



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 141 OF 2017

BONIFACE MUNYAO MUINDE.....APPELLANT

-VERSUS-

FREDRICK KATUVA MOSE.....RESPONDENT

(Being an Appeal from the Judgment of Hon. M.M Nafula in the Principal Magistrate's Court at Tawa Civil Case No. 21 of 2016, delivered on 21st December 2016).

JUDGEMENT

INTRODUCTION

1. The Appellant was the Plaintiff in the lower Court. His case was that he had suffered injuries as a result of being assaulted by the Respondent. He sought damages for the assault as well as the costs of the suit.
2. The Respondent entered appearance and filed his defence. After a full trial, the learned Trial Magistrate dismissed the suit with costs.
3. Aggrieved by the outcome of the suit, the Appellant filed the instant appeal and listed 4 grounds as follows;
 - i. The learned Magistrate erred in law and fact by dismissing the plaintiff's claim despite the weight of the evidence adduced by the plaintiff's witnesses.**
 - ii. The learned Magistrate erred in law and fact by not considering the medical evidence adduced.**
 - iii. The learned Magistrate erred in law and fact by considering the judgment in Criminal Case No. 248/2015 (Tawa) as a basis of reaching her decision.**
 - iv. The learned Magistrate erred in law and fact in not considering the totality of the evidence on record.**
4. The appeal was canvassed by way of written submissions.
5. I have looked at the evidence on record, the judgment of the trial Court, the Appellant's submissions and the authorities cited therein and the only issue for determination in my view is whether learned trial magistrate erred by dismissing the Appellants claim.
6. It is settled law that the duty of a first Appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
7. **PW1** was Boniface Muinde Munyao. He testified that on 05/12/2014, he was called by Mumo Muindi (PW2). Mumo wanted PW1 to assist him as a family chairman. He proceeded to Mumo's where he found the chief and the Respondent. The chief told the three of them i.e. PW1, Mumo and the Respondent to go and solve the water problem.
8. On 06/12/2014, he went to Mwanzi's place with Mumo. On their way back, they met the Respondent who emerged from the shamba. The Respondent kicked PW1 on the right leg and lower abdomen. He reported the matter at Iiani police station and was treated at Machakos Level 5 hospital.
9. The Respondent was arrested. He was willing to pay damages of Kshs. 50,000/=. He gave PW1 a cheque of Kshs. 15,000/= and did not pay anything else. He produced a letter from the chief, treatment notes, agreement, the cheque, a copy of the judgment and notices of intention to appeal as exhibits 1-6 respectively.

10. On cross examination, he said that on 05/12/2014 he was in his shamba and on 06/12/2014, he was on the path of his shamba. He said that he picked Mwinzi and they proceeded to Mumo's house. The Respondent emerged from the shamba and assaulted him.

11. **PW2** was Mumo Muindi. He testified that both the appellant and Respondent were known to him. They fought on 06/12/2014. He was at home when PW1 visited. He had been sent by the chief. The Respondent emerged from the shamba and kicked the Appellant on his right foot and lower abdomen.

12. On cross examination, he denied that they were planning to assault the Respondent. He denied damaging the Respondent's water pipes and denied seeing Mutinda Musyuu. He said that he saw the Respondent assaulting PW1.

13. **PW3** was Joshua Kitiwa Nzivo. He testified that he was a nyumba kumi chairman. On 06/12/2014, he was with Kioko Kyema headed to the Respondent's house to solve some problems. The Respondent emerged from the bush and kicked the Appellant on the right leg and lower abdomen.

14. On cross examination, he said that the Respondent pushed the Appellant and kicked him on the right foot. The Appellant closed his case.

15. On his part, the Respondent (**DW1**) testified that on 06/12/2014, the Appellant went to his farm. They had conspired to attack him. The Appellant threatened to kill him. The Appellant punched him on the chest and started hitting him with his elbow. He sustained injuries on his chest. He knocked his mouth.

16. He reported the matter at Wanzauni Patrol base and was treated at Tututha hospital. He was charged with assault and acquitted. He denied ever giving the Appellant a false cheque.

17. On cross examination, he said that the Appellant slept on his chest and there were two witnesses.

18. **DW2** was Jackson Mutinda. He said that on the material day, he was at DW1's house where they were solving a case with PW2. While walking down, he met Munyao Mwinzi Mumo who told them that he had finished the case. He testified that he saw the Appellant assaulting the respondent.

19. On cross examination, he said that he was at DW1's place at 7.00 a.m. where the Appellant, Mumo and Mwinzi were. He said that the appellant slept on the Respondent's chest.

ANALYSIS AND DETERMINATION

20. The Respondent was charged with assaulting and causing actual bodily harm upon the Appellant in Tawa SRM's Court Criminal Case No. 248 of 2015. He was acquitted under Section 215 of the Criminal Procedure Code. The learned magistrate found that there was an affray between the complainant and accused person and that both of them were injured. According to her, the evidence on record showed that there was a fight between the two. This judgment was produced and admitted in the civil case.

21. Exhibits 6(a) and (b) show that there was some effort by the Appellant to appeal against the said judgment through the Office of Director of Public Prosecutions in Machakos. The bottom line however is that no appeal was filed. The judgment was delivered by a competent Court and there was no indication that it was obtained through fraud or corruption.

22. Section 47A of the Evidence Act provides that:

47A. 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.

23. Similarly, where there is an acquittal and no appeal is preferred within the prescribed period, the inference to be drawn in light of the above section is that the person so acquitted was not guilty of the offence charged.

24. Consequently, the issue of assault was conclusively determined in the criminal trial and it is my considered view that the Learned Trial Magistrate did not err by considering the judgment therein. Ground 3 of the appeal therefore fails. Grounds 1, 2 and 4 will be considered together.

25. As already stated, it was the opinion of the learned magistrate in the criminal trial that what happened between the Appellant and the Respondent was an affray. PW2 buttressed her opinion by testifying that the two fought on 06/12/2014. Logically, when a fight occurs, the most likely result is that the participants will sustain injuries. The degree of injuries will of course depend on factors like, the duration of the fight, defence skills *et al*.

26. The treatment card produced by the appellant showed that he sustained blunt injuries and swellings on the abdomen and right leg. It also showed that he was treated on 06/12/2014. My view is that the Appellant was entitled to some compensation for the injuries sustained.

27. One might wonder whether, in light of the above, the Respondent was and is also entitled to some compensation for injuries he might have sustained during the fight. In my view, no one prevented him from filing a counter claim. As there was none filed, I will confine myself to the appellant's case.

LIABILITY

28. Ideally liability should be apportioned on a 50:50 basis where the injuries sustained are as a result of an affray, however, where the Court can determine who the aggressor was, apportionment should tilt in favour of the party who was attacked first.

29. I have already stated that the judgment in the criminal case was admitted in evidence by the civil Court. That judgment resulted from the proceedings recorded in the criminal trial. Consequently, those proceedings are part of the evidence and it is my view that nothing prevents this Court from reading them together with the Proceedings in the civil Court in order to get a clear picture of what transpired between the Appellant and Respondent.

30. The evidence shows that there was a water dispute between PW2 and the Respondent. On the material day, the Appellant had gone to PW2's home to resolve the dispute in his capacity as the family chairman. It is highly probable that the Respondent was not amused by what he perceived to be interference from the Appellant.

31. In his defence, the Respondent seemed to be suggesting that the Appellant attacked him out of the blues. With respect, I think this was an afterthought. These are people who in my view, were living in close proximity to each other, they were known to each other. It therefore beats me as to why the Appellant would pounce on the Respondent for no apparent reason.

32. As much as one of the Appellant's witnesses (PW3) was likely to give a favorable testimony on behalf of the Appellant due to the obvious reason that he had issues with the Respondent, I am nevertheless convinced that the Respondent was the aggressor. Apportionment of liability at 60:40 is reasonable in the circumstances.

QUANTUM

33. According to the Appellant, the Respondent had agreed to pay him Kshs. 50,000/= for the injuries sustained. He issued him with a cheque of Kshs. 15,000/= which bounced. The agreement being referred to was exhibit 3. It was dated 17/03/2015 and was basically a withdrawal of the complaint against the Respondent.

34. It stated that the Appellant had agreed to withdraw the charges against the Respondent. It further stated that the Appellant did it without being forced and had acted without conditions. The document was signed by both the Appellant and Respondent. Clearly, there was nothing in that document to suggest that the Appellant was withdrawing the charges on consideration that he would receive Kshs. 50,000/= from the Respondent.

35. Exhibit 4 was the cheque which was allegedly issued by the Respondent. It was dated 28/03/2015. On the face of it, the issuer was Kaynet Office Supplies. It was incumbent upon the Appellant to establish a connection between Kaynet Office Supplies and the Respondent. That was not done. In my view, exhibits 3 and 4 did not help the Appellant's cause of trying to show that the Respondent had agreed to pay him that amount.

36. Be that as it may, a critical look of those two documents show that the alleged dealings i.e. withdrawing of the charges and issuance of the cheque occurred after the affray and before the formal charges were pressed. The affray occurred in December 2014, the withdrawal of the charges and issuance of the cheque was done in March 2015 and the Respondent was arrested and arraigned in Court in May 2015.

37. The chronology of the above events leads me to the conclusion that there was some sort of a gentleman's agreement between the Appellant and Respondent. The Respondent dishonored it and this prompted the Appellant to carry on with the charges.

38. Having found no assistance in exhibits 3 and 4, I sought guidance from **Paul Kipsang Koech & Anor –vs- Titus osule Osore [2013] eKLR** in line with the principle that comparable injuries should be compensated by comparable awards.

39. In that case, the Plaintiff sustained the following injuries;

- a. Bruised lower lip.
- b. Fracture of the right upper lateral incisor tooth.
- c. Loosening of the right upper canine tooth.
- d. Loosening of the right upper medial incisor tooth.
- e. Blunt injury to the neck.
- f. Bruised right cheek.
- g. Blunt injury to the abdomen.
- h. Bruised left elbow.
- i. Bruised left knee.

40. The High Court in Bungoma set aside an award of Kshs. 300,000/= and substituted it with Kshs. 200,000/=. The learned Judge expressed himself as follows;

“Injuries suffered ordinarily attract an award between Kshs. 50,000/= - Kshs. 200,000/= depending on the extent and severity of the injuries. Since there is a fracture of the right upper incisor tooth, loosening of other two teeth, and post accident pains on the left elbow and the abdomen, I will hereby make an award of Kshs. 200,000/= as general damages.”

41. I note that the injuries suffered by the Plaintiff in that case were more severe than the ones sustained by the Appellant in the current case.

42. I am of the view that an award of Kshs. 80,000/= will be adequate in the circumstances. The award should be subjected to 40% contribution and this means that the amount awarded to the Appellant is Kshs. 40,000/=.

43. Before I sign off, I must comment about the issue of malicious prosecution which the Learned Trial Magistrate talked about in her judgment. It was a total deviation from the issues before the Court and to that extent, it was erroneous.

CONCLUSION

44. The appeal is meritorious and is hereby allowed in the following terms;

- i. The judgment of the lower Court is thus set aside in it's entirety.**
- ii. An ward of Kshs. 40,000/= is hereby made in favour of the Appellant.**
- iii. He will also get the costs in the lower Court as well as the costs of the appeal.**

SIGNED, DATED AND DELIVERED THIS 16TH DAY OF MAY, 2018 IN OPEN COURT.

C. KARIUKI

JUDGE

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