



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 129 OF 2003

**C M N suing as the next friend and father of D M
PLAINTIFF**

VERSUS

**KENNETH MWANIKI
DEFENDANT**

Coram: Before Hon. Justice Mwera

Hassan for the Plaintiff

Njonjo for the Defendants

Court clerk – Sango

JUDGEMENT

Suing through his father and next friend (C N) the minor D M brought this suit against the defendant Kenneth Mwaniki for injuries suffered when the defendant's motor vehicle No. KAK 449W hit him on 21-3-03 at Mwembeni stage Mishomoroni, Mombasa. It was averred that the defendant or his driver negligently and carelessly controlled and managed to the said motor vehicle that it veered off the road to where the minor D was. It hit him leaving him with a deep cut wound on the scalp and crushed right hand which had to be amputated below the humerus. The plaintiff sought damages costs and interests. The particulars of the negligent driving need not be gone into since liability was admitted and what the court concerned itself with was only assessment of damages. But be it noted that in the defence of 5th August 2003 negligence had been denied let alone injuries pleaded.

For a victim who appeared to the court be hardly over five years of age, and to whom no contribution can be attributed, the parties recorded a consent judgment of 20% liability against the plaintiff while 80% went to the defendant.

The plaintiff (PW.1) told the court that the accident occurred when the defendant's motor vehicle knocked down a cyclist before it got off the road to hit the minor who was playing with others under a nearby mango tree. He was taken to Coast General Hospital where he stayed for a month (Exh.P3). His right arm was amputated at the shoulder. He recovered but was to be given physiotherapy sessions at Port Reitz medial facility in order to enable him to use the left arm; he had been right-handed. PW.1 however testified that the minor experienced difficulties in eating, dressing himself and playing with toys. That an artificial arm whose cost was estimated at Sh.250,000/- need to be bought for Dickson to wear when he is

about 10 years old. That he would use such a limb for much longer as it would be cheaper than to begin fitting them from this age and having to change them more frequently as the minor grows.

In cross examination the court heard that the minor had adapted fairly well to be able to eat and write with the left hand. He faced some difficulties, though including time to socialize with other children and that he had become rather emotionally agitated.

In brief submission Mr. Hassan proposed Sh.1.5 m for pain and suffering contrasting this with the awards put at Sh.800,000/- in the late 80s. Cases of comparable circumstances were cited: **NAOMI RUMANO VS. ALICE RUMANO NRI H.C.C. 223/1996, MPALA MAZERA VS. ARUSHA BUS EXPRESS MBA H.C.C.C. 538/96 and SHARIFF CHARO VS. TANA RIVER BUS SERVICE MBA H.C.C.C. 38/1997.**

While special damages were said to have been agreed at Sh.2,000/- it was proposed that Sh.500,000/- be awarded for the artificial arm.

Mr. Njonjo while conceding Sh.2,000/- special damages put the loss of the arm at Sh.500,000/0 because the awards were Sh.350,000/- and Sh.400,000/- up to the mid nineties. That the loss of arm was not pleaded; defence cited the cases of **FATUMA SALI VS. OMAR & ANR. MBA H.C.C.C. 583/85**

In assessing what awards to give the court also referred to the 2 medical reports by Dr. F. Obwanda made on 30/5/03 and that of Dr. Waudu dated 25/8/03 - quite close. While Dr. Waudu referred to the injuries and treatment given to Dickson, he noted that both the scalp injuries and the wound, after amputation of the right arm, healed well. That amputation was a permanent incapacity and the minor would require physiotherapy and prosthesis.

Dr. Obwanda's report referred to the same adding that the injuries left permanent psychological effects and no utility from the amputated right arm. D would depend on one arm. He suffered 75% permanent disability and required an artificial arm costing about Sh.250,000/-.

Having considered the authorities cited and submissions made this court grants the plaintiff Sh.500,000/- for pain and suffering plus Sh.2,000/- special damages. As for the artificial arm an estimate as given by Dr. Obwanda is good. But such estimates help the court better when either orthopaedic surgeons or technicians specializing in the production, fitting and availability of artificial limbs give such estimates. Dr. Obwanda's report does not describe him as a specialist doctor in the field of bones or lost body parts like limbs. No doubt he must be drawing on his experience to give the estimate he does. In this court's view a specialist would have added about how many times D would have his prosthesis changed over a given period. Such information is useful in such cases but it is not given here.

In sum Sh.150,000/- is given under this item. It falls under aspects of general damages and having all circumstances in mind that is the award given. In sum:

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|-----------------------|-----------------------------|
| General Damages | Shs. 500,000/- |
| Artificial Arm | Shs. 150,000/- |
| Special Damages | <u>Shs. 2,000/-</u> |
| Total | <u>Shs.652,000/-</u> |

The award to be apportioned accordingly to the agreed ratio of liability.

Costs to the plaintiff.

Judgment according.

Delivered on 14th May, 2004.

J.W. MWERA

JUDGE