



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 155 of 1994

**SIMON LUDEKI.....
APPELLANT**

AND

**PHILOMENA NYABOKE.....1st
RESPONDENT**

**THE REGISTERED TRUSTEES OF THE CATHOLIC DIOCESE OF NAKURU....2nd
RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Nairobi (Justice Shields) dated 23rd
March, 1994**

IN

H.C.C.S. NO. 130 OF 1991

JUDGMENT OF THE COURT

Simon Ludeki (the appellant) sued Philomena Nyaboke (the first respondent) and the Registered Trustees of the Catholic Diocese of Nakuru (the second respondent) to recover damages for personal injuries he sustained in a collision between a motor vehicle driven by his son, in which he was a passenger, and another vehicle owned by the second respondent, but at the material time being driven by the first respondent. The Judge found that the accident was caused entirely by the negligence of the first respondent. The Judge awarded the appellant Shs.750,000/- for pain, suffering and loss of amenities; Shs.125,000/- for future medical expenses; and special damages in the sum and Shs.487,792.55. The total awarded amounted to Shs.1,362,792.55.

The appellant has put forward 3 grounds of appeal. The first ground is that the Judge erred in failing to award him any damages for loss of earning capacity or loss of income. At the date of trial early this year, the appellant was 63 years of age and had retired from his position as Managing Director of a company called Data Centre Ltd., a position to which he had been appointed in August, 1989. The accident occurred on 28th January, 1990. He returned to work in May 1990 and retired some time in 1992. He had already passed the normal retirement age. There was no evidence that his departure was attributable to the injuries he had sustained in the accident. Indeed there was no evidence that the injuries

he had sustained rendered him incapable of discharging the purely administrative responsibilities of a managing director of a company. There is no merit at all in this ground of appeal and we reject it.

The second ground of appeal is a complaint against the award of Shs.750,000/- made in respect of pain, suffering and loss of amenities. Mr. Gaya, for the appellant, was not able to show us that in arriving at this figure the Judge took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low that it must be a wholly erroneous estimate of the damages - See Kemfro Africa Ltd v. A.M. Lubia & Olive Lubia (1988) 1 KAR 727. Consequently, this ground of appeal fails also and is rejected.

The third and last ground of appeal relates to future medical expenses for which the Judge gave a total of Shs.125,000/-. This is made up of Shs.50,000/- for removal of the metal plate from the appellant's left leg, and Shs.75,000/- for pain killers and physiotherapy.

With regard to the metal plate, Dr. L.N. Gakuu, who examined appellant on 30th July, 1990, said in his report that the metal plate should be removed the following year - 1991. The appellant was seen by Professor Bencivenga on 2nd August, 1992 and it was his opinion that the removal of the metal plate was overdue. Another medical report prepared by Dr Malik dated 10th April, 1991, is silent on the question of the removal of the metal plate. Dr. Malik also gave evidence on behalf of the appellant, but again he said nothing on this issue expect that the cost of doing so would be in the range of Shs.100,000/- to Shs.140,000/-.

Dr Malik also said the appellant required pain killers which would cost Shs.90/- per day and physiotherapy but he was not able to say with any degree of certainty for how long this regime would last. There are two reports dated 25th October, 1990 and 5th March, 1993 prepared by Mr. S. K. Kiragu, a Physiotherapist, but these are contradictory and not helpful at all. We had no medical evidence before us to indicate the present condition of the appellant, although we were informed from the bar that the metal plate has still not been removed but no reason was given to explain why this has not been done. On this evidence at least one thing is clear and that is that the appellant will have to incur medical expenses in future to have the metal plate removed and provision has to be made for this. Accordingly, this ground of appeal succeeds and we award the appellant an additional sum of Shs.75,000/- for future medical expenses making a total of Shs.200,000/- under this head. To this extent only the appeal succeeds.

As the respondents refused to pay the general damages awarded under the decree notwithstanding the fact that they had not appealed against the award, they will now pay interest at the rate of 20% p.a. from 23rd March, 1994. The appellant will also have one half of his costs of this appeal.

Dated and delivered at Nairobi this 1st day of December, 1994.

R.O. KWACH

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JUDGE OF APPEAL

A.M. COCKAR

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL