



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT EMBU  
Civil Case 32 of 1997**

**PETER M. MAILANY..... PLAINTIFF**

**VERSUS**

**MOHAMMED HASSAN MUSA..... 1ST DEFENDANT**

**DENNIS CONSTELLO DOYLE ..... 2ND DEFENDANT**

**DIAMOND TRUST (K) LIMITED .....3RD DEFENDANT**

**Coram: A.G. A. Etyang J.**

**Mr. Arithi Advocate for Plaintiff Mr. Miller Advocate for Defendants**

**Court Clerk Murungi**

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**JUDGEMENT**

PETER M. MAILANYI is the Plaintiff. He instituted this suit through the law firm of Messrs Mithega & Arithi Advocates through a plaint dated 13th September 1996. It is a claim for general damages and special damages for pain, suffering and loss of amenities suffered as a result of a road traffic accident which occurred on the 26th October 1994 along Meru/Nanyuki Road The accident involved two vehicles, namely, a Mercedes Benz Saloon Registration No. KPA 800 belonging and driven by the Plaintiff and HINO LORRY Registration number KAD 775L owned by DENNIS CONSTELLO DOYLE (the 2nd Defendant) and DIAMOND TRUST (K) LTD (the 3rd Defendant) and driven, at the material time by Mohammed Hassan Musa (the 1st Defendant).

The Plaintiff pleaded in his plaint that on the material day of 26th October 1994 he was lawfully driving his said motor vehicle along Meru/Nanyuki Road when the 1st Defendant drove and/or managed the 2nd and 3rd Defendant's said lorry so dangerously, recklessly and carelessly that it rammed onto and/or collided with his said vehicle in which he was aboard, and that he sustained very serious injuries.

Particulars of the 1st Defendant's negligence were pleaded and set out in the said plaint. So were the particulars of injuries. Special damages pleaded amounted to Shs. 1,624,100/-. There was a further plea in paragraph 10 of the plaint which reads:

“10. FURTHER after the accident the Plaintiff, who is an advocate of the High Court of Kenya and is right handed, has been completely unable to carry on with his practice as an advocate and therefore claims Ksh.200, 000/- per month for 30 years that he expected to be in active practice. At the time of the accident he was only 33 years”.

Under this heading the Plaintiffs claim against the Defendants was Shs.72,000,000/-(Sh.200,000/- x 12 x 30 years).

Thus, on special damages alone, the Plaintiffs total claim against the Defendants was Shs.73, 624,100/-. It is, by any standards, a substantial claim. One that the court would have wanted the parties to treat with the seriousness it deserved. The pleadings show that, on the 31st October 1996, the law firm of MOHAMED & MUIGAI Advocates entered appearance for the 3rd Defendant and at the same time filed its written statement of defence in which it essentially pleaded that its interest in motor vehicle Registration No. KAD 775L was limited to that of a financier and that the 3rd Defendant did not have control over the running and operations of the aforesaid motor vehicle.

Three weeks or so thereafter, on 25th November 1996, the law firm of MESSRS ORARO & RACHIER Advocates entered appearance, not only for the 1st and 2nd Defendants, but also for the 3rd Defendant. MESSRS ORARO & RACHIER Advocates then filed on the same day (25th November 1996) a joint defence for all the three Defendants in which the said Defendants admitted the collision referred to in the plaint, denied that they were guilty of the alleged or any negligence or that the collision was caused by the alleged or any negligence on their part, claimed that the collision was caused solely or alternatively was contributed to by the negligence of the Plaintiff, (particulars of that contributory negligence was pleaded) and denied that the Plaintiff had suffered the alleged or any injury, loss or damage. The Defendants further denied paragraph 10 of the plaint, which I have reproduced in this judgement hereinabove, being a claim for Shs.72 million, and put the Plaintiff to strict proof thereof.

Pleadings were closed on 19th February 1997 and the case was listed for hearing at Embu on the 3rd July 1997. On that date Mr. Arithi appeared for the Plaintiff while Mr. Gacora held a brief for Mr. Miller of Messrs Oraro & Rachier Advocates, for the Defendants. The case was listed for hearing by consent on 1st December 1997 at 9.00 a.m. When it was called for hearing on that 1st December 1997 the Plaintiff and his advocate Mr. Arithi were present. Mr. Kibe advocate *held* Mr. Miller's brief. Mr. Kibe informed the court that Mr. Miller had instructed him to apply for an adjournment to facilitate an out of court settlement. The application for adjournment was granted and the case was fixed for hearing at Embu on 4th March 1998.

On the 4th March 1998 Mr. Arithi and the Plaintiff turned up in court. Mr. Kibe again held Mr. Miller's brief and told the court that Mr. Miller had called him from Nairobi to say that he was unable to travel to Embu due to the then Bank Staff strike. He then applied for an adjournment. Thereupon Mr. Arithi opposed it, submitting that the reason given for the adjournment was not good enough; that the bank's strike had affected the whole country; that he and the Plaintiff had travelled to Embu from Meru despite it; that Mr. Miller ought to have made prior alternative travel arrangements. That application was rejected and the hearing of the case was ordered to proceed. Mr. Kibe told the court that he had no instructions to proceed but Mr. Arithi said the Plaintiff had turned up and was ready to proceed. The case was ordered to proceed and the Plaintiff took the witness stand.

It is to be noted that, Messrs Mohammed & Muigai, who had entered appearance and defence for the 3rd Defendant did not go beyond filing that memorandum of appearance and the defence. They made no appearance in this court at all.

Mr. Miller did not explain the absence of the three Defendants in court when the case was called out for hearing. He did not, in particular, explain why DIAMOND TRUST (K) LTD, one of the leading financial institutions, could not send one of its authorised agents, to Embu for the conduct of its defence. All in all, the court was of the view that, the absence from court of the Defendants and their counsel, had not been satisfactorily explained and was without acceptable excuse. The hearing of the case proceeded *ex-parte* pursuant to the provisions of Order TXA Rule 3(a) Civil Procedure Rules. The Plaintiff gave evidence and closed his case on that same 4th March 1998. The case was adjourned to the 11th March 1998 for submissions. On that date Mr. Miller turned up and applied for the setting aside of those *ex parte* proceedings but the application was dismissed. He applied for stay of proceedings but again that was rejected. But Mr. Miller was granted the liberty to file any formal application for any orders which he thought the Defendants were entitled to. Hearing of the case, for oral submissions, was adjourned to the

26th March 1998. When the court resumed on that date Mr. Miller had not filed any application on behalf of the Defendants and did not make any other application. Instead both him and Mr. Arithi made oral submissions on the issue of liability, quantum of damages and special damages. In this judgement, these three issues will be determined in that order.

On the issue of liability, for the accident, the Plaintiff gave evidence and told the court that he is an advocate of this court and practices law at Nanyuki Town in the law firm of KAPARO & MAILANYI Advocates since January 1989, having been called to the Bar or admitted to the Roll of Advocates on the 9th December 1988. He recalled the 26th October 1994 at 12 noon he left Nanyuki Town for Meru Town to attend a burial of another advocate, the late Robert Mwiti Murungi. After that burial on the same day in the afternoon he started his journey back to Nanyuki. He was driving his personal car Mercedes Benz Saloon, Registration No. KPA 800. He was in the company of his wife Mrs. Julie Mailanyi and another passenger Mrs. Kaburu in the car. He drove along the MERU-NANYUKI ROAD towards Nanyuki Town upon arrival at the gate of TIMAU POLICE STATION at around 8.30 *p.m.* they found a police road block. They stopped and were checked by the policemen on duty at that roadblock. They were cleared to proceed after about five minutes. He drove on towards Nanyuki. Due to the relevance of the next line of evidence I will quote from the court record what the Plaintiff said. I quote:

"After about 600 metres from Timau Police Station I saw another on-coming motor vehicle with its lights on. I saw it when it was about 100 metres away from where we were. On seeing it I realised it was being driven in a zig-zag manner. I could see its front lights on the road moving from side to side. The lights showed the vehicle was moving from one side of the road to the other, and back to the road again. I told my wife that that vehicle was not being properly driven. I gave the driver dim lights, expecting the driver to do the same. Instead of giving me a dim, its lights went off completely. By this time the lorry was about fifty (50) metres from me. I became concerned about the switching off of the lights and I wanted to know what the driver of that vehicle was upto. I tried to see its registration number as it approached us. I noticed it was a lorry white in colour registration number KAD 775L. After noticing this number, I saw it being driven directly towards my car. When it was some five (5) metres from my car, the driver put on its full lights. When I saw the vehicle being driven in a zig-zag manner I slowed down to about 40 KPH and swerved to my left. After the lights were put on, I heard a bang on my side. That lorry hit my car. The impact against my car was so intense, it pushed the driver's door up to the steering wheel. I was then holding the steering wheel with both hands. My right hand was crashed and trapped between the steering wheel and the door. After that impact I could not control the vehicle any more. My vehicle lost control and went off the road for about 50 metres towards Nanyuki Town and cut off across the road for about 40 metres and stopped on the right hand side facing Nanyuki. I then realised I was trapped inside, between the steering wheel and the door. I was removed from the wreck of my car and I saw my car's right front tyre and tube had been ripped off, its rim had been extensively damaged."

The Defendants had, in their joint written statement of defence, admitted the fact of collision between motor vehicle KPA 800 and KAD 775L. (the Plaintiff's vehicle and their lorry) but had denied negligence on the part of the 1st Defendant. They had pleaded contributory negligence on the part of the Plaintiff. However, no evidence was adduced by them in this trial. Mr. Miller, in his submissions on the issue of liability, said that the lack of evidence to disprove the accident was purely because this trial proceeded EX-PARTE due to the Defendant's Counsel's failure to attend court on the hearing date. Lack of evidence in rebuttal was really due to the Defendants' failure to attend court, for which no explanation was given. It is true that Mr. Miller did say that he was unable to travel to court due to the Banker's strike. But he did not say why the Defendants had failed to attend court. I have dealt with this issue at the beginning of this judgement.

There was, therefore, no rebuttal evidence adduced by the Defendants on the issue of liability. I have the Plaintiffs account of how this accident occurred. I will apportion liability against the 1st Defendant at 100%.

The Defendants admitted, in their written statement of defence, the contents of paragraphs 1,2,3 and 4 of the plaint. This admission essentially meant that the 1st Defendant was at all material times the driver, agent and/or employee of the 2nd and 3rd Defendants, the 2nd Defendant and the 3rd Defendant were, at

all material times, co-owners of motor vehicle Registration No. KAD 775L. Therefore I hold that the 2nd and 3rd Defendants are vicariously liable for the torts and negligence of the 1st Defendant which he committed in this case in the course and nature of his duty as the driver, servant, agent and/or employee of the 2nd and 3rd Defendants.

On the issue of GENERAL DAMAGES, the Plaintiff gave evidence on the nature of injuries which he sustained in this accident. He said his right hand was shattered. It was severely damaged and he underwent two major operations at Nairobi Hospital. This is what he said in this court, and I quote:

"As a result of this accident my right hand was completely shattered. I lost complete use of the said arm. It is confirmed by two Medical Reports. (Witness shows the court the right hand which is all twisted muscle and ugly). I had also sustained head cuts".

During the trial the Plaintiff produced a Medical Report of Professor J.A.O. Mulimba Ref. PM/JAO/NBS/1995 dated 15th June 1995 as Exhibit No. 1 and a Medical Report from NAIROBI NEUROLOGICAL & PAIN CLINIC dated 25th June 1997 and signed by Professor GERISHON M. SANDE, a Consultant Neurosurgeon as Exhibit No. 3. In his submissions Mr. Miller stated that these Medical Reports are not properly before the court as they were produced, not by Prof. Mulimba and Prof. Sande respectively, being their authors, but by the Plaintiff himself. Mr. Miller said that since the parties had not consented to the production of these Medical Reports, then the said reports cannot be relied upon for purposes of determining the extent of injuries suffered and that, therefore, damages cannot be awarded as injuries will not have been proved. He relied on Section 48(1) of the Evidence Act Cap. 80 Laws of Kenya and submitted that these Medical Reports fall under that Subsection and can be classified as a matter of science. He said that only the experts could be qualified to guide the courts in order for the court to form an opinion and therefore that Prof. Mulimba and Prof. Sande should have been called to give evidence. Mr. Miller posed the following question:

"On what basis is the court being called upon to form an opinion when they were produced by a person who was not an expert?"

Section 48 Evidence Act Cap. 80 reads:

"(1) When the court has to form an opinion upon a point of foreign law or of science or art or as to the identity or genuinness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuinness of handwriting or finger or other impressions.

(2) Such persons are called experts.

The court was also referred to Section 35 of the Evidence act and to, in particular, the proviso to Subsection (1) thereof, which reads:

"Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which, in the circumstances of the case, appears to the court unreasonable."

In my view Mr. Miller is right to a limited extent. He is right in his submission that when a trial proceeds Ex-Parte and there is no consent on the production of Medical Reports or other exhibits, a Plaintiff is still under a duty to prove his case on the required standard through admissible evidence. In this case the Plaintiff was under a duty to call Professor Mulimba and prof. Sande to produce their Medical Reports before he could close his case. This is the relevance of Section 48 of the Evidence act (cited above).

However, Mr. Miller is wrong when he submits that general damages cannot be awarded in this case because Prof Mulimba and Prof. Sande were not called to give evidence, that is, for lack of expert evidence. I hold the view that each case must depend on its peculiar circumstances.

Indeed a court may proceed to assess general damages in the absence of expert medical evidence if there is other admissible evidence before it which proves the nature of injuries on the required standard and to the satisfaction of the court. In my view, this case before me is such a case.

The Plaintiff gave evidence, and which evidence I have accepted as credible, that his right hand was completely shattered in the accident. He said, and I believed him, that he cannot use that hand at all. He removed his coat and shirt before me. He stood on the witness stand, three to four metres from me. And I saw his hand. It was shattered, twisted muscle. It was just hanging loosely down his shoulder. I therefore do not agree with Mr. Miller that I need the opinion of Prof. Mulimba and that of Prof. Sande to make a finding that the hand of the person standing before me (Plaintiff) was shattered and is of no use to him.

Take the case of a Plaintiff whose leg is amputated as a result of injuries which he sustains in a road traffic accident. A court does not require a Professor in Medicine to come to court and say that, yes, the plaintiff's leg was amputated. That fact is all too *visible* to the court. Besides, in this case, there is credible evidence from the Plaintiff himself.

The Plaintiff told the court that the impact of the collision was so intense, it pushed the driver's door up to the steering wheel. He was then holding the steering wheel with both hands. His right hand was crushed and trapped between the steering wheel and the door. He was given first aid treatment by Dr. Abid Butt who referred him to Nairobi Hospital the same night. He left for Nairobi at 2.00 a.m. and was received at Nairobi Hospital by Prof. Mulimba who admitted him. He was then operated upon on his right hand which had been seriously damaged. He in fact underwent two major operations and remained as an in-patient from 27th October 1994 to 22nd November 1994 when he was discharged. Upon his discharge he still had fresh wounds on the hand under plaster and was advised to be attending routine check up at Dr. Butt's clinic at Nanyuki, which he did. He attended also Prof. Mulimba's clinic during the whole of 1995. In August 1995 he was admitted at Mater Misericordial Hospital where professor Mulimba operated on him, removing bone graft from bus stop to fill the gaps in his right hand. He recalled that in November 1995 after he ran out of cash he decided to seek cheaper medical treatment at WAMBAA CONSOLATA HOSPITAL, in Samburu District. He was admitted at that hospital where further bone grafting was done. The same was repeated in April 1996. At Wambaa Consolata Hospital he was attended to by Prof. Combostella. He told the court that he lost complete use of the arm, and all the nerves are gone.

The totality of the Plaintiffs evidence, before me, is that as a result of this road traffic accident, his right hand was crushed, and shattered. He has now lost complete use of it. This, therefore, is a case of a complete loss of the Plaintiffs right hand and, in my view he is entitled to damages for that loss, pain and suffering, without the court having to rely on Ex. 1 and Ex.3.

Mr. Arithi Advocate has submitted that the Plaintiff should be awarded Sh.2,000,000/-general damages and relies on several decided cases of this court. First, there is the case of FREDRICK OTIENO KOMBO V. TANA EXPRESS BUS & 3 OTHERS HCCC NO. 177 OF 1994 MSA. The Plaintiff was an employee aged 32 years at the time of accident and 34 at the time of trial. He suffered crush injury to his upper right limb (hand) head injury and loss of consciousness for 8 hours and post traumatic amnesia for about 3 days and chest injury. The right upper limb was amputated at the level of the shoulder joint The Hon. Mr. Wambilyanga on 19th June 1995 awarded him Sh.900,000/- general damages for pain, suffering and loss of amenities. In the present case the Plaintiff did not lose consciousness and has not had his hand amputated, although it is of no use to him.

The second case is that of BENJAMIN WANJALA MANDA V. HAFAH MANSOR MOHAMMED & ANOTHER ELDORET HCCC NO. 95 OF 1993. The Plaintiff a 19 year old boy, suffered injuries in a road traffic accident He sustained severe soft tissue injury to the right arm with muscle wasting. The right hand was paralysed up to the fingers, rendering *it* functionally useless. The Plaintiff also suffered fracture of the skull plus cuts on the right eye lid and cheek, which the Plaintiff in the present case did not suffer. The Hon. Lady Justice Roseline Nambuye awarded that Plaintiff Shs. 850,000/-.

In the third case of FLORENCE&KAIYU NYAMAI VS. COAST BUS CO, & ANOTHER HCCC NO. 401 OF 1993 MOMBASA. The Plaintiff was a shopkeeper married with four children. She suffered a

crush injury to the right hand resulting in amputation of mid-level. She was hospitalised for 74 days. The injuries resulted to a permanent loss of the right hand at mid-level leaving an 4" thick scar and cosmetically ugly scars on another (left) and multiple other scars. She was awarded Sh.900, 000/- by the Hon. Mr. Justice Wambilyanga for pain, suffering and loss of amenities.

The last case cited was MILLICENT WANGUIWAMUTEGI & OTHERS V. STEPHEN NJUGUNA GATUHI NRB HCCC NO. 2357 OF 1990. The Plaintiff Esther Mbaki sustained several injuries after being knocked down by a vehicle. She sustained a complete tear of the brachial plexus of the left arm, resulting with paralysis of the left shoulder and forearm, crack fracture of the right iliac bone of the pelvis and extensive lacerations of the left leg, leaving very unsightly scars. Her left hand was functionally useless with total disability of 76%. The Hon. Mr. Justice Mbogholi Msagha awarded her Sh. 1,000,000/- general damages for pain, suffering and loss of amenities.

I have taken into account all the above cited cases, as a guide only. The Plaintiff handed advocate aged about 34 years and married, lost the complete use of his right hand did not lose consciousness but was admitted at Nairobi Hospital for just about one month award him Sh.950,000/- general damages for pain and suffering, and loss of amenities

I will now deal with the issue of SPECIAL DAMAGES. Here the law is clear. Special damages must be pleaded and proved before they are awarded. The particulars of special damages pleaded include:

- (a) Police Abstract Report Sh. 100/-
- (b) Medical Report Sh. 2,000/-
- (c) Medical Bills & Hospital Bills Sh. 1,249,000/-
- (d) Transport to Nairobi Hospital, Prof. Mulimba's Clinic, Wambaa Hospital etc Sh. 350,000/-

TOTAL: Sh. 1,624,100/-

There was no amendment to these particulars of special damages in the course of the trial.

The Plaintiff produced two Medical Reports Ex. 1 and Ex.3 and he said that he paid Sh.2,500/- for the first Medical Report Ex. 1 and produced a receipt Ex.2. He also produced Dr. Sande's report Ex.3 and said he paid Sh.6,000/- for it and produced a receipt Ex.4 for it. have not taken into account these reports because both Prof. (Dr.) Mulimba and Prof. Sande were not called as witnesses to produce the same.

The injuries in this case have been assessed on what the Plaintiff told the court and from what the court observed that is loss of his right hand. However the Plaintiff spent money on Prof Mulimba and Prof. Sande which he pleaded and which he has proved through production of receipts Ex.2 and Ex.4.1 will award him the total of Shs.8,500/- (being Sh.2,500/- + Sh.6,000/-).

The Plaintiff told the court that he spent Shs. 173,396/- at Nairobi Hospital, Mater Misericordiae Hospital, Wambaa Consolata Hospital and Nanyuki Cottages. He gave the following breakdown:

- (a) Nairobi Hospital Sh. 113,140/-
- (b) Mater Misericordiae Hospital Sh. 52,356/-
- (c) Wambaa Hospital Sh. 9,740/-
- (d) Nanyuki Cottage Sh. 3,160/-

He produced a bundle of receipts for this expenditure which is marked Exhibit 5. He produced Nairobi Hospital Statement Ex.6; Discharge Note from Mater Misericordiae Hospital Ex.7.

The Plaintiff told the court that he attended various doctors and paid bills, details of which are:

- (a) Professor Mulimba Sh. 78,300/-
- (b) Dr. Seth of Nairobi Hospital Sh. 8,750/-
- (c) Dr. Gerald C. Munish of Nairobi Sh. 16,100/-
- (d) Dr. Abid Butt of Nanyuki Sh. 70,000/-

He produced a bundle of receipts to prove this expenditure and it is marked Exhibit 8.

The Plaintiff then finally told the court that he has spent Sh. 756,628/- on drugs - mainly pain killers and Anti-biotics from various chemists and pharmacies, e.g. Akothan Pharmacy Limited Isiolo, Laikipia Pharmacy Limited Nanyuki, Mountchem Chemists Nanyuki and Mt. Kenya Chemists. This is from the months of November 1994 through to August 1997. He produced a bundle of those receipts as Exhibit No. 9. I have gone through each receipt and the claim appears genuine and I hold that it is genuine.

Although the Plaintiff pleaded that he had spent Sh.350,000/- on transport, from one hospital to another and from one doctor to another, he did not pursue this claim and did not prove it.

On this limb of special damages, I award the Plaintiff a total of proved damages in the sum of Ksh. 1,116,674/-.

There is a further claim pleaded in paragraph 10 of the plaint, which is, I quote:

"10. FURTHER, after the accident, the Plaintiff who is an advocate of the High Court of Kenya and is right handed, has been completely unable to carry on with his practice as an advocate and therefore claims Sh.200,000/- per month for 30 years that he was expected to be in active practice. At the time of the accident he was aged only 33 years".

In support of that claim the Plaintiff gave evidence and told the court that the basis for it is that their law firm had a yearly audited accounts done by Messrs Obwocha & Associates based at Nakuru. He produced five booklets of these audited accounts from the years 1992 - 1996. The 1992 accounts were marked Ex. 14 showing a net profit of Sh.2,909,978/-. The 1993 accounts were marked Exhibit 15 showing a net profit of Sh.2,816,485/-. The 1994 accounts were marked Ex. 16 and showed a net profit of Sh. 1,372,881/-. There was a loss of Shs. 1,022,847/- in 1995 shown in the accounts of that year, marked Ex. 17. There was a net loss in 1996 of Shs.965,278/- as shown in the accounts of that year marked Ex. 18. The Plaintiff said that these accounts showed that the accident in question affected his legal practice. He said the average income per month had been Sh.200,000/-. He therefore claimed this amount from the date of the accident (26.10.1994) to November 1997 the date of discharge from hospital a period of three years. The amount so claimed is Sh. 7,200,000/- (Sh.200,000 x 12 x 3).

The Plaintiff further told the court that he cannot now practice law as he used to do because he cannot travel as much as he used to. He said he cannot drive his vehicle, which in any case was a total loss, and because of his injuries. He lost his right hand. He said his savings were all used up to meet the medical expenses. So he has not been able to raise enough cash to buy another vehicle. Therefore he is not able to bring the law firm to its past status. Most clients have left them and he cannot travel far from Nanyuki, he said.

He stated that he is teaching himself to write with the left hand. Besides, Mr. Francis Xavier Ole Kaparo, his partner, has been elected speaker of the 8th Parliament and cannot help in the practice. He said that Mr. Francis Xavier Ole Kaparo was his sleeping partner who never shared his profits. Meaning Mr. Kaparo received nothing from this law firm.

The Plaintiffs claim is therefore for diminished earnings (loss of capacity to earn) for 30 years from the

date of accident 26th October 1994. This as I have said, he divided into two portions: First portion was the period from 26th October 1994 to November 1997 when he was undergoing treatment. Here he claimed for Sh.200, 000/- per month for three years making a total of Sh.7, 200,000/-. The second portion is for a period of 27 years from the time he started to do little legal work in his office, teaching himself to write with his left hand and so forth. In this portion he conceded that he was only asking for Sh. 100,000/- per month, reduced from Sh.200, 000/-. From the reduced figure of Sh. 100,000/- per month for 27 years, he was asking for Sh. 100,000 x 12 x 27=Sh.32,400,000/- plus Sh.7,200,000/- bringing it to a grand total of Sh.39,600,000/-.

In his submissions Mr. Arithi justified this by stating that between 26th October 1994 and 26th October 1997 the Plaintiff was completely out of legal practice as he moved from one hospital to another. He did not earn any income from that office. The Plaintiff only returned to the office in October 1997 but even then, not on full throttle as he used to. Mr. Arithi also relied on the decided case of PATRICK K. NGULI VS. STEPHEN KARANJA HCCC NO. 2907 OF 1987 NAIROBI in which Hon. Mr. Justice Joseph Butler Sloss (as he then was) had this to say:

"The fourth claim is for diminished earning capacity. It is not Mr. Dhanji's argument that the Plaintiff has lost all earning capacity but that the figure for this head of damages should be reached by taking half of the Plaintiffs known salary that is half of Sh.3,500/-per month or slightly less than half viz Ksh. 1,500/- and applying to that figure a multiplier of eight years to represent the future years of impaired working capacity. I agree with this calculation and I adopt the figure proposed by Mr. Dhanji of Ksh. 144,000/-".

The principle for awarding damages for diminished earning capacity is that: damages should be awarded for diminished earning capacity by taking half the Plaintiffs known monthly earnings and multiplying it with the term of years the Plaintiff would have worked, to represent the future years of impaired working capacity.

At the time of the accident the Plaintiff was aged 33 years. His known monthly salary is said to be Sh.200,000/-. He would have worked up to the age of 60 years. But Mr. Arithi instead of sticking to the period of 27 years conceded to the multiplier of 10 years as reasonable. He therefore prayed for the award in the sum of Sh. half x 200,000/- x 12 x 10 which comes to Shs. 12,000,000/-. But, as I have pointed out, the Plaintiff himself did concede that he would pray for Sh. 100,000/- per month. The award, therefore, is considerably reduced and ought to be calculated on the basis of the conceded monthly salary of Sh. 100,000/- if at all. This would be half x 100,000/- x 12 x 10 which would boil down to Sh. 6,000,000/-.

This amount can only be awarded if there is admissible evidence sufficiently proving the Plaintiffs monthly earnings. And this is where Mr. Miller's submissions become relevant.

Mr. Miller submitted, first, that an advocate cannot be completely handicapped in terms of dispensing his services to his clients due to the loss of his right hand. He said the Plaintiff did not prove that his brain was affected, neither did he show that he could not dictate letters to his secretary. In other words the Plaintiff could have mitigated his losses by finding alternative ways of doing his work.

Mr. Miller's second submission is that the court was presented with accounts in the office for the period 1992 to 1996. These accounts were prepared by Messrs Obwocha & Associates, Certified Accountants. But unfortunately the said accountants were not called to give evidence and produce them in court. This offended Sections 48(1) and 35(1)(b) of the Evidence Act and these accounts would therefore be inadmissible.

The loss of earnings had to be pleaded and proved, unless there is an admission. The Plaintiff pleaded this loss at par. 10 of his plaint. Being a special damage he had to prove it. I agree with Mr. Miller that the authors of these accounts ought to have been called to produce them. I think it would be safe to reject these accounts, and I do reject them.

There is a difference between proof of these earnings as a special damage and proof of injuries in this case as a general damage. I assessed the Plaintiffs injuries, not from the Medical Reports which I did not

rely on, but from the evidence of the Plaintiff and from what I could see. The injury to the Plaintiffs body was visible: injury to his right hand which was of no functional use at all. It was as good as an amputated limb.

The rejection of these accounts, however, is not the end of the matter. It would have been the end, if the Defendants, through Mr. Miller, had not admitted a certain salary which the Plaintiff earned per month. Mr. Miller said that, in a small town like Nanyuki, an advocate would earn more or less Sh.20,000/- a month, net. He may very well be right. There is no admissible evidence to the contrary on record.

I will therefore use the Plaintiff's monthly salary of Sh.20, 000/- *per* month, as admitted by the Defendants. I will also use the multiplier of 10 years as submitted by Mr. Arithi. On diminished earning, I will assess the damages to be:  $\text{half} \times 20,000/- \times 12 \times 10 = \text{Sh. } 1,200,000/-$ . I award this amount to the Plaintiff.

In conclusion therefore I enter final judgement for the Plaintiff against all the three Defendants jointly and severally in the following sums:

(1) Damages for pain, suffering and loss of amenities Shs. 950,000/-

(2) Damages for loss of earning capacity

(diminished capacity) Sh. 1,200,000/-

(3) Special damages (Medical, Hospital bills and bills for drugs) Sh. 1.116.674/-

TOTAL: Sh.3,266.674/-

It is also ordered that the Defendants do pay to the Plaintiff interest at court rates on the sum of Sh.3, 266, 674/- from the date of this judgement until payment in full, costs of this suit to be taxed, if not agreed, and to bear interest thereon calculated at court rates from the date of such taxation or agreement until the same is paid in full.

It is so ordered.

Dated this 30th June 1998 at Mem,

A.G.A. ETYANG

JUDGE