



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Potter & Kneller, JJ A & Chesoni, Ag J A)

CIVIL APPEAL 28 OF 1983

BETWEEN

**RASHID ABED(suing through his father ABED RASHID as next friend
..... APPELLANT**

AND

1. OMAR MOHAMED

2. ABDULLAHI ALI RESPONDENTS

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Bhandari, J) dated February 24th, 1983 In Civil Case 964 of 1980)

JUDGMENT OF KNELLER, J A

Rashid Abed, the appellant, had the ring finger of his left hand crushed when the turn boy closed the door of a matatu KMY 814 on it. He was a passenger in it going home from school at 12.30 pm on May 30, 1978. He had alighted from it near Mombasa high School in Kenyatta Avenue to let other passengers leave it and this happened before he re-entered it. He was 9 years old and right handed.

He was taken home and his father took him to the Coast General Hospital, Mombasa where an x-ray revealed there was a fracture of the distal phalanx. The wound was sutured but it continued to bleed so his father bore him of to Pandya Memorial Clinic where a partial amputation of his finger was done. He was in these hospitals for 2 days and he attended the outpatient's clinic for some time. The finger did not heal for another month and he was away from school for about one and a half months. Mr Anjarwalla, a Mombasa surgeon, examined him on August 15 last year and wrote this:

“He has no pain and the wound on the left ring finger has healed, but he has lost part of this left ring finger. Clinical examination shows loss of the terminal phalanx of the left ring finger. The rest of the finger has good movements. This is a permanent loss and will remain with him for life. This shortened finger caused cosmetic disfigurement and also slightly affects the functional efficiency of the hand when precision movements or a strong grip are require.”

His father instructed Jiwaji & Jiwaji, the Mombasa Advocates, to sue Omar Mohamed, the driver of the matatu and his employer Abdullah Ali, who are now first and second respondents. Mr Jiwaji signed and filed a plaint on October 9, 1981 which in the particulars of injuries listed not only the ‘ring finger cut’

but also a fracture of the left tibia and fibula, a fracture of the left arm and various bruises and abrasions for which there is no warrant in Mr Anjawalla's report on the appellant's evidence. Some of the particulars of the first respondent's alleged negligence bear no relation to the accident. The claim was for damages for loss of earnings, expenses, pain and suffering.

The respondents did not enter appearance so, in due course, judgment was entered for the appellant against them jointly and severally, and on February 24, this year, Bhandari, J recorded the evidence of the appellant, now aged 13, and Mr Jiwaji's submissions during which he cited Kent v Metal Box Co and Whitehouse v Startrite Designs from Kemp & Kemp's The Quantum of Damages, Vol 2 1975 Section E page 9875. Bhandari, J then delivered this judgment: "On the evidence of the Plaintiff and on perusing the medical report I award a sum of Kshs 8,000 as general damages plus Kshs 890 as special damages plus costs of this suit."

The appellant produced receipts for the special damages so there is no appeal from that part of the judge's award. There is, however, an appeal from that for general damages and it was submitted in the memorandum of Appeal that he erred in law as well as on fact in the quantum. There was no error of fact in the judge's brief judgment. Did he err in law? Whitehouse a 35 year old toolmaker was awarded stg 800 general damages at the end of 1972 for a crushed right hand and the sliced off tip of his middle finger. He was left with some impairment of grip and 5% permanent loss of function. Kent was a 55 year old grinding machine operator and left handed whose right fore finger tip had to be amputated. He was awarded the same sum. These are foreign awards for adult male factory workers and decade old, so they were of no help to the learned judge when pondering on the correct sum for a right handed 13 year old Ziwani child whom his advocate forecast would be later employed at some desk job and who had had the tip of his ring amputated.

We asked if we might see the appellant and his injured finger today. When we did so we discovered that he has lost more than the tip of it and what remains may embarrass him in the future. We were not referred to any further authorities.

Weighing one thing with another, then, I am of the view that the learned Judge's award was manifestly inadequate for the appellant's pain, suffering and loss of amenities and it should be increased to Kshs 14,000 and the appeal allowed to this extent with costs.

Delivered at Mombasa this 28th day of July, 1983

A A KNELLER

JUDGE OF APPEAL

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JUDGMENT OF CHESONI, AG J A

I have had the advantage of reading the judgment of Kneller JA in draft, and I fully agree with it and with the orders proposed therein. The appellant lost only part i.e. terminal phalanx of his left ring finger. Although the loss is permanent the rest of the finger has good movements and affects the functional efficiency of the hand only to a slight extent e.g. when a strong grip is required or during processional movements. Indeed one must take into account the permanent cosmetic disfigurement. Taking all these factors into account and having seen the injured finger the sum of Kshs 8,000 - awarded for pain and suffering was inadequate and I agree with Kneller JA that the appeal should be allowed and the sum should be increased to Kshs 14,000.

Delivered at Mombasa this 28th day on July, 1983

Z R CHESONI

AG JUDGE OF APPEAL

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JUDGMENT OF POTTER, J A

I also agree. We allow this appeal, set aside the award of general damages of Kshs 8,000 and substitute therefore an award of Kshs 4,000 for general damages, which in this case is for pain and suffering substantial element of loss of amenity. The respondents are to pay the costs of this appeal.

Delivered at Mombasa this 28th day of July, 1983

K D POTTER

JUDGE OF APPEAL

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

DEPUTY REGISTRAR