



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 2 OF 2015**

***(An appeal from the Judgment/Decree of Acting Resident Magistrate, Siakago in PMCC No. 72 of 2013 dated 29/12/2014)***

**BIBIAN NGAI KITHINJI.....APPELLANT**

**V E R S U S**

**KANINI CHEGE.....RESPONDENT**

**J U D G M E N T**

1. This appeal arises from the judgment of Ag. Senior Resident Magistrate in Siakago CMCC No. 72 of 2013. The appellant's claim was for general damages for assault, loss of business and for stock lost in her kiosk business.
2. The learned magistrate entered judgment in favour of the respondent for general damages for assault at Kshs.80,000/= and dismissed the other two prayers for lack of proof.
3. The appellant listed six grounds which can be condensed as follows:-
  - (1) The learned magistrate misdirected herself on the law and facts thus reaching an erroneous decision.
  - (2) That the magistrate erred in relying on evidence which was not tendered by the respondent.
  - (3) That the magistrate misdirected herself that the respondent had satisfied the burden of proof.
4. The appeal was by consent argued by way of written submissions. Messrs Mogusu & Co. advocates represented the appellant while Messrs Mutahi & Co. represented the respondent.
5. In her submissions, the appellant argued that there was no medical evidence produced by the respondent to prove that she suffered injuries. The court proceedings were also not produced to show that the appellant pleaded guilty to the assault charge and the alleged loss of blood.
6. The respondent submits that the appellant was charged and convicted on her own plea of guilty of the charge of assault and fined Sh.5,000/= in default one (1) year imprisonment. It was after conviction in the criminal case that the civil suit Siakago SRMCC No. 75 of 2013 was filed. The respondent cites part of the judgment arguing that the decision was properly arrived at and was not erroneous.
7. The duty of the 1<sup>st</sup> appellate court was explained in the case of *Jabane Vs Olenja [1986] KLR 661* as

follows:-

*“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular **Ephantus Mwangi - vs- Duncan Mwangi Wambugu [1982-88] 1 KAR 278** and **Mwanasokoni vs. Kenya Bus Services [1982-88] 1 KAR 870.**”*

8. It was the testimony of the respondent that the appellant assaulted her using a panga and cut her twice on the left side. Her hand was affected to the extent that the respondent could not perform any duty of selling vegetables. Due to loss of business, the respondent was forced to sell her property to pay her child's school fees. He respondent also testified that the appellant pleaded guilty to the charge of assault and having been fined Shs.5,000/=.

9. The appeal is grounded on the argument that the case was not proved especially due to lack of documents. The specific documents referred are the medical report and the proceedings of the Siakago Criminal case No. 735 of 2012.

10. I have perused the record of appeal and noted that the two documents are not included. However, the original file contains the full proceedings, of the criminal case and also the P.3 form. It was not explained why the appellant left out these documents which were part of the record and filed together with the plaint.

11. From the evidence of the plaintiff, she did not produce the criminal proceedings which included the P.3 form and treatment notes from Kiritiri Health Centre. However, she referred to them in her evidence that the appellant pleaded guilty to the criminal charge. The failure to produce the documents by the plaintiff in her evidence is not fatal to the case. Once the documents are annexed to the plaint and filed in court together with the other statements of evidence, those documents become part of the evidence of the party who filed them.

12. The appellant has not said that he was not served with the said document. It is therefore, not correct for the appellant to say that the criminal case proceedings and the P.3 were not produced.

13. As for the medical report, it was not necessary for it to be prepared and produced. The P.3 form and treatment notes are documents used by doctors to prepare medical reports. The production of these two documents are sufficient to prove that the plaintiff was assaulted at the material time and that she was thereafter treated.

14. The P.3 form and the treatment notes put together show that the plaintiff suffered two cuts on the right occipital region (head) and two other cuts on the right upper arm. According to the doctor, the cuts were caused by a sharp object which the doctor identified as a panga. This medical evidence sufficiently supports that of the respondent that she was cut with a panga and suffered injuries. The respondent had blood-stained clothes carried in a paper bag when she saw the doctor on 24/10/2012. The treatment notes are also dated 24/10/2012.

15. The magistrate relied on the P.3 form in her judgment to the effect that the respondent had bloody wounds and blood-stained clothes and concluded that the respondent “suffered harm and lost blood.” The magistrate correctly observed that it was irrelevant how much blood the respondent lost. What matters is the nature and extent of the injury. This was in response to the appellant's submissions that the respondent did not know how much blood she lost. The respondent was only required to prove that she was assaulted by the appellant and that she suffered harm.

16. The conviction of the appellant of the offence of assault added weight to the respondent's case. The burden of proof was sufficiently discharged in this case.

17. The appellant has not shown that the learned magistrate misdirected herself on he law and fact.
18. I reach a conclusion that the judgment of the learned magistrate was supported by cogent evidence. The respondent proved her case on the balance of probability.
19. I find that this appeal has no merit and it is hereby dismissed.
20. The appellant to meet the costs of this appeal and of the court below.
21. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Mosugu for the appellant**