IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Gachuhi & Apaloo JJA)

CIVIL APPEAL NO 4 OF 1984

BETWEEN

CHEGE KIMOTHO & OTHERS..... APPELLANT

AND

MARIA VESTERS & ANOTHER.....RESPONDENT

(Appeal from Judgment/Decree of the High Court at Nairobi, Cockar J)

JUDGMENT

June 10, 1988, **Nyarangi JA** delivered the following Judgment.

This is an appeal from part of a judgment of Cockar J given on April 27, 1983 when he decided to award Kshs 910,000 to the first respondent for pain, suffering and loss of amenities of life, Kshs 150,000 to the first respondent for domestic help and assistance, Kshs 20,000 for loss of consortium, Kshs 20,000 and for loss of servitium to the second respondent.

Mr. Inamdar for the appellants while acknowledging that Maria Vesters was seriously injured at the age of 33, that there were some eight medical reports by which the Judge accurately summarised her injuries, she was discharged after 2 months and 20 days, was held to have suffered total disability of 55%, there was appearance of scars and the changed personality, some possibility of epilepsy in the future, and a possibility of Maria Vesters ending up in a wheel chair, nevertheless submitted that having regard to the gravity and diversity of the injuries, at the time of the trial, Maria Vesters had made good recovery. Her disabilities were nothing exceptional and that while she was deserving of a generous award, an award of Kshs 910,000 is by any standards known to us in Kenya out of keeping with awards for comparable injuries. Severe injuries are bound to have severe consequences, argued Mr. Inamdar, and there is a general pattern of awards which provides for resultant disabilities, unless therefore there is some exceptional circumstance, the award applicable here ought to remain within the established and know bracket. Counsel cited several English and Kenyan decided cases and on those authorities urged that a fair award for pain, suffering and loss of amenities would be in the region of Kshs 450,000. The court was also pressed to reduce the award for loss off consortium and to hold that any award for loss of *servitium* should here be substantially less than Kshs 20,000.

Counsel on behalf of the respondents replied to this on April 26 and 27. Among other things he accepted as correct the authorities cited by counsel for the appellants but asked for the part where the Judge had erred. He submitted that the Judge saw Maria Vesters, perused medical reports on her, and considered her testimony which was virtually unchallenged. Mr.. Georgiadis argued that assessment of an award is a

matter of judicial discretion which should not be interfered with unless it is wrong in principle. Counsel for the respondent contends that there is danger to be avoided in a desire for uniformity in these matters. Further that Maria Vesters suffered horrific injuries and the prognosis is not for improvement.

Counsel supported the Judge's award saying that he had not gone astray, had borne in mind her long painful hospitalisation, the seven separate operations and that she is due to have another four, the possibility of future epilepsy and the evidence of continuing of pain, discomfort all of which submitted counsel takes the case out of the ordinary case. The question was posed whether in exceptional cases this court will have sufficient elbow room to disregard brackets of awards which in any case are not sacrosanct or whether this court will adopt a strait – jacket approach.

Should the individual suffer or be sacrificed at the alter of brackets even

when no comparable case can be found? Mr. Georgiadis cited several authorities in support of his argument that the awards are not so inordinately high as to warrant interference. Counsel for the respondents recognized that normally he would have felt that the awards made by the Judge were on the higher side. However in the instant case considering what is just, the case has to be regarded as exceptional.

As to all this, Mr. Inamdar replied that the appellants rely on the principle that the awards are so manifestly excessive as to amount to a wrong award. Brackets or modes applied by courts do not constitute strait–jackets but are for maintenance of some uniformity and some consistency in awards.

The distinct question raised on this appeal is whether the trial Judge's awards are so inordinately high that they must be a wholly erroneous estimate of the pain, suffering and loss of amenities, sustained by Maria Vesters and the loss of consortium and of servitium sustained by the second respondent.

