ISAAC CHAMANGIRA
versus
RICHARD TSABORA

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 9 February 2016 and 9 March 2017

Civil appeal

A. A. Debwe, for the appellant
A. A. Makore, for the respondent

CHITAKUNYE J. Mr *A A Makore* who appeared for the respondent indicated that he was no longer representing the respondent and that he had merely attended court out of courtesy and to advise court of his position. He also had not filed a formal notice of renunciation of agency. In any case even if he had hoped to represent the respondent, he was barred by virtue of not having filed heads of arguments in terms of the High Court Rules, 1971.

The appellant was sued by the respondent in the magistrates' court for damages arising from an assault allegedly perpetrated by the appellant and one Gabriel Sachiwo.
The respondent alleged that the appellant and Gabriel Sachiwo assaulted him on 9 October 2011. As a result of the assault he sustained serious injuries all over the body. He also suffered public humiliation, pain, and discomfort as a result of the assault.

The respondent's claim against the two defendants jointly and severally one paying the other to be absolved was for:

a) Payment of US$ 3 000.00 for medical expenses

b) US$2 000.00 for future medical expenses;

c) US$ 5 000.00 being the amount in respect of pain, suffering and discomfort.

The appellant denied the allegations as a result of which a contested trial was held.

From the evidence led it was common cause that the plaintiff was assaulted at the defendant's business premises. The appellant and his co-defendant were present at the scene of the assault. It is not disputed that as a result of the assault the plaintiff sustained injuries on his body including the left eye. After the assault the respondent was hospitalised and the extent of the injuries to his left eye was diagnosed.

It was common cause that criminal charges of assault were made against the appellant and two co-accused persons. One of the accused persons was acquitted whilst the appellant and Gabriel Sachiwo were convicted. Each was sentenced to $100 in default of payment 30 days imprisonment. In addition 6 months imprisonment wholly suspended for 5 years on conditions of good behaviour.

It is further common cause that the appellant did not appeal against the conviction and sentence. He opted to pay the fine and live with the wholly suspended prison term hanging over his head.

From the pleadings the trial court had to determine whether the defendants were liable for the injuries suffered by the respondent if so the quantum of damages to award.

At the conclusion of the trial, the trial magistrate granted the respondents claim in the sum of US$3 000.00 for pain and suffering and US$ 2 000.00 for future medical expenses. The trial magistrate found that there was insufficient evidence for the claim for medical expenses and so did not award any damages under that heading.

The appellant was dissatisfied with the judgment hence this appeal. He advanced the following grounds of appeal:

1) The learned magistrate erred in making a finding that the appellant participated in the assault in question.

2) The learned Magistrate erred in ignoring the fact that appellant was nursing an injury at the time and further that his co-defendant is the one who assaulted the respondent with a button stick

3) Whilst it is not disputed that appellant and his co-defendant were convicted of the offence of assault by the Criminal Court, the learned magistrate erred in placing too much emphasis on the appellant's failure to note an appeal against such conviction. It is submitted with respect that the learned magistrate ought to have appreciated the appellant's reasons for not appealing against the said conviction.

4) The learned magistrate also erred in the exercise of her discretion in awarding damages to respondent in the total sum of US$5 000.00.

The appellant's prayer was therefore for the respondent's claim to be dismissed with costs.

The grounds of appeal will be dealt with in seriatim.

1. The learned Magistrate erred in making a finding that appellant participated in the assault.

Under this ground the appellant argued that the evidence led did not establish that the appellant actually assaulted the respondent.

The evidence by the respondent was to the effect that as soon as he got into the defendant's premises the door was shut behind him. His cousin, C Mutero, confirmed as much when he said that he had to literally squeeze in as the door was being shut. Within that moment respondent testified to hearing appellant instructing his co-defendant Gabriel to 'hit these people' referring to him and his cousin. There and then Gabriel struck him on the eye with a button stick. C Mutero confirmed as much when he said at p 21 of the record that:

> "As soon as I got in I saw the plaintiff lying on the ground already assaulted by the 1st defendant who had a button stick. The 2nd defendant was also there and he had an injured arm. The defendants joined in assaulting the plaintiff. Later on police officers came…"

The appellant, as the second defendant was clearly observed by Mutero joining in the physical attack on the respondent who was already lying on the ground. According to respondent he fell onto the ground as a result of being struck on the left eye with a button stick at the instruction of the appellant. Under cross examination Gabriel admitted to assaulting the respondent and confirmed that the criminal conviction was not wrong (pp38 and 39 of the record). As for the appellant his response to a question under cross examination almost betrayed his total denial. The following exchange at p 41 is in point:

"Q. Did you assault the plaintiff?

A. No in her (sic) evidence they admitted I slapped them only.
Q. Plaintiff is claiming damages of $ 10 000.00?
A. I dispute that because the plaintiff admitted that I slapped him and the admission is mainly that his eye was injured and he cannot see well. The button stick is the one which caused the eye problem so it is not clear. …."

