



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

**AT NAIROBI
MILIMANI LAW COURTS**

CIVIL CASE NO. 2450 FO 1997

ALFAS OCHIENG WERE PLAINTIFF

VERSUS

KENYA BUS SERVICES 1ST DEFENDANT

JOSEPH MAINA 2ND DEFENDANT

JUDGMENT

The Plaintiff was injured in a road accident on the 21st November, 1993. Liability has been agreed upon. The matter proceeded on assessment of damages.

The Plaintiff testified that he became unconscious immediately after the accident and found himself in Kenyatta National Hospital after four days. He stated that he was hospitalised for six months. He was admitted to Kendu Bay Adventist Hospital on two occasions then to St. Brigid's Home but there has been no improvement. He has no control over urine and it flows freely on its own. He was left with his father and mother as the rest of the relatives including his wife have run away. He has a child of three years conceived before the accident. He stinks and feels like committing suicide. He cannot erect.

The Plaintiff's father testified that he was a retired Assistant Chief. The Plaintiff was admitted to Kenyatta National Hospital for six months. On his discharge he took him home to Karachuonyo. He then took him to Kendu Bay Hospital when the catheter malfunctioned. He was operated upon but no improvement. The catheter was being inserted every Monday at the cost of Kshs.515/= per trip. The Plaintiff paid a total of Kshs.48,000/=. He took the Plaintiff to St. Brigid's Hospital in Kisumu but there was no cure. The Plaintiff fractured his waist and has no control over urine. Nobody wants to stay near him. He cannot travel alone. He has attempted suicide on two occasions. His wife ran away. He got another wife for him but this one ran away after three days saying that the Plaintiff was not a man.

Dr. Ernest Kioko, a doctor of 26 years standing and who has a Master degree in internal medicine and a kidney specialist testified that he examined the plaintiff. The Plaintiff was hospitalised for two months at Kenyatta National Hospital after he fractured his pelvis which tore the bladder and urethra. Had injuries to parts of the intestine. The Plaintiff looked ill and miserable. He weighed 49 Kgs. On examination the Plaintiff had 8" longitudinal scar below the umbilicus and a 4" scar traverse in the pubic area. Urine was noted to ooze from the traverse scar. Other sites noted to have urine leaking were scrotum, undersurface of the penile shaft, right groin and to the right of the anus. Pus was noted to ooze from the same sites. The area to the right of the anus and adjoining part of the right thigh, inner aspect, was swollen. This would explain why opening his bowels was painful.

X-ray of the pelvis revealed healed fractures of the right side pelvis and the presence of two stones in the he prostatic portion of the urethra. The urethra had a tight and complete stricture near the urinary bladder. The

Consultant concluded that the Plaintiff, aged 31 years by September 1997, sustained major injuries to the pelvis which tore the urethra. Surgical repair was not successful. He has therefore developed urinary leaks as urine tracks in different directions. These tracks have become infected and that is why the urine leakage is accompanied by pus. The Consultant recommends that he be taken back to hospital for major reconstruction of his urinary system. He is likely to stay in hospital for two months or so. The cost of treatment could well be about Kshs. One million.

At the request of the Defendant the Plaintiff was also examined by Dr. James Swao, Consultant Physician and Kidney Specialist. He confirmed that the Plaintiff sustained pelvic fractures and urinary bladder injury. He went on to state that attempted repair of the bladder trauma by non-specialist has led to multiple fistulae, kidney damage and hence hypertension. Because of these fistulae he has become a public nuisance and not able to marry. He concluded that he will require admission to a reputable hospital, engage a specialist, do specialized tests, treat infection and then do staged urethra surgery. This is difficult and expensive. The success rate is low. The hospital stay is long - six weeks because operation is done in stages. The total cost will be Kshs 2 million and this is on the lower side.

In cross examination he stated that it was not a case of negligence but it was prudent to have a urologist. The operation was carried out by orthopaedic surgeons.

The Plaintiff was also examined by Dr. Manfredi Risso Consultant Neurosurgeon, Neuro physician and Psychiatrist who prepared a Report. He did not detect any neurological deficits in the Plaintiff. He concluded that from psychological point of view, the Plaintiff has been considerably damaged by the physical injury he suffered during the accident, and by his complications. He recommended that the money for compensation should be first and foremost invested in a final operation, aimed to restore as much as possible the natural condition of the Plaintiff's urine ways.

The consultants are ad idem on the injuries sustained by the plaintiff. They agree as to the need for a further operation. Dr. Swao was of the opinion that unless the Plaintiff is operated upon by the specialist he has only two to three years to live.

Counsel for the defendant, Ole Kantai, has submitted that the Defendant is not liable for the consequences arising out of the operation on the plaintiff. He submits that the evidence is that a urologist should have been in attendance. The operation should not have been carried out by the three orthopaedic surgeons at Kenyatta National Hospital. He concedes that his client is only liable for the damages arising out of the fracture of the pelvis. The Plaintiff became unconscious immediately after the accident. He was rushed to Kenyatta National Hospital where he was operated upon by three orthopaedic surgeons. He had sustained fractures of the pelvis. His urinary bladder and urethra were torn. The Plaintiff did not choose the doctors nor the hospital. Dr. Kioko knew the two of the three doctors. He said they were good orthopaedic surgeons.

The Plaintiff had, according to the evidence of his father, come to Nairobi on a visit. He therefore returned home to Karachuonyo after he was discharged from Hospital. The complications then set in as the bladder was not properly repaired. The catheter malfunctioned and the Plaintiff went to Kendu Bay Hospital. Dr. Kioko testified that Kendu Bay Hospital would be able to carry out minor surgical operation relieve the pain and to insert catheter. The Plaintiff then attended two other Nursing Homes but no operation was carried out. Dr. Kioko testified that the inserting of a catheter is a minor operation and is routine. There is no negligence attributed to the three orthopaedic surgeons. Indeed Dr. Swao said so.

The case is distinguishable from Civil Appeal No.46 of 1977 JANE WANGUI OBWOGI -VS- LAWRENCE JOHN ABURI where the doctors detected one fracture and missed the other. The Court of Appeal held that negligence on the part of the medical team in failing to notice the fracture dislocation of the left hip during the initial hospitalisation was not something that the respondent could have reasonably

foreseen or provided against.

The Plaintiff sustained serious injuries. He has been in pain since the date of the accident. He stinks. He cannot sit with other people because of the stench he emits. Dr. Kioko testified that further surgery will not cure him 100%. He will improve at the most by 25 to 30%. He will however remain a permanent patient. Dr. Swao put the success rate at 25 - 50%.

The Plaintiff was born in 1967. He was therefore 26 years at the time of the accident. He was in good employment at the time. His future has been rendered bleak by the accident. His sexual life has been affected.

I assess general damages for pain, suffering and loss of amenities at Kshs.1,000,000/-.

The Plaintiff was employed as a buyer earning a net salary of Kshs.11,371/=. PW.3 George Olonde Administrative Manager of Multipurpose Enterprises Ltd. testified that the Plaintiff had good prospects. His salary had just been increased. I adopt a multiplier of 15 and assess damages for loss of future earning at $Kshs.11,371 \times 12 \times 15 = Kshs.2,046,780/=$.

All the three doctors recommended that the Plaintiff should undergo further surgery. Dr. swao, the defendant's Consultant, put the cost at Kshs.2,000,000/=. I award the said sum as cost of future surgery. This sum was pleaded under an amendment to the Plaint on the 10th November, 1997.

The Plaintiff will require nursing care but I have to bear in mind that after the operation the leakage will stop and the plaintiff will not require nursing care. The evidence adduced is that the father has been looking after the Plaintiff. I make no award under this heading.

I will also not award the cost of catheters and medical consultations for lack of proof.

I award Shs.443,907/= as proved special damages. The counsel for the defendant should have objected to the production of the copies at the hearing.

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

(a) General damages for pain, suffering and Loss of amenities -	Kshs.1,000,000/=
(b) Loss of earning capacity -	Kshs.2,046,780/=.
(c) Cost of future surgery -	Kshs.2,000,000/=.
(d) Special damages - Kshs. 443,907/=.	
	- Kshs.5,490,687/=
Less 20% contribution	<u>-Kshs.1,098,137/-.</u>
	<u>-Kshs.4,392,550/=</u>
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The Plaintiff shall also have the costs of suit and interest.

Delivered this 19th Day of December, 1997.

J.V. JUMA

JUDGE