

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT NYERI
CIVIL APPEAL CASE 145 OF 2001**

FRANCIS KIHUNYU KAMAE

JOSEPH MACHARIA MURITU.....APPELLANTS

JEREMIAH KAMAU RUMIRO

Versus

GERALD KAMURI MURITU.....RESPONDENT

JUDGMENT

The Respondent in this appeal had sued the three Appellants claiming general damages, special damages and costs of the suit from the Appellants jointly and severally. He obtained a judgment in which he was awarded Ksh.80,000/= general damages plus costs. The Appellants are aggrieved with that result.

Before the trial magistrate, the only witness the Respondent had, apart from the Respondent's own evidence, was that of his son. The three Appellants on their part, had the evidence of their Assistant Chief in addition to what they told the court themselves. I get the impression, from the recorded evidence, that the Second and Third Appellants were too protective of themselves and as a result they did not give the court much of what they knew.

But the Respondent was worse in that respect and as a result he could tell the court that he did not know why he was being assaulted by the three Appellants supposed to have been freely talking, not only between themselves but also to the Respondent. That conduct by the Plaintiff suggested the unreliability of what he was trying to put forth.

To the learned trial Resident Magistrate, she found no problem. Seeing and hearing the witnesses testify before her was an advantage and therefore concluded that the Respondent had proved his case against the Appellants.

Two documents were produced by the Respondent in the evidence, namely, a treatment note exhibit 1 and a P3 form exhibit 2. There were no objections when the documents were produced and I cannot therefore to-day say what the trial magistrate would have said had such objections been raised. In the circumstances, it is not fair for the Appellants' Counsel to have raised such objections during the hearing of this appeal. The documents were admitted in the evidence and were used in the evidence. All this court can properly do at the moment is to ask itself whether the weight the trial magistrate put on those documents is the correct weight.

Concerning the treatment note, the evidence of the doctor who claimed to have written it ought to have been there to confirm to the court that indeed he was the author of that document and that he treated the Respondent as stated in that treatment note and then go on to show the learned magistrate the wounds or injuries he had treated on the body of the Respondent and whether those were injuries caused on 18th July, 1999 pointing out the type of weapon used to cause those injuries. Perhaps that is the doctor who could have also produced the P3 form or if not, similar requirements for the P3 form were more or less needed as for the treatment note. Moreover for a P3 form, the evidence of the Police Officer who handled it would have been useful to the court.

In the absence of such evidence, what the Respondent put before the court was weak and doubtful evidence as for example, when the Respondent showed the magistrate a scar, what professional evidence was there to convince the learned magistrate that that was a scar from an injury caused on 18th July, 1999. What professional evidence was before the magistrate to show the seriousness of that injury?

The assault is alleged to have taken place at 6.30 a.m. at the village where the Respondent lived with neighbours who knew him very well and ought to have heard commotion and witnessed the incident. But the only other witness the Respondent could bring was his son P.W.2 Antony Godfrey Muritu Kamuri and the two could not reveal to the court that by that time the Respondent was a suspect in a criminal case wanted for arrest and that if the Respondent's alleged assault was at 6.30 a.m., that was after 6.00 a.m. when the Respondent had just been arrested and escaped at his home from a group of vigilants led by the area Assistant Chief, Haman Wanthe Murathi, D.W.1. Apparently, a number of people knew the Respondent was wanted for arrest. Some of them found him and arrested him and on that day he was actually taken to Kangema Police Station where the Respondent was re-arrested and put in custody, later to come and speak during the hearing of this case before the trial magistrate as if he was the one who went to Kangema Police Station to report the alleged assault. But did not remember to explain why the court had to make an order for him to obtain a P3 and why that P3 was not produced by a Police Officer from Kangema Police Station and further why there was no police witness at all in this suit.

I think what I have said above is sufficient to dispose off this appeal. I do not find evidence proving this case in favour of the Respondent even on the balance of probabilities. On the award of Kshs.80,600/= therefore, I would not award anything as there were no injuries proved and the figure is unjustifiable and arbitrary

Accordingly, I do hereby allow this appeal and set aside the trial magistrate's judgment dated 19th June, 2001 including the order for costs.

The Respondent to pay costs of this appeal and costs of proceedings in the court below – to the Appellants.

Dated this 14th day of June, 2005.

J. M. KHAMONI

JUDGE