



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 87 OF 2005

CHARLES MATHENGE WAHOME.....PLAINTIFF

V E R S U S

1. MARK MBOYA LIKANGA
2. KENAFRIC BAKERY LIMITED
3. FINA BANK LIMITED.....DEFENDANTS

J U D G M E N T

Following a road accident on 5th November, 2002 along the Thika/Sagana highway in which he was injured, the Plaintiff filed this suit against the Defendants jointly and severally seeking general and special damages. The Plaintiff's suit as against the 3rd Defendant, Fina Bank Limited, was subsequently withdrawn by consent order entered on 17th July, 2007, with no order as to costs.

On 8th November, 2010 judgment on liability was entered against the 1st and 2nd Defendants, jointly and severally, at 80%/20% in favour of the Plaintiff. This judgment therefore concerns quantum only.

General damages are sought for pain, suffering and loss of amenities. Damages are also sought for:-

- (a) Lost or diminished earning capacity.
- (b) Future medical treatment and management.

I took evidence on 18th May, 2011. The Plaintiff testified (as PW2) and called one witness, **Prof. Lawrence Ndegwa Gakuo (PW1)**. The Defendant called one witness, **Mr. Rajankant Prabhulal Shah**

(DW1). I have duly considered the testimonies of these three witnesses.

The parties put in written submissions (which were in place by 30th June, 2011). I have considered those submissions, including the cases cited.

The Plaintiff's testimony was that after the accident on 5th November, 2002 he was admitted at **Thika Nursing Home**. The following day, 6th November, 2002 he was transferred to **Nairobi Hospital**. His broken leg was operated on. He was finally discharged on 27th November, 2002. He produced in evidence his hospital discharge summary (**Exhibit P2**).

The Plaintiff further testified that after a few months he developed complications and was admitted at **MP Shah Hospital** on 9th July, 2003 and discharged on 18th July, 2003. He produced in evidence his second hospital discharge summary as **Exhibit P3**.

After the original discharge he also attended physiotherapy and reviews for a life-threatening condition he had developed on account of the fracture to his leg (a blood clot).

The Plaintiff also testified that on 16th December, 2005 he was admitted at Nairobi Hospital for removal of a metal plate that had been inserted in his leg at the fracture site. In this regard he produced a third discharge summary (**Exhibit P4**).

The Plaintiff complained that he subsequently developed swelling of his fractured leg and knee and severe back pain. He said he could not wear shoes for long and has to use a walking stick for support.

In summary, the Plaintiff testified that he sustained the following injuries in the accident:-

(i) Broken right upper leg.

(ii) Deep cut at the back of the head.

(iii) Minor bruises on the right hand.

In cross-examination the Plaintiff admitted that his employer at the time of the accident had retained him in employment to-date. Though employed as a driver (and was such at the time of the accident) he had since risen to the rank of a sub-branch liaison officer. His salary had risen from the gross of KShs. 12,000/00 gross per month that he was earning at the time of the accident to the current KShs. 46,000/00 gross per month.

PW1, Professor Gakuo, is a professor of orthopaedics at the University of Nairobi. As well as the bachelor's degree in medicine and surgery (University of Nairobi, 1976), he has a master's in surgery (UoN, 1980) and three fellowships in orthopaedics. He teaches, and has been teaching since 1977, in the Department of Orthopaedics at the University of Nairobi. He also practices orthopaedics at his private clinic in the City of Nairobi.

His testimony was that on 22nd December, 2002 he examined the Plaintiff, prepared and signed a medical report (**Exhibit P1**). Exhibit P1 reveals a history of road accident on 5th November, 2002 and the following injuries:-

- (i) Cut wound on the scalp.
- (ii) Fractured right femur.

Treatment included stitching of the scalp wound and plating and grafting of the right femur.

The Plaintiff's complaint to Professor Gakuo was that right leg was then shorter than the left one, impairing his gait and walking.

Professor Gakuo's prognosis was that the Plaintiff's fractured right femur had led to difficulties in walking and working efficiently. He assessed the Plaintiff's **permanent incapacity at 25%** of the total person.

In his oral testimony Professor Gakuo noted that the Plaintiff's right leg had healed 2.5 cm shorter than the left leg. He opined that the maximum shortage that can be compensated with a thicker-soled shoe, is 2 cm; anything more would affect the *lumber* spine (lower part of the spine). He had noted that the Plaintiff walked with an obvious limp and with the assistance of a walking stick.

