



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1224 of 1999**

**GILBERT NICHOLAS OTIENO.....APPLICANT**

**VERSUS**

**OIL CROP DEVELOPMENT CO. LTD & ANOTHER.....RESPONDENT**

**JUDGEMENT NO. 1**

On 29/07/2008 both counsels recorded a consent along the following lines:-

- (1) By consent Judgement on liability be entered in favour of the plaintiff in the Ratio of 70% to 30% to 70% against the defendant and 30% against the plaintiff.
- (2) The following documents to be produced by consent
  - (i) treatment sheet from Kenyatta National Hospital as exhibit 3.
  - (ii) P 3 dated 12/3/1997 as exhibits.
  - (iii) Out patient card from provincial general hospital Nakuru exhibit 6 (a)
  - (iv) X-ray request form exhibit 6 (b)
  - (v) Radiological report from exhibit 7
  - (vi) Medical report by Dr. Mokabi dated 22/2/1998.

The court has this invited to assess damages on the basis of the evidence adduced PW1 was the sole witness and he narrated the injuries as follows:-

- He was hit on the right hand side and he became unconscious.
- When he regained consciousness he saw people do embarking from a minibus to help take him to hospital.
- He found himself squatting holding a metal bar and then next to a structure in Nakuru Provincial Hospital.
- The wife transferred him to Menengai Nursing Home where he was admitted for three days. Admitted on 26/10/1996 and discharged on 29/10/2006 exhibit 2.

- He was then transferred to Kenyatta National Hospital where he was admitted for 13 days and then discharged vide exhibit 3.
- He attended clinics for one year as shown by the clinic card exhibit 4 No. 54017/96.
- Current complaints:
- Pain subsist to date. He feel pain on the right bottom.
- Feels pain when he walks for a long time.
- He had injured his wrist. He inclined medical expenses as shown by exhibit 10,11.
- After effects
- He could not walk long distance and on such he had to be transferred to a nearby school.
- He reported to school on crutches and he stopped using crutches after one year.
- From crutches he used cane for one year.
- As at the time of trial he uses it occasionally. He walks with a limb.

Both counsels filed written submissions. Counsel for the plaintiff filed theirs dated 13<sup>th</sup> August 2008. the court was invited to note that the fracture through the socket of the right hip joint has a higher chance pre disposing him to the development of Osteo – arthritis change at a later date.

The plaintiff was only aged 27 years as at the time of the accident and as such the injuries sustained predisposes him to osteo arthritis at a very early age whose treatment is continuous and expensive and this may cost him early retirement.

The court was invited to give an award of Kshs 500,000.00 as general damages and Kshs 58,640.00 as special damages.

The court was referred to the case of **FRANCIS MUNANE KABIRA VERSUS CHARLES N WANG'OMBE AND PETER KIRAITHE MATHONGE NAIROBI HCC NO 1809 OF 1998** in which the plaintiff sustained fractures to the pelvis with resultant disruption and separation of the pubic bones and eventual injuries of the urethral penis. The patient need periodical urethral surgery to facilitate normal urination. The consequences were that the plaintiff had been rendered impotent to sane decree resulting in week and infrequent erection, caused by damage to both his pelvis nerves and the blood vessels to the penis due to the fracture. The Doctors opined that though partial the injuries as stated exposes him to urinary tract infections.

The court assessed Kshs 1,000.00 as special damages, general damages as Kshs 400,000.00 future medical expenses Kshs 600,000.00 special damages kshs 1,100/=

The case of **MAJOR ROSE KAVILI MUTYAMBAI VERSUS MAMASSEH CHEGE WALHARO NAIROBI HCC NO 2264 OF 1993** in which the first plaintiff sustained fracture of the superior and interior public Rami.

(ii) fracture dislocation of the left hip joint.

- Fracture of six ribs left side of the chest with lung confusion.
- Fracture of the left Patelia bone.

- Multiple laceration.

The 3<sup>rd</sup> plaintiff sustained.

