



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

**AT ELDORET**

**Civil Case 73 of 1995**

**1. CYRUS GACHANJA MUYA**

**2. MOSES MACHARIA MUYA**

**3. RACHEAL WANJIRA KAMAU**

**4. IRENE NGINA WAMBUGUA**

**5. DENNIS MUYA GACHANJA (minor suing through next friend).....PLAINTIFFS**

**versus**

**1. ABBAS MOHAMMED**

**2. PETER WAHOME KARITAI.....DEFENDANTS**

**JUDGMENT**

The plaintiff herein sued the defendants seeking damages arising from an accident in which they sustained while traveling in the defendants' motor vehicle driven by the defendants, their servants and or agents. They were fare paying passengers.

The said accident was due to the negligence of the defendants, their servants and or agents whose particulars are given. They also rely on the Traffic Act, the rules and regulations made thereunder and the provisions of the Highway Code.

In consequence thereto the plaintiffs suffered injuries particularized in the plaint for which they claim both general and special damages.

The defendant was served but he filed no papers and the court being satisfied that he had due notice of the pleadings allowed the plaintiff to proceed by way of formal proof.

The sum total of the plaintiff's evidence is that on the material day they were traveling in the defendants' motor vehicle from Nyeri to Eldoret via Nakuru. 10km to the accident they had a tyre burst and the tyre was changed. At the accident some witnesses heard a bang and then they rolled. There was a tyre burst. The driver was not concentrating, did not have a proper control of the vehicle and yet he was speeding. They entirely blame him for the accident. They were fare paying passengers and had no control over the manner of driving. The witnesses gave concurrent evidence. At the close of the whole case counsel for the

plaintiffs put in written submissions and the major points relied on by them are:-

1. That the second defendant drove the vehicle negligently and recklessly causing it to veer off the road, rolled and crushed violently.
2. Failed to apply brakes sufficiently or in time at all to avoid the said accident.
3. Failed to keep any or any sufficient regard for the safety of others.
4. He also drove at a very high speed.

It is his stand that since the evidence is not challenged liability is established.

On quantum he referred the court to the case of Charles Agoya Mbuya v Fred Okiyo Olande and Another Nairobi HCCC No 750/87 where the plaintiff a 30 year old clerical officer married with three children at the time of the accident. He was involved in a road traffic accident while traveling as a passenger. He was rendered unconscious and regained after 2 days in hospital. He sustained a head injury, pain and swelling in the back, his left lower teeth was broken and the remaining fragment dropped out; injury to the left ear and multiple lacerations, bruises on the scalp and over left eyebrow. He was hospitalized for 9 weeks and 2 days.

The injuries healed with obvious scars on the left eye-brow, below lower lip, headaches which would occur for prolonged period, scars were a cosmetic disability, reduction in hearing in the left ear which would require hearing aid, pain killing drugs for headaches.

The reduction opposed to a risk of developing epilepsy in the general population of her age about 0.5%. The risk of post-traumatic epilepsy diminishes with time so that after 2 years it reverts to the general risk in the population. Her intellect had not been affected by the injury. The wounds healed with extensive well pigmented scars over her right shoulder blade, small scar of the back of the right elbow and the right left legs.

General damages for pain suffering and loss of amenities assessed at Kshs 150,000/-.

The case of Andrew Kamau Thuo v Mohamed N Salim and Another Mombasa HCCC 36 of 1989 where the plaintiff's age not stated sustained a head injury with a resultant post concussion syndrome, abrasions and injury to the neck. He was off work for one week, suffered dizziness and pain for further 3 weeks. General damages for pain suffering and loss of amenities assessed at Kshs 180,000/-.

The case of Joseph Were Ouma v Peter A.O. Sigwili and Another Nairobi HCCC No 3628/1998 where the plaintiff suffered lacerations on the face, distortion of the upper teeth, chest injury, laceration on both legs. The court awarded Kshs 180,000/- as general damages, cost of future treatment KShs. 28,000/- and special damages of Kshs 650/- total Kshs 208,650/-.

The case of Susan Njoki v Stephen Njuguna Gathi Nairobi HCCC 2366/90 where the plaintiff, a student at KTTC sustained head injury concussion and laceration near her right ankle. Rendered unconscious after accident. She was taken to hospital where the cut was sutured and treated. She was discharged the same day.

The injuries healed with a resultant 4 cm long scar above the outer side of the ankle with a keloid formation making it unsightly. General damages for pain suffering and loss of amenities assessed at Kshs 100,000/=.

The case of George Njihia Mburu v EA Road Services Ltd and Another Nairobi HCCC 2908/85 where the plaintiff suffered a closed head injury, multiple cuts and soft tissue injuries over left eyebrow, left eye-lid, left cheek and below left nostril and left ear.

The plaintiff injuries healed leaving permanent disfiguring scars and lack of concentration due to head injury. General damages for pain suffering assessed at Kshs 120,000/-.

The case of Dennys Mabwaka Mhabusi v Mawingo Bus Services Ltd and Another Nairobi HCCC No 2707/90 where the plaintiff was 37 years at the time of accident. The plaintiff sustained cut wound on face, chest and cut tendon on right arm muscle and right leg. The cut tendon on the right foot was a considerable disability of the right foot which would interfere with the plaintiff's sporting activities. The cut tendon of the right arm tend to weaken the arm and caused a lot of pain to the plaintiff. Other cut injuries healed leaving permanent scars. General damages for pain suffering and loss of amenities assessed at Kshs 120,000/-.

On the assessment of evidence on liability I find that the suit is not contested and in terms of Order 6 rule 9(1) of the Civil Procedure Rules the defendant is deemed to have admitted the allegations of the plaintiff save as to damages. That aside, I am alive to the requirement that he who alleges proves. The defendant driver knew that the tyres were worn out and that is why they kept on bursting and yet he kept on going at a speed which was dangerous to other road users. He should have driven in such a way so as to be able to control the vehicle in the event of any tyre burst. Had he done so he could have managed to bring the vehicle to a safe stand still. In failing to do so it shows that he was speeding, inattentive and therefore negligent in the discharge of his duties. The driver was in the course of his employment and so he binds the master.

I find liability established at 100% against the defendants jointly and severally as the plaintiff as passengers did not contribute to the causing of the accident as they had no control over the manner of driving of the said vehicle. Secondly, knowing that the tyres were not in good order it was negligent on his part to drive at a speed without due care or attention.

Having established liability I now come to the assessment of damages. The special damages though pleaded were not particularized. The law requires that they be pleaded, particularized and proved. Where the contrary is the case they cannot be awarded and the same are disallowed in this case.

On general damages the first plaintiff Cyrus Gachanja Muya produced medical report (exhibit 3) made on 12<sup>th</sup> July 1996. It lists the following injuries:

1. Severe injury of right elbow joint which resulted in dislocation.
2. Lacerated wound on the left knee
3. Cut wound on the left ear
4. Closed injury of right hip joint.
5. Closed injury of the chest
6. Severe concussion as a result of that he was unconscious for several hours.

On examination the doctor found 2 scars on the right knee of 3 and ½ cm each. X-ray of right elbow shows dislocation. Right elbow joint is still to some extent.

In his opinion the plaintiff sustained multiple external and internal injuries during the accident. These injuries have healed with scar formation externally in post traumatic changes on right elbow joint, followed by slight stiffness. The same joint may develop arthritis in future. He may also develop post traumatic epilepsy as a result of severe concussion which he sustained during the accident.

In his evidence in court he pointed out a cut on the left ear, head, right knee. He was admitted at Mweiga for 2 days and then he came to Eldoret and continued with treatment as an out patient. The complaints as at the time of trial are that the right hand cannot straighten and he cannot carry or push anything.

On the court's assessment the plaintiff sustained severe soft tissue injuries which have healed and his only complaint is that the right hand cannot push or hold anything heavy. Considering the injuries sustained by him, their effect on his activities and the awards in the authorities referred to me, I make an assessment of Kshs 85,000/- as general damages for pain suffering and loss of amenities and Kshs 30,000/- for head concussion.

The second plaintiff Moses Macharia Muya gave evidence as PW2. He produced the report (exhibit 6). The injuries listed are:-

1. concussion head injury
2. Deep cut over left side of head
3. Laceration on the left side of chest
4. Cut over left elbow
5. Deep cut right palm
6. Deep cut over left thigh posteriorly.

On examination the doctor found scars corresponding to the injuries sustained. The grip of the right hand was weaker than the left. The shoulder movements and power were gone. Chest examination was normal too. The power in the left lower limb was normal too. The scalp consistency was normal too. The higher centre function especially memory was found to be normal too.

In his opinion there is a permanent disability resulting from the injuries on the head. Most of the other complaints are psychological and difficult to make an objective assessment. The total disability was assessed at 10%.

In his evidence PW2 pointed out scars on the head, blunt injury on the head, right back inner thigh, scar below the left breast. He did not give any current complaints and it is evident that he had substantially healed. The medical report was made way back in 1995 at which time he had less power grip in the right hand. Since he had no complaint now it is clear that he has healed well.

Taking all the relevant factors into consideration inclusive of the authorities cited to me, their ages and the fact that the injuries are now healed with no permanent disability I assess Kshs 70,000/- as general damages for pain suffering and loss of amenities.

