



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL 215 OF 2000

JOHN KIHARA KIMANI APPELLANT

VERSUS

PETER KURIA GIKONYO RESPONDENT

(An appeal from the Judgment of A. M. Kingoo, RM

in Murang'a Civil Suit No. 76 of 1997 delivered on 7th April, 2000).

JUDGMENT

By a Plaint dated the 10th April, 1997, the Appellant (Plaintiff in the lower court) filed an action against the Respondent for damages arising out of assault and battery committed on him by the Respondent in a bar on 23rd January, 1997 at Kibutha Village in Murang'a District.

The Respondent denied the accusation, and in fact claimed that it was the Appellant who assaulted him. After hearing all the witnesses, the lower court concluded that the Plaintiff had not proved his case on a balance of probability, and dismissed the same. The Appellant has appealed to this court on the following 3 grounds:

“1. The learned Magistrate erred in law in failing to consider and evaluate the evidence before her at all or sufficiently thereby leading to a wrong decision. More particularly, she failed to appreciate that:-

(a) The plaintiff/appellant was first to call elders to arbitrate upon his assault by the defendant, preceded the defendant to the subchief, reported to the police first, applied to the court to be arrested when the police started harassing him, filed the above suit and there was no counterclaim by the defendant (respondent) who was alleging to have been assaulted.

(b) The assault occurred at the Appellant's premises.

2. The learned Magistrate erred in law and fact in failing to assess credibility of the witnesses before her and in failing to find that the weight of the evidence before her by far favoured the appellant's case on a preponderance of probabilities than the respondent.

3. The learned Magistrate erred in law in failing to apply the proper test in Civil matters of a balance of probabilities thereby leading to a wrong decision.”

In his submission before this Court, Mr Karago, Counsel for the Appellant stated that of the seven

witnesses presented by the Appellant, three had testified that they “heard” the defendant “admit” that he had assaulted the Plaintiff.

Ms Mwangi, for the Respondent, submitted that as there were no eye witnesses, the lower court could base its decision only on demeanour of the witnesses, and properly came to the conclusion that the case had not been established on a balance of probability.

I agree with Ms Mwangi. Having assessed and re-evaluated the evidence before the lower court, I am satisfied that the learned Magistrate’s findings of facts were based properly on the evidence before her and that she did not act on wrong principles in reaching her conclusion. There were no eye-witnesses to the alleged assault. Both the Appellant and the Respondent were charged in court with affray, and were acquitted. No one saw the incident. The Magistrate found the plaintiff not to be honest in the witness box. That was based on his demeanour. Only she, and not this court, had the benefit of watching and hearing the witness. I cannot, in the circumstances, find fault with that. As an appellate court, I cannot and should not interfere with the findings of facts of the lower court except in special compelling circumstances. I find that I have no basis to interfere with the decision of the lower court which I also find is based properly on the evidence before the court.

Accordingly, I find that there is no merit to this appeal, and the same is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 6th day of October, 2005.

ALNASHIR VISRAM

JUDGE