



- 1) Running Down Cause
- 2) Male adult aged 47 years old in 2002
- 3) Passenger motor vehicle accident
- 4) Injuries:

- a) Right lower incisor tooth with loss to the incisor
- b) Comminuted fracture of the left shoulder joint
- c) Bilateral fractures of both acetabuli

5) Liability : 100% against the defendant

6) Quantum

i) General damages

- a) Pain and suffering and loss of amenities Ksh.200,000/-

ii) Special Damages

- a) Future medical care Ksh.800,000/-
- b) Medical report Ksh.6,000/- Nil not proved
- c) X-rays Ksh.2,000/- Nil not proved
- d) Police abstract Ksh. 100/- Nil not proved
- e) Hospital charges Ksh. 8,550/- Nil not proved

Total Ksh.1,000,000/-

7) Case law

By plaintiff on quantum

- i) Major Rose Kavili Mutyambai v Manasseh Chege Waiharo  
(Nairobi) Hccc No. 2264/93 Osiemo J
- ii) Jane Nduta Kamade v John Kuria  
Nariobi) Jane Nduta Kamande v John Kuria  
(Nairobi) Hccc No.1665/97, Rawal J.
- iii) Edith Wanja Wairubi v Newton Mbuthia  
(Nakuru) Hccc 554/96 S.C. Ondeyo,J.

8) Advocates

J.C. Mukuru advocate for the plaintiff

E. W. Maina advocate for the defendant

**IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE NO. 736 OF 2003**

**HARRISON MUCHOKI KIMANI .....PLAINTIFF**

**VERSUS**

**DENNIS KIMEU GATHOKA .....DEFENDANT**

**JUDGMENT**

A day after Kenyatta day holidays of the 20th of October 2002 Harrison Muchoki Kimani boarded a public motor vehicle as a fare paying passenger at Muranga. The vehicle was driven by Dennis Kimengu Gathoka who is said to also be the owner of the said motor vehicle.

According to the evidence before court, the vehicle was driven at such high speed that as it traveled along the Thika Highway at Makenzi (police abstract) it had a tyre burst. The driver applied emergency brakes. The vehicle veered of the road and had a self involving accident. Harrison stated that:-

“The vehicle was travelling at a High Speed, and I heard a loud sound. I then heard breaks screech. The vehicle left the road and went into the grass .....

As a result of the accident Harrison sustained injuries. He sued the defendant for damages in tort and prayed that he be compensated.

**B:     LIABILITY**

The defendant, Dennis failed to enter appearance and file defence. An interlocutory judgment was entered but later set aside by the parties. He nonetheless did file a defence dated the 28.8.03.

The plaintiff filed and served on the defendant a notice to admit facts under order 12 and 4 CPR. .

Namely

- “1. That on the 21.10.02 the motor vehicle registration No. KAQ 509 had a tyre burst.
2. That as a result of the tyre burst an accident occurred.”

This fact was admitted by the defence.

The plaintiff further alleged that:-

The defendant was negligence in that he drove at a high speed, failed to steer the motor vehicle on a straight course, failed to swerve, brake or in any way prevent the accident; apply brakes sufficiently in time; drove a defective vehicle.

From the evidence, I was not informed whether the vehicle was defective nor was there an inspection report of the vehicle put in. The defendant denied there was an accident but in the particulars of negligence says it was “a sudden accident”.

I have evidence that the defendant braked. In fact he should not have braked his vehicle. That the fact he did so was in itself negligence.

Where a vehicle has a tyre burst (a fact not disputed in this case) the driver is to slow down the vehicle by means of shifting the gears and steadily controlling the steering wheel. The minute the driver applies breaks the effect is for the vehicle to veer off the road and overturn. An experienced driver would

infact not have applied breaks.

This accident was caused by the negligence of the defendant. He was over speeding. He was, through his action, the cause of this said accident. I find liability at 100% against the defendant.

**B) QUANTUM**

General Damages

a) Pain and suffering

The plaintiff sustained injuries as a result of the accident. He was an employee of the Kenya Railways but lost his employment due to the accident. The doctor said that he would be able to work again but requires future medical care to ease his inconvenienced caused.

The doctor who examined him was:-

Dr. N.H. Bhanji

MB. CHB Arzt t. Chirur

(W. Germany)

Consultant General

Surgeon and Traumatologist

Date of report 30.5.03

Injuries

- a) Right lower incisor tooth with subsequent loss of the same.
- b) Comminuted fracture of left shoulder joint
- c) Bilateral fractures of both acetabuli

In this well written and detailed medical report D. Bhanji was of the opinion that the loss of the incisor tooth is of a permanent nature. He is unable to move the left shoulder.

The left shoulder joint is not able to be moved. It has sinus discharging pus at the fracture site. The doctor had an x-ray taken of this suit and found evidence of osteoporosis and osteonecrosis on the humeral head. This can only be corrected by surgical intervention.

He then recommended there to be future surgery and hospitalization to the left shoulder joint. This is to be done where the sinus will be removed, then 2 weeks hospitalization and surgery. A shoulder prosthesis would be required.

Thus the cost of the future medical care would incur.

