



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.14 OF 2016**

**BETWEEN**

**MARY ADKINYI.....APPELLANT**

**AND**

**1. JARED OTIENO**

**2. DOROTHY ADHIAMBO.....RESPONDENTS**

*(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No. 464 of 2014 by Hon. H. Ndung'u-Chief Magistrate).*

**JUDGMENT**

1. The appellant herein, was the plaintiff in the Busia Chief Magistrate's Court Civil Case Number 464 of 2014. She had sued the respondents for special and general damages following a road traffic accident which involved motor vehicle KBH 841L Toyota matatu which lost control and injured her while walking along Busia-Kisumu road. The 2<sup>nd</sup> respondent was the registered owner of motor vehicle KBH 841L while the 1<sup>st</sup> respondent was the driver of the said motor vehicle at the time of the said accident. The parties entered a consent on liability at 70<sup>0</sup>/<sub>0</sub> against the respondents and 30<sup>0</sup>/<sub>0</sub> against the appellant.

2. In her judgment, the learned trial magistrate made an award as follows:

a) General damages for the injuries Kshs. 500,000/=

b) Special damages Kshs. 1500/=

The total award was therefore Kshs. 501,500/=. The appellant was aggrieved by the judgment which was delivered on 28<sup>th</sup> April 2016 and filed this appeal. The appellant was represented by the firm of Omondi & Company advocates. The appeal was on quantum of damages which was said to be inordinately low.

The respondents were represented by the firm of Makokha, Wattanga & Luyali Associates. They did not file any grounds in opposition of the appeal.

3. On 26<sup>th</sup> March 2019 this court gave directions that the appeal be disposed of by way of written submissions. It is only the appellant who filed submissions. The respondents' advocates did not attend court on 13<sup>th</sup> June 2019 when the matter was fixed for mention for further orders in spite of service of the notice upon them.

4. 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.

5. The only issue is whether the award was inordinately low. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. The Court of Appeal in **Ali vs. Nyambu t/a Sisera Store [1990] KLR 534** at page 538 quoted with approval the principles laid down by the Privy Council in **Nance vs. British Columbia Electric Railways Co. Ltd. [1951] AC 601** at page 613 where it 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.

6. The appellant herein suffered the following injuries:

- a) Blunt trauma to the chest which was tender;
- b) Both thighs and both knees were swollen and tender;
- c) She sustained a fracture of the right femur - distal third; and
- d) She sustained a fracture of the left femur – distal third.

At the time of treatment both legs were put on traction and later a POP (plaster of Paris) was applied.

7. In the case of **Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR** the appellant suffered the following injuries:

- a) Fracture of the right femur;
- b) Fracture of left femur;
- c) Fracture of the left scaphoid bones;
- d) Dislocation of the left lunate bone;
- e) Dislocation of the left elbow;
- f) A fracture of the radial head; and
- g) Bruises on the parietal scalp.

The appellant was on appeal awarded Kshs. 1,500,000/= for pain and suffering on 21<sup>st</sup> June 2013.

8. In the case of **Mwaura Muiruri vs. Suera Flowers limited & another [2014]** the plaintiff was awarded Kshs.1,450,000/= for pain and suffering on 28<sup>th</sup> February 2014 after sustaining the following injuries:

- a) Multiple lacerations on the face;
- b) Soft tissue injuries on the chest cage;
- c) Comminuted fractures of the right humerus upper and the lower thirds of the tibia;
- d) Compound double fractures of the right leg upper and lower third tibia fibula.

From the authorities I have cited and others that I was referred to with similar injuries suffered, I am persuaded to find that the learned trial magistrate erred in awarding a very low sum for pain and suffering. I therefore set aside the award of Kshs.500, 000/= for pain and suffering and substitute it with an award of Kshs.1, 000,000/=. The appeal therefore succeeds with costs.

**DELIVERED and SIGNED at BUSIA this 20<sup>th</sup> day of November, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**