REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CIVIL APPEAL 134 OF 1986

BELUF ESTABLISHMENT.....APPELLANT

AND

THE ATTORNEY-GENERAL.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mr Justice Sheikh Amin) dated the 7th day of November, 1987)

In

H.C.C.C. No 2436 of 1978)

JUDGMENT OF OMOLO, JA

I have had the advantage of reading in draft form the judgment of my Lord Akiwumi and I agree with this reasoning and conclusions. I would only add a few comments of my own.

The question that faces the learned trial judge and which was argued before us by Mr. Fraser on behalf of the appellant was whether it was lawful for a Kenyan court to give judgment expressed in a currency other than that of Kenya. Mr. Justice Sheikh Amin, who grappled with the issue during the trial, held that he could not. His reasons for holding so are not very clear, and somewhat difficult to understand but it would appear he was of the view first, that the Exchange Control Act of Kenya, Cap 113 does not allow a Kenyan court to give judgment in a currency other than that of Kenya, and secondly, that because of the security of foreign exchange in Kenya, which scarcity is caused by our economic under-development as compared to the western countries, it would not be in the interest of Kenyans to apply legal developments that have taken place in England in particular as the circumstances of the people in Kenya would not permit this. Though the trial Judge's reasons are not easy to understand, it would appear he had authority on his side, at any rate as far as the Kenyan situation is concerned. As far back as 1968, the then Court of Appeal for East Africa appears to have taken it for granted in the case of LIFE INSURANCE CORPORATION OF INDIA V VALJI (1968) E.A. 225 that the law in Kenya was the same as the law in England, namely that a Kenyan Court could only give judgment expressed in the Kenyan currency. The law in England as at that date was that an English Court could only give judgment expressed to be payable in Sterling. That had been the position since the case of MANNERS V PEARSON & SON [1898] 1 Ch 581. Lord Denning put it thus in the case of RE UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES LTD [1960] 2 ALL E.R. at page 356:-

'Now the respondents come to the Courts in England to recover the sums in arrear and unpaid. And if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in

sterling. We do not give judgment in dollars any more than the United States courts give judgments in sterling. …'

All the three judges in the Valji case, supra, were unanimous that the law in Kenya was the same as in England though Spry, JA disagreed with his brothers as to the date applicable for the purpose of calculating rates of exchange.

Again, in the more recent case of INTERCONTINENTAL GREETINGS KENYA LITHO LTD (1982-1988) 1 KAR 902, Hancox, JA, as he then was, doubted whether the recent developments in the law in England represented by the landmark decision of the House of Lords in MILIANGOS V GEORGE FRANK (TEXTILES) LTD [1976] AC 443 could be applied to Kenya where the conditions regarding, for instance, the necessity to preserve foreign exchange, are so vastly different from those obtaining in England where there was virtually no exchange control. But as my Lord Akiwumi correctly points out in his judgment, the same Judge, re: Hancox, J.A., when sitting now as Chief Justice in the High Court case DONALD JENKINGS V MOUNT KENYA SAFARI CLUB LTD AND ANOTHER H.C.C.C. No 4989 of 1987 (unreported) virtually abandoned the position he had taken in the Kenya Litho Ltd case, supra and ordered payment to be made in American dollars. The point I am making, however is that Amin, J's conclusions were supported by two decisions i.e. that of Valji case decided by the Court of Appeal for East Africa and that of Kenya Litho Ltd decided by the Kenya Court of Appeal. The Donald Jenkins case was decided by Chief Justice Hancox sitting in the High Court and much later than the decision of the Judge now appealed from.

If I understood Mr. Fraser correctly, he did not, either in the High Court or in this Court, attempt to challenge the position that as at the date when the High Court heard the case and gave judgment, the legal position in Kenya was that a Kenyan Court could only give judgment in the Kenyan currency. What, however, Mr. Fraser submitted before the High Court, and which he continued to do before us, was that that legal position was no longer tenable and the courts in Kenya ought to keep in step with the courts in England which abandoned the earlier stance established in 1898 in the Manners case, supra, and instead adopted a totally new stance in the Miliangos case. Mr. Fraser submitted that the common law of England, which forms part of the law of Kenya by virtue of section 3 of the Judicature Act, had made tremendous developments in this respect and there was nothing in the circumstances of Kenya and its inhabitants that would militate against these developments being applied to Kenya.

I would myself agree, and I doubt very much whether, in 1898 when the Manners case was decided, there was really any legal bar preventing English courts from giving judgments in currencies other than the sterling. The truth of the matter would appear to me to be that upto 1960 when Lord Denning was expressing himself in the Havana Regla case the sterling, backed by an empire over which it was thought the sun never set, was still master of the … and any other currencies did not really count. But the sun did set over the empire and the sterling, like all other currencies of the world became subject to violent and frequent fluctuation, so much so that by 1974, Lord Denning was compelled to say in the case of SCHORSCH MEIER G.M.B.H V HENNEIN [1975] I Q.B. 416 at page 224 Letters E to G:-

"Why have we in England insisted on a judgment in Sterling and nothing else? It is, I think, because of our faith in sterling. It was a stable currency which had no equal. Things are different now. Sterling floats in the wind. It changes like a weathercock with every gust that blows. So do other currencies. This change compels us to think again about our rules. I ask myself: Why do we say that an English court can only pronounce judgment in Sterling? Lord Reid thought it was "primarily procedural": see HAVANA case [1961] AC 1007, 1052. I think so too. It arises from the form in which we used to give judgment for money. From time immemorial the courts of common law used to give judgment in these words: "It is adjudged that the plaintiff DO RECOVER against the defendant ? x" in sterling. On getting such a judgment the plaintiff could at once issue out a writ of execution for ? x. If it was not in sterling, the sheriff would not be able to execute it. It was therefore essential that the judgment should be for a sum of money in sterling: for otherwise it could not be enforced."

That may be so but Lord Denning does not say why from time immemorial the courts would not adjudge that the plaintiff should pay to the defendant so much money in such and such a currency and why the

sheriff would not enforce such an order from the court. It cannot be supposed that in these days when such orders are made in England persons against whom they are made keep on their persons or in their bank accounts money in foreign currencies which was not possible in earlier periods. They have to arrange to make such payments as they would have had to do even in the earlier periods.

And what was the reason for Kenyan courts not being able to give a judgment in a currency other than that of Kenya? The only reason I can think of is that that was the law in England and consequently that had to be the law in Kenya. The Exchange Control Act upon which the trial Judge relied does not really affect the position. It gives the minister power to authorize payment in foreign currency to satisfy a judgment. Again the Act, in all material respects is similar to that in England and the English Act has never been considered as barring the courts there from giving judgment in foreign currency.

In my view, the courts in Kenya must now abandon these unintelligible concepts; they have been abandoned in England where they originated from and it would be ridiculous for the courts here to keep applying them when they have been shown to result in unjust result to the successful claimants such as this appellant. It is not doubted by any one that the application of the rule, i.e. that a Kenyan court can only pronounce judgment in Kenyan currency, does not necessarily conform with the principle of restitutio in integrum, which is the principle accepted as applying in these matters.

Nor, am I convinced that the circumstances of Kenya and its inhabitants do not permit the application of the principles set out in the MILANGOS case. Kenya, like all countries in the world, must trade with other nations and it must do so for its development, if not for its survival. It can only trade with other nations on equal terms and if it were to tell other nations:-

“I am developing and still too poor. If you want to trade with me then you must, on occasions, be prepared to suffer loss because of my poverty”.

There would be nothing to stop the other nations looking for other places where they would trade without suffering losses due to the poverty of the trading partner. If we were to be so abandoned, that would not be for the benefit of Kenya and its inhabitants. We cannot afford to shut up ourselves in an island of poverty.

It is for these reasons that I agree with my Lord Akiwumi that this appeal be allowed in the terms proposed by him. It is a matter of serious regret that the office of the Attorney-General, the respondent, was not, for reasons of their own, able to present its arguments in this serious matter to the Court. That may well show the futility of the courts leaving these matters to be dealt with by Parliament for one supposes Parliament can only take them up if advised by the Attorney-General. I agree that this appeal should be allowed in the terms proposed by Akiwumi, J.A.

Dated and delivered at Nairobi this 23rd day of September 1993.

R.S.C. OMOLO

JUDGE OF APPEAL

THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Omolo, & Akiwumi, JJA)

CIVIL APPEAL NO. 134 OF 1986

BETWEEN

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JUDGMENT OF AKIWUMI, JA

In 1977, the appellant, a Swiss company with its principal place of business in Vaduz in Switzerland, bought from a company known as CAPACO of Beni in the well known coffee in growing province of Kivu in the Republic of Zaire, 360 bags of coffee Arabica. Payment for this international transaction was made by the appellant to the vendor in US dollars, 82,643.92 US dollars, to be precise . The consignment of coffee was to be: shipped from Mombasa to Antwerp in Belgium and so it became necessary for it to be transported first by road and through Kenya to Mombasa. To guard the coffee on its journey through Kenya, the appellant, as was advisable in those days. hired the services of the Kenya Police. In the course of this journey, the vehicle on which the coffee was being transported through Kenya, broke down at Molo. The coffee was subsequently, taken to the police headquarters at Nairobi for safe keeping where it was on or about 27.9.1977, unlawfully released by the police to Messrs Muchiri and Gachago and whereby, the appellant lost all his 360 bags of coffee Arabica for which he had paid the sum of US dollars 82,643.92 and which was destined to be dealt in in Europe, and not in Kenya. This prompted the appellant to sue the respondent, the Attorney General, who is the proper person to be sued, in the High Court of Kenya since the alleged tortuous act was committed by the Kenya Police and in Kenya, for damages for conversion, breach of the duty of the police as a bailee. or for their negligence. The particulars of damage for the loss of the 360 bags of coffee Arabica were given as:

(d) US dollars 82,643.92 alternatively

(d) Kshs.687,737.90 being US dollars 82,643.92 converted at the rate of US dollar to the Kenya Shilling prevailing on 27.9.77.

Liability was admitted and the question that remained to be disposed of when the matter came for hearing in the High Court before Sheikh Amin, J, was the assessment of damages. Mr. Frazer, learned counsel for the appellant, argued at the trial, that following the House of Lords decision in the English case of Despina R (1979) AC 685, the position in common law, was that it was fairer in a claim based on tort to give judgment in the currency in which the loss was sustained and that the principles to be applied in ascertaining the currency of the loss were those of "restitutio in integrum" and reasonable foreseeability of damage sustained. Since this was the position in common law, which was part of the law of Kenya, and at the same time, was not inconsistent with any Kenyan statute or of the circumstances of Kenya and its peoples, these principles of common law should be applied and damages expressed in US dollars to be converted into Kenya shillings at the rate prevailing at the date of payment or the enforcement of the judgment .

Despina R itself, was inspired by the revolutionary House of Lords decision in the case of Miliangos v Frank (Textiles) Ltd (1976) AC 443 , which finally laid to rest , the then previously well settled principle of common law reflected in the case of Tomkinson and Another v First Pennsylvania Banking and Trust Co. (1961) AC 1007, that:

"An English court cannot give judgment for the payment of an amount in foreign currency, and for the purpose of litigation in England a debt expressed in a foreign a currency must be converted into sterling

with reference to the rate of exchange prevailing on the day when the debt was payable".

It is worthwhile setting out in full the holdings in Miliangos

" (Lord Simon of Glaisdale dissenting), (1) that it was legitimate for the House of Lords, to depart from the : "breach date conversion" rule and recognise that an English court was entitled to give judgment for a sum of money expressed in a foreign currency in the case of obligations of a money character to pay foreign currency under a contract, the proper law of which was that of a foreign country, and when the money of account was that of that country or possibly some country other than the United Kingdom.

(2) That the claim had to be specifically for foreign currency or its sterling equivalent and conversion should be at the date when the court authorised enforcement of the judgment in terms of sterling.

(3) That the instability which had overtaken the pound sterling and other major currencies since the decision of the House of Lords in In re United Railways of Havan – a and Regla Warehouses Ltd (1961) AC 1007, as well as the procedures evolved in consequence by the English courts and by arbitrators in the City of London to secure payment of foreign currency debts in foreign currency, justified departure from that decision in terms of the Practice Statement (Judicial Precedent) (19661 1 W.L.R. 1234 since a new and more satisfactory rule could be stated to enable the courts to keep step with commercial needs and would not involve undue practical and procedural difficulties".

Once it was accepted that damages for breach of contract could be rewarded in a foreign currency, a parallel extension of this in relation to damages for tort was inevitable. This found expression in the Despina R case.

It is worth noting with respect to the third holding in Miliangos that the reasons for it are the instability which had overtaken various currencies including the pound sterling, and the desirability for the law to keep in step with commercial needs, and not the application or effect of the English Exchange Control Act 1974, which is identical to the Kenya Exchange Control Act and which at the time of the decisions in both Miliangos in 1975, and Despina R in 1978, was still in force in England. The English Exchange Control Act was only subsequently, on 24th October 1979 rendered largely a reserve power as persons in or resident in the United Kingdom were from that time, exempted from their obligations under the Act (see Halsbury's Laws of England 4th Ed vol. 32 p 140 para 272). It can be said that for some time now, the Kenya shilling has also been subject to fluctuations and instability and more recently, to such a degree that state institutions like the Kenya Post and Telecommunications Corporation compute its charges for international telephone calls first in US dollars which are then converted into Kenya shillings. Apart from the official Central Bank of Kenya rate of exchange of the Kenya Shilling to the US dollar, there also exist recognised parallel rates of exchange which are more favourable to the U$ dollar quoted daily by the Commercial banks and known as the inter-bank rates.

In his leading speech in Despina R at 697, which was a case in tort based upon negligence arising out of the collision between two Greek ships off Shanghai, Lord Wilberforce who had been responsible for the leading majority speech in Miliangos, observed as follows:

"My Lords, I do not think that there can now be any doubt that, given the ability of an English court ... to give judgment ... in a foreign currency, to give a judgment in the currency in which the loss was sustained produces a juster result than one which fixes the plaintiff with a sum in sterling taken at the date of the breach or of the loss. I need not expand upon this because the point has been clearly made both in Miliangos v Frank (Textiles) Ltd (1976) AC 443, and in cases which have followed it, as well as in commentators who, prior to Miliangos, advocated the abandonment of the breach date sterling rule".

Basing his decision firmly on the principle of restitutio in integrum, Lord Wilberforce then determined the currency of judgment in these words which represent the common law position as of now:

"My Lords, in my opinion, this question can be solved by applying the normal principles. which govern the assessment of damages in cases of tort (I shall deal with contract cases in the second appeal). These

are the principles of restitutio in integrum and that of the reasonable foreseeability of the damage sustained. It appears to me that a plaintiff, who normally conducts his business through a particular currency, and who when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This the currency in which his loss felt. (underlining mine) and is the currency which it is reasonably foreseeable he will have to spend".

In his supporting speech in Despina R, Lord Russel of Killowen summarised most succinctly, the position in common law thus:

"The true loss of the respondent was loss of US dollars, and in pursuit of the remedy of restitutio in integrum, or full and proper compensation, I conclude that the claim and judgment should be for US dollars lost".

This common law position is also expounded in the leading work on the subject namely, McGregor on Damages 14th Ed. paras 516-519 which was drawn to the attention of the learned Judge. According to the learned author, the former common law principle that judgments in common law had to be expressed in the currency of the court in which the proceedings were brought and that in cases in tort the loss should be converted from the currency in which the loss was sustained into sterling at the rate of exchange prevailing at the date on which the loss occurred, has ceased to be good law. It was displaced by the House of Lords which held, beginning with Miliangos, the leading case on this question, that this requirement was merely procedural which could no longer be justified since there was nothing in the common law to prevent judgment being given in the currency in which the loss was sustained.

Apart from these authorities and the authoritative work of the learned author on the matter at hand, which were brought to the attention of the learned Judge, Mr. Frazer also drew his the attention to two Kenyan namely the Judicature Act and the Exchange Control Act. Section 3(1)(c) of the former statute provides that the jurisdiction of the High Court and indeed, this court, shall be exercised in conformity, subject to statute law, to the substance of the common law of England so far:

"only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary".

It was urged on behalf of the appellant that since there was nothing in the common law as set out in Despina R which was inconsistent with any Kenya statute or circumstances, judgment as to damage should be expressed in US dollars to be converted into Kenyan shillings either at the date of payment or of the enforcement of the judgment. It was reiterated that this would enable justice to be done to the appellant who had suffered loss in US dollars, by giving him proper compensation for the loss which all agreed he had suffered, and not make him the victim of currency fluctuation. The Exchange Control Act, was referred to, to show that whether judgment was expressed in US dollars or Kenya shillings, permission would still have to be obtained under that Act in order to remit the amount involved to the appellant, unless it was being suggested that any person who lived outside Kenya upon obtaining a monetary judgment in Kenyan courts should in all cases, perforce come to Kenya and spend the fruits of his victory here. But this cannot be the object of the Kenya Exchange Control Act since the Fourth Schedule to the Act, in identical words as the corresponding provisions of the English Exchange Control Act, permits, with the consent of the Minister, the transfer of money out of the country in foreign currency to satisfy judgment debts. The Kenya Exchange Control Act does not also, as illustrated by the decision in Miliangos and Despina R which were given when the English Exchange Control Act was still in force in the United Kingdom, prevent the expression of a judgment in foreign currency.

In reply to these formidable submissions made on behalf on the appellant, Mr Muhoro, learned counsel for the respondent, made the following submissions. Firstly, that although Miliangos and Despina R are common law decisions, they should not be applied to Kenya as they are inconsistent with the circumstances of Kenya where, as it was not the case in England, foreign exchange recourses were limited and difficult to come by, and that the court should not therefore, make orders that would be futile.

But the Kenya shilling is also subject as we have seen to fluctuation and with the permission of the Minister, money can be transferred in foreign currency.

It was secondly, argued that since there was no contract between the appellant and the respondent and indeed, the appellant was unknown to the respondent, the latter should compensate the appellant only in Kenya shillings, that being the currency of the respondent. But this argument is facetious and only needs to be stated to be rejected. The respondent was sued as is known to all, because the Government Proceedings Act requires that he should be the one to be sued as in the present case, where the alleged wrongdoer is a Government Department like the Kenya Police. It was submitted thirdly and lastly, that if judgment was to be expressed in US dollars, then it should be the value of the coffee at the time it was lost namely, Ksh. 687,736/90 and converted into US dollars at the rate prevailing at the date of judgment since the US dollar had since 1977 when the appellant sustained his loss, greatly appreciated against the Kenya Shilling. But this is not only against the decisions in Miliangos and Despina R but will surely mean that the appellant will receive only a fraction of his loss.

After considering all the submissions made by counsel, the learned Judge favoured those made on behalf of the respondent and proceeded to give judgment for the appellant in the sum of Kshs. 687,727/90 together with costs and interest thereon at Court rates.

It is, I think, however, necessary to set out in extenso, the parts of the judgment of the learned Judge that bear on the issue at hand:

"I have considered the submissions and the decision cited in support thereof by the counsel in respect of the 'Currency of Judgment' and I am satisfied that there is considerable merit in Hr. Muhoro's submissions and his argument. I find that the decision cited by Mr. Fraser are clearly distinguishable from the facts pertaining to the case before me and realities of the situation in a given country. The foreign currency dealings in the Republic are controlled and strictly regulated whereas United Kingdom and other European countries by the sheer massiveness of their industrial base and trade and commercial worldwide dealings are completely in another league and their freely convertible currencies are geared to their peculiar need and suited to their particular requirement. Any guidance and reliance on such precedents which are evolved and are creation of totally different set of circumstances are in my view of little help indeed to determine the issue before me. No doubt under the provision of the Judicature Act (Cap.8) S3(1)(c) Common Law is deemed to be Law of Kenya unless it is inconsistent with the Kenya Statute. There is no provision at present in force under the Common Law of England which could be comparable to the Exchange Control Act Cap. 113 Laws of Kenya and the Court is entitled to determine the purport of this enactment and I am unable to hold that there is any need to look elsewhere but to their (sic) peculiar circumstances, of our existence to find a fair and just determination to the case before me. The decision made in Despina R ((19792 A.C. 685 - I have fully considered. I have considered the principle of restitution in integrum and reasonable foreseeability are matters of prime consideration. This could not lave been the position in the case before me and with the widest imagination 1 do not think that this decision is relevant to the decision I am to make, except in abstract as a general principle and is clearly distinguishable from the facts of the case before me. I have also noted the cause of action before me arises from a breach of duty and in damages as opposed to a contractual obligation or a claim arising from a trading custom or a business in convention.

The fact pertaining to the claim of assessment of damages briefly are that 360 bags of coffee Arabica gross weight 21,960 kgs and net weight 21,600 kgs was (sic) in transit from Zaire through Kenya which was being transported on behalf of Beluf Establishment a body corporate of Vaduz Switzertland by Kenatco Transport Co. Ltd. under the security guard provided by the Kenya Police. The vehicle by which the coffee was being transported broke down at Molo, Kenya on 1.9.77 and that date i.e., 27th September, 1977 the plaintiff's ownership in the said goods ceased to exist.

In my opinion, therefore, the material date to the cause of action is 27th September, 1977. The value of the coffee lost on the said date was Shs. 687,737/90 only. It is in my view not proper to assess damages in relation with the cost of coffee on that particular day and time in the country of transit where the loss incurred. Any measure adopted to assess such a damage in my judgment would not be just or proper.

The defendant's liability is to make good the loss suffered at a particular time at a particular place. To rely on extraneous considerations to arrive at a fair assessment could work both ways; fluctuation of foreign currencies be it Zairian. Swiss or others, the quantum could be affected either way with the rise or fall of a particular currency.

However, in my view these considerations are not material to the determination of this case. Must the defendant be judged to pay damages assessed, calculated and computated with reference to the economic realities or consideration of other countries which has no bearing on the realities of the claim before me? The answer in my view to this question is no. moreover, the liability of the defendant relates to the jurisdiction of the Court in which the action is brought.

The appellant being aggrieved by the judgment of the learned judge appealed to this Court on the following grounds:

1. The Judge erred in refusing to enter judgment for US$82,643.92.

2. The Judge erred in falling to apply the principle of restitution in integrum

3. The Judge erred in failing to hold that the loss in US dollars or a foreign currency was forseeable.

4. The Judge erred in holding that there was no statute in force in England comparable to Kenya's exchange Control Act.

The hearing of the appeal was on 11th December, 1992, by consent of counsel appearing for the parties, fixed for 23rd May, 1993. On that day Mr. Frazer appeared for the appellant and argued his appeal. Miss Gichura, State Counsel, from the respondent's chambers who was appearing for the respondent, arrived very late in the proceedings, in fact, when Mr. Frazer was about to conclude his submissions. Miss Gichura, having apologised for being late, then applied for an adjournment to enable her to prepare her reply to Mr. Frazer's submissions. Her application for adjournment was refused and she therefore made no submissions.

I will deal with the fourth ground of appeal first. It is true that at the time when the matter came for trial before the learned Judge, the English Exchange Control Act, though not repealed, had ceased to confer obligations on residents of the United Kingdom, but as I have already observed, the existence of the English Exchange Control Act played no part in the decision in Miliangos and Despina R. What was of importance, was the fluctuation, in the English and other currencies which made it unjust, where loss had been suffered in a currency other than the pound sterling, to insist on giving judgment expressed in pound sterling which. with the fluctuation in the value of the pound sterling might lead to the judgment creditor obtaining much less than the real loss suffered by him.

The short point of the first three grounds of appeal is really whether judgment should have been expressed in US dollars and not as was done, in Kenya shillings. In support of the grounds of appeal that the High Court judgment should have been expressed in US dollars, Mr. Frazer submitted that the appellant had to institute proceedings in Kenya because the tortuous cause of action arose in Kenya and because the action could only, under the particular circumstances, be instituted in accordance with the Government Proceedings Act, against the Attorney-General of Kenya. He went on to cite various English cases culminating in Miliangos and Despina R, to show that in common law, courts could give judgment expressed in the currency in which the loss occurred and payable at the rate of exchange prevailing on the date of payment. I do not think it necessary to expand on these two authorities as I have already dealt with them at some length earlier on in this Judgment. 1 would, however, draw attention to the fact that since the decision in Despina R laid down the rules in the context of tortuous damage to property, there have been two English cases which have followed that decision. Mr. Frazer drew attention to McGregor on Damages l5th Ed. Chapter 15, pp 429 and 430, para 569, in which reference has been made to these two eases. The first is the case of Hallman v. Sofaer (1982) I.W.L.R 1350. In this case, and I have been able to obtain the law report, the plaintiff, an American, claiming damages for negligent medical treatment received whilst holidaying in England, was awarded damages in US dollars. Talbot J. gave the following

as his reasons for awarding damages in US dollars:

"As I see the problem, it is on these facts: with which currency is the plaintiff's loss closely linked? In my judgment undoubtedly all the losses in effect for which I have awarded damages other than that for pain and suffering are closely linked with the currency of his country, namely, dollars. To meet the losses which will arise as a result of his injuries he will have to pay in dollars , and therefore, so far as the judgment is concerned, with the exception of ?19,000, the judgment will be in United States dollars"

The second case referred to in McGregor on Damages is that of the Losh Atlantico [1985] 2 Lloyd's Rep. 464 where it was held that repairs of damage inflicted in a collision on the plaintiff's ship should be expressed in Greek drachma since as the plaintiff operated in Greek brachma that was the currency in which they felt that loss. These two cases show clearly that it is the currency in which the loss was closely linked in which the judgment should be expressed.

Mr. Frazer next submitted that since as laid down in section 3(1) of the Judicature Act, the common law was part of the law of this country and that the particular aspect of the common law in question in this appeal was not inconsistent with the circumstances of this country, the principles of common law laid down in Despina R should be applied. He further pointed out that the English Exchange Control Act which, like its corresponding Kenya Act, confers powers to control a wide variety of currency transactions with the objects, like in Kenya, of conserving foreign currency reserves, protecting the sterling system and helping to maintain the balance of payments, was still in force as already observed, at the time of the decisions in Miliangos and Despina R.The existence of foreign exchange control in England at the time was not regarded as a crucial militating factor. Similarly, the Kenya Exchange Control Act should also be regarded as such by Kenya courts. 1 think that Mr. Frazer is right in this and that the learned Judge erred in holding that because of the Kenya Exchange Control Act and Kenya's level of industrialisation, he could not express damages in US dollars.

I find nothing in the English common law decided cases already referred to which are inconsistent with, to adopt the wording of section 3(1) of the Judicature Act, "the circumstances of Kenya and what its inhabitants permit'. In my view, it is too far fetched, having regard to the fact that the Kenya Exchange Control Act permits with the consent of the Minister the transfer of Kenya currency out of the country to inter alia satisfy judgment debts, and further that the Act does not forbid the expression of judgments in a foreign currency, to bring within the purview of this provision of the Judicature Act judicial decisions affecting international transactions and commercial dealings. To base as the learned Judge did, his decision on the fact that foreign countries "are completely in another league and their freely convertible currencies are geared to their peculiar need and suited to their peculiar requirements", cannot in my view, be a notion that is consistent with the circumstances of Kenya. Kenya does not exist and develop in isolation from the rest of the world. Such a notion would rather lead, not to the development of Kenya, but to its isolation in a rapidly shrinking international business community and to a loss of confidence in its institutions. The application of the principles of restitutio in integrum and reasonable foreseeability which unfortunately, the learned Judge declined to apply, are the very principles that will promote the salutary and proper economic and commercial development of Kenya in the modern inter dependent world.

Mr. Frazer finally, drew attention to the Foreign Judgment (Reciprocal Enforcement) Act to show that foreign judgments which qualify to be registered under the Act, could be expressed in foreign currency and the necessary Kenya shillings required in satisfying them. If this is allowed by statute in respect of foreign judgments, then surely there can be no objection to Kenya courts also expressing judgments in foreign currency. Although the Act only applies to specified foreign judgments from designated foreign courts, the principle that emerges is that even by statute, foreign judgments expressed in foreign currency may be paid in Kenya shillings but at the rate prevailing at the time that the foreign judgment is registered. Section 7(1) of the Act states that:

"Where a sum payable under a judgment which is to be registered under this Act is expressed in a currency other than the currency of Kenya, the judgment may be registered as a judgment for a sum payable in such sums in Kenya currency as are equivalent thereto on the basis of the rate of exchange

prevailing at the time of registration".

In my view, though the conversion date is specified for the particular purposes of this Act as the date of the registration of the foreign judgment, the principle that a foreign judgment expressed in a foreign currency can be registered in Kenya and paid for in Kenya shillings, no matter the level of economic development of Kenya, but subject only to the granting of exchange control permission, has been enshrined in our statute books. A fortiori, Kenya courts on their part, should be able to, indeed, can, give judgments expressed in foreign currency.

The decisions in Miliangos and Despina R have received a somewhat chequered reception in Kenya courts. As far as I have been able to discover, they first fell to be considered by this court in Intercontinental Greetings v Kenva Litho Ltd (1982-88) 1 KAR 902. In this case, the plaintiff had sued the defendant for accounts to be taken for the purpose of determining royalty fees due to it from the defendant and for damages for breach of contract in the sum of US dollars 2,500. The plaintiff appealed against the question of damages awarded contending that the Judge should have awarded the equivalent in Kenya shillings of the US dollars 2,500. On appeal to this court, however, the issue that was for determination was the granting or otherwise, of leave to amend the memorandum of appeal. Leave was granted since the trial judge had not decided the issue whether judgment and decree could be given in foreign currency because the plaintiff had not pressed that part of its claim, so far as to restore the relief sought for judgment in US dollars. In its ruling of 14th June 1985, which was delivered by Hancox JA as he then was, on 19th September 1985, this court had this to say on the issue whether judgment could be expressed in foreign currency:

"But both these passages, as we read them, were in the context of the refusal of the Central Bank of Kenya to sanction the payments under the agreement for a period of more than one year, and were said in the course of deciding the issue of frustration, which had been raised by the respondents, rather than on the t principles governing the manner in which the relief granted should be expressed. It may be that a judgment expressed in foreign currency would not be enforceable without the necessary consent, but that is another issue".

Having not rejected the principle that a judgment could be expressed in foreign currency, this court went on to consider without deciding, and it was not called upon to do so, the issue whether a judgment of a court in Kenya could in fact, be expressed in foreign currency. In cautious language this court made the following observations:

"It will also be appreciated that any judgment of this court on the issue would have far reaching consequences, for it has always been generally assumed that the Kenya courts would confine themselves to the currency of the country of which they form part as was the case in England before the decision in Miliangos v George Frank (Textiles) Ltd (1975) 3 All ER 801, which revolutionised the law in this field, by holding that the plaintiff seller of a quantity of polyester yarn was entitled, provided the proper law of the contract was of another country, to have his judgment expressed in the currency of that country in other words that he was entitled to judgment in specie. Accordingly in the Mialiangos decision the House of Lords departed from their previous decision in Re United Railways of the Havana and Regla Warehouses Ltd (1960) 2 All ER 332, because conditions were vastly different as regards currencies and exchange rates in 1975 from those which were in 1960.

The decision in Miliangos v George Frank (Textiles) Ltd was explained in the Despina (1979) 1 All ER 421 at 425 where Lord Wilbeforce carried on the revolution commenced in that case ..... These questions were reconsidered by the House, and under the section dealing with The Folias, it was held that when the proper law of the contract was English Law, and the contract specified a particular currency of account and payment in respect of all transactions arising under the contract, then any damage awarded under the contract were to be awarded in the currency of the contract, since that was the currency with which the contract had the closest and most real connections. Various other situations were recognised, and in the end it was held right to express the award in French francs.

In this case, it could be argued that conditions in Kenya regarding, for instance, the necessity to preserve foreign exchange, are so vastly different from those obtaining in England, where there is now virtually no exchange control, that the Miliangos decision is not applicable here. We understand there is a Kenya High Court decision of Cotran J on the point, but this was not cited to Gachuhi J, nor was there any argument before Gachuhi J regarding the currency in which the Judgment should be expressed. Indeed, Mr Noad is on record as asking for judgment in Kenya shillings. The reason why Gachuhi J expressed it in Kenya shillings was because, having held that the refusal of exchange control did not frustrate the contract (because it was still capable of being performed by payment in Kenya shillings), he then went on to give judgment in shillings.

These observations were obiter. It does not seem that this court's attention at the time, was drawn to the fact that the English exchange Control Act had full force and effect when Miliangos and indeed, Despina R were decided. Furthermore, the issue whether the common law as expressed in Miliangos and Despina R formed part of the common law to be applied by this court by virtue of section 3(1) of the Judicature Act, was not conclusively dealt with.

The next Kenya decision is that which is the subject matter of this appeal. It was followed by the case of Ingra v National Construction Company, High Court Civil Case 460 of 1980, (unreported). Cockar J as he then was, considered in his ruling in the Ingra case, the ruling of this court in Intercontinental Greetings and the judgment in Miliangos and came to the conclusion that came closest to the principles of common law as laid down in Mliliangos and Despina R, that the debt that was covenanted to be paid in US dollars should be expressed in the judgment in that currency. He also held that the "preservation of foreign currency" was irrelevant in the particular case him because the judgment debtor which is a government institution, had from the very beginning agreed under its contract with the judgment creditor to pay for the services rendered to it in US dollars and so it could not be said that the preservation of foreign currency was a crucial factor. But I would go further and say that it is the currency in which the loss is sustained that should be the deciding factor. However, after specifying that the payment should be expressed in US dollars, Cockar J went on to order in the following words that conversion shall be at the rate prevailing at the time of payment:

"The plaintiffs are entitled to their US dollars at the value they held in the world market on 31.12.1978. The only way to ensure that they get that value of the judgment sum which is rightfully due to them is by ordering a conversion at the rate of exchange that applies on the day of payment".

The other Kenya authority which I have been able to discover and which dealt squarely with the issue whether a Kenya court could express judgment in foreign currency was in the very recent, High Court case of Donald Jenkins v Mount Kenya Safari Club Ltd and Another H.C.C.C. No. 4989 of 1987, (unreported) which was decided some eight years after Intercontinental Greetings. In his judgment in Jenkins dated 14th December 1992, Hancox CJ stated the position thus:

"As to whether the judgment can be expressed in foreign currency, namely US dollars, the only Kenya case, so far as I am aware, in which this point has been considered is Intercontinental Greetings v Kenya Litho Ltd; (1982-1988) 1 KAR 902, where the House of Lords decision in Miliangos v George Frank (Textiles) Ltd (1975) 3 All ER 801 was extensively reviewed. No conclusive decision was made in that case which was one of breach of contract. However, speaking for myself, I would think a judgment in a case of tortuous liability can be expressed in foreign currency, but is not to be enforceable therein without appropriate consents".

Although Hancox CJ went on to decide that the conversion date should be the date of judgment, with which I respectfully disagree, he had finally abandoned the stand earlier taken in Intercontinental Greetings that:

"… it has always been generally assumed that the Kenya courts would confine themselves to the currency of the country of which they form part, as was the case in England before the decision in Miliangos v George Frank (Textiles) Ltd".

The result is that in both Ingra and Jenkins, the High Court has held that judgment could be expressed in foreign currency. In the former case, the decision in Miliangos was followed. In the latter case, the reason is not too easy to discern. Hancox CJ after discussing briefly Intercontinental Greeting observed as has already been adverted to, that he though that judgment in a case of tortuous liability could be expressed in foreign currency. It does not appear from his judgment that he had on this occasion considered Miliangos or Despina R. He admitted though that:

"Again I have not had the benefit of submissions as to conversion if these amounts are intended to be converted in US dollars."

But having said that, he went on to consider only the case of S.S. Volturno (1921) AC 544, where it had been held that conversion should be on the date of breach. He however, declined to follow Volturno and held with the greatest respect, in my view, wrongly, that the conversion date should be the date of judgment. If Hancox CJ had considered Miliangos and Despina R, it is more than probable that he would have held the conversion date to be the date of payment or enforcement of the judgment debt, as Cockar J had held in Ingra.

I am clear in my mind that as the common law stands at present and which is part of the law which this court should uphold, judgment in a tortuous case can in appropriate cases, be if expressed in a foreign currency. As Lord Denning MR observed in the Despina R when it was before the Court of Appeal (1974) QB 491, 514:

"The plaintiff should be compensated for the expense or loss in the currency which most truly expressed his loss".

The currency that most truly expresses the loss of the appellant is the US dollar. The Kenya Exchange Control Act does not prevent judgments being expressed in foreign currency neither in my view, is the conservation of foreign exchange and the level of economic development relevant factors in determining whether a judgment should be expressed or not. Exchange control permission would still be required to transfer Kenya shillings to satisfy the judgment debt. Finally, the decisions in Miliangos and Despina R, have in my view, put it beyond doubt that the conversion date should be that when payment is made or judgment enforced. Applying all those considerations to the present appeal, I have come to a different conclusion than that reached by the learned trial Judge. I hope that it is now clear that Kenya courts in applying the common law can in proper cases, express judgment in foreign currency convertible at the rates prevailing on the date of payment or enforcement of the judgment. In the result, the appeal is allowed and judgment entered for the appellant in the sum of 82,643.92 US dollars at the conversion rate in Kenya shillings applicable on the day of payment or the enforcement of the judgment. The appellant shall have his costs of this appeal.

Dated and delivered at Nairobi this 23rd day of September 1993.

A.M. AKIWUMI

JUDGE OF APPEAL