REPUBLIC OF KENYA

The Administrator, HH The Aga Khan Platinum Jubilee Hospital v Munyambu

Court of Appeal, at Nairobi

Kneller, Hancox JJA & Chesoni Ag. JA

Civil Appeal No 18 of 1983
(Appeal from the High Court at Nairobi, Nyarangi J)

<u>Cases</u>

Khoo Sit Hah v Lain Ton (1912) AC, 323

Davies v Powell Duffryn Associated Collieries (1942) AC 601

Ladd v Marshall (1954) 1 WLR, 1489

Hatcher v Black (1954) Times July 2nd

Abdul Hameed Saif v Ali Mohamed Sholan (1955) 22 EACA, 270

Hunter v Harley (1955) S.C. 200

Karmali Tarmohammed v Lakhani & Co. (1958) EA, 567

Llanga v Manyoka (1961) EA, 105

Bashir v Commissioner of Income Tax (1961) EA, 508

Lukenyara Ranching Ltd. v Kavoloto (1970) EA, 414

Skone v Skone (1971) I WLR, 812

Dick v Koinange (1973) EA, 165

Rahman v Kirkless Aria Health Authority (1980) 3 AER 610

Joyce v Yeomans (1981) 1 W. L. R. 549

Ephantus Mwangi v Duncan Mwangi Wambugu, Civil Appeal 77 of 1982

Mzee Wanjie & Others v A.K. Saikwa and others, Civil Appeal 72 of 1982

Bunde Murube v Joseph Onkoba Nyamuro, Civil Appeal 8 of 1983

Linton v Ministry of Defence The Times November 4, 1983

Cousins v Dzosens, Law Society's Gazette, October 18, 1984

B.N. Georgiadis and R. Gaya for the Appellant

S. C. Gautama and M.T.A. Malik for the Respondent

February 22, 1985,

Kneller JA delivered the following Judgment.

Busan Munyambu, a security officer at Kenya Breweries Limited at Ruaraka, sued the administrator, as chief executive, of H.H. The Aga Khan's Platinum Jubilee Hospital for Kshs. 40,674.00 special damages, general damages, costs and interest in his plaint of March 27, 1979.

He alleged members of the hospital staff so negligently and unskilfully treated him while he was under care from October 12, 1975 to March 31, 1976 (five and a half months) that his condition was aggravated by them to such an extent that he had been under constant medical treatment ever since and that he has never fully recovered against the hospital's Consultants, doctors and physiotherapists.

The administrator's written statement of defence of August 8, 1979 was a denial of Munyambu's allegations of negligence and claims for loss of damage and, in the alternative, a plea that his condition and disability were inevitable and unavoidable taking into account his injuries and his condition when he was admitted to the hospital.

On February 23, 1982 Mr. Justice Nyarangi found that Munyambu had proved the administrator liable in negligence and on March 9, 1982 he awarded Munyambu Kshs. 78,147.00 special damages and Kshs. 800,000.00 general damages with costs.

He did not specify any rates of interest on any sum, and none was claimed in the plaint or during the trial, but the decree, although silent on the rate and period of interest on the costs, stipulates that interest at 8% from May 18, 1979 to March 9, 1982 on the special damages amounted to Kshs. 19,385.38 and that it would run at 12% a year on the general damages from March 10, 1982 until payment in full. He could have given interest on the costs at any rate not exceeding six per cent per annum. Section 27(2) Civil Procedure Act.

The administrator now appeals to this court against the learned judge's finding on liability and his award of general damages claiming that the latter was manifestly excessive.

And Munyambu cross-appeals against the award of those damages describing it as manifestly low.

So the issues in this appeal were –

> (*1) did Mr. Justice Nyarangi err when he found the hospital staff were negligent?*
>
> *(2) Was the general damages award manifestly excessive?*
>
> *(3) Was it manifestly low?*

Munyambu, aged forty-nine, was admitted to this hospital at about 1.00 a.m. on October 12, 1975 after a traffic accident. He was semi-conscious and suffering from pain down the right side of his head and face and in his right hand and right leg. His pulse and blood pressure were normal. There was a 5" long oval mangled wound on the right side of the top of his head and he had 1" lacerations on his right jaw. The left upper part of his chest was sore and there was a very small laceration down on the left lower part of it. He had another small lacerated wound on his left thumb. His right fore-arm was deformed and swollen. His

right leg twisted inwards and bent so that it was shorter than his left.

X-rays revealed his skull was not fractured, the outer and inner bones of his right forearm were splintered, his right first, second and third ribs were fractured, in his pelvis the right hip joint was dislocated at the rear and the cup-shaped socket in which rests the head of the femur or thigh bone was fractured and so was the bone that lies in front of the pelvis and protects the bladder.

The hospital’s case was that Dr Desai, the hospital’s senior surgical registrar, sutured Munyambu’s lacerations, and tried to put his right femur into its socket but without success on October 12. Mr Suleman, the hospital’s Consultant Orthopedic Surgeon, tried his hand on the right hip joint on October 13 and fared no better so he operated on it on October 15. When he was doing so he discovered that Munyambu’s sciatic nerve was injured in the accident. He put the femur back into position and the leg and skin on traction so Munyambu was immobile on his back and his right leg plastered and rigid.

He was discovered to be sweating profusely and in a state of shock on October 19. Tests on his urine revealed he had an alarming increase in sugar and acetone in it which the Consultant Physician Dr. Mwinze confirmed was diabetes and treated him for it.

X-rays of Munyambu’s right forearm on October 30 revealed the manipulation had failed so on November 5, Mr. Suleman operated on it. He put a plate in the radius and a pin through the ulna.

When Munyambu complained on November 12, that he had a pain in his sole under his right heel, Mr. Suleman removed the traction apparatus and plaster and discovered that the heel skin was not healthy. He also discovered that Munyambu could not raise the front part of his right foot. He had what is known as a drop-foot. Physiotherapy was the remedy and the hospital supplied it.

All along, it was assumed that the hospital’s daily routine of checking Munyambu at least twice if not four times for pressure or bed sores was observed. This was necessary for all patients, and more especially those who were cast on their backs with one or more immovable limbs like Munyambu. Nevertheless, Munyambu’s right heel broke out in such a sore and Mr. Suleman was told it had on November 17. This was also treated by the staff.

