



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL APPEAL NO. 26 OF 2014

(An appeal from the judgment of the Ag. Principal Magistrate, Embu

in Civil Suit No. 264 of 2010 dated 23/07/2014)

BONIFICE NDWIGA MBOGO.....APPELLANT

VERSUS

JAMLECK MWANIKI.....RESPONDENT

J U D G M E N T

1. This is an appeal against the judgment of Embu Ag. Principal Magistrate delivered on 23/7/2014 in CMCC 264 of 2010. The grounds of appeal are that the magistrate misdirected himself when he found that the civil case was filed after the High Court appeal decision in HCRA No. 3 of 2010 and that the appellant was trying his luck in the Civil process. Further that the magistrate erred when he found that the doctor's report was unreliable and that the appellant had failed to produce the P3 but in actual fact, he did not have it. The said P3 form had been produced as an exhibit in the criminal proceedings. The magistrate also erred in disregarding the proceedings of the criminal trial and its impact on the civil case..
2. The appellant further stated that magistrate was wrong to find that the appellant did not raise any strong defence or fact that the respondent needed to rebut and that he failed to consider that at the time of filing suit no appeal had been served upon him or determined. It was an error on the part of the magistrate to omit assessing damages in this case.
3. Both parties filed written submissions to canvas this appeal.
4. The appellant argued that it was erroneous for the magistrate to conclude that the appellant filed the civil suit after the high court allowed the respondent's appeal. He alleged that the magistrate was biased against him and did not fully evaluate the evidence on record. The plaint in this civil case was filed on 4/11/2010 and judgment delivered on 6/08/2014. The civil suit was filed before the judgment in the High Court Criminal Appeal No. 3 of 2010 was delivered.
5. It was further stated that the magistrate erred in finding that the appellant did not present the doctor with the P3 form and found that the medical report was unreliable since it relied on history given by the complainant two years after the alleged act was committed. The medical report by Dr. John Elijah Thiongo was clear that the doctor relied on the police abstract, outpatient card and the history given by the appellants. The P3 form was produced in the criminal case by PW3 and was therefore part of the record. The magistrate erred in finding that the defence raised was not strong and at the same time failed

to conclude whether the appellant had been assaulted and that it was by a third party.

6. The respondents submitted that the magistrate did not indicate that the decision was arrived at based on the date of filing the civil suit instead of being based on the evidence adduced before the court. It was further argued that the appellant had a duty to produce all documents he wished to rely on including the P3 form which was an important document. It is correct that Dr. Thiongo prepared the medical report two years after the incident. It was therefore necessary for the doctor to rely on the contents of the treatment notes. The respondent further argued that the fact that the P3 was only produced in the criminal proceedings and not the civil proceedings was meant to conceal some important matters material to the case.

7. The respondent said that the record of appeal indicated that the charge sheet had a problem on the face of it showed that the appellant was arrested on 12/9/2008 and arraigned in court on 14/9/2008 while the offence was committed on 29/9/2008. The issue arose as to whether the respondent was arrested before the commission of the offence.

8. The respondent argues there was no evidence that he assaulted the appellant. The fact that the magistrate did not assess the damages payable was a technicality that should not affect the judgment. There was evidence that the appellant was involved in a road traffic accident before the alleged assault incident occurred. It cannot be ruled out that the injuries identified by the Dr. Thiongo were sustained as a result of the road traffic accident. Dr. Thiongo examined the appellant 2 years after the accident.

9. The duty of the 1st appellate court was explained in the case of **SELLE AND ANOTHER VERSUS ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123**, where it was observed thus:-

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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.

10. The medical doctor testified that on 27/8/2010 he prepared a medical report for the appellant on his request. He relied on the P3 form, OB 12/23/23/9/08 and an outpatient card from Karau Health Center. The history given was that the appellant sustained a cut on the dosal hind finger and the right dosal wrist joint which injuries were inflicted on 22/9/2008. He further stated that he examined the appellant 2 years after the incident. The injuries were soft tissue injuries. He stated that he could not rule out a road traffic accident by looking at the injuries alone.

