



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. 71 OF 2015**

**EUNICE AUMA ONYANGO .....APPELLANT**

**VERSUS**

**SALIN AKINYI OLUOCH .....RESPONDENT**

**JUDGMENT**

**Background:**

1. **SALIN AKINYI OLUOCH**, the Respondent herein filed a civil claim against the Appellant herein, **EUNICE AUMA ONYANGO** in Rongo Principal Magistrates Court which claim was assigned as Civil Case No. 26 of 2014 (hereinafter referred to as “*the suit*”).
2. In the aforesaid suit, the Respondent claimed for damages for battery, special damages, costs and interest.
3. The Appellant herein, then the Defendant, was represented by Messrs Nyauke & Company Advocates who accordingly filed a Statement of Defence to the claim.
4. On close of pleadings, the suit was fully heard. Parties then tendered their respective submissions and the trial Court rendered its judgment on 21/11/2014 where it found for the Respondent herein and assessed damages at Kshs. 60,000/= with costs and interest.
5. The Appellant then moved to this Court and vide a Miscellaneous Civil Application No. 2 of 2015, she was granted leave to appeal out of time. Upon compliance thereof, the Record of Appeal was filed and the appeal was set for hearing.

**The Appeal:**

6. By a Memorandum of Appeal dated 09/03/2015, the Appellant preferred the following grounds:-
  - (i) *The Learned Magistrate misapprehended and misinterpreted the Stamp Duty Act generally.*
  - (ii) *The Lower Court erred in law and in fact in awarding the Respondent special damages when the Respondent failed to place and claim particulars of assault specially and strictly.*
  - (iii) *The Lower Court erred in law and in fact in holding that the Respondent had been assaulted by the Appellant.*
  - (iv) *The Learned Magistrate erred in law and in fact in classifying the tort as an assault.*

(v) *The Lower Court erred in law and in fact in admitting as evidence a medical receipt for which stamp duty had not been assessed and paid.*

(vi) *The Lower Court erred in law and in fact in failing to consider the Appellant's submission that the Respondent had not proved her case on a balance of probability.*

(vii) *The Learned Magistrate misapprehended the law governing pleadings generally.*

7. I have however, noted in the Memorandum of Appeal that the judgment appealed from is that delivered by Hon. Z. Nyakundi (PM) on **14<sup>th</sup> November 2014**. I have counter-checked with the lower Court record, both the handwritten and the typed record, and they reveal that the judgment in the suit was delivered on **21<sup>st</sup> November 2014** and by Hon. J. Mitey (RM) instead. I will however revisit this issue later on.

8. Whereas the Appellant's Counsel tendered oral submissions in support of the appeal, the Respondent filed written submissions.

9. At the hearing of the appeal, the Appellant's consolidated the seven grounds into three being that the lower Court misapprehend the law on pleadings, that the provisions of the Stamp Duty Act were not properly dealt with and that the Respondent was not entitled to the judgment. She prayed that the appeal be allowed and the suit be dismissed but since the parties are family members, each party ought to shoulder its own costs.

10. The Respondent, appearing in person, relied on her written submissions.

11. It is upon the foregone background that this judgment arose.

#### **Analysis and Determination:**

12. As this is the Appellant's first appeal, the role of this Court is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348.**

13. It was further held in the case of **Hahn vs. Singh (1985)KLR 716** that the appellate Court will hardly interfere with the conclusions made by a trial Court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial.

14. This Court will therefore consider the three grounds of appeal as tendered by the Appellant singly and as follows:-

#### **a. Whether the trial Court misapprehended the law on pleadings:**

15. It was the Appellant's contention that the Respondent's pleadings as presented before the trial Court could not stand in many ways. First, the Plaintiff sought for exemplary damages for battery and not general damages. Second, the claim was for such exemplary damages arising out of an alleged battery and not an assault as the trial Court deemed it. Third, the Plaintiff was short of the particulars of the claim as expressly required of in law and fourth that the trial Court even after finding out that the Respondent's pleadings were not proper, went ahead to amend the same on the ground that the Respondent was a lay person and instead awarded general damages; which damages had not been sought for by the Respondent. It was the Appellant's further contention that the damages as awarded are unclear if they were for assault or battery.

16. In response thereto the Respondent argued that the suit was based on a Criminal Case No. 508 of 2012

at the Principal Magistrate's Court at Rongo against the Appellant where the Appellant was charged with assaulting and causing her actual bodily harm. That the Appellant was convicted and fined and that the said conviction and sentence do stand to date. To her, it is immaterial how the loss was classified, be it assault or battery, since her claim was on compensation as a result of the injuries she sustained from the Appellant's unlawful acts.

17. I will first deal with the issue of the tort in this matter. It is a fact that the Appellant was charged with Assault causing actual bodily harm aforesaid. It also remains a fact that the Appellant was convicted and sentenced as a result of the said offence and that the said conviction and sentence still stands.

