



**REPUBLIC OF KENYA**

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

**Civil Suit 103 of 2004**

**ERICK ONYANGO OKUMU.....PLAINTIFF**

**VERSUS**

**SDV TRANSAMI (K) LIMITED.....DEFENDANT**

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

This is a claim for damages for personal injuries that the plaintiff suffered at a road accident.

The plaintiff who was at the material time working for the defendant as a turn boy or loader was on the 18<sup>th</sup> October 2003 travelling as a passenger in the defendant's motor vehicle registration number KAK 287 P. The vehicle collided with another at Eldama Ravine along the Nakuru/Eldoret road. The plaintiff suffered a comminuted fracture of the mid shaft of the right femur, cut on the right leg on the achilles' tendon and friction burns on the right foot. He was admitted to Valley Hospital Nakuru where open reduction and plating were done. He was discharged after 21 days on crutches with strict instructions not to put weight on the right leg.

The plaintiff then came to Mombasa where after three months he was admitted to Aga Khan Hospital for 6 days where he underwent another operation for the replacement of the metal plate which had bent. He stayed with the new metal plate for twelve months after which he was once again admitted to hospital, this time at Jocham Hospital Mombasa, for three days when the metal plate was removed.

He was on 1<sup>st</sup> April 2005 retired on medical grounds. The issue of liability was resolved by consent with the plaintiff shouldering 40% and the defendant 60%. This judgment is therefore only on the assessment of damages.

The plaintiff himself testified and called one witness, Dr. Adede. In his testimony the plaintiff, after relating how the accident occurred and the treatment he received, stated that after being retired on medical grounds he has, not, despite making effort, been able to secure employment. He said that wherever he has gone looking for employment he has been told he cannot be employed in view of the doctor's letter recommending his retirement on medical grounds. He said that his right leg which is now bent and shorter is also weak. He cannot do any hard labour or even carry anything heavy. The only work he can do, he said, is selling in a shop. He therefore claims general damages for pain and suffering and loss of amenities, general damages for loss of future earnings and special damages.

The plaintiff's only witness, Dr. Ajoni Adede MB CHB. Is a Senior Medical Officer with 17 years experience. He examined the plaintiff on 5<sup>th</sup> November 2005 and noted that the plaintiff had a 30 cm cut wound scar on the right thigh and a fracture of the right thigh bone which was curving outwardly which

he termed as a convex deformity. Due to the curving he said the right leg had shortened by 1 cm. He said that the plaintiff had difficulty rising from a sitting position while from a crotching position it was impossible for him to rise at all. He also noted a 4 cm wound scar across the right achilles tendon and a prominent friction burn scar of the right foot. In his opinion the plaintiff suffered a permanent incapacity of the right thigh bone and post trauma osteoarthritis.

For its part the defendant called Dr. Rasik Patel, a consultant surgeon with many years experience. He examined the plaintiff on the 17<sup>th</sup> August 2005. He said that the X-rays taken 9 months after the accident showed no union of the fracture but those taken after one year showed some slight union with the metal plate bent. He attributed the bend to pressure that must have been exerted on the fracture site. In March 2005 there was full union and the metal plate was removed. The plaintiff was on crutches for three months after which he discarded them. In his opinion the plaintiff walks with normal gait and has full movement of both the knee and hip joints. He disputed Dr. Adede's opinion that the plaintiff has muscle atrophy and has suffered a permanent incapacity of the right leg. According to him the plaintiff has fully healed and is able to work. He said he saw him on the day he testified climbing a stair case in court with no difficulty at all.

I am now left with the question of which of the two doctors' opinions I should accept. As I have said Dr. Adede's opinion is that the plaintiff has as result of the fracture to his right femur suffered a permanent incapacity of his right leg. According to Dr. Rasik Patel, however, the plaintiff has fully healed and has not suffered any such incapacity.

After considering the evidence on record in this case, I am inclined to believe the testimony of Dr. Adede. This is because on 1<sup>st</sup> April 2005, only five months previous to the plaintiff's examination by Dr. Patel the plaintiff had been retired on medical grounds on another doctor's recommendation. Although that doctor's report or letter of recommendation was not produced as an exhibit in this case the defendant's own letter of 1<sup>st</sup> April 2005, Ex. 2, retiring the plaintiff on medical grounds makes that quite clear. So as it were we have two opinions counter to that of Dr. Patel. Further more Dr. Adede examined the plaintiff in November 2005 after Dr. Patel had seen him in August of the same year. At the prompting of counsel for the defendant the plaintiff walked in court and I saw him limping.

Taking all these factors into account I find that the plaintiff has suffered a permanent incapacity of his right leg.

On the quantum of damages Miss Abwodha, counsel for the plaintiff submitted that the plaintiff should be awarded three heads of damages; general damages for pain and suffering and loss of amenities, general damages for loss of future earnings and special damages.

On the first head of damages for pain and suffering Miss Abwodha relying on the High Court decision in **James Macharia Mureithi -VS- Geoffrey Gateri Nakuru HCCC No. 209 of 1996** recommended an award of Sh.800,000/=.