The view of the law as to when this appellate court may interfere with an award of damages was stated in *Butt v Khan* C A No 40 of 1977 as follows:-

> *"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".*

I approach this case upon the basis that the task of the assessment of damages is not an easy one. I see the warning of Lord Morris in *H West & Sons Ltd v Shephard*, [1967] AC 326 at page 353 as clearly indicating the direction which this court will consider.

Before coming to the crucial part of this case, I think there is much to be said for the view which was expressed in *Nyambura Kigaragari v Agripina Mary Aya,* CA 85 of 1983 in these words.

> "…….awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by the decided cases but also to be within what Kenyans can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover …….or increased fees".

I pause to mention a relevant holding in a decision of this Court dated September 10, 1985, in *Southern Engineering Company Limited v Musingi Mutua,* C A No. 46 of 1983.

Holding (iii) states that in future in personal injury cases, where there are Kenya authorities on the point, in which the main essentials bear comparison with the facts of the one before the Court, and they otherwise bear a reasonable measure of similarity to it, Kenyan authorities should be used to the exclusion of others, save those from neighbouring jurisdiction with similar conditions to those obtaining in Kenya.

Let me turn to consider the authorities relied upon in support of the parties to this appeal. Certain of them appear to me not to be relevant at all. The first of the various authorities upon which Mr. Inamdar relied is *Zablon Mariga v Musila*, C A No 166 of 1982 for the proposition that severe injuries are bound to have severe consequences and that awards in such cases do provide for resultant disabilities. In *Thomas v French*, Kemp & Kemp vol 2 para 10-665, a case decided on May 16, 1983, a girl then aged 23, had her leg severed. She was seriously mentally depressed and the English Court of Appeal accepted that it would take some considerable time for her to adjust and accept the fact of the loss of her leg. She was awarded £28,000 general damages for pain, suffering and loss of amenities.

Maria Vesters was 33 at the time of the tragedy. She was very severely injured and suffered much resultant pain. Her torture, mental and physical as a result of her injuries could not compare with an amputation.

In *Kitavi v Coastal Bottlers Ltd*, C A No 69 of 1984 decided on July 25, 1985, an award of Kshs 475,000 was made for total blindness, an injury of the utmost gravity.

In *Vaughan v Howe*, [1983] CLY 998, the respondent suffered multiple serious injuries reasonably comparable to those of Maria Vesters. The agreed general damages for pain and suffering and loss of amenities was £120,000.

The next case is *Chapman v Lidstone*, Kemp, Vol 2 para 1-210, where a woman suffered a spinal fracture the effect of which was to render her completely paraplegic. General damages for pain and suffering and loss of amenities was in December 1982 assessed at £50,000. In another paraplegic case *Angus v Jones*, Kemp & Kemp, vol 2 para 1-217 the plaintiff aged 26 at the material time was awarded £40,000 for pain, suffering and loss of amenities.

Now, there can be no possible fair comparison between the injuries of Maria Vesters and the consequences of the injuries with paraplegic cases.

Likewise it seems to me that the award of Kshs 700,000 *Lydia Wavinya v George Gregory Wilson Nthenge*, HCCC 3239 of 1981 was for more serious injuries. There the plaintiff was to be confined to a wheel-chair permanently, with more chances of developing pressure sores.

In September 1981, Kneller J (as he then was) awarded Kshs 400,000 for loss of both legs to the plaintiff in *Peter Kitwai v D Singh*, HCCC 841 of 1978 who was aged 33 years at the time of the accident. Maria Vesters' injuries don't in my judgment compare with the loss of both legs.

The facts of the injuries sustained by Maria Vesters may be out of the ordinary. However, overall, her injuries could not reasonably be held to cause more pain, suffering and loss of amenities than that suffered by one who loses eyesight and has to face the catastrophic nature of blindness.

The next matter concerns the question of domestic assistance. In *Cookson v Knowles*, [1979] A C 556 at page 577 it was stated that the courts in assessing damages in personal injury cases should leave out of account inflation. The measure of a proper award is a sum of money which if wisely invested would yield an income that goes some way to compensate the plaintiff. The Judge erred because there was no evidence before him that this case is so exceptional as to make it necessary for the provision for future inflation. The correct award for domestic assistance here is therefore, Kshs 123,750 which amount is substituted for Kshs 150,000.

I now pass to the authorities to which we were referred by counsel for the respondents. I find it more convenient to discuss the twin issues of consortium and *servitium* towards the end of my judgment.

From *Idd Ayub Shabani v City Council of Nairobi*, C A 52 of 1984 Mr. Georgiadis cited the well – known passage as to when an appellate court will disturb an award of general damages. On the other parts of the case, counsel for the respondents cited *Bhogal v Burbidge* [1975] EA 285 and urged that the principles therein stated be applied to this case.

There can, in my opinion, be no doubt that it is plain on the authorities cited to the trial court and to this court that the awards of damages must be disturbed for being so inordinately high as to present an entirely erroneous estimate. It is significant and unfortunate that the trial Judge made no effort to find a local comparable or analogous case with the instant one. Now, speaking for myself, I am far from convinced that the grave injuries suffered by Maria Vesters, their consequences including the fact that there will be other operations, that there is a possibility of epilepsy and that she is likely to end up in a wheel chair – none of this is collectively graver than the loss of eyesight. The continuing pain, discomfort and the loss of amenities which the plaintiff in *Zablon Mariga v Musila*, C A 66, of 1982 suffers seems to me greater than that now experienced by Maria Vesters. At least she has the remaining operations upon which to pin some hope of improvement. I am very conscious that several operations on a person with the state of health of Maria Vesters will cause very much pain and suffering. Zablon Mariga's conditions are however likely to get worse, not better. There is no medical opinion to the contrary. Nor could I be readily persuaded that in their collective effect, the loss of both legs and the loss of eyesight and the severing of a leg of a Young girl should be regarded as any less serious than Maria Vester's injuries. To the anxieties and of Mr. Georgiadis I say this, "The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people.

It must never be strangled by the dead hand of long discarded custom, belief, doctrine or principle" – per Sir George Baker, at page 9, *Midland Bank Trust Co Ltd & Another v Green* [1982] 2 WLR1-130.

In view of these considerations and bearing in mind that as far as possible awards for general damages should be reasonably consistent and have a real bearing to the Kenyan situation, I would reduce the award for pain, suffering and loss of amenities to the first respondent Maria Vesters to Kshs 550,000. To the extent I would disturb this particular award of the trial Judge. There then follow the two issues of claimed loss of consortium and of servitium.

So far as consortium is concerned, it is conceded on all hands that as a result of the accident, Maria Vesters and her husband were separated, first for five months and later for another two or so months. During this short period the second respondent did without his wife's companionship.

There is an impairment in the social life of the couple to the clear disadvantage of the second respondent.

In *Best v Samuel Fox & Co Ltd v J W Thompson,* [1951] 2 KB 639 Birkett LJ observed as follows on page 664,

> "There would appear to be no case where damages have been recovered save for the loss of, as distinct from any impairment of, consortium."

The view that I take is that consortium is incapable of minor, separate sub-divisions each of which would give a cause of action. Consortium must be viewed as one whole entity. Again, as Birkett LJ stated in *Best*, on page 665,

> "companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state.

Serious injury to any of the components that go to make consortium would affect all the others. Definitely the type of injuries which Maria Vesters sustained affected every ingredient of consortium, giving the second respondent a cause of action. I would say it is a question of evidence and all the surrounding circumstances whether there has been loss of consortium or not. Each case would be judged on its own facts. An award of Kshs 20,000 to the second respondent for loss of consortium is in my opinion manifestly excessive.

Maria Vesters was not away for too long. One of course is aware that while at home she experiences pain and that affects the whole issue of consortium. I would reduce the award to the second respondent for loss of consortium in this case to Kshs 10,000.