11. The evidence of PW2 was that he was approached by the respondent and ordered him to stop. The respondent then cut him with a panga on the hind of the head and on the left hand. The respondent was charged in Criminal case No. 1742/08 and was later convicted. He also stated that in the year 2001 he was involved in a road traffic accident where he sustained a leg fracture. He confirmed that he saw Dr. Thiongo two years after the assault when he had fully healed.

12. In his testimony, PW3, said that he saw testified that on 22/9/2008 he saw the defendant armed and cut the plaintiff. The plaintiff sustained injuries on the back of the head and on the fingers.

13. The term “balance of probability” was defined in the case of **JOHN KANYUNGU NJOGU VS DANIEL KIMANI MAINGI [2000] eKLR** the court of appeal held that the plaintiff had the burden of proofing her case on a balance of probabilities. When the court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to say that one probability was more probable than the other.

14. In the case of **D.T DOBIE & COMPANY (K) LTD VS WANYONYI WAFULA CHEBUKATI [2014] eKLR** the court cited with approval the decision of **DENNING J IN MILLER VS MINISTER OF PENSIONS [1947]** where it was held that;

The degree is well settled .It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

15. During the plaintiff/appellant's case a medical report and its receipt, demand letter, certified copies of the criminal proceedings. The treatment notes and the P3 form were not produced. The plaintiff confirmed that he had earlier sustained injuries due to a road traffic accident which were not related to the assault. The medical doctor stated that he saw the plaintiff two years after the accident. He stated that he relied on a treatment notes from Karau Health center which were not produced in court. The treatment notes from Embu PGH were also not produced. The P3 form was also not produced in court.

16. The issue of whether failure to produce supporting medical records was discussed in the following cases; **CHARLES MARANGA BAGWASI & ANOTHER VS KAMONJO MUCHIRI & ANOTHER[2000] eKLR** where the court of appeal held that even though the medical report and treatment notes had not been produced, the appellants gave credible and unchallenged evidence and hence they ought to have been awarded some general damages.

17. **JOSEPH MUNYAMBU KAREGA VS CHARLES OGOLLAH OBIERO [2014] eKLR** it was held that the medical report tendered by appellant during trial was not objected to by the respondent and therefore the magistrate ought to have considered the appellant's counterclaim on his injuries. The court cited the case of **CHARLES MARANGA BAGEASI & ANOTHER (SUPRA) AND THE CASE OF STEPHEN KAGOIVO VS JOSEPH WAITHAKE KABAI & 3 OTHERS HCCC NO 4089 OF 1988** where the defendant's counsel argued that in absence of admissible medical evidence there was no basis for the court to assess damages. The court held that lack of medical evidence is not fatal to the plaintiff's claim in civil proceedings where proof is on a balance of probability.

18. **BEATRICE NTHENYA SILA V RUTH MBITHE KITSISA & 3 OTHERS [2014] eKLR** some of the grounds of appeal were that the medical report was prepared three months after the accident, no initial treatment notes and P3 were produced and that the medical report referred to treatment notes and P3 which were not produced.

19. The court held that the medical report was not challenged by production of a contrary report. Further each respondent gave evidence and details of the injuries they had suffered following the accident. The court cited the case of **CHARLES MARANGA BAGEASI & ANOTHER (SUPRA) AND THE CASE OF STEPHEN KAGOIVO VS JOSEPH WAITHAKE KABAI & 3 OTHERS HCCC NO 4089 OF 1988** where the defendant's counsel argued that in absence of admissible medical evidence there was no basis for the court to assess damages. The court held that lack of medical evidence is not fatal to the plaintiff's claim in civil proceedings where proof is on a balance of probability.

20. The fact that the plaintiff did not produce the P3 form and initial treatment notes did not render the plaintiff's case fatal. Further the medical report by Dr Thiongo was not challenged by a contrary report and the respondent did not object to its production during trial.