Munyambu was up and about on crutches on November 26. Mr Suleman devised a splint to correct the right foot drop on December 21. He removed the plaster from Munyambu’s right forearm at the end of the first week in January, 1976 and sent him home one week later. He was still on crutches and he still had this sore on his right heel.

Thereafter Munyambu was supposed to return to the hospital’s out-patient clinic for physiotherapy for his right hand, forearm, hip and foot. The crutches were to take some of his weight off his feet.

Mr. Suleman saw him on January 28 in the clinic and March 3 in his own clinic and recommended that Munyambu should continue with is physiotherapy. He also advised him to have one more operation (his sixth), namely, a skin graft to seal the sore. Munyambu declined to have that done. Mr. Suleman could not remember if Munyambu had diabetes or not then. He did not see Munyambu again.

It was (to Dr. Robinson and then?) to Mr. Beecher, a Consultant Orthopedic Surgeon at the Nairobi Hospital, that Munyambu went at the end of March 1976 because he was dissatisfied withMr. Suleman and the Aga Khan Platinum Jubilee Hospital. Mr. Beecher listened to his medical history, examined and X-rayed him. He discovered that the plate and screw in the right forearm need refixing, his right leg was shorter than his left, he still could not raise the front of it, he had this pressure sore on its sole and the right sciatic nerve was still partly paralysed. Mr. Beecher decided Munyambu needd an artificial hip joint and the sooner the better but that sore was grave hazard since it was a possible source of infection. He sent Munyambu home, still on crutches, to wait for the sore to heel which it did by September 1976.

Munyambu’s subsequent medical history was the following. Mr. Beecher tried to put in the artificial hip joint in September, 1976 but he could not manage to do so, because there was some difficulty with the

anaesthetic. He succeeded in doing so three weeks later. A year later part of it was cast off from the pelvis so he had to reinsert it. Munyambu then refractured his right forearm and broke the plate in it in December 1977 so Mr. Beecher operated on it and put in a new stronger plate which he removed in May 1978. But the new hip joint was loose again by September 1978. Mr Beecher packed Munyambu off to Enfield in England for surgery on it and back again in April 1979 to have it reinforced.

Thus, by September 1976, Munyambu's sore had healed, by May 1978 his right forearm had mended and by, say, June 1979 he had an artificial hip joint which was reasonably effective.

Mr Beecher's assessment of Munyambu's disability was between 35% to 40% because he had a very marked limp and relied on a walking stick. There would be no more progress after this.

Munyambu's testimony revealed he was injured when he was off duty and driving his volkswagen Kombi along the Nairobi Mombasa main road towards his home town Machakos. It collided at night on October 12, 1975 with a Ford Taunus driven by Chimanlal Jivraj Shah of Tigoni Stores Limited.

He sued Shah and the stores for their negligence in the High Court claiming Kshs. 38,550.70 special damages for his medical expenses and the Kombi which was a writeoff. Shah had been convicted on March 16, 1977 of driving dangerously the Taunus. The action was settled by December 5, 1978 according to a letter of that date in the court file signed by the advocates for each side. See Nairobi High Court Civil Suit 2477 of 1977. The settlement sum was Kshs. 400,000.00 and, presumably, it covered the claim for special damages. According to the particulars of those special damages they included the fees of Mr Suleman, Dr Mwinzi, Dr Robinson, Mr Beecher and the anaesthetist, Dr Flowerdew, and the expenses he incurred in both hospitals. The last claim in the particulars is dated November 2, 1977.

So the special damages claimed and allowed in the action which is the subject of this appeal are for medical and surgical expenses incurred in England and for return flights between the two countries between December 1978 and June 1979.

Munyambu alleged that those expenses, his pain and suffering from October 12, 1975 to the trial and his loss of amenities and future promotion in the Kenya Breweries was due to the hospital's negligent and inadequate nursing care because it led to this sore on his right foot. The hospital's defence was that the sore was the consequence of the accident which smashed the hip joint and injured the sciatic nerve, his diabetes and the need for his right hip and leg to be kept rigidly immobilized.

Munyambu confessed to being a (moderate) beer drinker, having ' a big tummy' and weighing 14 ¼ stone before the accident, but he no longer indulged in alcohol, had lost his paunch and weighed 10 stone when he left the hospital. He had never had diabetes, so far as he knew, before October 1975. He was told by a nurse he had it on October 16 and Dr. Mwinzi prescribed injections, eighteen tablets a day (9 in the morning and 9 in the evening) and a diet free of fat, sugar and starch which he was told had cleared it up by November 10.

There were only two Indian and one African trainee nurses for the ward and they ignored him as much as they could. He was left unbathed for hours (and once for two days) and his urine bottle was left unemptied for too long. They were always darting away to classes.

He was told by a male nurse to raise his left side off the bed from time to time which he did. No-one rubbed or massaged the parts of his body which were in contact with the bed. No-one inspected his leg and he lost all feeling in it soon after it was immobilized. Once, when he lifted his left leg off the bed, he heard a noise in (right?) hip. He mentioned this to Dr. Katharu, a house doctor, but he told him to 'shut up'. The young male physiotherapist visited him only twice and then only touched his fingers and toes. In all, Munyambu said, his treatment was inhuman.

Mr. Beecher had no criticism of the treatment Munyambu had for his lacerations and ribs. He believed that the head of the femur was not destroyed or damaged in the accident and that if the sciatic nerve was damaged it was uncommon in a hip dislocation. Now this caused the foot drop and should have been

noticed in the first examination Munyambu had on admission to the hospital or very soon afterwards in an X-ray. It was more probably damaged in the hospital and went undiscovered until X-rayed the hip in March 1976. It ought to have been X-rayed in the hospital.

He was sure Munyambu never had diabetes and to confirm it he had his blood and urine tested by the Department of Pathology at Nairobi Hospital and Laboratory of Clinical Medicine in the middle of January 1980 and the reports revealed he was correct. If he did not have it then, by definition, he never had it. Any diagnosis of diabetes was incorrect and treatment for it was wrong. The hospital's record of sugar in the urine would be reflecting the glucose in the intravenous fluids Munyambu had and acetone would be due to his metabolizing food stores.

Pressure sores were preventable and this one on Munyambu's foot could be indicative of inadequate and unskilled nursing.

This particular sore, in the opinion of Mr Beecher, led to the delay in fitting the artificial hip joint, and because Munyambu had to sag onto and move along those crutches so the bones round that joint could not and did not "stand up" to it. Thus the earlier operations were unsuccessful and the later ones were necessary because of this sore.

Gulsham Lalani, the hospital's matron, and Martha Ann Murage, the ward sister, knew the nursing routine that saved patients from such sores and were certain it had been followed by the nurses. Mr Suleman had no complaint to make about the care of Munyambu in the ward. It was adequate. The absence of any sores elsewhere underlined this.

Mr Suleman's view was that Munyambu's diabetes was latent and manifested itself under stress due to shock of the impact of the accident. This sort of diabetes would clear-up with treatment and did so. It was true that a glucose drip would raise by a few milligrams the sugar level in Munyambu's blood stream but it would not overflow into his urine nor precipitate acetone. Right through, then, Mr Beecher was saying that Munyambu was treated wrongly by Mr. Suleman and by the nurses and, therefore, the hospital. Munyambu should have had his hip X-rayed almost on arrival and when the plaster was removed, the Desai manipulation and or Suleman operation should have been successful, the joint should not have slipped out or broken apart again and no sore on the heel should have developed. Mr Suleman, Matron Lalani and sister Murage claimed they did their best, it was adequate and the sore was unavoidable and inevitable.

Lord Scarman in his speech in the House of Lords in <u>Maynard v. West Midlands Regional Health Authority</u> 1983 The Times May 9 said:

> ***"Differences of opinion and practise exists, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgement. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence.***

If there are two respectable and responsible schools of medical thought holding different or opposing views of what is or is not negligent in the circumstances of the case the trial judge ought not to choose between them.

The House approved of Lord Clyde's test in Hunter v. Harley 1955 SC 200:

> ***"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other men……… The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to have been guilty of such failure as no doctor of ordinary skill would be guilty of it acting with ordinary care."***

This is related to doctors but, in my respectful view, it is also the right test to apply to the diagnosis and treatment on the part of surgeons, anaesthetists and nurses.

Mr Justice Nyarangi believed the evidence of Munyambu and Mr. Beecher but not that of Mr Suleman (or by implication, the matron, and ward sister). He found Mr. Beecher avoided extreme and absolute position and his evidence appeared to be well founded whereas Mr. Suleman was not a sufficiently independent witness for he was too anxious to shield the hospital staff.

So he found the nursing care was negligent and inadequate and it led to Munyambu's sore on his right heel. This caused Munyambu to endure pain and worry which were both increased by the fact it delayed the operation to insert the aritificial hip joint by six months. In short, the learned judge said, this delay was the direct cause of the unsuccessful operations in England.

He could find no overlapping or duplication in the special damages claim in the earlier action and it was against different defendants. He would ignore it though he would keep it in mind so as not to overcompensate Munyambu in the one with which he was dealing.

Turning to that he recalled the pain and suffering Munyambu had had from mid October 1975 his loss of amenities and probable promotion, the misery he was to endure until his death and the effect of inflation and devaluation and then selected Kshs. 800,000.00 as an appropriate award for general damages.

The impression that the learned judge gained of these witnesses was based partly on their demeanour and my reading of the record does not suggest it was inconsistent with the evidence he recorded. It was also based partly on that evidence itself.

He was, therefore, in my judgement, correct when he found Munyambu proved that the staff of the hospital were negligent in nursing him and that this led to his having this sore on his heel. It might have been different if the hospital's male and female nurses and physiotherapist who treated him had given evidence. Dr. Katharu and Dr. Mwinzi were also not called. So what was there to offset the direct evidence of Munyambu which was believed on this issue? That of the matron and ward sister would not suffice, as the learned judge remarked, for it is one thing to devise a routine but quite another thing to see it so observed and that is where so many public bodies fail in their duty.

The fact that the hospital's consultant physician was not called meant that the learned judge had to choose between the evidence of Mr Beecher and Mr Suleman and their charts or reports as to whether Munyambu had had diabetes in the hospital and, if he had, did it, among other things, make this sore unavoidable and inevitable? Neither Mr Beecher nor Mr Suleman is an expert in such matters, as each disarmingly admitted, but the judge believed Mr Beecher and so found Munyambu did not have diabetes then and never had it. Again, that is, in my opinion, an unassailable finding of fact. The accident injury to the right leg and the need to immobilize it did not make a sore on the heel inevitable or unavoidable and the hospital staff and Mr Suleman did not attempt to say so.

I would, therefore, dismiss the hospital's appeal on liability for Mr Justice Nyarangi did not err when he found the hospital staff negligent. That answers the first issue. See generally: Joyce v. Yeomans, (1981) 1 WLR 549 (CA).

He went on, however, to accept Mr. Beecher's opinion that the sore delayed his operation on Munyambu by six months and that must be right.

He also accepted his view that this delay was the reason for the failure of his (Mr. Beecher's) operations and the first done in England and consequent need for a second one there with all their attendant expenses. This, with all due respect to Mr Beecher, and the learned judge, is probably incorrect. It was by no means clear why Mr Beecher's three operations and the English surgeon's second one on the joint were necessary. Evidence from the English surgeon might have dispelled the doubt. And was it necessary to have it done in England or could it have been performed by a third Orthopedic Consultant here?

Mr Beecher said his English counterparts had more experience which may be so but that the operation would probably not be accomplished successfully here was not established. I am not bound to accept the learned judge's finding of fact on this point and I fear I do not do so because, with great respect I consider that he failed to take account of these particular lacunae and alternatives which were material. See Khoo Sit Hah v. Lain Thean Ton, [1912] AC 323 (PC); Abdul Hameed Saif v. Ali Geoffrey Nginyo Ngatia v. Duncan Mwangi Wambugu Civil Appeal 77 of 1982 March 22 1984 (unreported).

Add to this the fact that the learned judge found that the hospital nursing staff's negligence led to a further eleven operations when, in fact, the evidence points to seven at the most on Munyambu's hip and only five after the sore appeared and even those all took place when the sore had healed and it will be seen that the award of Kshs. 800,000.00 general damages was unmerited.

The upshot is that general damages of Kshs. 800,000.00 for the consequence of the negligent nursing which was extra pain, delay and worry, and not eleven operations and all their expenses, was a manifestly excessive award which answers the second issue, in my judgement. And it should be reduced to Kshs. 100,000.00. The special damages are not related to that negligence and that award will have to be set aside.

The last issue in the appeal was whether or not the award for general damages was inordinately low? At the trial Munyambu's advocate submitted that Kshs. 1,000,000.00 was the appropriate sum to award and the hospital's advocate properly left it to the court. Another advocate for Munyambu submitted in the appeal Kshs. 4,000.00 would do. Before the appeal began Munyambu's advocate applied by motion on notice, which was filed on November 9, 1983 for leave to adduce additional evidence in the form of a medical report by Mr Beecher dated May 24, 1983 because it confirms further aggravation of Munyambu's disabilities since the trial. The motion was supported by an affidavit of his advocate explaining that he arranged for Munyambu to be examined again by Mr Beecher on May 24, 1983 and when he read his report he advised Munyambu to cross-appeal on the quantum of damages which he did and attached to it a copy of the report. It was opposed on the ground that the rules of this court governing the reception of evidence in an appeal had not been followed, the motion was filed and served the previous afternoon, the report added little to the evidence before Mr. Justice Nyarangi and did not present any different picture. Against this was the plea that the latest account of Munyambu's condition was in the report, this court should take it into account and the interests of justice required this to be done.

The application was refused and the reasons for doing this were reserved. On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction this court has power, in its discretion, for sufficient reason, to take additional evidence. Rule 29(1) (b) Court of Appeal Rules

Munyambu's advocate did not comply with the rule of practise of this court that an affidavit in support of his application should be filed attesting that the evidence it is sought to call was not available at the trial, it is relevant to the issue in the appeal, it is credible, in the sense that it is well capable of belief and, in all the circumstances, in the interests of justice the application should be allowed. He did not file a proof of the evidence Mr Beecher would give if he were allowed to do so but instead filed a photocopy of the letter Mr Beecher sent to him on May 24, 1983. See e.g. Karmali Tarmohammed & Lakhani & Co., [1958] EA 567, 573 C (CA-U).

In a civil appeal, except on grounds of fraud or surprise, generally leave will only be granted if the evidence could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible, though it need not be incontrovertible. Karmali Tarmohammed & Anr v. Lakhani & Co., (ibid) 574E to 575D. This applies to oral and documentary evidence. Bashir v. Commissioner of Income Tax, (1961) EA 508 (CA-K). See also Ladd v. Marshall, [1954] 1 WLR1489 (CA) Skone v. Skone, [1971] 1 WLR 812 (HL) and Linton v. Ministry of Defence The Times November 4, 1983.

It will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and to refuse the application would affront commonsense or a sense of justice. Dick v. Koinange, [1973] EA 165 (CA-K).

All along, however the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage. Thus, in Dick v. Koinange (ibid) the reports of five medical experts were before the court but it was not realised at the time of the decision of the superior court that appellant's injured leg would have to be amputated and so leave was given to produce the fresh evidence.

Here, leaving aside the failure of Mr.Malik to follow the practice of this court for such applications, it could be said that Mr Beecher's re-examination of the respondent took place after the decision of the High Court was delivered so it was not available at the trial. It would have been relevant to the issues of whether the awards of damages was too high or too low. It was capable of belief. The pre-conditions for the exercise of the discretion of the Court were present. The report did, however, reveal that subsequent events falsified no assumption common to both sides and refusing the application did not affront commonsense or a sense of justice. Accordingly, there were no exceptional circumstances justifying receiving it and Mr. Beecher's evidence in the appeal. An award of general damages is limited to a once for all sum fixed by the trial Court and parties may not have the issue reactivated from time to time save in exceptional circumstances. Those were, in my view the reasons for repelling Munyambu's application.

So, in my opinion, the answer to the question of whether or not the award of Kshs. 800,000.00 was too low is, in the the light of the earlier part of this judgement, clearly "no".

I recall that it is a grave move for an appeal court to interfere with an award of damages. Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd. [1942] AC 601, 616, 617 (HL) declared it

> ***"…….should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."***

And it is because in my respectful view, the learned judge misapprehended the facts that I have ventured to suggest that it would be right to interfere with his award and come down heavily against the sum attacked.

So far as the memorandum of appeal is concerned the grounds relating to liability, in my view, all fail but those relating to the award of special and general damages succeed. The cross appeal fails.

For these reasons I would dismiss the appeal from Mr Justice Nyarangi's finding that the hospital was liable, allow it from the award of special damages and interest which must be set aside in part from the award of Kshs. 800,000.00 general damages which should be reduced to Kshs. 100,000.00 with interest thereon from March 9, 1982 until payment in full and I would dismiss the cross-appeal.

Costs normally follow the event, so the respondent Munyambu should pay the costs of the motion on notice for leave to adduce further evidence and of the cross-appeal, which failed.

The appellant hospital failed on its seven grounds of appeal relating to liability for the pressure sores. It succeeded, in my view, in showing that the operations subsequent to that performed by Mr Beecher in September 1976, were not attributable to the press resores. It followed that it has substantially succeeded in its appeal as regards general damages and wholly succeeded as to its appeal on special damages.

However, in my view, it would be unrealistic to measure the damages which were awarded against the hospital at the trial and the figure that I have now substituted on this appeal, because much of the argument and the time of the court, as is shown in the respective judgments (let alone the memorandum of appeal itself) has been devoted to attacking the learned judge's findings that the hospital was liable for the existence of the pressure sores. That, as has been shown, was an unassailable finding of a primary fact as opposed to inferences drawn from the primary fact.As a result, a great deal of the costs were incurred in this appeal in relation to a finding of an issue which, was not likely to have been over-turned. It was,

indeed, central to liability in the whole case. Therefore, the hospital should not be awarded the same proportion of the costs as the extent to which it has succeeded on the amount of damages because that is not the correct yardstick which I should apply. I feel, accordingly that the hospital should get one third of its costs on the main appeal and I would so order.

