



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 460 OF 1999**

E K M ..... APPELLANT

VERSUS

J K ..... RESPONDENT

**J U D G E M E N T**

This appeal arises from the order of the Senior Principal Magistrate (J.R. Karanja) in the Chief Magistrates court Civil Case No. 5697 of 1998 at Nairobi (Milimani Commercial Court) delivered on 29th September, 1999.

On 8th May, 1998 the appellant and the respondent, an estranged married couple, engaged in a fight at Buruburu Nairobi in which the appellant was injured.

She blamed the respondent for the incident and filed a suit in the above court on 21st July, 1998 to claim both special and general damages from him for the injuries sustained.

In court on 5th August, 1998 she told the Senior Principal Magistrate that she was at the bus stage after visiting her daughter at school when the respondent assaulted her for no apparent reason, as a result of which she sustained injuries she complained of.

The respondent, however, complained that though the couple has separated, he was the one in custody of the two issues of the marriage, namely E K and A M.

That on the day of the incident he came home from work and found the appellant at the gate taking photographs of the children without first seeking permission from him.

That when he asked her why she was doing this, she abused him and also attacked him with her handbag and held his private parts so hard that he became powerless. That this is why he bit her in self defence.

When the learned Magistrate wrote his judgement, this is what he said:

***“On the issue of liability it is basically the plaintiff’s case against that of the defendant. The plaintiff’s version of the story implies that she was mercilessly and unreasonably attacked and beaten up by the defendant. On the other hand, the defendant implies that he was the***

*first to be attacked before he defended himself.*

*Without the benefit of independent (while)(I think it is “witness”) it becomes difficult to overrule either parties version of the story in favour of the other. What is apparent is that those two people as a result of hostility arising from a strained marital relationship were over come by emotion and decided to go physical b y engaging in an act of affray on that material day. If there were any previous incidences involving the two, these cannot be visited on the material incident to found liability. It would be absurd for the plaintiff to claim damages from the defendant wh en it is apparent that she was also the author of her own injuries”.*

The Magistrate then dismissed the appellants’ case with costs.

Much as an affray involves a fight or brawl, it has the connotation of a disturbance or breach of peace or a violation of public peace, by say, a riot.

It connotes the involvement of the public who become frightened by what is going on and/or the outcome of the riot.

The fight between the parties must create fear in the mind of those who are around that something more serious with result from it and cause some kind of panic.

The evidence adduced by the parties to the case subject to this appeal does not suggest the presence of members of the public at the scene of this fight.

Rather, it suggests a domestic quarrel between the two who have begrudged one another since separating, not in affray as such.

And I do not know what the learned Magistrate had in mind by importing the term “affray” into this case.

But when he stated that

*“without the benefit of an independent witness it becomes difficult to overrule either party’s version of the story in favour of the other”.*

He had in mind the burden placed upon the plaintiff in a civil matter to prove his/her allegations on a balance of probabilities and that he was unable to believe the appellant’s evidence in face of equally convincing evidence from the respondent over the incident which then boils down to the fact that the Magistrate was not satisfied the appellant proved her case on a balance of probabilities.

The Magistrate saw and heard witnesses testify in the case and was in a better position to assess their credibility.

To my mind he disbelieved the evidence of the appellant and believed that of the respondent, which he was entitled to do. I cannot fault him in this decision.

If I were him I would have arrived at a similar decision as the Magistrate did and find no merit in this appeal which I dismiss but as the parties are still husband and wife, though separated, each should bear his/her own costs of this appeal and the case below.

Delivered this 19th day of June, 2002.

**D.K.S AGANYANYA**

**JUDGE**