Finally, the law recognizes the loss of service: per Lord Reid in *Best v Samuel Fox Co Ltd*, [1952] AC 716 at page 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.

The second respondent told the trial Judge that,

> "Before the accident she ran the home ……. Now she does only light house hold work. She does the cooking, dusting, making beds."

The trial Judge tended to overlook Maria Vester's capacity to assist the second respondent. I regard the award of Kshs 20,000 as manifestly excessive. I would reduce it to Kshs 10,000. To sum up, having disturbed the trial Judge's awards, I would make the following awards:-

(i)Kshs 550,000 general damages for pain, suffering and loss of amenities to Maria Vesters, the first respondent.

(ii)Kshs 123,750 for domestic help and assistance to the first respondent.

(iii)Kshs 10,000 to the second respondent for loss of consortium

(iv)Kshs 10,000 to the second respondent for the loss of *servitium*

I would allow the appeal to that extent.

I would set aside the award of interest at the rate of 2% p.a from the date of filing suit.

As Gachuhi and Apaloo JJA agree it is so ordered.

Gachuhi JA. I have had the advantage of reading the judgement prepared my Lord Nyarangi JA in draft form with which I agree. However, I wish to add that the main complaints in the appeal are against the awards under the following heads:-

(1) The award of Shs. 910,000/- for pain suffering and loss of amenities of life.

(2) The award of Shs. 150,000/- for domestic help and assistance.

(3) The award of Shs. 40,000/- to the husband for loss of consortium and servitium.

(4) The award of 2% interest from the date of filing suit to the date of judgement.

It is not disputed that Mrs. Vesters who was injured in a road accident on 4th April 1979, as a result of which the driver of the other vehicle died and she suffered serious injuries. She was hospitalised from 4th April 1979 to 2nd June 1979, a period of about four months. The injuries as described in the medical reports are serious. In fact Mr.. Inamdar is on the view that Mrs. Vesters due to her injuries is entitled to a very high award but such award should not be outside the brackets of the damages awarded in such other serious injuries. Mr.. Georgiadis submits that in trying to keep to the perimeter of damages within a bracket range, it may cause injustice, Mrs. Vesters should be treated as a special case due to her serious injuries. He also submitted, and I agree, that no two accidents can result in the same injuries.

I would stress that though Mrs. Vesters suffered serious injuries and will bear the effect of the injuries and ugly scars for the rest of her life, that would not make her case to be treated indifferently from other cases some of which are more serious. There are more serious injuries as in the cases of quadriplegia, paraplegia, loss of limbs, legs and arms, total blindness and multiple injuries for which damages awarded are within a certain bracket. In those cases the injured persons have to depend on other people in one way

or another as they had become cripples. Some cannot walk, feed or dress themselves but are confined in wheel chairs. For myself those cases are more serious and would deserve serious consideration.

This does not mean that I do not sympathise with Mrs. Vesters' injuries. I very much do. Mrs. Vesters is at least mobile, she can move around the house, though she cannot do gardening or drive as she used to do in the past and will no longer be a model. In the course of time however, some of the injuries could be improved, as she gets used to the situation. I have to consider the range of damages that have been awarded in the past judgements in order to place Mrs. Vesters in one of those brackets.

It is trite Law that in awarding damages, the Court has to take into consideration comparable awards. The awards should not be too high or too low so as not to reasonably provide the injured person with something for pain, suffering and loss of amenities. It is impossible to compensate such pains and suffering in monetary form. Mr.. Inamdar has, and I would commend him for this, produced a vast list of authorities on the subject which lays down the principles of awarding damages and the comparable awards prior to and after the judgement appealed against. Mr.. Georgiadis supports them. These authorities are local as well as the English decisions.

The stress is that local decisions should be of persuasive nature and worthy of considerations. The Court of Appeal both in England and in Kenya have been reducing damages awarded by the High Court so as to be within the comparable bracket. My Lord Nyarangi has cited some of the cases.

