



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 78 OF 2019**

**BETWEEN**

**PAUL OMONDI OGUTU.....APPELLANT**

**AND**

**ZAINAB MBARUK SWALEH.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon. J.Wambilyanga (PM) in Kisumu CMCC NO. 250 of 2014 on 17<sup>th</sup> June, 2019)**

**JUDGMENT**

1. **ZAINAB MBARUK SWALEH (*Respondent*)** sued **PAUL OMONDI OGUTU (*Appellant*)** in the lower court claiming damages for injuries she suffered in an assault committed by the Respondent on 19.03.14.
2. The Appellant filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on 17<sup>th</sup> June, 2019, the learned trial Magistrate found the Respondent's claim proved, apportioned liability at 100% against the Appellant and awarded the Respondent general damages in the sum of Kshs. 170,000/.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 08th November, 2019 filed the Memorandum of Appeal dated 28th June, 2019 which set out 8 grounds of appeal which

I have summarized into 3 grounds to wit:

1. **The Respondent's case was not proved**
2. **Appellant's had been acquitted of the charge of assault**
3. **The award of damages was inordinately high**

**Analysis and Determination**

5. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.
6. This court has considered the parties' pleadings, evidence on record and the submissions and cited authorities and I have

deduced the following issues for determination:

**1) Whether Respondent proved that she was assaulted**

**2) Whether the awarded damages are excessive**

7. From the evidence tendered before the trial court, it is not disputed that the Appellant and the Respondent met on 19.03.14 and a commotion ensued after the Respondent threatened to disconnect water to the Appellant's premises for non-payment of bills. Respondent told court that she and Appellant were struggling over a camera and when it fell, she

stepped on it and Appellant stepped on her right leg injuring it and also caused injuries to her left small finger and chest. PW3 Daniel Omondi Otieno confirmed that he was present during the commotion and that the Respondent was injured on the right leg.

8. The treatment notes, P3 form and a report by Dr. Orina all confirmed the injuries as stated by the Respondent.

9. From the foregoing, I find that the trial court rightly found that the Respondent had been injured by the Appellant. I also find that the court rightly addressed itself non-production of medical reports were not in criminal case no. 148 of 2014 and the subsequent acquittal of the Appellant and arrived at the correct conclusion.

10. Concerning quantum, this court is aware that it has no jurisdiction

to interfere with the decision of the trial court unless it is shown that the court proceeded on the wrong principle of law and arrived at misconceived estimates. (See **Butt V Khan (1978) eKLR**).

11. The decision in **Karanja v Inter-Continental Hotel & another [1987] eKLR** cited by the Appellant is distinguishable from this case for the reason that there is no evidence that the Respondent was partly responsible for the damage he suffered.

12. There is no evidence that in assessing damages, the trial court proceeded on the wrong principle of law and arrived at misconceived estimates.

13. From the foregoing analysis, I am not persuaded that this appeal has merit. The same is disallowed with costs to the Respondent.

**DATED AT KISUMU ON THIS 23<sup>rd</sup> DAY OF *September* 2020**

**T.W. CHERERE**

**JUDGE**

**Court Assistants - Ms. Amondi/Ms. Okodoi**

**- Ms. Gimbaya for Bruce Odeny & Co. Advocates for Appellant**

**- Mr. Otieno Njoga for Ouma Njoga & Co. Advocates for Respondent**

**Order**

**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic.**