



REPUBLIC OF KENYA



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**Mwangi & another v Nyambura (Civil Appeal 277 of 2010)
[2024] KEHC 2868 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 277 OF 2010
SM MOHOCHI, J
MARCH 20, 2024**

BETWEEN

ESTHER KABURA MWANGI 1ST APPELLANT

LEONARD WAWERU MWANGI 2ND APPELLANT

AND

HANNAH NYAMBURA RESPONDENT

JUDGMENT

Introductions

1. The Respondent moved Court vide Plaintiff dated 26th February, 1996 seeking compensation for special and general damages as well as costs and interests for physical injuries sustained on 23rd August, 1993 from an assault by the Appellants. The Respondent pleaded that she was walking with 3 friends along Nakuru Njoro road when on reaching Kokoto Limited turn off the Appellants accused the Respondent of stealing firewood and thereby assaulting the Respondent with sticks and pangas.
2. The Appellant's entered appearance on 25th November, 1996 and filed their joint Defence and Counterclaim dated 5th December, 1996 denying the allegations or that she suffered injuries. The Appellants claimed that the Respondent entered their land and proceeded to cut down trees. They claimed damages for trespass and a permanent injunction restraining the Respondent from interfering with their quiet possession of their land.

Evidence

3. PW1, Hannah Nyambura Njuguna stated that she was 24 years but at the time of the assault she was 13 years old. She stated that on 23rd August, 1993 together with other girls they were looking for firewood. That a vehicle approached and they moved to the nearby shamba to let it pass. They were apprehended by the 1st Appellant and her daughter Njoki who tied her up accusing her of stealing firewood. They



- beat her up and took her to Njoro Police station. Her mother came after two hours and took her to hospital. She was injured all over. Her clothes were bloody and they used sticks and one of them stepped on her head. That she was examined by Dr. D’Cunha. She added that she never took anything from the shamba they beat her up first.
4. On cross examination, she stated that they were 5 girls in total and when Njoki caught her they ran away. She stated that she was avoiding the vehicle which was a lorry. That she did testify in another case but she did not say they used ropes. They used sticks to beat her. The Appellants took her to the police station. She admitted that there were trees there but she did not cut them. That Njoki did not beat her she took her to her mother the 1st Appellant, where the 2nd Appellant also beat her and stepped on her head. That she was not aware of any meeting between the chief or OCS or that the OCS warned them.
 5. On re-examination she stated that she was never charged with theft of firewood.
 6. PW2, Naomi Wangui Njuguna, the Respondent’s mother. On the said date she was at the shamba she heard that the Respondent had been assaulted and taken to the police station. That she found her lying on the ground and took her to the hospital. The Respondent told her that she had been beaten by the Appellants.
 7. On cross examination, she stated that she knew the Appellants as they lived nearby. A road divides their farms. That the Respondent had closed school and had gone to fetch firewood during the school holidays and it was not the first time she had done so. That she learned from other children that she had been arrested. That they never used to get firewood from the Respondent’s land.
 8. PW3, Dr. Wellington Kiambaa stated that on 8th July, 2010 he attended to the Respondent. He saw two earlier reports by Dr. D’Cunha and Dr. Bhatt both surgeons. He conducted physical examinations. She complained of pain in the elbow joint and back. He noted down the injuries. He also noted she went to Njoro Health Centre then Nakuru PGH for X-Ray. That she was admitted there 2 to 6 weeks He produced his report “P-Ex-1” and receipt as “P Ex-2”.
 9. On cross-examination, he stated that he examined her that she was hit with something. She had no plaster not a fracture. That he did not know the weapon used. He took history and saw the other reports and also did a physical examination. That he could tell whether one was in pain from examination. It’s the muscles that die.
 10. PW4, Robbinson Kipsut, a Clinical Officer and Njoro Health Centre, testified on the treatment notes of the Appellant. He stated that the Respondent was treated at the clinic from an assault and was given anti tetanus and dressed. She was then referred to Nakuru PGH for X-Ray and further treatment. She had swelling of the left hand, scratches, swelling on the left and right wrist joint and swelling on the back which was tender then. He produced the treatment sheets as “P Ex-3”.
 11. On cross examination, he stated that he was not the one who treated her. The out-patient number was on the card No. 11344/93 he added that he did not see who assault her. The x-rays were not brought back and did not know who escorted her to hospital.
 12. On cross examination he stated that a recommendation to go to a bigger hospital shows that that the injuries require more attention. They noted what they could see and sent her for x-ray.
 13. DW1 was Esther Kabura Mwangi stated that on 23rd August 1993 she went to the Respondent’s father as she was chasing some girls who ran into the Respondent’s mother’s house. She told them to get the children who were there and the husband took a whip and a panga, the wife took a panga and the daughter and son took firewood. The 4 pulled her to get into the house to get the children. She did not enter. She called out the father of the Respondent as someone who commanded respect and asked