I have been persuaded by the submissions made, based on these authorities, to believe that the trial judge while seized with all the facts of the case and the law in the matter, if the authorities now referred to us were referred to him, he could have considered them and probably followed them. The damages awarded under this head in the past judgements are between Shs. 300,000 and Shs. 600,000. The damages Cockar J. awarded under this head was in excess and outside the bracket of decisions of this court.

It is for this reason that I believe that the amount should be reduced to a realistic figure supported by other decisions. I agree that the figure of Shs. 550,000/- proposed by my Lord Nyarangi should be a reasonable award under this head.

As the award for her domestic help and assistance, the trial judge made a correct assessment of Shs. 8,250/- per year. With a multiplier of 15 it gives the sum of Shs. 123,750/-. But the judge increased the sum of Shs. 8,250/- to Shs. 10,000/- per year taking inflation into account. As I had earlier said on authorities had the House of Lords judgement in *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] AC been citied to Cockar J at least he would have read the judgement of Lord Scarman at page 193 where the question of inflation was held to be speculative and that it should not be considered or taken into account.

The amount awarded if invested will earn interest that would compensate for the inflation. For this reason, I would also agree that the amount of Shs. 150,000/- should be reduced to Shs. 123,500/- based on the actual assessment of Shs. 8,250/- per year.

Now for the loss of consortium and servitium, the husband was awarded Shs. 40,000/-. The only period that the wife stayed away from the husband was at the time she was in hospital for a period of about six months.

Since then, they have been together. The only loss at the time, was temporary period of absence and the extra burden the husband carried due to the wife's handicap as a result of her injuries. The wife having been compensated for future help and assistance the husband is not entitled to damages for future assistance that he will render to his wife. The only aspect that may need consideration in the marital relationship. The wife, according to her evidence, was within her early thirties but complained that she was unable to perform marital relationship due to pain in her legs. She had two children who ere in school. There is no evidence that she was expected to have more children. In English cases the amount awarded is a low as 20 Pounds. The husband would only be entitled to a nominal figure in that case. I would agree that the figure of Shs. 40,000/ - should be reduced by half to give the figure of Shs. 20,000/-

as proposed by My Lord Nyarangi JA.

The only other matter is the question of interest. Though the award of interest is at the discretion of the Court, Mr.. Geogiadis conceded to this ground straight away which saved Mr.. Inamdar submitting on it.

As the appellants have succeeded on the points argued, and dropped the argument on the award of loss of future earning, I would allow this appeal to the extent of the reduction of the amount and award full costs of the appeal to the appellants.

Mr. Inamdar informed the Court that the decretal amount was paid to the respondent immediately after judgement and that it might have been invested. I would order that the amount paid in excess be refunded to the appellants with the interest earned on that amount.

Apaloo JA. At about 8.30 a.m. on the 4th April 1979, a collision occurred between a fiat saloon car driven by the 1st respondent and a Peugeot car in charge of one Jane Wanjiku Chege on the Nairobi–Thika Road. Both cars were extensively damaged and Jane Chege lost her life as a result of the injuries she sustained in the accident. The 1st respondent who survived, also sustained very severe multiple injuries. She claimed that the accident was caused by the negligent driving of the Deceased Jane Chege. So she brought an action against the administrator of her estate as well as Chege Kimotho, the owner of the Peugeot car. He was sued on the basis of vicarious responsibility. They are the appellants in this appeal.

The 1st respondent Maria Vesters, lived with her husband. He, for his part, joined the action and claimed damages against both appellants on the ground that by reason of the 1st respondent's injury and consequent disablement, he lost her society and services. On the pleadings, both appellants denied negligence and pleaded that;

> "the accident occurred due to the sole or substantial negligence of the first plaintiff (meaning the first respondent) in driving, managing or controlling the motor vehicle."

The respondents disputed this and joined issue with the appellants on their averment. But when hearing of the suit opened before Cockar J on the 14th December 1982, both appellants reversed their position and admitted liability for negligence. Accordingly, the learned Judge was not troubled with the issue whose negligence caused the accident. The only question he was asked to decide, was the quantum of damages to which either respondent was entitled to receive. On the 27th April, 1983, the Court delivered judgement and awarded the 1st respondent general and special damages and the 2nd respondent general damages only.

In a judgement which ran into twenty pages of typescript and which is difficult to fault, the learned Judge summarised the 1st respondent's injuries and related the medical evidence and the prognosis of the 1st respondent's ailment. A great number of decided cases was cited to him apparently to guide him on what sum to award in respect of each head. The Judge said he considered all those cases and the awards made to them and came to the conclusion that for the 1st respondent's injuries and "permanent disability", the sum of 910,000/- was adequate and proceeded to award that sum in favour of the 1st respondent.

The Judge also felt that in view of the 1st respondent's injuries and permanent disability, she would be severely handicapped in the performance of her ordinary chores. The Court thought she would therefore require domestic help at a cost of 8,250/- per annum for at least 15 years. But taking account of future inflation, the learned Judge rounded the figure of 8,250/- to 10,000/- per annum and awarded her an aggregate sum of 150,000/- under this head. The sums awarded to the 1st respondent under the two foregoing heads, namely (1) pain, suffering and loss of amenities of life and (2) for domestic help, were questioned on this appeal. To this, I will return.

With regard to the husband, that is the 2nd respondent, the Judge considered that as a result of the injury to his wife, he suffered impairment in the sexual, social and domestic aspects of his married life and ought to be compensated for this and as the accident disabled the wife from rendering some of the

ordinary domestic services that the wife rendered to her husband, such as “shopping, gardening and transporting children” the latter was entitled to compensation for these. The learned Judge accordingly assessed compensation under either head, namely first loss of consortium and second, loss of services as 20,000/- each making an aggregate sum of 40,000/- under both heads.

The Appellants appeal to this Court and invite us to say that both awards were excessive or were based on wrong principles of law or were otherwise too high and should be reduced. Mr.. Inamdar who appeared for the Appellants and who presented a full and convincing argument, acknowledged that the 1st respondent suffered horrific injuries and was entitled to generous compensation. He was not prepared to question the medical evidence as to the extent and severity of the 1st respondent’s injuries nor the rather dismal prognosis made by the doctors.

He would not quarrel with the finding that the 1st respondent who was a model, underwent a change of personality and may well suffer epilepsy in the future. Counsel also said, he would take no issue with the Judge’s holding that the 1st respondent, a healthy outdoor woman with a zest for outdoor physical activities has been rendered into a house-bound semicripple.

Mr.. Inamdar felt it would be difficult not to feel sympathy for the 1st respondent in view of the extensive nature of her injuries and it may be anything but easy to resist the temptation of approaching the question of an adequate compensation for her without some emotion.

But Counsel saw and pointed out some consequences of the accident which could be said to be redeeming features. The 1st respondent was not immobilized nor was she bedridden. She also had the use of her hands and legs and could do some slight domestic work. Although marital relations with her husband was impaired by her multiple injuries, it was not altogether impossible. True, the 1st respondent’s handsome facial features were marred by scars, but these could be corrected, at least up to a point, by plastic surgery. So, although in the submission of Counsel, the 1st respondent was deserving of generous damages, she ought not to be awarded what was more than adequate. And in the contention of counsel, the damages of 910,000/- awarded to her for pain, suffering and loss of amenities of life, was much too high and was wholly out of step with the general trend of awards made in this country and in England.

Counsel cited and relied on a great number of decided cases and indeed gave us each, a bulky file containing 39 cases showing awards made in diverse cases here and in England and submitted that the multiple injuries sustained by the respondent though grave were less serious than paraplegic cases where the compensation awarded for pain and suffering were comparatively lower. Counsel also took us through at least four cases to which he said injuries suffered by the victims were comparable to those suffered by the 1st respondent in each of which the compensation awarded was a lot less than the sum awarded in this case. Accordingly, Mr.. Inamdar invited us to reduce the compensation of 910,000/- awarded to the 1st respondent under the head pain, suffering and loss of amenities. It is difficult not to be persuaded by Counsel’s helpful and thorough argument.

