



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 045 of 2018

In the matter between

ODIYA RICHARD

APPELLANT

And

1. **OKELLO JOHN BOSCO**
2. **APARO IRENE**
3. **ADYERO HILDER**
4. **LAYET CONCY**

RESPONDENTS

Heard: 22 July 2019
Delivered: 29 August 2019

Civil Procedure: — *General damages for Assault causing Actual Bodily Harm — Whereas when an order of compensation in a criminal trial is made the quantum may be determined by taking into account the nature of crime, the injury suffered, the justness of claim by the victim, the ability of accused to pay / the means of the offender, whether the criminal court will be involved in a long process of assessment of the loss, whether civil proceedings have been taken and, if so, whether they are being pursued and other relevant circumstances, the principle in civil matters is restitudo in integrum — The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the complainant's grievance.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

- [1] The appellant sued the respondents jointly and severally for recovery of general and special damages for personal injury, interest thereon and the costs of the suit. His claim was that on 7th September, 2015, at Oryang Trading Centre, Lagoro sub-county, Kitgum District the respondents assaulted him thereby inflicting upon him actual bodily harm. As a result of that assault, he sustained; a deep incised wound (bite) on the side of his left hand, tenderness of the neck, strain in the limbs and multiple soft tissue injuries on various parts of his body. On medical examination, the injuries were classified as "harm." He reported the incident to the police whereupon the respondents were arrested, prosecuted and convicted of the offence of Assault Occasioning Actual Bodily Harm C/s 236 of *The Penal Code Act*. Each of them was sentenced to a fine in the sum of shs. 500,000/= or one years' imprisonment in default. The appellant then filed the suit for recovery of shs. 2,200,000/= in medical and related expenses, and shs. 450,000/= per month from 7th September, 2015 until the date of judgment as special damages for lost income resulting from the loss of his job, consequent upon the injuries he suffered.
- [2] In their joint written statement of defence, the respondents refuted his claim and made bare denials of the appellant's averments.

The respondent's evidence in the court below:

- [3] In his defence as D.W.1, the 1st respondent Okello John Bosco admitted being convicted for the assault and sentenced to a fine of shs. 500,000/= or one year's imprisonment in default. The appellant was unemployed at the time of the assault. D.W.2 Aparo Irene the 2nd respondent admitted being convicted for the assault and sentenced to a fine of shs. 500,000/= or one year's imprisonment in default. The assault arose out of a land dispute. The documents produced by the appellant as proof of medical expense are a fraud. The appellant is unemployed. The time served in prison should be considered enough atonement. His claim or

additional compensation should be rejected. The other two respondents did not testify.

The appellant's evidence in the court below:

- [4] The appellant Odiya Richard testified as P.W.1 and stated assaulted by ten people who included the respondents. He was assaulted when he went with police officers to cause their arrest for threatening him with violence, over a land dispute. P.W.2 Okogo Simon; injuries sustained by the appellant included a deep cut on the arm suspected to be a bite, a swelling on the neck, injury on the right pinna, left deltoid (a thick triangular muscle covering the shoulder joint and used for raising the arm away from the body), and the right hip. He classified the injury as harm. The injuries were minor. They are not the type of injuries that would require a long period of medication.

Judgment of the court below:

- [5] In his judgment, the trial Magistrate stated that the respondents were sentenced to an order of compensation in the sum of shs. 500,000/= each or one year's imprisonment in default. They failed to pay the compensation and served the term of imprisonment. P.W.2 testified that the injuries sustained by the appellant were minor. He sustained a deep cut wound on the hand and a swelling on the neck. They could not have caused such a degree of pain as described by the appellant to the extent of losing his job. He did not sustain any permanent injury. He therefore is not entitled to general damages. The court agrees with the 2nd respondent that the term of imprisonment was sufficient atonement. The amounts claimed as special damages are unfounded. It includes expenditure incurred in prosecution of the criminal case which expenses are borne by the police. In the alternative, they can be deemed to have been covered in the order of compensation, which the respondents failed to meet and served a term of imprisonment instead. The receipts he tendered in evidence as proof of medical

expenses may not be related to the injuries he sustained since P.W.2 testified they were minor. The Magistrate ordered compensation and in default he gave a sentence which was duly served, and "I believe this covered the complainant's claims on the same as well. I will therefore dismiss his claims with costs," he concluded.

