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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CV-CA-003/2002

(Arising from Kumi Civil Suit No. 37of 2000)

1.ABWONGO ZIRUBABERI}

2.OSIRIM NOAH }.....APPELLANTS

VERSUS

ELUNGAT JAMES IGNATIUS.....RESPONDENT

BFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGEMENT

The appellants were sued in the Grade I Magistrate's court of Kumi for special and general damages for assault. The learned trial magistrate found for the respondent/plaintiff, and awarded him general damages of shs. 400.000/-, payable by each of the defendants, hence this appeal. I will hereinafter refer to the parties' as they were known in the trial court, i.e. appellants as the defendants and the respondent as the plaintiff.

The facts from which this appeal arose are as follows. On 12/1/2000 the plaintiff was at the home of his brother Amuriat Washington PW2. At about 8.00pm, they were finishing or had finished their meal, when a dog belonging to the 2nd defendant came and either licked the plate or took therefrom a piece of meat. The plaintiff beat it up, and it went off howling. The two defendants are father and son respectively. They were at their home with PW5 wife of the 1st defendant, and mother of 2nd defendant. They heard the crying of their dog, and the 2nd defendant got up and went to investigate.

This was a season for mating season and many dogs were doing so at Amuriat's place. Children nearby were shouting that the plaintiff had killed the defendant's dog.

According to the plaintiff, the 2nd defendant came with his father, and later their mother joined them. They were quarrelling about the beating of their dog. The 1st defendant hit him in the waist with a stick or pestle, while the 2nd defendant stabbed him with a knife near the left eye. The plaintiff picked his bicycle and rode to he local council authorities and reported the incident. He was forwarded to the police where he went and made the complaint.

The two defendants were arrested, charged and later prosecuted for assault occasioning actual bodily harm. They were convicted and each was sentenced to a fine of shs. 20.000/-, or 6 months imprisonment in default. Each of them paid the fine. There was no appeal from the decision in the criminal case.

The defendants' version was that when they heard the dog howling in pain, the 2nd defendant went near the neighbours compound to investigate. This was the home of Amuriat PW2, his cousin. His father, the 1st defendant restrained him from going into a confrontation with the plaintiff, and he did not. The matter was reported to the local council authorities who advised that it would be settled in the morning. The defendants never followed it up thereafter. They were shocked to discover that the plaintiff complained of assault against them to the police. They conceded that they were prosecuted with the stated results.

The respondent then filed a civil suit for damages as a result of that assault, with the results in the lower court as stated above. The defendants/appellants were dissatisfied with the decision of the lower court and filed a memorandum of appeal in which 6 grounds were set out against the judgment of the trail court as follows;

1. The learned trial magistrate failed to properly evaluate and appraise the evidence on record and thereby reached a wrong decision.
2. The learned trial magistrate erred in law in relying on the decision of the lower court in Kumi criminal case No. 15/2000, which was decided on erroneous grounds.
3. The learned trial magistrate erred in law in failing to make a finding that the trial magistrate in Kumi criminal case No. 15 of 2000, had vested interest in the land dispute between the 1st appellant and the family of the respondent.
4. The learned trial magistrate erred in law and fact in failing to make a finding that the plaintiff's witnesses were liars and misleading the court.
5. The learned trial magistrate erred in holding that the appellants assaulted the respondent without receiving medical evidence to ascertain whether the nature of the injuries complained of by he plaintiff were caused by the appellants or were self inflicted.
6. There are fundamental errors and misdirections on the face of the record.

The 1st ground of appeal was that the magistrate did not evaluate the evidence properly and he thereby reached a wrong decision. I found that this

was essentially the complaint in the 4th, 5th and 6th grounds of appeal. I will therefore dispose of the 2nd and 3rd grounds first, and thereafter revert to those other grounds together.

