REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Appeal 198 of 2003

ROSELYNE ACHIENG ATENGI..... APPELLANT

-VERSUS-

MARKO ODHIAMBO..... 1ST RESPONDENT

RAPHAEL OMOLLO..... 2ND RESPONDENT

(Appeal from the original conviction and sentence of Chief Magistrate's Court Kisumu delivered on 14th November 2003

IN

CMCC NO. 218 OF 1997

JUDGMENT

This is an appeal by the successful plaintiff against the quantum of damages awarded her for injuries she suffered at a road accident by the Chief Magistrate's Court Kisumu in CMCC No. 218 of 1997 in a judgment delivered on 14th November 2003.

As this appeal is only against the quantum of damages awarded by the trial Court, I intend to limit my examination of the case to the injuries allegedly sustained by the appellant as a result of a road accident and the comparable injuries suffered by the plaintiffs in the authorities cited by the parties. It is settled principle of law that in assessing damages for injuries suffered at a road accident, the learned Magistrate is exercising an unfettered judicial discretion. In examining the said injuries in this appeal I have to bear in mind the circumstances in which an appellate Court may upset the exercise of such unfettered

discretion of the trial Court. In the case of ***Mbogo & Ano versus- Shah [1968] EA 93 EA,*** Sir Charles Newbold stated those circumstances as follows:-

> *".... ..... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result, there has been misjutice ".*

In his submission, Mr. Onyiso for the appellant contended that the learned Magistrate had erred in awarding the appellant Kshs 100,000/= as general damages for theinjuries she had suffered. He added that as confirmed by the report of Dr. Mubisi Swaro, the appellant had suffered severe injuries which included 2 broken upper teeth, and epilepsy fits. He admitted that there were no fractures disclosed by the report. Relying on the ***Nairobi HCCC No. 71 of 1991 Abdallah Owino through Sainabu AchienA -vs- Patrick Oluoch Nanda & Ano.*** Mr Chebiy for the respondent contended that the learned Magistrate had been too generous to the appellant especially as she had not suffered any fractures.He added that there was no proof of the alleged epilepsy fits. It was a further contention of Mr Chebiy that this appeal is incompetent in that Order XLI rule IA of Civil Procedure Rules was not complied with in that there is no certified copy of the decree appealed from in the record.

As indicated above this appeal is only against the award of Kshs 100,000/= as general damages in favour of the appellant for the injuries she had suffered. It was incumbent upon the appellant to show any misdirection of the Magistrate in some matter which cause her to arrive at a wrong decision or whether it is manifest from the case as a whole that the Magistrate was clearly wrong in the exercise of her discretion. The claim that the appellant had become epileptic is not new and it cannot be said it caused misdirection of the Court. On this issue this appeal should fail.

It was also contended by Mr. Chebiy that the appeal is incompetent for a failure to comply with order XLI rule IA of Civil Procedure Rules. I have perused the record and I agree with him that there is no such document on record. This appeal is therefore incompetent and accordingly, it is struck out with costs.

Dated and delivered this 10th Day of November 2005.

B. K. TANUI

JUDGE

In the presence of; Ouma for Macharia for applicant

Siganga for Kiarie for respondent

B. K. TANUI

JUDGE

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