REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU
(Coram: Kneller, Hancox and Nyarangi, JJ A)

CIVIL APPEAL NO 2 OF 1986

BETWEEN

MOHAMED MAHMOUD JABANE …….....…….....…..…….
APPELLANT

AND

HIGHSTONE BUTTY TONGOI OLENJA …….....…….....…..
RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Kisumu, (Schofield J)
dated December 13, 1984 and March 22, 1985
In
Civil Case No 60 of 1980)

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JUDGMENT OF KNELLER, JA

Mr Justice Schofield awarded Highstone Butty Tongoi Olenja, the respondent plaintiff (Olenja) Kshs 29,320.00 special damages with interest on them at 12% a year from February 20, 1980 (the date the plaint was filed) to March 22, 1985 (the date of the judgment) which came to another Kshs 17,592.00 so the total award for special damages was Kshs 46,912.00. He also assessed the general damages at Kshs 786,600.00. Add these two sums and the result is Kshs 833,512.00

Mr Menezes, the advocate for Mohamed Mahamed Jabane, the appellant defendant (Jabane) in the memorandum of appeal has complained that –

> 7. The learned trial judge awarded damages to the respondent which were so grossly excessive as to be a gross misdirection in law.
>
> 8. The learned trial judge did not take into consideration that part of the submission of the respondent regarding general damages were vague, speculative and conjectural without evidence being led on it. And hence should have been ignored by him.
>
> 9 .....
>
> 10. The judgment of the Honourable Trial judge has occasioned a failure of justice and or resulted in a gross miscarriage of justice."

The material put before Mr Justice Schofield for assessing these awards was not abundant. Olenja's advocate in both courts, Mr Wasuna, with the consent of Mr Menezes, put in a valuation report on the Renault and medical report on Olenja. He declared that Olenja claimed special damages for the value of his car and general damages for his injuries. He and Mr Menezes announced that they agreed that the judge should then decide quantum on those two reports. What the awards should have been only those reports in conjecture but it would have served Olenja right if they had been nominal. It was the duty of his advocate, Mr Wasuna, to bring to the notice of the judge the principles and recent local awards for such claims. Firozali N Lalji v Elias Kapombe toak & Ors, CA Civil Appeal 46 of 1980; Bonham Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, 178.

The judge called for further information on the scrap value of the vehicle and the respondent plaintiff's loss of employment prospects which was conscientious and proper of him.

So Mr Wasuna returned to another day and, again with the consent of Mr Menezas put in another medical report on Olenja and one from his employer and six salary slips. He then claimed Kshs 30,000.00 for the value of the Renault, Kshs 320, for the cost of obtaining (all) the reports and Kshs 5,130.00 for being on half-pay for six months.

He called Olenja who gave his age as thirty six on March 20, 1985 and added that he was married, had six children and his injuries had affected his 'sexual life' at which point Mr Menezes reminded Mr Wasuna that they had agreed that damages should be assessed by the judge on the reports so Olenja gave no more evidence.

Mr Wasuna submitted the award for general damages should be made up of sums for

(i) pain suffering loss of amenities;

(ii) loss of expectation of life;

(iii) loss of future earnings; and

(iv) loss of earning power

He then underscored these matters. Olenja suffered considerable pain for a long period of time. His left eye still ached and watered. There was bone infection. His right hand might require an operation later. He could no longer play football, drive safely or squat (repeatedly typed as squart in the medical report for some reason). He was very likely to have to retire ten years before the usual age of fifty-five. He had lost his chances of promotion because he had not been summoned before any promotion boards. So his (annual?) increments had been only Kshs 100.00

Mr Wasuna cited some awards of the English Courts for comparable injuries from Kemp & Kemp on Damages. He then suggested-

(i) Kshs 500,000.00 for pain, suffering loss of amenities;

(ii) Kshs 20,000.00 for loss of expectation of life;

(iii) Kshs 336,600.00 for loss of future earnings; and

(iv) No specific sum for loss of earning power.

The total of these figures is Kshs 856,600.00.

Mr Menezes replied by conceding that Jabane did not dispute the value of the Renault at the time of the accident but reminded the judge that its scrap value should be deducted from it. The cost of the reports was not challenged.

