

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS, CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E634 OF 2024
(Coram: Andayi W. F., J.)

JOYCE NDUKU KIOKO.....
APPELLANT

VERSUS

JUSTUS
KITENGU
RESPONDENT

(Being an appeal against the judgment and decree of Hon. D. S. Aswani Adjudicator and Resident Magistrate delivered on 18th April 2024 in Small Claims Court Claim No. E2129 of 2023)

JUDGMENT

1. This appeal by way of a memorandum dated 17th May 2024 arises from the judgment of the learned Adjudicator in the Small Claims Court (SCC) delivered on 18th April 2024 dismissing the claim dated 15th May 2023 by the appellant (claimant in the SCC) against the respondent (respondent in the SCC). This appeal seeks to challenge the trial court's judgment on both liability and assessment of quantum of damages.
2. The claim through the statement of claim dated 15th May 2023 was for general and special damages for personal injuries arising out of an alleged assault by the respondent upon the appellant on 19th March 2023 at Trekers Bar in Saika estate. It was the appellant's case through the claim, the witness statement dated 15th May 2023 and testimony in court on 30th August 2023 that while she was in company of a group of friends commonly known as "chama" members, the respondent with whom she had no relationship whatsoever and who was seated on a different table from hers at the bar, for no apparent reason hurled insults at her then approached

her table and slapped her twice. The appellant took off to save herself from further assault but the respondent pursued her outside the premises and slapped her more then kicked her twice on the left leg and left hip bone. The appellant was rescued by one Jackson Wambua and two others who held the respondent back from further assaulting her. The respondent then ran away from the scene.

3. As a result of the assault the appellant sustained injuries to her left leg and hip. She received treatment at Saika Nursing home where she was admitted overnight. She reported the incident at Obama police station on 21st March 2023 and was issued with a P3 form and recorded a statement together with her witness Jackson Wambua.
4. It was the appellant's case that she suffered public humiliation for being called a prostitute, a useless woman, "shetani" or devil and being told that she had gone to the premises for immoral purposes by the respondent. Her evidence was that she suffered injuries to her face, mouth, nose, left leg and left hip.. She thereby suffered loss and damage and sought compensation in the Small Claims Court against the respondent for general and special damages. She also said that the respondent had been charged with the offence of assault before the Makadara Law Courts and the case was pending hearing and determination. The appellant further relied upon several documents which she produced as exhibits to support her case.
5. In cross-examination the appellant said that she had been taking wine with her "chama" members and that she had never met the respondent before the date of the incident. She said that after the assault at the table, the respondent pronounced himself as Mheshimiwa Justus Kitengu.
6. She also reiterated that the respondent had been charged with a criminal case for the assault.

7. The respondent in his response date 21st June 2023, witness statement dated 21st June 2023 and testimony in court on 7th February 2024 denied the appellant's claim in *toto*. He said in cross-examination that he had been charged in Makadara Law Courts for assault but that the case was different from the civil case. He said that he did not know the position in the criminal case and that he had tasked his advocate to find out the position. He denied that he was aware that there was a warrant of arrest out for him. He said that he works for the County Government of Machakos and during the period 2017-2022 he was a Member of County Assembly (MCA).
8. The claim before the SCC proceeded by way of hearing where each party adopted his or her respective witness statement as evidence in chief, testified and was cross-examined.
9. Upon considering the evidence, the learned Adjudicator found that the appellant had not proved her claim on a balance of probability. She held that no police abstract was produced by the appellant which would have been evidence of a report of the incident. The learned Adjudicator did not indicate where she sourced the requirement that one must have a police abstract in order to confirm that she had been assaulted by someone else. I do not think there is any such legal requirement under the law and to that extent, that was an error of law.
10. The learned Adjudicator found that the no P3 form had been tendered in evidence alongside witness statements of the appellant and her witness Wambua who however did not testify. She then found that the appellant did not make available any witness from the issuing police station and neither did she call the doctor to produce the medical report whose production by the respondent was objected to and sustained by the court. Further that no warrant of arrest had been applied to issue against the doctor who had failed to

honour court summons to testify. She found that by failing to produce the medical documents by a licenced medical practitioner the appellant had failed to prove her claim against the respondent as regards her injuries as required under section 107(1) and (2) and section 112 of the Evidence Act (Cap. 80) Laws of Kenya.