But Mr.Georgiadis for the respondents, submitted that the damages awarded under this head was fair and reasonable and could be supported. He said the 1st respondent suffered what was, by common consent, horrific injuries. While the Court ought to have recourse to guides, he said, the assessment of compensation, is discretionary and that there is no showing that the learned Judge misapprehended the facts or went astray on any point of principle. According to Counsel, the 1st respondent suffered injury on almost every part of her body, was detained in hospital for 5 months and had no fewer than seven separate operations. And her prognosis is not that of improvement but deterioration and an increasing load of pain.

According to Counsel, the 1st respondent who was an attractive woman of 33, is now a depressed and suicidal wreck and has become a great burden.

Counsel argued that the main complaint of the appellants was that the sum awarded did not fit into a known bracket and that the desire for uniformity though desirable, may well result in injustice.

In so far as Mr.. Geordiadis says, no two injuries are exactly alike and that slavish adherence to brackets

may result in a denial of justice in an individual case, I think that is a fair and right-minded observation. But my understanding of the bracket, is that it does not fix a sum certain to which, like procrustes' bed, all awards for similar or almost similar injuries must fit. The bracket only provides a range. The rationale for this appears to be that award of compensation, like the administration of justice itself, must, as far as possible, be consistent and predictable. Judicial impartiality demands like compensation for like injury. But the fact that the extent and severity of the injury may vary from person to person, is catered for by a range, a broad pattern. And within that range, what is fair and reasonable to award in each individual case, is a matter for judicial discretion. Appellate intervention in the quantum awarded can only arise or be justified if that sum violently departs from the range which the collective good sense of the Judges, have, over a period of time established.

The grounds on which an appellate Court may interfere with an award of damages, is now trite learning. They are first, the Judge acted on a wrong principle of law, second, the Judge misapprehended the facts or third, the Court for some reason made a wholly erroneous estimate of the damage suffered. I, of course, accept without hesitation that the learned Judge in the instant case stated the facts accurately without any embellishment or embroidery. He did not slip on any principle of law. But having looked and considered the compensation awarded for comparable or almost comparable injuries both before and after the date of the judgement, I think a fair and reasonable compensation should be within the 40,000/- to 50,000/- bracket. If that be right, I am driven too the conclusion that the award of 910,000/- is inordinately high and must be a wholly erroneous estimate of the damage suffered by the first respondent.

My Lord Nyarangi considers 55,000/- fair and reasonable under this head. That exceeds the upward limit of my bracket by 50,000/-. Since there is no objective guideline which can point to the correct assessment, the difference between us is only a matter of "balance and preference." I would not make a song and dance of this marginal difference and will go along with the 550,000/- which my Lord has proposed. I would also accordingly reduce the compensation for pain, suffering and loss of amenities of life to that figure.

The Appellants also complained that the sum awarded for future domestic help was, in part, arrived at on a wrong principle of law and should be reduced. The learned Judge actually assessed the sum at 8,250/- per annum and took a multiplier of 15 years. But he said:

> "Keeping rising labour costs in mind, I feel a sum of 10,000/- is a fair estimate."

Although he did not, in terms, so put it, what he did, was to take into consideration future inflation. That does not strike me as unreasonable.

But such a course was disapproved by high judicial authority. In *Lim v Camden Health Authority* [1980] AC 174 to which Mr.. Inamdar helpfully referred us, Lord Scarman speaking for the House of Lords said:

> "The law appears now settled that only in exceptional cases where justice can be shown to require it, will the risk of future inflation be brought into account in the assessment of damages for future loss."

The reason for this appears to be that the rate of future inflation is too speculative a matter to be built in the award of damages. It was though future inflation can better be taken care of in sound investment. There is no showing here that this is an exceptional case or that any grounds exists for saying that justice requires that future inflation should be taken into account.

Accordingly, unless *Lim v Garden Health Authority* was wrongly decided and Mr.. Georgiadis shrank from the saying so, or that this decision ought not to be followed in this country, the conclusion is inescapable that in fixing the future loss at 150,000/- instead of the 123,750/-, the learned Judge acted on a wrong principle of law and his assessment should be reduced to a sum which takes no account of future inflation. That sum is 123,750/-.

That brings me to the damages awarded to the husband *per quod consortium et servitium amisit.* The total

sum awarded for both loss of consortium and of services is 40,000/-. In view of the comparatively large sums awarded to the wife, this sum can be said to be child's play.

But the objection taken to the quantum of the award appears to be taken as a matter f principle only.

Although there was at sometime difference of judicial opinion whether an action lies for impairment as distinct from total loss of consortium, the better view is, an action will lie for impairment only. The learned Judge found that the husband's enjoyment of sexual life with his wife has been curtailed. He held that this affected his physical and emotional life, and he ought to be compensated for this. I have no quarrel with that. The question the learned Judge omitted to address, was what sort of compensation should be awarded to the husband for that?

The wealth of judicial opinion, is that such compensation should be modest. In England, sums as low as 20 Pounds, 30 Pounds, 40 Pounds and at most 200 Pounds were awarded in a number of cases under this head. I think it is the sort of compensation that in another branch of the law of tort would be called a *Benham v Gambling* award. If the Judge awarded as much as 20,000/- (the equivalent in 1983 of 10,000 Pounds) for impairment, then the figure he would award for total destruction of consortium would be mind-boggling. That would be wrong in principle. Like My Lord Nyarangi, I also think 10,000/- reasonable. It is even certainly more than modest.

The learned Judge awarded a similar sum to the husband for loss of his wife's services. Again, the loss of servitium is only partial. The wife, fortunately, has the use of her hands and legs and can do light domestic work. She herself has been compensated for domestic help that she may need in the future and the husband will not be out of pocket for this. True as the Judge found, she cannot now do shopping, gardening or driving.

But it cannot be supposed that the husband lent no hand in these essentially joint household "occupations". The learned Judge seems to have fixed the quantum of the compensation on the footing that the wife will render no domestic service at all in the future or that the husband will be out of pocket in funding this. Again that basis must be wrong. In the circumstances, I also think 20,000/- is excessive and would reduce it to 10,000/-.

The appellants complained in ground 12 of their memorandum, that the learned Judge erred in awarding interest in favour of the 1st respondent at the rate of 2% per annum from the date of plaint till the date of judgement.

Counsel for the respondent frankly conceded that that award was made in error and declined to support it. So the appellants were spared the trouble of addressing any argument to us on that ground. I agree that that award cannot stand and must go. In the result, like my Lord Nyarangi, I would allow the appeal in the following respects; viz,

> *(a) I would vary the award made in favour of the 1st respondent by substituting for the 910,000/- the sum of 550,000/-*
>
> *(b) I would also vary the award of 150,000/- made in favour of the same respondent by substituting for it, the sum of 123,750/-*
>
> *(c) I would set aside the interest of 2% per annum from date of filing till date of judgement made in favour of the 1st respondent.*
>
> *(d) I would set aside the award of 40,000/- made in favour of the 2nd respondent and substitute for it, the sum of 20,000/-.*

As the appellants have succeeded in reducing the damages to an appreciable extent, I would award them two thirds of the costs of this appeal.

I would also order that the judgement debt and costs, if paid in full, should be refunded to the extent reduced in this judgement. It is only right that I should extend to Counsel on both sides our thanks for the considerable assistance they rendered us especially Mr.. Inamdar who provided us with the many authorities and other material on which he relied.

Dated and delivered at Nairobi this 10th day of June , 1988

J.O. NYARANGI

.....

JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

F.K APALOO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR