Mukuru v Nderi (Civil Appeal E005 of 2024)
[2025] KEHC 1388 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1388 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E005 OF 2024

LW GITARI, J

FEBRUARY 7, 2025

BETWEEN

DERICK MWENDA MUKURU ..... APPELLANT

AND

CHARLES NDERI ..... RESPONDENT

JUDGMENT

1. This appeal arises from the decision in the Chief Magistrate's Court at Chuka Civil Suit No.155/2021 delivered on 18/3/2024. The brief background of the matter is that the respondent has filed a plaint claiming a liquidated sum of Ksh.102,825/-, exemplary and general damages against the appellant arising from injuries inflicted on the respondent and his son by the appellant. This happened at Cool Inn Bar at Ikuu while the parties were attending a committee meeting for Ikuu Market. The respondent reported the matter to the police and the appellant was charged with two counts of causing grievous harm to him and his son one Isaak Njeru. The appellant was charged under Section 234 of the *Penal Code* (Cap 163 of the Laws of Kenya) and he was found guilty, ordered to pay a fine of Ksh.20,000/- or indefault serve three years imprisonment and Ksh.10,000 or indefault serve three years imprisonment. The respondent had sustained a cut wound on the forehead, a cut wound on the palm wrist and a raccoon left eye blunt trauma to left eye resulting in poor vision. His son had sustained lacerating cut wound on the forehead and broken upper incisors tooth. The respondent filed this suit claiming general and special damages. The appellant had filed a defence and counter-claim. In his defence he averred that he had also sustained injuries in the incident which were a cut on the right palm, cut near base of little and ring finger and a cut over the left side of the face. In his counter claim he prayed for special damages amounting to Ksh.6910/- and general damages.

2. The matter proceeded to full trial and in the end the learned magistrate entered Judgment in favour of the respondent against the appellant as follows:-

    a. Ksh.250,000/- as general damages with interests at court's rates from the date of filing the suit.

b. Kshs.12,400/- special damages with interests at court's rates from the date of filing the suit.

3. The learned magistrate dismissed the defence and the counter claim with costs to the respondent. The appellant was dissatisfied with the Judgment and filed this appeal based on the following grounds:-

    1. That the learned magistrate erred by dismissing the defence and counter claim despite the appellant having adduced cogent evidence.

    2. That the learned magistrate erred by awarding Ksh.250,000/- general damage for pain and suffering which were excessive.

    3. That the learned magistrate by finding that it was only the respondent who was injured by over-relying on the Criminal Case No.78/2020 to determine whether the appellant was injured and dismissing the counter claim for special damages thereby failing to apply the principle of set off.

    4. That the learned magistrate erred in law and facts by holding that the appellant's documents were not in the court file thus visiting the error on the civil registry on the appellant and that the counsel for the respondent did not complain that they were served with the documents.

    5. That the Judgment of the learned magistrate was against the weight of the evidence.

4. The appellant prays that the appeal be allowed and the Judgment be set aside. The respondent be awarded ksh.100,000/- general damages. The appellant be awarded Ks.100,000/- general damages as prayed in the counter claim.

5. The court to direct that there be set off upon allowing the counter claim. That the award of Ksh.12,400/- as special damages for the respondent be upheld and there be a set off of Ksh.6910/- as prayed in the counter claim so that he pays the respondent Ksh.5490/- . Finally he prays for costs of this appeal and the lower court proceedings.

6. The respondent opposed the appeal and filed written submissions.

Appellant's Submissions:-

7. The appellant submits that the learned magistrate erred in dismissing the counter-claim and yet the appellant and the respondent had fought in public and police charged the appellant.

8. He submits that the fact that the appellant was not charged by police does not mean he was not injured. That magistrate erred by dismissing the appellant's injuries. He submits that the appellant had testified that he was issued with a P3 form but the learned magistrate held that he did not tender evidence to show that he had suffered any injuries out of the physical confrontation.

9. The appellant further submits that the learned magistrate erred by holding that the appellant did not filed documents and failed to ask the Registry Personnel to avail the documents. That the respondent did not complain that they were not served with documents. That the documents were lying in the registry due to laxity. That the documents proved the injuries the appellant suffered and the special damages. The appellant faults the learned magistrate for holding that he did not prove the counterclaim on a balance of probability and yet a tort can give rise to both criminal and civil liability. That the appellant and the respondent ought to have been charged with affray but police chose to charge him therefor sought remedy in a civil suit. The respondent submits that the learned magistrate as he relied on the testimony of the appellant and insisted that the appellant could have called eye witnesses. The counsel submits that the learned magistrate awarded Ksh.250,000/- as general damages for pain and suffering which was excessive. The appellant has urged the court to reduce the award to ksh.150,000/- and relies on Justine Nyamwenya Ochoki & Another –v- Jumaa Karisa Kipigwa (2020) eKLR where

the plaintiff was awarded Ksh.300,000/- for blunt injuries to the chest, left wrist and lower lip and on appeal it was reduced to ksh.150,000/-.