The third plaintiff Rachel Wanjira Kamau gave evidence as PW3. She produced the medical report (exhibit 8). The injuries listed were:-

1. Concussion head injury
2. Concussion on the back of head
3. Concussion of cervical spine
4. Concussion and laceration of left shoulder
5. Concussion of left side of chest.

The report is dated 25<sup>th</sup> October 1995 and the doctor's findings are that locally there was a scar behind her left shoulder. The shoulder left joint was painful on all its movements. The fore arm was sensitive to superficial palpation. The neck movements were painful too. The doctor assessed permanent disability at 15%. Her complaint as at the time of trial are that she cannot lift anything with the left hand, still feels

headaches and she cannot even bend. She loses memory and cannot concentrate but she had not received any specialized treatment for that, but she uses pain killers. She also suffers from fear. She fears driving or travelling over long distances.

Apart from the unsupported loss of memory the injuries have virtually healed. Considering the fact that the injuries are now healed and the fact that there is no backup information on loss of memory to show that it is connected to the accident, I make assessment of Kshs 45,000/- as damages for pain, suffering and loss of amenities.

The 4<sup>th</sup> plaintiff gave evidence as PW4. Her medical report was produced as exhibit 11. The injuries listed were a cut wound on the right leg and closed injury of the spine. The findings were that the cut wound had healed with scar formation. In his conclusion the doctor said that the injury on the lower 1/3 of the right knee healed with scar formation but cannot in any way interfere with her duties in future. She did not give any current complaints as at the time of trial and I took it that she was completely healed. Considering the extent of the injuries sustained by her and since they are completely healed and have no effect to her activities I assess Kshs 20,000/- as general damages for pain suffering and loss of amenities.

PW4 also gave evidence on behalf of the minor (5<sup>th</sup> plaintiff). She said the child had a cut on the head and the lower jaw as hit and pushed. The child's current complaints as at the time of assessment was headaches. The child just received treatment at Mweiga and then discharged to go home. The child's medical report was produced as exhibit 10.

The doctor's findings were that the child had a lacerated wound on the frontal region. Suffered concussion and was unconscious for several hours and had an injury on the lower jaw.

As at the time of examination the wound had healed with a small scar formation on the face. The skull x-ray was normal. In the doctor's opinion the injuries had healed with scar formation externally. Internally the injuries had also healed but he could not rule out complications like post traumatic epilepsy as a result of concussion suffered during the accident.

The accident was in 1992. The report was made 4 years later in 1996 while the trial was held in 1999, a period of 7 years since the occurrence of the accident. Apart from the headaches there is no evidence of any onset of epileptic fits. However since the doctor did not indicate in the report that the risk diminishes with time the same cannot be ruled out.

On the whole I would assess Kshs 190,000/- as general damages for pain suffering and loss of amenities.

I therefore enter judgment for the plaintiffs on the following terms:

1. 1<sup>st</sup> Plaintiff – Cyrus Gachanja Muya

General damages for pain, suffering and loss of amenities Kshs 30,000/- for head concussion, Kshs 80,000 for severe soft tissue injuries. Total Kshs 110,000/- with interest at court rates from the date of judgment until payment in full.

2. 2<sup>nd</sup> Plaintiff – Moses Macharia Muya

General damages for pain, suffering and loss of amenities Kshs 70,000/- with interest at court rates from the date of judgment until payment in full.

3. 3<sup>rd</sup> Plaintiff – Rachel Wanjira Kamau

General damages for pain, suffering and loss of amenities Kshs 45,000/- with interest at court rates from the date of judgment until payment in full.

4. 4<sup>th</sup> Plaintiff – Irene Ngina Wambugu

General damages for pain, suffering and loss of amenities Kshs 20,000/- with interest at court rates from the date of judgment until payment in full.

5. 5<sup>th</sup> Plaintiff – Dennis Muya Gachanja

General damages for pain, suffering and loss of amenities with a risk of developing post traumatic epilepsy Kshs 190,000/- with interest at court rates from the date of judgment until payment in full.

6. Costs of the suit.

7. The adults shares to be paid out to them forthwith.

8. The minor's share to be invested in an interest earning account in the joint names of the Deputy Registrar of this court and the next friend in any sound financial institution and the same is not to be withdrawn without prior authority from the court. The interest earned to be withdrawn by the mother from time to time and the same to be applied towards the general and education maintenance of the minor. The main amount so invested to be paid out to the minor when he attains the age of majority.

9. There will be liberty to apply in respect to the minor's funds.

Dated at Eldoret this 20<sup>th</sup> day of August 1999.

Read and delivered at Eldoret this 5<sup>th</sup> day of October 1999.

**R NAMBUYE**

**JUDGE**