The claim for six months pay, he added, had not been pleaded. It was accepted that Olenja suffered severe injuries which reduced the quality of his life. Kshs 500,000.00 was excessive claim for pain, suffering, loss of amenities and Kshs 250,000.00 at the most would be appropriate. There was no evidence to indicate his life expectancy was affected. Loss of future earnings he had nothing to say about, it would seem, save that local decisions were unhelpful. Finally, there was no evidence to support the respondent plaintiff's claim he would be retired at forty-five and not fifty-five.

Mr Justice Schofield assessed the value of the Renault at Kshs 30,000.00 and deducted Kshs 1,000.00 for its scrap value. He allowed Kshs 320.00 for the cost of the reports. Thus he reached the total for special damages of Kshs 29,320.00. He refused to add Kshs 5,130.00 to them for the six months half salary Olenja lost because it was not pleaded.

Turning to the four headings for general damages the learned judge assessed them thus-

(i) pain suffering loss of amenities Kshs 450,000.00

(ii) loss of expectation of life nil

(iii) loss of future earnings Kshs 336,000.00 and

(iv) loss of earnings power no figures

and the total of those figures is Kshs 786,600.00

He listed the injuries Olenja suffered and the subsequent surgical and medical treatment he endured. He followed this with an account of his present condition and what the future held for him including further operations. He found the injuries of Burbridge in Bhogal v Burbridge & Another, [1975] EA 285 the nearest to those of Olenja but slightly less severe. Burbridge was awarded Kshs 160,000.00 for pain suffering loss of amenities. Inflation, he said, would raise that to a far greater sum. There was no element in Burbridge's award for the cost of a further surgical operation as Olenja might have to have and because Burbridge was a farmer loss of promotion prospects did not arise. He ended up with an award of Kshs 450,000.00 under this heading for Olenja.

But he declined to make any award for loss of expectation of life. The surgeon did not mention it in this first report. He asserted in his second part that Olenja's injuries had 'considerably reduced the quality hence the expectancy of his life'. The judge was of the view that a lowering of a quality of life of a man did not mean that his life would automatically be shorter.

The loss caused by the respondent plaintiff's potential early retirement he found proved. He assessed the compensation for this by taking Kshs 2,805.00 a month. (Olenja's salary at the end of March, 1985) or Kshs 33,660.00 a year, as the multiplicand and choosing then as the multiplier and so reached Kshs 336,600.00 as an appropriate award for this item.

The loss of promotion prospects the judge said must form part of the general award for damages. The letter from his employer clearly indicated that the accident had caused the respondent plaintiff to miss all promotion to date. There was no figure chosen for this loss as far as I can tell.

Mr Dhanji opening Jabane's appeal pointed out that the particulars of the respondent plaintiff's injuries did not mention a brain injury, the Kidney failure and subsequent septicaemia was not linked to the injuries he received in the accident, there was no unconsciousness after the accident, fracture of the skull, loss of memory or powers of concentration, headaches or loss of vision. A serious injury to the right knee and shortening of that leg were the only result of the accident. All other injuries had healed. It was an error, Mr Dhanji went on, to assume Olenja would be retired early. Burbridge was also 36 when he had his accident in early October, 1975 and his injuries were not less but more severe than those inflicted on

Olenja. Loss of future earnings had not been pleaded and should not have been quantified. They were an actual loss and must be proved as part of the special damages. Anyway, the evidence revealed that the loss of half his salary for six months, apart, Olenja returned to his employment on full salary and it increased annual. Loss of earning power or promotion was, Mr Dhanji agreed, part of the general damages. The evidence did not, however, indicate Olenja was suitable for promotion or likely to have been invited to any interview for it. He had missed interviews held between May 21, 1978 (the date of the accident) and November 22, 1979 (the date of his final discharge from hospital) which is eighteen months but thereafter it was unclear that he had missed any more. Olenja is a postal clerk and his residual injuries did not indicate he would lose his job or be retired before he was fiftyfive. He was still a postal clerk eight years after the accident. If, on the contrary, he was retired at 45 then presumably he would receive a pension which was something the learned judge had overlooked.

Mr Wasuna supported the assessments of Mr Justice Schofield. He analysed the injuries and their treatment. He computed the time spent in hospital and out-patient's clinics and the number of operations. There were four principal injuries for Olenjas and only one for Brubridge. Severe pain continued for Olenja and infection in his knee bone was now incurable. The days of small and stingy awards have gone. When it came to loss of future earnings the test was not whether he would but whether there was a real likelihood that he would be retired at forty-five. Mr Wasuna very properly pointed out that it was his duty to the court that led him to admit the learned judge erred in not taking into account the facts that Olenja would receive a reduced pension and be able to invest some of it if he were retired early. There should have been some deduction for these points.

