen the matter for them to give a defence.
- (6) Issues raised in the defence have been sufficiently answered by the evidence on the record and so failure to reopen the matter to allow the appellants to be heard on the same will not occasion any miscarriage of justice for the following reasons:-
 - (i) Paragraph 3 and 4 of the defence have been answered by the evidence of P.W.1, 2, 3 and 6 who were at the scene and it is doubtful if that evidence can be uprooted.
 - (ii) Paragraph has been answered by the finding that an acquittal in criminal proceedings is not a bar to civil proceedings against the party acquitted and a civil court is entitled to re-evaluate the evidence before it and arrive at its own decision.
 - (iii) Paragraphs 6 of the defence cannot hold because particulars of malice were not given as required by law.
 - (iv) Paragraph 7 of the defence also does not hold as the appellants pleaded that the respondents moved to court to forestall an anticipated prosecution against him and yet did not put in a counter claim for the same.
- (7) Although the appellants had an apparent genuine complaint, they become disentitled of the relief for setting aside because of their conduct of inaction and failing to move the court at the earliest opportune time. Reopening the matter at this belated state will cause hardship and injustice to the respondent who will be made to shoulder the appellants burden of failure to move the court at the right time. Further there is nothing to show that the appellant's in action qualify to be termed excusable mistake, error or inadvertence.

(8) There is nothing to show that the award arrived at by the lower court is erroneous, considering the circumstances under which the injuries were sustained.

The appeal is therefore dismissed with costs to the Respondent both on appeal and the court below.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY, 2007.

R. NAMBUYE

JUDGE