



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 110 OF 2014

GRACE KAVITHE MUTISO.....APPELLANT

VERSUS

PHILIP MANG'OKA MULUKA.....RESPONDENT

JUDGMENT

Background

1. The appellant herein being dissatisfied with the judgment of the Honourable M. Ochieng (Ag) SRM delivered at Makueni in the Makueni Principle Magistrate's Civil Suit No. 73 of 2012 on 17/12/2014 appealed on the following specific grounds of appeal:

- a. The learned Magistrate erred in law and fact when he proceeded to dismiss the appellant's case against the tremendous weight of evidence.*
- b. The learned trial Magistrate erred in law and fact when he failed to appreciate that the appellant had proved her case to the required standard of proof.*
- c. The learned Magistrate erred in fact and in law when he failed to consider any of the compelling evidence adduced by the Appellant at the trial court.*
- d. The learned trial Magistrate erred in law and fact and misdirected himself when he relied on extraneous and irrelevant matters to enter judgment in favor of the respondent.*
- e. The learned trial Magistrate erred in law and fact and misdirected himself on the applicable law in total disregard of sections 46 & 47A of the Evidence Act (Cap 80 laws of Kenya).*
- f. The learned trial Magistrate erred in law and facts by disregarding and failing to take into account credible and reliable evidence presented by the Appellant.*
- g. The learned Magistrate so misdirected himself on matters of both law and fact that he occasioned a miscarriage of justice against the Appellant.*

2. The appellant prayed for the following specific orders;

- a) The appeal be allowed.
- b) The trial court's judgment made on 5/6/14 be set aside and this court be pleased to enter judgment and assess quantum in favor of the appellant.
- c) The costs of this appeal and those of the trial court.

3. On 30.11.15 the court directed that the appellant files written submissions by the 17.2.16 whereas the respondent to file within 21 days upon service.

Submissions

Appellants written submissions

4. The appellant was the Plaintiff in the lower court suit. She had sought for special damages and general damages for bodily injuries suffered as a result of being assaulted by the respondent (defendant in the lower court file). The respondent had been charged on 5/12/2011 and convicted of assault causing actual body harm under section 251 of the Penal Code in Kilungu Senior Resident Magistrate's Court Criminal Case No. 221 of 2008. The respondent (accused) in Criminal Case No. 221 of 2008 on 5/12/2011 was sentenced to pay a fine of Ksh 20,000/= and in default to serve six (6) months imprisonment. The Appellant's (Plaintiff's) case was dismissed. The Civil case judgment was delivered 5.6.14 and she lodged an appeal on 30.06.2014, which was beyond the period provided to lodge an appeal.

5. The appellant argued grounds 1, 2, 3 and 5 together. The respondent had assaulted her on or about the 3.5.2008. She had 3 witnesses and the judgment in Kilungu SRM Criminal Case No. 221 of 2008 was produced as exhibit No. 5, it showed the respondent's conviction and sentence. A medical report was exhibit 1 which showed that she had sustained a blunt injury to the head resulting to a punctured wound with complaints of blurring vision, loss of consciousness and seizure (convulsion). In addition to this she urged that she had produced credible compelling and strong evidence to prove her case in the lower court not only on the required standard of proof which is on a balance of probabilities but also beyond reasonable doubt.

6. The court was referred to section 47A of the Evidence Act which states as:

"A final judgment of a competent court in any Criminal Proceedings which declares any person to be guilty of 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 latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

It was her submission that the judgment of the lower court was conclusive in evidence that the respondent intentionally assaulted her causing actual bodily harm.

7. The appellant urged that the lower court grossly misdirected itself on extraneous and irrelevant issues. The respondent was liable for assaulting and causing injury intentionally attaching liability. In **Bundi v. Joseph Onkoba Nyamaro** (1983) eKLR it was held that unintentional assault showed negligence. The only scenario where liability would not attach was in accidental assault or misadventure, which was never pleaded or shown by the respondent. Further the conviction in the criminal case would have actually not been reached if *actus reus* and *mens rea* were not proved hence the intention to assault and the actual assault was proved.

8. In addition, the appellant urged that she was never guided as to filing submissions; change of advocates and on how to act in person after her counsel's death. The matter in the lower court had proceeded to judgment without her submissions and legal proceedings. Costs were awarded to the respondent at Ksh 40,825/= and no draft decree or certificate of costs was ever sent to her.