Professor Gakuo also testified that it is possible to lengthen a short leg, though that in the case of the Plaintiff costs and the potential risks involved in this major surgery would far outweighed the potential benefits, and he would not recommend it. He was of the view that the Plaintiff could still drive with the shortened leg.

Professor Gakuo also explained that his assessment of 25% permanent disability was informed by the permanent shortening of the leg which would lead to knee and back problems.

DW1, Mr Rajankant Prabhulal, is a general surgeon. I understand that surgeons are by professional convention addressed as "Mister." not "Doctor". DW1 has a first degree in medicine and surgery (Aberdeen University, 1962) and one fellowship. He has practised medicine for over 35 years.

On 28th October, 2005 he examined the Plaintiff. He prepared a medical report which he produced in evidence as **Exhibit D1**. He agreed with Professor Gakuo that the Plaintiff's right leg was shorter than the left by 2.5 cm. But he differed with the Professor about the effect of that shortage. It will be recalled that it was Professor Gakuo's opinion that any shortage greater than 2 cm cannot be adequately compensated for by a raised shoe, and that it must inevitably lead to problems with the knee and the lower back. To the contrary, DW1's view was that a 2.5 cm shortage can be adequately compensated for by a raised shoe without any future complication.

DW1 was also of the opinion that the Plaintiff's permanent disability was only 5% of the total person, principally because the 2.5 cm shortage of the right leg could fully and properly be compensated for by a raised shoe.

DW1 agreed with Professor Gakuo that though lengthening of a short leg is possible, in the Plaintiff's case it would not be advisable because the risks attendant upon his major surgery would far outweigh the benefits.

Regarding the areas in which he differed with Professor Gakuo, DW1 stated that he considered the professor to be more learned than him in orthopaedics as he is a professor of orthopaedics and he (DW1) is only a general surgeon. He said he would defer to the professor as far as orthopaedics is concerned.

The totality of the evidence before court discloses as follows:-

1. The major injury that the Plaintiffs suffered was fracture of the right femur. The other injuries were a minor cut on the back of the head and bruises.
2. There was, attendant to the fracture, a complication of pulmonary embolism (which was life-

threatening) which sent the Plaintiff to the intensive care unit for several days.

3. The fracture united and healed well, but with attendant shortening of the leg by 2.5 cm.

I accept Professor Gakuo's opinion, because of his superior knowledge in orthopaedics, that the shortening of the leg by 2.5 cm cannot be adequately and properly be compensated for by a raised shoe, and that the Plaintiff must suffer, for the rest of his life, attendant problems in his knee and lower back. He will also not be able to walk without the assistance of a walking stick.

I accept the opinion of both doctors that though a short leg can be lengthened, for the Plaintiff the risks attending upon such major surgery would far outweigh the benefits, and that therefore it is best that the Plaintiff lives with the shortened leg for the rest of his life. For this reason the Professor's assessment of permanent disability at 25% of the total person appears to be the reasonable one, and I accept it.

The shortening of the Plaintiff's leg has not affected his current employment, and his career with the employer appears to have progressed upwards. There has not been any loss or compromise of earning capacity in his present employment. It is difficult to know whether this favourable outlook would be maintained if he were for any reason to lose his present employment and be forced to seek employment elsewhere. The impairment must however surely affect all his other endeavours, including amenities.

It also does appear that the Plaintiff will not require any dedicated further medical treatment, save for the problems attendant on his shortened leg. But these do not appear to go beyond management of pain and discomfort.

I have looked at all the decisions cited by the learned counsels and noted that the awards range from the year 1999 to the year 2011.

No injuries to different people can be exactly the same. I have noted the Plaintiff's extended admissions at hospital.

Doing the best that I can, and balancing this against that, I will award the Plaintiff KShs. 1,500,000/00 for pain, suffering and loss of amenities, subject to reduction by 20% contributory negligence. There will be interest on this sum at court rates from the date of judgment until payment in full.

Special damages must be particularly pleaded and strictly proved. KShs. 700/00 (for police abstract and copy of records) was pleaded. The same was not strictly proved, and I will not award it.

The Plaintiff will have costs of the suit subject to reduction by 20%.

There will be judgment as above.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 5th DAY OF AUGUST, 2011.

H.P.G. WAWERU
JUDGE