**18. The Penal Code, Chapter 63 of the Laws of Kenya** provides for assaults under **Chapter XXIV** thereof, that is from **Sections 250 to 253** inclusive. The said Chapter provides for the offences of Common assault, Assault causing actual bodily harm, insulting modesty by forcible stripping, Assault on persons protecting wreck among other assaults. The said Chapter does not expressly provide for the offence of battery.

**19. The Black's Law Dictionary 9<sup>th</sup> Edition** defines 'assault' as follows at **page 130**:-

*“Assault, n 1. Criminal and tort law. The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.*

*2. Criminal law. An attempt to commit battery, requiring the specific intent to cause physical injury -*

*Also termed (in senses 1 and 2) simple assault; common assaulting*

*3. Loosely, a battery.”*

20. At **page 173**, the Black's Law Dictionary aforesaid defines a '**battery**' as follows:-

*“1. Criminal law. The use of force against another, resulting in harmful or offensive contact -*

*2. Torts. An intentional and offensive touching of another without lawful justification. Also termed tortious battery.....*

*“A battery is the actual application of force to the body of the prosecutor. It is, in other words, the assault brought to completion. Thus, if a man strikes at another with his cane and misses him; it is an assault; if he hits him, it is a battery...”*

21. Looking at the Penal Code and the definitions of assault and battery side by side, it is clear that the law in Kenya has not expressly created the offence of criminal battery but instead the said offence is what is known as Assault causing actual bodily harm. Therefore whereas the Appellant was charged and convicted with the offence of Assault causing actual bodily harm on one hand, the Respondent on the other hand could sustain a civil claim on the tort of battery the success of which would however remain subject to proof as required in law.

22. Turning to the **Plaint** in the suit, the Respondent clearly pleaded her cause of action based on the criminal case aforesaid and at **paragraph 8** she pleaded as follows:-

*“8. The Plaintiff avers that the defendant occasioned her injuries in a manner that constitutes battery”.*

23. It is therefore clear that the Respondent's claim for damages in the suit resulted from the assault which caused her bodily harm. In **paragraph 9** the Respondent further pleaded as follows:-

***“9. The Plaintiff's claim against the defendant is for compensation in terms of exemplary general damages for battery.”***

24. The Respondent went ahead and made the following specific prayers in the suit:-

***“REASONS WHEREOF: The plaintiff prays for judgment against the defendant for:-***

***a) Exemplary General Damages for battery;***

***b) Special damages;***

***c) Costs and interest;***

***d) Any other further relief as the honourable court deems just to grant.”*** ( emphasis added).

25. I have further addressed my mind to the provisions of **Order 4 of the Civil Procedure Rules 2010** on how Plaints ought to be framed and also considered **Order 2 Rule 14 of the Civil Procedure Rules 2010** and I am satisfied and so hold, that the pleadings tendered before the trial Court remain in consonance with the requisite legal requirements and I do not find any error on the part of the trial Court in dealing with the said pleadings. The Appellant's first ground therefore fails.

**b) Whether the trial Court properly dealt with the issue of the receipts for special damages in line with the Stamp Duty Act.**

26. The record reveals that when the Respondent was testifying she attempted to produce some receipts in proof of special damages. The Appellant's Counsel objected to the admission of the said receipts on the ground that they did not bear revenue stamps. The trial Court in overruling the Appellant stated as follows:-

***“Objection overruled; the receipts can be produced however it is upon the court to decide whether to admit them or rely on them on the issue of special damages incurred or not. Defendant will also have a chance to challenge the same during their submissions and cross examinations. Bundle of receipts to be marked as Exh.P2.”***

27. In the course of writing the judgment, the trial Court did not consider the said receipts to be of any probative value and declined to award any special damages based on the said receipts.

28. The Appellant therefore seems to have been dissatisfied with the admission of the receipts as part of the record notwithstanding that the Court declined to award special damages based on the same.

29. Be that as it may, I have looked at the provisions of the Stamp Duty Act and I have no hesitation in finding that the trial Court did not err in admitting the said receipts. Whether or not the said receipts had the probative value to amount to proof of a claim on special damages remains an absolutely different issue altogether. In fact that was the position taken by my Sister Lady Justice Mary Kasango in **Leonard Nyongesa v Derick Ngula Right, Civil Appeal No. 168 of 2008 a Mombasa (unreported)** when she held thus:-

***“The position, therefore is that a receipt for which payment of stamp duty is required under the Stamp Duty Act is admissible in evidence on condition that the person issuing the same takes it for Stamp duty assessment before the Court can attach any probative value to it. In my opinion, if that is not done, the Court cannot award damages based on such a receipt.”***

30. And, since there is no cross-appeal on the issue of the special damages, I will rest that issue here. This ground therefore equally fails.

**c) Whether the Respondent was entitled to the judgment.**

31. I have carefully considered and re-evaluated the evidence tendered before the trial Court alongside the pleadings and the judgment.

32. The Respondent having pleaded her case went ahead to adduce evidence on how she sustained the injuries. To that end she produced the proceedings in the said Criminal case, the P3 Form and the treatment notes. Infact the production of those documents was by the consent of the parties. The Respondent clearly stated that it was the Appellant who injured her and that was further proved by the judgment in the criminal case.

33. On her part, the Appellant denied any involvement in the alleged battery. She even said that she was not aware of the criminal case and that she was even then not aware why she was in Court on the day she tendered her defence. She however contended that the Respondent, who was her co-wife, was the one who had problems with her but not herself and urged the trial Court to dismiss the case. She further contended that there was no evidence of the Respondent's injuries and treatment and that she was entitled to costs of the suit on dismissal.

34. I have equally perused the record and the proceedings in the Criminal case, the P3 Form and the treatment notes. The said documents were filed together with the Plaintiff as part of those appearing in the List of Documents. They were eventually produced in Court. The proceedings and judgment in the criminal case were certified as true copies by the Learned Resident Magistrate. Those proceedings referred to the P3 Form and the Treatment Notes and had them marked as "MFI -2" and "MFI -1" and were eventually produced as Exhibits 2 and 1 respectively. These are the same documents referred to by the trial Court in the judgment and are in support of the injuries in the Plaintiff.

35. The Appellant however contended that said documents were improperly produced in evidence as they were instead copies. Respectfully, that argument cannot stand. Indeed the Appellant is estopped in law under **Section 120 of the Evidence Act, Chapter 80 of the Laws of Kenya** from taking such a position as the said documents were produced by the consent of the parties as opposed to a scenario where the same would have been admitted by the Court on an objection. The said documents were hence properly produced before the trial Court and the Court considered them appropriately.

36. On a further re-evaluation of the evidence, I do concur with the trial Court that the Appellant was 100% liable for the injuries she inflicted upon the Respondent since the record remains silent on any possible contribution on the part of the Respondent and/or any such mitigating factors.

37. On the aspect of damages, the Plaintiff is clear that the Respondent prayed for both general and exemplary damages. The trial Court declined to grant the prayer on exemplary damages but made an award on general damages. I have however noted that the trial Court, as well the Appellant, had some hesitation on the issue of the damages as pleaded as the Court was of the view that the Respondent had only prayed for exemplary damages.

38. But that was not the position. The Respondent prayed for "***exemplary general damages***" as a result of the injuries she sustained. It is a well settled principle in law that exemplary damages are different from general damages. The Respondent prayed for both types of damages. The confusion on the part of the Court was therefore caused by the lack of the word "***and***" between "***exemplary***" and "***general***" damages in the Plaintiff.

39. That notwithstanding it cannot be said that the Respondent only sought for exemplary damages. The trial Court therefore erred in dealing with the matter under the impression that the Respondent had only sought for exemplary damages.

40. However, the trial Court was correct in proceeding on to award only general damages as opposed to exemplary damages as no basis had been laid upon which exemplary damages would have been granted.

41. It is on the consideration of the injuries sustained that the trial Court exercised its discretion and settled for an award of Kshs. 60,000/= as sufficient compensation.

42. I will not disturb that award as there is no ground tendered calling for such intervention. In making such a holding, I am guided by the settled principles as enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777.** when the Court expressed itself clearly thus:-

*‘the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.’*

43. Further for avoidance of any doubt, going by the injuries as disclosed before the trial Court, the award of Kshs. 60,000/= remains a fair compensation and cannot be said to be excessive by any standards. Needless to say, Page 2 of the P3 Form reveals the extensive nature of the injuries sustained by the Respondent which included a difficulty in the use of the left hip joint which had resulted in the Respondent walking with a gait.

44. As I have no reason to disturb the finding on damages, I find that this ground equally fails since the Respondent was entitled to judgment.

**Disposition:**

45. As I come to the end of this judgment, I wish to note that the Appellant based the appeal more on technicalities instead. This Court will always endeavor to deal with matters in such ways as to dispense substantive justice as per the calling under **Article 159 of the Constitution**. It is for that reason that this Court overlooked the fact that the Memorandum of Appeal referred to a technically non-existent judgment since the judgment on record was delivered on 21/11/2014 by Hon J. Mitey (Mrs.) whereas the one appealed from was allegedly delivered on 14/11/2014 by Hon. Z. Nyakundi (PM).

46. The foregoing analysis therefore renders the appeal for rejection. It is hereby dismissed with costs.

**DATED, DELIVERED and SIGNED at MIGORI this 13<sup>th</sup> day of OCTOBER, 2015**

**A. C. MRIMA**

**JUDGE**

**In the presence of:**

Mr. Nyagesoa for Mr. Nyauke for the Appellant

Salim Akinyi Oluoch – Respondent – Present in person

Court Clerk Ojwang