



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gadano General Trading Company Limited v Okol (Civil Appeal  
9 of 2023) [2024] KEHC 6579 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6579 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 9 OF 2023  
SM GITHINJI, J  
JUNE 6, 2024**

**BETWEEN**

**GADANO GENERAL TRADING COMPANY LIMITED ..... APPELLANT**

**AND**

**EVANS AIRO OKOL ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon N.Chepchirchir Adalo –SRM  
delivered at SPM’s Court at Mariakani in SPMCC No.E011 of 2022 on 24th January, 2023)*

**JUDGMENT**

1. By a Memorandum of Appeal dated 6<sup>th</sup> February 2023 the Appellant sought that judgment delivered in Mariakani Civil Suit No. E011 of 2022 by Hon. N.C. Adalo (SRM) on 24<sup>th</sup> January 2023, be set aside with costs. The Appellant raised the following grounds of appeal: -
  1. That the learned trial magistrate grossly misdirected herself in treating the evidence and submissions on general damages before her superficially and consequently coming to an erroneous conclusion on the same.
  2. That the learned trial magistrate misdirected herself in ignoring the principles applicable in awarding general damages and the relevant authorities on general damages cited in the written submissions presented and filed by Appellant.
  3. That the learned trial magistrate proceeded on wrong principles when assessing the general damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
  4. That the learned trial magistrate erred in awarding a sum in respect of general damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent’s claim.



5. That the learned trial magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on general damages and thereby arrived at a decision unsustainable in law.
2. A brief background of this appeal is that the Respondent instituted a suit before the Mariakani Chief Magistrate's Court against the Appellant. He filed a plaint dated 21<sup>st</sup> January 2022 seeking general and special damages for injuries sustained, costs for future medical expenses, loss of earning capacity and costs of the suit. His case is that at all material times, the Appellant was the registered owner of motor vehicle registration number KBK 401B ZD 7485 Mercedes Benz while the Respondent was a driver in motor vehicle registration number KCH 643A ZB 9861 earning a monthly sum of Kshs. 18,000/-.
3. That on the 25<sup>th</sup> November 2021 along Mombasa-Voi road at Manyani area, the Appellant's driver Mr. Dahir Adan so negligently managed, and or controlled the Appellant's vehicle causing it to hit the Respondent's vehicle which was parked off the road. As a result, the Respondent sustained physical injuries. The particulars of negligence were listed thereon, as well as particulars of injuries sustained and expected future medical expenses.
4. The Appellant entered appearance and filed a statement of defence dated 16<sup>th</sup> February 2022 wherein it denied ownership of the motor vehicle KBK 401B ZD 7485 and every other allegation in the plaint. The Defendant averred that if at all an accident occurred on the material date, it was caused or substantially contributed by the negligence of the Respondent. The Defendant pleaded and relied on the doctrine of *volenti non fit injuria*.
5. The suit was set down for hearing on 4<sup>th</sup> October 2022. The Respondent had three witnesses in support of his case. Corporal Lennox Juba (PW1) the investigating officer, testified that he was called to the scene on the material date. He drew a sketch plan of the scene and towed the motor vehicles to the police station for inspection. He narrated that the accident occurred when the Appellant's driver tried to overtake another motor vehicle. According to him, the driver of motor vehicle KBK 401B/ZD 7485 was to blame for the accident. He produced a copy of the police abstract and P3 form as PEXH-1 and 2 respectively.
6. Dr. Darius Wambua Kiema (PW2) produced the medical report as PEXH-3 and receipt of Kshs. 2,000/- for preparing the report as PEXH-4. He told the court on cross examination that he saw the Respondent on 14<sup>th</sup> January 2022, and that the fractures sustained would unite after some time. He added that an injury of the back would cause erectile dysfunction, and he related the Respondent's dysfunction to the accident.
7. The respondent testified as PW3. He adopted his written statement filed on 21<sup>st</sup> January 2022 as part of his evidence in chief. He equally produced his treatment notes and a copy of records as PEXH-5 and 6 respectively. He told the court that the accident caused a fracture in his limbs causing metal plates to be implanted. He stated that he also sustained a fracture to his spine causing him erectile dysfunction. He added that his monthly income was Kshs. 22,000/-.
8. On its part, the Appellant had one witness, Dr. Francis Waudu Siganga (DW1). He produced a medical report dated 15<sup>th</sup> March 2022 as DEXH-1. He told the court that he is a general practitioner at Optimum Care Services. He testified that when he saw the respondent 5 months' post-accident, he observed a broken right back injury and multiple soft injuries. That the respondent still had some pains on the back, erectile failure and implants on his leg. He added that the fracture had healed but with a deformity. That the respondent had a corset for his back. To DW1, the erectile dysfunction was not as a result of the back injury. He ascertained incapacity at 15% and added that the same will reduce with time.



9. On cross examination, DW1 told the court that there would be erectile dysfunction if the respondent had suffered neurological defects and that in this case, there was no connection between the erectile problems and the injuries. DW1 added on re-examination that with movement and physiotherapy, the respondent could improve.
10. At the conclusion of the hearing, the trial court found the Appellant 100% liable for the accident and awarded the Respondent damages as follows: -
  - i. General damages – Kshs. 1,200,000/-
  - ii. Special damages -Kshs. 50,250/-
  - iii. Future medical expenses – Kshs. 254,000/-
  - iv. Diminished earning capacity – Kshs. 700,000/-

The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

11. In the submissions filed on 18<sup>th</sup> August 2023, Mr. Tsofwa counsel for the Appellant relied on the case of Anthony Nyamwaya v Jackline Moraa Nyandemo [2022] eKLR to argue that the injuries sustained therein constitute 80% of the injuries sustained by the Respondent. In the said case, the court made an award of Kshs. 250,000/- as general damages. It was counsel's argument that an award of Kshs. 260,000/- would suffice in this case. He further relied on the case of C.A Stanley Maore v Geoffrey Mwenda [2004] eKLR; and Abdi Haji Gulleid v Auto Selection (K) Ltd & another [2015] eKLR and submitted that an award of Kshs. 400,000/- would suffice. In total, counsel submitted that an award of Kshs. 660,000/- should be given.
12. Further, counsel argued that the Respondent failed to prove his monthly salary which is a special damage that must be strictly pleaded and proved as was stated in the case of Cecilia W. Mwangi & another v Ruth W. Mwangi [1997] eKLR; Douglas Kalafa Ombeya v David Ngama [2013] eKLR.
13. Further relying on the cases of S.J v Francesco Di Nello & another [2015] eKLR, Fairley v John Thomson Ltd [1973] 2 Lloyd's Law Reports 40; and Beatrice Anyango Okoth v Rift Valley Railways (K) Limited & another [2018] eKLR, Mr. Tsofwa argued that the trial magistrate ignored the evidence tendered and authorities and proceeded to award Kshs. 2,500,000/- general damages and Kshs. 1,500,000/- for loss of earning capacity which translated to a double award.
14. It was counsel's submission that the magistrate failed to apply herself judicially and adequately evaluate the evidence on record thus failing to apportion liability on the Respondent. To counsel, the Respondent's failure to put up a road sign to warn other road users meant that he was equally negligent and the trial magistrate ought to have found that. Counsel relied on the case of Peter Ochieng & 2 others v Serfina Atieno Okwaro & another [2015] eKLR to buttress this point.

### **Respondent's Submissions**

15. In the submissions filed on 14<sup>th</sup> September 2023, Mr. Nyongesa counsel for the Respondent addresses grounds 1-4 of appeal jointly and cited the cases of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR where the court held inter alia that an appellate court will not disturb an award of damages unless it is so inordinately high or low so as to represent an erroneous estimate; and the case of Arrow Car Limited v Elijah Shamalla Bimomo & 2 others Civil Appeal No. 344 of 2001.



16. To Mr. Nyongesa, in the cases relied upon by the Appellant, the victims had less serious injuries compared to the Respondent herein who suffered two serious fractures with life changing consequences. Mr. Nyongesa added that the issue of loss of earning capacity was never raised at trial, as such, the Appellant could not raise it now on appeal. He argued that contrary to what Mr. Tsofwa submitted, loss of earning capacity was not similar to lost earnings, as the former was general damages and the latter special damages. Counsel urged the court to ignore the issue of liability as it was not raised in the memorandum of appeal.