So much for the outline of the findings and reasons for them of the learned judge on damages. The submissions of the advocates for the parties in both courts are added as a background. What must come next is what were Olenja's injuries, treatment and consequent condition?

Just after the accident he had a compound comminuted fracture of the right femeral condyles, compound fracture of the neck of the right metacapal of the middle finger, injury to the left eye with tear of the cornea and prolapse of the iris, cut wounds and lacerations on the face, right hand, right leg and right foot, head injury and haemorrhagic shock.

He was admitted the same day to Maseno Hospital in very low condition. He was confused, disorientated and in a state of shock. He was resuscitated with intravenous fluids and blood transfusions and he was transferred to the Nyanza General Hospital. After two days he had improved enough to have an emergency operation cleaning up and stitching his right thigh and right hand. Another two days passed and he had an operation on his left eye.

May 28, came and he developed jaundice and his temperature rose to 39C. He was delirious. He had his third operation on his right thigh and it was discovered that its fracture was infected with osteomyilitis so that it had to be drained of pus and then the would closed. His right lower limb was immobilised in plaster of paris. Two days later his general condition was worsening so he was transferred to the Kenyatta National Hospital. It was now the end of May 1978.

There he was found to be confused and his right thigh severely infected. Worse was to follow. On June 13, he went into a coma because his kidneys failed. They were septicaemic again. Three times in the next week he was put on a kidney machine and then he came out of this coma.

His thigh had to be reopened and cleaned another eight times between June 27, 1978 and February 24, 1981. Sometimes irrigation suction plugged into it. Sometimes pieces of dead bone and necrotic tissues were removed. Sometimes he was sent home on crutches. Once an arthrodesis of his right knee was done with bone from the right side of his pelvis and a metal plate and another time it was stabilized with a second plate. Finally the plates were removed and the crutches cast aside.

And in the end Olenja had a permanently shortened right leg with a fused knee. His thigh bone was still infected. He could no longer bend at the knee so he could not use a western lavatory or drive a car. He limped. This is a strain on his right ankle and hip. Osteoarthritis would attack his spine and legs early. His

right hand was shortened and weaker and might need operation on later. The iris of his left eye was distorted and that eye had to be protected from bright light. Stress in it gave him headaches. His face was scarred which was a social embarrassment. It was difficult to determine in early March 1985 if his brain or kidneys were permanently damaged. All this at the age of thirty-six.

His employer in a letter of March 13, 1985 to his advocate said the accident had

> (a) substantially impaired his physical capabilities and drastically affected his performance at work;
>
> (b) led to his missing interviews for promotion to Assistant Postal Controller with a salary of Kshs 4,800.00 a month;
>
> (c) made it impossible for him to supervise staff in scattered post offices;
>
> (d) made it obvious he would be retired only on medical grounds, but when could not forecast; and
>
> (e) reduced him from an active playing member of the post office sports club to a passive non-playing one.

The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

> 1. Each case depends on its own facts;
>
> 2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
>
> 3. comparable injuries should attract comparable awards.
>
> 4. inflation should be taken into account; and
>
> 5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.

See generally Butt v Khan CA Civil Appeal 40 of 1977; Southern Engineering Company Limited v Musingi Mutia, C A Civil Appeal 46 of 1983, Nairobi; Idi Ayub Omari Shabani &Yusuf Juma v City Council of Nairobi & Daniel Nachela Kahungu, CA Civil Appeal 52 of 1984 Hancox and Nyarangi, JJ A and Platt, Ag JA March 6, 1985.

Bearing those principles in mind and applying them to the sums awarded by Mr Justice Schofield it is clear that he did not err in his award of special damages and refusal to award any sum for the loss of salary for six months and loss of expectancy of life. There was no appeal from these matters.

He was right to find on the strength of the employers letter that Olenja would not be promoted because of his injuries which meant he had lost something called his earning power which was to be considered as part of the general damages (though he did not in the end make any separate award for it). This court was not asked to remedy that deficiency.

When it came to the sum of Kshs 450,000.00 for pain, suffering and loss of amenities it is clear that it is excessive and must be reduced. Account was not taken, it seems, of the remoteness from the injuries caused by the accident of the infection of the kidneys and of the fracture of the right thigh bone. They were post hoc and not propter hoc the events of that accident. The recurring and virulent infections probably had their origins in different causes which we need not specify. Set them aside as not being due to Jabane’s negligent driving, and then Olenja’s injuries, treatment and residual conditions in March 1985, were near enough those of Burbridge in October 1985 to warrant a similar award under this

heading. It would have to be increased to take account of the fall in the value of money in the last eleven years. The appropriate sum should have been Kshs 352,000.00 and the learned judge's one of the Kshs 450,000.00 must be reduced to that sum.

The learned judge chose the correct multiplicand and multiplier for loss of future earnings. He did not, as Mr Wasuna said, take into account his reduced pension on early retirement and the opportunity to invest part of it. Jabane's advocates did not complain of this at the trial or in the appeal. There was no evidence on either matter. This court should not 'tinker' with this part of the award for general damages in these circumstances so it will remain unscathed at Kshs 366,000.00.

So far as the issue of liability is concerned I agree with the result reached by Hancox, JA , and that Jabane and Olenja were negligent in the ration of 90% and 10% respectively.

And when it comes to costs the proposals of Hancox, JA are, in my judgment, appropriate. Likewise the refusal of a certificate for two advocates.

Nyarangi, JA agrees. Therefore the orders of this court are that the appeal is allowed in part, the finding of the trial judge of one hundred per cent liability on the part of Jabane is set aside and one of ninety per cent substituted, the finding of the judge of no contributory negligence by Olenja is set aside and one of ten per cent substituted, the award of Kshs 786,600.00 general damages reduced to Kshs 688,000.00 and, allowing for ten per cent contributory negligence, to Kshs 619,200.00, the award of special damages, interest and costs in the High Court is confirmed, sixty per cent of his costs of this appeal are to be paid by Jabane to Olenja and the application for a certificate for two advocates is rejected. The advocates of the parties may by consent adjust the figures in these judgments if they are correct. Orders accordingly

Dated at Kisumu this 2nd day of September, 1986.

AA Kneller

Judge of Appeal

REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

(Coram: Kneller, Hancox and Nyarangi, JJ A)

CIVIL APPEAL NO 2 OF 1986

BETWEEN

MOHAMED MAHMOUD JABANE …….....……..……. APPELLANT

AND

HIGHSTONE BUTTY TONGOI OLENJA …….. RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Kisumu, (Schofield J)

dated December 13, 1984 and March 22, 1985
In
Civil Case No 60 of 1980)

JUDGMENT OF HANCOX, JA

The respondent who was at the material time a Postal Officer with the Kenya Posts & Telecommunications Corporation, and is still employed by them, was driving his Renault Saloon KJM 646 along the Maseno Luanda Road in the direction of Luanda when it collided with a tanker lorry No KQL 465, as a result of which the Renault was written off as a total loss, and the respondent received moderately severe injuries, the most serious of which was to his right leg.

The accident occurred at about 7.30 pm on May 21, 1978. The Renault had just passed a police road block at Maseno and was on a downhill slope at the time of the impact, with the consequence that the lorry was coming uphill in the opposite direction. The respondent said in evidence that the tanker encroached over to his side of the road by about two feet over the middle yellow line. Its lights were full on, and though the respondent did not specifically say so, his front seat passenger, Wycliff Job Ananda, (PW 2), said that he was dazzled by its lights so that he could not see properly. Both witnesses said that the Renault swerved to its left in an attempt to avoid a collision but the passenger added that the respondent came back on to the road before the collision occurred.

The driver of the tanker, Awes Abdikadir Osiman, was not called in evidence, though he was a defendant to the action in the High Court, with the result that the only witness as to fact (and the only witness apart from the employer, Mohamed Jabane, who was also first defendant and is currently the appellant in this appeal) was the turn boy Said Mohamed Hirs. He gave a directly opposing account of how the collision occurred but the learned judge disbelieved him, found that the tanker had encroached over to the respondent's side of the road and answered the agreed issue as to negligence and vicarious liability in favour of the respondent. He expressly found that the respondent was not guilty of any contributory negligence. He went on to award the respondent Kshs 29,320.00 as special damages, and a total of Kshs 786,600.00 by way of general damages, made up as follows:-

(i) 450,000.00 for pain suffering and lose of the amenities of life.

