



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 2068 of 2002**

**HASSAN NOOR MAHMOUD ..... PLAINTIFF**

**VERSUS**

**TAE YOUN ANN .....DEFENDANT**

**JUDGMENT**

**1. BACKGROUND OF CASE**

On the 15<sup>th</sup> December 1997 Hassan Noor Mahmoud, the plaintiff herein was walking along the Thika road near Githurai round about. He was on the side walk when a vehicle driven by the 1<sup>st</sup> defendant Tae Young Ann and owned by the 2<sup>nd</sup> defendant, the “Trustee of the Independent Board for Presbyterian Foreign Mission” left the road at a high speed and veered onto the side walk. It knocked the plaintiff from behind. The vehicle Reg.

KAE 459M then drove off towards the police station. I believe this was to avoid a mob justice being undertaken on the 1<sup>st</sup> defendant. The plaintiff had a brother or relative working at the Military air base. He was rushed there and later an ambulance took him to Madina hospital where he was treated. It seems he was also treated at Kikuyu PCEA hospital and St. Sinai hospital.

He sued the two defendants on 11.12.00 and prayed for damages.

**II: LIABILITY**

The parties agreed to liability by a letter written to the Registrar of the High Court of Kenya Ref. K/56/201 of 15.8.02 and filed on 10.9.02 to 70% against the defendant and 30% contributory negligence against the plaintiff. This judgment was duly recorded by C. Njai, Principal Deputy Registrar (as he then was) on 5.11.02 under order 48 of the Civil Procedure Act.

The issue left for trial was that of quantum on assessment of damages.

**II: QUANTUM**

i) Pain suffering and loss of amenities

The plaintiff was examined by:-

JOAB BODO

mb.chb (EA) FRCS

Consultant Orthopaedic

Surgeon and prepared

a report on 24.7.01

During the trial, this report was never produced but instead parties put in a report of:-

Dr. J.M. Salim

Mb chb.m Med (Surg) Nairobi.

Dated 30.08.00

And a report from

Dr. Moses Kinuthia

Mb chb (Nbi)

General Practitioner

Dated 22.6.05

It is imperative that where a litigant has sustained injuries and a medical report is hereby required, that the doctor who prepares the report must be an orthopaedic consultant where injuries involves the bones. That is, the doctor must specialize in the same field of medicine as the injuries that have occurred. This court has also stated in the past that where a medical report has been submitted and after several years have lapsed the latest medical report is required to be given. This court directed the plaintiff be re-examined again by an Orthopaedic consultant of his choice. The report submitted was indeed of a vast difference.

The latest report submitted was from Joab Bodo

Date 15.7.05

Injuries sustained

i) Fracture in the lower

1/3 of the left tibia and fibula

ii) Fracture of left clavicle

The doctor was of the view in 24.7.01:-

That the clavicle fracture united with an angulations deformity at the fracture site. The function of the left shoulder is normal.

The lower third of the left leg the fracture tibia/fibula went into a non union.

As of 2005, the plaintiff had on 22.3.04 been admitted to the Kikuyu rehabilitation Centre with the non union of the fracture of the left tibia. "The old plate at the fracture site was removed and the fracture treated by stabilization with a rush pin." The leg was mobilized in a below knee plaster cast.

The left leg as of 2005 a year or more later was still in plaster. The x-ray clearly showed a non union of the fracture tube still persisted.

It was the Doctor's opinion that the fractured needed Orthopedics attention. As he had recommended in 2001, the fracture required bone grafting and unless this is done it will not unite. I observed the plaintiff as he came to court. He was on crutches and had difficulties in walking. The report by the doctor has now clearly explained that the fractures indeed had a

mal union requiring bone grafting.

The advocates for the plaintiff prayed I award Ksh.800,000/- basing this on the case law of:-

Victor Musoga V Linus Watito Kariuki Hccc2797/97, Osiemo,J.

Where the plaintiff – a former provincial commissioner was involved in a road traffic accident as a driver He was awarded Ksh.800,000/- for a fracture to the leg.

The case of George:-

Mathenge Mbiyo V M.D.Patel Hccc 2216/93 Osiemo,J.

Where a fracture was sustained and an award of Ksh.600,000/- was given.

The above awards are indeed a large. Comparing the awards with the case of:-

James Musau Kimweli V Benard Ndegwa Kireru Machakos Hccc133/99, Mulwa J

Who awarded Ksh.250,000/- for a fracture to the arm.

In tort, cases for personally injuries are awarded and based on the decision made earlier on the same similar injuries. We follow in Kenya the precedent system. The above awards are large in the circumstances compared to those normally given by these court's

We have nonetheless case law submitted by the defence, but the defence gave awards per each individual injuries. For example in the case of :

a) Alex Okello V Kenya Bus Services Hccc1571/98.

Fracture to tibia and fibula was given at Ksh.200,000/-. The case of:

b) Benedict Oncgabgu Bunduki v J.A. Koriri & Another Hccc 1980/88 J.V. Juma

Ksh.250,000/- was awarded as was in the case law of:

c) George Ndungu v Njoroge Wakai & 2 Others, Hccc145/91

And

d) Isaya Magumba Kirambi v John Kipngetich Hcc514191

The case advocate went further to rely on the case of:-

e) Elizabeth W. Maina V William Nyauma Bangili Hccc2943/93

Where bruises were awarded. He prayed that Ksh.150,000/- be awarded for the various injuries totaling Ksh.400,000/-.

It is clear that when a person suffers for pain it is one and indivisible. Pain cannot be to the leg, the arm the head and different awards be given.

I would find that the plaintiff injuries are serious due to the Malunion. There seems to be grafting required at a later stage. I note the issue of future medical expenses have been taken care of. I hereby find that a sum of Ksh.200,000/- of pain and suffering is sufficient.

## II: Special Damages

The parties had agreed to the following special damages and the plaint amended to reflect the as follows:-

i) Police abstract	Ksh.100/-
ii) Medical report	Ksh.7,000/-
iii) Medical expenses	Ksh.116,983/-
iv) Further future medical expenses	<u>Ksh.150,000/-</u>
Total	<u>Ksh.274,083/-</u>

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

## In summary

- a) Male adult pedestrian aged in 1997
- b) Motor vehicle pedestrian accident
- c) Injuries
  - i) Fracture of left leg tibia and fibula
  - ii) Dislocation of left ankle
  - iii) Fracture of left collar bone
- d) Liability: Agreed 70% against the defendant jointly and severally
- d) Quantum:

## I: General Damages

- i. Pain suffering and loss

of amenities Ksh.200,000/-

## II: Special Damages (agreed)

- i) Police abstract Ksh. 100/-
- ii) Medical report Ksh.7,000/-

iii) Medical expenses Ksh.116,983/-

iv) Further future

medical expenses Ksh.150,000/-

Total Special Damages Ksh.274,083/-

Total Ksh.474.083/-

Less 30% contributory negligence Ksh.142,224/90

70% net total Ksh.331,858/10

I award the costs 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 21<sup>st</sup> day of July 2001 at Nairobi.

M.A. ANG'AWA

JUDGE

Chaudhri & Co. Advocates for the plaintiff

Ruing Rainji & Co. Advocates for the defendant