REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 54 of 2009

BETWEEN

JOSEPH MUTHEE KAMAU…….…….. 1ST APPELLANT

DAVID MWANGI MUTHEE…….. 2ND APPELLANT

AND

DAVID MWANGI GICHURU ……...……..…. 1ST RESPONDENT

JOHN MAINA GICHURU ……..…..……...…….. 2ND RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri (Kasango, J.) delivered on 23rd April 2008

in
H.C.C.A. No.152 of 2002)
****

JUDGMENT OF THE COURT

1. The background of this case is that on 31st January, 1998 at 3.00 pm at Waithera Stage in Othaya Township in Nyeri District, the appellants unlawfully and without just cause, assaulted the respondents causing them actual bodily injury. The appellants were jointly charged with the criminal offence of assault and were convicted in Mukurweini Criminal Case No. 47 of 1999. No appeal was filed against that conviction and sentence. The respondents, who were the complainants in the criminal case, filed civil proceedings against the appellants in the Chief Magistrate's Court at Nyeri claiming general and special damages for the assault.

2. Two separate suits were filed against the appellants being Civil Cases Nos. 410 and 411 of 2000. The two cases were consolidated and a single judgment delivered by the trial court. The issue raised in this appeal is the limit of the pecuniary jurisdiction of the trial court arising from the consolidation.

3. The hearing of the consolidated civil cases commenced on 20th July, 2001 before the magistrate's court. At that time, the pecuniary jurisdictional limit of the court was Kshs. 300,000/=. At the close of the hearing, judgment was reserved to be delivered on 28th June, 2002. On this date, the judgment was not delivered; it was eventually delivered on 30th August, 2002. In the meantime, the pecuniary jurisdictional limit of the trial magistrate was enhanced to Kshs. 500,000/= with effect from 1st July, 2002.

4. The trial magistrate awarded the 1st respondent general damages of Kshs. 350,000/= and Kshs.

2,950/= as special damages; the 2nd respondent was awarded of Kshs. 450,000/= as general damages and Kshs. 2,780/= as special damages.

5. The appellants lodged a counterclaim for injuries sustained during the fracas. The learned magistrate awarded to each of the appellants a sum of Kshs. 100,000/= as general damages.

6. At the hearing before the trial magistrate, the respondents through written submission by learned counsel, **Mr. Kariuki Mwangi,** quantified the general damages awardable as Kshs. 300,000/= for the 2nd respondent and Kshs. 250,000/= for the 1st respondent.

7. The appellants contend that if judgment had been delivered on 28th June, 2002 the maximum award for general and special damages that the trial court could have made is Ksh. 300,000/= as per the pecuniary jurisdictional limits of the court; that the trial magistrate erred by awarding a sum in excess of Kshs. 300,000/= on the basis that the court's jurisdiction had been enhanced to Kshs. 500,000/= as at the date when the judgment was delivered. It is not in dispute that the pecuniary jurisdiction of the trial court was enhanced with effect from 1st July, 2002.

8. Aggrieved by the trial court's decision, the appellants moved to the High Court and raised five grounds of appeal namely:

I.That the learned Magistrate erred in law and fact in awarding what was not prayed for by the plaintiffs.

II.That the learned Magistrate erred in law in that he exceeded his jurisdiction.

III.The learned magistrate erred in law in that he exceeded his jurisdiction.

IV.That the learned Magistrate erred in law and fact and misconstrued the evidence and the meaning and purport of the decisions of law cited.

V.*That the decision of the Resident Magistrate is unjust and unfair as it was arrived at on wrong principles.*

9. The learned judge of the High Court dismissed the appeal with costs. This is a second appeal where 10 grounds of appeal have been proffered as follows:

i. The honourable judge misdirected herself in holding that the learned magistrate in the subordinate court had jurisdiction to award an amount beyond the pecuniary jurisdiction at the time of concluding the hearing and the first day which was fixed for judgment.

ii. That the honourable judge erred in law in her failure to determine whether a magistrate having heard a matter with a lower pecuniary jurisdiction to its closure could after his/her pecuniary jurisdiction being enhanced after closure of the defendant's suit and a date of judgment given purport to enhance her jurisdiction in order to determine the already closed suit in conformity with the newly enhanced pecuniary jurisdiction.

iii. That the honourable judge erred in law in holding that the appellants not having appealed against the conviction in the criminal trial as conclusive evidence of their guilt of the offence charged.

iv. The learned honourable judge erred in law in failing to appreciate that although the two suits were consolidated, the findings were to be made on all issues raised.

v. The learned honourable judge erred in law in failing to consider all issues or to do so adequately and critically to consider all the issues of law raised and consequently came to the wrong

decision.

