



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 30 OF 2017

STANLEY KATINA INGOSI APPELLANT

VERSUS

ALPHONCE VITIENYI 1ST RESPONDENT

ALEX KENYATTA 2ND RESPONDENT

MATHEW YAPESI 3RD RESPONDENT

(from the judgment and the decree of Hon. J. Ong'ondo, PM, in Kakamega CMC Civil Suit No. 521 of 2001 dated 7/3/2017)

JUDGMENT

1. The appellant had sued the respondents at the lower court in claim of general damages after the respondents allegedly assaulted the appellant and occasioned him bodily harm. The suit was dismissed on grounds that the appellant had failed to prove the claim. He was aggrieved by the decision of the trial court and filed the appeal herein. The grounds of the appeal are that:-

1. That the honourable court erred in law and fact in holding that the appellant had not proved his case on a balance of probability.
2. That the honourable court took into account the matters which ought not to have been considered in dismissing the case of the appellant.
3. That the honourable court failed to analyze the evidence before it and took into account extraneous matters.

2. The appeal was opposed by the respondents through the written submissions of their advocates, **Shitsama & Company Advocates**.

Case for appellant

3. The appellant's evidence was that the respondents were persons well known to him who came from his neighbourhood of Shinyalu sub-location. That on the 25th February, 2001 he was sleeping at his house at 1 a.m. when he was attacked by a gang of people. The people entered into his house and tied him up. They cut him on the head, back, hands and palms. He recognized three of the people as the three respondents. They stole his pair of slippers and Ksh. 400/=. The people then went away. He was taken to the Assistant Chief. The Assistant Chief wrote him a letter and he went for treatment at Kakamega Provincial Hospital where he was admitted for 2 days. He reported the matter at Kakamega Police Station. The police visited the scene. They issued him with a P3 form. The police did not charge the three respondents over the assault and the theft. He did not know why. He then opted to file a civil case.

4. The appellant further stated that before the date of the said assault the respondents had assaulted him on accusations that he had defiled the 1st respondent's daughter.

5. The appellant called two witnesses - the doctor who prepared his medical report, Dr. Abukuse PW2, and the clinical officer who had treated him after the attack, DW3. The doctor stated that he had prepared the report months later after the assault and that he had relied on the treatment notes from Kakamega Provincial General Hospital and the P3 form. The clinical officer, DW2, stated that the appellant told him that he knew his attackers.

Respondents' Case

6. The respondents called the evidence of the 1st respondent (DW1) and the Assistant Chief of Shikunga sub-location, DW2. It was the

evidence of the 1st respondent that the appellant was a person from his home area. That he, the 1st respondent, was working at Mumias Sugar Company. That on the 21/2/2001 the appellant had defiled his daughter. They took the matter before the Sub-Chief of Shimanyiro. The appellant admitted in writing that he had committed the act. He promised not to do it again. He signed a document to that effect. His father Paul Okiya was present and signed the document. A brother to the appellant and a clan elder were also present. That later on he learnt from the Assistant Chief that the appellant had been assaulted by some people. His co-respondents, Alex and Mathews were arrested by the police but they were not charged. The police did not arrest him. He denied that he assaulted the appellant on 25/2/2001. He said that at the alleged time of assault he was on duty at Mumias Sugar Company. He said in cross-examination that he was not with Alex and Mathews on the material day.

7. The Assistant Chief, DW2, testified that thieves had attacked some homesteads in his area on 25/2/2001. The homes were those of Oredo Stanley (the appellant) and that of Alphonse (1st respondent). He and other people went to console the victims including Stanley. The people said that they did not recognize the assailants. Nobody was arrested over the attack.

8. The witness stated in cross-examination that the appellant had reported to him and he wrote him a letter to go to hospital. That he recorded in the letter that the appellant had told him that he had been attacked by persons known to him though he did not record the names of the attackers in the letter.

Findings of the trial Court

9. The trial magistrate found that the appellant did not identify the

respondents as the people who attacked him. That though the appellant stated that he identified the attackers from torch light, he did not state as to who had the torch and the intensity of the light that enabled him to see them. The magistrate questioned why the police arrested the respondents and released them. The magistrate concluded that the identification of the respondents was not proper and without error. He cited the case of **R –Vs- Turbull & Others (1970) 3 All 549** which case deals with requirement of identification of accused persons in criminal cases.

Submissions

10. The advocates for the appellant **Momanyi, Manyoni & Co. Advocates**, faulted the trial magistrate for applying the standard of proof applicable in criminal cases in civil cases. The advocates submitted that the applicable standard of proof was on a balance of probabilities. That applying this standard the appellant had proved his case as the respondents were persons known to him. That he recognized them in the torch light. That they spent time with him as they tied him. That he reported to the assistant chief that he had recognized the three people. That the three people had previously assaulted him on allegations that he had defiled the daughter of the 1st respondent. That the 1st respondent admitted that the respondent knew them before. That the assistant chief's letter indicated that the appellant knew the people who had assaulted him. That the P3 form indicated that he told the clinical officer who treated him that he knew his attackers. That the 1st respondent did not produce any document to prove that he was at work at the alleged time of assault. That the 2nd and 3rd respondents did not give evidence to contradict the evidence of the appellant yet the burden of proof had shifted to them.

11. The advocates further submitted that failure by the police to prefer charges against the respondents did not absolve them from civil liability. That it is the respondents who should have called the police to testify in the case as it is them who alleged that there was no evidence to charge them with a criminal offence.