- fracture dislocation of the head and right hummerous.
- Subluxation of right acromino – clavicular joint.
- Cut wounds and bruising around the face and chest. The court assessed general damages for pain suffering and loss of amenities Kshs 500,000.00 and special damages of Kshs 398,086/=
- For the 3<sup>rd</sup> plaintiff general damages for pain suffering and loss of amenities Kshs 300,000.00 and special damages Kshs 31,071.00.
- The case of **SIMON GITHAUGA WACHIRA VERSUS TIMOTHY NDIRANGU MWANGI NAIROBI HCC NO 723 OF 1998** where the plaintiff suffered blunt injury to the chest which caused a fracture of the 7<sup>th</sup> rib left side. Blunt injury to the abdomen.
- A fracture of pelvic bone which caused urethral injury. X-ray showed failures in four areas of the pubic rami, the fracture were treated conservatively by bed rest for six weeks and they healed satisfactorily. However due to urethral injury there was narrowing of the urethra (structure) in multiple sites causing in continuance of urine. An operation to insert a catheter in the bladder was done. He was discharged after 25 days with a catheter. The court assessed Kshs 800,000.00 for pain suffering and loss of amenities Kshs 100,000.00 loss of earning capacity Kshs 150,000.00 as costs of future operations. Special damages of kshs 45,139.00

The case of **RUTH LILIAN NYAWIRO OKOTH VERSUS PHILIP OLEGO ODENY NAIROBI HCC NO 1186 OF 1996** in which the plaintiff sustained a fracture of the right femur, right foot, fracture of right hip joint, fracture of pelvic bones. Had a late pain in the head and neck. She could not mover her head. The right it was injured and was painful. Right arm was numb. The bladder was ruptured and a lot of blood was passing out. She was discharged on crutches which she used till 1996 when she started using only one. She continued to visit the doctors to assess her progress. She also went for physiotherapy. She refractured the femur when she fell in the Bathroom.

The plaintiff was 27 years of age and secondary school teacher. She uses pain killers as she still experience severe headaches especially at the back. Cannot stand for long. The ankle swells most of the time. Cannot walk for long and when she sits for long and when she sits for long the hips pain. The court assessed Kshs 950,000.00 as general damages for pains suffering and loss of amenities, Kshs 296,000.00 as future medical expenses and special damages Kshs 644,010/=

The defence on the other hand also filed written submissions dated 29<sup>th</sup> day of September 2008 and filed on 6<sup>th</sup> October 2008. The court was invited to take not of the following as regards the evidence on record to note that the tow medical reports agree that the plaintiff suffered future of the right superior and inferior pubic ramus and right a cerebellum bruises on the chin right side of abdomen and right knee.

- Complaint of loss of libido could not have been as a result of the injuries sustained as opined by both doctors.
- Dr. Wakobi summarized the injuries as double fracture where as Dr. Malin says that the chance of post traumatic osteo arthritis setting in in the right hip joint are rather remote. On the basis of those injuries the defence suggested a figure of Kshs 250,000.00 and adequate

compensation.

The court was referred to the case of **CHRISTINE KANINI MUTHOKE VERSUS SIMON OKOTH OBOK AND ANOTHER NAIROBI HCC NO 3987 OF 1993** decided by J V. Juma on the 13<sup>th</sup> day of May 1997 in which the plaintiff sustained blunt injury to the chest and right wrist joint, fracture of the pelvic bone, blunt injury to the left lower jaw, blunt injury to the left knee. The court assessed Kshs 200,000 as general damages for pain suffering and loss of amenities and 100/= as specials.

The case of **PATRICK MUCHANGI NGOROI VERSUS DAVID GITAU AND ANOTHER NAIROBI HCC NO 950 OF 2002** decided by M.A.Ang'awa on the 27<sup>th</sup> day of April 2004 where the plaintiff aged 30 years at the time of the accident and sustained cut wound on the head and fracture of the left pelvis to both pubic rami. The court assessed Kshs 200,000.00 as general damages for pain and suffering and specials agreed at Kshs 28, 170.00.