The above exchange gives the impression appellant was impliedly admitting to slapping the respondent, which he said respondent admitted, and not to causing the injury to the eye, which he said was caused by the button stick.

In the circumstances, the trial magistrate believed the respondent's version as more probable than the appellant's version. The appellant's version was an attempt to distance

himself from the occurrence when in fact he had been part and parcel of the occurrence and had also assaulted the respondent.

I did not find that the magistrate erred. She clearly had the benefit of seeing and hearing the witnesses testifying and was able to assess their credibility. The finding on this aspect did not appear to be out of *sinc* with the evidence adduced.

2. The learned magistrate erred in ignoring the fact that the appellant was nursing an injury at the time and further that his co-defendant is the one who assaulted the respondent with a button stick.

The learned trial magistrate did not ignore these aspects at all. The fact of the appellant having an arm in a sling was confirmed by the respondent and his witness. However that injury to the arm did not stop the appellant from participating in the assault by firstly instructing his co-defendant to beat these people with the button stick and from physically applying force on the respondent as the defendant lay on the ground. If the appellant is now conceding that his co-defendant is the one who struck respondent with the button stick then he is in *sinc* with respondent's version. The respondent clearly stated that the appellant instructed his co-defendant that 'hit these people they are the ones who used to mess around this place' and that co-defendant pounced on him with the button stick.

3. Whilst it is not disputed that appellant and co-defendant were convicted of the offence to assault by the Criminal Courts the learned magistrate erred in placing too much emphasis on the appellant's failure to note an appeal against such a conviction. It is submitted with respect that the learned magistrate ought to have appreciated appellant's reasons for not appealing against the said conviction.

The appellant's counsel argued that the trial magistrate incorrectly apprehended the nature of the respondent's onus thus coming to a decision which is not in accordance with the evidence especially in reference to s 31(3) of the Civil Evidence Act, [*Chapter 8:01*].

Section 31(3) of the Civil Evidence Act (*supra*) states that:

> "Where it is proved in any civil proceedings that a person has been convicted of a criminal offence, it shall be presumed, unless the contrary is shown:
>
> (a) That he did all the acts necessary to constitute the offence;
> (b) Where the offence is constituted by an omission to do anything, that he omitted to do that thing, as the case may be."

In *casu* it is common cause that the appellant and his co-defendant were convicted of the offence of assaulting the respondent, they did not appeal against that conviction. In terms of the above section' it shall be presumed, unless the contrary is shown that he did all the acts constituting the offence' of assault on the person of the respondent. It was thus upon the defendant to rebut that presumption.

In his evidence in chief the appellant was asked about the criminal conviction and this is what he said:

"Q. Confirm you were arraigned at the Criminal Court?

A. Yes and I was convicted but the magistrate at the criminal court stated that the plaintiff was assaulted but it is not clear as to who assaulted him.

Q. Did you assault the plaintiff?

A. No in her (*sic*) evidence they admitted I slapped them only."

The above exchange would tend to show doubts in the magistrate on convicting which in the ordinary situation would be a good ground for one to appeal against conviction. Having been given such a good ground for appealing, appellant did not appeal and at p 43 of the record of appeal his reason for not appealing is captured as follows:

"Q. Confirm you can appeal against a decision to protect your reputation?

A. There is loss I considered time wasted then I thought it was prudent."

Before this court counsel for the appellant submitted that the appellant explained that he considered it prudent as a businessman, to simply pay the fine of US$100.00 rather than to pursue the matter. This is the explanation counsel argued was adequate to rebut the presumption in s 31 (3) of the Act.

A careful examination of the sentence imposed shows that it was not just a fine of US100.00; there was an additional 6 months imprisonment. Though this was wholly suspended, it remained a sentence hanging over the appellant's head and any slipup would end in his imprisonment. As a person who had indicated in his evidence that he was concerned about his reputation he ought to have realised that the additional imprisonment term was part of his sentence and should be set aside if he was to protect his reputation.

In my view the magistrate did not place too much emphasis on the appellant's failure to appeal but merely fond that the appellant had not rebutted the presumption to an extent where one can say he did not do the acts in question. The appellant's explanation for not

appealing was not convincing at all if he indeed was innocent of the crime and had been wrongly convicted.

4. The learned Magistrate also erred in the exercise of her discretion in awarding damages to respondent in the total sum of US$5 000-00.

The damages awarded comprised US$2000.00 for future medical expenses and US$3 000.00 for pain and suffering.

It is a principle of our law that the trial court has a wide discretion in determining what it considers to be a fair and adequate compensation to the injured person. A court of appeal cannot interfere with such awards at the slightest of disagreement with an award.

In *Ministry of Defence & Another* v *Jackson* 1990 (2) ZLR 1(SC) at 7C-E GUBBAY CJ opined that:

> "The circumstances in which an appeal court will interfere with an award of general damages made by a trial court are well known. Such assessment is notoriously beset with difficulty, but it is established law that the trial court has a large discretion to award what it considers to be a fair and adequate compensation to the injured party. Thus an appeal court cannot simply substitute its own assessment for that of the trial court. it will only interfere with the exercise of the discretion if satisfied that there was a material misdirection, or that no sound basis exists for the award, or that the award is manifestly too great or too small—where there is a striking disparity between what the trial court awarded and what the appeal court considers ought to have been awarded."

In *casu*, it was upon the appellant to satisfy this court that from the evidence adduced in the court *a quo* the factors for this court's interference exist.

In attacking the magistrate's assessment of the awards appellant's counsel argued that no sufficient evidence was adduced from which the magistrate could have arrived at these figures.

The issue of assessment of damages is not an easy one. In *Aaron's Whale Rock Trust* v *Murray & Roberts Ltd and Anor* 1992 (1) SA 652 (C) at 655H-656F Berman had this to say:

> "Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork, what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as fair approximation of his mathematically unquantifiable loss. ….."

The evidence adduced, including medical affidavit, showed that the respondent

suffered the following injuries: multiple bruising on the back and backache, 2 lacerations on the back - 4cm in diameter, and injury to the left eye described as vitreous haemorrhage and macular haemorrhage. The most serious injury was on the left eye and this required an eye specialist.

It was in respect of these injuries that the damages were awarded.

The respondent testified on the injuries and how he continued to require treatment and reviews. Dr. Chinogurei also testified for the respondent. Dr. Chinogurei confirmed that he was the eye specialist who attended to the respondent. His evidence gave a graphic picture of the extent of the injury to the eye and the fact that it will require regular reviews. Such reviews would be at 6 months' intervals. The witness confirmed that the injury affected the respondent's vision such that he now has to wear spectacles and he will require a new set of spectacles every 2 years. Even with spectacles, it was his evidence that the respondent will need future examinations and may require to undergo further operations which cost about US$5 000.00. The witness further indicated that from his experience as an eye specialist, the sum of US$2000.00 claimed for future medical expense was an underestimation.

The evidence by Dr. Chinogurei cannot be wished away but must be accepted as coming from an expert who has been attending to the respondent. His evidence on the future reviews and possible operations cannot be discounted. In the light of the above it cannot be said that there was no sufficient evidence from which to assess future medical expenses.

The figure of US$2 000.00 that the trial magistrate awarded in this regard cannot be said to be too great taking into account the evidence adduced. I am thus of the view that the trial magistrate did not err in arriving at a figure of US$ 2 000.00 for future medical costs.

The next award was that of pain and suffering. In *The Law of Delict, PQ R Boberg* Vol.1 (1984) at p 516, the learned author, in commenting on pain and suffering opined that:

> "Compensation may be awarded not only for actual physical pain but also shock, discomfort and mental suffering, disfigurement, loss of amenities of life and disability; and loss of expectations of life. For convenience we speak simply of 'pain and suffering', but the concept embraces all these non-pecuniary misfortunes-past and future – of an injured person. Nor is the list a closed one."

In considering damages for pain and suffering one has to have regard to all the above aspects. In *casu*, from the time of the assault, to the agony the respondent went through, hospitalisation and the current state where he has to accept the fact of being visually impaired at his age. The respondent has to live the rest of his life with limited vision in the left eye. An eye as we all know is a sensitive part of the body and loss of vision can be very devastating.

In *Dzangare* v *Chivare & Anor* 1996 (1) ZLR 454 (H) at p 459 SMITH J quoted with approval the words of SQUIRES J in *Mabatapasi* v *John* HH 265/82 wherein the honourable judge said that:

> "Even at the meanest level and in the ordinary acts of each day, the limitations and inconvenience of single-eye vision suddenly imposed on a person who hitherto had enjoyed sight in both eyes, must be very noticeable, if not drastic. Whether it be the additional turning of the head to see properly on the blind side, or the extra burden of general awareness cast on someone who has lost the full range of vision afforded by two sound eyes, or the imperfect residual ability to judge distances, heights or depths, or the enhanced fear of anything ever happening to the remaining eye, the result is marked diminution in the quality of life."

Whilst *in casu,* the respondent did not completely lose the eye, that limited vision remaining is certainly a source of discomfort. The extra burden of requiring spectacles is something the respondent had not expected. The respondent's lived experience since the incident bear testimony to the above. Constant headaches and pain in the eye have become part of his life as a consequence of this assault.

In the circumstance I am of the view that the award of US$ 3 000.00 for pain and suffering cannot be said to be too great or so great as to warrant this court's interference.
For this court to interfere with the award it must be satisfied that the award is extravagant or unreasonable or violates some principle of law on the assessment of damages. In *casu*, I am not so satisfied. If anything, the court *a quo*'s assessment seems well supported by the evidence adduced.

I thus conclude that, all in all, the trial magistrate did not misdirect himself in any of the aspects alleged. The court's findings were consistent with the evidence adduced.
In the circumstances the appeal cannot succeed.

Accordingly, it is ordered that the appeal be and is hereby dismissed with costs.

NDEWERE J I concur …….

Debwe & Partners, appellant's legal practitioners.
Chinawa Law Chambers, respondent's legal practitioners