vi. The learned honourable judge erred in law in failing to determine whether the court had jurisdiction to grant an award of damages which was not prayed for by the respondents.

vii. That the honourable judge erred in her failure to determine whether the learned magistrate had over reached himself/herself by granting orders in damages not prayed for.

viii. That the honourable judge erred in law in her failure to determine the issue of apportionment of liability in the circumstances where all parties admit having been involved in fracas and public fight all suffering injuries, failing to determine the issue of law involved.

ix. That the honourable judge erred in law in accepting the lower court apportioning equal liability against both appellants in respect of the two separate suits filed by the respondents against the appellants, when the same was not based on any ground.

x. ***The learned judge erred in law in her failure to determine that the learned magistrate erred in law in determining and granting damages without first dispensing with the issue of liability and contribution.***

10.At the hearing of the appeal, the appellants were represented by learned counsel **Mr. Gathiga Mwangi** while the respondents were represented by learned counsel **Mr. Kariuki Mwangi**.

11.The appellants reiterated the grounds of appeal and dwelt on the issue of jurisdiction and apportionment of liability. It was contented that the learned judge of the High Court erred in failing to determine whether the trial court had jurisdiction to grant an award of damages which were not prayed for by the respondents. The appellants clarified that the damages prayed for refers to the general damages as quantified by the respondents in their written submissions before the trial court. In this regard, the respondents submitted before the trial magistrate that a sum of Kshs. 300,000/= was awardable to the 1st respondent as general damages and Kshs. 250,000/= to the 2nd respondent. The appellants contend that the trial court erred in awarding general damages above the sums quantified by the respondents.

12.On apportionment of liability, the appellants contend that in the criminal case, they were jointly charged with other persons and it was wrong for both the trial magistrate and the learned judge to impose civil liability on the two appellants in total disregard that there were other persons who also committed the assault. It was also contended that the assault that led to the criminal charge involved a fracas at a bus stage between the appellants and the respondents where all parties including the appellants were injured. That the trial court and the learned judge ignored this fact and the respondents should have been held liable to some extent for injuries occasioned to the appellants.

13.The respondent's counsel submitted that the issue of apportionment or contribution to liability does not arise. The appellants did not appeal against the criminal conviction hence the findings and sentence in the criminal case are final.

14.On the issue of jurisdiction, the respondents contend that the trial court had jurisdiction and this was affirmed by the learned judge; that the trial magistrate did not exceed the pecuniary limits of jurisdiction; that each case is to be taken separately and when judgment was delivered, the general damages awarded was below the pecuniary limit of Kshs. 500,000/=. The respondents contend that the damages awarded to the 1st and 2nd appellant should not be aggregated to get a sum over Kshs. 500,000/=. The respondents supported the learned judge's position that the cases were consolidated for ease of hearing and not for purposes of consolidating or aggregating the damages awarded. On quantum, it was submitted that the damages awarded were reasonable.

15.We have considered the rival submissions by learned counsel and examined the record of appeal. The appellant contends that the learned judge erred on the question of apportionment of liability. On this issue, the learned judge expressed herself thus:

'In relation to the respondents statement that some of the injuries were occasioned by other persons not parties to this case, I find that the respondents were very clear in their evidence on the exact injuries inflicted by the appellants. They even described the weapons used. That having not appealed against the conviction in the criminal trial, their conviction is conclusive evidence that they were guilty of the offence charged.'

16.The issue of liability of the appellants for the injuries sustained by the respondents was canvassed in the criminal trial as well as in the civil suit before the trial magistrate and the evidence re-evaluated by the learned judge of the High Court. This Court stated in **Jabane v Olenja [1986] KLR 661** at pg 664, thus:

"…this court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni v Kenya Bus Services (1982-88) 1 KAR 870."

17.On the issue of contribution and apportionment, we have perused the record; the appellants lodged a counterclaim for injuries sustained during the fracas; the learned magistrate awarded each of the appellants a sum of Ksh. 100,000/= as general damages. The magistrate took into account that the appellants were injured by the respondents during the fracas. This ground of appeal based on apportionment must fail as the counterclaim succeeded. The learned judge of the High Court did not interfere with the award made in the counterclaim. The appellants have not demonstrated to our satisfaction that there has been a misapprehension of evidence. We see no reason to interfere with the apportionment of liability by the trial magistrate as upheld by the learned judge of the High Court. If other persons were involved in the fracas, the appellants are at liberty, subject to limitation of actions, to bring suit against these other persons.

*18.*The appellants urged before the High Court that the trial magistrate awarded an amount that was in excess to the one sought in the respondent's submissions. On this issue, the learned judge of the High Court expressed herself as follows:

*"**Indeed, it was the respondent who annexed the Gazette Notice dated 2nd August 2002 which gave the magistrate who heard this case an enhancement of jurisdiction to Kshs. 500,000/=. I find I am in agreement with the respondent that in considering that jurisdiction, one ought to look at each respondent as an individual. The respondents' cases in the lower court were consolidated for the convenience of hearing the case. I therefore reject this ground of appeal".***

19.We have taken note of the learned judge's response stated above. We agree with the judge that upon consolidation of the cases, each respondent's case should be looked at separately. However, with due respect, the learned judge erred and missed the point. The issue raised in the ground of appeal is not one of consolidation but jurisdiction. The learned judge erred and dealt with the ground as an issue for consolidation and made a decision pertaining to the consequences of consolidation rather than addressing the issue of jurisdiction.

20.Each of the two cases filed in the magistrate's court requires that the trial court must have jurisdiction. The issue at hand is whether the trial court had jurisdiction to award general damages for each case in excess of the pecuniary jurisdiction of the court. In the case relating to the 1st respondent, the trial magistrate awarded general damages of Ksh. 450,000/=. This sum exceeded the pecuniary jurisdiction of the court which was Ksh. 300,000/=. In the case for the 2nd respondent, the trial court awarded a sum of Ksh. 350,000/= as general damages. This sum also exceeded the pecuniary jurisdiction of the court.

21.The cardinal issue for us to consider is one of jurisdiction. Jurisdiction is the first test in the legal authority of a court. Did the trial court have jurisdiction to award damages over Kshs. 300,000/= taking into account that at the time when the hearing commenced and concluded, the pecuniary jurisdictional limit for the court was Kshs. 300,000/=? The issue can be posited in another way, is jurisdiction conferred at the time when the plaint is filed; at the time of hearing the suit; or at the time of writing and delivery of

judgment. Can jurisdiction be acquired retroactively?

22.Both the trial court and the High Court arrived at the conclusion that jurisdiction could be conferred at the time of delivery of judgment and that jurisdiction can be acquired retroactively. In **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. [1989] KLR 1,** Nyarangi, Masime and Kwach, JJ.A had this to say of jurisdiction:-

"… Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

'By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.' See Words and Phrases Legally defined – Volume 3: I – N Page 113."

*23.*In the present appeal, the civil jurisdiction of the Resident Magistrate's Court is circumscribed by section 5 of the Magistrate Courts Act (Cap 10) as follows:

*"**(1) Subject to any other written law the Resident Magistrates Court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed .... Provided that the Chief Justice may, by Notice in the Gazette increase the limit of jurisdiction.***

24.The Resident Magistrate's Court can only deal with proceedings of civil nature whose subject matter has a value falling within the pecuniary limit set out in the Section 5 of the Magistrate Courts' Act. In this case, the pecuniary jurisdiction of the court was **Kshs. 300,000/=.** Clearly, the respondents by filing suit before the trial court had thought that their claim for general damages would be within the pecuniary jurisdiction of the court hence the decision to file the case before a magistrate's court instead of the High Court. In their submissions before the trial court, the respondents requested for damages within the pecuniary jurisdiction of the court. The contended issue in this case relate to the general damages awarded which exceeded the pecuniary jurisdiction of the magistrate's court at the time of filing suit and conclusion of hearing.

25.When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being the case of *Kagenyi v Musirambo* [1968] EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction. However, this does not apply to the present case in a claim for general damages where it is the respondents who appointed, through their own assessment, what the amount of damages they would claim. The respondents are permitted to limit the amount of general and special damages they would like to claim in order to bring themselves within the pecuniary jurisdiction of a particular court. The decision of Justice J.B. Ojwang in ***Armitral Bagwanji Shah v Mash Express Ltd & Others*** **(Nairobi HCCC 1095 of 2005 *(Unreported*))** is in accord.

26.In the instant case, the subordinate court had jurisdiction subject to the upper limit of the damages

being **Kshs. 300,000/=.** We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

27. For the foregoing reasons, we allow this appeal, set aside the judgment of the High Court and substitute judgment for the 1st respondent as against the appellants jointly and severally and award an aggregate special and general damages in the sum of **Kshs. 300,000/=. In relation to the 2nd respondent, we** enter judgment for the 2nd respondent as against the appellants jointly and severally and award in aggregate special and general damages in the sum of **Kshs. 250,000/=. For avoidance of doubt, these sums are aggregate sums inclusive of general and special damages. We uphold the sum of Ksh. 100,000/= awarded as general damages in counterclaim for the appellants against the respondents. Each party to bear his cost.**

Dated and delivered at Nyeri this 29th day of May, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….
JUDGE OF APPEAL

OTIENO-ODEK

……..
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR