



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 120 OF 1987**

**MOSES NG'ANG'A ..... PLAINTIFF**

**VERSUS**

**STEPHEN CHUMO AND OTHERS ..... DEFENDANT**

**JUDGMENT**

This plaint was filed on 12<sup>th</sup> January, 1987. The file rounded back to my lap after six years due to non action by the Civil Division of the High Court during my transfers to other Divisions.

Be that as it may the plaintiff adduced evidence and the Defendants opted not to do so. The Defendants specifically denied the accident as pleaded and as per the law of evidence, the plaintiff was obligated to prove his case as alleged and particularly paragraphs 6 and 7 of the plaint which read:

6. On 31<sup>st</sup> day of July, 1995 the Plaintiff was lawfully riding a motor bike along Waiyaki way when he was struck and knocked down by a motor-car registration number KWF 633 driven by the 1<sup>st</sup> Defendant. The Plaintiff is forty one years of age.

7. The matters complained of were caused by the negligence and/or breach of statutory duty of the first Defendant.

It is alleged as obvious from his pleadings that he was riding a motor bike (without specifying its registration numbers) on 31<sup>st</sup> July, 1985. In the amended plaint the averment was that he was riding a motor bicycle.

The Defendants have traversed the allegation of occurrence of the accident and particulars of negligence and injuries.

Dr. George Kangu (Pw1) examined the plaintiff on 10<sup>th</sup> April, 2001 and as per his report, (P.EX 1) he had sustained:

1. Fracture of both bones of right hand - radius/ulnar
2. Fractured left 3<sup>rd</sup> rib

### 3. Multiple head bruises.

The p3 form signed by the police surgeon on 6<sup>th</sup> August, 1985 (P.EX4) does not mention the 2<sup>nd</sup> and 3<sup>rd</sup> injuries, except that it was mentioned therein that the plaintiff complained of chest pain.

The medical report consented to be placed on record from R. P. Shah, Consultant Surgeon dated 1<sup>st</sup> September, 1988 also does not give any prognosis on the Head injury or neck injury.

According to the medical report produced by the plaintiff, Dr. Kungu has opined 30 per cent permanent incapacity, which the Defendant's medical report suggests otherwise and has categorically stated that according to the plaintiff he started his normal work six weeks from the date of accident.

In his evidence, the plaintiff deposed that he was riding a bicycle along Waiyaki Way on 31<sup>st</sup> July, 1985 and was hit by a big truck, ten wheeled according to him, which he saw and counted while rolling down and while the truck passed by. He stated that he broke his right arm, left third rib and was hit on head, and then he became unconscious. He gained consciousness after a while and tried to get up which he could not. As he was near a bus stop he asked people to get the registration number of the truck which did not stop. He was given a chit by some one afterwards. Thereafter he went to the M. P. Shah hospital and was admitted for five days.

I may note here that the chit he was given was not produced before the court nor was the person who had given the same gave evidence. It is also not clear when he regained consciousness after the accident and how he requested people at the bus stand to write the registration number of the truck which did not stop, and which according to him was speeding. It is also evident that the police abstract produced (P.EX3) has an altered date to read 23<sup>rd</sup> January 1993 without any authentication and that the person injured was described as a pedestrian.

No effort to explain the inconsistencies has been made. The plaintiff has also been inconsistent with his details of the accident as I have observed hereinbefore. Moreover, the plaintiff has conceded that he had accidents before and after the present accident. The receipt of the spare parts reads 4<sup>th</sup> June, 1986. With these evidence before me, I cannot be satisfied that the plaintiff has proved his case as pleaded even on balance of probability. The inconsistency in his evidence and pleadings as to how the accident occurred, how he got the registration number of the vehicle which he claims to be the one which hit him, deters me to accept the plaintiff's evidence as reliable.

I thus do agree with the submissions made by the learned counsel for the Defendants that the plaintiff has been unable to prove his case as per the required standards of proof.

I thus find that the plaintiff being unable to prove his case, the plaint is dismissed with costs.

However, if I am found to be not correct in what I have found, it shall be necessary for me to quantify the damages which this court would have awarded, if the plaintiff succeeded.

It is evident that the plaintiff did suffer a serious injury on his right arm.

The plaintiff is asking for award of shs.350,000/= for damages, for pain and suffering considering 30 per cent permanent incapacity.

The Defendants are submitting for an award of shs.160,000/=. The court is asked to dismiss the claim for repairs after a period of about one year.

I have considered the authorities submitted by both counsel and of course the evidence led before me.

In my considered opinion, the award of general damages for pain and suffering in the sum of shs.175,000/= shall be appropriately one and I would have awarded the same.

A sum of shs.1,000/= for the medical report shall also be awarded as proven special damages.

Thus my award would have been in the total sum of shs.176,000/- with costs.

Dated and signed at Nairobi this 6<sup>th</sup> day of March, 2008.

**K.H.RAWAL**

**JUDGE**

**6.3.08**