9. The appellant urged that the learned Magistrate ignored her credible and reliable evidence, which was not challenged by the respondent. The P3 form indicated injuries, which the court did not rely on.

10. The appellant referred the court to the **Kisumu court of Appeal Civil Appeal No. 8 of 1983 Bundi Marube (an infant suing by his next friend Thomas Bundi – v. Joseph Onkoba Nyamuro and Kericho High Court Civil Suit No. 73 of 2004 Ann Chebet Cheruiyot v. Samwel Kipkurui Bore.**

11. Lastly the appellant urged the court to set aside the lower court's judgment and enter judgment in favor of the appellant for the sum of Ksh 400,000/= being general damages and special damages of Ksh 7000/= as adequate compensation.

Respondent's Submission

12. The respondent urged the appeal is incompetent on a point of law since it was filed out of time and no leave was sought to extend time within which to file an appeal. The judgment in the lower court was delivered on 5/6/2014 a period of 6 months. The only leave that was sought was for filing of the lower court case. On this basis he urged the appeal to be dismissed.

13. Further that the appellant did not state in her evidence in chief and in cross-examination the nature of the injuries she sustained other than she was hit. The injuries contained in the P3 form and the medical reports are inconsistent. In addition that the witnesses (pw2 and pw3) were not eye witnesses.

14. Also the right to consider a conviction does not automatically give rise to liability and the court did not error in relying on section 44 and 47 of the Evidence Act. The judgment in the lower court was right and he urged the appeal be dismissed with costs for lack of merit.

Issues for Determination

15. The court has considered the issues raised, the record of appeal, the written submissions and authorities relied on, the following specific issues arise for determination.

- a) Whether the appeal was filed on time.
- b) Whether the appellant herein was injured.
- c) Whether the appellant proved her case on a balance of probability and if so how much is adequate compensation.

Determination

16. The appellant herein submitted to have filed the appeal in time whereas the respondent stated that it was filed out of time. The judgment in the lower court case was delivered on 5.6.2014. The appeal was filed in court on 17.12.14. The Civil Procedure Rule at section 79G states as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filling the appeal in time”

The record of appeal shows it was filed on 17.12.14 and the memorandum of appeal shows it was filed on 30.06.2014, which was well within the 30 days provided by the law. The appellant had to seek for leave to appeal if the decree or order would not be secured within the limitation period. In this instant case the decree was issued on 26.06.2014. The appellant did not need to seek extension of time within which to file the appeal. In **Kyuma v. Kyeme** (1988) KLR 185 it was held:

“The appellant was entitled to appeal to the High Court against these orders if he felt aggrieved by them. Section 65 (1) of the Civil Procedure Act confers a right to appeal on him. But in order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order. This period may be extended provided he obtained from the Magistrates court a certificate of delay within the meaning of section 79G of Act. The section allows thirty days to be extended by such period as was required to make a copy of the “decree or order of the court”. As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the Memorandum of appeal, not only the order of the court but also a certificate of delay.”

In view of this the court finds that the appeal was filed within the stipulated time.

17. The other issue was whether the appellant had been injured. The plaint filed on 2.07.2012 indicates the particulars of injuries as follows;

“ (i) Blunt injury to the head resulting to a punctured wound on the left side of the head. (more particulars to be given upon a medical report)

The appellant had further at paragraph 8 stated as, *(ii) to seek for general damages for bodily injuries suffered.* The appellant produced a P3 form dated 3.5.08 which indicated the alleged offence was committed on 3.5.08, but it showed the appellant visited Makindu District Hospital on 24.05.2010 under the escort of herself. The P3 form further stated that the appellant was first treated at Nunguni Health Centre in May, 2008. The details of the P3 form at section A was as follows.

(a) Head and neck – Tender swelling fore head

(b) Thorax and abdomen – Tenderness of left side of the chest

The probable type of weapon that caused the injury was blunt and the approximate age of injuries was one day.

18. This is a first appeal and being a court of first appeal it has duties as was held in **Abok Jaya t/a A.J.Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** as follows:

“This being a first appeal, we are reminded of our primary rule as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority v. Kusthon (Kenya) Limited (2009) 2 EA 212 wherein the court of Appeal held, inter alia, that:

“On a first appeal from the High Court, the court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that It has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

The court should also reconsider the evidence, evaluate it herself and draw its own conclusion.

19. The medical report dated 25th October, 2013 was prepared by an anesthetist who examined the appellant on the same day. The report shows the appellant sustained the following injuries.

i) Deep cut wound on the parietal region = 5x2 cm

ii) Blurring of vision

iii) Loss of consciousness

iv) *Seizure (confusion). The doctor's opinion was that the appellant suffered soft tissue injuries.*

This medical report was prepared almost 5 years from the alleged date of assault. It is the court's opinion that these injuries are quite different from what the P3 form states. The P3 form too was filled 21 days after the alleged day of assault. The initial treatment chit/document from Nunguni Health Centre was not produced in court nor was it attached in the record of appeal. The initial treatment chit is important too.

20. The appellant in the lower court had testified that the respondent had hit her on the forehead. This was corroborated by PW2 Steven Mwaema Mwingi who testified that he saw the appellant standing with the respondent on 3.5.2008. The appellant's 4th witness PW4 Ludwig Muinde an anesthetist at Machakos level 5 District Hospital confirmed to the court that he had relied on the P3 form and medical notes from Nunguni. He testified to have examined the appellant herein on 25/2/2013. The respondent also testified on 12.2.2014 and confirmed he was charged at Kilungu Law courts and fined Ksh.20,000/=. The court has considered section 47A of the evidence Act which reads as follows;

"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall – be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

In view of the above section, this court finds that the respondent was liable for the injuries sustained by the appellant.

21. The respondent being liable for the injuries sustained by the appellant, what amount of damages is adequate compensation. The appellant in her plaint had particularized the injuries sustained as follows;

Blunt injury to the head resulting to a punctured wound on the left side of the head. (more particulars to be given upon a medical report)

The court has analyzed the treatment documents and has come to the conclusion that the only injury sustained by the appellant was;

tender injury on the forehead.

The court once again reiterates the principles upon which this court will interfere with the exercise of discretion of a lower court only where the latter court has failed to take into account a relevant factor or taken into account an irrelevant factor or the amount awarded is inordinately so low or so high so that it must amount to wholly erroneous estimate to the damages. This threshold was set in ***Kemfro Africa Limited v/a Meru Express service & Anor v. A.M. Lubia & Anor*** (1982 – 88) IKAR 727.

22. In ***B.G.Saint v. Kevin Hogan*** [1953] E.A.C.A. 85 it was held:

i. Although as a general rule an appeal court will not disturb assessment of damages made by the trial court, where there are no reasons are stated by the trial court, the Appeal court can make its own assessment of damages.

ii. In assessing damages for personal injuries, whilst the special facts of the case under consideration must be borne in mind the assessment should accord with the general run of assessments made over a substantial time in comparative cases.

The appellant urged the court to award a sum of Ksh.400,000/= as general damages. In ***Kericho HCCC No. 75 of 2004 Anne Chebet Cheruiyot v. Samwel Kipkurui Bore*** [2014] eKLR the injuries were more severe compared to the injury sustained by the appellant in this instant case. In ***Thomas Bundi v. Joseph Onkoba Nyamuro*** [1983] eKLR the injury was loss of the left eye, which is severe than the injury in the present suit.

The court would award a sum of Ksh.75,000/= which shall be adequate compensation.

23. The appellant had pleaded for special damages as follows;

i) P3 form filling – 1,000

ii) Medical expenses

The appellant had not proved this sum of money. The appellant annexed receipts of Ksh,7000/= in total being payment of the medical report and payment to the anesthetist (PW4), all duly stamped with Stamp Duty as provided under section 19 of Stamp Duty Act.

24. The lower court had awarded the respondent costs. The certificate of costs at pg. 61 of the record of appeal shows Ksh.40,825.00/=. This was in accordance with section 26 and 27 of the Civil Procedure Act since the court has the full power to determine the extent of cost to be paid. The court sets aside the said amount since the appellant has proved her appeal.

Orders

25. Accordingly, the court sets aside the trial magistrate's judgment and allows the appeal with costs of the lower court proceedings payable by the respondent.

26. The court, therefore, makes an award in favour of the appellant in the sum of Ksh.75, 000/= as general damages and Ksh.7, 000/= as

special damages making a total of **Ksh.82, 000/=** to be paid by the respondent, with interest at court rates until payment in full.

27. The Respondent shall also bear the costs of the appeal.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 9TH DAY OF OCTOBER 2018.

G.V. ODUNGA

JUDGE

Appearances: -

M/S B.M. Kituku & Co. Advocates for the Appellant.

Philip Mang'oka Muluka in person.