10. The respondent faults the learned magistrate for not awarding the respondent the special damages which were strictly pleaded and proved. He further submits that the appellant and respondent both suffered injuries in the confrontation should have been awarded Ksh150,000/- each and the court to order a set off. The appellant proposes that the appeal be allowed and the respondent's award of Ksh.12,400/- special damages be confirmed.

Respondent's Submissions:

11. The respondent has raised three issues as follows:

    1. Whether the respondent proved his case on a balance of probabilities
    2. Whether the quantum of damages should stand
    3. Who should bear the costs of the appeal.

12. The counsel for the appellant sbumtis that this guided by Section 78 of the *Civil Procedure Act* to exercise the same powers and the same duties as conferred on the court when dealing with the matter as the 1st appellate court. He submits the matter in the lower court was a civil dispute and the burden of proof was on a balance of probabilities. He relies on the case of Ngugi –v- Karanja & Another (Civil Appeal No.161/2018) 2023 KEHC 2368 (KLR) (27 March 2023) where it was held:-

> " The question then is what amounts to proof on a balance of probabilities, Kimaru J (as he then was) in William Kabogo Gitau –v- George Thuo & 2 Others (2010) 1KLR 526 stated as follows:-
>
> > " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he had pleaded in his case are more likely than not to be what took place. In percentage terms a party who is able to establish his case to a percentage of 51% as opposed to 49 % of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

13. He further relies on Kenya Akiba Micro Fincancing Ltd –v- Ezekial Chebii and 14 Others (2012) eKLR where the court held that-

> " In my view a statement made on Oath should be as a matter of fact be expressly denied on Oath. If not challenged it remains a fact and the truth for that matter."

14. He submits that the claim before the learned magistrate was based on tort and what the respondent was required o proof is that he was owed a duty of care and that duty was breached by the appellant when he inflicted harm on him. The appellant denied the claim. He submits that there was no dispute that there was an altercation between the parties and that the appellant was charged in criminal case and was convicted. The appellant did not appeal against the conviction in the criminal case and he purported to rely on documents which were never placed in the file. The respondent supplied his documents and therefor allegation of bias cannot stand.

15. The respondent further submits that Order 11 of the Civil Procedure Rules places a duty on the party to ensure that their pleadings were properly before the court before proceeding with the case. Further that Section 107, 108, 109 & 112 of the *Evidence Act* places the burden of proof on the party who

alleges. That on the allegation that the court should have asked the appellant to supply the documents, it is submitted that the court could not descend to arena of conflict as it would have been unfair and contrary to the respondent's right to a fair and impartial trial as provided under Article 50 of the *Constitution*.

16. That the respondent proved his claim on a balance of probability.

17. On damages awarded, it is submitted that there was no error of principle to warrant this court to interfere with the award.

18. That there is no dispute on the special damages and the court should confirm both the special and general damages.

19. The respondent has urged the court to rely on the case of Catholic Diocese of Kisumu –v- Tete (2004) eKLR where the Court of Appeal stated that-

> " It is trite law that the assessment of general damages is the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court justifiably interfered with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate." See Kemfro –v- Lubia (1982-88) 1 KAR 272 & Kitavi –v- Coast Bottlers Limited (1985) KLR 470)

20. The respondent submits that the learned magistrate did not err in anyway urges the court to confirm the award of damages and dismiss the appeal with costs.

Analysis and Determination:

21. I have considered before the learned magistrate, the grounds of appeal and the submissions by the parties. I have noted that some issues are not in dispute, i.e (1) The fact that the parties were involved in an altercation at cool Inn Bar Ikuu and the respondent sustained injuries. Arising from the said alteration, the appellant was charged with grievous harm contrary to Section 234 of the *Penal Code* Code Criminal Case No, 78/2020. The appellant was convicted and sentenced to pay a fine of Kshs.10,000/- or in default to serve three years imprisonment. The appellant has conceded that the respondent's award of Ksh.12,400/- should be confirmed. The issues which arise for determination are:

    1. Whether the learned magistrate erred by dismissing the appellants counter claim.

    2. Whether the damages for pain and suffering were excessive

22. This is a first appeal and the duty of this court is to analyse and re-evaluate the evidence tendered before the trial court and come with its own independent finding. However, the court should leave room for the fact that it did not have a chance to see and hear the witnesses then leave an allow3ance for that. See Selle & Another –v- Associated Motor Boat Co. Ltd & Others (1968) E.A 123 and Peters –v- Sunday Post limited (1958) E.A.

23. The appellant was charged with a criminal offence, convicted and sentenced. The appellant did not file an appeal. Section 47 A of the *Evidence Act* provides:-

> "A final Judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence, shall after the expiry of the time limited for an appeal against such Judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

24. The appellant did not appeal against his conviction of the charge of assault against the respondent. It follows that he stands guilty and convicted for the charge of assaulting the complainant and a civil court adjudicating a civil dispute arising from the assault lacks jurisdiction to determine any criminal matter arising from that incident. It was therefore futile and an exercise in futility to invite the learned magistrate to find that what took place was a bar brawl and not an assault. He could not sit on appeal on that find. The conviction of the appellant for the charge of assault and having not appealed against the conviction and sentence, was conclusive evidence that he assaulted the respondent. This was so held in the case of Peter Odhiambo –v- Ali Bakari Helefi (2005) eKLR where Justice D.K. Maraga (as he then was) stated:-

> "The respondents driver having not appealed against his conviction in the traffic case, that is conclusive evidence of his guilt as provide in Section 47 of the *Evidence Act*" and the respondent therefore vicariously liable to the appellant for damages."