21. In addition to the evidence in the Civil Case, the respondent was convicted of assaulting the complainant in Criminal Case No. 1742/08. The criminal court accepted the medical evidence of Dr. Thiongo in its observation in the judgment:-

The medical evidence did confirm the complainants evidence is that he had been assaulted and

injured to the head and to the right index finger the findings of the medical doctor PW11 herein, I find were consistent with that of the complainant. He, the medical doctor had stated that the complainant had a metal implant to his left femur but which he stated was not relevant to this case. This was indeed the evidence of the complainant who told court that he had in 2010 been involved in an accident, the result of which he broke his leg. In his evidence he did not in any way accuse the defendant of having caused the said injury to his leg.

22. According to the medical report dated 27/4/2010 and the plaint filed on 4/11/2010, the plaintiff sustained the following injuries;

- wound on the occipital region
- cut of dorsal left index finger
- cut right dorsal wrist joint

23. There was no doubt that the appellant sustained soft tissue injuries which Dr Thiongo confirmed during cross examination. He also confirmed that he saw the treatment notes from Karau Health Centre. In the criminal case, Dr. Njiru Njuki of Embu Provincial General Hospital testified that the appellant was treated in the hospital and a P3 form filled. He produced the P3 form and confirmed that the appellant suffered the following injuries:-

- a healed cut wound scar on the left occipital region.
- a healed scar on the right index finger.

24. Dr. Njuki filled the P3 form which was produced in evidence in the criminal case using the treatment notes. Dr. Thiongo who prepared the medical report for the appellant for purposes of the civil case. Both Dr. Njuki and Dr. Thiongo made it very clear in their evidence that the appellant had sustained other injuries in a road accident earlier which had nothing to do with the assault injuries.

25. The trial magistrate in the civil case emphasized on error on the dates of the assault and that of the examination by Dr. Thiongo. However, it is very clear from the evidence in the criminal proceedings and from the appellant himself in that he was assaulted on 22/09/2008 and treated after the accident. The date of examination by Dr. Thiongo was given as 27/08/2010 and was no doubt an error which does not shake the rest of the evidence. It was wrong for the trial magistrate to lay too much emphasis on the said error in.

26. The respondent was convicted of assaulting the appellant in the criminal case. In his submissions he states that the conviction was quashed on appeal but he did not produce the appeal judgment.

27. However, proof in civil cases is on the balance of probability as opposed to a criminal case where the burden of proof is beyond reasonable doubt. The civil proceedings do not depend on the outcome of a criminal case although a conviction would add more weight to the evidence. It is therefore immaterial whether the respondent was acquitted on appeal. The civil case must be decided independently of the criminal case.

28. The evidence on record especially that of the appellant and the doctor was sufficient to prove the appellant's case on the balance of probability. The magistrate erred both in law and fact in his finding that the plaintiff did not prove that he was injured by the respondent.

29. The magistrate was required to assess damages in the event that his judgment is overturned on appeal. It was an error not to assess damages in this case.

30. The respondent did not plead provocation and neither did he allege that he sustained any injuries caused by the appellant.

31. It is my finding that this appeal is merited and it is hereby allowed. The judgment of the trial magistrate dismissing the case is hereby quashed. I substitute it with judgment in favour of the appellant on full liability.

32. As for damages for the soft tissue injuries sustained as per Dr. Thiongo's report and also shown in the P3 form, I rely on the following cases:-

(a) **PATRICK MWITI IMANENE & ANOTHER VS KEVIN MUGAMBI NKUNJA [2013] eKLR** where the court upheld an award of Kshs.170,000/= for soft tissue injuries in the year 2013.

(b) **PAUL KIPSANG KOECH & ANOTHER V TITUS OSULE OSORE [2013] eKLR** the court awarded Kshs.200,000/= for minor soft tissue injuries in the year 2013.

33. The damages are hereby assessed as Kshs.200,000/= payable to the appellant by the respondent.

34. The appeal is allowed with costs to the appellant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND OF MARCH, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Kathungu for the appellant

Ms. Ndarong'o for Momanyi for the respondent