



Ganday General Trading & Transport Co. Ltd v Ataka & 2 others (Civil Appeal E047 of 2023) [2024] KEHC 7717 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E047 OF 2023
DO OGEMBO, J
JUNE 20, 2024**

BETWEEN
GANDAY GENERAL TRADING & TRANSPORT CO. LTD APPELLANT
AND
SANDRA ATAKA 1ST RESPONDENT
CAROLINE WANGARI MWANGI 2ND RESPONDENT
JOHN MWANGI 3RD RESPONDENT

*(Being an appeal from the Judgment of the Small Claims Court
at Kakamega by Hon. Sylvia A. Wayundi, adjudicator/Resident
Magistrate, delivered on 10/3/2023 in Kakamega SCCC No. E020/2023)*

JUDGMENT

1. The 1st Respondent herein, Sandra Ataka, sued the appellant and the 2nd and 3rd Respondents before the Small Claims Court in the above case seeking compensation, costs and special damages of Kshs7,790/=. The Defendants therein defended the suit. However in the judgment of the court delivered on 10/3/2023, the court entered judgment in favour of the plaintiff against the Respondents in the following terms:-

Liability.....100%

General Damages.....Kshs. 650,000/=

Special Damages.....Kshs 7,790/=

Total Kshs 657,790/=



2. The claimant was also awarded costs and interests of the suit. The appellant herein, has appealed against the said decision of the adjudicator. In the memorandum of appeal filed herein on 5/4/2023, the appellant has raised the following grounds of appeal:

1. That the learned adjudicator erred in law and in fact in finding the appellant liable for the accident in spite of lack of evidence thereon.
2. That the learned adjudicator analysis of the evidence is erroneous in law and fact.
3. That the learned adjudicator erred in law and in fact in awarding general damages of Kshs.650,000/= for pain and suffering and loss of amenities.

3. The appellant has prayed that this appeal be allowed with costs and that the decision of the learned magistrate on quantum be set aside. The first respondent has opposed this appeal.

4. As rightly submitted by the appellant, based on the authority in *Selly -vs- Associated Motr Boat Co. Ltd And Others* (1968) EA. 123, the jurisdiction of this court as a first appellate court is to re-consider and re-evaluate the evidence and to draw its own conclusions. It is therefore important that this court considers wholly the evidence that was tendered by the parties before the adjudicator.

5. From the record of the proceedings, it was the evidence of PW1, Sandra Ataka (1st respondent herein), that on 17/1/2023, she was a passenger in motor vehicle, a Molo Line, when the two motor vehicles KCH 107X and KCB317Z hit each other. That the vehicle she was in lost control and hit the other motor vehicle in a head on collision. In the process, she sustained two fractures on the left arm and also on the feet. Also soft tissue injuries on the back, and blunt trauma on the thigh. She confirmed that she was a fair paying passenger, but could not tell how the accident happened as she fell unconscious. She called no witness but relied on her exhibits including the discharge summary, treatment notes, xray report, the police abstract, P3 form, medical report and copy of record of the two motor vehicles.

The appellant did not call any witness.

6. This appeal has now been canvassed by way of written submissions. On the appellant's side, it was submitted that as a first appellate court, this court is enjoined to reconsider and re-evaluate the evidence before coming or drawing its conclusion. (*Selle & Ano. -vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123. That the plaintiff failed to prove the negligence on the part of the appellant as the police abstract is not conclusive proof.

7. On quantum, it was submitted that the sum awarded of Ksh650,000/= in general damages was excessive in view of the fact that the plaintiff was admitted only for one day. Based on *Gogni Rajope Construction Co. Ltd -vs- Francis Ojak Olewe* (2015) eKLR, it was proposed that a sum of Kshs300,000/= would be sufficient.

8. The Respondent, on the other hand, submitted that the 1st Respondent relied on the doctrine of ResIpsa Loquitur and that her evidence was not challenged by the appellant. That the 1st Respondent established a *prima facie* evidence of negligence against the appellant (*Nandwa -vs- Kenya Kazi Ltd* (1988) KLR 488. That the appellant has not shown that the adjudicator took into account on irrelevant factor or left out any relevant one.

9. And on quantum, it was submitted that the appellate court can only disturb an award of damages if it satisfied that it is either inordinately high or low to justify an inference that it represented an erroneous estimate of the damage suffered or that the trial court took into account irrelevant factors or omitted to take into account relevant ones or acted on wrong legal principles in arriving at the award (*Kemfro Africa Ltd T/a Meru Express Services -vs- Am Lubia & Another* (1987) KLR 27.



10. On quantum, counsel relied on the same decisions relied on before the trial court ie JTK -VS- Bonaya Godana (2021) eKLR in which damages of Kshs480,000/= were awarded and Njora Samwel -vs- Richard Nyangau Orechi (2018) eKLR, in which General Damages of Kshs.500,000/= was awarded. And that in view of the deformity of the 1st Respondent on the left thigh and right foot, the case of Christine Kong'ani Juma -vs- Flexpax INT LTD (2017) eKLR in which a sum of Ksh200,000/= was awarded is applicable. That the finding on quantum is not inordinately too low nor too high to warrant this court disturbing the same.

11. I have considered the evidence on record before the trial court and the submissions made by the two parties herein. It is worth noting that it is only 1st Respondent, acting as the plaintiff who gave evidence during trial. And her evidence was that she was a fare paying passenger in KCH 107X when the accident happened. Being a passenger, there is no possibility of the 1st Respondent responsible for the accident. Her evidence was that the motor vehicle lost control before having a head on collision with the other motor vehicle. The appellant did not rebut the evidence of the plaintiff, having called no witness. In the absence of any such rebuttal, it is the opinion of this court that it is safe to hold the appellant 100 % liable for the accident. In any case, the appellant in the memorandum of appeal only prays for orders against the quantum of damages awarded. On quantum of damages awardable, the 1st Respondent produced the relevant treatment notes, discharge summary and medical report detailing the injuries she suffered including fractures on the left radial head and 2nd right metatarsal permanent deformity on left thigh and right foot, bruises on her legs, soft tissue injuries on the back and limbs.

12. The parties herein have referred this court to related cases including:-

- i. Gogni Rajope Construction Co. Ltd -Vs- Francis Ojok Olewe (2015) eKLR, in which a sum of Ksh300,000/= was awarded as general damages for a fracture of the left distal ulna and radius, fracture and dislocation of left elbow joint and other soft tissue injuries.
- ii. Jtk -vs- Bonaya Godana (2021) eKLR, in which general damages were awarded of Ksh480,000/= in case of fractures of the toe and heel.
- iii. Njora Samwel -vs- Richard Nyangau Orechi (2018) eKLR, in which general damages of Kshs500,000/= was awarded for a closed fracture of the right 5th metatarsal.

13. The trial court in making the award, relied on 2 other authorities:-

- a. Sammy Mugo Kinyanjui & Ano. -Vs- Kairo Thuo (2017) eKLR, in which a sum of Ksh600,000/= was awarded for fracture of right tibia, fracture of left tibia and fibula amongst other soft tissue injuries.
- b. Titus Mbaru Chege & Ano. -Vs- JKN & Another (2018) eKLR in which an award of Ksh500,000/= was made for fractures of the tibia and fibula on both legs, blunt injury on the forehead and other soft tissue injuries.

14. The case of Kemfro Africa Ltd T/a Meru Express Services & Ano. (1987) KLR cited by the 1st Respondent binds this case on what this court is to consider when to interfere with an award of the trial court. In the same, the court of appeal held:

It is trite law 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 award by the court below, simply because it would have awarded a different figure if it had tried the case at first instance. The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge..... it must



be satisfied either that the judge in assessing the damages took into account an irrelevant factor or left out a relevant one or that short of this, the amount is so inordinately low or inordinately high that it must be wholly erroneous estimate of damages.

15. I have considered the nature of the injuries suffered by the 1st Respondent, and the authorities form the courts in related cases and the awards therein. I have compared the same with the award of the trial court. I am convinced that the trial magistrate duly considered all relevant facts regarding this case. The award of Ksh650,000/= in general damages was similarly not inordinately high nor inordinately low compared to the authorities cited of the superior courts. This court therefore, has absolutely no reason to disturb the finding of the trial court.
16. I consequently therefore do not find any merit in this appeal. of the appellant filed herein on 5/4/2023. I dismiss the same with costs to the 1st Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE, 2024.

D. O. OGEMBO

JUDGE

20/6/2024

Court

Judgment read out in court (Virtually) in presence of Mr. Situma for 1st Respondent, and Mr. Njeri for Maina for Appellant.

Ms. Situma

We request that the decretal sum be released to the 1st Respondent.

Ms. Njeri

We ask for some time as our client is under administration.

Court

Decretal sum to be released to the 1st Respondent.

