



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 68 of 2005**

**CHARLES WANYOIKE GITHUKA.....PLAINTIFF**

**VERSUS**

**JOSEPH MWANGI THUO.....1<sup>ST</sup> DEFENDANT**

**THOMAS KIHARA KIMANI.....2<sup>ND</sup> DEFENDANT**

**JOHN MUIRU MUTURI.....3<sup>RD</sup>**

**DEFENDANT**

**JUDGMENT**

This is a claim for damages for the injuries the plaintiff suffered in a road traffic accident, on or about 27<sup>th</sup> April 2002: On that day, while the plaintiff was travelling as a passenger in the first defendant's motor vehicle registration number KAP 863A, a Mitisubishi Minibus (the minibus) it was involved in a collision with motor vehicle registration number KTF 649, Bedford lorry (the lorry) owned by the second defendant and at the material time driven by the third defendant and he suffered serious injuries. He lost consciousness and when he regained it he found himself at Kikuyu Hospital from where he was transferred to Aga Khan Hospital Nairobi on the same day. He remained admitted in the latter for a period of 2 months.

After he was discharged he filed this suit against the first defendant as the owner of the minibus and against the second and third defendants as the owner and driver respectively of the lorry attributing the cause of the accident to the negligence of the first defendant's driver and that of the third defendant. He claims general damages for pain and suffering, a sum of Kshs.3,742,600/- as special damages as well as costs and interest.

Upon being served the first defendant entered appearance and filed a defence in which, while admitting the accident, he denied that the plaintiff suffered the injuries and/or loss alleged in the plaint and averred that the accident was caused by the negligence of the third defendant. The second and third defendants were served but never entered appearance or filed defence and interlocutory judgment was accordingly entered against them. Later apparently after some negotiations the first defendant admitted 80% liability and conceded to judgment for special damages in the sum of Kshs.3,459,263/- which I am told has already been paid to the plaintiff. The hearing therefore proceeded before me on the assessment of general damages for pain and suffering.

As I have said, soon after the accident the plaintiff was taken to Kikuyu Mission Hospital from where he

was transferred to Aga Khan Hospital in Nairobi under the care of Doctor N. H. Bhanji. After discharge Dr. Bhanji prepared two medical reports. At the instance of the first defendant Dr. R. P. Shah examined the plaintiff and also made two reports. All those four reports were produced by consent without calling the two doctors.

The two doctors are agreed that the plaintiff suffered the following injuries:-

- (a) “Head injuries (cerebral concussions)
- (b) Abrasion over the left forehead.
- (c) Injury to the chest causing fractures of the 8<sup>th</sup> rib on the right chest wall.
- (d) Fracture mid-shaft of the right femur
- (e) Segmental fractures of the left femur
- (f) Compound fracture of the right lower leg (fibia & fibula bones)
- (g) Fracture of the right tibia plateau (knee joint)
- (h) Fracture of the right ankle joint.
- (i) Deep cut wound on the medial aspect of the left foot.
- (j) Compound fracture dislocation of the right foot.
- (k) Fracture of the right upper incisor tooth with loss of the fracture fragment.
- (l) Deep abrasion on the left lower leg.”

At the hearing only the plaintiff testified. The first defendant did not call any evidence. In his testimony, after giving details of the accident and how he suffered loss of consciousness and came to several hours later, the Plaintiff said he was admitted to Aga Khan Hospital for a period of 4 months, from 28<sup>th</sup> April 2002 to 28<sup>th</sup> August 2002. After discharge he was treated at the same hospital as an outpatient for a period of 1 year. He produced as **Exhibit 3** the appointment cards. Though he has not had to go for any further treatment since 7<sup>th</sup> November 2002, he says at the moment he feels a lot of pain especially during the cold season and when he walks. Due to the deformity of his right leg and the pain he feels he said he cannot walk for long distances or stand for a long time.

The Plaintiff further testified said that before the accident he had no health problems. He was employed as an accountant with Kenya Tea Agency. Four years after the accident he was requested by his employer to relocate to Gacharage Tea Factory in Muranga District but he opted to retire on medical grounds as he could not stand the cold climatic condition in that place. He is now engaged in transport business in Nairobi. In cross examination he admitted that the doctors certified him fit to continue working but he retired on his own volition of the above stated reason.

After the plaintiff’s testimony counsel for the parties filed written submissions. In his submissions, counsel for the plaintiff contended that given the injuries the plaintiff suffered and the resultant effect on his health, he should be awarded a sum of Kshs.8,000,000/-. He based this figure on three High Court authorities in which sums ranging from Kshs.1,000,000/- to Kshs.1,800,000/- were awarded. He submitted that as those authorities are more than 10 years old and given the inflationary trends in Kenya an award of Kshs.8,000,000/- is, in his view, reasonable. Also basing themselves on past decisions, in their submissions, counsel for the first defendant suggested an award of Kshs.500,000/- as reasonable compensation for the injuries the plaintiff in this case suffered.

I have considered both counsel's submissions and read the authorities cited. It is not in dispute that the plaintiff suffered serious injuries enumerated above in the accident involving the first and second defendants' vehicles. During his testimony in court, the plaintiff showed me his deformed right foot which has large healed scars. It is unsightly. Save for minor discrepancies the two doctors who examined the plaintiff are agreed that as a result of the injuries suffered, the plaintiff lost consciousness for several hours. Dr. Bhanji says that as a result of cerebral concussion the plaintiff has 5% chance of developing epilepsy. Dr. Shah has, in his reports, said nothing about that. The plaintiff having, for now over 6 years since the accident, not suffered any epileptic fits and considering the fact that he did not suffer any major head injury I think any chance of suffering epilepsy is remote.

The doctors are also agreed that as a result of the injury to the right leg the plaintiff has suffered a deformity of the right ankle joint and his right leg was shortened by 1cm causing him to walk with a limp and he has already had symptoms of early development of osteoarthritis. According to Dr. Bhanji, due to the limb there is unequal distribution of stress forces along the right hip, near the ankle joints.

Again according to Dr. Bhanji, due to repeated hospitalization and the magnitude of the trauma and surgery the plaintiff developed a psychological problem which resulted in erectile dysfunction thereby affecting his sexual life. Dr. Shah, however, discounts this on the ground that the plaintiff sustained no injury that would affect his sexual function. He, however, concedes that during the first 6 months the plaintiff was admitted in hospital it was impossible for him to have had any sexual intercourse, but after discharge he should have had no problem in that regard.

The plaintiff in his testimony did not make mention of any impairment to his sexual function. In the circumstances I again agree with Dr. Shah that the plaintiff having not suffered any injury to his sexual organs or the nervous system, his inability, if any, to have normal sexual life is not related to the accident.

The authorities cited by counsel for the plaintiff in support of his recommendation for an award of Kshs.8,000,000/- are with due respect not useful. The major injury suffered by the plaintiff in the case of **Rachael Kirera Vs Joseph M'Rimbere M'Rimberia & Another, Nairobi HCCC No.1197 of 1988** was a depressed fracture of the nasal bone. The other injuries were on the upper limbs. In **Mutinda Mutheka Vs Gulamu Yusuf Mombasa HCCC No.752 of 1993**, although the plaintiff, like the one in this case, also suffered fractures of the tibia, his major injuries were a severe fracture of the pelvis and rupture of the urethra. In this case the plaintiff's major injuries are on the lower limbs. Those authorities are therefore not useful.

The authorities cited by counsel for the first defendant related to injuries of lower limbs which were not as serious as those suffered by the plaintiff in this case.

There is no doubt that the plaintiff suffered a lot of pain and lost a considerable amount of blood. He was transfused with two units of blood at Kikuyu Mission Hospital and later with 4 units at Aga Khan Hospital. As I have said he was admitted for a period of 2 months during which he underwent several operations which left him with marked scars some of which are unsightly. Taking all these, and the resultant effects of his injuries, into account and given the inflationary trends, I consider a sum of Kshs.2,000,000/- as a reasonable award for pain and loss of amenities. I accordingly enter judgment for the plaintiff against the first defendant in the sum of Kshs.1,600,000/- being 80% of that sum. The Plaintiff shall also have the costs of this suit and interest at court rates.

DATED and delivered at Nakuru this 25<sup>th</sup> day of September, 2008.

**D. K. MARAGA**

**JUDGE**