REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 34 of 1997

KANAMPIU M'LIBUA……..……. 1ST APPELLANT

VERSUS

JACOB M'ABUANGA. …….....…….……...…. 1ST DEFENDANT

FRANCIS IKABU…….....…….. 2ND DEFENDANT

AGNES NTHIORI…….....……..…3RD DEFENDANT

JUDGEMENT

(An appeal from the Judgment of the Learned Resident Magistrate N.H. Oundu Esq. In Meru CMCC No. 223 of 1992 dated the 13.5.1997)

1. In his memorandum of Appeal filed on 10.6.1999 the Appellant Kanampiu M'Libua listed the following as the grounds upon which he is appealing;
    1. The Learned Trial Magistrate erred in law in dismissing the Appellant's counter-claim as being time-barred.
    2. The Learned Trial Magistrate further erred in law in that he awarded the Respondent/Plaintiff excessive general damages without proof nor any submission in support of the same.
    3. The Learned Trial Magistrate further erred in law and fact in failing to find that the plaintiff's suit was filed out of time and hence time-barred and the same was filed without leave and no court order for extending time to file suit was ever produced in court as evidence.
    4. The Learned Trial Magistrate further erred in law in that he did not notice that the plaintiff's suit was fatally defective in that no case number for obtaining leave was ever given.
    5. The Learned Trial Magistrate further erred in law by holding that the Appellant did not plead the defence of self defence whereas the evidence produced in court and pleadings indicated to the contrary.
    6. The Learned Trial Magistrate further erred in awarding the plaintiff manifestly excessive damages which were not warranted.
    7. The Judgment of the Learned Trial Magistrate is against the weight of evidence and the same is bad in law.
2. During submissions, Mr. Mwanzia, learned advocate for the Appellant abandoned grounds 1 and 5 above.

3. On Grounds 3 and 4, he argued that the suit before the subordinate court was time-barred and since no evidence of leave to file suit out of time was exhibited at any time during the trial, then it ought to have been struck out.

4. Grounds 2, 6 and 7 counsel argued that the learned trial magistrate erred in awarding a manifestly excessive and unreasonable award, which was in any event against the weight of all evidence tendered before the court.

5. It was also argued on this point that the medical evidence as to injuries suffered was not produced by an expert and as such was not reliable and it was an error on the part of the trial court to make any findings on the basis of that evidence. I was asked to be guided by the court of Appeal decision in Mohammed Hassan Musa and Another vs Peter M. Mailanyi and another C.A. 243/1998 where it was held that the court could not make its own opinion as to injuries suffered without calling expert evidence on the subject.

6. Lastly, it was argued that even if an award on injuries suffered was to be made, then the award ought to be commensurate with those injuries and that in the instant matter that was not the case.

7. In response Ms. Mwangi, learned advocate for the Respondent argued that leave to file suit was obtained and admitted as much at paragraph 7 of the Defence filed by the Appellant and it is not open to the Appellant to raise the issue now.

8. On the award of general damages for injuries suffered, it was argued that the injuries were apparent from all medical documents, produced without objection, and the award being a matter of judicial discretion, the learned trial magistrate reached a fair decision in the circumstances of the case. Ms. Mwangi sought to distinguish the Mohammed case (Supra) because the original suit in that Appeal was heard ex-parte and without clear medical evidence as to the degree of injury as opposed to the fact of injury. In any event, it was her submission that since the Respondent admitted liability for injuries inflicted on the Respondent the court had no choice but to make an award in damages and the Ksh.60,000/- awarded was in fact too low.

9. I was otherwise urged to dismiss the Appeal with costs to the Respondent.

10. The case before the subordinate court had its genesis in events that took place on 15.8.1988. On that day the Respondent (in his Plaint) alleged that the Appellant without justifiable cause attacked him and inflicted injuries to his head and hands. Thereafter the Appellant was arrested, charged and convicted in P.M.'s Criminal Case No. 3689/1998 (Meru) and sentenced to pay a fine of Ksh.3000/= or 6 months imprisonment in default, for the offence of causing grievous harm contrary to s. 234 of the Penal Code.

