

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 5 OF 90

Walji.....plaintiff

v

Mistri & Another.....respondent

JUDGMENT

This claim arises out of a road traffic accident. It is not in dispute that on the 30th January, 1989 the plaintiff suffered injuries when his vehicle KVV 162 collided with the 2nd defendant's KWC 308 which at all material times was being driven by the 1st defendant. Both defendants concede 85% liability for the negligence. I now proceed to assess the quantum.

There were three medical reports produced in the case. It is generally agreed in all of them that the injuries which the plaintiff sustained were as follows:

- (a) Whip lash injury (on t he neck)
- (b) Injury to the mandibular, joint (on the right side)

Following the accident the plaintiff felt well enough to go home. But on the next day he pain on the neck and also when opening his mouth.

He was seen by a family doctor who prescribed analgics for him. On 4th February, 1989 he felt no better and had to consult a surgeon who advised him to get an excision of the maniseus of the right temporomandibular joint as he had subluxation. On the 8th February he consulted a dental surgeon who did an inter-dental wiring which immobilized the jaw. As a result he was kept on liquid diet till the wires were removed on the 4th March, 1989.

But then he developed a clicking jaw on the right side and also, he felt pain the right side of face, neck and ear and was unable to eat food properly. It is in the medical report of Mr. Rasik Patel that in July 1989 the plaintiff consulted Prof. Bencivenga at Mater- Miseriocodial Hospital in Nairobi who prescribed for him physiotherapy and analgesic tablets. He received the physiotherapy with short wave diathermy and exercises but still there was no relief. He then was referred to Dr. C. Tessenia, an oral maxillo-facial surgeon who redid the inter-dental wiring for 3 weeks. After this the plaintiff's ability to open his mouth was much better but the clicking and the pain were still there. But he have up going for treatment. When he was examined in September 1991 for the medical report it was found that flexion, extension and external rotation of his neck were of full range except for residual pain in the last stages of those movements. It was also found that he suffered the clicking noise of the right temporo-mandibular joint when opening or closing the mouth. These jaw movements were also found to be painful. In conclusion the surgeon said:

“The clicking of the jaw and pain have persisted in spite of the meniscus be exercised which shall give him a trouble-free jaw and ability to eat the food normally.”

With regard to general damages of pain, suffering and loss of amenities Mr. Gor for plaintiff submitted that the award should be pegged to the one in the case of Franke Ray v Paul M. Kalama and others H.C.C.C 579/1989 (Mombasa).

But Mr. Kassim-Shah contended, and I agree with him, that the cited case was one of myriads of injuries and of more fundamental residual disabilities than the ones described in the present case. I needless go into the details of the cited case. It is only relevant for me to say that in the instant case, I recognize that the plaintiff's difficulty when chewing food and the pain felt when eating constitute a serious handicap and loss of amenity: He is not only restricted as to what he should consume, but his eating habits also have had to be a source of tremendous embarrassment to him when he has to meet friends over a meal: Besides, it must be also a frustrating nuisance to himself. I also take into account the other aspects such as the neck injury which has, happily, fully healed and the fact that the purchasing power of money is nowadays considerably low. I would award the plaintiff Shs.180,000/= on the head of pain, suffering and loss of amenities. This figure has to be reduced by 15% on account of contributory negligence. Special damages were agreed at Kshs.50,000/=.

In the upshot judgment is entered for the plaintiff for Shs.203,000/= with interest and costs.