Under this head Mr. Khagram, counsel for the defendant, recommended an award of sh.400,000/=. In support of that recommendation he cited the Court of Appeal decisions in **Tahir Sheikh Said Transporters Ltd and Another -VS- Mugabo Civil Appeal No. 273 of 1998 & Mugambi & Another -VS- Gitira Civil Appeal No. 138 of 2002** in both of which the plaintiffs suffered more serious injuries and the Court of Appeal reduced the High Court awards under this head to Sh.500,000/= each.

I have read those authorities and I agree with Mr. Khagram that they had slightly more serious injuries than those suffered by the plaintiff in this case. They however provide a useful guide as to the damages that should be awarded in this case.

The first case of **Tahir Sheikh Said Transporters Ltd** which was decided on 8<sup>th</sup> October 1998 had more serious injuries than those of the plaintiff in the second one of **Mugambi -VS- Gitiru** which was decided on 28<sup>th</sup> May 2004.

Taking into account the ages of those cases I award the plaintiff in this case a sum of Sh.600,000/= under this head.

Mr. Khagram submitted that the plaintiff should not be awarded any damages under the head of loss of future earning. This is because, he said, that is a special damage claim which should not only be specifically pleaded but should also be strictly proved. In support of this submission he relied on the Court of Appeal decision in **Tahir Sheikh Said Transporters Ltd –VS- Mugabo** (supra). The claim having not been specifically pleaded and proved by evidence, he urged me not to entertain it.

I entirely agree with Mr. Khagram that a claim for loss of future earnings is in the category of special damages which should not only be specifically pleaded but should also be strictly proved. The Court of Appeal decision in the case cited **Sande –VS- Kenya Co-Operative Creameries Ltd [1992] LLR 314 (ACK)** and **Karuri –VS- Ncheche [996] LLR 464 (CAK)** therein referred to make that quite clear. I therefore dismiss the plaintiff's claim for loss of future earnings.

That, however, is not the end of the matter. The plaintiff is in my view entitled to damages for loss of earning capacity. That is different from loss of future earnings and is part of general damages which do not have to be pleaded. –See **Butler –VS- Butler [1984] KLR 225 at page 232** where while making the distinction between the two heads of damages Kneller JA Said:

**“It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way:**

**‘...compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.’ Lord Denning MR in *Fairley –VS- John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd’s Rep 40, 42 (CA)***

Chesoni Ag JA (as he then was) described the loss of earning capacity in the same case in the following words:

**“What a victim whose earning capacity is diminished through an accident loses is an interest which if not sellable in the labour market, has an assessable value. It is, therefore, an economic loss of the same class as the “lost years,” for which the wrongdoer should fairly compensate the victim.” (Page 235)**

Echoing the same view also in that case Nyarangi Ag JA (as he then was) stated:

**“I would liken loss of earning capacity to the doctrine of ‘lost years’ whereby a victim, whose capacity is lessened by the negligence of the defendant, is entitled to be compensated for the ‘lost years’. In my judgment, the decisions in the *Picket –VS- British Rail Engineering Ltd [1979] 1 ALL ER 774* and *civil Appeal no. 66 of 1982 [that is Mariga –VS- Musila [1982 –88] 1 KAR 507]* provide clear authority for separate compensation for loss of earning capacity which, as I have already observed, is akin to the loss of the whole period for which a person has been deprived his ability to earn.” (Page 237)**

This is a head of damages awardable irrespective of whether the plaintiff was in salaried employment before injury or not. The factors to be considered in awarding it vary with the circumstances of each case. They include the age and qualifications of the plaintiff, his remaining length of working life, his disabilities, previous service, if any, and so on.

In this case as I have already found the plaintiff suffered a permanent incapacity of his right leg. Being a loader he could not continue working and the defendant had to retire him on medical grounds. I have not been told that he had any qualification which can enable him secure any form of employment. He said in his evidence in court that the only thing he can do is to sell in a shop but he is not doing that apparently because he has no shop. In the circumstances I find that he has suffered total loss of earning capacity for

which on the authority of **Butler –VS- Butler (supra)** he should be compensated.

The plaintiff, as stated in the medical reports **Ex.3** was 27 years old in 2005. He is now 28. He would have worked up to the age of 55 years if it were not for the incapacity he has suffered. That is a period of about 27 years. However taking into account that he is being paid in lump sum what he would otherwise have earned over a period of time I consider a multiplier of 15 reasonable and award him Sh.1,576,800/= under this head basing it on his last salary stated on **Ex. IV** as Sh.8760/=.

On special damages I agree with Mr. Khagram that the amount pleaded and proved is only Sh.2500/= and that is the amount I award him under this head.

In the result I enter judgment for he plaintiff against the defendant in the sum of Sh.1,307,580/= net of contribution as follows: -

1. General damages for pain and suffering and loss of amenities	Sh. 600,000.00
2. General damages for loss of earning capacity	Sh. 1,576,800.00
3. Special damages	<u>Sh.2,500.00</u>
Total	<u>Sh. 2,179,300.00</u>

Less 40% Contribution Sh. 871,720.00

Balance Sh.1,307,580.00

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The plaintiff shall also have costs of the case and interest at court rates.

DATED and delivered this 18th day of January 2007

**D.K. MARAGA**

JUDGE