- why he was not warning the children. She stated that he called her silly, fool and lazy, that she could not farm and would die like her husband and that the land would be given to him by her in-laws to grow his crops and keep livestock. That she told him to look after his children and not let them go to her land. That he chased her.
14. That she told her daughter to get some girls and boys to arrest the boys. That on 23rd August, 1993 her daughter caught the Respondent and Muthoni (who escaped). The Respondent was brought to her home and told that she was arrested when the trees were cut. That she held the Respondent so as to put her in a car and saw she had soiled herself. She called the 2nd Appellant to him to stay on top of the car with the Respondent so that she wouldn't jump and go to the police station. Before they left he asked her whose child she was and where her home was. That she started naming people with many children. That she took her to the police station to get to know who her father was.
 15. That when she got to the station she was told the police do not arrest children and she stated that she told them she wanted the child warned and asked the child to produce the parent. That the Respondent named 4 other children. She left to get the parents of the other children and as she was going home she met the Respondent's mother and her daughter. She told her that she had caught the Respondent and she was looking for the parents. They proceeded toward Njoro. She went home and went back to the police station at around 4 pm. That the other parent came and they went to the police station. At the police station the one police officer stated that he had established that the person that beat up the Respondent was the 2nd Appellant who was pushed to the cells.
 16. On the 25th of August, the police came to her home and asked for her. She was outside and she followed the police car to the Respondent's father house whom she heard laughing saying she would know who they were. She hid for 5 days. She went to the OCPD but met the deputy who called the OCS and asked whether he should lock up the 1st Appellant to which he said no. He then enquired why he had gone to the 1st Appellant's home on 25th and the OCS stated that he wanted to establish who had beaten up the Respondent.
 17. She stated that she was not satisfied as the Respondent's father was beating them up with pangas. She was sent to the chief who issued her with summons for 9th and 3rd. That on 3rd she went to the Deputy officer and was not served. She was picked by a land rover and taken to the police station and was put in the cells. She was called by the OCS who was in the company of the Respondent's father who informed her that he had been asked to charge her with assault. She stated that she asked the OCS how much money he had been bribed. She was given free bond to attend Court. Her case and that of the 2nd Appellant was consolidated. That the Respondent's witnesses in the case admitted that they were stealing trees and that they had nothing to do with fighting.
 18. She stated that the Respondent's father fabricated the story so that he could buy her shamba. Therefore, she is fighting over her shamba and property. That the Respondent's father was sending thugs her way and sought to be left to live peacefully.
 19. DW2 was Leonard Waweru Nyaga. He stated that on 23rd August, 1993 he visited his mother and on arriving he found that the Respondent had been arrested. They cut the 1st Appellant's trees. He was told to go up the pick as the Respondent had diarrhoea herself. That the Respondent named her accomplices and the police gave them the names to call their parents. They came back at 4pm where he was put in the cells. He was given cash bail and charged with assault.
 20. On cross examination, he stated that he had heard of stories of the girls passing into the 1st Appellant's land and had reported to the chief many times. That she found the girl crying and she had soiled herself.



She did not say why she was crying. His duty was to ensure she did not jump. They did not touch her. He did not step on her head. The case was going on.

