



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

CIVIL APPEAL 638 OF 2000

R.V. PATELAPPELLANT

VERSUS

JOHN WILLICE OPOT RESPONDENT

JUDGMENT

The Appellant appeals against the decision of the Senior Principal Magistrate in P.M. 's C.C. No.6335 of 1998 delivered on the 22nd November, 2000.

The suit was filed by the Respondent as next friend to his daughter June, a minor. The allegation in the Plaintiff is that the Appellant entered the ladies changing room (to the swimming pool) in the Premier Club where the minor was lawfully present and was undressing seized the minor whilst naked and with great force ejected her out of the changing room as a result of which she suffered a bruise on her right arm and embarrassment and mental anguish.

The Appellant denied the allegations and alleged that the minor was at the relevant time a trespasser in the swimming pool.

The parties gave evidence. The minor stated that she went with her dad (The Plaintiff) to the Premier Club and went to the shower room and undressed. As she was naked a man came and grabbed her arm and shouted it is not a place for Africans. She resisted and banged the wall. He called a watchman and told him to get her out. He allowed her to dress and she dressed and went out.

The Appellant said on the day in question at around 6.30 a.m. he saw a couple walking towards the school area. He went to the pool at around 6.30 a.m. to check if any unauthorized persons were using the pool. He did not find anybody in the swimming pool. He called the watchman and told him to sit there and when he finds any member coming out of the pool to have his membership No. and name. He denied entering the ladies changing room and did not see the minor in the changing room. He did not forcibly grab her and push her out naked.

The facts were set out by the Learned Magistrate in her Judgment on substantially the same terms that I have set out. The Magistrate made a finding that the Plaintiff and the minor were not trespassers in the Premier Club. She also found that the Appellant had personally committed a tort against the minor.

Mr. Goswami for the Appellant attacked the Judgment of the Magistrate on 11 grounds as set out in the Memorandum of Appeal.

He pointed out a number of inconsistencies in the facts alleged and the evidence. In the plaint it referred to other friends being in the changing room whereas only the minor was there. He attacked the statement by the Magistrate in his Judgment by which she said: -

“The young minor testified that the defendant physically and personally grabbed her hand forcefully and dragged her out as she was naked as she was resisting”

This is not an accurate account of what the minor said as she stated the watchman allowed her to dress and she left when dressed.

The Magistrate found that the Appellant exercised his official duties by physically dragging the minor away as he uttered racist remarks.

She also found the Appellant acted in excess of his powers and personally caused the young minor to suffer physical injuries and Psychological stress.

Mr. Goswami also attacked the Magistrate’s finding as she did not hold that the onus was on the Appellant to take disciplinary action against the Respondent as provided for by the constitution of the Club and that she failed to recognize that the Respondent not having made any written complaint to the Club nor having recorded a statement to the police was intent to make a profit from the alleged incident.

The Learned Magistrate heard the witnesses and accepted the minor’s version of what happened.

The stories of the minor and the Appellant are diametrically opposed and it was correct for the Magistrate to prefer one to the other.

The fact that she was not correct in saying on the evidence that the Appellant dragged the minor naked from the changing room does not vitiate the Magistrate’s decision.

Having accepted the minor’s stories it is clear that she was assaulted by the Appellant in the changing room and suffered the bruise, which Dr. Indeche spoke of in his evidence.

I do not see that the Magistrate was wrong in finding that the assault upon the minor was a personal attack. I do not think it was a matter for the club committee. Indeed I am sure the club would not countenanced the Appellant in entering the ladies changing room and grabbing the minor by the arm.

In my view on the evidence as accepted by the Magistrate there was evidence of an assault, which occasioned physical injuries. It also not difficult to imagine the embarrassment and stress the young minor would have felt.

The Appellant does not attack the quantum of damages. In the result I do not find that the Magistrate misdirected herself in the matter and that the damages awarded are reasonable. I therefore dismiss this Appeal with costs to the Respondent. Dated and delivered at Nairobi this 20th day of July, 2005

P.J. RANSLEY

JUDGE