11. The learned Adjudicator did not assess the damages that she would have awarded the respondent had the claim been successful. That was an error.
12. Dissatisfied with the learned Adjudicator's decision the appellant now appeals to this court on the following grounds of appeal as laid out in the memorandum:
 - a. The learned Magistrate erred in law and fact in failing to consider that the court is not bound by the strict rules of evidence.
 - b. The learned Magistrate misdirected herself by overlooking the documentary evidence brought by the appellant.
 - c. The learned Magistrate erred in law and in fact in not considering established precedent by relying on a police by failing to appreciate that the appellant discharged her burden of proof through her statement of claim, medical report and receipts of medical expenses.
 - d. The learned Magistrate erred in law and in fact by not putting any weight into the written testimonies of the witnesses for the appellant.
 - e. The learned Magistrate misdirected herself by failing to consider that the medical report and receipts of medical expenses were properly produced by the appellant as their authenticity was not in question.
 - f. The learned Magistrate erred in law and was biased against the appellant by failing to consider the appellant's witness statement.

- g. The learned Magistrate erred in law and was biased against the appellant who had no control over the doctor who completely refused to honour the court summons to attend and give evidence.
13. The appellant prays that the appeal be allowed with costs.
14. Despite service, the respondent did not respond to the appeal. The appeal was canvassed by way of written submissions filed by learned counsel for the appellant. The submissions are considered in the analysis that follows.
15. Learned counsel for the appellant collapsed the grounds of appeal into one, that is, whether the learned trial magistrate (sic) erred in law by failing to apply **Rule 5(3)** of the **Small Claims Court Rules**.
16. Learned counsel for the appellant submits that the learned Adjudicator was wrong in her application of **Rule 5(3)** of the **SCC Rules** which provides as follows:
- 5(3) A person claiming compensation for personal injuries pursuant to [section 12\(1\)\(d\)](#) of the Act shall attach to the Statement of Claim—**
- (a) a medical report from a licenced medical practitioner; and
- (b) any receipts in respect of medical expenses incurred on treatment.
17. Learned counsel submits that the following documents produced by the appellant fully satisfied the requirements of Rule 5(3): (a) a medical report from Saika Nursing Home dated 19th March 2023. (b) a receipt of payment for the medical services from Saika Nursing Home dated 19th March 2023. (c) a P3 form dated 21st March 2025 detailing the nature of injuries sustained by the appellant.
18. Learned counsel submits further that the learned Adjudicator misapprehended the law for holding that it was fatal to the appellant's case for the appellant's failure to call to testify the licensed medical officer who authored the appellant's

medical report, the failure to produce a police abstract and the failure to produce a witness Obama police station and also the failure to call the appellant's witness Jackson Wambua to testify because section 32 of the Small Claims Court Act and Rule 31 of the Small Claims Court Rules, both which provide that the Court shall not be bound by the strict rules of evidence. Learned counsel submits that this provision allows the Small Claims Court to admit and rely upon any relevant material, even if such material might otherwise be inadmissible under the strict provisions of the Evidence Act as applied in other courts.

19. He has cited the the cases of [Otieno v Mwea County Medical Centre Ltd & 2 others \[2023\] KEHC 22474 \(KLR\)](#), for the holding that proof of injuries can be proved by way of oral or documentary evidence and the absence of a doctor's evidence or medical report is not necessarily fatal to the plaintiff's case since the injuries sustained can be established through oral evidence of the victim.
20. I have considered the grounds of appeal raised in the memorandum of appeal, the record of appeal and the submissions by learned counsel for the appellant.
21. This court adopts the issue for determination to be that set out above by the appellant, that is whether the learned Adjudicator properly applied the law under the SCCA in her determination of the claim.
22. An appeal to this court from the SCC is on points of law only as provided for under **section 38** of the **SCC Act**.
23. In some paragraphs of the grounds of appeal laid out in the memorandum, the learned counsel for the appellant keeps adverting to the learned magistrate having "erred in law and in fact." Learned counsel would do well to refer to and be guided by the Court of Appeal's observation in the case of **Independent Electoral and Boundaries Commission &**

another v Stephen Mutinda Mule & 3 others [2014] eKLR that:

“Those points in an appeal of the kind before us, being from an election court’s decision, are further circumscribed by Section 85A of the Elections Act which limits appeals to the Court of Appeal to matters of law only. It is therefore quite strange and improper that each of the seventeen grounds, without exception, commences with a standard expression “the judge erred in fact and law” or “the learned Judge erred in law and in fact.” Clearly the drafters of the memorandum did not have the legal provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal.”

24. The Court of Appeal in M’Riungu v. Republic [1983] KLR 455, considering how to proceed to determine an appeal on points of law only, held thus:

“where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.

25. The appellate court may however justifiably interfere with the findings of fact by the trial court where it is demonstrated that there was no evidence at all upon which such findings were based or that the evidence relied upon was of such a nature that no reasonable tribunal, properly addressing its mind on it, could have made such findings as has been held in numerous decisions. (see for instance **Bashir**

Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR.

26. The principles are also captured in the case of **Ephantus Mwangi And Another vs. Duncan Mwangi Wambugu, [1982-88] 1 KAR 278)** and **Simon Muchemi Atako & Another vs. Gordon Osore [2013] eKLR** as follows:

- a) The trial Magistrate reached a finding that is not based on evidence /or is based on no evidence going by the record.
- b) The trial court misapprehended the evidence in some material respect.
- c) The trial court proceeded on wrong principles by taking into account some irrelevant factor or leaving out of account some relevant factor.
- d) The trial court failed to take account of a particular circumstance or probability material to an estimate of the evidence.
- e) The trial Magistrate's impression, based on the demeanour of a material witness, is inconsistent with the evidence in the case generally

27. Secondly, as submitted by learned counsel, **section 32 of the Small Claims Court Act** exempts the court's proceedings from the rigid application of the standards of evidence applicable in other court proceedings and permits the court to include as evidence any material that it deems credible or trustworthy. For its full purport and meaning the said section 32(1) and (2) of the SCCA provide as follows:

- (1) The Court shall not be bound wholly by the Rules of evidence.**
- (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other**

material is not admissible as evidence in any other Court under the law of evidence.

28. From this section, it follows that it is upon the Adjudicator to determine the material to rely upon and be satisfied that the same is credible and trustworthy. The simple question the learned Adjudicator ought to have asked herself was whether the recorded statement of Wambua and the medical report of the doctor who failed to testify were credible and trustworthy. This is a matter of law and so this court is entitled to consider it in this appeal.
29. There was evidence of a report of the incident to the police contrary to the learned Adjudicator's finding that there was no police abstract. A police abstract, though as referred to by the learned Adjudicator was not necessary to be produced by the appellant in her evidence.
30. Apart from the appellant's evidence, the respondent conceded that he had been arrested and charged for assault even as he claimed that it was for a different incident. He then said he was not even attending court in the criminal matter. Although the evidence of arrest and being charged for the criminal offence was not in itself sufficient to establish liability upon the respondent, it showed that the appellant was a consistent witness whose evidence could be relied upon. On the other hand, the fact that the respondent had absconded court was sufficient to point to him as an unreliable witness whose account of what happened on the material night, denying that he assaulted and hurled insults at the appellant, could not be believed.
31. Furthermore, the appellant's evidence was supported by the statement of Wambua to the police which was produced as evidence in court, the complainant's evidence of the police report which was also produced in evidence and the respondent's own evidence that he had been at the scene of the incident and witnessed what he alleged to be a scuffle in

the premises and that he had been charged for assault. The appellant clearly stated that Wambua was at the scene and intervened to rescue her from the assault by the respondent and also went with her to the police station and recorded a statement. His statement as recorded at the police station was available to the SCC as evidence. I am satisfied and find that, in spite of Wambua not being made available to testify, his recorded statement with the police was credible and trustworthy evidence that the learned Adjudicator ought to have taken into account in arriving at her decision.

32. On the application of **Rule 5(3)** of the **SCC Rules**, the learned Adjudicator misdirected herself by finding that the failure to call the doctor was fatal to the appellant's case. She seemed to have thought that a P3 form is not medical report. In fact, the proper name for a P3 form is medical report as indicated at the head of the form. Therefore, the production of the P3 form alone together with the treatment notes and receipts for payment at Saika medical Centre satisfied the requirement of **Rule 5(3)** of the **SCCR**. That must be taken to be the spirit of the SCCA which provides for simplicity of proceedings and cutting of costs. The injuries sustained by the appellant were not so complex as to require the services of a specialist medical practitioner to describe them in complex medical jargon and provide a prognosis of the future impact they would have on her life. That notwithstanding, the P3 form was sufficient under the provisions of the SCCA. In terms of assessment of evidence tendered before a SCC, it was not necessary to call the doctor who prepared the additional medical report of examination of the appellant. I therefore find that the medical evidence of the P3 form which was not contested was sufficient to prove that the appellant had indeed sustained the injuries.

33. It is apparent that the learned Adjudicator applied the strict rules of evidence such as the rule against hearsay on the

production of medical report and the calling of the respondent's witness to testify. It follows that she unjustifiably excluded otherwise material evidence that was on record and thus failed to take it into account. That evidence would have enabled her to come to a different finding on proof of the case by the appellant against the respondent.

34. Therefore, although the evaluation was brief, as it should be for a SCC, it was not crisp to correctly capture the case as presented by the parties. To that end, that was an error of law that calls for this court's intervention.
35. Arising from the above exposition of how the learned Adjudicator analyzed the evidence, I find the submission by the appellant that the SCC failed to give proper consideration to her evidence and thereby arrived at an erroneous conclusion that the claimant had not proved her case on a balance of probabilities, is not without merit. That calls for interference of those findings by this court. Consequently, the findings of the SCC on liability must be and are hereby set aside.
36. On the assessment of quantum of damages, I note that before the SCC the appellant proposed a sum of KShs 750,000/= as general damages but did not provide any authority to back up that submission.
37. I have considered the cited authorities and the injuries sustained by the appellant. It is a hallowed principle in assessment of general damages that similar injuries will attract similar awards. The time lapse from the decided case being used as a comparison is also a relevant factor to consider. In the case of [David Kiprugut & another v Peter Okebe Pango \[2007\] KECA 368 \(KLR\)](#) the Court of Appeal stated thus:

“...in the assessment of damages, the general method of approach should be that comparable injuries should

as far as possible be compensated by comparable awards keeping in mind the correct level of awards on similar cases.”

38. I have considered the injuries sustained by appellant as per the medical examination report also known as P3 form bearing the stamp of Mama Lucy Kibaki Hopsital, BuruBuru and signed by Dr. Brian which was produced in evidence without any objection. The report indicates the following injuries sustained by the appellant:

- a. Tender swelling left temporal area.
- b. Tenderness left lower limb.

39. I have considered the following authorities in the assessment of general damages herein.

- a. [Maseno University College v Elizabeth Kerubo Mokaya \[2021\] KEHC 6571 \(KLR\)](#). The respondent suffered a chest contusion; bruises on the right forearm and right leg including the right and left elbow; degloving injury on the left floor and dislocation of the left ankle. In his report, Dr. Morebu Peter Momanyi was of the opinion that the dislocation may lead to post traumatic arthritis and that the respondent may require to undergo surgery for the degloving injury so that skin grafting may be done. The High Court on appeal substituted the trial court award of KShs 600,000/= general damages for pain, suffering and loss of amenities which it found to be excessive with Kshs 200,000/=.

40. This authority, which involved far more serious injuries than those sustained by the appellant herein is relevant to demonstrate that the damages proposed by the appellant of KShs 700,000/= are excessive and cannot be awarded.

41. The other relevant authorities are:

- b. **Ndung’u Dennis v Ann Wangari Ndirangu & another (2018) eKLR** where the respondent suffered bruises on the neck, tenderness on the right leg, blunt injury to

the chest and both hands, back and chest pains. The trial court awarded KShs. 300,000/= which was reduced to KShs. 100,000/= on appeal.

c. **Kitale Hauliers Limited v Emmanuel Soita Simiyu** [2013] eKLR where the claimant suffered; painful shoulders, bruises on right forearm and left upper arms, bruises on the knee, painful back and the High Court awarded KShs. 200,000.

d. **John Wambua v Mathew Makau Mwololo & another** [2020] eKLR the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. He was treated as an outpatient and was put on painkillers. The trial court assessed general damages for pain and suffering in the sum of KShs. 120,000/- and this was affirmed by the High Court.

42. Doing the best I can in the circumstances and considering that the assault was deliberate and not accidental and made with a view to humiliate the appellant and persisted even after the appellant ran away from the respondent but he pursued her outside the premises, I find that a sum of KShs 150,000/= would be adequate compensation as general damages for pain, suffering and loss of amenities for the appellant.

43. On special damages, the appellant had pleaded for KShs 26,300/= as treatment expenses, KShs 1,000/= for the medical report. I have seen receipts that were produced as exhibits to support each of these items. I am satisfied that the same were specifically pleaded and strictly proved. I award the sum of KShs 27,300/= special damages.

44. The other damages sought by the appellant were in the nature of injured feelings. Courts have consistently held that there can really be no damages awarded for injured feelings as a head on its own (see generally the discussions in the cases of University of Nairobi v Mbutia

[\[1980\] KECA 38 \(KLR\)](#), [Postal Corporation of Kenya v Tanui](#) [\[2019\] KECA 489 \(KLR\)](#) and in the case of **Sonye vs Siaya Teachers Co-operative Savings and Credit Society & Another** [1999]2 E. A. 310 where the claim was made for wrongful termination as well as damages for defamation, but the Court of Appeal, relying on the English House of Lords decision in **Addis vs Gramophone Co. Ltd** [1907]1 AC 488, held that "*no damages for distress, mental anguish and injured feelings may be awarded*".

45. It appears that the same may be considered under such heads as defamation, breach of a fundamental right on against discrimination and wrongful dismissal of employment, among others but not on its own.
46. Under section 13(5) of the SCC Act, the SCC has no jurisdiction over these matters and therefore the court would not in any case have made any award for the same.
47. In the final analysis, I find the appeal has merit and it succeeds. The judgment and order of the learned Adjudicator is set aside in its entirety and substituted with a judgment allowing the appellant's claim against the respondent and damages assessed at KShs 177,300/= with interest and costs.
48. Interest on general damages will run from the date of judgment before the trial court while interest on special damages will run from the date of filing the suit before the trial court.
49. Orders accordingly.
Delivered, dated and signed on the Virtual Platform, Teams this 17th day of February 2026.

ANDAYI W. FRANCIS
JUDGE

In the presence of:

Anisa (Ms) for the Appellant.

N/A for the Respondent.

Ummu h/b for Amina: Court Assistant.

ANDAYI W. FRANCIS
JUDGE