REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 30 OF 1997

BETWEEN

1. OSSUMAN DHAHIR MOHAMED

2. KENYA WILDLIFE SERVICE.....APPELLANTS

AND

SALURO BUNDIT MUHUMED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi of the Honourable Mr. Justice A.M. Mbogholi dated 29th July, 1993 in H.C.C.C. NO. 6039 OF 1991)

JUDGMENT OF THE COURT

A lorry registration number GK 469L which was at the material time in the control or custody of Kenya Wildlife Service (the second appellant) was, on the 27th day of April, 1990, being driven by Osman Dhahir Mohamed (the first appellant) along a road at Hulugho some 12 kilometres from Garissa. The lorry had at the relevant time broken down and attempts were being made to push it.

The respondent, Saluro Bundit Muhumed, in her evidence in the superior court stated that she was one of the passengers on the lorry and that at the time it broke down she was one of the persons who helped to push the lorry. She said that whilst the lorry was being pushed it went out of the mud and instead of going forward it reversed without any warning and hit her. She fell down and the rear wheels of the vehicle ran over her.

On the other hand the first appellant said in the superior court that there were no passengers in the lorry. There were 6 Wildlife Service guards ("Askaris") on the lorry and they had all been on some anti-poaching operation. When the lorry broke down he sought help by radio call for the services of a mechanic.As the lorry was being pushed, helped by members of the public it entered another muddy section. It was pushed out of the first muddy section. After it entered the other muddy section he came out of the lorry and told the people pushing to move out of the way as he wanted to reverse the lorry. He said there were no women involved in pushing the lorry. He drove the lorry `forward and front' three times ahead and then (the 4th time) he reversed the lorry. Whilst so reversing he heard a scream. He came out of the lorry and saw the respondent lying flat on the road having been run over by a tyre of the lorry. He said that he had not seen the respondent before and that she could not have been pushing the lorry and he

was given to understand that the respondent might have been run over whilst crossing from right to the left.

One Corporal Mutuku Muthiani (PW2 in the superior court) confirmed the first appellant's version of events save for minor variations which are not material.

A Kenya Wildlife Service ranger Barnabas Tinenga (PW3 in the superior court) also confirmed the version of events as narrated by the first appellant. He was keeping guard whilst the lorry was being pushed.

he first appellant was charged with the offence of careless driving contrary to section 49(1) of the Traffic Act, in connection with the suit accident but was acquitted under section 215 of the Criminal Procedure Code.

In the conflict of evidence before the superior court one fact emerges clearly and that is that the respondent was knocked down by the lorry whilst it was being reversed. What is not clear is whether she was one of those pushing the vehicle at the material time or whether she came from the bush around the make-shift road that the lorry was on. The learned Judge having set out the differing versions of the respondent on the one hand and the first appellant and that of his witnesses on the other hand and having extensively referred to the traffic proceedings said this:

> "It will be noted that the first defendant and his witnesses in this trial maintained all along that other than the officers in the said motor vehicle there were no pasengers, the plaintiff had stated that she was a passenger therein together with many other members of the public. She said so before the learned trial magistrate in the traffic proceedings. She found support in the evidence of PW2, PW3 and PW5. These were members of public, an Assistant Kadhi, a businessman and a labourer respectively. To crown it all the learned trial
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> magistrate also found as a fact that the plaintiff was a passenger in the said motor vehicle. It is not however, the fact that the plaintiff was a passenger in the said motor vehicle that is going to determine the issue of negligence. I have stressed this fact because it goes to the root of the credibility of the defence advanced through the first defendant and his witnesses. If the first defendant and his witnesses can try to mislead the court in the face of obvious evidence that not only was the plaintiff a passenger in the said motor vehicle but that many other civilians were also there what justification will there be for believing their version of the occurrence."

Mr. Muthoga for the appellant has argued that what the learned judge said amounts to a serious misdirection. When the learned judge relied on the findings of the traffic magistrate as regards the respondent being a passenger in the vehicle as opposed to a stranger and then basing his findings on the credibility of the appellants' witnesses on that finding was in our view a serious misdirection.

