



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.14 OF 2017

BETWEEN

WILFRED OCHIENG ODUOR..... APPELLANT

AND

CELESTINE AKINYI AKUNDA.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No.504 of 2015 by Hon. J.N Maragia - Resident Magistrate).

JUDGMENT

1. **Wilfred Ochieng Oduor**, the appellant herein, was the defendant in the Busia Chief Magistrate's Court Civil Case Number 504 of 2015. He had been sued for a claim of Kshs.10,000/= special damages and for general damages for injuries the respondent sustained as result of injuries he inflicted on the respondent. The claim was that the injuries were unlawful and intentional.

2. In her judgment, the learned trial magistrate found the appellant liable and awarded Kshs.300,000/= general damages to the respondent. Special damages were not awarded.

3. The appellant was aggrieved by the judgment which was delivered on 12th September 2017 and filed this appeal. He was in person. the appellant raised seven grounds of appeals which I have summarized as follows: -

- a) The learned trial magistrate erred in law and in fact by entering a judgment without regard to the pleadings and the evidence.
- b) The learned trial magistrate erred in law and in fact by failing to find that the prosecution of the appellant was instituted without probable cause.
- c) The learned trial magistrate erred in law and in fact in awarding Kshs.300,000/= general damages.

4. The respondent was in person. She opposed the appeal.

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. At the time of hearing of this appeal, the appellant indicated that he only appealed against the sentence though he did not tell the court what the outcome was. This notwithstanding, it impliedly meant that he was satisfied with the conviction. Section 47A of the Evidence Act Cap. 80 Laws of Kenya provides:

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

Having failed to contest the conviction at the appeal, he is estopped from challenging the evidence adduced therein. The only issue I can interrogate at this stage is whether the award of Kshs.300,000/= general damages was excessive in the circumstances of this case.

7. The medical report prepared by Doctor Charles Andai had the following findings:

- a) She had permanently flexed 4 fingers of her right hand.
- b) She had a scar 4cm long between the index fingers and thumb.

His opinion and prognosis were expressed as follows:

This woman sustained serious soft tissue injuries during the assault i.e. a cut wound to the right hand which has healed with permanent deformity of the right-hand fingers.

This is about 20% permanent physical disablement.

8. The issue for determination is whether the award by the learned trial magistrate was inordinately high to warrant this court's interference. Though when awarding the general damages, the learned trial magistrate did not indicate what was her guide, I will attempt to find some guiding authorities. The Court of Appeal in **Ali vs. Nyambu t/a Sisera Store [1990] KLR 534** held that:

The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury; the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –vs- Lovell [1935] 1KB 354) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Collieries Ltd. [1941]AC 601.

In the case of **Spin Knit Limited vs. Johnstone Otara [2006] eKLR** where the respondent was awarded Kshs.300,000/= for injuries that left him unable to use his right hand. On appeal, Kimaru J, declined to reduce the award. In this case there were no fractures but the all the right fingers were permanently flexed. In the case of **Roto Moulders Ltd vs. Lawrence Maingi John [2008] eKLR** the respondent had sustained a cut injury of the left hand which included fracture of proximal phalanx, fracture of metacarpal of the middle finger, amputation of the small finger at mid proximal phalanx and fracture of the left radius. At the time of examination, the respondent still had pains in the fingers and was unable to grasp effectively with the hand. The right hand had numerous scars and there was a deformity of the middle finger which also had restriction in flexion movement. On Appeal, the High court sustained an award of Kshs. 270,000/=.

9. After considering the above-mentioned cases and the time that has elapsed since the decisions therein, I find no reason to interfere with the award by the trial court. The appeal is therefore dismissed with costs.

DELIVERED and SIGNED at BUSIA this 25th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE