**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Cockar, Muli & Tunoi JJ A )**

**CIVIL APPEAL NO. 123 OF 1986**

**BETWEEN**

**1. MOSES M. NJOROGE**

**2. JOHN KAMAU.....APPELLANTS**

**AND**

**SAMAT BHIMA.....RESPONDENT**

**(Appeal from judgment and decree of the High Court of Kenya at Eldoret by the Honourable Mr Justice V V Patel dated 9th August, 1985**

**in**

**Eldoret HCCC No 91 of 1979)**

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**JUDGMENT**

This is an appeal from a judgment of the High Court of Kenya at Eldoret (Patel J) awarding the respondent the sum of Shs 412,317.00 representing special damages, general damages and interest thereon in consequence of the proven negligence on the part of the second appellant in driving a lorry motor registration number KRF 345 belonging to the first appellant on 5th August, 1978, at about 2.30 pm along Nairobi – Nakuru Road, whereby the same collided with the respondent's car motor registration number KLR 155, a Peugeot 504 saloon, occasioning the respondent grave injuries.

During the trial, the respondent testified that on the material day he was on his way to Eldoret having left Nairobi at about 12.30 pm. His wife was in the front passenger seat and their child in the rear seat. At Ilkek, near Gilgil, he approached a car bearing Uganda registration numbers ahead of him. At a distance away from that foreign car was a bridge. As he neared the bridge he saw a lorry approaching the bridge from the opposite direction with flashing lights. The Ugandan car stopped to allow the lorry to go through the bridge. The said car stopped at its near side with its two wheels on the grass verge and the other two on the tarmac. The respondent also pulled up behind the said car in the same position. The lorry was at a high speed and as it crossed the bridge it was swinging from side to side. It passed the Ugandan car without incident. But immediately it did so, its

driver lost control and hit the front side of the respondent's car when it was still stationary damaging the

whole part of the driver's side.

When it was their turn to present their case, none of the appellants gave evidence. Their only witness, apparently, was the turnboy. He told a different story from that of the respondent. At the material time he was sitting next to the driver of the lorry. As it neared the bridge he saw two oncoming cars. The lorry driver gave flash lights signals so as to be given free passage over the bridge. The first car stopped and thereupon the lorry passed it but the respondent's car which was behind the first car overtook the first car that was stationary and thus collided with the lorry. The point of impact, the turnboy stated, was in the middle of the road.

After the turnboy had testified the appellants' counsel told the Court that he had "no further witness available" and was therefore applying for adjournment in order to call the OCS of Naivasha Police Station, to produce the file prepared in respect of the accident so that he could study the sketch plan and the statements of the witnesses in it. The respondent's counsel opposed the application and submitted that the hearing of the suit had been adjourned many times at the appellants' request and that in any case the production of the police file would not make any difference to their case. The learned judge ruled:-

"I have considered the application with care. This is an old case. It has been adjourned time and again as can be seen from the record. The police has misplaced the file in question. There is no good reason to believe that it would be traced in two weeks' time. The case must come to an end. I decline to grant the adjournment. The application refused."

The appellants now attack this ruling on the grounds that the learned judge in not granting the adjournment to call a material witness failed to exercise his discretion judicially and thereby were denied a fair trial.

It is of course not in doubt that any question of adjournment is a matter within the discretion of the judge of the court of trial and the manner of its exercise will not be interfered with if it appears to an appellate court that all necessary matters have been taken into consideration. See the case of *Patel v Gottfried* (1953) 20 EACA 81. The exercise of the discretion should not defeat the rights of the parties altogether and should not do injustice to one or other of the parties. If it does so then the appellate court has power to review such an order.

In the instant case the appellants had caused not less than four adjournments some of which appeared to the learned judge to be frivolous; and indeed, meant to prejudice the expeditious disposal of the suit. As to the production of the police file, its author had left the force and his whereabouts were then unknown. The OCS desired to be summoned by the appellants to give evidence had never been to the scene of the accident and his testimony would not have been of any evidential value. Again and, Mr Bowry, counsel for the appellants, confirmed no one was sure the sketch plan was in that police file. However, as it transpired the learned judge had before him the abstract report and two eye witnesses to the accident from both sides of the case. We are satisfied that in refusing to grant the adjournment sought, the learned judge did not take a course which resulted in an incorrect exercise of his discretion and did not do injustice to the appellants. We reject grounds 1 and 2 of the appeal.

On liability, we are satisfied on the evidence on record that the learned judge was correct in holding that the second appellant's negligence was the sole cause of the accident. We accordingly disallow Mr Bowry's submission that the decision of the learned judge on the matter of liability is against the weight of evidence.

There is, however, considerable force in Mr Bowry's contention in grounds 15 and 16 of the memorandum of the appeal that:-

"15. The learned trial judge erred in taking judicial notice of sexual incapacity and further erred in prompting evidence of sexual incapacity from a witness.

16. The learned trial judge when granting damages erred and unduly relied on extraneous matters and

awarded damages to the plaintiff respondent on purported damage to the wife of the plaintiff respondent when she was not a party to the suit."

It was not pleaded and neither was any evidence adduced to prove that the respondent had ceased to enjoy normal sexual relationship with his wife. The respondent in his evidence had not claimed any pain or difficulty in the performance of the act. His doctor (PW1) had made no mention at all of the existence of such a disability in either of his two lengthy and comprehensive medical reports. It was only after the judge had in a most improper manner, and despite strong objection from Mr Bowry for the appellants, allowed the doctor to go and speak to the respondent that he said that the respondent suffered pain in the hip joint whenever he performed

sex. Finally even the respondent's wife was not called as a witness to give evidence on this issue. It was, therefore, manifestly wrong for the learned judge to surmise that the respondent's hip joint injury had reduced the frequency of sexual relationship.

The learned judge must have lately read *Kama Sutra* for how else does he account for his holding that:-

"People know it too well that even a headache or uneasiness due to a rise in temperature takes away the performance or a full joy and satisfaction thereof.

and that:

"The plaintiff is a young man with a far younger wife. (I saw her when she came into Court during the hearing). He must feel helpless being mindful of the fact that he cannot fulfil adequately her normal natural expectations and cravings in a sweet secluded corner of their bungalow and that she will have to put up false curls over her forehead to bring a satisfying, agreeable smile on her tender lips. Intense bodily and mental suffering in a way demand desperate efforts and severe struggle at each stage in life to keep up the front. An award of money cannot end them but it does provide some redress bearing in mind the human psychology."

If the wife had sued the appellants the learned judge would have been perfectly right in holding as he did above. These two grounds of appeal must succeed and we allow them. The damages for pain, suffering and loss of amenities of life are accordingly reduced by Shs 25,000/- to Shs 200,000/-. We will not interfere with the other assessments as to the amount of damages as we are not satisfied that the learned judge acted upon a wrong principle of law, or that the amount awarded was so inordinately high as to make it an entirely erroneous estimate of the damage to which the respondent was entitled.

On costs of this appeal, the appellants have succeeded only on two grounds but failed on major grounds. We accordingly award them one quarter of the costs.

**Dated and Delivered at Nairobi this 15th day of December 1994.**

**A.M.COCKAR**

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**JUDGE OF APPEAL**

**M.G.MULI**

**.....**

**JUDGE OF APPEAL**

**P.K.TUNOI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**