**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 108 OF 2019**

**JOYCE OLWEYA ......................................................................APPELLANT**

**VERSUS**

**PAULINE AKINYI OJOO...............................................1ST RESPONDENT**

**TOM MBOYA OCHOLA ...............................................2ND RESPONDENT**

**JUDGMENT**

The appeal before me is in relation to the quantum of damages awarded by the trial court. The issue of liability had been resolved through a consent.

**1.** It is well settled that the first appellate court is obliged, to re-evaluate all the evidence on record. I will undertake that task, whilst bearing in mind that, unlike the learned trial magistrate, I did not have the benefit of seeing the witnesses when they were testifying.

**2.** However, I am also fully alive to the fact that in this case, the determination would be centred upon the consideration of the medical reports concerning the injuries sustained by the Plaintiff, coupled with an analysis of the authorities on the quantum of the compensation.

**3.** Ultimately, I will answer the question about whether or not the damages awarded by the trial court were inordinately high.

**4.** This court may only interfere with the award made by the trial court if it is persuaded that the said court had either failed to take into account a relevant factor or, in the alternative, had taken into account an irrelevant factor.

**5.** The Appellant has submitted that the trial court had ignored the cardinal principle which is applicable in the assessment of damages; and that is, that comparable injuries should be compensated by comparable awards.

**6.** The parties before me appreciate the principle, that the injured person is entitled to a fair compensation; and that in determining what is fair in the circumstances, the court ought to derive guidance from comparable awards made by other courts which handled cases where the injuries sustained were comparable to those in the case before it.

**7.** The Appellant submitted that the trial court fell into error, by failing to give due consideration to the authorities cited before it.

**8.** On the other hand, the 1st Respondent submitted that the trial court had given due consideration to the authorities cited by all the parties.

**9.** The Respondent submitted thus;

> ***"….. authorities submitted to court, to support a party's position in a case are of a persuasive nature to the court. The court can either agree with the cited decision wholly or partially or otherwise find that on the facts, it is not relevant or helpful to the court and thus choose not to follow it."***

**10.** The submission actually finds support from the following authority which was cited by the Appellant; **RAM GOPAL GUPTA Vs NAIROBI TEA PACKERS LTD & 2 OTHERS, CIVIL APPEAL NO. 65 OF 2006**. In that case, the Court of Appeal said;

> ***"A perusal of the judgement written by the trial Judge shows that although the learned Judge set out the cases referred to by counsel on either side, nonetheless, she did not make any comment on the cases at all; nor did she say whether they were relevant***

***to the matter before her; or even compare the injuries in the previous cases to the case before her. She did not distinguish them. All she satisfied herself with, was to state cases referred to and proceeded to make the award we have referred to without reference to any past decided case. We think that the learned Judge erred by failing to make reference to past decided cases and made an award without laying any basis for it. This was, with respect, an improper use of her discretion and this is a case where we must interfere with that wrong use of discretion and correct the error that the learned Judge made."***

**11.** In this case the learned trial magistrate summarized the authorities cited by the parties; she did so elaborately, in almost 4 pages of the Judgment.

**12.** Thereafter, the trial court concluded that the award which comparable was that of **BEN OTIENO OWAGA & 2 OTHERS Vs ELIAKIM OWALLA & ANOTHER (2017) eKLR**.

**13.** I find that the said *"analysis"* was perfunctory, and failed to bring out the reasons why that particular case was the only one considered to be comparable.

**14.** If the other cited authorities were distinguishable, the trial court should have made it clear why they were so considered.

**15.** By not commenting on the authorities, the trial court failed to demonstrate in a verifiable manner, that it had properly exercised its discretion.

**16.** Secondly, I find that even if the trial court had been right to conclude that it was the case of **BEN OTIENO OWAGA** that was comparable to this case, there was no verifiable justification for awarding Kshs 2.5 Million, whereas in the said comparable case, the award was of Kshs 1.5 Million.

**17.** The trial court attributed its decision to

> ***"the high rate of inflation……."***

**18.** That would imply that between 2017 when the case of **BEN OTIENO OWAGA** was determined, and 2019 when the trial court determined this case, the rate of inflation was almost 70%. However, the trial court did not lay out the particulars of the information that constituted the foundation for the decision that the rate of inflation was as high as implied.

**19.** I now revert to the evidence on record. The Plaintiff testified as **PW1**. She said that the following are the injuries she sustained in the accident which gave rise to this case;

***(i) Broken hip;***

***(ii) Cut at the back of right leg;***

***(iii) Fracture on the lower right side of the leg; and***

***(iv) Bruises on the knee.***

**20.** **PW2, PROF. WERE OKOMBO**, is a Physician. He testified that the Plaintiff suffered a fractured bone of the hip joint, which had not yet fully united, as at 29th May 2009 when he examined her.

**21.** He also found that the Plaintiff sustained a fracture of the ankle, which had united, but with malunion. As a consequence of the said malunion, there was a deformity of the ankle joint.

**22.** On 10th May 2019, the 2 Medical Reports by Dr. **JOHN OUMA ODONDI** and Dr. **ANDREW OTIENO** were adduced in evidence, by mutual consent of the parties.

**23.** Dr. Odondi's Report confirmed that the Plaintiff had suffered 2 fractures. The said fractures were at the right hip and at the right fibula.

**24.** Dr. Odondi noted that the Plaintiff's right leg had a shortening of 7 cm. He also noted that although the Plaintiff had undergone a total hip replacement, she was still unable to walk without crutches.

**25.** On his part, Dr. **OTIENO ANDREW** also noted the 2 fractures which the Plaintiff had suffered. He confirmed that the Plaintiff's right leg had been shortened.

**26.** In his assessment, the Plaintiff sustained a permanent disability of 25%.

**27.** Although the Plaintiff cited the case of **JAMES NJAU KARIUKI Vs MARY WAKWIBUBI & ANOTHER, HCCC NO. 2 OF 2005 (ELDORET)**, to support her claim, I find that in that case the injuries in that case were many more than those in this case. Indeed, the prognosis was that the Plaintiff in that case had suffered a permanent partial disability of 50%.

**28.** If that was the applicable yardstick, it would imply that in this case the compensation ought to be one-half of what was awarded in that case.

**29.** In the case of **JAMES KATUA PETER Vs SIMON MUTUA MUASYA, HCCC NO. 135 OF 2001**, the doctor assessed the disability at 70%. He had sustained 4 fractures, as follows;

***(i) Posterior fracture and dislocation of the left hip;***

***(ii) Fracture of acetabulum roof;***

***(iii) Comminuted fracture of the left tibia and fibula; and***

***(iv) Fracture of medial malleolus.***

**30.** As compensation for these injuries, the court awarded Kshs 2,000,000/=.

**31.** I find that the injuries sustained by the Plaintiff in that case were more in number, and with a much higher permanent disability compared to the case before me.

**32.** Accordingly, the trial court was right to have concluded that the authorities cited by the Plaintiff were inapplicable to this case.

**33.** I have also given due consideration to all the authorities cited by the Appellant, before the trial court. I find, just like the trial court, that the most comparable injuries are in the case of **BEN OTIENO OWAGA & 2 OTHERS Vs ELIAKIM OWALLA & ANOTHER, HCCC NO. 340 OF 2013**.

**34.** Therefore, the starting point is the sum of Kshs 1,500,000/= which was awarded to the 2nd Plaintiff in that case.

**35.** The said award was made on 6th October 2017, which was less than 2 years before the trial court herein delivered its judgment.

**36.** The Plaintiff did not make submissions that would persuade the court to factor into the award herein, any noteable rate of inflation. Accordingly, I find that an award of Kshs 1,700,000/= is a fair compensation for pain and suffering. Therefore, I set aside the award of Kshs 2,500,000/= and substitute it with an award of Kshs 1,700,000/=.

**37.** The said sum will attract interest at Court rates from 21st August 2019, when the trial court delivered its judgment.

**38.** As regards costs, I award the same to the Appellant. However, the costs of the suit shall still be paid by the Defendants, to the Plaintiff.

**DATED, SIGNED** and **DELIVERED** at **KISUMU** This **21st** day of **April** 2021

**FRED A. OCHIENG**

**JUDGE**