



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 18 OF 2012

GEOFFREY MWANGI MUYA.....APPELLANT

VERSUS

DAVID MUTAHI WACHIRA.....RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate's Court (E. K. Nyutu) at Wang'uru, Civil Case No. 32 of 2012 dated

18th October, 2012)

JUDGMENT

1. **GEOFFREY MWANGI MUYA** has appealed to this Court against the judgment of the subordinate court in Wang'uru Principal Magistrate's Court Civil Case No. 32 of 2012. At the said court the Appellant was found liable to the Respondent in the above suit for tort (assault) committed against the Respondent herein. The subordinate court entered judgment and awarded the Respondent Kshs.200,000/- as general damages for the injuries suffered at the hands of the Appellant. Being dissatisfied, the Appellant filed this appeal and raised three (3) grounds as follows:-
2. **(i) That the trial magistrate erred in law and fact in condemning the appellant for a second time over the same set of facts contrary to the constitutional provision against double jeopardy.**
(ii) That the learned magistrate erred in law and fact in awarding general damages for pain, suffering and loss of amenities which was highly excessive.
(iii) That the trial magistrate erred in law in failing to appreciate that judgment in Criminal Case No. 348 of 2011 was conclusive as to all the rights between the parties therein and the suit was thus an abuse of the court process.
3. In his written submissions, the Appellant has contended that the judgment entered against him was against the rules on double jeopardy arguing that he had been found guilty and punished in the **Criminal Case No. 348 of 2011** at Wang'uru Law Courts to serve six(6) months imprisonment. He submitted that the criminal court which convicted him had a discretion to make an award on damages under **Section 175 of Criminal Procedure Code** as read with **Section 31 of the Penal Code**. The Appellant contended that because the criminal court did not award any compensation, the Plaintiff should have appealed instead of filing the Civil claim and that failure to appeal against the judgment in the criminal court and filing a civil claim instead amounted to an abuse of court process as the suit against him was a back door appeal against the sentence passed against

him. He relied on a decision in **Criminal Appeal No. 59 of 2005** at Kakamega involving **SIMON WAMACHABA -VS- REPUBLIC** to buttress his point that courts in criminal cases can award damages to be paid to the complainant.

4. The Appellant further submitted that the criminal case resolved all the rights accruing to the Respondent as a result of the incident. In his view the criminal court never found it fit to award any compensation or damages and in so far as he is concerned that decision by the criminal court determined civil rights in the negative and therefore the issue was not open again for further litigation. He opined that the learned magistrate in the civil case erred by entertaining the suit and awarding the Respondent damages just because the Appellant had been convicted in a criminal case.
5. On quantum, the Appellant contended that the award of Kshs.200,000/- made against him was manifestly excessive in view of the injuries suffered which he submitted were soft tissue. He further submitted that the Respondent was treated and discharged the same day showing that the injuries were not serious. In his view an award of Kshs.20,000/- should have been sufficient considering the authorities cited on awards given by courts for similar injuries.
6. The Respondent opposed this appeal and relied on his written submissions to support the judgment and the award of the learned trial magistrate. The Respondent contended that rules on double jeopardy only apply to criminal cases and the suit against the Appellant was a civil and not criminal action over the same set of facts to entitle the Appellant to make a plea of rule against double jeopardy. He argued that the Appellant was not subjected to another criminal trial for the same offence and the rule against double jeopardy does not apply. He further argued that he had a right to pursue his civil rights separately from the criminal proceedings against the Appellant.
7. On quantum, the Respondent submitted that the injuries suffered were proved and that the trial court took into consideration the rate of inflation and the awards in other courts to arrive at the figure of Kshs.200,000/- which according to the Respondent was fair and just in the circumstances.
8. Finally the Respondent submitted that the criminal case did not extinguish his rights and that the civil court could not depart from the judgment in the criminal case. He urged this court to find that the appeal lacked merit and dismiss it.
9. I have considered both submissions from both sides and in my view the issues in this appeal for determination are two and are as follows:
 - i. Whether a complainant in a criminal case can file a civil suit for damages and/or whether a conviction in a criminal case can give rise to a cause of action to a complainant.
 - ii. Whether damages awarded in this case are excessive.

10. On the first issue, it is true as contended by the Appellant that

a criminal court has a discretion when passing a sentence against an accused person to, in addition to any fine, order that the complainant be compensated with a specified amount in damages in accordance with **Section 175 (2)** of the **Criminal Procedure Code**. However, it is incorrect to say that a criminal court must or should make a finding on the issue of damages payable. The law is clear that the conviction and sentence of an accused person does not and cannot absolve the accused of civil liability on action brought by the injured party.

11. In the same vein, a conviction on a criminal case does not conclude or determine all the rights to the complainant or an injured party. This Court finds that the Appellant cannot and could not use the rule against double jeopardy as a defence or shelter to the civil claim brought by the Respondent. The Respondent was within his rights and the law to bring an action for the injuries suffered as a result of the Appellant's action. The learned trial magistrate was correct in finding that the Appellant was liable. He did not appeal against the conviction in Wang'uru
11. **Principal Magistrate's Court Criminal Case No. 348 of 2011** and the civil court was right to admit the conviction as part of the evidence in the civil case. The two grounds (1 & 3) in the appeal cannot hold as the same are unsustainable in law.

12. On the question of quantum this Court finds that the award made is on the higher side though not manifestly excessive as contended by the Appellant. I have looked at the injuries and it is true that they were soft tissue for which the Respondent was treated and discharged on the same day on 18th May, 2011 at Kimbimbi sub-District Hospital. I have looked at the treatment card, the medical report and the P3 form which were produced as exhibits. The trial court had a discretion to make an award that was fair and just in the circumstances. This Court being an appellate court can only interfere where it is shown that wrong principles were applied in making the award. The Appellant has submitted that the learned magistrate should have awarded Kshs.20,000/-.
13. Taking all factors into consideration the proposal by the

Appellant is excessively low. I am however, inclined to partly agree with him that the award of Kshs.200,000/- is high considering that the authorities quoted before the trial court demonstrated more serious injuries. This Court considers that an award of Kshs.100,000/- could have been fair and just. In view of the above this appeal partly succeeds only on the issue of quantum.

The upshot of this is that the appeal partly fails as indicated

above and partly succeeds in that the award of Kshs.200,000/- is set aside and in its place an award of Kshs.100,000/- is given. The Appellant shall have half costs in this appeal and the interests on the award of Ksh.100,000/- shall be computed from the date of judgment entered at the trial court. It is so ordered.

Dated and delivered at Kerugoya this 8th day of June, 2015.

R. K. LIMO

JUDGE

8.6.15

Before Hon. Justice R. Limo

Court Assistant: Willy

Mwai holding brief for Kinyua for Plaintiff

Wachira holding brief for Thungu for Respondent.

COURT: Judgment signed, dated and delivered in the presence of Mwai holding brief for Kinyua and Wachira holding brief for Thungu Advocate.

R. K. LIMO

JUDGE