11. The Respondent's suit which gave rise to the Appeal was for general damages for the injuries suffered as a result of the attack, special damages thereof and costs of the suit.

12. The evidence given by the Respondent as to the attack itself was not contested in evidence before the subordinate court. In cross examination, the Respondent said, as regards that aspect of the case;

"**On 15/8/88 I cut the plaintiff. I have never denied that at any time. I cut him twice, I was with my wife but my wife did not cut him. It is me alone who cut him."** This admission on his part should be taken together with the conviction (which was not appealed from) as clear evidence of culpability on his part and that liability in tort for the personal injuries is taken as a foregone conclusion.

13. As to whether the suit was filed without leave of court and that the same was therefore statute time-barred and a nullity, the Appellant pleaded on paragraph 7 of his defence dated 17.7.1992 and filed on the same date;

"**The leave obtained was unlawfully obtained**."

14. The meaning of this averment as I understand it is that leave was indeed obtained by the Respondent but that the said leave was "**unlawfully obtained**". No particulars pointing to what was unlawful about the leave were given by the Appellant and yet by that statement it was incumbent upon him to prove the allegation that he made. As to the leave obtained, he cannot now be heard to say that in fact it was not obtained at all when he so openly admitted that fact.

15. I have said above that liability was clearly admitted by the Appellant for injuries he concedes he inflicted on the Respondent and for which he was punished in Criminal Law. As to the tort which was the basis for the suit on Appeal, the learned trial magistrate having found that the injuries were unlawfully inflicted, as no defence of self defence was raised, awarded Ksh.50,000/- in general damages as general damages.

16. This court is of the same mind as the trial magistrate that no defence capable of answering the Respondent's claim was raised in the trial and the only question left to address is whether there was good evidence to award damages at all and whether the award of Ksh.50,000 in general damages was unreasonably excessive.

17. P.Exh. 2 was a medical report prepared by Dr. Kimathi Mbogori. That document was produced without objection by the Appellant and it became part of the record of the court unless expunged and it has not been expunged. The report shows that the Respondent had cuts to the head, fingers, right upper arm and a bruise on the ankle. The same injuries are also noted in the medical report prepared by Dr. Lakuna of Maua Methodist Hospital where the Respondent was treated soon after the attack. That report was produced without objection as P.Exh.3 and is of the same status in evidence as P.Exh.2. Granted, medical or expert evidence for that matter ought to be tendered by those well versed in those matters but where a document is produced without the maker thereof being called and the opposing partly does not object to its production, I cannot see how it can be challenged on Appeal when no argument arose as to its validity at the time of production.

18. Parties were all represented at the trial by advocates of their choice and I do not now see why the

evidence produced without challenge can be challenged now.

19. The above being my findings I cannot fault the trial magistrate for finding and accepting the injuries stated in the two medical reports as reflective of the injuries suffered by the Respondent.

20. I agree therefore, with Ms. Mwangi when she says that the Mohammed Hassan Case (supra) is distinguishable in the sense that the Judge in that case, saw the hand of the Plaintiff, decided that it was now completely unless and awarded damages from his own opinion of the degree of injury which by all reason, a court is not competent to do. In the instant case, the injuries are not qualified in terms of the degree of seriousness but the mere physical injury as set out in two separate medical reports. There is no complaint that the trial magistrate placed himself in the position of a medical doctor and qualified the degree of injury.

21. As to quantum, a court such as this one can only interfere with a discretionary award of damages if the trial court applied wrong principles of law or that it awarded either a very high or very low amount in damages. I have not heard either of these issues being addressed in substance. If the award of Ksh.50,000/= is too high, what is the basis for saying so? None has been shown to me and I see no reason to interfere with an otherwise reasonable award.

22. On the whole, I find that the Appeal was filed without good reason and is clearly lacking in merit.

23. The Appeal is therefore dismissed with costs to the Respondent.

23. Orders accordingly.

Dated, signed and delivered at Meru this 14th Day of July 2006.

I. LENAOLA

JUDGE

In the presence of:

Mr. Mwanzia Advocate for the Appellant

Miss Mwangi Advocate for the Defendant

I. LENAOLA,

JUDGE