



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 215 of 2003**

**MICHAEL NGIGI NJOROGE & ANOTHER..... APPELLANT**

**VERSUS**

**DAVID KIRUGI KINYUA..... RESPONDENT**

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

On 16/4/03 when the appellant challenged the Judgment of the Senior Resident Magistrate, Githunguri in Civil Case No. 162 of 1999, delivered on 19/3/03, he based his appeal on the following six grounds:-

- 1. The Lower Court erred in law and in fact in awarding the Respondent K.Shs.24,000/- when no injuries were proved.**
- 2. The Lower Court erred in law and fact in holding that the Respondent had been assaulted by the appellants.**
- 3. The learned Magistrate erred in law and in fact in classifying the assault as common assault.**
- 4. The Lower Court erred in law and in fact n failing to consider the evidence adduced by the appellants.**
- 5. The Learned Magistrate erred in entering judgment in favour of the Respondent when the Respondent had not proved unlawfulness or malice on the part of the appellants.**
- 6. The Lower Court erred in law and in fact n failing to consider the appellants' submissions that the Respondent had substantially contributed to the assault.**

Wherefore, the appellants pray that the Judgment of the Lower Court be set aside or varied, then costs of this appeal and at the lower court.

Having carefully read the pleadings herein, especially the plaint and the judgment of the lower court that is appealed against, there are clear technical discrepancies in that the facts disclose the tort of battery, while the plaint talks of assault. Ordinarily the two go together even through each tort can and does stand as separate tort.

Thus while battery is the intentional and direct application of force to another person, assault is an act of the defendant which causes the Plaintiff/Claimant reasonable apprehension of the infliction of a battery on him by the defendant. Thus the popular usage of the word assault to mean both is fallacious because

legally, assault is actionable per se – that is without any proof of damage. To the contrary, battery is only actionable upon proof of damage.

From the facts and the evidence before me, from the lower court's record, the plaint is based on assault while the details of what is alleged to have happened to the Respondent was clearly battery. Given the definition of battery, I agree with the appellant that even if the Respondent was beaten by the appellants, there is no evidence to prove that. The P3 which was used in the criminal case was apparently not produced in this civil case; and the medical report was based on hearsay given that the Doctor who purportedly prepared it based his report on a medical card which he did not prepare himself. In brief, Dr. Simiyu, who gave evidence on the Medical report and the injuries sustained by the Respondent, did not himself treat the Respondent.

It is thus sad that the physical injuries, if any, are not supported by the law to constitute proof of the alleged battery on the Respondent occasioned by the appellants herein.

It is not clear whether that explains the choice of assault as opposed to assault and battery or battery, given that battery could not technically have been proved by the Respondent in the absence of an acceptable medical Report.

Grounds of appeal numbers two and three are subsumed in what I have already said herein earlier. From the record, there was no evidence to support the claim for assault as known within the law of torts. The evidence would support a claim for battery, but that evidence is not supported by the requisite medical report.

I need to observe that under ground of appeal No. three, there is no tort known by the name **common assault**. The learned Magistrate seems to have been heavily swayed by the crime of common assault, under Section 250 of the Penal Code, Cap. 63 with which the Defendants/appellants had been charged and convicted in the Criminal Case No. 1302 of 1998.

Common assault is a criminal offence and the ingredients, apart from the standard of proof required, are different from the tort of assault, dealt with in this judgment, **supra**.

Ground of appeal No. five is subsumed in what I have said herein above. It is true that there was no evidence of malice in the case before me. Again, the learned Magistrate was clearly moved by the criminal aspects of the case, where the words unlawful constitute the crime with which the appellants had been charged and convicted.

However, there is sufficient evidence in the record before me, that the 1<sup>st</sup> appellant tore the Respondent's jacket. Whether that was malicious or unlawful is neither here nor there as a factual matter. The jacket was damaged. The issue of concern to me here is the basis for the value of the jacket. The value awarded to the Respondent for the jacket awarded to the Respondent for the jacket has to fall within special damages, which must be both pleaded and proved.

Whereas the Respondent might have attempted to plead the case for special damages, the same were not particularized and proved, as required before the court could award the same. It is not clear where the figure of K.Shs.800/- came from in the absence of a receipt to that effect when the jacket was bought.

I find no merit in the last ground of appeal. The issue raised there is one of contributory negligence which would have been in the evidence of the appellants. The issue is neither raised in the appellants' defences nor is there any evidence to show how the Respondent contributed to the battery. Accordingly, I reject that ground of appeal, even though the lower court had apportioned 20% liability on grounds of contributory negligence. It is not clear to me how that apportionment came about because the evidence, from the record is that the Respondent did not start the fight. He was walking out when the Appellants attacked him.

All in all therefore the appeal succeeds. The judgment of the lower court is set aside. The Respondent to

pay the costs of both this appeal and the court below.

DATED and delivered in Nairobi, this 15<sup>th</sup> Day of November, 2006.

O.K. MUTUNGI

**JUDGE**