25. The learned magistrate cannot be faulted for dismissing the counterclaim by the appellant. The learned magistrate did not seem to be aware of Section 47 of the *Evidence Act*. Despite that he did consider the evidence at length and properly arrived at the right decision that the appellant was 100% liable and the appellant did not prove his counter claim. It is trite that assault is actionable 'per se' that is, it can be taken to court without proof of damage. This is because assault is an intentional tort that falls under the category of trespass to person. The three torts that emerged from the concept of trespass to the person, assault, battery and false imprisonment are actionable perse. The damages are recoverable from that injury as well.

26. The claim by the respondent arising from the assault was properly before the court.

Whether the damages awarded to respondent were excessive:

27. The principles for awarding damages are that, they are in the discretion of the learned magistrate or Judge, they should not be excessive nor too low as to present a wrong award. In the case of Bashir Ahmed Butt-v- Uwais Khan (supra) it was held that for an appellate court to interfere with an award of general damages, it must be shown that the award is inordinately high or low as to represent an entirely erroneous award. In Loise Wanjiku Kagunda-v- Julius Gachau Mwangi, C.A 142/2003 (UR)

28. The Judges stated that, 'the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the Judge acted on wrong principles of law or has misapprehended he facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. "The question is not what the appellate court would award but whether the lower court acted on the wrong principles" (See Manga –v- Musila (1984) KLR 257

29. The learned magistrate found as fact that the respondent was injured, a fact which was admitted by the appellant. The learned magistrate held that the respondent proved that he suffered a cut wound

on the forehead and a vacoom left eye blunt trauma to the left eye resulting poor vision as stated in the medical report by doctor Nkonge and the P3 form. The learned magistrate applied the principle that in awarding general damages, comparable injuries should be awarded for comparable award. He relied on Anthony Nyamwaya- v- Jackline Moraa Nyandemo (2022) eKLR where Kshs.250,000/- was awarded for similar injuries, that is soft tissue injuries. I have looked at the authority and noted that the plaintiff had suffered more serious injuries than those sustained by the plaintiff in this case. The plaintiff in the case cited by the learned magistrate was awarded Ksh.500,000/- less her contribution of 50% leaving Ksh.250,000. The plaintiff in the case had sustained the following injuries-Left shoulder dislocationBruises of left forearmHematoma on left should andDeep cut would on left forearm

30. When awarding damages the courts have considered the circumstances and the effect of the injuries on the plaintiff and some degree of uniformity must be sought. The best approach in this respect is to have regard to recent award in comparable awards. The courts have to strike a balance between endevouring to award the plaintiff as reasonable amount so far as money can ever compensate. The injuries sustained by the respondent were far less severe than those suffered by the plaintiff in the case relied on by the learned magistrate. The appellant had relied on Taita Taveta Matatu Co- operative Savings –v- Zaina Lozutu Rukoo (2016) eKLR and urged the court to award the respondent Ksh.150,000/-. The learned magistrate did not consider this authority. The plaintiff in the case was awarded Ksh.256,312/- for injuries involved loss of two lower teeth, dental alveolar fracture upper teeth and soft issue injury to the leg and was admitted in hospital for two days and was put on conservative management. Had the learned magistrate perused this authority he would have realized that an award of Ksh.250,000/- for injuries which were classified as harm was inordinately high.

31. I find that although the learned magistrate was a verse of the fact that comparable injuries should attract comparable awards, his award of damages does not reflect that he made award which was for comparable injuries. I find that the award by learned magistrate was in ordinately high and therefore an erroneous estimate. For this reason I have reason to interfere with the assessment of damages. The appellant has urged the court to award the respondent Ksh.150,000/-

32. In view of the above analysis, I find that an award of Ksh.150,000/- is reasonable in view of the inures sustained by the respondent.

33. On the counter claim I agree with the learned magistrate that the appellant did not prove his claim on a balance of probabilities as he did not produce any medical evidence the extent of the injuries. The appellant had intended to rely on medical records which he never produced. He had a duty to ensure that the documents to support his case were on record as provided under Order II. He did not strictly proof his case. I find that the learned magistrate's finding was proper and I have no reason to interfere with his finding.

Conclusion:

34. For the reasons stated in this Judgment. I find that the appeal partly succeeds.

35. I order that-

    1. The award of damages by leaned magistrate is set aside.

    2. It is substituted with an award of Ksh.150,000/- for pain and suffering

    3. The award of Ksh.12,400/- as special damages with interests at court rates from the date of Judgment is upheld.

    4. The decision of the learned magistrate dismissing the counter-claim is upheld.

5. The appellant to pay the respondent half (1/2) the costs of this appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF FEBRUARY 2025.

L.W. GITARI

JUDGE