



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

**AT NAIROBI**

**CIVIL CASE NO. 1063 OF 1989**

**DR. SUNNY SAMUEL ..... PLAINTIFF**

**VERSUS**

**SIMON M. MBWIKA ..... 1ST DEFENDANT**

**SAMUEL M. MUNYAO ..... 2ND DEFENDANT**

**JUDGMENT**

The Plaintiff was injured in a road accident in November 1987. The issue of liability has already been determined. The matter proceeded on assessment of damages.

Dr. Bhanji, Consultant Surgeon, testified that he examined the plaintiff and found that the main injuries were head injury - cerebral concussion, compound fracture of the right lower leg - tibia and fibula bones, soft tissue injuries and loosening of three lower incisor teeth. He also damaged the upper eyelid with a result that he cannot close his right eye due to scarring.

The Plaintiff is a medical practitioner.

When he examined the plaintiff in July 1990 the Plaintiff complained of headaches, pain with feeling of fatigue around the neck, spells of dizziness, pain at the fracture site, inability to do sports, abdominal distension following ingestion of meals, inability to chew hard food, increased watering in the right eye, lack of concentration, forgetfulness, insomnia, swelling of the right foot and irritability. The doctor termed the injuries as severe. He prepared a Medical Report.

The Plaintiff testified and narrated the injuries he sustained as set out in the Report of Dr. Bhanji. He stated that he underwent plastic surgery at Aga Khan Hospital. He remained on crutches for six months after leaving Nairobi Hospital. He was a medical practitioner in Machakos and also a director of Machakos Nursing Home. He was the only doctor at the Home. He did not resume normal duty for one year and has had to close down the clinic. He employed another doctor to run the Nursing Home.

He testified that he stopped working because he could not concentrate on his work. He does not get proper sleep. His body tends to form keloids. He suffers from imbalance. He has lost sight in the right eye. His eye is watering. He travelled to India seven times for herbal treatment and also went to England once for general check-up. His income per year was Ksh.300,000/-. He was getting Kshs.6000/= per month from the Nursing Home. He incurred expenses amounting to Kshs.2,626,037/-.

In cross examination he stated that he has relatives in India. He stopped work due to constant headaches,

fatigue and dizziness. He denied that his illness was imaginary.

The Plaintiff was, at the request of the defendant, examined by Mr. Gerald Nevill of Nairobi Hospital on the 8th November 1991. The injuries were set out as follows:-

- (i) Concussion and loss of much skin mid forehead, right eyebrow and upper eye lid and dorsum of nose.
- (ii) Lacerated wound right knee anteriorly.
- (iii) Compound fracture right tibia and fibula.

At the time of re-examination he complained of the following:-

- (a) He still gets the odd headaches, the scars of the wounds to forehead, eyebrow and eyelid have healed well but they still itch and he thinks he is very disfigured. He gets some watering of the right eye but the eyesight is now O.K. He finds it difficult to concentrate.
- (b) The 4 central incisors teeth are still loose.
- (c) The fracture union is sound enough but does not feel comfortable, it swells at times and he limps at times.
- (d) He says he has lost confidence and is “not the man he was” and cannot return to playing games and is getting a distended tummy.

On examination the doctor found that the Plaintiff’s forehead, eyebrow, eyelid and nose were badly wounded but good plastic surgery and skin grafting have resulted in an excellent repair. There is no keloid formation evident. The eyelid is a bit stiffer than normal hence the watering of the eye. Eyesight is normal. He found the belly normal. He was putting on weight due to his inactivity. The tibia - fibula fracture is fully united in excellent line and with less than 1 cm shortening. All the joints of the leg are normal. The “limp” if any is slight. There is no evidence of any defect of the brain or nervous system or of any serious sequelae from the concussion. He has many psychological complaints. The 4 central incisors are still a bit loose and a brace or support would assist this slight defect.

It cannot be denied that the Plaintiff sustained serious injuries. He was only fortunate to have good doctors who operated on his leg and carried out plastic surgery.

Counsel for the Plaintiff has submitted that I should award Kshs.1,125,000/- as general damages for pain, suffering and loss of amenities. He has cited two cases in support of his submission. I have perused the two judgments. The injuries in those cases were more severe than in the present case. In the instant case the plaintiff sustained cerebral concussion, fracture of tibia and fibula and lacerations over different parts of the body. The eyesight is normal contrary to what the Plaintiff had testified.

I assess general damages for pain , suffering and loss of amenities at Kshs.400,000/=.

The Plaintiff has claimed loss of earning. This is a special damage which ought to have been quantified or particularised. It was not. Furthermore the loss ought to have been proved. The evidence on record is a mere assertion that the plaintiff used to earn Kshs.300,000/= per year and Kshs.6000/= per month from the Nursing Home. No attempt was made to prove how these figures were arrived at. No books of accounts were tendered in evidence. I therefore disallow the claim for loss of earning as the same has not been proved.

The Plaintiff has also claimed future medical expenses amounting to Kshs.380,000/=. Dr. Nevill was of the view that the Plaintiff recovered from his injuries thank to the excellent doctors he had. His Report was made after the Plaintiff had seen Dr. Bhanji. In fact a year later. It appears that the plaintiff recovered

in the intervening period. The only future medical care he will require is a brace or support in respect of his teeth. He will also require operation to remove the plate. The cost of these have been put by Dr. Bhanji at kshs.200,000/= in all. I award the same.

As regards special damages claimed of Kshs.396,166.95, these were not pleaded as required. They were only alluded to in the Plaint. The Defendant has conceded the following:-

(a) Dr. Parakash Heda's fees- Kshs.49,060/=.

(b) Dr. M. Haq's fees - Kshs.73,000/-

(c) Dr. David Silversten's fees - Kshs.16,600 - Kshs.138,660/=

I will therefore allow the sum of kshs.138,660. I would have dismissed the whole claim of special damages for not having been pleaded.

The Plaintiff incurred overseas expenses amounting to Kshs.2,069,840 and has claimed them. These are special damages which ought to have been specifically pleaded. They were not. Even if they had been pleaded, I would have disallowed the same. None of the various doctors who attended the Plaintiff recommended that the Plaintiff be seen by an overseas specialist. One has to mitigate one's losses. Counsel for the defendant kindly drew my attention to the case of DI CAPRIO - VS- ARGO FILMS (EA) LTD [1971] EA. 483 on this issue. I hold that the plaintiff has failed to justify the need for overseas treatment. I therefore dismiss this aspect of the claim.

I therefore enter judgment for the Plaintiff against the Defendants jointly and severally as follows:-

(i) General damages - Kshs.400,000/-

(ii) Future medical expenses- Kshs.200,000/=.

(iii) Special damages - Kshs.138,660/=

- Kshs.738,660/=

The Plaintiff shall also have costs of this suit and interest.

Delivered this 16th day of October, 1997.

**J.V. JUMA**

**JUDGE**