It is, in this respect, fortunate for the respondent that the argument on the cross appeal was not of a similar length, for in my view it was wholly untenable.

As Hancox, JA and Chesoni, Ag. JA agree on the issues of liability, the appeal, crossappeal and costs and Hancox, JA agrees on those of the special damages and general damages those are now the orders of the Court.

Hancox JA. The respondent and former plaintiff in the action before the High Court (to whom I shall refer as the plaintiff) was seriously injured in a traffic accident on October 12, 1975. He was and still is a Senior Security officer employed by the Kenya Breweries at Ruaraka. His injuries included a fracture of the right forearm, a fracture of the acetabulum (the socket in which rests the top or head of the thigh bone) and dislocation of the right hip joint. He was admitted to the Aga Khan Hospital that night, X-rays were carried out, his arm set in plaster and that which is called reduction or closed replacement of the hip joint carried out by a registrar at the hospital.

The first operation on the hip was unsuccessful so Mr Suleman, the Consultant Orthopedic Surgeon, carried out the same process on October 13. However, as the joint was again out of socket, (presumable this was the re-dislocation to which Mr Beecher, who was the surgeon called on the plaintiff's behalf, had already referred in his evidence) a further replacement had to be done on October 15, and the plaintiff's hip was then immobilised in a splint from the groin to the foot, with traction of fifteen pounds.

Soon afterwards Mr Suleman found that the plaintiff had also suffered injury to his right sciatic nerve, which had two consequences, first the plaintiff's leg muscles suffered paralysis, which in turn would cause a dropped right foot, and secondly there was a loss of sensation in the areas of the leg and foot supplied by that nerve. The plaintiff was obviously in pain and only half conscious during the early days of his treatment, but he said that while he was in traction a young physiotherapist came and did nothing more than touch his right fingers and toes and ask the plaintiff what was he felt. He did not move the leg.

After some two months a plaintiff said a nurse from the Breweries told him he had a pressure sore on his right heel. Mr Suleman said he had received a report of this on what must have been the November 17, that is to say just over one month after the accident. The sore was actually noticed on that day. As a result he directed that the traction be removed after only four, instead of six, weeks. On the 17th he gave instructions for the sore to be treated and dressed frequently, but about one week after that the plaintiff was observed to be sweating heavily and shocked. As a result of tests his blood sugar level was found to be extremely high and diabetes was consequently suspected. Further tests showed a high level of sugar and acetone in the urine, and, according to Mr Suleman, a consultant Physician, presumably Dr Mwinzi, was called in, and he confirmed the diagnosis of diabetes. The relevance of this was that, if the plaintiff had diabetes, latent or patent, temporary or otherwise, and it was an issue at the trial, the process of healing of the sore would be retarded.

Moreover, it is manifest that, if the plaintiff's right arm was also in plaster he would be to a large extent incapacitated and, even though the plaintiff frequently lifted himself up from the bed his daily condition would need to be monitored carefully so as to see that he did not suffer from such ancillary ailments as pressure sores which, as the Sister in charge of the Men's Surgical Ward, sister Murage, said that Mr. Suleman did not become aware of the pressure sore until the end of December, and when he did find out about it he angrily reprimanded the sisters and nurses for their negligence. The plaintiff said that he frequently had to plead with the student nurses to attend to and bathe him, only to be told they were going to classes. During the period he was in traction no one looked at or lifted his right leg.

After the traction was removed the plaintiff was given physiotherapy treatment and crutches, so that he was presumably more mobile henceforth. He was not, however, discharged from hospital until January

14, 1976 a week after the plaster on his arm was taken off. He visited the hospital as an outpatient until March 3, during which period he still received some treatment for diabetes. He "did not accept" Mr Suleman's suggestion that he should return further for skin grafting on his heel. He then went to see Mr Beecher, who on March 16, 1979 reported, inter alia as follows:-

> ***"In my opinion as a result of inadequate nursing care he "(meaning the plaintiff)" developed a pressure sore on the foot of the paralysed right leg because of the area of anaesthesia caused by the nerve pressure. This was a very long time in healing, which considerably delayed his eventual correct treatment to the extent of some four or five months. I am sure that this delay has had considerable effect on the difficulties and repeated operations that he has had to have since."***

Mr Beecher suggested replacement of the damaged, or, as he put it in evidence, destroyed, right hip joint, with an artificial hip joint. This, however, could not be done, because the pressure sore, which Mr Beecher attributed to negligent and inadequate nursing care in the Aga Khan Hospital, was a potential source of infection. The operation was eventually carried out by Mr Beecher in two parts starting in September 1976.

Despite satisfactory progress this artificial hip joint became loose in September, 1977, necessitating yet another operation, followed by two more to the plaintiff's arm in December, 1977 for the insertion of a stronger steel plate, and in May, 1978 for the removal of that plate. By September, 1978, the hip joint having loosened again, Mr Beecher elt it wise to send the plaintiff to a colleague in England who would, of necessity, have greater experience in dealing with such complications as these. More operations followed in the latter part of 1978 and in 1979, the one in the December 6, 1978, carried out in England by Mr Basil Holal, being for a total right hip replacement. The plaintiff has had, in all, some eleven operations, and still walks with a marked limp and a stick, all found by the learned judge to be due to the initial delay caused by the pressure sore, and by the pressure sore itself, for which he has sued the Hospital, alleging that it was due to negligent and unskilful care and treatment, and lack of proper observations and supervision. The judge awarded Kshs. 78,147.00 as special damages and Kshs. 800,000.00 by way of general damages against the Aga Khan Hospital for negligence, plus interest and costs.

In the meantime the plaintiff had sued for damages in respect of the car accident and the case was settled with a consent order whereby, as I understand the position he received Kshs. 400,000.00 to include his general and special damages claimed, plus interest and costs. One of the questions before the High Court was whether this suit was "concerned" with the other one (High Court Civil Case 2477 of 1977), but, leaving aside some questions that arose as to joinder of the parties, I agree, with the learned judge on this point. I cannot see that the cause of action in that case is in any way similar, or that it impinges upon, the one in this case. The former was negligence arising out of a traffic accident; this is negligence by a hospital. Neither do the special damages in that case, which have been detailed by Kneller JA; appear to have been duplicated by, or to overlap into, those claimed here, but it is suggested by Mr. Georgiadis, that, as a result of the general damages given in this case, there has been an element of double damages.