The learned judge thus relied quite substantially on the record of traffic proceedings exhibited before him. Such reliance on such proceedings is erroneous. A similar issue came up for consideration in this court in the case of Tuitoek Cheserem & another vs. H.Z. & Company Limited, Civil Appeal No. 55 of 1981,

> (unreported) and Law JA had this to say: "The third ground is that the learned judge failed to consider the evidence contained in the record of the Criminal Case in which the employee was convicted of causing death by dangerous driving, which record was admitted as an exhibit by consent at the trial of the consolidated suits. This was done to prove the conviction, which was material for the purpose of section 47A of the Evidence Act; to make available the exhibits which formed part of the criminal record and which were required in the civil proceedings, for instance sketch plans of the locus in quo; and to enable witnesses in the civil proceedings who also gave evidence in the criminal proceedings to be cross-examined on their previous depositions.
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> Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings, as

> Mr. Barasa contended, a proposition for which he could produce no authority. Of course, it is always open to the advocates in a civil suit to agree upon facts to which no evidence is called, or to agree to accept a statement by a witness in other proceedings, although the witness is not called as a witness in the civil suit, provided the agreement is absolutely clear and unambiguous."

There was no admission by the first appellant in the traffic case that the respondent was a passenger in the lorry. Nor did he so admit in the civil proceedings. In the circumstances the learned judge ought not to have used as a `crutch' the magistrate's finding that the respondent was a passenger in the lorry to disbelieve the first appellant's version of the occurance of the accident. The learned judge could only have done so after evaluating the evidence of the first appellant and his witnesses as opposed to that of the respondent. To reiterate the learned judge ought not to have used such a finding to almost totally discredit the evidence of the first appellant and his witnesses.

It becomes incumbent upon us, therefore, to re-evaluate the evidence in its totality and as a first appellate court we are bound to do so. We have already set out the areas of conflict between the evidence of the respondent and that of the appellants' witnesses. We have also set out the common factor, namely, that the respondent was run over by the second appellant's lorry whilst the lorry was reversing. It is also on record that several persons were pushing the lorry. The respondent said that she, another lady, and several men were pushing the lorry. She then said that she was the only lady (not two of them) pushing the lorry along with 10 to 20 men. We think it is probable that she was one of the persons pushing the lorry but in our view it is also probable that the first appellant had, before reversing, warned those pushing the lorry to move out of the way before reversing. Otherwise, of the 10 to 20 persons pushing, more could have been injured or crushed. It is in this aspect that the first appellant's version that he warned those pushing the lorry becomes probable and the first appellant's version, in this aspect, is amply corroborated by that of Corporal Muthiani and Ranger Tinenga.

Mr. Muthoga argued that if the first appellant and his witnesses' version of events was to be accepted there was no liability at all on the part of the appellants. This submission in view of all the facts that we have set out and also in view of the fact that the first appellant was in charge of a lorry, on a slippery make-shift road with people or persons near or around the lorry fixes on the driver some responsibility of being absolutely certain that there was no one within the range of movement of the lorry whilst reversing.

The task that the learned judge had before him and the one that we have is not an easy one. Yet we are bound to find a solution to the problem. We keep in mind the fact that the respondent was able to move much more slowly than the lorry, comparatively speaking. We also keep in mind the fact that the first appellant could have asked one of the game wardens with him to keep a constant look out whilst reversing. Yet the first appellant did warn the persons pushing the lorry to steer clear. The learned judge apportioned liability, after evaluating the evidence in the way he did, at 80% on part of the appellants and 20% on part of the respondent.

We are not unmindful of the fact that it is only in exceptional circumstances that an appellate court would interfere with the findings of apportionment of blameworthiness by a lower court. The apportionment of blame represents an exercise of discretion with which the Court of Appeal will interfere only when it is clearly wrong, or based or no evidence, or on misapprehension of the evidence or on the application of a wrong principle. This was said by Law J.A in Malde v. Angira Civil Appeal No.12 of 1982 (unreported) and accepted with approval in Isabella W. Karanja vs. W. Malele [1982-88] 1KAR 186. See what Chesoni Ag.JA (as he then was) said at page 193.

The situation therefore is that the first appellant had as pointed out earlier, warned all persons near the lorry to move out of harm's way as he was reversing but even if he did so it was still his duty to ensure that those pushing the lorry had moved away before he started to reverse.

In apportioning blameworthiness regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blameworthiness. The omission on part of the respondent to move out of the lorry's way when warned to do so was, to a high degree, potently causative of the accident. Equally it was potently causative of the accident that the lorry was reversed without a

proper or adequate look-out. In those circumstances what commends to us itself is that liability ought to be equally apportioned and we so find. We set aside the learned judge's apportionment of liability at 80% - 20% and substitute the same with an order that each party namely, the respondent and the first appellant, was 50% to blame for the accident. The 2nd appellant was vicariously liable for the default of the first appellant.

We come now to the issue of damages. There can be no doubt that the respondent suffered severe injuries. These are:

(a) Bilateral fractures of both the superior and inferior pubic ramii; with dislocation of the symphysis pubis.

(b) Fracture of the right sacro-iliac joint

(c) Destruction of the urethral wall.

(d) Deep laceration over the right sacro-iliac area.

(e) Soft tissue injury to the right foot.

(f) Laceration over the right viginal fold.

(g) Abrasions over both gluteal areas.

As a result of these injuries the plaintiff has developed severe backaches, dysuria, incontinence of urine, pain in the right hip joint, shortening of the right leg, and permanent and uncosmetic scars and inability to walk without support, as per the respondent's complaints.

The appellants did not have the respondent examined by any of their medical experts. What we have before us, as had the learned judge, are two medical reports by Dr. N.H. Bhanji a Consultant General Surgeon and Trumatologist practising in Nairobi. The first report is dated 23rd October, 1991 and the second report is dated 24th October, 1992. There is also a letter dated 5th November, 1991 addressed by Dr. Bhanji to M/s Ameka & Company, the respondent's advocates. This letter is obviously in response to a query by M/s Ameka & Company Advocates in regard to what possible surgical treatment could be available to alleviate the distress of the respondent, and Dr. Bhanji has this to say:

"A. This lady was injured on the 27th April, 1990. Hence, it is more than one and a half years since the accident and the distortion of the whole of the pelvis has led to a disorganization of the soft tissues as well as the muscles in the area. Such injuries are easier to treat when fresh. If any treatment is attempted now it will be at considerable risk to the patinent and may even result in added complications. If surgery is at all attempted, it would involve an artherodesis (fusion) of the right sacro-iliac joint with open reduction and internal fixation of the fractures of both the superior and the inferior pubic ramii bilaterally. This would mean surgeries from the lower spine as well as from the abdomen. During such surgery a urologist would have to be involved to re-construct the injury to the urethra, so that, following surgery, this patient is able to pass urine normally. Such a surgery would, in my opinion, involve a hospitalization of at least two months followed by physiotherapy and convalescence period of another six months. I would estimate the cost to be in the region of Kshs.700,000/= to 1 million shillings."

We will revert to the issue of costs of the operation in question, later on, in this judgment. At this stage we are concerned with the issue of damages for pain, suffering and loss of amenities and we have set out Dr. Bhanji's comments on the efficacy and costs of the operation as his letter of 5th November, 1991 forms part of his three stage medical report.

The respondent was treated at Kenyatta National Hospital after having been flown there by Flying Doctor Service where she was managed conservatively and was transferred, on 21st May, 1990, to Nairobi West

Nursing Home for further management where the wound over the right sacro-iliac area was operated and she was discharged home on 6th July, 1990, on a pair of crutches, and advised not to bear weight on the right leg. Since then she did not seek medical attention save for seeing a herbalist in the Eastleigh area of Nairobi. Whilst the respondent's upper limb and chest were normal the abdomen revealed marked tenderness on palpation (touch or stroke) over the pubic area, especially over the symphysis (meeting point of the bones) pubis. There was a hypopigmented scar, measuring 7cm. in length, running in a curved manner over the right viginal fold. This scar was from the laceration sustained during the accident. There were no masses palpable in the abdomen. There was pain on compression of the pelvis.

There was a one cm. shortening of right leg. There was a 9cm x 11cm hyperpigmented soft scarring patch. The straight leg raising test on the right side measured 70° and on the left side 90° The rest of the examination of the lower limbs was normal. The movements of all the joints of both lower limbs were of normal range and painfree. The tendon reflexes were bilaterally equal. There was no circulatory or sensory deficit.

The X-rays showed a malunited, displaced fracture of all pubic ramii; with inferior displacement of the central block with pubic symphysis and a distorted pelvic inlet. Hip joints are normal, with normal articular margins and space. There was malalignment of right SI joint with slight superior right iliac displacement due to fracture. The right foot showed no osteoporosis. Nor did it have any fracture or deformity. Shorn of all medical language the respondent had a severe fracture injury restricted to pelvis area which fractures did not properly unite leading to a situation whereby the respondent will permanently need support either of crutches or stick to walk and also to incontinence of urine as well as loss to some extent of sexual enjoyment but the rest of her limbs are not affected.

We have attempted to set out at length her injuries and sequelae thereof so as to enable us to decide if the sum of Shs.1,000,000/= awarded to her by the learned judge in respect of pain suffering and loss of amenities was so inordinately high as to merit interference. The reason for this is that this court can only reduce or increase an award if the same is manifestly excessive or too low as the case may be. To enable us to decide this we must look at our own awards in cases of injuries of similar nature or of similar sequelae. Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees. See Kigaragari vs. Aya [1982-88] 1KAR 768; also see Chege v. Vesters [1982-88] 1KAR 1197 at page 1021. Of the cases quoted by counsel one was that of Livingstone Wendo Mutsotso v. Onyango Ongwendo, H.C.C.C. No.4562 of 1991, unreported in which case on 22nd June, 1995, Ringera J. awarded a sum of shs.450,000/- for general damages to the plaintiff who had lacerations over the forehead, forearm, deformed right thigh and deformed right shin.

He had sustained fractures of the pelvis, right tibia and fibula and the left tibia and fibula. He was operated on twice and fractures on both legs were fixed with metallic plates and screws. There was nerve injury which resulted in partial paralysis after he healed. The left leg was shortened by 1cm. The legs were left deformed. No further surgery could ameliorate the injuries. It can be seen that some of the injuries suffered by Mr. Mutsotso were probably more severe than those suffered by the respondent, but there was no incontinence of urine. The case nearest the present one was that of Jimmy Mbithi Kitele vs. Ramji Ratna Construction Co. Ltd, H.C.C.C. No.2993 of 1988 (NBI) (unreported). In that case the plaintiff had a fracture of the left superior ramii, fracture of the left inferior pubic ramii, fracture of the right inferior pubic ramus, fracture of the left iliac bone, dislocation of the left sacral iliac joint and rupture of the urinary bladder. He recovered but his left leg was 2cm. shorter causing him to walk with a limp.He was also left with severe obstearthritis of the sacral iliac joint. Mbohgholi J. on, 7th July, 1992, awarded him shs.250,000/= general damages.

We sought to know from Mrs. Ameka if the injuries suffered by Mrs. Vesters in the case of Chege & another vs. Johanna W.M. Vesters & Another[1982-88] 1KAR 1197 were more severe compared to those suffered by the respondent. On 10th June, 1988 this Court reduced the award of shs.910,000/= for pain suffering and loss of amenities to shs.650,000/= in keeping with other awards for comparable injuries. Mrs. Vesters had injuries of great severity which rendered her a house-bound semi cripple. She was 33 at

the time of the accident. It would be prudent, we think, to set out the nature of her injuries to decide whether or not the respondent's injuries were more, or less, severe. Mrs. Vesters suffered from the following injuries:

(i) Brain concussion.

(ii) Fracture of the right transverse process of 7th cervical vertebrae (base of the neck at the back)

(iii) Fracture of two ribs of the right side and two on the left;

(iv) Fracture of right shoulder blade

(v) Comminuted, compound fracture of the lower end of the right humerous;

(vi) Compound fracture of the right olecranon;

(vii) Closed fracture of mid-shaft right femur with medial comminution;

(viii) Compound fracture of the lateral candyle of the left femur;

(ix) Compound fracture of the eminentia inter candylor of left tibia with wide exposure of the knee joint;

(x) Compound fracture dislocation of the right ankle;

(ix) Fracture of right patella which was undisplaced.

It can be sen immediately that Mrs. Vesters had injuries more severe compared to that of the respondent although the result in both instances is that both were rendered semi house-bound cripples but the respondent to a lesser extent. But that was in 1988.

There must be some sort of uniformity in awards. Considering all that we have said we think the learned judge awarded damages in excess of comparable awards. Taking into account all relevant factors we would award a sum of shs.700,000/= for pain suffering and loss of amenities. In arriving at this figure we have also kept in mind the cases of

(i) Serah Wairimu Njau vs. Joseph Ndungu Mwangi H.C.C.C. No. 3983 of 1991 (unreported), (ii) Cathy Karimi vs. Chege Patrick Muturi H.C.C.C. No. 4595 of 1989 (unreported) and (iii) that of Cecilia W. Mwangi & Another vs. Ruth W. Mwangi Civil Appeal No. 251 of 1996 (unreported). In all of these cases the claimants suffered pelvic injuries of somewhat lesser nature. In the case of Cecilia W. Mwangi the decision of this Court was handed down on 3rd December, 1997.

