



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 578 OF 2010**

**GEOFFREY MWANIKI MWINZI.....PLAINTIFF**

**V E R S U S**

**1. IBERO (K) LIMITED**

**2. ALFRED KARIUKI.....DEFENDANTS**

**J U D G M E N T**

1. Following a road accident on 9<sup>th</sup> September, 2008 along **Ring Road, Pangani** in Nairobi in which he was injured, the Plaintiff filed this suit against the Defendants seeking general and special damages against them jointly and severally.

2. On 25<sup>th</sup> June, 2013 a consent order was recorded in the following terms -

"By consent,

a. Judgment on liability be entered in favour of the Plaintiff in the ratio of 80 to 20 per centum against the Defendants.

b. Part-judgment on quantum be entered in favour of the Plaintiff in the sum of KShs 66,160/00 arrived at as follows:

- i. Special damages.....KShs 2,700/00
- ii. Future medical expenses.....80,000/00

**Sub- total                      KShs 82,700/00**

**Less 20% contribution.....16,540/00**

**Total                              KShs 66,160/00**

c) Further consent to be recorded on quantum and costs or to be determined by the court as the case may be.

d) ....."

3.= The parties failed to agree on the rest of the heads of damages- for **pain, suffering and loss of**

**amenities and loss of future earnings.**

4. On 29th January 2014, the **Plaintiff's list and bundle of documents filed on 27th October 2011** and the **Defendant's list and bundle of documents filed on 26th January 2011** were by consent admitted in evidence without necessity of calling the makers of the documents. Those documents constituted the facts for assessment of the outstanding damages. There was no oral testimony.

5. The parties put in written submissions which I have considered, together with the cases cited.

6. There are two medical reports, one by **Dr Wokabi** (put in by the Plaintiff) and the other by **Dr R. P. Shah** (put in by the Defendants). They are both **consultant surgeons** in private practise in Nairobi.

7. **Dr. Wokabi's report, dated 22<sup>nd</sup> December 2008**, reveals that the Plaintiff sustained the following injuries -

- i. Extensive compound fractures of the left tibia and fibula and extensive damage to the soft tissues of the left leg.
- ii. Fractured left collarbone.

Treatment included initial internal fixation of the fracture with a metallic plate, and subsequent amputation of the left lower limb above the knee.

8. The Plaintiff's complaint to Dr. Wokabi at the time of examination was that he experiences pain on the stump; is not able to mobilise well with crutches; has difficulties using latrines; and pain over the left shoulder.

9. Dr. Wokabi's prognosis was that the Plaintiff's injuries were major. The fracture of the left collarbone was clinically united and the pain he felt over the left shoulder would decrease when he stops using crutches. The stump healed well and is well cushioned with soft tissue. Despite this, the loss of the leg at that level will confer major **permanent disability**, which he assessed at **55% of the total person**. The Plaintiff would also require an artificial limb at a cost of approximately KShs 80,000/00.

10. **Dr. R.P. Shah's report dated 23rd June 2009** noted that though the fracture of the collarbone was cited in the P3 form, there was no mention of such injury in the hospital discharge summary, and that even if he did sustain such fracture, there is no long-term disability. Apart from the difference of opinion on whether the Plaintiff sustained a collarbone fracture, his observation, prognosis and opinion to a great extent concurred with that of Dr. Wokabi. At the time he examined the Plaintiff he had been fitted with an artificial leg. In the end, he assessed the Plaintiff's permanent disability at **60% of the total person**.

### **Pain, Suffering and Loss of Amenities**

11. The totality of the evidence before court discloses that the major injury that the Plaintiff suffered was fracture of the left tibia and fibula. I also accept that he suffered a fracture of the collarbone. There was, attendant to the fractures in the left leg, a complication when the leg became gangrenous, which sent the Plaintiff to the operating table to have the leg amputated. The resultant stump, though it healed well, is however painful. The Plaintiff has to use an artificial limb.

12. It does appear that the Plaintiff will not require any dedicated further medical treatment, save for management of pain and discomfort. The prosthesis will require replacement on occasion.

13. The decisions cited by the learned counsel for the Plaintiff for pain, suffering and loss of amenities range between KShs. 1.5 million and 2 million. They were decided in 2005 and 2006. An award of KShs 5 million is proposed on account of inflation. On the other hand learned counsel for the Defendants cites two cases where awards range between KShs 800,000/00 and KShs. 900,000/00. They are both 2005 decisions. He recommends KShs 800,000/00 for pain, suffering and loss of amenities.

14. Injuries to different people can never be exactly the same or to the same extent. I note the Plaintiff's extended admission in hospital for 38 days and the pain he must have gone through during treatment. An award of **KShs 2,500,000/00** for pain, suffering and loss of amenities is reasonable subject to reduction by 20% contributory negligence. I will award that sum.

**Loss of Earning Capacity**

15. The loss of one lower limb may not necessarily lead to total incapacity to work. A person can lead a useful life with only one leg, depending of course on what their profession or trade might be. But there is no doubt in the present case that the Plaintiff lost a significant portion of his earning capacity on account of his permanent disability which was assessed by the two doctors at about 55-60%. The Plaintiff was a construction supervisor at the time of the accident. The job required walking around construction sites and walking into and up structures under construction. It is doubtful that he will ever be employed again in a similar job. I assess that he has lost about one-half of his earning capacity.

16. The Plaintiff's daily wage of KShs. 2,000/00 as illustrated by the letter dated 27<sup>th</sup> November 2009 by **Archidraw Associates** seems rather exaggerated for a construction supervisor in the year 2008. It translates to monthly wages of KShs 60,000/00. KShs 1,200/00 per day (KShs 36,000/00 per month) was more like it. But as the Plaintiff has a permanent disability of about 50% only of the total person, I will reduce this sum to KShs. 20,000/00 per month.

17. The Plaintiff was aged 47 years at the time of the accident. He would have been able to work for a number of years, all things being equal. But things are never equal. The vagaries and uncertainties of life must be taken into account.

18. The Plaintiff's advocate suggested a **multiplier** of 13 years. On the other hand, the Defendants' advocate urged a multiplier of 6 years. Given the prime age of the Plaintiff at the time of the accident, a multiplier of **9 years** would meet the ends of justice in this case.

19. The arithmetic for loss of earning capacity therefore works out as follows -

$$\text{KShs } 20,000/00 \times 12 \times 9 = \text{KShs } 2,160,000/00$$

20. In the event, I will enter judgment for the Plaintiff against the Defendants as follows (after deducting 20% agreed contributory negligence) –

- (i) Agreed quantum.....KShs 66,160/00
- (ii) Pain, suffering and loss of amenities.....2,000,000/00
- (ii) Loss of earning capacity.....1, 728,000/00

**Total                    KShs 3,794,160/00**

21. The general damages will carry interest at court rates from the date of judgment until payment in full while the specials will carry interest from the date of filing suit until payment in full. The Plaintiff will have costs of the suit and interest thereon at court rates.

22. There will be judgment accordingly.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS, 30<sup>TH</sup> DAY OF JULY 2014**

**H P G WAWERU**

**JUDGE**