



**STEPHEN ONYANGO OGALO.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT**

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

The claim arose out of an accident that occurred on the 9<sup>th</sup> February 2001 between the Plaintiff who was then cycling along the Usenge/Bondo Road in Bondo town and Motor Vehicle Registration number GKL 711 being driven by Police Constable *George Musabi*.

In the plaint filed on the 20<sup>th</sup> of November 2001 the Plaintiff attributed negligence on the part of the said driver. The Defendant entered appearance on 21<sup>st</sup> January, 2002 and filed a defence on the 5<sup>th</sup> of April, 2002, admitting that the accident took place but denied the allegations of negligence attributed to the driver of GKL 711. On its part, the Defence stated that the accident was caused or contributed to by the Plaintiff's negligence.

At the hearing the Plaintiff gave evidence in support of his claim. The Plaintiff's counsel filed submissions on the 14<sup>th</sup> of July, 2009. The defence did adduce any evidence nor file any submissions. Apart from the statement of defence, the evidence of the Plaintiff remains uncontroverted. The evidence on record therefore, is what the Plaintiff put forth. In **EDWARD MARIGA vs. NATHANIEL DAVID SCHULTER & ANOTHER C.A. Case No. 23 of 1997**. The Court of Appeal stated as follows regarding pleadings on record.

**“The Respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the Appellant and his brother -----”**

**“----- the allegations in the defence is not evidence and remains so forever.”**

The Plaintiff gave an account of the accident as follows: That the accident occurred along Usenge/Bondo road at about 5 p.m., on the 9<sup>th</sup> of February 2001. He was cycling on the left side of the road when he saw a land rover coming from the opposite site, the side of Kisumu. The vehicle veered to his side and hit him, and as a result of the accident he sustained injuries and was rushed to Bondo hospital and thereafter to New Nyanza hospital. That after the accident, he was unconscious for a few hours. He stayed at the New Nyanza Hospital from the date of the accident to the 23<sup>rd</sup> of September, 2009 when he was discharged. He stayed home for 2 months; after which he was admitted at the National Spinal Injury Hospital, from 20th June, 2001, where he remained for 2 years.

The Plaintiff produced a medical report prepared by *Dr. Maurice Peter Siminyu*, a consultant Surgeon, dated 17<sup>th</sup> May, 2002 which outlined injuries received as follows:-

#### **Injuries sustained**

1. Fracture dislocation at T12, L1

2. Paraplegia with loss of sensation from L2
3. Loss of urine control
4. Loss of stool control
5. Loss of sexual function

At the time of examination the findings were that:-

- 1. He had residual scars at various places**
- 2. He had a residual kyphosis (Gibbus) at the fracture dislocation area at T12, L1 with mild tenderness**
- 3. He had flaccid paralysis of both lower limbs with occasional episodes of spasms and loss of muscle tone and bulk due to disuse.**
- 4. He had an indwelling catheter in situ, which is to assist in collecting urine into the urine bag due to the loss of urine control**
- 5. He had mild abdominal distention, due to a full gut. Had to use Laxatives and sometime manual evacuation of stool due to the stool incontinence.**
- 6. He could not assess sexual dis-function**

The doctor further found that the spinal injury had shattered the Plaintiff's hope in life due to the permanent loss which he listed down as:-

- 1. Inability to walk: and as such the Plaintiff would be confined to a wheelchair for life. The cost of one wheel chair was given as Ksh.60, 000/=. The doctor indicated the need to change the same from time to time. The doctor also pointed out that the Plaintiff would require a helper at cost of approximately Kshs.5, 000/= a month.**
- 2. Inability to control stool for life: – will cause the plaintiff frequently use drugs approximately Kshs.500/= weekly.**
- 3. Inability to control urine:- this will require frequent usage of catheter, uridom and urine bag at approximately Kshs.600/= a week.**
- 4. Inability to be sexually active.**
- 5. Psychological effects and**
- 6. Predisposed to recurrent chest, urinary tract and skin infection due to the nature of injuries sustained and would require constant medical check up and medication assessed at Kshs.2,000/= a month, and transport of about Kshs.3,000/= after every 3 months.**
- 7. Permanent disability was assessed at 100%**

Although, as earlier stated the defence merely made allegations of negligence, in my Judgment, however I will consider the fact that, as a road user the Plaintiff had a duty to be careful and vigilant while on the road and the fact that he had a duty of care to other road users. I will therefore a portion some degree of blame on him. Having stated as above I take note of the fact that the driver of the Motor Vehicle had a higher duty of care, as the motor vehicle was likely to cause serious or fatal injury, if not properly driven or controlled while on the road and I shall therefore a portion a high degree of blame on

the Motor vehicle driver. I accordingly apportion blame at 20/80 in favour of the Plaintiff.

