



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(Coram: Apaloo CJ, Gachuhi & Omolo JJ A)**

**CIVIL APPEAL NO 75 OF 1991**

**NAIROBI BUS UNION..... APPELLANT**

**VERSUS**

**DEXTER IRERI IMANENE ..... RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Eldoret

(Mr Justice KKS Aganyanya) dated 24th May, 1989

in HCCC NO 74 OF 1987)

**JUDGMENT**

Nairobi Bus Union, the appellant herein, is a public transport company and on the 27th February, 1983, Dexter Ireri Imanene, the respondent, was seriously injured when the appellant's motor omnibus Reg No KVK 746 in which the respondent was a fare-paying passenger veered off the Nakuru- Kericho Road and overturned. The respondent thought the appellant's driver or agent in charge of the bus was negligent in the manner in which he drove, managed and controlled the appellant's bus thus causing the accident and so in April, 1987, the respondent instituted a suit against the appellant claiming general and special damages for the injuries he sustained during the accident. The appellant at first filed a defence denying liability to the respondent but when the case came up for hearing before the High Court (Aganyanya, J) on the 20th February, 1989, a consent order was entered and the terms of that order were that judgment on liability was entered for the respondent and four medical reports were put in evidence without calling the doctors who had made them. Liability having been admitted, the trial proceeded on the issue of quantum of damages payable to the respondent and on that issue, the only witness who testified before the learned judge was the appellant who narrated to the judge the nature of the injuries he had sustained and their effect upon his personal well-being and upon his career as a police-officer.

The respondent was a Chief Inspector of Police at the time of the accident. Of course apart from the evidence of the respondent, there were also the four medical reports to which we have already referred. Written submissions were then made to the judge and at the end of it all he delivered his judgment on the 24th May, 1989, and the operative part of that judgment was as follows:-

“After considering the evidence adduced, the medical reports and written submissions of the counsel, cited authorities and in view of the fact that the plaintiff has taken long to heal from the injuries sustained in the accident which occurred on 27th February, 1987 and in particular his impaired libido, I am satisfied that he suffered serious injuries for which substantial damages should be awarded. In my own judgment, therefore, I would award him a sum of Shs 750,000/= as general damages for pain, suffering and loss or

amenities, on top of which I would add Kshs 13,050/=, being special damages and enter judgment for the plaintiff for Sh 763,050/= with interest and costs. I would, however, disallow loss of earning which was estimated at Kshs 67,600/= and loss of prospective earnings which was estimated at Kshs 268,800/= .....

The appellant has appealed to this Court against the judge's award and the three grounds of appeal set out by the appellant were to the effect that the judge's award was so manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss sustained by the respondent; that the judge erred in law and in fact in basing his assessment of damages on authorities which were not material and relevant to the injuries complained of by the respondent and finally, that the judge erred in law and in fact in failing to make a finding that the respondent had made recovery from his injuries. In plain language, the appellant is simply asking this Court to reduce the amount of damages awarded to the respondent by the trial judge because in the view of the appellant, those damages are so excessive that they amount to an erroneous estimate of the loss suffered by the respondent. There of course can never be a mathematical formula for the assessment of damages in these matters and the Courts have over the years recognized the position that assessment of such damages is essentially an exercise of the trial judge's discretion. Accordingly, the circumstances under which an appellate tribunal such as this Court will interfere with an award given by a trial judge are now well settled and both Mr Mungai and Mr Nyairo who argued the appeal before us referred us to the well known case of *Butt v Khan* (1982-88) 1 KAR, 1 where Law JA (as he then was) set out the law as follows at page 4:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low .....

Mr Mungai for the appellant contended, first, that the learned trial judge proceeded on wrong principles and if we understood him correctly, his argument on this point was that of the various cases which had been cited to the judge, he relied only on one case, namely, the case of *Harshid Fakirbhai Patel v Agembo Dulo & another* NRB HCCC No1408 at 1980 (unreported) where Schofield J, as he then was, had awarded to the plaintiff the sum of Shs 500,000/= as general damages for pain, suffering and loss of amenities. There, the injuries suffered by the plaintiff were listed as:

1. fracture of the right fronto-zygomatic process;
2. fracture of the right maxillary antrum;
3. pieces of glass in the left maxillary antrum; and
4. small pieces of glass in the right thumb

and the plaintiff who had been “a very competent mechanic before the accident” was after the accident, said to be “as good as a spanner boy”. He had a permanent brain damage which was assessed to be in the range of 20% to 30%, and suffered loss of smell and taste, loss of memory and concentration and sleep disturbances.

Mr Mungai's contention was that these injuries were far more serious than those suffered by the respondent and he drew our attention to the fact that the respondent's permanent brain damage was assessed only at between 2 to 3%, that the respondent still remained a police-officer and had in fact been given heavier responsibilities as an OCPD after the accident and that he had in fact recovered well from the injuries he had sustained. It is on this basis that Mr Mungai contended that the learned trial judge not only proceeded on wrong principles but also misapprehended the evidence and arrived at a figure which was, in the circumstances, inordinately high. We only need to say that Mr Nyairo for the respondent contended that the learned trial judge did not proceed on any wrong principle and that he correctly understood and appreciated the evidence before him and that he arrived at a correct assessment which we ought not to interfere with.

What do we, ourselves, make of these arguments?

Our starting point must be the injuries sustained by the respondent and whether the learned judge was, in the circumstances, right in comparing those injuries to the ones suffered by the plaintiff in the *Patel* case to which we have already referred. The basic injuries suffered by the respondent were listed in the medical report of Mr Angelo D’Cunha, consulting surgeon, as:-

1. Head injury with post traumatic headaches, loss of concentration and inability to remember things well.
2. Disturbed hearing in the right ear with reduction of visual acuity in the right eye.
3. Compression fracture of the Lumbar IV vertebral body with residual backaches and paraesthesia of the left thigh.

The medical reports produced by consent showed that following the accident, the respondent had psychiatric problems and had to be placed on drugs. Dr Kokonya put him on those drugs and it is clear from the evidence that while he was on the drugs, he suffered from forgetfulness, lack of mental concentration, ulcers and reduced sexual activity or what was referred to as loss of libido. Professor Ruberti who assessed his permanent brain - damage at between 2% and 3% recommended that the drugs be discontinued and it was only after the use of the drugs was stopped that the respondent started to regain some of his normal bodily functions.

It is, however, not suggested in evidence that Dr Kokonya had no basis for starting the respondent on the drugs in the first place. The respondent himself explained how he had been admitted into a course from which he would have emerged as a Superintendent of Police if he had successfully completed it. He had to withdraw from the course because of the effects of the drugs used to treat him and he thus lost the chance to be promoted. The evidence of the respondent on this point was extremely telling and we can do no better than to quote him:-

“Injuries have affected my work very much. Appointed as Chief Inspector on 1.2.82. Since then have been given a chance to go and do a superintendent’s course - 1985. I was on depression treatment - was taking tablets. One takes these drugs, no concentration. I was sleeping in class. Drugs were supposed to relax the brain but here I was on a strenuous course. The two could not match. So after staying for sometime and seeing that I had no concentration, I discontinued the course after staying there for three weeks. The course was to last for 4 months.

We were 25 in class and all of them save me were made superintendents and even confirmed. My salary as Chief Inspector is Shs 5,250/=. If I were a superintendent I would be earning Shs 6,850/=” .

That evidence was not challenged in any serious manner or at all, the appellant having called no evidence. It may well be that the injuries sustained by the plaintiff in the *Patel* case were more serious than those of the respondent, but in our view, the effects of the two sets of injuries upon their victims were remarkably similar and the learned trial judge was, with respect, correct in treating the two cases as similar. In the *Patel* case, Shs 500,000/= was awarded as general damages for pain, suffering and loss of amenities; that was apparently in 1986, some three years before the award we are now considering. Probably if we had sat on the trial, we might have awarded to the respondent some lower sum than that awarded by the trial court, but that cannot be the basis for our interfering with the trial judge’s award. We have said enough, we think, to indicate that we are not at all convinced that the trial judge

“..... proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was .....inordinately high .....”.

The consequence of that must be that this appeal fails and we order it to be dismissed with costs.

Dated and Delivered at Nakuru this 22<sup>nd</sup> day of November, 1993

**F.K. APALOO**

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**CHIEF JUSTICE**

**J.M. GACHUHI**

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**JUDGE OF APPEAL**

**R.S.C OMOLO**

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**JUDGE OF APPEAL**