

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

CIVIL APPEAL NO. 15 OF 2021

(Arising from the Resident Magistrate Court of Kagera at Bukoba in Civil Case No. 9 of 2021)

MNAWARA SWALEHE APPELLANT

VERSUS

ANIFA MOHAMED RESPONDENT

JUDGMENT

*Date of Judgment: 24.02.2023
A.Y. Mwenda J,*

Before the Resident Magistrate Court of Kagera at Bukoba the plaintiff (now the respondent) filed a plaint against the defendant (now the appellant) claiming a total of TZS 869,300/= being a specific damages and TZS 10,000,000/= as general damages for the injuries she suffered due to grievous harm caused by the appellant.

At the end of the trial, the court ordered the respondent to be paid TZS 869,300/= as specific damages and TZS 4,130,700/= as general damages. Aggrieved by the said decision the appellant filed the present appeal with two (2) grounds which reads

During the hearing of this appeal the appellant was represented by Mr. Seth Niyikiza, learned counsel while the respondent hired the legal services from Mr. Lameck John Erasto, learned counsel.

When invited to submit in respect of the grounds of appeal Mr. Seth submitted that the case before the RMS Court was not proved on the balance of probabilities. He submitted that the burden of proof in Civil Cases is on the balance of probabilities in that is he who alleges must prove. According to him there was no enough evidence produced before the trial court to prove the plaintiff's claims. He said the issue of beatings was not described before the court and since the only evidence to prove it was through a PF3 which was not admitted before the court, then the said claim cannot be said to have been proved. He submitted that criminal cases are different from civil cases and added that the evidence of criminal case can not suffice to support the civil suit. He further submitted that even in the copy of judgment at page 2, the record shows that the respondent suffered multiple injuries but the said judgment was not tendered before the court. He went on to submitting that the proceedings ought to have shown that the said copy judgment was admitted as exhibit and if it does not, then the said judgment should not be considered. He further submitted that even the discharge form which was tendered came from Katoma Health centre instead of Bukoba regional referral Hospital. He thus concluded his submission in respect of the first ground of appeal by stating that the plaintiff's case was not proved on the balance of probabilities and to support this argument, he cited the case of BARELIA KARANGIRANGI VS ASTERIA NYALWAMBWA CIVIL APPEAL NO. 237 OF 2017.

With regard to the second ground of appeal Mr. Seth submitted that the issues framed were not made and agreed by the parties. He said that the law requires the issues to be drawn in court by the parties. He submitted that the issues framed at page 7 of the proceedings and those appearing at page 2 of judgment are quite different. Specifically he said that the issue regarding cause of action as appearing in the copy of judgment is not one of the issues framed by the parties. He submitted that amendment of issues ought to have involved the parties and to support this point he cited the case of SAID MOHAMED SAID V MUHUSIN AMIRI & ANOTHER, CIVIL APPEAL NO. 110 OF 2020. To conclude his submissions the learned counsel for the appellant prayed this appeal to be allowed and thereby quashing the proceedings of the trial court.

Responding to the submissions by the learned counsel for the appellant, Mr. Lameck submitted that the respondent (the then plaintiff) proved her case as per standard required in accordance with section 110 of the Evidence Act [CAP 6 R.E 2019].

He submitted that in the case before the trial court the cause of action was in regard to the claims that the plaintiff was beaten, injured and sustain permanent disfigurement and this is in accordance with paragraph 5 of the plaintiff's plaint. He submitted further that the respondent described how she was treated at Katoro Health Centre and later referred to Bukoba Regional Referral Hospital. The learned counsel went further to submitting that parties are bound by their pleadings. He said that by looking at para 1, 2, 4 and 5 of

the plaint, it is revealed how the incident occurred and how the respondent was sent to the hospital for treatment, the fact which the appellant did not contest.

With regard to the decision of criminal case being considered in the civil suit, the learned counsel submitted that the said case was brought to prove that the appellant was charged on the said offence at Katoro Primary Court and the court did so by taking judicial notice on its existence under Section 58 of the Evidence Act [CAP 6 R.E 2019]. On top of that the counsel for the respondent submitted that the plaintiff's PF3 was tendered and admitted without objection by the appellant as Exhibit P2 and thereafter its contents were read in court.

The learned counsel for the respondent submitted further to the effect that in the trial court's judgment, the Hon. Magistrate was aware that civil cases and criminal cases are different and that is why the plaintiff's case being on tortious liability, a proof of the cause of action was brought into play. He submitted that the respondent's evidence and the exhibits which she tendered proved the existence of cause of action and the Hon. trial Magistrate had opportunity to assessing the witness as to whether they were telling the truth or not. To support his argument, he cited the case of IBRAHIM AHMED VS HALIMA BULESI [1968] HCD.

In respect of the second ground of appeal, the learned counsel for the respondent submitted that the issues framed were the same save that they were enlisted differently. He submitted that the issue of cause of action was a

proof as to whether or not the respondent had a claim against the appellant. To support his argument, he cited the case of MUSA NGANG'ANDWA VS CHIEF JAPHET WANZAGI & 8 OTHERS [2006] TLR 351. The learned counsel for the respondent concluded his submission by praying this appeal to be dismissed with costs.

In rejoinder Mr. Seth agreed that there was a PF3 tendered but he doubted its genuineness as to whether it is the same which was tendered at Katoro Primary Court. He added to the effect that the issue discussed were not the one which was framed by the parties and he concluded his rejoinder by submitting that the anomalies so pointed affected the plaintiff's case hence this appeal should be allowed.

Having gone through submissions by both parties the issue for determination is whether or not this appeal is meritorious.

From the appellant's submissions, there are two points which he seeks this court to discuss/determine. One is if the case before the trial court was proved on the balance of probabilities and two is if the issue regarding cause of action raised by the court *Suo Muto* vitiates the proceedings.

Before the above points are determine it is important to note that, by looking at the lower court's records, the appellant does not dispute the fact that he assaulted the respondent the gist of his complaint, as he alleges, is on the failure by the plaintiff (now the respondent) to prove her claim before the trial

court. In bid to resolve the appellant's complaint as stated above this court went through the lower court's records and noted that the respondent (the then plaintiff), having lodged her claim before the trial court proved her case, by tendering discharge form, billing forms and PF3 (Exhibit P2). All these pieces of evidence were tendered in court without any objection by the appellant (the then defendant). It is also important to note, in the cause of preparing the judgment, the trial court took a judicial notice of the judgment of Criminal Case No. 53 of 2020 at Katoro Primary Court where the appellant was convicted and sentenced for assault causing actual bodily harm. In the said judgment the degree of injuries sustained by the respondent (the then plaintiff) based on the exhibits mentioned herein above was described. With the above evidence by the respondent (the then plaintiff) it is clear that respondent effort to prove her case is in alignment with the provision of section 110 of the Evidence Act [CAP 6 R.E 2019] which reads as follows;

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

While submitting in support of this ground of appeal the counsel for the appellant averred that since neither the copy a judgment nor a PF3 was tendered in court to describe the injuries sustained by the respondent (the then plaintiff), then the plaintiff's case was not proved to the standard required.

I have considered the learned counsel's argument only to note, with due respect that what is alleges is not the case. As I have stated earlier, the trial magistrate took judicial notice of judgment of Criminal Case No. 53 of 2020 within which the plaintiff described the degree of injuries sustained, the evidence which led to the conviction and the sentence to be entered against the appellant.

With regard to the appellant's complaint that the trial magistrate dealt with a new issues which was not framed by the parties, I agree with the learned counsels for both parties that it is the requirement of the law that the court should confine itself to the issues framed. As a general rule determination of civil matter has to be based on framed issues as provided under Order XX Rule 5 of the Civil Procedure Code [CAP 33 R.E 2019] which provides as follows;

"In suits in which issues have been framed, the court shall state its finding or decision with the reason therefore, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

Going through the records this court found out that at page 7 of the typed proceedings the issues which framed by parties read as follows;

- 1) Whether the defendant inflicted grievous harm to the plaintiff.*
- 2) Whether the plaintiff suffered multiple injuries because of the inflicted grievous harm by the defendant.*

3) What are the reliefs to the parties.

However, at page 2 of the typed judgment the issues which were recorded and discussed appeared to be as follows;

1) Whether the plaintiff suffered multiple injuries because of the inflicted grievous harm by the defendant,

2) If the first issue is answered in affirmative, then whether there is a cause of action against the defendant

3) What relief are the parties entitled to.

From the said issues it is evident that the purported new issue which is ***whether there is a cause of action against the defendant*** is what the trial magistrate analyzed as to how the plaintiff proved her claim of being assaulted by the defendant thereby suffering multiple bodily injuries.

On my part, before resolving this issue, I found it pertinent to define what does cause of action. This phrase is defined in the case of STANBIC FINANCE TANZANIA LTD VS GIUSEPPE TRUPIA AND CHIARA MALAVASI [2002] TLR 221 to mean,

"Facts which gives a person a right to judicial redress or relief against another as found on the plaint at its annexure".

With the above definition it is clear that in providing answers to the issues which were framed by the parties and agreed by the court the trial magistrate had,

by considering the totality of the evidence adjudicate on the rights to judicial redress or reliefs of the respondent against the appellant. In other words the purported new issue ought to be dealt with regardless as to whether it was raised by the parties or not, that is why in the cause of the trial both parties found themselves dealing with the said issue indirectly. That said although order XX Rule 5 of Civil Procedure Code sanctions the court to confine itself to the framed issues, there are however exception to this rule. This exception was discussed in the case of Dr. A NKII & ASSOCIATE LIMITED VS NATIONAL HOUSING CORPORATION, CIVIL APPEAL NO. 72 OF 2015, CAT (Unreported) where, the Court having stated the general rule on determination of a civil matter based on the framed issues under Order XX Rule 5 of the Civil Procedure Code, had this to say that;

"However, there are exceptions to the rule, say where, though a matter was not framed as an issue the parties were allowed to address it during the hearing as it has been decided in, GEORGE J. MINJA VS THE ATTORNEY GENERAL, CIVIL APPEAL NO. 75 OF 2015 and FELECIAN MUHANDIKI VS MANAGING DIRECTOR BARCLAYS BANK TANZANIA LIMITED, CIVIL APPEAL NO. 82 OF 2016 (both unreported). Or where it appears the parties left the issue to the trial court for determination in line with ODD JOBS VS MUBIA [1970] E.A. 476 cited by the court in AGRO INDUSTRIES LTD VS THE ATTORNEY GENERAL [1994] TLR 43."

From the above analysis this court is of the view that since the parties were allowed to address the said issue (cause of action) in the cause of hearing, and the said issue was left to the trial court for determination then the appellant's complaint in that regard is baseless.

In the upshot this court find no merits in this appeal and it is hereby dismissed with costs and the decision in Civil Case No.09 of 2021 before Resident Magistrate Court of Kagera at Bukoba is hereby upheld.

It is so ordered.




A.Y. Mwenda
Judge
24.02.2023

This judgment is delivered in chamber under the seal of this court in the presence of the appellant and in the presence of Mr. Geoffrey learned counsel for respondent.




A.Y. Mwenda
Judge
24.02.2023