In considering the issue of quantum I will consider the different heads as follows:-

### 1. General damages

In assessing quantum the Plaintiffs counsel has proposed the sum of **Kshs.2.5m** for injuries pain and suffering and she has relied on relative authorities namely:-

#### A. H.C.C.C. No. 3217 of 1997

**Nicodemus Owuor Ongondo Vs Chemlil Sugar Co. Ltd.** The court awarded **Kshs.2,000,000.00/=** for general damages.

#### B. H.C.C.C No. 1536 of 1996

**Zebed Kariuki Ireri vs Charles Ng'ang'a Wazima.** The court awarded **Kshs.2,500,000/=** for general damages.

#### C. H.C.C.C. No. 183 of 1999

**Magdalene Chebet Sigei vs. Joseph Njogu Mwaura.** The court awarded **Kshs.2, 000,000/=** for general damages.

#### D. H.C.C.C No. 60 of 2001

**Paul Mubia Mathu vs Ibrahim Kariuki Gichumu.** The court awarded **Kshs.1, 800,000/=** as general damages.

I find the assessment by the Plaintiff's counsel reasonable. Having taken inflationary factors into consideration I assess damages at **Kshs.2,500,000/=** 2. **Loss of Income**

The Plaintiff stated that he was a watchman and a farmer prior to the accident. No proof of either of the two occupations was given. The plaintiff state in evidence, that he has a wife and 6 children. It is obvious that he must have provided for his fairly large family. He at least made some money for their upkeep. He stated in evidence that he earned **Kshs.1, 500/=** although no evidence was given, the said amount is most reasonable and I therefore accept that as evidence of his income. The Plaintiff is 40 years and a Multiplier of 12 is proposed in calculating lost years. However I am of the view that a multiplier of 10 will be reasonable. I assess payment under this head as follows:-

**1,500 x 12 x 10= Kshs.180, 000/=**

### 3. Nursing care

From the Plaintiff's evidence and the medical report, the Plaintiff will definitely need assistance due to his 100% incapacity. The doctor recommended a sum of **Kshs.5, 000/=** as payment to an assistant, which I find more than reasonable especially in the rural area where the Plaintiff resides. I therefore assess the award under this head as follows:-

**5,000x12x10 = Kshs.600, 000/=.**

### 4. Cost wheelchair

The Plaintiff has to use a wheelchair for life. He proposes the sum of **Kshs.244, 000/=** as costs for such. I will reduce the same and award the sum of **Kshs.180, 000/=.**

## 5. Further Medical Expenses

It is clear that the Plaintiff will be required to use gadgets to assist with loss of urine control, medication and assistance from loss of stool control.

The Plaintiff has proposed **Kshs.345, 000/=** for expenses for the urine control using a multiplier of 12. As hereinabove indicated the court has used a multiplier of 10. Using 10 as a multiplier I award the sum at **Kshs.255, 000/=** The Plaintiff has proposed another sum of **Kshs.50, 000/=** for the evacuation of stool I find the same reasonable. I assess the total award under this heading at **Kshs.338, 000/=**.

## 6. Medical care and related expenses

The Plaintiff's counsel has proposed a flat figure of **Kshs.500, 000/=**, including the cost of special equipment. The court can only award what is pleaded and stated in evidence. The Plaintiff did not ask for any specialized equipment nor did the doctor allude to any. **Dr. Siminyu** only mentioned the need for constant medical care, at approximately **Kshs 2,000/=** he suggested quarterly medical check up. He also alluded to the cost of transport at

**Kshs 3,000/=**.

The cost of medical check up, quarterly would be approximately

**Kshs.8, 000/=** using a multiplier of 10 the total would be **Kshs.80, 000/=**.

Cost of transport – no proof of the same was adduced, however the doctor's proposal **Kshs.3, 000/=** appears fairly reasonable I therefore assess the same using the multiplier of **10** at **Kshs.12,000/=** a year. I therefore assess the sum as follows **12,000 x 10 – 120,000/=**. Making the award under this hearing as **Kshs.200, 000/=**.

## 7. Special damages

The receipts produced in court were for **Kshs.3, 860/=**. I will take this as special damages proved

Having considered the above, there will be judgment for the Plaintiff as against the Defendant in the following terms:-

I. General damages	<b>Kshs.2,500,000/=</b>
II. Loss of Income	<b>Kshs. 180,000/=</b>
III. Nursing care	<b>Kshs. 600,000/=</b>
IV. Cost of wheel chair	<b>Kshs. 180,000/=</b>
V. Further medical exp	<b>Kshs. 338,000/=</b>
VI. Future medical care	<b>Kshs. 200,000/=</b>
VII. Special damaged	<b>Kshs. 3,860/=</b>
<b>Grand Total</b>	<b>Kshs 4,001,860/=</b>

Less 20% Plaintiff's contribution **Kshs. 800,372/=**

**Total payable Kshs.3,201,488/=**

The Plaintiff is also awarded interest and costs of the suit.

Dated and delivered at Nairobi this 19<sup>th</sup> day of October, 2009.

**ALI-ARONI**

**JUDGE**