



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 220 of 2001**

**TIMOTHY ODWORI MAKHOKA ..... PLAINTIFF**

**- Versus -**

**RAMA LUGO**

**SULEIMAN MONI CHARO ..... DEFENDANT**

**Coram: Before Hon. Justice Mwera**

**Omondi for Plaintiff**

**Ms Ngugi for Defendant**

**Court clerk – Kazungu**

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

The record bears the amended plaint dated 12/2/2004 and the amended defence of 23/2/2004 as the principal pleadings. In this claim for damages arising from a road accident, the plaintiff averred that on 9/12/1999 he was a pedestrian along Mombasa – Nairobi Road when the 1st defendant's motor vehicle registration No. KAG 017C was so negligently driven by the 2nd defendant, at a spot called Bangladeshi, that he let it knock down the plaintiff, injuring him. The injuries were listed as painful left elbow and a fracture of the olecranon of the ulna of the left elbow.

The particulars of negligence were set out as driving at an excessive speed in the circumstances; not bearing reasonable care and attention while driving the offending motor vehicle; failing to notice the plaintiff on the road and failing to brake, swerve or otherwise avoid knocking him down. Thus the plaintiff sought damages, costs and interest.

In the amended defence the 1st defendant admitted being the owner of the subject motor vehicle but that the 2nd defendant was not its driver. All the particulars of negligence were denied. But it was added that, in the alternative, the plaintiff wholly or substantially contributed to the said accident by suddenly getting into the road and the path of the 1st defendant's motor vehicle and he did not keep a proper look – out to notice that the motor vehicle was approaching. That he did not thus have his safety in mind and therefore attempt to avoid the accident. The alleged injuries were also denied and the plaintiff was put to strict proof of everything in the plaint. There do not seem to have been a reply to the defence and the hearing took off on 14/10/2004.

The plaintiff (P.W.1) told the court that he knew the 2 defendants in the capacities that they were sued. When he was at Bangladeshi bus stage on the said road, intending to travel to Mombasa town, two motor

vehicles came from Mombasa side, a minibus trying to overtake another. That the minibus (registration No. KAG 017C) came along at a high speed, got to the bus stage where the plaintiff was standing and knocked him down. That he was on the left side of the road as one faced Mombasa while the two motor vehicles came from Mombasa direction. The plaintiff broke his left arm at the elbow and sustained bruises on his knees. He was taken to Coast General Hospital and treated (ExhP1). The police came to the scene. P.W.1 got a P3 form which was completed at the hospital. He saw two doctors: R. Patel and Muthuri who made medical reports on the plaintiff's condition. That although P.W.1 was no longer having pains but he could not use his left arm. It was bent and shortened.

The plaintiff saw the motor vehicles coming but that it was because of the minibus overtaking the other motor vehicle that it came his way and hit him. He was not crossing the road. He fell in the road. P.W.1 did not know if the 2nd defendant was charged with a traffic offence following that accident. Mr. Rasik Patel (P.W.2) examined the plaintiff and got from him the history following the accident of 9/12/1999. He saw the hospital cards and Xray showing the fractured upper end of the ulna. This was on 7/2/2000. After two months P.W.2 again saw the plaintiff whose arm was still in plaster and he was still undergoing treatment. P.W.2's medical report (ExhP2) was paid for (ExhP3) – Sh. 1,500/=.

Dr. Jamlick Muthuri (P.W.3) examined the plaintiff on 4/7/2000. He got the accident story, nature of the injuries, their management and present state. The plaintiff's left arm was deformed at the elbow while the hand lacked sensation. Dr. Muthuri's opinion was that the badly deformed left arm had no function and thus the plaintiff suffered 50% permanent disability (ExhP5). He was paid Sh. 5,000/= for this report (ExhP6). The good doctor told the court that the plaintiff's injury was not treated; only a plaster was applied.

I.P. Ngoni (P.W.4) of the Traffic Department (Investigations) Central Police Station (Mombasa) brought a file relating to the subject accident. He gave the details as contained in the file; the motor vehicle, its driver, owner the plaintiff with his injuries etc. That the motor vehicle driver was not charged in court as the matter was then referred to the insurance company. P.W.4 who did not visit the scene had no sketch plan to produce or say exactly where the plaintiff was on this road I.P. Ngoni seemed to know the road well.

The defence case opened with Charo (2nd defendant D.W.1) testifying. He was driving the subject motor vehicle belonging to the 1st defendant on the day and place stated, on his way from Mombasa to Mariakani. He had just dropped passengers at Bangladeshi. When he started off a pedestrian suddenly came from his right side and collided with the minibus. It was so sudden that any effort to avoid the collision came to nothing. That after the collision the victim (the plaintiff herein) fell by the road. D.W.1 rushed to report the accident to the police; he took the victim to Coast General Hospital. He was never charged in court on account of this accident.

The witness told the court that the road was straight and clear at this point with no motor vehicles in front of him. That it was during day and D.W.1 could well see ahead. That with motor vehicles coming from the opposite side, D.W.1 was not able to discern how the plaintiff came into the road, and that he was driving slowly as he left a bus stage.

In his submission the plaintiff held the 2nd defendant, and by so doing the 1st defendant vicariously, liable for the subject accident. That the plaintiff sustained the injuries complained of and so he is entitled to the reliefs sought. Sh. 1m for pain and suffering and Sh. 1,600/= special damages. The case of DR. WALFGONG FARRUGIA VS THE A.G. & ANOR. NRI HCCC 422/1988 was cited. The plaintiff there got Sh. 500,000/= for a fracture to the elbow, Sh. 600,000/= to the claimant in PHILIP SILA VS KIOKO & ANOR. MACHAKOS HCCC 42/1995 for a dislocated left shoulder and a fractured left humerus which resulted in paralysis of the arm. In this case there were other injuries also:- tissue injuries of the neck, forehead, upper eye lid and knee. Then MBA HCCC 38/1997 SHARIFF CHARO VS TANA RIVER BUS SERVICE where the claimant suffered several rather serious injuries including dislocation of acromio – clavicular joint and got Sh. 950,000/= general damages.

The defendant's side maintained that the plaintiff was the author of all that he suffered because he

collided with the defendant's motor vehicle as he crossed the road when it was not safe to do so.

That his story of having been hit as the defendants' motor vehicle tried to overtake another had no basis. That Charo (D.W.1) had told the court that he could see well ahead of him with no vehicles in front and only that motor vehicles were coming from the opposite side. That he even tried to avoid hitting the plaintiff who had suddenly emerged from his right side. That either the plaintiff be held fully responsible for this accident or he takes 70% of it.

After going over the medical reports Sh. 200,000/= was considered adequate compensation. And the case of KENNETH ONGUMO VS ODIPO NRI HCCC 5197/1989 was cited where Sh. 150,000/= was awarded for more serious injuries which included a fracture of the left humerus.

After all the above this court is inclined to apportion liability at 60% against the defendants jointly and severally while 40% is borne by the plaintiff. The reason is that he did not reply to the defence which specifically set out his own part in the accident (see Order 6 rule 9 CPC). And what is laid/alleged and not denied is deemed admitted. Indeed D.W.1 (2nd defendant) maintained in his evidence that the plaintiff suddenly emerged from his right side of the motor vehicle and collided with it.

As for the general damages the medical reports show that the plaintiff's left arm was so injured that it was deformed, shortened and with no use. Permanent liability was put at 50%. That is serious. So with the cited cases most of which had more serious or extensive injuries, the plaintiff gets Sh. 300,000/= for pain suffering and loss of amenities.

Special damages stand at Sh. 6,600/= for the medical reports, and the police abstract.

The total award is:

General Damages - Sh. 300,000/=

Special Damages - Sh. 5,600/=

Total Sh. 305,600/=

The sum of Sh. 305,600/= (Three Hundred & Five Thousand Six Hundred shillings) is awarded with costs and interest in the lower court rates. The award is subject to the ratio of liability borne by each side.

Judgment accordingly.

Delivered on 30th September 2005.

**J.W. MWERA**

**JUDGE**