### **Analysis and Determination**

17. As the first appellate court, I have a duty to re-evaluate, re-analyze and re-consider the evidence and draw my own conclusions, bearing in mind that I did not hear and see the witnesses testify. (See the Court of Appeal in *Gitobu Manyara & 2 others v Attorney General* [2016] eKLR). Therefore, having considered the evidence before the trial court, the memorandum of appeal, submissions and authorities presented by both parties, I find that the sole issue for determination is whether general damages awarded by the trial court were excessively high. This is because I have thoroughly considered the memorandum of appeal in which they have set out the grounds which only challenges the quantum of general damages as being excessive.

18. The injuries suffered by the respondent as shown by the medical report dated 14<sup>th</sup> January 2022 are as follows: -

1. Compression fracture 1<sup>st</sup> lumbar vertebra.
2. Right tibia plateau fracture with post traumatic arthritis/stiffness right knee.
3. Deep cut/laceration right elbow, right index finger.
4. Bruises and abrasions right shoulder, right hand and right leg.
5. Blunt object trauma soft tissue injuries to the right shoulder.

19. A second medical report dated 15<sup>th</sup> March 2022 was also produced which confirmed the injuries sustained by the respondent as set out in the first medical report dated 14<sup>th</sup> January 2022 but opined the expected permanent incapacity at 15% as opposed to the estimated 20% in the former report.

It is trite that awarding of general damages is at the discretion of the court. In the case of *Savana Saw Mills v George Mwale Mudomo* [2005] eKLR, the court stated as follows: -

“I must state from the outset that the award of general damages is a discretion of a trial court and an appellate court will be slow to interfere with such discretion unless the discretion is exercised on wrong principles of law.”

20. Similarly, in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete – Kisumu Civil Appeal No. 284 of 2001*, the Court of Appeal reiterated its earlier holding in the case of *Kemfro v Lubia* [1982 – 88] that: -

“It is trite that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out some relevant one)



or misapprehended the evidence and so arrived at a figure so inordinacy high or low as to represent an entirely erroneous estimate”.

21. It must also be understood that assessment of damages must be reflective of the prevailing inflationary trends and is not without limits because a court must be guided by precedents.
22. I have carefully considered the precedent cited to me by Mr. Tsofwa. In *Anthony Nyamwaya v Jackline Moraa Nyandemo* [supra] the injuries sustained therein were elaborately less serious than those sustained by the respondent herein. The respondent in that case suffered rugged cut wounds on the temporal region of the head, tenderness on the neck, anterior chest, lower back, shoulders and right hand, bruises on the right index finger and swelling and tenderness on both legs.
23. Mr. Tsofwa also relied on the case of *Abdi Haji Gulleid v Auto Selection (K) Ltd & another* [supra] where the injuries sustained were serious. The Plaintiff suffered grievous injuries to the spine, serious injuries to the upper limbs and wedge compression fracture of the back at L1. The court awarded Kshs. 750, 000 for pain and suffering and loss of amenities. I agree with counsel for the Appellant that the seriousness of the injuries in the Abdi case are comparable to those sustained by the Respondent herein. However, noting that the Abdi decision was in the year 2015, 8 years before the trial court’s decision in this matter, and considering the unimpressive prevailing inflationary trends, I find that the quantum arrived at by the trial court was proper.
24. The Appellant has failed to demonstrate how the learned trial magistrate in awarding a sum in respect of general damages relied on wrong principles or failed to adequately evaluate the evidence and exhibits on record. The outcome is that this appeal is unmerited, and it is hereby dismissed with costs.

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 6<sup>TH</sup> DAY OF JUNE, 2024.**

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**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Mr Tsofwa for the Appellant

Sabastian Nyongesa & Co. Advocates (absent). They be notified.

Mr Tsofwa;-I pray for 45 days.

Court; - 45 days of execution is granted.

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**6/6/2024**