12. The advocates submitted that the trial magistrate failed to assess the amount of general damages he would have awarded the appellant. That taking into account the nature of the injuries a sum of Ksh. 100,000/= is sufficient. They cited the case of **Joseph Mbiria –Vs- Jamlic Fredrick Kirimi Milimani Commercial Courts Civil Suit No. 866 of 2001**, the same authority that they had relied on at the lower court.

13. The advocates for the respondents on the other hand submitted that the burden of proof was on the appellant to prove the averments raised against the respondents. That he did not prove this as he said that the incident occurred at night. That the appellant did not call the police to testify in the case. That it is the duty of the state to prosecute criminal cases. That it is upon a successful prosecution of a criminal case against an accused person that one can move court for compensation in damages. Therefore that the trial court was not at fault in dismissing the case.

Analysis and Determination

14. The question before the court is whether the appellant had proved his case to the required standard.

15. Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya provides as follows:-

“107. (1) Whoever deserves any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.”

Sections 108 of the Evidence Act states that:-

“The burden of proof in a suit or proceeding lies on the person who would fail if not evidence at all were given on either side.”

16. The standard of proof in civil cases is on a balance of probabilities. The trial magistrate in his findings subjected the case to proof of identification of the assailants on the basis of proof beyond reasonable doubt which standard is applicable in criminal cases. The trial magistrate erred in applying the wrong standard of proof in a civil case. It has to be noted that evidence that may not be sufficient in proof of a criminal case by way of beyond reasonable doubt can be sufficient to prove a civil claim on a balance of probabilities. In **Mwaura Ndegwa –Vs- Isaiah Njuguna (2007) eKLR** the court noted that:-

“A civil court faced with evidence similar to that of the criminal proceedings is entitled to make its own assessment of the same and then arrive at its own conclusion. Further the standard of proof required is different. In a criminal trial the standard is beyond reasonable doubt while in a civil proceedings it is on a balance of probability. This being the case it is not surprising that evidence that fails to secure a conviction can secure a finding of a liability. This standard of proof in civil matters has to be established even where it is only the evidence of the plaintiff which is being considered like in this case.”

17. The burden of proof was on the appellant to prove that the respondents are the people who assaulted him. The appellant claimed that it is the respondents who attacked him and that he reported the same to the Assistant Chief and to the police. The chief wrote the appellant an introductory letter for him to report the incident to the police. Though the letter did not name the respondents it stated that the appellant knew his attackers.

18. It is clear that the police arrested the 2nd and 3rd respondents but released them without preferring any charges on them. The only reason why the police would have failed to charge the respondents with any offence is because there was no evidence that the respondents are the ones who had committed the offence. If the police were actuated by malice and failed to charge the respondents when there was sufficient evidence against them, then the appellant should have adduced evidence towards that end. All he stated is that he did not know why the police did not charge the respondents. The appellant did not produce the report made to the police to indicate that he named the assailants in the report he presented to the police.

19. It was the evidence of the appellant that the respondents had assaulted him a few days before the incident of 25/2/2001 on accusations that he had defiled the 1st respondent’s daughter. The incident of 25/2/2001 took place at night. The appellant did not give the names of the attackers to the Assistant Chief. There is no evidence that he mentioned them to the police when he made his first report to the police. It is possible that the appellant was only suspecting that the respondents were the people who assaulted him on that material night simply because they had assaulted him before. Though the appellant knew the respondents before and could have identified them in favourable circumstances, the fact that the incident took place at night required the appellant to adduce credible evidence that he identified the respondents as the people who assaulted him. The appellant did not prove that fact on a balance of probabilities. In the premises the appellant failed to prove his case against the appellants. There is no merit in the appeal. The appeal ought to be dismissed.

20. It is the requirement of the law that where a court dismisses a claim for general damages, the court ought to assess the amount of damages it would have awarded the claimant had he been successful in the case. See **Mordekai Mwangi Nandwa –Vs- Bhogals Garage Ltd CA No. 124 of 1993 (1993) KLR 448**. The trial court erred in failing to do so.

21. The appellant sustained the following injuries:-

- Deep cut wound on the right wrist/palm area measuring 6cm long.
- Deep cut wound on left hand extending from the wrist to base of ring finger across the palm side measuring 11cm long.
- Cut wound in the lateral part of left palm measuring 3cm long.
- Cut wound on the left hand middle finger on the palm side measuring 1cm long.

Dr. Abukuse opined that the injuries were soft tissue in nature that involved nerve damage of the right hand. That they healed with keloid and permanent scars and left the appellant with deformed left palm and damaged ulna nerve of the right hand.

22. I have considered the following authorities:-

In the case of **Hantex Garments (EPZ) Ltd –Vs- Haron Mwasala Mwakawa (2017) eKLR** the High court upheld an award of Ksh. 100,000/= for bruises, blunt trauma, swelling and tenderness on the right leg. In **Ndungu Dennis –Vs- Ann Wangari Ndirangu & Another (2018) eKLR** the High court reduced an award of Ksh. 300,000/= to Ksh. 100,000/= for soft tissue injuries to the lower leg and back.

23. I am of the view that a sum of Ksh. 100,000/= would have been adequate compensation for the injuries.

24. The upshot is that the appeal is bereft of merit. The same is dismissed with costs to the respondents.

Delivered, dated and signed in open court at Kakamega this 13th day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

No appearance for Respondents

Appellant - absent

Respondents - absent

Court Assistant - George