As to the injuries to the hip joint there is evidence of osteoarthritis on both joints. An operation by way of "an open reduction and exact internal fixation with metal plates and screw" should have been done at the Thika Hospital but as there may not have been facilities there of this, the injuries sustained is now permanent. A replacement of both hip joint is required.

Evidence of shortening of the right leg is seen. The unequal distribution of the stress forces along the

lumber spine may develop problems in future.

In his medical report and as also pleaded in the plaint the doctor computed the cost as follows; in a private hospital.

a) Left shoulder

To removal of dead bone to allow sinu to heal surgery, hospital anesthetic costs Ksh.300,000/-

To placing a shoulder of prosthesis Ksh.400,000/-.

b) Hip replacement

To both hip joints being replaced Ksh.300,000/- per hip. Total 600,000/-

c) Physiotherapy Ksh.1,500/-

Per session three times a week My finding are under the head of General Damages.

a) Pain, suffering and loss of amenities

The plaintiff indeed sustained injuries as a result of the said accident. He was hospitalized but did not obtain complete treatment. The injuries to his left shoulder and both hip bones has caused him pain and the doctor was of the opinion that due to pressure placed as he walked he would always be uncomfortable unless this is corrected by future surgery.

I would note the case law relied on by the plaintiff of:-

1: Major Rose Kavili Mutyambai

v

Manasseh Chege Waiharo

Hccc No.2264/93 Osiemo, J

Two plaintiffs suffered injuries on 4.10.97 along the lower Kabete road as a result of a road traffic accident.

The 1st plaintiff had

i) A fracture of the superior and inter pubic rain

j) Dislocation of left hip joint

k) Fracture of six inches

l) Fracture of left patellar toe

m) Multiple laceration

An award of Ksh.500,000/-

was made

The 3rd plaintiff had

i) Fracture dislocation of the bed and right humerus

j) Subluxation of right acromioclavicular joint

k) Cut wounds

Ksh.300,000/- was awarded.

The same was made subject to apportionment.

II) Jane Nduta Kamande

V

John Kuria

Hccc 1665/97, Rawal J

Where the case came for assessment of damages. It therefore gave the circumstances of case of the plaintiff. A passenger travelling in a motor vehicle that was involved in an accident that occurred on 18.4.96.

The plaintiff – a female adult sustained a “butterfly fracture of the superior and inferior pubic rami of the pelvis” There was a non union of the fracture.

A sum of ksh.300,000/- was awarded.

III) Edith Wairubi Wanja

V

Newton Mbuthia Hccc No.554/97 Ondeyo J

The parties put in written submissions, the medical reports were annexed to the written submissions. As liability was admitted at 100% there is no circumstances as how injuries by the plaintiff was sustained.

The injuries according to the judgment was:-

(i) Fracture to 5,6,8 ribs on right side of chest

(ii) Bilateral fracture of pelvis both superior and inferior rami

(iii) Degloving injury to left leg above ankle joint An award of Ksh.550,000/- was given.

This award was attributed to the heard injuries. The other two authorities outline the serious injuries sustained.

I find that the plaintiff here in having developed post accident injuries as a result of the said accident and as per the doctor's report I would find the sum of ksh.200,000/- appropriate in the circumstances under this head.

### C) Special Damages

i) Future medical cost

The plaintiff prayed for Special Damages “as prayed for under paragraph 7.

There are two paragraph 7. This must have been a typographical error. The prayer is the one for future surgery.

These were dealt with above. I note the doctor stating that the cost of the future medical care which is a necessity is for a private surgery and hospitalization care. The total costs amounts to Ksh.1.3 million.

I believe that this amount would be less in the public hospitals. I believe that the plaintiff is entitled to future medical expenses. I would award Ksh.800,000/- under this head to cater for treatment at a public hospital.

ii) Special Damages as pleaded para 5.

The plaintiff gave particulars of Special Damages but did not pray for them.

These are:-

Medical report Ksh.6,000/-

X-rays Ksh.2,000/-

Police abstract Ksh. 100/-

Hospital charges Ksh.8.500/-

Ksh.16,650/-

The plaintiff was not able to prove the above claims by calling the markers. The claims had been disputed by the defence. Even if the claims had been proved it had never been prayed for in the plaint as earlier stated and as such I dismiss the claims.

I accordingly enter judgment for the plaintiff on the proved claims.

In summary:-

a) Passenger aged 47 years old motor vehicle self accident

b) Injuries

i) Right lower incisor tooth with loss to the union

ii) Comminuted fracture of the left shoulder joint.

iii) Bilateral fractures of both acetabulum

c) Liability: 100% against the defendant

a. Quantum:

I: General Damages

a) Pain, suffering and

loss of amenities Ksh..200,000/-

II: Special Damages

a) Future medical care	Ksh.800,000/-
b) Medical report	Ksh. 6,000/-
Nil not proved	
c) X-rays Ksh.	2,000/-
nil not proved	
d) Police abstract Ksh.	100/-
Nil not proved	
e) Hospital charges	Ksh 8,550 /-
Not proved	_____
	Ksh.1,000,000/-

I award the cost of this suit to the plaintiff. I award interest on General damages from the date of this judgment. Interest on Special Damages from the date of filing suit.

Dated this 21st day of September 2004 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**