



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 159 OF 2012

BENJAMIN MUELA KIMONO.....PLAINTIFF

VERSUS

1. DANIEL KIPKIRONG TARUS.....1ST DEFENDANT

2. DAVID KIBET RONO.....2ND DEFENDANT

JUDGMENT

1. This is one of four cases in a series where **HCCC No. 398/2012** was adopted as the lead file. Judgment in the lead file on liability is adopted, that the defendants jointly and severally are held wholly to blame for the accident that occurred on the 24th April 2011 where the plaintiff herein sustained serious injuries.

2. I now proceed to assess *quantum* damages.

The Plaintiff **Benjamin Muela Kimomo** testified in **HCCC NO 398 OF 2012** that he was the only survivor of the accident where his four colleagues died during the accident. After the accident he was taken to the Nakuru Provincial Hospital where he was admitted for four days and continued treatment as an out patient. He testified that his left leg was broken, his right leg injured and had back and head injuries. He said that he stayed out of work for 8 months and resumed his duties in January 2012. He stated that he had *in situ* metal plates/nails in the left leg that need to be removed at a cost. He was later examined by Dr. Limotia of the Nakuru Hospital Orthopaedic and Dental care who also treated him during his admission in the same hospital.

He produced the following documents in support of his claim:

- 1. The police abstract**
- 2. Pay slip for month of March 2011**
- 3. Bundle of receipts for medical expenses and consultations in the sum of Kshs.202,300/=.**

In his list of documents filed together with the plaint on the 10th May 2012, the following documents in respect of the injuries were filed;

- 1. Medical report dated the 1st May 2011**

2. **P3 form dated 4th March 2011**
3. **Nakuru Orthopaedic and Dental Centre receipts**
6. **Nakuru War Memorial Hospital discharge summary dated 25th April 2011**
7. **Aga Khan University Hospital (Nairobi) receipts.**

The medical report by Dr. Litomia admitted by consent of both counsel on the hearing date.

3. I have considered the medical report. It shows that the plaintiff sustained a closed fracture of his right-femur. Surgery and open reduction and internal fixation by intramedullary locked nail were performed on the plaintiff's femur. It is noted that he had uneventful recovery and fracture united fully and patient ambulant without walking aids.

At the time of preparation of the report, the doctor noted that the surgical scar was visible but well healed, there was no deformity or shortening but nail was *in situ*.

4. He recommended temporal incapacitation for three months after which no disability was anticipated; only awaits removal of nail.

The court notes that the doctor did not give an estimate of cost of removal of the nails.

The plaintiff's advocate Mr. Kiania Njau has proposed general damages for pain and suffering in the sum of Ksh.600,000/= and relied on six cases all decided between 1984 and 1990, they are over twenty(20)years old. In the said cases the injuries are very close to injuries sustained by the plaintiff herein.

These are:

1. **Katanu Mutamba -vs- Hamisi Bakari & Another NBI HCCC No 1888 of 1984.**
2. **Stephen Njoroge -vs- Standard Bakers Ltd Nbi HCCC No 2567 of 1987**
3. **Patrick Muturi Kangundu -vs- David Mwanza Musilu NBI HCCC No 1204 of 1990 where a sum of Kshs.400,000/= for fracture of the femur in 1990.**
4. **Meshack Alan Olang -vs- Erick Goni NBI HCCC NO 2371 OF 1991.**

In all, a sum of Kshs.400,000/= was awarded to the plaintiffs for fracture of the thigh bone (femur) in 1990.

5. I have considered more recent authorities for similar injuries.

In the case **Nairobi HCCC No 817 of 1983 Mahinda Sembi -vs- Ag** the plaintiff had his thigh bone (femur) broken. He was awarded Kshs.500,000/= in 2000 for pain and suffering.

In **Barbara Fenwick -vs- Bernard Ngigi HCCC no 742 of 1997**, the court awarded a sum of Ksh.500,000/= also in 2000 for fracture of the femur.

In **Joseph Musee Mua -vs- Julius Mbogo Mugi & Others (2013) KLR** the court awarded Kshs.500,000/= for fracture of the femur.

While assessing damages, the court is minded that the same ought to be within the context of Kenyan economy and guidance ought to be drawn from precedent.

I shall therefore award to the plaintiff a sum of **Ksh.600,000/= being damages for pain and suffering.**

6. On **special damages a sum of Kshs.196,200/= medical bills** and **Kshs.6000/=** for medical report fees are pleaded.

I have looked at the various receipts issued in respect of the medical bills by various institutions. Payment receipts issued by Dr. Lutomia of Nakuru Orthopaedic Centre in the sum of Ksh.104,000/= have no revenue stamps affixed on them. Payment receipts by Aga Khan Hospital for Kshs.11,600/= too are not stamped; so is a receipt for Kshs.20,000/= from War Memorial Hospital. I have not seen a payment receipt in respect of medical report preparation for Ksh.6,000/= nor was it produced as an exhibit.

The defence did not object to the production and admission for the said bundle of receipts.

7. Under the **Stamp Duty Act, Chapter 480 Laws of Kenya** it is not specifically provided that payment receipts in respect of services rendered must be stamped. **Section 88 of the Act**, in my opinion, it is the duty of the receiver of monies who has a duty to affix revenue stamps, not the payee – who cannot be penalised for omissions of the receiver. I am guided by the cases **Benedetta Wanjiku Kimani -vs- Chanaw Cheboi & Another HCCC No 373 of 2008 and Irene Ngombo Mshingo -vs- Miriam Kadogo (2000)KLR** where the Learned Judges held that a document does not cease from being admissible for lack of affixation of a revenue stamp in the latter case the court proceeds to admit payment receipts issued from Kenyatta National Hospital without Revenue stamp being affixed thereon.

8. I am satisfied that the receipts for medical expenses are admissible as they also bear stamps of the doctors and medical institutions that issued them.

The result is that the sum of Ksh.196,200/= in respect of Medical expenses is allowed. There being no evidence of payment of Ksh.6000/= for the preparation fees of the medical report, it is disallowed.

9. Consequently, judgment is entered for the plaintiff against the defendants jointly and severally in the sum of **Ksh.600,000/= in general damages** for pain and suffering and **Kshs.196,000/= special damages**. Interest accrues on the award of special damages from the date of filing of the suit.

The plaintiff shall have costs of the case.

Dated, signed and delivered in open court this 12th day of November 2015

JANET MULWA

JUDGE