



**KENNEDY OSEUR.....PLAINTIFF**

**Versus**

**MUSA LOCHO & ANOTHER.....1<sup>st</sup> DEFENDANT**

**COPY POINT LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff filed this suit praying for judgment against the Defendants jointly and severally for

**“(a) General damages inclusive of future medical treatment to be proved at trial;**

**(b) Special damages Kshs.710,521/=;**

**(c) Costs of this suit;**

**(d) Interest on (a), (b) and (c) above at the current Court’s rates of 14%;**

**(e) Any other relief that this Honourable court deems fit and just to grant.”**

The suit results from a motor traffic accident which took place on 13<sup>th</sup> September 1998 along Mashuuru Kajiado Road involving the Plaintiff’s Motor cycle Reg. No. G.K. 049 and the Defendant’s motor vehicle Reg. No. KAE 786 Y. The Plaintiff was riding the motor cycle and the 1<sup>st</sup> Defendant was driving the motor vehicle when a collision between the two occurred.

I am looking at the Plaintiff’s further Amended Plaintiff dated 4<sup>th</sup> June 2008 to which the Defendants responded by filing their Amended Defence dated 13<sup>th</sup> June 2008.

When this suit was for the first time listed before me for hearing, and that was on 20<sup>th</sup> May 2009, Mr. Mwaniki Gitau appearing for the Plaintiff while Mr. Mwangona appeared for the Defendants, a consent judgment on liability was entered for the Plaintiff against the Defendants jointly and severally in the ratio of 60% in favour of the Plaintiff and 40% in favour of the Defendants.

Hearing was to proceed for the assessment of damages where the Plaintiff’s doctor was to give evidence on the aspect of future medical treatment and the injuries suffered by the Plaintiff. The Defendant was to be at liberty to call his doctor to counter the evidence tendered by the Plaintiff’s doctor. The Plaintiff was also personally to give evidence as to the extent of injuries sustained in the accident.

The said hearing took place on 7<sup>th</sup> July 2009 and 24<sup>th</sup> September 2009 when the Defendant opted to tender no evidence as the hearing closed.

For the assessment of damages therefore, the court had the evidence of Doctor Victor Mugendi Kireti (PW 1) who produced his medical report which he produced as P Exh 1 and also produced P Exh 2 the

receipts he issued when he was being paid for the medical services rendered. He is an Orthopaedic Surgeon who treated the Plaintiff right from the beginning up to the end. After his evidence, the Plaintiff gave his evidence and briefly what they said can be stated as under:

The Plaintiff sustained severe compound fractures of the right tibia and fibula with extensive loss of skin muscles, bones tendons and nerves. The skin loss was from the mid-leg anteriorly and extending to the mid foot anteriorly. About 60% of the muscles of the anterior compartment of the leg were damaged and lost in the accident. He also suffered generalized body soft tissue injuries and bruises. He underwent several major operations to repair and reconstruct the limbs. The first operation involved removal of dead muscles and other tissues, stabilization of bones with external fixator. There was severe sepsis and the Plaintiff had to be taken to theater and repeat surgical debridement done several time.

According to Doctor Kireti, five more surgeries were done. He was admitted for further surgery on 25<sup>th</sup> January 1999 and discharged on 24<sup>th</sup> February 1999. He was again admitted on 26<sup>th</sup> April 1999 for further surgery. He was last examined on 14<sup>th</sup> April 2008 when he was found to have a very large scar about 30 cm square on account of skin graft with a 3 cm wound. Part of the plate inserted is still exposed. On the right thigh where the skin was harvested a 49 cm scar remains. The ankle is ankylosed at about 30% planter flexion and the leg shortened by 2 inches or approximately 5 cm. he walks with a limp. The toes cannot move and he has muscle loss.

According to the Doctor, the ankle needs to be leveled so that he can walk properly. He also requires 3 plastic surgeries with operations to remove skin from the tummy tube flaps and a further 4 operations to fuse the joint. In the Doctor's opinion, the sum total of the operations will be Kshs.1,300,000/=.

Even after the operations, the leg would regain approximately 70% of its pre-injury state. Other past costs being amount to Kshs.135,000/= paid and submitted as evidence.

The Plaintiff testified on 24<sup>th</sup> September 2009 and stated that he is a Public Health Officer in Kajiado District Hospital. His evidence collaborated most of what Doctor Kireti had testified save to add that he underwent pain and agony having to deal with infections of the whole leg and daily dressings for very many years. He also underwent multiple surgeries and is yet to undergo more operations. He stated that he misses the small bones of his ankle joint.

The functions of the joint are limited as the toes are also stiff. He uses ½ of his foot to walk and gets blisters and muscles pain. He is usually on pain killers. He cannot squat and use the Indian type toilet. He has to look for a toilet with a seat. He was field worker but cannot use a motor bike any longer. He testified that he has stagnated in the same position and lost about Kshs.80,000/= difference in salary compared to his colleagues who were in similar rank before the accident. Some have been promoted and salaries raised, moving from Job group J to K and even L while he remains in J. he is 42 years old. He says that the salary structure of job group K is Kshs.28,000/= while that of Job group L is Kshs.36,000/=.

The Plaintiff's Counsel cited the following authorities to support the Plaintiff's claim as can be seen from filed written submissions both counsel agreed to file:

**Sophia Achieng Tete vs Catholic Diocese of Kisumu H.C.C.C. No. 287 of 1997 Kisii (I.C.C. Wambilyangah Judge 11<sup>th</sup> June 2001)**

The Plaintiff sustained a cut on temporal parietal region, was unconscious at the time when she was admitted and she underwent craniotomy to the exclude bleeding into the brain, fracture of the femur with proximal fragment of the bone, central fracture of the acetabulum, comminuted fracture of the upper 1/3 of the left femur.

General damages for pain and suffering and loss of amenities of Kshs.1,300,000/= awarded.

**Timo Kalevi Jappinen and Another vs Texcal House Service Station Ltd. & Another H.C.C.C. No.**

**220 of 1997 Nairobi (J.V. Juma Judge in 1998)**

The Plaintiff aged 40 years suffered a posterior dislocation of the right hip joint with comminuted fractures of the posterior rim of the acetabulum, compound comminuted fractures in the lower third of the left tibia and fibula and bruises over the right side of the forehead. He was operated on, screws on the right hip joint were removed and bone grafting done. Also he had about five operations under general anesthesia and was not physiologically prepared for another operation as yet. He developed recurrent infection at the site of the compound fracture wound on the left leg.

He underwent further operations in Finland where the metal plates and screws on the left leg were removed. The fractured ends of the bones were cleaned and cancellous bone graft laid at the fracture sites to facilitate healing. The leg was immobilized in a plaster of paris post operatively which was removed 2 ½ months. He underwent physiotherapy. Despite this operation the fractures failed to unite. He returned to Kenya in June 1995.

He had problems with the sciatic nerve and developed angulation deformity at the fracture site on the lower leg. He returned to Finland for further operations of the hip joint for removal of the screws hip joint and bone grafting. His fractures on the tibia and fibula was stabilized by ilizarov frame. He underwent a further operation where the pins were repositioned due to infections at the previous sites.

General damages for pain and suffering and loss of amenities assessed at Kshs.1,750,000/=.

**Edward Mzamili Katana vs CMC Motors Group Ltd. And Another H.C.C.C. No. 70 of 1997 (D.K. Maraga Judge, 10<sup>th</sup> May 2006)**

The Plaintiff sustained head injury leading to concussion, cut wound and bruises at the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injuries with multiple fractures of the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> ribs and fracture of the left femur upper 1/3 shaft. He underwent an operation to remove the broken plates and screws, excision of fibrous tissues and re-grafting of the cancellous bone. The fracture of the femur had not united well and there was a chance it would turn to non-union. The Plaintiff refractured the same femur leading to the shortening of the leg by about 3 inches thus aggravating a simple fracture that had united well. The trial Judge however found that the Defendant were liable to the Plaintiff for damages as though the fall was also caused by the accident.

General damages for pain and suffering and loss of amenities assessed at Kshs.2,000,000/=

This court considers all the evidence before it, more particularly that it is now 12 years or so since this accident occurred, looks at the prospect of further pain and suffering on account of the anticipated operations, in a situation in which the Plaintiff returned to active employment a year after the accident.

In the circumstances, claim for payment for loss of future earnings or future expectations does not really arise or was not sufficiently proved especially since the supposition that the Plaintiff would have earned a promotion or has never been promoted is not supported and is left only speculative just as the present salary and salary scale of the plaintiff is.

On future medical expenses, I think better evidence than that given by Doctor Kireti (PW 1) should have been adduced. I will therefore reduce the sum of Kshs.1,300,000/= to Kshs.1,200,000/=

From the above therefore, my assessment is as follows:

General damages for pain and suffering Kshs.2,089,479/=

Future medical treatment Kshs.1,200,000/=

Special damages Kshs. 710,521/=

Total Kshs. 4,000,000/=

60% thereof  $\frac{4,000,000 \times 60}{100}$

100

=Kshs 2,400,000/=

Accordingly Defendants herein jointly and severally to pay the Plaintiff a total of Kshs.2,400,000/= plus costs of this suit and interest on the decretal sum at the current court rate until payment in full.

Dated this 30<sup>th</sup> day of October 2009.

**J.M. KHAMONI**

**JUDGE**

**Present:**

Mr. Mwaniki for the Plaintiff

Mr. Mwagona for the Defendant

Court Clerk: Kabiru