The grounds of appeal:

[6] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The trial Magistrate exercised a lot of bias during the trial of the above civil suit.
2. The trial Magistrate erred in law and fact when he dismissed the suit on grounds that the defendants had already served their sentences in the above case when it was tried as a criminal matter against the respondents.
3. The trial Magistrate erred in law and fact when he awarded costs of the dismissed suit.

[7] Before the appeal could be heard, the court was notified that the appellant had been murdered by the respondents when, together with the court process server, he went to serve them with a hearing notice for the appeal. The court therefore invoked the provisions of Order 24 rules 1 and 3 (1) of *The Civil Procedure Rules*, and section 222 of *The Succession Act*, to grant his brother Mr. Komakech Alex Anselm, letters of administration limited for the purpose of representing the deceased in this appeal, touching the matters at issue in the appeal, until a final decree shall be made in it, and carried into complete execution.

Arguments for the appellant:

[8] At the hearing of the appeal, Mr. Komaketch Alex, argued that since the respondents were convicted at the criminal trial, they were also under the legal obligation to compensate the appellant for the damage he suffered as a result of their unlawful attack on him. The appellant should therefore be awarded general damages. The respondents did not turn up at the hearing of the appeal.

Duties of a first appellate court:

[9] This being a first appeal, it is the duty of this court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[10] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

All the grounds of appeal will be considered concurrently.

- [11] The case before the trial court was a personal injury claim. A personal injury claim is based upon an injury that occurs to an individual. The person with *locus standi* in a personal injury claim is the actual person who suffered the injury. At common law, when a personal injury to the plaintiff resulted in death, no action for the personal injury survived, and any such action pending at the time of death abates (see *Baker v. Bolton*, 170 Eng. Rep. 1033). However, under section 11 (1) of *The Law Reform (Miscellaneous Provisions) Act*, save for actions for defamation, seduction, inducing one spouse to leave or remain apart from the other, or claims for damages on the ground of adultery, all causes of action subsisting against or vested in a deceased person survive against, or, as the case may be, for the benefit of his or her estate.
- [12] Having perused the record of proceedings, I find that the court below misdirected itself when it failed to recognise that one event can give rise to both criminal and tortious liability. Assault and battery are intentional torts, and thus can serve as the basis for a civil suit demanding compensation in the form of monetary damages. At the same time assault and battery are also crimes, under *The Penal Code Act* implying that they can also result in prosecution by the state and, if the accused is found guilty, can result in a term of imprisonment or a fine or both.
- [13] In the judgment of 7th April, 2016 delivered in the criminal trial where the respondents were the accused (Kitgum Grade One Magistrate's Court Criminal case No. 817 of 2015) it is stated that each was sentenced to a "fine" and not "compensation." The trial Magistrate thus misconstrued the import of that decision. There was no order of compensation in the criminal trial.
- [14] Even if that order had been one for compensation, section 197 of *The Magistrates Courts Act* confers discretion upon a trial court, in addition to any other lawful punishment, to order the convicted person to pay another person

such compensation as the court deems fair and reasonable, where it appears from the evidence that, that other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit. The idea behind it is that a victim of crime in a situation where the amount involved is readily ascertained and acknowledged by the accused should not be forced to undertake the often slow, tedious and expensive civil proceedings against the very person who is responsible for the injury.

[15] The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the complainant's grievance. It is a measure of responding appropriately to crime as well as reconciling the victim with the offence. However, courts are slow to make an assessment and award of substantial amounts as compensation, without clear evidence of a definite amount by admission or other proof, otherwise it risks descending into purely civil consequences of the facts that constitute a crime. An order of compensation equivalent to a judgment in a civil suit is an open invitation to resort to the criminal process mainly for the purpose of obtaining the civil remedy.