The case of **SUSAN WANJIKU ISAAC VERSUS DANSON CHEGE KAMAU AND ANOTHER NAIROBI HCC NO 4353 OF 1989** decided by M.A Ang'awa on the 16<sup>th</sup> day of November 2005. The plaintiff sustained fracture of the right clavicle, fracture of the superior rami of the left side of the pelvis and soft tissue injuries. The court awarded Kshs 180, 000.00 as general damages. No specials were awarded.

Due consideration has been made by this court of the above words and the same considered in the light of principle guiding the making of an award of damages established by the Court of Appeal and as dutifully followed by the superior courts that this court has judicial notice of normally:

- (i) An award of damages is a matter of the courts discretion of the court seized of the matter.
- (ii) This discretion has to be exercised judicially and with a reason.
- (iii) The discretion to so award damages is unfettered with the only fetter being.
  - (a) The award should not be too inordinately high or too low.
  - (b) It should be commonurate to the injuries suffered.
  - (c) It is not meant to enrich the claimant but to restore him to the position in which he was before the injuries were suffered.
- (iv) Awards on past decisions are more guides and each case has to depend on its own merits and facts.
- (v) Where past awards are taken into account as guides, then the date when they were decided should be considered taking into account either the depreciating or appreciating value of the purchasing power of the Kenyan shilling as the case may be. The injuries to be compensated are those noted in the medical documents tendered by the plaintiffs. The P3 had the following injuries:-
  - Bruise at the right forehead and cheek borne.
  - Generalized bruises on the body.
  - Upper limbs were bruised generally and tender and worse at the right wrist.

- The pelvic areas were painful with loss of function of the lower limbs. X-ray showed several pelvic bone fractures.
- The X-ray report exhibit 7 notes that there is deformity of the right inferior pubic ramus most likely due to old fractures mild 0.9 right joint of pelvic bones are normal.

The earliest medical report exhibit 12 is dated 17<sup>th</sup> day of February 1998. After setting out the medical history, the Doctor made findings as follows:-

- gait is normal.
- No abnormality in the pelvis.
- No pelvis deformity
- Movement of the hip were within normal limits.
- X rays showed fractures of the right superior and inferior pubic rami.
- Fracture of the right pubic body
- Lower fracture of the joint of the right hip.
- The sacral liliac joint is essentially normal.

In the Doctors opinion:-

- (i) The plaintiff had been involved in an accident and he sustained injuries.
- (ii) The injuries sustained were mainly to the pelvic area normally.
  - fracture of the right inferior and superior pubic ramii.
  - Fracture of the socket of the hip.
  - Fracture of the pubic body.
  - Recovery of 2-3 years of the occurrence they are not known to be associated with long-term problems.
  - Although the victims complained that his sexual performance desire had decreased, the injuries sustained are not normally known to be associated with such complaints. To the doctor this was not as a direct result of the injury but purely psychological in the mistaken belief that sexually organs were damaged by the traumatic process.
  - The possibility of a future operation to correct the reproductive system was remote.
  - The fracture through the socket of the right hip joint has a higher chance of predisposing it to development of oste arthritis changes at a later date, which is a known complication of such an injury.
  - Never complained of head injury and as such memory damage did not arise and as such no problems with his mental faculties.

In conclusion the Doctor opined that the plaintiff is an individual who sustained double fractures of the pelvis. The injuries were of an ordinary nature and not associated with any

visceral damage. By natural outcome they are expected to heal completely. Long term he is not likely to suffer any severe complications as suggested in the other reports. However the possibility of him developing osteoarthritic changes on the right hip at a later date is likely. Sexual complication is not a known complication of the pelvic injuries. The prospective of future operative procedures are uncalled for in this case.

The next medical report is the dated 24/5/2005 by Dr. M.S.Malik after the medical history the Doctor noted the following:-

- The patient complained of occasional pain in the right hip area but did not complain about any loss of libido.
- There were no abnormalities in the neck, chest or abdomen.
- No cranial nerve paralysis.
- No lateralizing sign to suggest the presence of an intra-cranial space occupying lesion. The higher functions are quite normal. No visible scar on the chin.
- The bony contours of the pelvic bones and hip joints are normal. There is no tenderness to pressure over the iliac bones or the symphysis pubic. Both hip joints are fully mobile and free of pain. He walks without a limp.
- There are about 6 scars of superficial abrasions over the front of the joint. There is a full range of flexion and extension with normal muscle power. The medial and lateral collateral ligaments are intact as are cruciates there are no signs of damage to the cartilages in the joint.
- X rays show a segmental fracture of the right – anterior pubic ramus with displacement of the fragments. The superior ramus is also fractured. There is an undisplaced crack fracture of the right acetabulum. The hip joints are normal. The fractures are fully united. The right acetabulum looks quite normal. The fractures of the pubic rami are also fully united. The pelvic bony is of normal shape and size.

In the Doctor's opinion the plaintiff sustained fractures of his pelvic bones and bruises over the chin and right knee as a result of a traffic accident on 27/10/1996. A lot of his symptoms have since then improved dramatically or disappeared all together. He had a limping gait then but has a normal gait now.

- the stability of his pelvis has been restored totally. His pelvic bones are quite symmetrical and the weight bearing lines have not been altered. The bones are solidly united and his chances of breaking them again are almost the same as any other person with bones that have not broken in the past.
- Internal fixation of broken pelvic bones is rarely done as they usually heal well. Operative restoration of the fractures to anatomical shape may not be beneficial from a functional viewpoint. If this acetabular fracture had distorted the articular surface internal fixation would have been considered in order to restore the anatomical shape of the acetabular cap thereby minimizing the chances of post-traumatic osteo-arthritis of the hip. His acetabulum had an undisplaced crack fracture and it seems to have healed fully and in good position.
- No complaint about loss of libido, the physical exertion of the sexual act may have caused a fair amount of pain in the pelvic bones and thus a reduction in the libido which seems to have returned to normal.
- The suggestion that his reproductive organs and ducts may have been damaged and may require surgical repair is a rather fetched assumption as the patient did not sustain injury to

rupture bladder or urethra.

- The chance of post-traumatic osteo arthritis setting in, in the right hip joint are rather remote as his acetabular fracture was not displaced.

In the Doctors opinion the patient suffered total incapacity of a temporary nature for a period of twelve weeks followed by partial incapacity of a temporary nature for a further period of six weeks. He has suffered no permanent physical disability.

This court has given due consideration has been made by this court of the findings in the Doctors opinion on both reports. In the light of the plaintiffs own evidence on the record and makes a finding that indeed the plaintiff was injured in an accident that is subject of these proceedings. He suffered pain and injuries. There were minor bruises here and there over his body but these healed with no permanent disabilities. The major injuries were fractures around the pelvic which also healed with no permanent disabilities. With this finding in mind, the court proceeds to make an assessment of damages.

(i) on specials no receipts were produced but two medical reports were produced. Though the law requires that receipts be produced before any reimbursement can be made, the court takes judicial notice of the fact that medical reports are not for free they are paid for and so it will use its discretion to allow Kshs 2,000.00 under this head less 30%.

As for general damages the court considers the award suggested by the defence to be for law where as that suggested by the plaintiff is rather reasonable though slightly higher. This court has to take into account that it should not lose sight of the current weakened purchasing power of the Kenyan shilling and the galloping prevailing inflationary trends. Doing the best I can, I assess Kshs 1, 200,000.00 as general damages for pain suffering and loss of amenities Kshs 30%.

This court therefore enters judgement in favour of the plaintiff against the defendant jointly and severally on the following terms.

(1) Special damages of Kshs 2, 000.00 less 30% of Kshs 600.00 leaving balance of Kshs 1,400.00 with interest at court rates from the date of filing till payment in full.

(2) General damages for pains suffering and loss of amenities Kshs 1,200,000.000 less 30% of Kshs 360,000.00 leaving balance of Kshs 740,000.00 with interest at court rates from the date of judgement till payment in full.

(3) Costs of the suit less 30%.

**Dated, Read and delivered at Nairobi this 10<sup>th</sup> day of July 2009.**

**R.N.NAMBUYE**

**JUDGE**