21. The judgment was delivered on 1st December, 2010 in favour of the Respondent against the Appellants for Kshs. 80,000 as general damages, special damages of Kshs. 1,500.

Appeal

22. Being dissatisfied with the judgment of the Trial Court, the Appellants preferred the instant Appeal vide Memorandum of Appeal dated 28th October, 2010 on the following grounds:
- i. That the Learned Magistrate erred in law and in fact in finding that the Respondent had proved her case on a balance of probability contrary to the evidence on record.
 - ii. That the Learned Magistrate erred in law and in fact in making a finding based on the evidence on record.
 - iii. That the Learned Magistrate erred in law and in fact in failing to appreciate and consider the evidence adduced and submissions made by the 1st and 2nd Appellants.
 - iv. That the Learned Magistrate erred in law and in fact in relying solely on the evidence of the Respondent thus arriving at a wrong conclusion.
 - v. That the Learned Magistrate erred in law and in fact in assessing damages so high an unproportionate to the injuries sustained by the Respondent.
 - vi. That Learned Magistrate erred in law and in fact in failing to find that the Respondent had not complained with the law and in Particular Order XXXI Rule 12(1) (2) and (3) of the Civil Procedure Rules.
23. The Appellants sought that the appeal be allowed and the judgment of the Trial Court be set aside and Nakuru CMCC No. 591 be dismissed with costs to the Respondent. The Appellants also sought at prayer (b) “in the alternative the G.D herein be set aside and be reviewed”
24. The Appeal was canvassed by way of written submissions. The Appellants filed their submissions on 22nd September, 2023 and the Respondent filed her submission on 18th September, 2023.

Submissions

25. The Appellants in support of the Appeal submitted that there was no eye witness to corroborate her testimony and the Court should not have held the Appellants 100% liable and reliance was placed in the case of John Kihara Kimani v Peter Kuria Gikonyo (2005) eKLR. That no evidence was produced in Court and the Respondent did not even call a police officer to Court. That the claim ought to have been dismissed for failure to produce criminal proceedings to prove that the Appellant had been charged for assault and relied in the case of Gilbert Musembi vs Joseph Kaloki Kula & Another (2021) eKLR as well as Stanley Katina Ingosi v Alphonse Vitiyeni & 2 Others (2019) eKLR.
26. The Appellant contented that the award was too high since the Appellant sustained minor soft injuries without any permanent disability. According to the Appellants the Respondent ought to have been awarded damages of between Kshs. 30,000 and Kshs. 60,000. Reliance was placed in Lawrence Amararu vKPLC HCC 975 of 1998 and Lucy Wairimu Waithaka v Sokoro Plywood LTD CA 55/2002.



27. The Respondent on the other hand in opposing the Appeal submitted that the Appellant failed to prove their case to the required standard of proof and relied in the case of *Christine Kalama v Jane Wanja Njeru & Another*(2021) eKLR.
28. It was also submitted that the Trial Court did consider the Appellants' submissions and the evidence in the judgments as well as correctly assessing the damages according to the injuries sustained and asked Court not to disturb the award and relied on *Butt v Khan* (1978) eKLR.
29. As to comparable injuries and awards, she relied on *Daniel Gatana Ndungu' & Another vs Harrison Angore Katana* (2020) eKLR and *Anthony Nyamwaya v Jackline Moraa Nyandemo* (2022) eKLR.

