



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT 200 OF 2007**

**BETHWEL MUTAI.....PLAINTIFF**

**VERSUS**

**CHINA ROAD & BRIDGE CORPORATION.....DEFENDANT**

**JUDGMENT**

On 8<sup>th</sup> December 2006 Bethwel Mutahi (hereinafter “the plaintiff”) was knocked down by motor vehicle registration number CK 612-150 belonging to the defendant. At the time, the plaintiff was employed by the defendant for moving bitumen. The plaintiff testified that he was knocked down due to the negligence of the defendant’s driver. He sustained severe injuries. He was taken to Mariakani in the defendant’s vehicle from where he was picked by his brother who took him to Mombasa Hospital where he was admitted, treated and later discharged on out patient treatment. The plaintiff produced his job card to confirm his employment with the defendant, treatment cards issued by Mombasa Hospital and a Medical Report prepared by Dr. Muthuuri.

When he was discharged, he reported to Mariakani Police Station where a police abstract of the accident was issued to him which he produced as an exhibit in this case. He then instructed his advocates M/S Khaminwa & Khaminwa Advocates to make a demand before action against the defendant. He produced that demand to which there was no response from the defendant. He then instituted this suit by way of a plaint dated 21<sup>st</sup> August 2007 claiming damages.

The defendant has neither entered appearance nor filed a defence to the plaintiff’s claim. The suit therefore proceeded ex parte on 28<sup>th</sup> February 2008. Interlocutory judgment had been entered on 28<sup>th</sup> September 2007 and the plaintiff’s evidence was on the issue of damages.

The plaintiff called two witnesses. The first witness was Dr. J. M. Muthuuri. He testified that he is a General Trauma Surgeon and treated the plaintiff who was admitted to Mombasa Hospital from 9<sup>th</sup> December 2006 to 21<sup>st</sup> December 2006. The plaintiff was subsequently followed up in Nairobi. The surgeon told the court that the plaintiff sustained multiple fractures which he described as follows:

- 1) Fracture of the Left Clavicle.
- 2) Fracture of the Right Humerus and
- 3) Fracture of the Right Femur.

With regard to the first two fractures he operated thereon and had them professionally fixed and with regard to the 3<sup>rd</sup> fracture Dr. Muthuri testified that there infact were two fractures of the same femur at different places. He operated thereon and fixed them with an interlocking nail.

The doctor continued that, when he saw the plaintiff again on 15<sup>th</sup> June 2007, he complained of occasional pain on the right arm and thigh. He however did not detect any gross abnormalities. He was of the opinion that the plaintiff sustained multiple fractures and had had adequate treatment with good results. In his view the pain the plaintiff complained about would recur as that was normal in such injuries. He further testified that the plaintiff would require removal of the implants inserted at an approximate cost of Kshs. 250,000.00. He prepared a report of the injuries which he produced as an exhibit. He also produced the Hospital Discharge Summary notes. He charged the plaintiff Kshs. 5,000.00 and produced a receipt to confirm the same. In his opinion the plaintiff suffered grievous harm.

The second witness was PC Wycliff Agessa from Mariakani Police Station. He testified that he was conversant with the accident involving the plaintiff and the defendant's vehicle even though he was not the investigating officer. He told the court that the accident occurred on 8<sup>th</sup> December 2006. The defendant's driver was one Mwangangi Mwoka Ndaka and he drove motor vehicle registration number T-102 AAL Mitsubishi Lorry (Tipper). On the material date, the lorry was picking employees of the defendant including the plaintiff. As the plaintiff was boarding the lorry the driver drove off before the plaintiff had completed the boarding. The plaintiff slipped and fell down. The back wheels of the lorry ran over the plaintiff who sustained injuries. The accident was entered in the Accident Register as No. 63 of 2006. He produced the same as an exhibit. PC Agessa then issued a police abstract of the accident being No. A769332 on 18<sup>th</sup> April 2007. He produced the same as an exhibit. He also produced the receipt issued to the plaintiff when he obtained the said abstract.

It is clear from the evidence that the plaintiff suffered serious injuries. He was admitted in hospital for nearly two weeks during which time he was operated upon and plates and nails used to fix the fractures he sustained on his left clavicle, right humerus and right femur. Those implants are still in place and will require removal. The doctor estimated the cost of removal at Kshs. 250,000.00. The plaintiff still feels pain and cannot do any hard work. That was the position about two years and seven months later.

In **Esther Wanjiru Kiarie – v – Joseph Kiarie Nganga HCC No. 384 of 2000 (UR)** Visram J. awarded Kshs. 1,000,000.00 for pain suffering and loss of amenities for the plaintiff who had sustained the following injuries:

- a) Fracture of the left humerus.
- b) Fracture of the right tibia and fibula.
- c) Fracture of the socket of the left hip.
- d) Dislocation of the left hip joint.
- e) Crash injury to the right ring finger.
- f) Avulsion to the distal end of the finger.

After the accident the plaintiff was admitted in hospital for 5 weeks. The plaintiff developed osteoarthritis of the left hip joint and right knee joint and the pain would worsen with age.

In my view the plaintiff in the above case suffered more serious injuries than the plaintiff herein. The plaintiff submits that an award of Kshs. 2,000,000.00 would be appropriate. I do not agree. That sum is rather on the high side taking into account the injuries sustained by the plaintiff.

I have carefully considered the nature of the injuries sustained by the plaintiff. I have also taken into

account counsel's submissions. Having done so I am of the view that an award of Kshs. 800,000.00 would be a fair and adequate compensation for the plaintiff's suffering and loss of amenities and I award him that sum.

With regard to special damages, judgment for Kshs. 668,383.00 has already been entered in favour of the plaintiff. That sum includes medical costs of Kshs. 568,283.00 and costs of future medical treatment of Kshs. 100,000.00.

I therefore enter judgment for the plaintiff as follows:-

a) General Damages      Kshs. 800,000.00

b) Special Damages      Kshs. 668,383.00

**Total                      Kshs.1,468,383.00**

The plaintiff will also have the costs of the suit and interest as prayed. Interest on the special damages will be applied from the date of filing suit whilst interest on General Damages will be applied from the date of this judgment.

Judgment accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF APRIL 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of Dr. Khaminwa for the plaintiff.

**F. AZANGALALA**

**JUDGE**

**25<sup>TH</sup> APRIL 2008**