



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: AKIWUMI, TUNOI & PALL, J.J.A.)**  
**CIVIL APPEAL NO. 190 OF 1997**  
**BETWEEN**

**RODRECK NDIRANGU WANDARUA .....APPELLANT**  
**AND**  
**PETER MAINA KARIUKI .....RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mr. Justice J. V. Juma) delivered on 12th November 1996**

**in**

**H.C.C.C. NO. 3047 OF 1994)**  
**\*\*\*\*\***  
**JUDGMENT OF THE COURT**

This is an appeal by the defendant against a judgment of the High Court of Kenya at Nairobi (Juma, J) in which he was ordered to pay to the respondent, the original plaintiff, a total of Shs.1,634,848.20 damages for personal injuries suffered as a result of a motor accident.

Liability for the accident is not the subject of this appeal as none of the grounds of appeal raises this issue.

Mrs. Kiarie, counsel for the appellant, has based her appeal on the following two grounds, namely:-

***"1.That the learned Judge erred in awarding Shs.1,000,000/= in cost of prosthesis to the plaintiff while relying on the evidence of Dr. Bhanji, in the light of Dr. Wokabi's evidence that a prosthesis obtained locally made of fibre glass material was available; offering the same facilities and conveniences as the exotic prosthesis. Further in the light of the fact that the prosthesis made of fibre glass had movable joints and this fact was not disputed by Dr. Bhanji.***

***2.That learned Judge erred in failing to take into consideration the submissions of the defendant's Advocate on the issue of mitigation of loss based on the fact that since reasonably good prosthesis was available locally and taking into consideration the plaintiffs station in life then there was no need to award the plaintiff the cost of the exotic prosthesis."***

Mrs. Kiarie argued these grounds together and contended that the resultant award of Shs.1,000,000.00 as the cost of prosthesis was based on the wrong and misapprehended analysis of the total evidence produced in court during the trial and that the learned Judge exclusively considered and relied upon Dr. Bhanji's medical report and ignored that of Dr. Wokabi; and, in so doing, arrived at a manifestly excessive and erroneous award.

The respondent was born deaf and dumb. At the time of the trial he was aged 32 years. The accident

occurred on 15th June, 1993, when he was riding a bicycle along the Karatina - Nyeri Road. There was no real contest about the medical evidence which was in the main comprised in both oral testimony and written reports tendered in Court by Drs. Wokabi and Bhanji called by the appellant and the respondent respectively.

The respondent who was a trained tailor but at the material time employed as a waiter in a local hotel near Sagana suffered grave injuries. He sustained head injury (cerebral concussion), compound fractures of the right tibia and fibula, soft tissue injuries and lacerations. He underwent various surgeries and was hospitalised three times for a total of three months. Three years after the accident Dr. Wokabi, on examination of the respondent, observed that the right leg had an obvious bony protuberance over the right mid shin on the fracture site and there was a good reduction with metallic plate and screws. The left leg was amputated at the level of the upper thigh and the respondent was moving with the aid of under arm crutches. The two doctors agree that the respondent required prosthesis.

According to Dr. Bhanji a suitable prosthesis for the respondent would be such a type which includes knee and ankle joints which is not available locally but in Europe. As it cannot be fitted locally, the respondent would have to travel to Europe, have the cast made and taught for a period of about two weeks how to walk. The total cost would be in the region of Shs.1,000,000.00. Dr. Bhanji was of the view that the exotic prosthesis made of fibre glass and manufactured by Medical Training Centre at a moderate cost of Shs.40,000.00 was most unsuitable for the respondent as it has no ankle joint, breaks easily, burns if seated next to a fire and if not properly fitted would cause ulcers and abrasions. Again, it needs replacement every two years.

Dr. Wokabi, on the other hand, testified that a high quality prosthesis or artificial limb is easily available in Kenya as it could be imported and assembled and fitted at The Aga Khan and Nairobi Hospitals at not more than Shs.150,000/=. Such a prosthesis, he averred, is of good material, with flexible joints and properly padded. It is sturdy and can last for 10 years.

The learned Judge observed, quite rightly in our view, that the respondent had two healthy legs before the accident and that now, pursuant to the accident, had one and half badly damaged legs and that it is not asking too much to try and give him a suitable prosthesis which is as near as possible to the real leg. But, the question we pose is: Did the learned Judge in trying to grant the respondent his just award err in principle or is his award of Shs.1,000,000.00 for prosthesis so inordinately high that it must be an erroneous estimate of the damages on this head to merit interference?

It has often been pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. True, money cannot renew the respondent's physical frame that has now been battered and shattered in the accident. The respondent, being deaf and dumb, was a special litigant whose station in life has now been drastically made worse. However, the court must only award him sums which must be regarded as giving reasonable compensation. We would in this instance refer to the following passage from the speech of Lord Morris of Borthy- Gest in the case of *West(H) & Son Ltd vs. Shephard* [1964] AC 326 at page 345:

***"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."***

Several decided cases with similar injuries were referred and cited to the learned trial Judge. The awards ranged between Shs.150,000.00 and Shs.500,000.00. In the case of Eliakim Abuti Bushuru vs. Francis Kihonge Nairobi H.C.C.C. NO. 4533 of 1992 (Unreported) Ringera, J. awarded Shs.500,000.00 for a severe crush injury to the left leg that led to an amputation below the knee. The same judge also

awarded Shs.450,000.00 in the case of Wilson Kuria & Another vs. Tibi Githiora Nairobi H.C.C.C. No. 968 of 1988 (Unreported) wherein the plaintiff was injured on the head, arm and left leg which fractured and was amputated 2" above the knee. In October, 1995 the Judge also awarded Shs.500,000.00 for a 42 year old bilateral amputee. See the case of Esther Gathoni Gatonye vs. John K. Kimani & Another Nairobi H.C.C.C. No. 718 of 1992 (unreported).

It is significant in all these awards that the unsuitability of the exotic prosthesis never featured considering the fact that the lifestyles of the claimants therein were not in any way far different from that of the respondent who is an unsophisticated rural folk in the deep end of the village in Nyeri. Dr. Wokabi was, however, emphatic in his evidence that the respondent did not need to travel overseas for the fitting of the prosthesis and that a good prosthesis was available locally at not more than Shs.150,000.00. We believe that he is right. Dr. Bhanji's opinion and recommendation that this respondent should go to Europe for the fitting of prosthesis is absurd and totally unacceptable.

We are of the view that the award of Shs.1,000,000.00 for prosthesis in the particular circumstances of this case is so inordinately high as to represent an entirely erroneous estimate as to call for reduction. The upshot of all this is that this appeal is allowed and the award made by the learned Judge is reduced to Shs.500,000.00 and further reduced by 20% as the appellant's liability was 80%. The appellant will have the costs of the appeal.

**Dated and delivered at Nairobi this 20th day of February, 1998.**

**A. M. AKIWUMI**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**G. S. PALL**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**