



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**CIVIL CASE NO 673 OF 1990**  
**KISOMO ..... PLAINTIFF**  
**VERSUS**  
**DAHMAN.....DEFENDANT**

**JUDGMENT**

The plaintiff in this case claims damages against the defendant for the personal injuries he suffered when he was involved in a road traffic accident with the defendant's motor vehicle on the 13th of November 1988. In his plaint he averred that the accident resulted from the catalogued negligent acts or omissions on the part of the defendant's driver.

The defendant in its defence admitted that the accident occurred but it denied that it should be blamed for it. But as Mr Wanyonyi has pointed out in his submission the statement of defence did not attempt to provide any explanation as to what brought about the accident. In para 3 of the statement it was merely alleged that following the accident the accused was convicted, and fined Shs 150/= on a charge of riding a bicycle without lights. But that is neither here nor there: It does not follow that the plaintiff's failure to have bicycle lights *per se* was the factor that caused the accident. If indeed it was, it was not appropriately and procedurally averred in the statement of the defence. It means that the Civil Procedure Rules order VI rule 4 (1) which requires the particulars of negligence to be set out in the pleadings was not adhered to by the defendant. In the trial the defendant's driver adduced evidence to the effect that the accident should be attributed to the drunken or zig-zag manner in which the plaintiff rode his bicycle at the material time. This was evidence which was thus adduced without prior basis having been laid as required. It is clearly offended the basic rule in the adversarial system of litigation which forbids a party from taking the other by surprise and also enjoins a party to be bound by his pleadings. If the defendant's counsel had been told by his client the pieces of evidence subsequently adduced, I can not conceive why the statement of defence is silent on them. The inescapable inference to be drawn in these circumstances is that the evidence adduced by the defendant was concocted when it was his turn to give evidence; or else an amendment to the statement would have been sought at the appropriate point in time.

For these reasons I am constrained to conclude that the evidence of the defendant's driver is wanting in probative value and I reject it altogether. It follows that I must hold that the accident happened because of the culpably negligent manner in which the bus was overtaking the other vehicle. Consequently I assess the defendant's liability at 100% and proceed on to assess the damages.

The plaintiff sustained two deep lacerations on the back of the right elbow and on the lateral side of the right knee and a contusion. He was been treated for the injuries in it at least 3 hospitals. Initially he was admitted for two days to Galama Hospital Malindi where the wounds were sutured and dressed. While he

was receiving treatment as an outpatient the wounds became infected and as a result he had to have an incision and drainage of the knee abscesses. This was done at Kilifi District Hospital on two occasions ie 19th June 1986 and 14th August 1989. He was then given a plaster of the right leg. Then on the 8th of 1989 he was admitted to the Coast General Hospital for an arthrotomy but this could not be done because the operation theatre had been closed. So, on the 12th September 1989 he was discharged and told to keep on going to Hospital for treatment. The plaster was removed on the 27th October 1989. The X-ray examination done on 13th July 1990 showed “gross deformities of artulating surface, improper alignment and medial displacement of femeral end in genu valguss. “the surgeon’s final opinion, in part, reads:

“He has fully recovered from the right elbow injury. The present symptoms of the right knee restricts his life to a great extent and he is in constant pain. The knee joint is deranged and articular surfaces are eroded. This is permanent incapacity. The only solution is for him to undergo operation artrodesis (fusion of joint). This will remove pain but he will have permanent stiff leg at the knee and he will also have about 1” to 1 1/2 shortening of the leg.”

It was evident that the plaintiff’s condition has not improved since the last examination because he came to Court on crutches and appeared to be in pain when making his walking movements. In this regard it is necessary to remember that in the medical report the surgeon listed the following findings as constituting the plaintiff’s “present” position.

- (i) Extreme pain and stiffness of the right knee;
- (ii) Inability to walk without crutches;
- (iii) Inability to walk long distances.

The general damages awarded for the amputation of a leg at below knee is now slightly over 1/2 million, see the case of *Peter Mativo Mawania v Michael Wambua Ndambuki & Anor* HCCC 86/91 (MSA). Apart from having difficult in walking, the life of a man with an amputated leg is a painless one. But this plaintiff is condemned to endure “constant pain” permanently. He is aged 57. Before the accident he was an agile cyclist. The restricted life to which he is now consigned by reason the injuries would not avail to him the opportunity to attend to his personal matters. We have in this country men who become versatile farmers or businessmen after retiring from the civil sevice. But the plaintiff’s retired life will be much of an an ordeal; and also useless to a large extent.

Therefore his deprivations are of an enormous magnitude. Also, the unprecedented inflation which this country is currently experiencing must be accounted for.

For these reasons I award him Shs 500,000/- on the head of pain, suffering and loss of amenities. On this basis of the opinion in the medical report I award Shs 60,000/= to cover the costs of the projected operation. I allow Shs 1,100/= as special damages.

In the upshot I enter judgment for the plaintiff against the defendant for Shs 561,100/= with costs and interest.

Dated and Delivered at Mombasa this 19<sup>th</sup> day of May, 1993

**I.C.C WAMBILYANGAH**

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**JUDGE**