



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 244 of 1998**

**AHAMED MOHAMUD ADAM ..... PLAINTIFF**

**VERSUS**

**JIMMY TOMINO ..... 1<sup>ST</sup> DEFENDANT**

**WILFRED CHEPKURGAT ..... 2<sup>ND</sup> DEFENDANT**

**MICHAEL CHEPKWONY ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, Ahmed Mohamud Adam instituted this suit against Jimmy Tomino, Wilfred Chepkurgat and Michael Chepkwony the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively.

On 30<sup>th</sup> August 2001, the parties recorded a consent attributing 50% liability to the 1<sup>st</sup> defendant and the remaining 50% to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally. The outstanding issues for determination according to the agreed issues are as follows: -

- i) *Whether the plaintiff sustained injuries.*
- ii) *Whether the plaintiff suffered loss and damage.*
- iii) *Whether the plaintiff is entitled to the receipts sought.*
- iv) *Who should pay the costs of this suit.*

The plaintiff gave evidence in court and also relied on the evidence of Dr Wellington Kiamba who evaluated the plaintiff's injuries and produced a medical report.

According to the plaintiff, he was lawfully travelling as a fare passenger in motor vehicle registration number KAC 569R along Nakuru – Ravine road on 28<sup>th</sup> December 1996. The said vehicle was negligently driven or controlled by the 1<sup>st</sup> defendant and it collided with the tractor registration number KLN 835 Massey Ferguson which was being driven/controlled by the 3<sup>rd</sup> defendant. As a result of the said collision, the plaintiff suffered very serious bodily injuries. He was initially treated at the Mercy Hospital, Nakuru Nursing and Maternity Home and the Provincial General Hospital Nakuru.

The plaintiff suffered the following injuries;

1. *Amputation of the left lower limb below the knee joint.*
2. *Multiple fractures of the tarsal bones of the right foot and burns on the planter aspect of this foot.*
3. *Compound fracture of the right malleolus and dislocation of the right ankle joint.*
4. *Burns of the planter aspect of the right foot.*
5. *Stiffness of the ankle joint.*

According to Dr Kiama the permanent degree of incapacity was assessed at 70%. The plaintiff told the court that he would need future medical expenses such as the artificial leg which requires regular maintenance and change.

The plaintiff present complains are;

- (1) *Pain and stiffness of the right ankle joint.*
- (2) *Pain on the right foot.*
- (3) *Inability to work and to walk due to constant pain.*

The plaintiff therefore sought for compensation for the suffering he has gone for the last ten (10) years and which he will go through for the rest of his life due to the permanent disability. Medical expenses which he has incurred at Kshs.156,206/- according to the receipts produced and the costs of the suit.

The defence did not call any witness.

On the issue of quantum, parties filed written submissions which they relied on entirely. According to Counsel for the plaintiff, he urged this court to award the plaintiff a sum of Kshs.2,300,000/- as general damages while relying on the following decisions:

1) Nakuru HCCC No. 86 of 1998, Rosemary Bulinda –Vs- Peter Kinyanjui Gakumu & 5 others, a decision by *Justice Muga Apondi* where the plaintiff was awarded Kshs.1,700,000/- for;

- (a) *Comminuted fracture on the right femur.*
- (b) *Cut wounds on both legs.*

2) Machakos HCCC No.226 of 1998, Zacharia Nyabuti Onchiri –Vs- Tashrif Bus Services Ltd where the plaintiff was awarded Kshs.1,710,000/- by *Justice R. Nambuye* for the followings;

- (a) *Severe head injuries with fractures of the right auxiliary sinus.*
- (b) *Fracture of the spine.*
- (c) *Compound segmental fracture of the right tibia and fibula.*

The degree of permanent disability was assessed at 45%.

Thus Counsel for the plaintiff urged this court consider that the injuries suffered by the plaintiff in this case are more serious. Considering the inflation and the degree of permanent disability which is much higher than in the cited authorities.

On the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, Counsel submitted that the assessment of the degree of disability at 70% is an exaggeration and they suggested 40% as the objective percentage for an amputation below the knee.

On quantum the defendants suggested an award of Kshs.300,000/- and relied on the case of;

NAIROBI HCCC No.6374 of 1990 Loise Wangechi –Vs- John Njoroge Nginya where the plaintiff was awarded Kshs.400,000/-.

I have considered the injuries suffered by the plaintiff against the background of decided cases. The plaintiff suffered very serious injuries as a result of which his leg was amputated in addition to the multiple fractures. The plaintiff has to do with constant debilitating pain and this inconvenience will be for the rest of his life. His permanent disability has been assessed at 70% and although this is disputed by the defendants, they did not call any evidence or subject the plaintiff to another medical opinion to support their contention that the disability is 40%.

Taking all the factors into consideration, I hereby award the plaintiff;

- a) *General damages* - Kshs.1,900,000/-
- b) *Special damages* - Kshs. 156,206/-
- Medical report* - Kshs. 2,100/-
- c) *Future medical case* - Kshs. 500,000/-
- TOTAL* Kshs.2,558,306/-

Costs of the suit and interest thereon.

It is so ordered.

Judgment read and signed on 13<sup>th</sup> day of October 2006.

**MARTHA KOOME**

**JUDGE**