We come now to the award of shs.1,890,000/= in respect of:

(i) Cost of operation including hospitalization, anaesthetics and specialist costs, drugs, accessories and physiotherapy for 6 months - Shs.1,200,000/=

(ii) Rehabilitation attention after surgery for 1½ years - shs. 500,000/=

(iii) Orthopaedic bed and mattress - shs. 50,000/=

(iv) Corrective surgery to the right

foot to free the extension tendons

caught beneath the scarring patch	
over the dorsum of the right foot	shs. 70,000/=
(v) Grafting operation over the	
hyperpigmentation soft scarring	
patch over the right foot	shs. 70,000/=
Total	Shs.1,890,000/=

At this stage it becomes relevant to note that it was Dr. Bhanji who himself said that "such injuries are easier to treat when fresh. If any treatment is attempted now, it will be at considerable risk to the patient and may even result in added complications." These remarks by the doctor called on behalf of the respondent negate the whole award. A court of Law cannot give its blessing to an unincurred figure of future probable costs of operations which "may even result in added complications." This can create impossible situations or rather a difficult situation whereby injured claimants, some time after the date of accident will seek costs of future operation which may not serve any purpose and saddle the defendants, their insurers and eventually premium paying public or tax-payers with costs which may never be incurred in future. It appear that the claim for costs of future operations and allied costs were really an afterthought and Dr. Bhanji's evidence on that score goes against his own opinion that such operations may even cause added complications. On this basis we have no option but to disallow wholly these future costs of treatment estimated at shs.1,890,000/=.

However, the nature of injuries suffered by the respondent, serious as they are call for added gadgets of convenience of life, like orthopaedic mattress and bed, crutches or walking sticks etc. These injuries also call for treatment like physiotherapy for which purpose the respondent would have to travel to centres where physiotherapy is available. Although there is evidence that the respondent sought no medical attention after July, 1990 (save for consulting or seeing a herbalist) it would be prudent to assume that if she had any funds available she would opt for treatments which could ameliorate her condition. She is rural Somali lady. Perhaps on advice of her clanspeople she saw the herbalist. This is not uncommon, but given more funds she will opt for better treatment. It is for these reasons that we would award her further general damages which we assess at shs.300,000/= So that total general damages come to shs.1,000,000/=.

We come now to the award made by the learned judge for hiring of a domestic help. There is no tangible evidence to the effect that the respondent paid a sum of shs.27,737/= for a period of 2 years, 3 months and 22 days, that is from the date she was discharged from the hospital to the date the pleadings in the superior court closed. This sum of shs.27,737/= is clearly special damage which ought to be strictly proved. If the respondent had paid such a sum of money she would have obtained acknowledgments of payments (which she did not) in view of the fact that she intended to claim this sum from the appellants. She simply said "I have employed someone at a salary of shs.2,000/= per month. How could she pay this sum when her own child was expelled from Garissa Secondary School for non-payment of a fee of shs.300/=? We believe that she merely put up for consideration by court a totally unsubstantiated figure. She probably did not pay this sum, monthly, to anyone. We have no alternative but to set aside this award of shs.27,737/= wholly.

The learned judge then proceeded to award her a sum of shs.180,000/= for hire of domestic help for a period of 15 years at the rate of shs.12,000/= per year. There is no basis for this multiplicand. The respondent said that her neighbour, a 20 year old lady, helped her to wash clothes, cook, take her to toilet, wash her etc. She spent all her savings for all that, she said. She was also assisted financially by her relatives and brothers by regular payments, she said. All this seems too far-fetched especially when she has grown up children. In our societies the children help; more so grown-up children. We are left with the feeling that she could not afford to and did not engage for reward any domestic help. She could simply not have afforded the expense and even if she were to retain the said sum of shs.180,000/= she would not

engage a paid domestic help. The award of shs.180,000/= is also set aside in its entirety.

However, the law does recognize the loss of service. See Chege vs. Vesters (supra) at page 1203 where Nyarangi JA said:

> "Finally, the law recognizes the loss of service; per Lord Reid in Best vs. Fox (Samuel) Co. Ltd [1952] AC 716 at 794. The second respondent has to do the shopping, gardening and transporting of children.Before she was injured, Maria Vesters, like other housewives, used to see to all those matters. Yet, she is at home, not confined to a wheel-chair and is able to assist by keeping a watchful eye on what is done and how it is done. She is therefore able to assist to some degree."

It is obvious that the older children of the respondent or the younger ones as they grow older will help. We think that the respondent ought to be compensated for loss of service, not by way of a sum assessed by the learned judge, but on the basis that this Court did in the case of Chege vs. Vesters (supra). The court awarded a sum of shs.10,000/= in 1988 - going back to 1984. To-day we could and do award a sum of shs.50,000/= for loss of service.

We now come to the damages awarded by the learned judge for loss of earnings, from the date of the accident to close of pleadings that is for a period of 30 months, a sum of shs.600,000/= calculated at the rate of nett profit (tax free) of shs.20,000/= per month. Whilst the learned judge warned himself that he ought to approach this award with caution, he still, despite there being (i) no supportive documents produced, (2) no bank account (3) no tax payment proof (4) no trade licence (5) no proof of any kind like hire of vehicles for transport of miraa, accepted her evidence as not unreasonable. Having done so the learned judge proceeded to award her a sum of shs.1,800,000/= for loss of earning capacity for a period of 15 years at the rate of shs.10,000/= per month.

The respondent was 45 years old at the time of the accident and she had said that she had carried on Miraa selling trade for some time. If she was really a Miraa trader and if she really was earning a nett sum of Shs.240,000/= per year, she could have earned a sum of Shs.4,800,000/= in say 20 years and could have saved Shs.2,400,000/= if assuming she was spending half of her earnings for herself and her family. She could not have been destitute enough not to be able to pay even a sum of Shs.300/= for school fees. The story of loss of earnings appears to us to be too glib to be believable. We have in the circumstances no alternative but to set aside in toto the total award under these two heads (loss of earnings and loss of earning capacity) of Shs.2,400,000/=. This brings us to the oft-repeated warnings issued by this court and we reiterate what this court said in the case of Cecilia Mwangi & Another vs. Ruth W. Mwangi (supra):-

> "loss of earning is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earnings capacity" can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just "throw figures" at the judge and ask him to assess such damages. See the Case of Kenya Bus Services ltd. vs. Mayende [1991] 2 KAR 232 at page 235 where this Court referred to the cases of Ali vs. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported), and Shabani vs. City Council of Nairobi (1985) 1 KAR 681 at 684 in which (Shabani case) the following statement by Lord Goddard C.J. in the case of Bonham Carter vs. Park Hotel [1948] 64 T.L.R. 177 was approved:
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> "Plaintiffs must understand that if they bring actions for damages it is not enough for them to write down particulars and, so to speak, throw them at the head of the Court, saying, `this is what I have lost'! I ask you to give me these damages"

We would also wish to point out that such large and unwarranted awards as made in this case would injure the body politic. That was also the warning in Tayab v. Kinanu (1982-88) 1 KAR 90. Mr. Muthoga also took issue on the special damages of Shs.115,470/= awarded by the learned judge. The learned judge said that the said sum was proved to his satisfaction. From the documentary evidence produced before the learned judge we note that vouchers produced to prove special damages total up to Shs. 98,400/= (not Shs. 104,490/=). Although

Mr. Muthoga expressed reservations about the authenticity of some of the vouchers we do think that the authenticity thereof was established. We would allow special damages in the sum of shs.98,400/=.

The upshot of all this is that the award (on 100% liability basis) of Shs.5,497,737/= is set aside and is substituted by an award on 100% basis as follows:-

(i) Damages for pain suffering and loss

of amenities Shs.700,000/=

(ii) Further damages in lieu of future

medical and surgical treatments and

allied expenses. Shs.300,000/=

(iii) Award for loss of services. Shs. 50,000/=

(iv) Special damages. Shs. 98,400/=

TOTAL Shs.1,148,400/=

The nett award of damages therefore, after deducting 50% is Shs.574,200/=. The sum of Shs.49,700/= (nett special damages) will carry interest at the rate of 12% per annum from 12th November, 1991 until date of payment and the sum of Shs.524,500/= will carry interest at the rate of 12% per annum from 29th day of July, 1993 until date of payment in full.

The appellants have had a large measure of success in this appeal. The respondent will pay two-thirds of the taxed costs of this appeal to the appellants and the respondent will have her costs in the superior court taxed or agreed on the basis of damages being Shs.574,200/=.

Dated and delivered at Nairobi this 19th day of December, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF A PPEAL

G.S. PALL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR