



**Gichovi v Kilem (Civil Appeal E020 of 2024)
[2024] KEHC 10859 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E020 OF 2024
LM NJUGUNA, J
SEPTEMBER 18, 2024**

BETWEEN

FLORENCE MURIGI GICHOVI APPELLANT

AND

ADAMS MWITI KILEM RESPONDENT

*(Appeal arising from the decision of Hon. Mercy Nkirote Kinyua
in Embu SCCC No. E007 of 2024 delivered on 29th February 2024)*

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 29th February 2024 seeking the following orders:
 - a. That the appeal be allowed;
 - b. That the ruling of the learned Magistrate be set aside and the suit be reinstated; and
 - c. That the costs of the appeal be borne by the respondent.
2. The appeal is premised on the grounds that:
 - a. The learned trial magistrate erred in law and fact by finding that the Small Claims Court lacks jurisdiction to hear and determine claims arising from personal injury claims contrary to the provisions of Section 12(1)(d) of the *Small Claims Court Act* 2016;
 - b. The learned trial magistrate erred in law and fact by relying on the obiter dictum in the case of *Ogwari v. Hersi (Civil Appeal 223 of 2022)* (2023) KEHC 20111 (KLR) (3rd July 2023) in striking out the suit; and



- c. The learned trial magistrate erred in law and fact by failing to exercise her discretion judiciously in failing to consider the totality of the submissions by the appellant.
3. Through a statement of claim dated 26th January 2024, the appellant sought for special damages of Kshs.5,990/=, compensation, costs of the claim and any other appropriate relief. The appellant stated that on 04th November 2023 along Embu-Meru Road at Mutunduri area, the claimant was a lawful pedestrian when the defendant's authorized driver, agent, servant and/or employee so negligently, carelessly and/or recklessly drove motor vehicle registration number KDK 924M that he lost control causing an accident thereby occasioning the appellant serious injuries.
 4. The respondent filed a response to the statement of claim and alluded negligence on the part of the appellant. The respondent also filed a preliminary objection challenging the jurisdiction of the small claims court to determine the claim and award general damages which cannot be quantified/ are damages at large. He cited section 12(1)(d) and section 24 of the *Small Claims Court Act* and the case of *Ogwari v. Hersi (Civil Appeal 223 of 2022)* (2023) KEHC 20111 (KLR) (3rd July 2023) where it was held that the small claims court is unsuited to handle personal injury claims.
 5. The parties submitted at the hearing of the preliminary objection. The appellant relied on the case of Samuel Kamau Macharia v Kenya Commercial Bank and others SCK Application *No 2 of 2011* [2012] eKLR and section 12(1) of the *Small Claims Court Act* and stated that the court has jurisdiction to determine the claim and that the damages sought for soft tissue injuries cannot exceed the court's limit. The respondent relied on the contents of the preliminary objection. The trial court found itself lacking jurisdiction and it struck out the suit for re-filing before the appropriate court, citing the case of *Ogwari v. Hersi (Civil Appeal 223 of 2022)* (2023) KEHC 20111 (KLR) and Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1.
 6. The court directed the parties to file written submissions but only the appellant complied.
 7. It was the appellant's submission that indeed, the question of jurisdiction ought to be brought at the earliest. She relied on the definition of jurisdiction according to Halsbury's Law of England (4 Ed. Vol. 9) and the views of the courts on the subject in the cases of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1, Samuel Kamau Macharia v Kenya Commercial Bank and others SCK Application *No 2 of 2011* [2012] eKLR and Speaker of the National Assembly v James Njenga Karume [1992] eKLR.
 8. That the cause of action arose from a negligence claim for compensation for personal injury and the same is provided for under Section 12 (1)(d) of the *Small Claims Court Act* hence the court has jurisdiction to hear and determine the suit. That it is upon the court to find the link between the respondent's negligence and the appellant's injuries through examining the evidence on a balance of probabilities. That according to Section 24 of the *Small Claims Court Act*, the amount of damages should be assessed by the court and it cannot therefore be predetermined in the pleadings.
 9. She stated that in the case of Mukhisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696, a preliminary objection should arise out of a matter of law that has been pleaded and which can be clearly implied out of the pleadings. Further reliance was placed on the case of Avtar Singh Bhamra & another Vs Oriental Commercial Bank (2004) eKLR. She faulted the trial court for relying on an obiter dictum and not the ratio decidendi of the court in the case of *Ogwari v. Hersi (Civil Appeal 223 of 2022)* [2023] KEHC 20111 (KLR). She stated that an obiter dictum is simply a persuasive judicial comment by a court but it is not precedential and this argument was supported by the Court of Appeal case of Kiriri Cotton Co. v. Ranchoddas K. Dewani (1958) E.A 239.



