



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.24 OF 2016

BETWEEN

ALFRED JUMA OJWANG.....APPELLANT

AND

EVANS BUYENDE OTSIENO.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No.164 of 2015 by Hon.C. I Agutu- Resident Magistrate).

JUDGMENT

1. **Alfred Juma Ojwang**, the appellant herein, was the plaintiff in the Busia Chief Magistrate's Court Civil Case Number 164 of 2015 He had sued the respondent for a claim of Kshs.6,320/= special damages and for general damages for injuries he sustained as result of unlawful battery by the respondent.

2. After the hearing of the case the learned trial magistrate allowed special damages but declined to award general damages.

3. The appellant was aggrieved by the judgment which was delivered on 26th September 2016 and filed this appeal He was represented by the firm of Manwari & Company, Advocates In the Memorandum of Appeal, the appellant set out five grounds of appeals as follows: -

- a) The learned trial magistrate erred in not awarding general damages.
- b) The learned trial magistrate erred in law and in fact by ignoring the unchallenged evidence of the appellant.
- c) The learned trial magistrate erred in law and in fact by holding that the award of general damages was not available.
- d) The learned trial magistrate was wrong in basing her judgment on the cause of injuries instead of their nature.

4. The respondent was in person He did not respond to the appeal nor file any submissions.

5. This Court is the first appellate court I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor I will be guided by the pronouncements in the case of **Selle vs Associated Motor Boat Co Ltd [1965] E.A 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter

6. In Black's Law Dictionary 10th Edition, general damages is defined as follows:

Damages that the law presumes follow from the type of wrong complained of, compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved General damages do not need to be specifically claimed.

7. From the pleadings and the proceedings in Busia Chief Magistrate's Court Criminal Case No 530 of 2012 it was evident that the appellant suffered harm The respondent was the accused in the criminal trial He was convicted for the offence of assault causing actual bodily harm to the appellant.

8. The learned trial magistrate erred in holding that the appellant was not entitled to general damages She equally misdirected herself by basing her decision on the fact that the figures prayed for were inordinately high Whatever proposal parties make during submissions are

merely proposal meant to guide the court The court is not bound to award what has been suggested but cannot deny a party damages on this ground General damages are usually assessed by the trial court after factoring in the nature of injury suffered and other decisions on similar injuries In the instant case the denial of general damages had no legal basis.

9. In the trial court the appellant had made a proposal of Kshs 400,000/= as adequate compensation There was no counter proposal by the respondent.

10 The appellant sustained the following injuries as were captured in the P3 form that was produced:

- a) Deep cut wound on the left hand;
- b) A minor cut on the right hand; and
- c) Cut on the little finger.

These injuries were classified as harm I therefore agree with the trial court that a proposal of Kshs 400,00/= was inordinately high She however, ought to have given an award that would have adequately compensated the appellant I therefore set aside the judgment of the trial court on the issues of general damages and substitute it as hereunder indicated

11. After factoring all relevant facts, I am of the opinion that Kshs 30,000/= would be adequate compensation for pain and suffering from the injuries sustained This will be in addition of the special damages award by the trial court Costs of this appeal and in the lower court be borne by the respondent.

DELIVERED and SIGNED at BUSIA this 30th day of January, 2019

KIARIE WAWERU KIARIE

JUDGE