



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 103 B OF 2013

CORAM: D.S. MAJANJA J.

BETWEEN

SAMUEL INAYA KIRINGO.....1ST APPELLANT

BENSON KAIRITHIA.....2ND APPELLANT

AND

ELIJAH MUTHAURA MWINA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. Ochieng', PM dated 8th March 2012 at the Chief Magistrates Court at Meru in Civil Case No.240 of 2010)

JUDGMENT

1. The respondent's case before the subordinate court was that he was assaulted on 8th December 2009 by a gang led by the appellants following which he sustained injuries. The trial magistrate found the appellants jointly and severally liable and awarded the respondent Kshs. 300,000/- as general damages for pain and suffering and Kshs. 5000/- as special damages. It is this judgment that has now precipitated this appeal.
2. In the memorandum of appeal dated 14th March 2013, the appellants contend that the respondent did not prove the case on a balance of probabilities and the trial court's findings were against the weight of evidence. They attack the judgment on the basis that the trial magistrate erred in finding that they had assaulted the respondent when the evidence was contrary and that he ignored the appellants' evidence.
3. Counsel for the respondent submitted that the respondent proved his case by calling eye witnesses whose evidence was not controverted and that the appellants did not call any independent eye witnesses to support their case.
4. Both parties filed written submissions which I shall take into account in making my determination but before I do so, it is important to set out the manner in which this court exercises its appellate jurisdiction. It is the duty of the first appellate court to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for it to reach an independent conclusion as to whether to uphold the judgment (see *Selle v Associated Motor Boat Co. [1968] EA 123*). Further, an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge (magistrate) is shown demonstrably to have acted on wrong principles (see *Ephantus Mwangi and Another v Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278*).
5. The respondent testified as PW 1 and his evidence mirrored what he stated in the plaint. He told the court that he was employed by the 1st appellant in his hotel. They had a fall out after the 1st appellant failed to pay him and he reported the matter to the area Chief who was unable to resolve the matter. He also knew the 2nd appellant as the 1st appellant's friend. On 18th December 2009 at 4.00am, while he was asleep in his house, he was awoken by people who introduced themselves as the chief and policemen. When he opened the door, he was grabbed by the appellants in the company of 10 other people. They tied him up with ropes alleging that he was a thief and started assaulting him using pangas, rungas and whips. The 1st appellant used a panga and the 2nd appellant used a whip to assault him. He was injured on the left arm, face, right elbow, wrist and ankle joint. The other people pleaded with the pair not to harm him to no avail. He further testified that he was frogmarched into a river and then taken to Mikinduri Police Station where he was booked into the police cells.
6. PW 1 further testified that he was released on the following day, that is 9th December 2009 and told to report back on 15th December 2009 and when he reported back, the Commanding Officer told him that there was no case against him. He stated that he recorded his statement on 18th December 2009 and was issued with a P3 form which was completed by a doctor. He stated that although he lodged his complaint, no action was taken by the police causing him to instruct his advocate to make a demand then file suit. In cross-examination, he told the court

that his treatment note, P3 form and receipts were seized by police officers after he demanded to know why suspects had not been arrested.

7. Among those who witnessed what took place was Brown Mwirigi (PW 2) and Stanley Muthui Mberia (PW 3) who testified that on the material morning they heard some commotion. PW 2 was harvesting miraa while PW 3 was in his hotel. They both rushed to the scene where they found the appellants had tied up the respondent alleging that he had stolen green maize and wheat flour. According to PW 2, the 1st appellant had a knife while the 2nd appellant had a rungu which they used to assault the respondent. They both witnessed the assault and testified that the respondent was frogmarched to Mikinduri Police Station.

8. The 1st appellant (DW 1) testified that that he knew the respondent who was working for him at his hotel but he left employment in October of that year. He told the court that he did not have any grudge or dispute over salary arrears with him as he had paid him. He recalled that on the material night, he was asleep in his hotel when heard commotion. Going outside, he found three people had been arrested and tied with ropes and were being assaulted by a mob who were demanding that they be taken to their accomplices. They led the mob to the respondent's house where he was apprehended. He denied all the allegations by PW 1 that he assaulted him. In cross-examination, he told the court that there had been burglaries in the area and that he went with other businessmen to the respondent's house in solidarity at about 4 00am.

9. The 2nd appellant (DW 2) told the court that while taking his children to school, he found a crowd had arrested the respondent and another person whom they had tied together. He left to open his shop as the crowd took the respondent to the police station then came back and accompanied them to the police station. He told the court that the respondent was not beaten as alleged.

10. The Commanding Officer of Mikinduri Police Station, Alfred Wambua (DW 3) testified that one Patrick Chokera had made a complaint against the respondent and another person. He confirmed that the respondent was brought to the police station by a mob of people and in the incident reported in the Occurrence Book (OB) as Entry No. 13 of 8.12.2009 and that there was no complaint of assault. In OB No. 21 of 18.12.2009, the respondent complained that he had been assaulted. The 1st appellant was arrested and then released. The matter was given to an officer to investigate the matter and other persons were charged with breaking into a building and committing a felony.

11. The issue in this case is whether the respondent proved his case on the balance of probabilities. There is no dispute that on the material night or early morning the mob had gathered at Mlango market centre where some suspects accused of stealing had been flushed out. The respondent was one of those who was suspected and he was taken to the police station as confirmed by DW 3. The question is whether the appellants were part of the mob and whether they assaulted PW 1.

12. I have evaluated the evidence and I am constrained to find that the respondent did not prove his case on the balance of probabilities. I say so because, this is a matter that largely depends on the credibility of witnesses and I find the evidence of DW 3 decisive in determining the evidence one way or another as he was an independent witness. First, had the respondent been injured as alleged, nothing would have been easier than reporting the incident on the date he was arrested and released. There was no complaint of assault on the first day when he was released. Second, there was no record of the fact that the respondent was brought into the police station in a state of distress with injuries. This fact would have been noticed by the police officers and recorded in the Occurrence Book for that day.

13. The complaint of assault was recorded on 18th December 2009, 10 days after the incident. In his testimony, the respondent stated that when he was released, he was told to report back on 15th December 2009. Although DW 3 denied that he reported back, PW 1 states that when he reported, he was informed that there was no case against him. Why didn't he make the report on that date? In my view, since both DW 1 and DW 2 were known to him, he would have made the complaint at the earliest opportunity. I have searched his testimony and I do not find any reason for the delay. The medical report of Dr Macharia does not show that he was admitted in hospital after the injuries.

14. The trial magistrate did not consider this aspect of the case. However, upon my own assessment of the evidence, I find that the respondent did not prove that he was assaulted by the appellants.

15. The appeal is allowed. The judgment of the subordinate court is set aside and is substituted with a judgment dismissing the suit. The respondent shall bear the costs in the court below and this appeal. I assess the costs of this appeal at Kshs. 30,000/-.

DATED and DELIVERED at MERU this 7th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Ondari instructed by Leonard Ondari and Company Advocates for the appellants.

Mr Mbaabu instructed by Carlpeters Mbaabu and Company Advocates for the respondents.