



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 300 of 2001

ALPHONSE MWATSUMA MWAGAMCHI.....PLAINTIFF

VERSUS

1. JOSEPH MWANZIA MWANZU.....1st DEFENDANT

2. NAKRUMAH MEGHJI SHAH2nd DEFENDANT

J U D G M E N T S

In this case liability is agreed upon and apportioned as follows:-

Plaintiff - 10%

First Defendant - 10%

2nd Defendant - 80%

The court has to assess quantum and enter judgment accordingly. The evidence offered as to quantum is on injuries suffered.

The Plaintiff said that he sustained loss of 7 teeth and a fracture of the jaw. His legs were damaged and even at the trial he had not healed. He was walking with a 'bakora'. He produced police abstract and receipts for payment of expenses incurred. He also produced medical reports.

The plaintiff called a dental surgeon Yusuf Ali Sudi who examined plaintiff on 14/3/2003 and made a report. He also assessed the cost of prosthesis. He confirmed that 6 of Plaintiff's teeth were lost and 7th was broken. All needed replacement. The witness said that the dental prosthesis was in three categories.

1. To cost Kshs.8000/- for a removable partial dentures made in acrylic with estimated useful life of about 5 years.

2. To cost Shs.45,000/- for a removable partials made with chrome-cobalt metal and acrylic with

working life of about 15 years.

3. To cost Kshs.190,000/- for a fixed prosthesis made in porcelain bonded to vitallium metal estimated useful life for about 30 years.

4. A second witness on the lost teeth was called. Dr. Satish M. Vaghela who gave evidence and produced a report. He confirmed there were 7 teeth requiring replacement.

He categorized three methods for treatment.

1. fitting of 11 unit metal bonded ceramic bridge the cost of which would be approximately Shs.165,000/-

2. removable chrome cobalt denture the costs of which would be 35,000/-

3. fitting a normal acrylic denture the costs of which would be about Shs.8,000/-.

Otherwise the plaintiff confirmed the mouth had healed. Regarding the injuries suffered, the plaintiff produced medical report of Hermant Patel dated 12.4.2001 and another dated 4.11.2002.

Injuries suffered were described as:

1. Fracture of mandible with loss of the teeth mentioned above.
2. contusion of chest (no fracture)
3. severe back injury with spinal cord involvement (persthenia both legs).

He was treated from 25.9.2000 – 22.11.2000 discharged to attend out patient.

On 4.11.2002 the plaintiff visited Dr. Patel for further examination. The same doctor found:

- a. Mild weakness both legs
- b. Loss of 7 lower teeth
- c. Mild back pains

The doctor found the plaintiff had grade 4 muscle power in legs and sensations were normal. Plaintiff was using a stick as support and walks were near normal.

The doctors' opinion was that the plaintiff had made good recovery from weakness of both legs and was advised to continue in active Physiotherapy. It was doctors' opinion that there was no permanent incapacity but the 7 teeth to be replaced.

The 2nd defendant also arranged for the examination of the plaintiff by Dr. Rasik Patel on 10/1/2002. At this time the plaintiff was aged 39. He had been in hospital for 28 days. He attended physiotherapy for 6 weeks at this time the doctor found the plaintiff walking normally with no weakness of legs. There was slight weakness on right arm.

Thoracic and lumber spine were found to be normal no tenderness. This Doctor found the plaintiff considerably improved from the weakness of legs and right arm.

Only permanent disability is the loss of teeth. There is no difference of opinion between Dr. Rasik Patel on his examination on 10/11/2002 and that of Dr. H. Patel of 4/11/2002. Both doctors found that there would be no permanent incapacity but while Dr. Rasik Patel said "He has considerably improved from weakness of legs and right arm and there shall not be any disability from this," Dr. Patel also said "He made good recovery from weakness of both legs and is advised to continue Physiotherapy. He then suffers no incapacity".

Both doctors were conscious that the plaintiff was not fully recovered when they examined him. The matter of whether the plaintiff could walk without a stick was contested in court during the hearing. The plaintiff was asked to walk from the witness box to the entrance door of the court. He did so and the court noticed that he still needs to support himself with a stick. That is the evidence on injury.

The plaintiff was employed as a plumber. He is no longer able to perform that job and therefore he is unemployed. He said he lives on the food his wife brings to the house.

On the issue of replacement of teeth the consideration must be the length of the time the new denture will last. The plaintiff is now 42 years old.

Dr. Vaghela recommended the first of his options costing 165,000/- its useful life is not known. Dr. Yusuf said his last option costing 190,000.00 would last for about 30 years.

In 30 years the plaintiff will be aged 72 years and at that time he may not need any replacement. For these reasons I award Shs.190,000/- for the purpose of the plaintiff teeth replacement.

On the issue of general damages for pain and suffering the medical reports of Rasik Patel and H. Patel are relevant. Dr. H. Patel examined the plaintiff twice. There was one fracture of the jaws. He was fitted with inter-dental wiring to immobilize the fractured jaws, which were removed after six weeks. He was on strict bed rest on fracture board for 2 weeks and was hospitalized for 28 days and thereafter attended out patient and physiotherapy 3 times a week for six months. He was unable to chew food properly, had constant low back pain, weakness of the legs and right arm. This was due to severe back injury and chest conclusion. I have considered the submissions of Counsel for Plaintiff and Defendant.

The case of **P. Nekesa V Andrew Mwambingu & anor. HCC NO.4539 OF 1988 (NRB)** fracture of the maxilla with loss of 10 teeth requiring replacement and other injuries. Award for general damages was Shs.360,000/- in 1993.

Also the case of **Raphael Oloo vs. Industrial Plant (E.A.) Ltd. HCC NO. 4400 of 1986 (NRB)** there was loss of 6 teeth, low backache could not lift heavy objects. It was said that back pain would persist for a long time. The court awarded Shs.1,000,000/- as General Damages, on 31/1/2001. In the case of **Patrick W. Mutua vs. Warren Enterprises** there was fracture at base of skull. Plaintiff was in coma for 2 weeks and spine injuries. The plaintiff was working after accident and his incapacity was assessed at 18% - 30%. The award was shillings 400,000/- on 100% basis.

There was also cited the case of **Beatrice W. Kimani vs. Kenya Bus Services Ltd. HCC 3503 of 1988 (NRB)**. In this case there was injuries and fractures not similar to the present case. The award was Shs.400,000/-. This authority is not relevant. Also the authority of **Mary Odego v. Justus Olang Orabo HCC NO. 83 of 1987 Kisumu** the award was 200,000/-.

Mr. Faiz Anjarwalla also cited the authority of **Sarah N. Muchiri vs. John T. Kamau HCC 395/85 at Nairobi** where there was loss of 8 teeth with other injuries. Award was Shs.40,000/- for the 8 teeth. These awards were made in the eighties.

After consideration of the above, I am convinced that an award for general damages in the sum of Shs.1,200,000/- is sufficient to compensate the plaintiff for pain and suffering on 100% basis.

The special damages pleaded and proved

Shs.6,000.00 - medical reports

Shs. 100.00 - police abstract

Shs.14,925.00 - Medical treatment expenses

Shs.21,025.00

Also the cost of teeth replacement is awarded at Shs.190,000/-. Total Specials - Shs. 211,025/- proved

Total award - Shs.1,200,000/-

Shs. 211,025/-

Shs.1,411,025/-

This amount is subject to apportionment as agreed. The plaintiff share of liability is 10% equivalent to Shs.141,102.50 judgment is entered for the plaintiff against the defendants jointly and severally as apportioned by consent .on the sum of:

Shs.1,411,025.00

Less: Shs. 141,102.50

Shs. **1,269,922.50**

The plaintiff shall have costs and interest at Court rates.

Delivered and dated and Mombasa this 15th day of December 2005.

J. KHAMINWA

J U D G E

15/12/05

Mr. F. Anjarwalla for 3rd Defendant

Mr. Tindika for Plaintiff

Notices sent for judgement

Mr. Faiz Anjarwalla:

I apply for stay. This being Christmas vacation time does not start to run until January 6th next year.

Court: - Stay is granted for a period of 21 days from when time for X-mas has expired.

KHAMINWA, J



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