The approach to be followed by a first appellate court is that it ought to subject the evidence adduced before the trial court to a fresh and exhaustive scrutiny so that it weighs the conflicting evidence and draws its own conclusions. It is not enough for the appellate court to merely scrutinise the evidence to see if there is some evidence to support the findings and conclusions of the lower court, it must make its own findings and conclusions. Only then can it decide whether the findings of the trial court should be supported. In so doing the appellate court must make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. *Yosamu Kawule V. Erusania Kalule* [1977] HCB 135, *Sitefano Baraba V. Haji Edirisa Kimuli* [1977] HCB 137, *Ugachick Poultry Breeders Ltd. V. Tadjin Kara* C.A., Civil Appeal No. 2 0f 1997.

The complaint in the 2nd ground was that the magistrate erred in relying on the decision of the lower court in the criminal case, which according to the defendants was decided on erroneous grounds. The evidence of this was a statement in the judgement of the lower court. Learned Counsel for the appellants quoted the magistrate at page 8 of the judgement as follows;

> 'Their evidence is supported by criminal case judgement No. 15 of 2000 (Kumi court) where the two accused were convicted of assault occasioning actual bodily harm to the plaintiff.'

Counsel ought to have continued with the very next sentence in the judgment which read as follows;

'On the defence side it is contended that the conviction in the criminal case was based on hearsay evidence as far as the medical report is concerned and that the trial magistrate had interest in the matter because he had correspondence with the plaintiff's brother in an earlier case where D1 was a party.'

Clearly the quoted statement was not a conclusion by the magistrate. It was an analysis of the evidence of the parties as the very next sentence, which I produced above shows.

Further to this at page 10 of the judgement, the learned trial magistrate discussed the absence of medical evidence in the criminal case, and how its absence in the civil case before him was not fatal to the plaintiff's case. He continued as follows;

'This case was invited to look at this anomaly in the criminal case that gave rise to this instant case but my findings in this instant case is based on the evidence adduced before court by eye witnesses during the assault.'

The assertion by appellants Counsel that the magistrate relied on the decision of the criminal case was not made out. He stated that he did not do so, and it is clear from his analysis that he did not. That ground of appeal fails.

The 3rd ground of appeal was that the magistrate erred in law in failing to make a finding that the trial magistrate in Kumi criminal case No. 15 of 2000, had vested interest in the land dispute between the 1st defendant and the family of the respondent.

The allegations contained in the above ground occurred in the criminal case. Learned Counsel for the appellants represented the two accused persons in that case. These are the present defendants in the civil case now before court. Counsel did not raise those apparently numerous anomalies and irregularities by way of appeal. He cannot now be seen to raise issues about them in a civil suit.

Secondly, one wonders what relevance the irregularities in a criminal case would have in the civil one. The alleged bias or interest in the suit by the trial magistrate was, even if true, in respect of the trial magistrate in the criminal case. He was not the magistrate trying the civil suit. There was no allegation that the magistrate in the civil suit was biased or had any interest in any subject matter in any suit in any court between the parties.

Thirdly, I have found that the magistrate in the trial court below did not put any reliance on the decision in the criminal case. The irregularities, bias or interest imagined or real by the magistrate who heard the criminal case was of no consequence in the civil suit out of which this appeal arose. That ground of appeal was therefore to be dismissed.

I now turn to the complaint that the learned trial magistrate failed to properly evaluate and appraise the evidence on record and thereby reached a wrong decision. The analysis of this ground will determine the remaining grounds of appeal, as they all relate to failure by the magistrate to evaluate the evidence.

The suit was instituted by the plaintiff against the defendants claiming for damages for the assault and the resulting injuries, which were inflicted on him in the evening of 12th January 2000.

The evidence to support this claim was from three witnesses. The plaintiff himself told court that he was having dinner with his brother Amuriat Washington PW2. A dog belonging to the 2nd defendant came and ate a piece of meat from his plate. Apparently there were many dogs in the vicinity as this was mating season.

The plaintiff beat it and thereupon the owners came to the rescue. First to arrive was the 2nd defendant. Next came the father, the 1st defendant who was armed with a stick like a hoe handle, with which he hit him in the waist. Then the 2nd defendant stabbed him in the left eye, and he alarmed, and ran away.

The plaintiff in cross examination said that he did not know one Okiror, and that he was not aware whether the 1st defendant had a land dispute with said Okiror. He however said he knew one Elungat James, the local council defence secretary in the village, and another Eduwan Michael. He had no grudge against either of them, but he did not meet any of them that day.

