



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 25 OF 2017**

**DAVID MOMANYI MATONDA.....APPELLANT**

**=VRS=**

**BAHARINI CONSULTANTS LTD.....-RESPONDENT**

**{Being an Appeal from the Judgement and Decree of Hon. N. Kahara – RM dated and delivered on the 28<sup>th</sup> day of September 2017 in the original Keroka Principal Magistrate’s Court Civil Case No. 146 of 2016}**

**JUDGEMENT**

This is an appeal against the quantum of general damages awarded to the appellant. The appellant contends that the award was so inordinately low as to warrant this court to interfere. The appeal was canvassed through written submissions.

The injuries sustained by the appellant and which were proved by a medical report by Dr. Ezekiel Ogando Zoga were: -

- (a) Deep stitched cut wound on the head.
- (b) Multiple fracture of the right 4<sup>th</sup>, 5<sup>th</sup> & 7<sup>th</sup> ribs.
- (c) Fracture of the left forearm.
- (d) Severe injury to the chest.

The trial court awarded the appellant Kshs. 300,000/= which his Advocate submits should be enhanced to Kshs. 1,500,000/=. Counsel for the appellant relied on two cases where he contends the plaintiffs were awarded higher damages for more or less similar injuries. The two cases are: -

- **Edward Mzamili Katana Vs. CMC Motors Group Ltd & Another [2006] eKLR – Kshs. 2,000,000/=.**
- **Hellen Atieno Oduor Vs. SS Mehta & Sons Ltd & Muthitu Nanua [2015] eKLR.**

The appeal is however vehemently opposed while conceding that the appellant sustained the injuries pleaded. Counsel for the respondent submitted that the award is not low at all and this court should not interfere. Counsel submitted that no permanent disability was envisaged on the part of the appellant and that the trial Magistrate based his assessment on a case where the plaintiff had sustained injuries much more severe than those of the appellant. Counsel put reliance on the following cases: -

- 1. Johnson Mose Nyaundi (Minor suing through next friend and father Wilfred Wadibe Nyaundi) Vs. Petroleum Industries Ltd [2014] eKLR.**
- 2. Mwavita Jonathan Vs. Silvia Onunga [2017] eKLR.**
- 3. Morris Miriti Vs. Nahashon Muriuki & Another [2018] eKLR.**

In determining this appeal, I am guided by two principles the first being that an appellate court should not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate of the damage or the same is based on some wrong principle or on a misapprehension of the evidence – **Butler Vs. Butler [1984] KLR 225 at 277, Bhatt Vs. Khan [1981] KLR 349.**

The second principle is that comparable injuries should attract comparable awards – **see Kiwanjani Hardware Ltd & Another Vs.**

**Nicholas Mule Mitinda [2008] eKLR.** When Dr. Zoga examined the appellant on 25<sup>th</sup> March 2016 {see Exhibit P. 8 (a)} he opined that the appellant sustained soft tissue injuries and fractures to the right 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> ribs, a fracture to the left forearm and that the soft tissue injuries would heal well under proper management but that the fractured areas would remain with generalized weak points and the appellant would require pain killers. Other than Dr. Zoga's report the appellant produced a document from the Pooslo Clinic (Exhibit P2) which states: -

*“..... Sustained multiple injuries chest.*

*There a simple # It forearm.*

*.....”*

The fracture to the forearm was therefore a simple fracture and indeed by the time Dr. VV Lodhia saw him on 9<sup>th</sup> February 2017 the injuries had healed well without any post injury functional deficit and there was no permanent disability. This is unlike in the cases of **Hellen Atieno Oduor Vs. SS Mehta & Sons Ltd & Muthitu Nanua (Supra)** and **Edward Mzamili Katana V. CMC Motors Group Ltd & Another (Supra)** where the plaintiffs were disabled by the injuries. It is my finding that for a simple fracture and other soft tissue injuries from which there was no disability the damages awarded were adequate. This appeal has no merit and it is dismissed with costs to the respondent. It is so ordered.

**Signed, dated and delivered in Nyamira this 13<sup>th</sup> day of June 2019.**

**E. N. MAINA**

**JUDGE**