



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA MALINDI**

**CIVIL MISC APP 33 OF 2001**

**JOHN KIRIRU NJOROGE**

**T/A JENGO & ASSOCIATES, ADVOCATES.....PLAINTIFF**

**VERSUS**

**DAVID  
NJIIRU.....DEFENDANT**

**JUDGEMENT**

John Kiriru Njoroge (the Plaintiff) filed this suit against David Njiiru (Defendant) seeking;-

- (a) General damages**
- (b) Special damages (a) Kshs.2,000/-**
- (c) Costs of the suit**
- (d) Interest at court rates.**

The claim arises out of a road traffic accident on 4/6/05 involving the Plaintiff who was cycling along Baharini – Mpeketoni Road when upon reaching near Lake Kenyatta junction, he was knocked down by the Defendant’s motor vehicle registration Number KAR 146E, Toyota Land Cruiser, which was being driven by the Defendant, his authorized driver, agent, servant and/or employee.

A consent judgment was entered on 31/7/08 whereby judgment on liability was apportioned at 30% against the Plaintiff and 70% against the Defendants jointly and severally. The matter then proceeded to hearing for the assessment of damages. The Plaintiff testified that he was hit by the motorvehicle while riding his bicycle and as a result, he sustained a fracture right leg, hip, knee and bruises and cuts all over his body. His leg was in plaster for three months, but it had a problem and had to be re-done so he was in cast for 6 months. He still goes for physiotherapy and radio therapy and now has a shortened limb.

Before the incident, he was a mason earning Ksh.300/- per day or Kshs.9000-10,000/- per month but due to the injuries, he is now unable to work and depends on the church for assistance. Appellant spent Ksh.19240/- on medical expenses as per the receipts produced as Exhibit 6. His advocate paid Ksh.500/- to carry out a search and the search certificate is produced as Exhibit 7. He says the advocate will recover this amount from him.

He complained that he has not fully recovered as he still experiences pain especially if he walks or stands for too long or when it gets cold.

On cross-examination Plaintiff stated that he did not have anything to prove that he earned Ksh.300/- per day and that indeed the Doctor's report did not say that he was incapacitated not to be able to work. He is 35 years old and stated that currently he cannot do any work. He informed the court that he uses a stick to aid him in his walk, but forgot the same in the matatu he had traveled in, on the morning of the hearing. He also confirmed on cross-examination that he got a job that involved sitting, then he would have no problem.

The Doctor who examined him testified as Pw 1 (Doctor AJONI ADEDE) and he confirmed to the court that Plaintiff had fractures of the Right hip bone and fracture of the both right leg bone (Tibia and Fibula) and multiple cuts on the abdomen and lower limbs. On the day of examination that is on 19<sup>th</sup> February 2006, Plaintiff was in crutches, walked with difficulty and had an obvious limp. The Right hip was swollen and tender and the right knee was stiff with a shortening of the right leg by 3 cm. There were multiple scars on the abdomen the larger measuring 10cm and a large scar on the right leg measuring 6x3cm. His conclusion was that Plaintiff would suffer permanent partial disability due to multiple fractures, shortening of the right leg and stiffening of the right knee.

The soft tissue injuries would leave no residual disability – the medical report by Pw 1 was thus produced as 1. He was paid Kshs.2000/- for the same as per receipts Exhibit 2 and he was also paid a further Ksh.4000/- for court attendance. Pw 1 explained that due to the shortening of the leg and stiff knee. Plaintiff now suffers from arthritis and he experiences pain during the cold weather. There was another medical report by Doctor J M Muthuuri which was produced by consent as D.exhibit 2 which confirmed the injuries before referred by Doctor Adede. He assessed degree of permanent incapacity say he.

The Plaintiff's counsel suggests general damages for pain and suffering at Ksh.200,000/- and for diminished earning capacity he suggests Ksh.400,000/-. He also suggests the sum of Kshs.180, 000/- as loss of income based on grounds that Plaintiff has not worked for 18 months and was earning at least Kshs.10,000/- per month.

The Plaintiff's counsel submits that Plaintiff was advised by the Doctor not to engage in tasks that would hinder his healing process unless otherwise advised by the Doctor. The Plaintiff's counsel has cited three decisions to support his suggested injuries in *Mutinda Mathcke V Gulsham Yusuf HCCC 752 of 1993 Kibet Chelangat (A minor) V Plan International HCCC 261 of 1995 (Nairobi).*

*Gladys Kadzo tsofa V Samuel Kamau Njoroge HCCC 207/95 Mombasa.*

The defence counsel on the other hand submits that even though the injuries were multiple fractures, the same had healed with serious permanent incapacity and relying on the decision in *Evans Kamau V Cecilia Wanjiru ndungu No. 16 of 1992 (Mombasa) and Peter Lenys Deroni V Dr. Stephen W. Kabetis HCCC 2502 of 1990,* he proposed general damages in the sum of Ksh.350,000/-.

Defendant's counsel submitted that Plaintiff is not entitled to claim for loss of amenities, loss of earnings or diminished earning capacity on grounds that the two medical reports did not indicate that Plaintiff cannot work.

As for loss of income, he argued that Plaintiff should not be awarded the same as he was not able to produce documents any audience regarding his purported income of Kshs.10,000/- per month. Even though he alleged that he had payslips and also had contract with various people so there was no proof of income. As for special damages, defence counsel submits that Plaintiff should only be awarded what was pleaded and proved – reference was made to *HCC 447 of 2001 Joseph Wando Aketch V Corrogated sheet Ltd which held* that loss of earnings is a special damage and which must be specifically pleaded and strictly proved and this was repeated in *Thuranira Karauru V Agnes Ncheche, CAppeal 192 of 1996 (Nyeri).*

For General damages for pain and suffering taking into consideration the nature of injuries and the two medical reports produced, I consider also the decided cases cited – I think the decision in **Mutinda Matheka V Gulsham** dealt with far more severe injuries than the present case.

However the case of **Gladys Kadzo Tsofa** is a useful guide although even than the extent of injury was more severe - it was delivered on 10/3/00 and my consideration is that general damages 450,000/- (Four hundred and fifty thousands only) is sufficient and I so award less 30% contribution. For loss of income – no evidence has been tendered to prove that the Plaintiff was engaged in gainful employment he says was a mason at a site where a school was being constructed – he did not name the company or individual for whom he was working. He had no documents to support his claim nor did he produce the purported pay slips he claims to have been issued with while in employment. Plaintiff cannot just pluck figures from the abacus, throw them at the court and expect the court to believe them without question.

For loss of income, I concur with defence counsel that this is a special damage which must be specifically pleaded – in the plaint dated 10<sup>th</sup> August 2006, the same is not included in the pleadings and seems to have been introduced at the hearing and in the defence. I find no basis upon which to make any award under this head. The other special damages claimed and proved relate to the medical expenses to Doctor's fees which total to Kshs.23,940/- (Twenty three thousand, nine hundred and forty only, as per the receipts produce and I enter judgement in favour of the Plaintiff in that sum.

I award costs of the suit to Plaintiff plus interest thereon at court rates from date of judgement until payment in full.

***Delivered and dated in open court this 5<sup>th</sup> day of November 2008 at Malindi.***

**H A OMONDI**

**JUDGE**

In the presence of

Douglas Randu – court clerk

Mr. Mwadilo holding brief for Jengo for the plaintiff

No appearance for the defendant