Analysis and Determination

30. The Court has carefully considered the grounds of appeal, the record, the parties' rival submissions as well as the authorities relied on by the parties and the Judgment of the trial Court. The Court finds that the only issues for determination are on liability and quantum.
31. This being a first appeal it is by way of re-trial, the Court has a duty to re-evaluate, re-analyze and re-consider the evidence and make its own conclusion while appreciating that the Trial Court had the privilege of hearing the witnesses as they testified and as such give due allowance to it. See *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123)
32. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the Court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must 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 allowances in this respect.”
33. The first issue is whether the Respondent proved her case on a balance of probabilities. First and foremost, there is no doubt that the Respondent sustained injuries from an assault. Who assaulted the Respondent?
34. The Respondent testified that the Appellants had beaten her and took her to the police station. She was 13 years. The Appellants stated that they only took her to the police station but never beat her. The record shows that the Respondent sustained injuries and that the police wrote a note referring her to the health center. From the Appellants testimony the Respondent had even soiled her clothes. So, who therefore assaulted the Respondent between the time she was arrested by the Appellants and the time she was taken to the police station?
35. The Appellant faulted the Trial Court for failing to consider their evidence and that the Respondent never brought an eye witness despite the fact that she stated she was in the Company of other children. The record shows that the Respondent was taken by the 1st Appellant's daughter on seeing that the other children ran away. The other children could not have witnessed the assault. This argument does not hold water.
36. The Appellants faulted the trial Court for finding them liable despite the fact that the Respondent never availed the criminal proceedings. On this issue, the Trial magistrate noted that despite the fact that it was the 2nd Defendant who was charged in Court the Court record “grew legs”.



37. Be that as it may, in *Mwaura Ndegwa -vs- Isaiah Njuguna* (2007) eKLR the Court noted that:-
- “A civil Court faced with evidence similar to that of the criminal proceedings is entitled to make its own assessment of the same and then arrive at its own conclusion. Further the standard of proof required is different. In a criminal trial the standard is beyond reasonable doubt while in a civil proceeding it is on a balance of probability. This being the case it is not surprising that evidence that fails to secure a conviction can secure a finding of a liability. This standard of proof in civil matters has to be established even where it is only the evidence of the plaintiff which is being considered like in this case.”
38. Similarly, Kimaru, J expressed himself as follows in *Joshua Muriungi Ng’anatha v Benson Kataka Lemureiyani* [2016] eKLR
- “This does not, however, follow that such a convicted person will be found wholly liable in civil proceedings that a complainant institutes arising out of such criminal or traffic proceedings because the civil case will be determined on a balance of probability. This is notwithstanding that the witnesses who testified in the criminal proceedings are the same ones who testified in the civil proceedings.”
39. The outcome of the criminal charge or lack thereof does not necessarily and automatically determine the outcome of a civil case. The absence of the criminal proceedings does not absolve the Appellants from liability. Going by the forgoing, the Court is satisfied that the Court directed itself accordingly on this issue.
40. As to whether the Appellants evidence was credible, the 1st Appellant testified that she had gone previously to the Respondent’s father to tell him to warn his children. On the other hand, on the fateful date she stated that when she arrested the Respondent she enquired about her home and who her father was. She also stated that she met the Respondent’s mother on her way home from the station but did not know who she was.
41. It was the 1st Appellants testimony that that the Respondent’s father was targeting her and wanted to buy her land yet she claimed she did not know who they were. PW2 stated that the Appellants were well known to her and the only thing separating their parcels of land was a road. For a person who had gone to the Respondent’s home, lived next to them and met the Respondent’s parents who allegedly had issues with her. PW1 also testified and identified the Appellants as persons she knew. It would be surprising that after the assault The Appellant could not identify them or their child. There were glaring contradictions and her explanation was not concrete plausible.
42. The 1st Appellant admitted that she went into hiding for 5 days when the police went looking for her. The Trial magistrate noted that as well and it would appear that the 1st Appellant knew what she was doing by hiding.
43. This Court is alive to the fact that the standard of proof in civil cases is on a balance of probabilities. The Court will have to weigh the evidence of either to mean if there is evidence to show that one probability was more probable than the other then the balance of probability is applied. The burden of proof was on the Respondent who sought the relief of the Court by accusing the Appellants for the assault. She tendered her evidence and brought other witnesses. She produced documentary evidence to prove her claim. The burden of proof thereafter shifted to the Appellants to rebut with concrete or plausible evidence.



44. The 1st Appellant testified how the Respondent's father had in it for her hence the commencement of the case. That the Respondent children had been warned and reported to the chief severally. If the Appellants had reported to the chief many times why was the chief not called to give evidence of the reports. If the Respondent was trespassing then why wasn't there record of any complaint? If indeed the Respondent did steal firewood as claimed, it was incumbent on the Appellant to follow the proper channels to ensure the child was warned accordingly.
45. On the issue of liability this Court finds that the Respondent proved her case on a balance of probabilities and the Court finds no reason to disturb the finding.
46. The second issue which is on the quantum of the general damages, the question that the Court will strive to answer is whether the award was manifestly excessive to warrant interference. The Court is alive to the parameters of its jurisdiction to disturb and award of damages as set out in *Butt v. Khan* [1981] KLR 349 where the Court of Appeal held: -
- “An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low”.
47. According to the medical report by Dr. W. Kiambaa dated 8th July, 2010 the Appellant sustained
- a. Severe soft tissue injuries on the elbows
 - b. Severe soft tissue injuries of the hands/wrist joints
 - c. Severe soft tissue injuries on back-limb thoracic region
48. The Respondent was treated at Njoro Health Centre and later referred to Nakuru PGH for X-Rays of the elbow, wrist joints, hand and back and thoraco-lumbar spine. She was put on medication and followed up with the outpatient clinic three times. The degree of injury was classified as harm.
49. The Appellants submitted and termed the injuries as “very minor soft tissue injuries without any permanent disability”. For the Respondent to be given anti tetanus there must have lacerations that were severe which the healthcare practitioner felt would be best treated in that manner. She was then sent to Nakuru PGH for further treatment. If the injuries were not so severe, the Respondent would not have been referred for x-rays and further treatment. She was also examined by 2 other doctors. Dr. Kiambaa observed that the Respondent had a bit of pain on examination. Just because there was no permanent disability, it does not mean that there was no pain and suffering.
50. In *Teresia Njoki Mwangi V Elizabeth Wanjiru Kimani* [2010] eKLR the Court stated that:-
- “The Respondent suffered soft tissue injuries. It is common knowledge that such injuries attract awards between Kshs. 20,000/= and Kshs. 200,000/= depending upon their seriousness.”
51. In assessing damages, the Court finds that the learned trial magistrate correctly appreciated the law as to quantum. The medical report tendered as well as the evidence adduced was considered in the judgement. The Appellants were represented by counsel but never cited any authority in their submissions filed on 30th August, 2010, that would have assisted the learned trial magistrate in arriving at an appropriate award of damages. The Appellant cannot now be heard to complain that their submissions were never considered. From the medical report, the extent of her injuries, and the effect



of her injuries resulting in her soiling herself. It cannot be therefore said that she sustained minor soft tissue injuries as to attract a dismal sum of Kshs. 30,000 to Kshs 60,000 as general damages. She referred to Nakuru PGH since in the opinion of PW4 she needed further treatment and x-ray. The Appellants were adults and should have known better and like the Trial Magistrate observed, even if the Respondent was stealing from them there were civil ways of addressing the same as opposed to a beating of that nature.

52. In the Circumstances the Court finds that the award was appropriate everything considered at the time and finds no reason to disturb the award for general damages. Indeed, the award was within the permissible range
53. The Appellants attempted to raise an issue in terms of Ground 6 Looking at Ground 6 of the Appeal, the Appellant faulted the Trial Court: “That Learned Magistrate erred in law and in fact in failing to find that the Respondent had not complied with the law and in Particular Order XXXI Rule 12(1) (2) and (3) of the Civil Procedure Rules” Order 32 has only two Rules and it addresses: “Suits by or against Trustees, Executors and Administrators”. The Court is not going to presume what the Appellant meant by this since this order is not applicable anywhere as this is not a succession cause.
54. The Respondent claimed costs and interests of the suit but the Trial Court did not award the same. It follows that costs follow the event. This Court see no reason why a successful litigant should not be awarded costs.
55. The upshot of the above is that the Court finds no merit in the Appeal and is thus dismissed with costs to the Respondent. The Respondent is also awarded costs and interests of the suit in the Trial Court. The costs shall attract interests from the time of delivery of judgement.

It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 20TH DAY OF MARCH 2024.

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MOHOCHI S. M.
JUDGE