Although there are further disputed matters as to the events which occurred and how they affected the plaintiff before and since his discharge from the Aga Khan Hospital, I think the foregoing is a fair summary of the primary facts, as they were termed by Lord Scarman in Maynard v. West Midlands Regional Health Authority, the recent report of which Mr. Georgiadis, appearing on behalf of the Administrator of the appellant Hospital, handed to us during his submissions. It is also reported in the Times of May 9, 1983.

Apart from the first ground of appeal, which relates to the alleged wrongful exclusion by the trial judge of the appellant's hospital treatment records (although the Diabetes Charts from October 12 to December 5, 1975 are included in the record of the appeal) grounds 2 to 7 all related to the learned judge's assessment of the evidence and his failure to find certain facts as a result of that evidence. Mr. Georgiadis submitted that there must exist "strong, irrefutable and unambiguous" evidence to support the findings that the learned judge did make, and that the burden resting on the plaintiff was to prove:-

(A) That the Hospital staff were negligent or deficient in their duty of care to the plaintiff

. (B) That negligence, and no other, caused the pressure sore, which would not have happened if due care had been used.

(C) That the pressure could not have occurred without negligence and was inconsistent with due care being exercised. (

D) That the expert evidence called by the plaintiff (in the shape of Mr Beecher) showed <u>ex necessitate</u> that all the operations which the plaintiff underwent to replace or repair his hip joint (which was initially injured as a result of the car accident) were directly related to the pressure sore.

(E) That the delay of 5 to 6 months before Mr Beecher operated caused the further operations and were not inevitable in any event because of the original car accident.

(F) (To which I have already referred) if all the operations are traced to lack of proper nursing care what effect if any did the consent award i <u>Highn Court Civil Case 2477 of 1977</u> have on the quantum of damages, and, if it had any effect, and if (A) to (E) are established, what is the proper quantum of damages?

Mr. Georgiadis then submitted that none of the foregoing had been established and expanded this by a detailed and minute examination of the recorded. In the course of this, Mr Georgiadis referred us to the recent decision in <u>Rahaman v. Kirkless Area Health Authority</u> [1980] 3 ALL ER 610. While it is true that that case concerned medical negligence relating to the alleged wrongful delivery of the plaintiff's stillborn child by Cessarian section, the report is only the appeal against the judge's interlocutory order reversing the Master, who had directed that medical reports be exchanged and that the medical witnesses be limited to one on each side.

I agree with Mr. Gautama, who represents the plaintiff on this appeal, that there is no direct relevance between orders 37 and 38 of the Rules of the Supreme Court, on the context of which that decision was based, and the present case. All that was there stated was that it was an over-simplification to regard a case of medical negligence in the same way as a straightforward action for personal injuries where the facts on which the medical experts give their opinions are to a large extent undisputed. In a case of medical, or in this case which I may refer to as hospital negligence, the history of supervision, diagnosis and treatment from day to day, and even from hour to hour, may well be called into question and have to be the subject of opinions by opposing medical experts. Clearly in such a case an order for mutual exchange in advance of medical reports is inappropriate. Disclosure in such a case is better obtained through discovery of documents and interrogatories.

Mr Gautama, on behalf of the plaintiff, devoted much time in endeavouring to persuade us that the injury to the sciatic nerve was covered by the particulars set out in paragraph 5 of the plaint in this action, so that the hospital were liable for the injury to it; for it will be observed that this is one of the ways in which the memorandum of appeal criticizes the learned judge, for failing to find that the injury to the sciatic nerve was due to the original accident. However, I indicated, and I remain of the view, that by no stretch of the imagination can those particulars be said to cover an injury to the sciatic nerve for which the hospital is responsible. In this connection I still find it difficult to understand Mr Beecher's expressed view that it is uncommon for the sciatic nerve to be damaged at the time of the dislocation was stated to be accompanied by an injury to the sciatic nerve. Mr Suleman said positively in re-examination that the sciatic nerve was injured at the time of the accident, and that the leg was paralysed. Although Mr Beecher advanced the suggestion that it occurred on a re-dislocation of the hip, on my own assessment of the evidence, this being a first appeal, for my part I would take the view that the sciatic nerve injury was caused at the time of the accident and not subsequently. I also find it hard to follow the suggestion now put forward on the plaintiff's behalf that this injury was due to negligent hospital treatment, as opposed to the acts of Mr Suleman and /or the registrar, against neither of whom is any professional negligence alleged, which in itself distinguished these circumstances from those in Maynard's case.I observe also

that if negligence of the surgeon and registrar really represented that which the plaintiff's advisers thought then they had every opportunity to join either or both of those two professional men in the action and did not do so. If, however, it was their contention that the hospital caused the sciatic nerve injury not vicariously, but by lack of proper nursing skill and care, it was incumbent upon them to give proper and reasonably precise particulars of the allegation. Merely to ever in the plaint that the plaintiff's condition was aggravated by negligent and unskilled treatment would not in my opinion cover alleged responsibility for a fresh and separate injury (if that be the case) to the sciatic nerve. Mr Gautama eventually conceded that the plaint could have been drawn with more particularity. As I said I would go further than that. It does not contain any averment as to the sciatic nerve. The only paragraph particularising negligence is paragraph 5, and it refers only to the pressure sore on the plaintiff's foot.

In my judgment then this case as it was presented depended on two relatively simple questions, namely:-

> (***1) Was the pressure sore caused or did it develop due to the inadequate nursing care and therefore the negligence of the staff of the Aga Khan Hospital?***
>
> ***(2) If so, was it sufficiently established that the surgical treatment, pain, suffering, and expense that is said to have occurred thereafter was due to this pressure sore?***

The learned judge's finding was unequivocally in the affirmative to both those essential questions. Mr Gautama strenuously argued that the judge was right in his decision in the instant case. He distinguished the result in Maynard's case, in which the Court of Appeal had reversed the trial judge's findings of negligence against the physician and the surgeon concerned, and the House of Lords upheld that finding. He emphasised that Nyarangi J. had observed the witnesses called at the trial. He had regarded Mr. Suleman as

> ***"much too anxious to help the hospital,"***

and that he was not a sufficiently independent expert witness. By contrast the judge said:

> ***"Mr Beecher's evidence appeared to be well founded and avoided extreme and absolute positions."***

In relation to this aspect of the case Mr Gautama drew our attention to the second page of the report in Maynard's case where a passage from Brandon L J's judgment in Joyce v. Yeoman's [1981] 1 WLR, 549, is cited with approval. The passage reads:-

> ***"There are various aspects of such evidence in respect of which the trial judge can get the 'feeling' of a case in a way in which an appellate court, reading the transcript, cannot. Sometimes expert witnesses display signs of partisanship in a witness box or lack of objectivity. This may or may not be obvious from the transcript, yet it may be quite plain to the trial judge. Sometimes an expert witness may refuse to make what a more wise witness would make, namely, proper concessions to the viewpoint of the other side. Here again this may or may not be apparent from the transcript, although plain to the trial judge. I mention only two aspects of the matter but there are others."***

Lord Scarman, delivering the leading speech continued:-

> ***"These are wise words of warning, but they do not modify Lord Thankerton's statement of principle, nor were they intended to do so. The relevant principle remains, namely that an appellate court, if disposed to come to a different conclusion from the trial judge on the printed evidence, should not do so unless satisfied that the advantage enjoyed by him of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion. But if the appellate court is satisfied that he had not made a proper use of his advantage, the matter will then become at large for the appellate court."***

Thus the limitations upon an appellate court's ability to review findings of fact are severe and well established. In Kenya those limitations have been stated to be:

> ***"A court on appeal will not normally interfere with a finding of fact by the trial court unless it is 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 for instance, Ephantus Mwangi and another v. Duncan Mwangi Wambugu, Civil Appeal 77 or 1982, and Bundi Marube v. Joseph Onkoba Nyamuro, Civil Appeal 8 of 1983).

Both counsel on this appeal referred to the House of Lords decision in Whitehouse v. Jordan [1981] 1 ALL ER 267. That was a case where the negligence of a senior registrar and a professor of obstetrics was in issue as regards the delivery of a baby who suffered brain damage. The importance of that decision is the distinction which it draws between findings as to pure facts and the inferences which are properly to be drawn from those facts. I agree with Mr. Gautama that where the trial judge's decision depends on his impression of the witnesses and on his findings as to the primary facts, then, as Lord Bridge said at page 286 of the report:-

> ***"… In the realm of "(pure)" fact, as the authorities repeatedly emphasise, the advantage which the judge derives from seeing and hearing the witnesses must always be respected by an appellate court"***

However, he continued:-

> ***"At the same time the importance of the part played by those advantages in asssisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."***

Again Lord Fraser said at p.281:-

> "***Apart from her evidence, the important facts are almost entirely inferences from the primary facts, and in determining what inferences should properly be drawn, an appellate court is just as well placed as the trial judge. Accordingly this is a case where the judge's decision on fact is more open to be reassessed by an appellate court that it often is."***

Mr Georgiadis was intent on persuading us that the gravamen of the findings in this case depended almost entirely on inferences drawn from the primary facts, and not on the primary facts themselves which the learned judge had found.

Mr Beecher said that in his opinion the pressure sore was caused by the plaintiff being confined to bed during traction, and, after the traction was removed, because an area of the skin lacked sensation due to the partial paralysis of the sciatic nerve. The statement of defence filed did not in substance deny that the pressure sore developed in the hospital and was caused "by a combination of circumstances" which are then detailed in the rest of the defence. There was therefore ample justification for the learned judge's finding that the pressure sore developed while the plaintiff was in the hospital. That was a finding of a primary fact from which, as I said, an appellate court would be slow to differ. Nor do I seek to differ from it. I agree with it. I agree also with the judge that there was enough evidence for him to find that the nursing staff should have realised that there was a risk of this occurring, given the plaintiff's immobility and loss of sensation in the leg, and that they took no steps either to discover the sore earlier, or by which it would been discovered earlier than it was, and, consequently, to treat it. As Mr Suleman said, this treatment would involve lifting the heel, cleaning it and applying powder, as well as changing the

patient's position as much as possible. Neither, by the same token, did they take any or adequate steps to prevent the sore starting up. Therefore the finding of negligence in relation to the pressure sore itself was in my opinion justified.

Where I differ with the learned judge is as to consequences which flowed from the pressure sore. It is true that there was no independent expert called on the side of the hospital, for, without disrespect, I do not regard Mr Suleman as totally independent in that sense because, as Lord Wilberforce said in Whitehouse v. Jordan, at p. 276.

> ***"It is necessary that expert evidence presented to the court should be, and should be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.***

" In the instant case it cannot be gainsaid that Mr Suleman was the Consultant Orthopedic Surgeon to the hospital and had been so for several years altogether. To that extent, and because he was a witness as to fact, he was not entirely independent in the sense of being divorced from the case.

Mr Beecher said that he had to wait six months until the pressure sore had been treated before carrying out the replacement of the hip joint. The next operation was not because of the pressure sore, or because of the delay in the first operation performed by Mr Beecher due to it. It was because, as Mr Beecher said, the aritificial hip joint had become loose in its attachment to the pelvis. In all the plaintiff said that Mr Beecher performed four operations on him, but no clear details emerge until September 1978, when the hip joint became loose again, and Mr Beecher said:

> ***"At this stage I felt it wiser to send him to a colleague in Britain who had more experience in dealing with the complications of an artificial hip joint because of the vastly greater numbers that are carried out in Britain than here."***

Then, in May, 1979, the next operation occurred because the hip joint had to be further re-inforced, but, to Mr Beecher's knowledge, the plaintiff had had no further trouble since then.