PW2 was the host and brother of the plaintiff, Amuriat Washington. He more or less corroborated the evidence of the plaintiff. He however told court that the 1st defendant arrived later with his wife. He was armed with a panga. He hit the plaintiff with a stick in the waist. The wife of the 1st defendant intervened and separated the plaintiff and the 2nd defendant who

were fighting. The 1st defendant pushed the wife away and stabbed the plaintiff in the left eye.

Amuriat told court that he was the cousin to the 2nd defendant as well as the plaintiff, as the 1st defendant was his Uncle. Okiror was another cousin. They were all neighbours, but this Okiror had a long standing land dispute with the 1st defendant. Obviously the plaintiff knew his own brother Okiror and the land dispute between Okiror and the 1st defendant.

PW3 Timo Hellen Christian was the wife of PW2. she served the men food, but they were interrupted by a small dog, which the plaintiff beat and it cried as it ran off. She said she did not know Okiror her brother in law, though she was married in the family for 14 years. She told court that the 1st defendant hit the plaintiff with a pestle, while the 2nd defendant stabbed him in the left eye. She said she was not sure. That the defendants went away when they heard that the plaintiff was stabbed.

PW3 told court that her husband was drank, and so did not see anything. That it was only herself who saw what took place. She said that the plaintiff did not appear drank.

That was the evidence upon which the court was asked to find that the plaintiff was assaulted, and to award him damages for the assault. The defendant denied the assault.

The 1st defendant a reverend in the church, and father of the 2nd defendant told court that while the dog of the 2nd defendant was beaten by the plaintiff,

he did not go to the home of Amuriat at all. He and his son and wife remained in their compound, but stood up to ask why the dog was being beaten. He advised the son not to confront the plaintiff. He went to the local council; authorities and reported the incident the following day. The children had been shouting that the plaintiff had killed the dog. He did not follow up the matter, because it would appear that the dog was not dead anyway.

He told court that when the plaintiff reported him in criminal court for the assault, he called both PW2 and PW3 to testify on his behalf, as he never assaulted the plaintiff at all from their home as he was alleging. He was aware that the plaintiff sustained injuries prior to the altercation in the home of Amuriat.

His son the 2nd defendant also denied going to the home of Amuriat, and assaulting the plaintiff. When his dog was beaten by the plaintiff, his father advised that they would solve the matters the following morning, and he complied. The matter was not followed up next morning, as there was no interest to do so.

DW3 Elungat James was the defence secretary of the village. On that day, he was drinking local brew with among others Eduwan Michael in Califonia bar. Also drinking in the same bar, but in another group was the plaintiff. He left before them around 7.00 pm. The two, Elungat James and Eduwan followed. They found the plaintiff having fallen off his bicycle. He was bleeding from the left eye and bruised on the knee. They advised him to tie the bleeding eye, but he refused.

The following morning the 1st defendant reported to him that the plaintiff had killed their dog. When he learnt of the complaint by the plaintiff that the defendant assaulted him, he went to the police and recorded a statement about what he knew. Obviously the police or the court did not treat him seriously. DW4 Eduwan Michael told a similar story to that of DW3.

The trial magistrate decided that the two eye witnesses of the plaintiff were believable. According to PW3 the wife of PW2, her husband was too drank to know what took place. There would be no reasons to disbelieve her. She stated that she was not sure of what happened, yet she was sober and within the vicinity. This was the only witness who had the clarity of vision and mind to tell court what transpired, but she was not sure whether or not the 2nd defendant stabbed the plaintiff. That was her testimony.

On the other hand, if court chose to disbelieve that aspect of her evidence, and believed the evidence of PW2, it was at best contradictory. He told court that the person who stabbed the plaintiff was the 1st defendant, yet the plaintiff told court that the person who stabbed him was the 2nd defendant.

Amuriat PW2 told court that the 1st defendant came with a panga. However, he used a stick to hit the plaintiff. Where the stick came from was not clear. On the other hand, the 2nd defendant was not spotted to be armed with any weapon yet he reportedly stabbed the plaintiff with a knife. Where it materialised from is not known. PW2 told court that if the plaintiff had an accident earlier on his bicycle, he would have known, as the plaintiff would have told him. But this is the same person who was reported by his own wife

to be too drunk to know what took place, and she should know, after all she was his wife for 14 years.

These were the plaintiff's witnesses. They were all related. They all had an interest in the result of the suit being close relatives. Their testimony therefore ought to have been taken with some caution. I agree with Counsel for the appellants that they were not witnesses of truth. The plaintiff denied his own brother Sam Okiror, obviously because he wanted to distance himself from the land dispute which Okiror had with the 1st defendant. The only other sober witness also told lies on oath. PW3 was the wife of Amuriat, a cousin of Okiror. But she denied him and said that she did not know Okiror her own brother in law in spite of being married in their family for 14 years and producing 5 children.

The only independent witnesses in this case were the two defence witnesses DW3 and DW4, Elungat James the secretary for defence, and Eduwan Michael. The learned trial magistrate decided that they were not eye-witnesses to the altercation in the home of Amuriat. That was correct. He therefore dismissed their testimonies because of that. He stated that in any event, they could not have been telling the truth from their demeanour, as they did not put the defendants at the scene of crime.

I found that conclusion to be skewed. They did not testify to the events at the home of Amuriat. They were not there. All they testified to was that they were with the plaintiff earlier in the day, and that they found plaintiff having fallen off his bicycle, lying on the ground, as he was on his way home from the bar. The magistrate held that they did not witness the accident they

sought to testify to. That was also correct. What was not justified was the conclusion from this that they were therefore liars. According to them, the plaintiff sustained injuries, from whatever cause on the left eye, and bruises on the knee.

None of these two witnesses was related to the defendants. None had any grudge with the plaintiff, and he conceded to this. So they had no reasons to tell lies against him. The evidence of these witnesses was to me corroborated by the fact that soon later, the plaintiff was reported with injuries on the left eye.

It is settled law that the burden of proof in civil cases lies upon the person who asserts the existence of a state of affairs or facts. A party can only be called to dispute or rebut what has been proved by the other side. This is so because the person who alleges is the one who is interested in the court believing his contention. *Nsubuga v. Kavuma* [1978] HCB 307 and *Sebuliba v. Coop Bank* [1982] HCB 129.

The Plaintiff's evidence must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not" the burden is discharged, but if the probabilities are equal, it is not. See *Muller v. Minister of Pensions* [1947] 2 ALL ER 372.

If the magistrate had not dismissed the evidence of these two independent eye-witnesses, and if he had on top of that considered the veracity of the

plaintiff's witnesses as I have pointed out, he would have come to a different decision.

The court had to find that there was assault before deciding whether or not to award general damages. From the evidence on record, the plaintiff told court that he was treated for injuries arising from the assault. He told court that he would call the examining doctor to testify, but he did not do so. There was no indication of the extent if any, of the injuries which the plaintiff allegedly sustained. No one described any injuries on the plaintiff, including himself. Was that possibly because there were no injuries? That remained a distinct possibility. PW3 Timo Hellen the wife of Amuriat told court she was not sure whether or not the 2nd defendant stabbed the plaintiff. Even the obviously dubious medical evidence was not tendered in evidence.

Even if I had found that there was any assault, I would have awarded only nominal damages of shs. 5,000/-, as there was no evidence of injury. However, my finding is that the plaintiff did not, upon the evidence on the record, discharge the burden of proving on a balance of probabilities that there was any assault on him at all by the defendants.

The 1st ground of appeal therefore succeeds. I said that disposal of that ground would effectively dispose of the remaining grounds of appeal. I will not therefore go into them. Judgement is given for the appellants. The judgement and orders of the magistrate in the lower court are hereby set aside.

The appeal therefore succeeds only in part. For that reason, I will award the appellants only half of their costs of the appeal. They shall have their costs in the court below.

RUGADYA ATWOKI

JUDGE

8/06/2005.

Court: The Deputy Registrar of the court shall deliver this judgement to the parties.

RUGADYA ATWOKI

JUDGE

8/06/2005.