[16] The quantum of compensation may be determined by taking into account the nature of crime, the injury suffered the justness of claim by the victim, the ability of accused to pay and other relevant circumstances. A relevant consideration would be whether civil proceedings have been taken and, if so, whether they are being pursued. Other factors that enter into the exercise of the discretion are; the means of the offender, and whether the criminal court will be involved in a long process of assessment of the loss (see *R. v. Zelensky*, [1978] 2 S.C.R. 940 at 961). The amount determined by court should exclusively be aimed at remedying the damage caused through the wrongful act, and not conceived as an exemplary measure. The aim should be to redress only direct damage and loss

resulting from the illegal act, leaving out those damages and losses which are too indirect or remote.

- [17] The principle in civil matters is different; it is *restituto in integrum*. The plaintiff has to be restored as nearly as possible to the position he/she would have been had the injury complained of not occurred (see *Dharamshi v. Karsan [1974] EA 41*). Unlike a civil court which when awarding general damages is bound to wipe out the legal and material consequences of the wrongful act by re-establishing the situation that would exist if that act had not been committed, irrespective of the defendant's ability to pay, a criminal court is required to take into account the ability of the convict to pay the compensation ordered. A criminal court will therefore order compensation intended to re-establish the situation that would exist if that act had not been committed, to the extent of the convict's ability to pay.
- [18] The appellant adduced evidence to show that he sustained injuries as a result of the assault. The trial court was obliged to make an assessment and make an appropriate award of general damages. Since the court below failed in that duty, it is incumbent upon this court to rectify the anomaly. In doing this I have been guided by a judgment delivered on 30th April, 2009 in the case of *John Ogil v. Attorney General, H.C. Civil Suit No.94 of 2004*, shs. 4,000,000/= where general damages were awarded for personal injuries sustained in the shootout incident. During the incident, the plaintiff sustained serious gunshot wounds on posterior left thigh, soft tissues injury with no fracture. The plaintiff was hospitalised for 11 days, resuscitated before being operated upon to remove the bullet that had lodged in his body together with dead tissues. He lost a lot of blood, suffered pain and loss of sensation at the site of injury. He developed scars. His disability was put at 10%.
- [19] Taking into account the transient nature of the injuries sustained by the appellant, the facts that he was never admitted in hospital nor underwent any surgery, but

considering the effect of inflation, I consider the sum of shs. 1,500,000/= to be adequate compensation as general damages. As regards the claim for special damages, these are not awarded to enrich a plaintiff far beyond his or her actual losses nor should the plaintiff get far less than his or her actual loss. Therefore, when a claim for special damages is made, the plaintiff is required to provide evidence in support of the claim and to adduce facts upon which the damages could be assessed. Special damages must be specifically pleaded and proved. Special damages are out-of-pocket expenses that can be determined by adding together all the plaintiff's quantifiable financial losses. These losses or expenses must be proven with specificity. The court though will disregard expenses that were not necessary or that are unreasonable.

[20] Public prosecutions are conducted by the state at the costs of the state. The appellant's expenditure on criminal prosecution was unjustified and is accordingly rejected. As regards expenditure on treatment, the appellant adduced receipts of October, 2015 to 2017 yet the injury was sustained on 7th September, 2015. Due to its transient nature, the appellant could not have continued with treatment for the next two years. That evidence therefore is rejected since there is no proof that the course of treatment was for the injuries sustained in the assault. The only receipt that appears to be contemporaneous with the injury is that of 26th October, 2015 in the sum of shs. 15,000/= for the medical report. That amount is allowed.

Order :

[22] In the final result, the appeal is allowed. The judgment of the court below is set aside and instead judgment is entered for the appellant against the respondents jointly and severally for;

- a) General damages of shs. 1,500,000/=
- b) Special damages of shs. 15,000/=
- c) Interest on (a) and (b) above at the rate of 8% per annum from the date of judgment until payment in full.

d) The costs of the appeal as well as those of the court below are awarded to the appellant.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : Mr. Komaketch Alex (the appellant's legal representative).

For the respondent : The Respondents.