



**Industrial accident
Fracture of Pelvis
3 ribs, left femur
Loss of earning**

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1617 OF 1998

BILDAD MWANGI GICHUKI PLAINTIFF

VERSUS

TM- AM CONSTRUCTION GROUP (AFRICA) DEFENDANT

JUDGEMENT

Bildad Mwangi Gichuki had been employed by M/s-Am Construction Group (Africa) since 1978. He was at first employed as a “Spanner boy” but later was promoted to a mechanic.

On the material day of the 6th of August 1996, the said Bildad was working in HomaBay. He was repairing a lorry. The chain holding the trailer of the lorry for purposes of repair snapped from its crane hook. The trailer fell on Bildad. He lost consciousness. He was admitted to Tabaka Mission Hospital and later Nairobi West Hospital for treatment. The injuries sustained by Bildad were :-

- a) A fractured pelvis
- b) Fractured 3 ribs
- c) Segmental fracture of the left femur bone.

Bildad sued his employer on 22.7.98 for negligence. Namely that his employer failed to provide him with a safe place to work. He was subjected to a risk of injury that his employer ought to know. The employer failed to ensure the chain was properly hooked to the crane; failed to provide safe hooks and or safe chains; failed to provide pressure, electric cranes or lifts for lifting motor vehicles or trucks under repair. Bildad also pleaded Res ipsa loquitor.

His employer filed defence on the 13.11.98 after entering appearance to this case through their advocates on the 29.10.98. By now Bildad had been dismissed from his employment as of December, 1996.

In their defence, the employers denied the allegations of negligence. They nonetheless accused Bildad of solely or extensively contributing to his injuries due to his own negligence. He did this by removing the “calabrese lifting jack” from the trailer causing the chain to slip. Basically what they were saying is that Bildad was reckless and negligence himself

The case came for trial before me on the 2nd of February, 2000. The parties entered into a consent judgment as to liability. This was:-

“judgment for the plaintiff against the defendant on liability at 80%”.

As a result, the “agreed issues “entered into on the 23.11.98 and filed on the 16.4.99 by consent has now been narrowed down. Namely, Issue No.2, 3,4, 5 which deal with how the accident occurred, who caused the accident, whose negligence contributed to it and whether the accident was inevitable; has now been taken care with the consent judgement.

What is now in issue is that of Quantum of damages. The court is to assess what this amount would be. The agreed issues pending are issues No.1, 7, 8 and 9.

Namely:-

1. What is the monthly salary overtime and or remuneration of the plaintiff by the defendant at the material time.
7. Has the plaintiff suffered past or future loss of earning - what is the quantum thereof if any.
8. Is the plaintiff entitled to damages for future medical expenses. In what sum if at all.
9. Quantum of General & Special Damages.

Issue No. 10 deals with the costs.

I wish to begin with issue No.9 on the Quantum for General Damages.

Bildad sustained a fracture of the pelvis, ribs and left femur (segmented).

He has proven to this court through a medical report produced as an exhibit that he did sustain these injuries. The report was prepared by Dr. Wambugu P.M. MBChB M. MED (surgery) a Consultant Surgeon. He examined Bildad and came to the conclusion that due to the fractures sustained a metal implant would be required to be removed at a cost of Ksh.70,000/- at a private institution. The other fractures had united and healed well. Bildad will always have a shortening of the left bone. Due to the uneven weight distribution axis, it would mean that there would be an early osteoarthritis of the spine. Bildad would continue to have pain in his left hip point due to the pelvic bones not being fully united.

Dr. Wambugu went further to assess the permanent incapacity injuries at 50%.

I am satisfied that Bildad sustained injuries as a result of the industrial accident that occurred on the 6th of August, 1996. I would award him General Damages for pain suffering and loss of amenities. How much should this be?

His advocate relied on a series of authorities namely:

1 Harry Evayo Murumba V Julius Musyoka Kisaso

Hccc 181/96

(J.W. Mwera, J.)

2. Francis Kiio Makumi V Martin Mailu & Another

Hccc 121 of 1997

(J.W. Mwera)

3. Jimmy Mbithi Kitele V Ramji Ratina Construction Ltd

Hccc No.2993/88

(Mbogholi-Msagha, J.

4. Ruth Lilian Nyawir Okoth V Philip Olago Odeny

Hccc 186/96

(J.V. Juma,J.)

5. Morris Waheire Kahado v David Musau & Rabadia Builders

Hccc No.1829/91

The above authorities made awards varying from 250,000/- to 400,000/- or similar injuries.

The advocate for the plaintiff prayed that an award of Ksh.500,000/- should therefore be awarded. The defence on the other hand relied on the case law of:-

Solomon Waiganjo Njoroge v Anne Wambui Mwangi

Hccc 4935/91

(J.Mwera, J.)

An authority that had been submitted by the advocate for the plaintiff. I believe at page 109 of the authority, it questioned the doctors estimated sum of costs on special damages.

The other two authorities he relied on is that of

Cathy Karimi v Chege Patrick Muturi

Hccc 4595/89 (Ringera, J.)

Kromah Musa V Mapus Pall & Another

Hccc 5285/92

(Ringera J.)

Where the issue of a medical report in the above (former) first authority, questions a report that is 5 years old being submitted. I do not think this is an issue in this case. The medical report before me is of 1998. If the defendant required a recent medical report he ought to have sort for it during the directions stage before the Deputy Registrar.

On the latter authority it was delivered in 1994 and gave general damages Ksh.200,000/-.

The defence prayed an award of Ksh.200,000/- be therefore awarded.

I would hold that a fair and reasonable award be Kshs.250,000/-.

As to the issue of Special Damages, Bildad pleaded he be awarded Ksh.151,617.20 being half pay from

August 1996 to December 1996 Ksh.19,500/-, an average pay from January 1997 to May 1998 at ksh.7,771.60 X 17 =132,117.20 and lost payment earnings total 151,617.20/-.

The question arises is what was Bildad wages and or salary. From the pay slip produced in evidence, the basic salary is Ksh.6,500/-This at all times is the salary that the court would take. There is no such a term as “an average salary”. As it stands Bildad would not be paid overtime as he has not earned this salary due to his injuries.

I note that Bildad had a lot of overtime. He also often took salary advances.

No reasons has been given as to why Bildad was given half pay as of 1996. No reasons had been given as to why he was dismissed from employment on December, 1996.

In the absence of this explanation I would award him his salary half pay from August 1996 to December, 1996. This is a total of four months at a basic salary of half 3,250/- = Ksh.13,000/-.

As to the pay from January 1997 to May 1998 as pleaded Kshs.6,500/- x 17 = 110,500/-.

The other aspect is that of future medical costs. Dr. Wambugu has recommended a sum of Ksh.70,000/- to remove the metal implants in the future. I would accept this. I refuse to accept a statement in para 9 of the Plaint saying that Bildad would “require pain killers for a long time to come”. This statement is vague. It is one in which no proof has been deduced nor is there any where that the doctor mention this requirement of drugs. I would not therefore make awards on this.

On the diminished earning capacity Bildad is now 43 years of age. Apart from his limb he appears fit and able to work elsewhere in future. I would award him this head of damages for 2 yeas at Ksh.6,500/- = Ksh156,000. In summary

Injuries sustained by the plaintiff

- 1 Fractured pelvis
2. Fractured ribs (3)
3. Segmented fractured left femur-bone

Liability

Consent judgement entered into by the parties. Liability agreed at the ratio of 20%:80% between the plaintiff and the defendant respectively.

Quantum

General Damages

a) Pain suffering and loss of amenities	Ksh250.000/-
b) Past loss earnings	Ksh.123,500/-
c) Future medical care	Ksh. 70,000/-
d) Diminished earning capacity	Ksh.156,500/-
	<u>Ksh.599,500/-</u>

I award costs of this suit to the plaintiff and interest at court rates from the date of this judgement.

Dated this 7th day of February, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE