**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL CASE NO. 74 OF 1983**

**PAOLO BENCIVENGA.....PLAINTIFF**

**VERSUS**

**GILBERT AMIMO.....DEFENDANT**

## JUDGMENT

The plaintiff, Paolo Bencivenga, was a pillion passenger on a motor cycle driven by his schoolmate, Steward Herd, on Forest Road, off Ngong Road, during morning hours of April 3, 1982. Forest Road leads to the vicarage of St Francis Church, Karen, then occupied by the defendant, Rev Gilbert Amimo and extends to a path or road which leads to where some people do horse riding, or some lorries travel to collect murram and which path or road leads to Hillcrest Secondary School. The vicarage has a driveway which exits on Forest Road. However, the driveway had tall hedge (according to the defendant about 10 feet high) which obstructed the view of the traffic on Forest Road before one emerged from the driveway on to Forest Road. According to Dr Bencivenga (PW 3) the father of the plaintiff, who performed various surgical operations on his son for the injuries received as a result of accident, and who used Forest Road frequently for horse riding, he considered the approach to the driveway of the vicarage dangerous because anyone emerging from the driveway could not see either side of Forest Road. Moreover, whilst riding in the vicinity, he would slow down and stand on stirrup to ensure that no car was emerging from the driveway. Be that as it may, there is common ground that the high hedge on both sides of the driveway obstructed the view of anyone emerging in a car from the driveway to Forest Road.

On this particular occasion, whilst the motor cycle was driven on its correct side, the defendant driving his motor vehicle from the vicarage emerged from the driveway and collided with the motorcycle. The motor cyclist and the plaintiff fell somewhere in front of the motor vehicle. The motor cycle received few scratches and the cyclist received some bruises but was otherwise not injured. The motor vehicle received slight dent on the front mudguard. However, the plaintiff sustained injury on his left leg which was swollen and bleeding. He could not get up and walk. The defendant and the rider of the motor cycle assisted the plaintiff who was driven in the motor vehicle of the defendant to Mater Miscericordiae Hospital where he was admitted and treated by his father.

In his evidence, the defendant admits all the above but contends that the motor cycle was driven at high speed and hit the front bonnet of his car. If so, the defendant could have joined the rider as a party to claim contributory negligence and indemnity. However, he has not done so. Having regard to all the

evidence before the court which includes photographs of the scene taken subsequently minus the vehicles involved in the accident, I cannot accept the contention of the defendant that the motor cycle was travelling at a high speed, took evasive action and hit the front bonnet of the car of the defendant.

In my view, the defendant who lived in that vicarage for some time, must have been aware of the traffic on that road and the obstruction of the high hedge on the driveway. As a prudent driver, it was his duty to stop and check for the traffic on both sides of Forest Road before emerging on to that road. He did not do so and the result was the collision between his motor vehicle and the motor cycle. He is, therefore, liable. Naturally, the evidence of Dr Bencivenga, with regard to shock, bleeding and injury to the left lower leg was slightly over-wrought but we have medical report of Dr Prasad dated November 23, 1982, about 7½ months after the accident which was adduced in evidence by consent. The plaintiff had the following injuries on the left leg, according to the medical report.

"2nd degree compound fracture of the medical malleolus (inner part of the metice which joins tibia with talus) with underlaying flake fracture of the talus; rapture of the distal tibio-fibular syndesmosis; rapture of the interosseous membrane; rapture of the proximal tibio-fibular syndesmosis; comminuted fracture of the neck of the tibular; tear of the fibular portion of the lateral collateral ligament of the knee; diffuse soft tissue injuries with tears of the muscle of the anterior tibial compartment and loss of skin; post-haemorrhagic shock."

The plaintiff was fortunate to have his father, an orthopaedic surgeon of considerable skill and experience, on hand to treat him for the above injuries. A surgical operation, after treatment of shock, with the aid of xrays, was carried out to repair the above injuries by insertion of wires and screws with plaster of Paris cast. He was given high doses of antibiotics and discharged. About a week or so later, he was operated upon for skin grafting and was again given full leg cast. About four weeks after the first operation, the wires and screws were removed under local anaesthesia. The fourth operation was done on May 21, 1982 to excise pus infection.

According to Dr Pasad, the patient was on crutches (non weight bearing) for three months and for further two weeks on partial weight bearing.

The patient had done very good recovery but a post-traumatic arthritis of the tibio-talus (main ankle) joint would be unavoidable. A further operation under general anaesthesia planned for removal of two screws, was subsequently and successfully carried out by Dr Bencivebenga on August 26, 1985 and no further operation will be necessary.

The prognosis of Dr Bencivenga was that the ligament and the fracture were perfectly repaired and united very well. The only black cloud is the slow development of arthritis in the flaked fracture of the talus. In his opinion, plaintiff is now capable of taking a profession involving physical fitness and can play squash though cannot compete in tournament. He was captain of squash in his school.

Paolo, according to his evidence on July 1, 1983 planned to go to naval academy in Italy to follow a career as Naval Officer but cannot do so after being examined by Dr Taddei (PW 2) of the Italian Embassy because of injury received by the accident. In July, 1983, Paolo was thinking of joining a university for medical career. However having passed 'A' Level, he is now at the university of Rome studying for civil engineering. His father maintains him at the university, which costs him about £10,000 per annum for a five year course in civil engineering. If he had joined naval academy in Italy, his education would have been free and would have received some salary as a cadet for three years and after being commissioned as naval officer, some greater salary upto the age of 35 with some benefits. It may be observed that both his father and Dr Taddei joined Navy as medical officer after qualifying in the

medical profession.

Mr Mohamed for the plaintiff asks this court to award damages under the following heads:

(1) Pain, suffering and loss of amenities

(2) Loss of pleasure in pursuing a chosen career

(3) Benefit of free education and maintenance

(4) Loss of salary as a cadet

(5) Maintenance and education by his father

Mr Mohamed submits that these are the losses which plaintiff has suffered as a direct consequence of the defendant's negligence and the defendant should have reasonably foreseen. I do not subscribe to the latter submission.

In support of his submissions, Mr Mohamed has cited several English authorities. One of these is *Halsbury* 4th Edition Volume 12 pages 446 and 447 paragraph 1147:

"Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the court in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff including his age and any unusual deprivation he may suffer is reflected in the amount of the ward."

I agree that award of damages must be fair, bearing in mind the previous decisions. Moreover, each case has its own circumstances which may not be overlooked including the age of the plaintiff and any unusual deprivation he may suffer. In the instant case, the only evidence is of the plaintiff and his father that the plaintiff was planning a naval career in the Italian Navy. Dr Taddei's examination of the plaintiff to assess his physical fitness for Italian Navy was done in December 1982 ie about 8 months after the accident. Such evidence does not tend to show that before the accident the plaintiff was planning a naval career. Be that as it may, there is evidence that both his father and Dr Taddei joined Italian Navy after qualifying in medical profession. There is evidence of plaintiff that in 1983, he was thinking of persuing a medical career but in 1985, he had chosen to pursue the career of civil engineer. Would a young man with a fairly brilliant school record and whose father is an ortheopaedic surgeon of considerable skill and experience opt for a naval career where the earning power may be limited compared to a profession, regard being had to imponderables of promotion, especially so where competition for advancement may be much greater and stiff" I think not, having regard to all the circumstances. The case of loss of two fingers of a celebrated concert pianist (*Yorkshire Electricity Board v Naylor* [1968] AC 529 at 549) and of an infant plaintiff failing to get a place in a grammar school due to permanent impairment of his powers of concentration (*Jones v Lawrence* [1969] 3 All ER 267) are an altogether different footing from that of the present plaintiff.

Again I agree that "The basic principle so far as loss of earnings and out of pocket expenses are concerned is that the injured person should be placed in the same financial position, as far as can be done by an award of money, as he would have been had the accident not happened". (*British Transport Commission v Gourley* [1955] 3 All ER 796 at 804) but in a case like the present one where the factors of

pursuing a naval career are clouded by insufficiency of evidence, it would be unrealistic and fraught with risks to embark on restoring the plaintiff to the same financial position as before had the accident not happened. In my view the phrase “loss of earnings and out of pocket expenses’ is loss actually incurred upto the date of trial under the head of “special damages”. (*Attorney General v Joseph Wanjira*, Court of Appeal CA No 45 of 1982).

I am asked to open a new vista of jurisprudence in determining factors to be taken into account whilst assessing damages. A young man planning for a naval career in a foreign country (where he would be qualified for such career) be provided for loss of benefits, had he joined such career, arising out of injury received due to negligence of the defendant, without the benefit of proper evidence as to loss of benefits. In doing so, the fact that both plaintiff’s father and Dr Taddei joined the Italian Navy after qualifying as medical men cannot be overlooked. Moreover, the plaintiff, at the time of giving evidence in July, 1983 was thinking of pursuing medical career but is now pursuing a course in civil engineering. I am not inclined to delve into unfathomed waters having regard to circumstances.

Mr Mohamed has cited several English cases with regard to an award of damages for injuries which he contends were similar to those sustained by the plaintiff. Mr Onono for the defendant has adequately distinguished the dissimilarities. All that I would say, having regard to recent decisions of the Court of Appeal, that “in cases in which there are Kenya decisions on the point, in which the main essentials bear comparison with the facts of the one before the court, and they otherwise bear a reasonable measure of similarity to it, Kenya decisions should be used to the exclusion of the others, save those from a neighbouring jurisdiction with similar conditions to Kenya,. Only when there are no local decisions on the point should resort be had to English or other authorities, and then only as helpful indicators”. (*Southern Engineering Co Ltd v Musingi Mutua*, Court of Appeal CC No 46 of 1983).

In *Mumo Mbatha v Nzau Kiilu* Machakos HCCC No 14 of 1985, a young boy of about 17 years old in secondary school, who sustained among other injuries, fracture of pelvis at symphysis pubis but recovered well though could not walk long distances or take part in outdoor games, I awarded Kshs 150,000 as general damages for loss of amenities, pain and suffering. Although my decision which may be subject to appeal may not bear a reasonable measure of similarity, I derive comfort from it to afford a reasonable perception and guide to the range and limits of current thought.

In *Amisa Ali v John Mukozozo & Another* Court of Appeal CA No 9 of 1983, Chesoni JA commented thus on lack of well maintained record of what the courts have done in the past:-

“Assessment of damages in motor accident in this country still poses a great problem because there is hardly any well maintained record of what the court have done in the past. Indeed no one case is the same as another on all facts and circumstances but previous decisions are of guidance.”

As to imponderables and incalculables in measuring awards satisfactory to both sides of the combat and the gone days of stingy awards due to inflation, I can do no better than quote the following passage of Madan, JA in *Ugenya Bus Services v James Kongo Gachohi*, Court of Appeal CA No 66 of 1981:-

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know that I am placed in an inescapable situation for criticism by one party or other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can. I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs 20,000 for loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly. I

remember but ignore them. We have inflation with us. We all have to live with the exorbitance which the inflation has brought into our lives."

In the instant case, the plaintiff, a young man on the threshold of his professional career and from a well to do family, living a life of comfort and well being, eventually came out unscathed from the injury sustained to his ankle joint but for the future prospect of onset arthritis which will not enable him to participate in competitive outdoor sports. However, this happy event has come about because of the careful and skilled attention to treatment which was given to him by his father. Although, all is more or less well for Paolo, he had to undergo five surgical operations, some under general anaesthesia, to bring about his present state near perfect repair. These must have been painful exercises which may not have been free from suffering. In assessing the award, this aspect of pain and suffering must not be overlooked.

Doing the best as I can, after taking into account all the various authorities cited as well as all the circumstances of the case, I would say that a reasonable, and fair award for general damages for loss of amenities, pain and suffering should be the sum of Kshs 200,000. I enter judgment for the plaintiff for Kshs 2000,000 for general damages. As there is no dispute with regard to special damages for which appropriate documents were adduced in evidence for the inspection of the court, I enter judgment for the plaintiff in the sum of Kshs 31,700 being special damages. The plaintiff shall have costs of this suit.

**Dated and delivered at Machakos this 10th day of March ,1986.**

**F.E.ABDULLAH**

**JUDGE**