(ii) Kshs 336,600.00 for loss of furure earnings

The second figure was arrived at by an assumption of early retirement, leading to the use of a multiplier of 10 years or 120 months, and a multiplicand of Kshs 2,805.00 per month, being the respondent's earnings at the date of the hearing.

The appellant has attacked all these findings on his appeal to this court. As regards the judge's findings of fact as to the cause of the accident, Mr Dhanji, who led the case for the appellant, cited to us numerous authorities for his proposition that a court on appeal is not bound to follow the trial judge's findings of fact if it is satisfactorily shown that he had failed to take into account circumstances or probabilities which exist, or if he has made a finding as regards the demeanour of the witnesses which is inconsistent with the totality of the evidence.

In support of this proposition our attention was invited to Saif v Sholan (1955) 22 EACA 270, Price v Kesall [1957] EA 752, Selle v Associated Motor Boat Company [1968] EA 123 and Williamson Diamonds Ltd v Brown [1970] EA 1. I accept this proposition, so far as it goes, and that this court does have the power to examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand – see Peter v Sunday Post [1958] EA 249. More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who has had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu [1983] 2 KCA 100 at p 118 and Mwanasokoni v Kenya Bus Services and Others Civil Appeal 35 of 1985.

More specifically Mr Dhanji referred us to Mute v Elikana [1975] EA 201, in which the Court of Appeal for East Africa held that where particulars of negligence are pleaded it is incumbent on the trial court to make its own findings on the issues so raised from the material available on record. In the instant case the driver of the tanker was said in the plaint to have been negligent is seven different ways, sub-paragraphed as (a) to (g) of paragraph 5 of the plaint. Of these at least five are, in my experience, stereotyped allegations of negligence which can be found in any standard text book on pleadings and in the pleadings in most of the accident actions brought in any of the countries, in which Kenya is one, which apply the common law. It would be a waste of time if every trial court was obliged to weigh and evaluate the evidence, arrive at its findings of fact, and then go on to deal minutely with every standard allegation of negligence which has been lifted out of a book on precedents.

However, there are two allegations in the particulars of negligence which are special to the facts of this case, namely

(e) failing to dim his (the tanker driver's) lights when it was proper to do so

and (f) driving on to the wrong side of the road.

Mr. Dhanji took us through parts of the turnboy's evidence in which he said that the small vehicle (the Renault) was over on to their side of the road, that it came at a very high speed and banged into the tanker, bursting two of the lorry's tyres and one on the trailer. He suggested that that was in fact corroborative of Wycliff's evidence and that the judge had failed to appreciate this, which led, in part at least, to his finding that the tanker driver was wholly responsible for the accident.

I cannot see that this is so. To my mind the two accounts showed a direct conflict on the facts. In my opinion the learned judge carefully evaluated both versions of how the collision occurred and it has not been shown that he took into account facts or factors which he should not have taken into account, or that he failed to take into account matters of which he should have taken account, that he misapprehended the effect of the evidence, or that he demonstrably acted on wrong principles in making his findings. In my judgment he was entitled to find, as he did, (notwithstanding that neither side was able to call an independent witness) that the tanker had encroached two feet over the midline on to the respondent's side of the road, that the respondent's speed cannot have been very high bearing in mind the road block which he had just encountered, and that the tanker's head lights were full on and not dipped. He thus answered in specie the only allegations of negligence which were really particular to this case, as opposed to the generalities to which I have just referred.

I would therefore uphold to the learned judge's findings which I have just set out and on which, in my view, he was perfectly right to reach the conclusions that he did.

The only question remaining in my mind as regards liability is what was the true effect of those findings? Should the judge have found the tanker driver one hundred per cent to blame or should he have found that the respondents bore some measure of responsibility for the accident? In other words, within the context of those findings, was there yet room for a valid finding of contributory negligence? Mr Dhanji suggested that the respondent must have been going very fast in order to cause the tankers tyres to burst, and submitted that he was 75% to blame. At the very least, he said, this court should hold that each driver bore an equal share of responsibility and that liability should be apportioned on a fifty per cent basis.

I am not prepared to go that far, neither am I prepared to assume that the road was the normal width of a truck road, namely twenty-two feet, so that, on the respondent's half, there would still have been approximately 9 feet left for the Renault, being a car of only 4 to 5 feet in width, to pass. There was not a shred of evidence to support this suggestion. Moreover, as Mr Wasuna said when he was addressing us on behalf of the respondent, the appellant's advocates, having been loud in their complaints about the respondent's pleading, should themselves have complied with the Civil Procedure Rules. They should in their defence have averred in the alternative that if, contrary to their contention, the tanker did go on to its wrongside, then the respondent had failed to take all due measures to prevent the accident and any necessary avoiding action. Mr Wasuna, submitted that it was sufficient if the respondent had taken the

most prudent action in all the circumstances. I think that is a correct proposition.

I have borne all this in mind. After careful consideration of Mr Wasuna's submission on this aspect. I do not think the appellant was precluded on the pleadings from alleging and proving contributory negligence if he could. In my judgment it was established that the tanker came over on to the Renault's side of the road. On the evidence the respondent had about one minute in which to avoid the accident. True he swerved to his left, but he also appears to have come back to his right. This is consistent with the respondent (even though he did not say so) being dazzled by the lights of the tanker, which was a much larger and taller vehicle, as Wycliff said that he (Wycliff) was. In those circumstances it was incumbent on the respondent to slow down even further from the 40 KPH he said he was doing, and to move more than a little to his left so as to avoid the tanker. The fact that he did not take sufficient avoiding action is evidenced by the fact of the Renault coming into contact with the tanker and its trailer. I do not consider it is consistent with the proved facts to say that the respondent was entirely free from blame. I would, on the evidence, hold that the respondent was contributory negligent to the degree of ten per cent. To that extent only would I allow the appeal as regards liability.

Turning now to the quantum of damages, I have had the advantage of reading in draft the judgment of Kneller, JA. I entirely agree with it and with the figure he proposes to compensate the respondent for all his pain, suffering and loss of the amenities of life. I also agree the judge was perfectly right to award the sum he did for loss of future earnings.

As regards costs, each side has had had a measure of success, but the preponderance of success on this appeal has been with the appellant. I would award him sixty per cent of his costs of this appeal, but I would not, having considered the matter, certify for two counsel. As the respondent has, in the High Court absolutely, and here substantially, succeeded on the question of liability and on loss of earnings, I would not interfere with the learned judge's order that the appellant should pay the costs of High Court proceedings.

Dated at Kisumu this 2nd day of September, 1986.

ARW Hancox

Judge of Appeal

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(Coram: Kneller, Hancox and Nyarangi, JJ A)

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(Appeal from a judgment and decree of the High Court of Kenya at Kisumu, (Schofield J)

dated December 13, 1984 and March 22, 1985
In
Civil Case No 60 of 1980)

JUDGMENT OF NYARANGI, J A

I entirely agree with everything that has fallen from Kneller and Hancox, JJA. I need not rehearse the facts, but out of deference to the clear arguments on both sides in the appeal I add one paragraph.

At this juncture it is apposite to recall that on an appeal against quantum, although the damages awarded by a trial court say, in the opinion of an appellate court, be excessive, the appellate court would not interfere unless there is evidence that the damages have been assessed on wrong grounds or are unreasonable: Witu v Peake [1913 / 1914] 5 EALR 17 and Butt v Khan Civil Appeal 40 of 1977. See also H West & Sons Ltd v Shephard [1964] AC 326 at p 353 and Idi Ayub Omari v City Council of Nairobi & Daniel N Kahungu, Civil Appeal No 52 of 1984. It was an error for the trial judge to take into account the subsequent infection of the kidneys and the fracture in right thigh bone.

There was credible evidence that at the material time the tanker was being driven two feet beyond the yellow line and therefore on its wrong side, that the respondent did stop at the road block and that the respondent, in the circumstances, could not have been driving at too high a speed and therefore was in a position to avoid the accident or much of it.

The appellant was highly regarded by his employer because on March 13, 1985 in reply to a letter from the appellant's advocates, the employer stated,

> "Due to long hospitalization … he has missed all the interviews for promotion "

I understand the employer to have been said but for illness, the appellant would have been interviewed as often as necessary and was bound subsequently to be promoted. On that score the appellant had lost his capability for which the appellant was entitled to appropriate compensation. As Kneller, JA states, we were not invited to consider an award for the particular loss.

I agree with the order proposed on costs.

Date at Kisumu this 2nd day of September, 1986.

JO Nyarangi

Judge of Appeal

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

DEPUTY REGISTRAR