



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 13 OF 2014

MUTISYA KIMWELU.....APPELLANT

VERSUS

NZAMBI MATI.....RESPONDENT

(From the judgment and award in Kyuso Principal Magistrates

Civil Case No. 11 of 2013 – E. M. Mutunga RM)

JUDGMENT

The respondent who was the plaintiff in the trial court brought proceedings by way of a plaint which she filed on 18th April 2013. In the plaint she claimed that on the 27th August 2011 at Nzanzeni Location in Tseikuru District the appellant created a disturbance in a manner likely to cause a breach of the peace by chasing the respondent with a panga. It was also pleaded that the matter was reported to the police and that the appellant was charged in Kyuso Criminal Case No. 178 of 2011. The respondent claimed that the appellant was convicted of the offence on the 27th February 2013 and fined Kshs. 10,000/= and in default to serve 3 months imprisonment. The respondent claimed that she attended court for the criminal case on 12 days and incurred costs of Kshs. 38,000/= and as such she claimed this amount as special damages to cover transport, breakfast, lunch, supper, accommodation and expenses incurred for transport of police officer and their subsistence. The respondent also claimed an award of general damages and costs.

In response the appellant filed a one paragraph defence, in which he stated that he knew the respondent as a daughter in law of Mutua Kyaika who had laid a claim to his late father's land. He denied the respondents claim as pleaded in the plaint.

The trial court entered judgment for the respondent and awarded her special damages of Kshs. 36,000/=, general damages of Kshs. 50,000/= as well as costs and interest. Aggrieved by the decision of the trial court the appellant has now come to this court on appeal on the following grounds:-

1. That the learned trial magistrate erred in law and in fact by failing to make necessary consideration on the evidence tendered in total and the evidence adduced by the appellant.
2. The learned trial magistrate erred in law and fact by considering a previous criminal case between the parties which came out of land dispute.
3. The learned trial magistrate erred in law and in fact by considering irrelevant factors and failing to consider relevant factors in reaching the conclusion in both criminal and civil matters between the appellant and the respondent.
4. The learned trial magistrate erred in law and in fact in basing his judgment on repelled law.
5. The learned trial magistrate erred in law and in fact in failing to consider and analyze the reasons

for the previous criminal case and defence as set out in the appellants pleading and evidence and coming to the wrong conclusion.

6. The learned trial magistrate erred in law and in fact in failing to record all proceedings especially the evidence tendered by the appellant and his witness in the said criminal case.
7. The learned trial magistrate erred in law and in fact in showing open bias against the appellant hence failing to give the appellant a fair hearing.
8. The learned trial magistrate erred in law and in fact in failing to consider that the appellant had overriding interest on the respondents piece of land which was the cause of the criminal case.
9. The learned trial magistrate erred in law and in fact in failing to consider that the criminal case arose out of a land dispute which was still pending between the two parties.
10. The learned trial magistrate erred in law and in fact in failing to consider and apply the legal principles as set out in the defence of the appellant and to advise the respondent to file a land case between the parties herein hence reaching a wrong conclusion in law.

The appellant also filed written submissions to the appeal. He summarized the facts of the case and submitted that the respondent did not establish a prima facie case and therefore the learned trial magistrate was wrong in entering judgment for the respondent. The appellant also submitted orally that the respondent had been assisted by her father to construct a house on the appellants land. Though she was ordered to remove the house she had not done so. He stated that the criminal case which was determined against him was a frame up.

The respondent submitted by stating that the appellant was ordered to pay her Kshs. 36,000/=. He had appealed. She stated that he was ordered at Kyuso to pay a fine of Kshs. 10,000/= but he had refused to pay her any damages and that was the reason why she brought her to court.

At the hearing the respondent called 2 witnesses. The respondent testified as PW1. It was her evidence that on 27th August 2011 at 9p.m while at home she noticed a torch light and when she checked, she found out that the appellant was flashing the torch while carrying a panga. According to the witness the appellant threatened to kill her because of building a homestead on disputed land. The respondent thus ran away with her children to her father and then Tseikuru Police Station and made a report of the incident.

It was her evidence that the appellant was arrested and after a criminal trial he was convicted of creating a disturbance and fined Kshs. 10,000/= and in default to serve 3 months imprisonment. She stated that she incurred expenses attending the criminal case and was therefore claiming the amount of Kshs. 38,000/= which she had spent attending the criminal case as special damages. She also asked for general damages as well as costs of the suit.

In cross examination she stated that she was asking for payment for the appellant because the fine that the appellant paid was to the government. She maintained that she was entitled to payment of damages.

PW2 was Mutua Kyaika from Tseikuru District. It was his evidence that the respondent was married to his son. He stated on the 27th of November 2011, he heard screams from her grandsons and when he woke up, he found that the respondent and her children had been chased away by the appellant. The respondent narrated to him the incident and they proceeded to the police station and made a report. The appellant was then tried and sentenced to a fine of Kshs. 10,000/= and in default to serve 3 months imprisonment.

In cross examination, he stated that he was aware of a land dispute with the appellant. He maintained that the appellant had created a disturbance by threatening to kill people. He stated that the respondent had spent the money claimed attending court, and that was the reason why she was claiming compensation. That was the respondents evidence.

In his defence, the appellant stated that on 8th September 2011 he was arrested and charged with creating a disturbance, and was sentenced to pay a fine of Kshs. 10,000/= or be imprisoned for 3 months

and he paid the fine. He stated that he did not understand what caused the respondent to sue him in the present claim.

In cross examination he stated he had been tried in a criminal case. He also stated that though the respondent might have incurred the expenses he did not know how much it was and maintained that he had already paid the fine in respect of the same incident.

He called one witness DW2 Mwikali Mutisya. It was her evidence that the respondent had claimed that she had been attacked and that the appellant was found guilty and sentenced to pay a fine of Kshs. 10,000/= or in default to serve 3 months imprisonment. In cross examination she stated that she did not know what damages the respondent should be paid.

This is a first appeal. As a first appellate court I am required to re-reconsider the evidence on record and come to my own conclusions. See the case of **Selle Vs. Associated Boat Company Ltd [1968] EA 123.**

I have reconsidered the evidence on record. I have perused the judgment of the trial court. I have also considered the submissions on both sides.

The respondent was awarded Kshs. 36,000/= as special damages. Special damages must be pleaded and also proved. Indeed, the respondent pleaded special damages in her plaint. She specifically pleaded special damages of Kshs. 38,000/=, and the learned magistrate came to the conclusion that only Kshs. 36,000/= had been proved as special damages. In my view, no special damages were proved by the respondent. Though I see receipts in the court file, purportedly for expenses incurred by the respondent during the criminal case, there is no record that the said receipts were either admitted in evidence by consent of the parties or referred to or identified and produced by the respondent in her evidence. Secondly, as for transport and accommodation expenses to attend hearing of a criminal case, the practice in this country is that witnesses are reimbursed the cost of travel and accommodation by the state. There being no evidence either from the prosecutor's office, or from a court official that the respondent was not paid for travel and accommodation or that she was not transported by the police from her place of residence to the court and back, in my view, the alleged special damages for transport and accommodation were not proved on a balance of probabilities by the respondent. Cost of food is also covered in the accommodation allowance paid to a witness and in my view the respondent did not prove the claim for special damages for food in attending the criminal case as a witness and complainant. I will thus set aside the award of the trial magistrate for special damages.

The respondent was awarded Kshs. 50,000/= as general damages. General damages is a figure usually determined by the court and awarded to a litigant for pain, suffering and loss of amenities.

The complaint of the respondent against the appellant was that the appellant threatened her with a panga and chased her from her house at night. The witness called by the respondent PW2 also supported that contention. In my view, though there was no physical injury suffered by the respondent, the threat by the appellant on the respondent with a panga at night caused the respondent such anxiety and inconvenience which amounted to pain and suffering, though presumably for a short period. The respondent had to run away from her house at night with her children. I thus find that the respondent was entitled to the award of general damages as the appellant by his action caused her pain and suffering.

The figure of Kshs. 50,000/= general damages awarded by the trial court in my view was on the higher side. Though the award of damages is an exercise of discretion by a trial court, see the case of **Butt Vs. Khan [1977] 1KLR1**, the learned trial magistrate did not cite any authority for the amount of award, and in my view, considering that the threat was for a short duration and that in any case the appellant was punished by the criminal court for the same incident, a figure of general damages of Kshs. 15,000/= for pain and suffering would be adequate compensation to the respondent. I should emphasize that the respondent herein was the complainant in the criminal case and had the choice to pursue only the civil claim herein, without necessarily pursuing the criminal case.

In the result therefore, I find that this appeal will succeed in part. I set aside the award of special damages. With regard to the award for general damages, I set aside the amount awarded by the trial court, and order that the appellant will pay the respondent Kshs. 15,000/= as general damages for pain and suffering. In view of the nature of the matter and the decision I have reached above, I order that each party will bear their respective costs of the appeal but the appellant will pay the costs of the proceedings in the magistrates court based on the award of general damages of Kshs.15,000/= herein. No interest is payable as same was not sought.

Dated and delivered at Garissa this 13th day of October, 2015

GEORGE DULU

JUDGE