10. That the interpretation by the Court in *Ogwari v. Hersi (Civil Appeal 223 of 2022)* [2023] KEHC 20111 (KLR) that personal injury claims cannot be heard and determined by the Small Claims Court in tandem with Section 12 (1) (d) is aimed at undermining the Small Claims Court and more so Article 48 *the constitution* of Kenya 2010 which provides for access to justice for all persons. That personal injury claims of whatever nature were within the jurisdiction of the Court and not just injuries arising from assault. That unless and until such time as the *Small Claims Court Act* is amended, the jurisdiction of the said court shall continue to flow from Section 12(1) of the Act and *the Constitution*.
11. She urged that courts of equal status are not bound by each other's decision as was held in the Nigerian case of *Orji Uzor Kalu v. Federal Republic of Nigeria; Udeh Jones Udeogu and Slok Nigeria Limited* (2016) while relying on the case of *Uwazuruike v. Attorney General of the Federation* (2008) 10 NWLR (1096) 444 at 458-59. Further reliance was placed on the case of *In re Estate of Alfred Mutuku (Deceased)* [2020] EKLK wherein the same sentiments were stated. She urged the court to allow the appeal.
12. The issue for determination is whether the appeal has merit.
13. The respondent raised a preliminary objection challenging the jurisdiction of the Small Claims Court to determine a claim for personal injury. The court found in favour of the respondent and allowed the preliminary objection on the basis of the case of *Ogwari v. Hersi (Civil Appeal 223 of 2022)* [2023] KEHC 20111 (KLR) where the court limited jurisdiction of the court to determine personal injuries arising from assault. The trial court ordered that the suit be struck out and it be re-filed before the appropriate court.
14. The *Small Claims Court Act* was enacted for the purpose of providing jurisdiction and procedures for the court and for connected purposes. This court's jurisdiction has a limited pecuniary jurisdiction of upto one million shillings and a subject matter jurisdiction as provided under section 12 of the *Small Claims Court Act* as follows:
 - “(1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—
 - (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract.
 - (2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
 - (3) The pecuniary jurisdiction of the Court shall be limited to one million shillings.
 - (4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.”



15. Section 13 of the Act provides for matters in which the jurisdiction of the Small Claims Court is excluded. Establishment of the small claims court is directly in line with Article 48 of the constitution which provides:

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”
16. For a matter to be heard and determined by the Small Claims Court, it has to fit into the tenets provided under section 12(1) of the Small Claims Act. The appellant’s statement of claim is for compensation for personal injury and so it is rightly before this court. The respondent’s contention in the preliminary objection was that the damages sought through the claim were damages at large and that they were unquantified. In an appeal with a similar issue arising, the High Court in the case of Ogwari v. Hersi (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) guided the adjudicator. The court in that appeal held that the claim which lacked monetary value and particulars of negligence was not a small claim and it ordered that the suit be filed before the Chief Magistrate’s court.
17. In my view, the nature of personal injury claims in Small Claims Courts is that they ought to be determined from the evidence adduced and the adjudicator should assess the award. Thankfully, the Small Claims Court is not obligated to follow the rules of procedure strictly as provided by section 32 of the Small Claims Court Act. Even then, the evidence adduced, in whatever form, should be considered by the adjudicator in assessing damages. Section 17 of the Small Claims Act provides thus:

“Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice.”
18. This means that parties have equal rights to be heard before the adjudicator who should remain unbiased and therefore make a finding in the case. I do not associate myself with the arguments by the court in the case of Ogwari v. Hersi (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) where it reasoned that the personal injury claims only relate to assault. Further, the decision of the court in that matter is not binding to this court since both are courts of concurrent jurisdiction. Being a claim in negligence resulting in personal injury, the adjudicator has the jurisdiction to consider the evidence placed before her and assess compensation for the injuries. In the case of Irungu v Karanja (Civil Appeal E037 of 2024) [2024] KEHC 8162 (KLR), the court was faced with a similar appeal and it declined to be guided by the case of Ogwari v. Hersi (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR), being a court of concurrent jurisdiction as itself. The court found that the Small Claims Court bore the relevant jurisdiction under section 12(1)(d) of the Small Claims Court Act.
19. Moreover, section 12(1)(d) of the Small Claims Court Act does not distinguish the nature of the personal injuries that should be placed before the Small Claims Court. The assessment of damages is done in comparison with other similar (never exactly the same) decided cases and the court arriving at its award. This is why, as rightly submitted by the appellant, the amount of damages cannot be predetermined since it is based on the adduced evidence.
20. Though there is a concern that the adjudicator may overshoot his/her pecuniary jurisdiction if the awards in comparable cases go beyond one million shillings, the concern has several



remedies in the law, for instance, the adjudicator, can transfer the case to a Magistrate’s court. I say this while keeping in mind that the award of general damages is discretionary.

21. This position was discussed in the case of *Wambua v Kimondiu & 3 others (Miscellaneous Civil Application 087 of 2022)* [2022] KEHC 10426 (KLR) where when faced with similar circumstances as those herein, the court ordered that the trial court does consider the evidence adduced and make its determination. Should the award fall beyond the pecuniary jurisdiction of the Small Claims Court, thus outside its jurisdiction, the trial court should transfer the file to the Magistrate’s court. The court noted that such a suit needed not be withdrawn especially if the Small Claims Adjudicators also sits as a Magistrate with the relevant jurisdiction. The court stated:

“The second scenario do occur for example where a suit is filed for general damages which are in the discretion of the Court. However, in the course of trial the Court is of the view that the damages that ought to be awarded outstrip the Court’s jurisdiction. For example, the injuries sustained at the inception of the case may not appear to be very serious but later it may turn out that as a result of the action that gave rise to the matter, the injuries have given rise to the risk of degeneration of the plaintiff’s health further such as by developing epilepsy. In that event, it would be unjust for the Court to decline to transfer the matter to a Court with jurisdiction to make the appropriate award.”

22. All in all, it is my considered view that the trial court indeed bore the jurisdiction to determine the case as bestowed upon it by section 12(1)(d) of the *Small Claims Court Act*.
23. Therefore, I find that the appeal has merit and it is hereby allowed as prayed.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2024.

**L. NJUGUNA
JUDGE**

..... for the Appellant
..... for the Respondent