I do not see Mr Beecher's evidence any material providing a basis for saying that either the total of eleven operations, or those performed after September, 1976 were due to the pressure sore itself or to the delay in carrying out Mr Beecher's first operation. In my judgment the judge's inference from the primary facts was in this respect incorrect. I do not see that the necessary nexus has been shown between the pressure sore, for which I agree the hospital is liable, and the operations subsequent to that which Mr Beecher performed in September, 1976. I do not consider the necessary clement of causation in respect of them came anywhere near to being established. Applying the principles regarding an appeal to which I have referred and which are extracted from Whitehouse v. Jordan, and , and Maynard's case, together with the Kenya cases. I would respectfully differ from the judge when he found:-

> ***"It can be safely held that but for the pressure sore, the plaintiff would not have had to undergo as many as eleven operations. There is a direct connection between the pressure sore and the repeated operations."***

I would consequently hold that the only reasonable inference to be drawn from the primary fact that the pressure sore itself was caused, and that it developed, through the negligence of the hospital staff, is that it caused the delay of six months in the first of Mr Beecher's operations. I would hold that any suggestion of the subsequent operations having been caused thereby is not only contrary to the evidence but that they were in any event too remote.

The judge assessed the damages on the basis of eleven operations having been caused as a direct result of the negligence of the hospital staff. He awarded Kshs. 800.000.00 as general damages. As I am of the view that only the delay in carrying out the operation in September, 1976, is susceptible of an award in damages I do not regard it necessary to deal with the cases which Mr Malik cited as regards the quantum of damages. I take into account the fact that the plaintiff now walks with a limp and needs a walking

stick. I also take in to account the evidence of Mr Beecher that the pressure sore was one of the causes of the delay, another being the re-dislocation of the hip which was not discovered until January, 1976. I therefore bear in mind that not all the residual disability can be attributed to the pressure sore. As regards the effect of the plaintiff's latent or patent diabetes, I find that, after careful consideration of the evidence on this issue, it is in my opinion not sufficiently conclusive, as the judge, in effect, said, to effect the extent of the liability of the hospital for negligence for causing the pressure sore one way or the other.I therefore do not take it into account in my proposed assessment of the general damages that ought to be awarded in this case.

Doing the best I can on the available material I would substitute for the judge's award of Kshs. 800,000.00 for general damages, an award of Kshs. 100,000.00 under this head, to compensate the plaintiff for the pain suffering and anxiety he underwent, and the additional degree of residual disability he has, by reason of that delay. In arriving at this figure I have borne in mind the figure arrived at for the settlement in favour of the plaintiff in High Court Civil Case 2477 of 1977. It follows from all of the foregoing that I agree with Kneller JA, that the cross-appeal should be dismissed. There was simply no basis for saying that the award was too low.

As regards the special damages, nothing was claimed in respect of the plaintiff's expenses at the Aga Khan Hospital, nor for the six months awaiting the next operation. That claim covered only the treatment and expenses in Britain. Accordingly I would make no award for special damages as the basis for the learned judge's an award under this head has gone.

Turning to the reasons for our refusal to allow the respondent to adduce additional evidence before this court at the inception of the hearing, I agree with all that has fallen from Kneller, J.A. on this issue, and I would only, in addition, refer to this court's ruling in Mzee Wanjie and Others v. Saikwa and Others Civil Appeal 72 of 1982 and to Cousins v. Dzosens, Law Society's Gazette October 18, 1984, p 2855.

I would therefore allow the appeal by reducing the general damages to Kshs. 100,000.00 and by eliminating the award of special damages. I would for the reasons that appear in this judgment, dismiss the cross appeal with costs. I agree with the orders as to interest and costs proposed by Kneller JA. Chesoni Ag JA. When the respondent, Busan Munyambu, was admitted to the appellant's hospital, H.H. The Aga Khan Platinum Jubilee, after a motor accident on October 12, 1975, he was, upon examination, found to have suffered serious injuries which have been narrated in detail in the judgments of Kneller and Hancox JJA. both of which I had the advantage of reading. This appeal is from the judgment of Nyarangi J. (as he then was) in a suit for negligence originally filed by the respondent against the appellant. Nyarangi J. found that the appellant hospital was negligent during the period the respondent was under its care for medical treatment from October 12, 1975 to March 1976, and as a result he awarded the respondent special damages of Kshs. 78,147.00 and general damages of Kshs. 800,000.00 plus costs.

There is no complication about the issue of liability. On November 12, Mr. Suleman, a surgeon at the hospital, diagnosed a foot drop on the appellant's right foot and on November 17 Mr Suleman learnt that the appellant's right heel had a pressure sore. The respondent's testimony, which the learned judge believed to be true, was that the nursing staff did not check on him for bed or pressure sores regularly as they ought to have done while he was on traction immobilised and lying on his back. Even when he sought attention from the nursing staff he got none. Had the hospital staff diligently executed their duties the damage to the respondent's right foot would not have occurred. To me this was not a case of simply a misadventure or mishap occurring, even when one accepts what was said by Lord Denning in summing up in the English case of Hatcher v Black and Others [1954] Times, July 22 that in a hospital, when a person who is ill goes in for treatment, there is always some risk, no matter what care is used. The Hatcher case was referred to us by Mr Georgiadis, but in my view it strongly supports the respondent's case.

The pressure sore caused a delay of the subsequent operation to the respondent's hip to fit an artificial one which delay made his condition worse and caused him pain and suffering and it led to unsuccessful operations that necessitated two further operations in England. The learned judge based his findings upon his observation of the witnesses and he regarded Mr Suleman as a witness who was "much too anxious to

help the hospital" and was not independent. Of course Mr Suleman had been at the head of the team that treated the respondent at the hospital so the judge was entitled not to regard him as an independent expert witness. On the other hand the judge must have been impressed by Mr Beecher's evidence as he held it to be well founded and not given to extreme and absolute positions. There can be no doubt that Nyarangi J. had the opportunity of getting the feeling of the case in a way in which this court on appeal cannot get from reading the lower court's transcript. The signs of partisanship which the trial judge observed cannot be discerned from the transcript. I agree with what Brandon L.J. said in Joyce v Yeomans [1981] I WLR, 549 and cited with appproval in Maynard v West Midlands Regional Health Authority The Times May, 1983.

Mr Beecher was of the view that the pressure sore developed during the time the respondent was on traction almost certainly because the hip had re-dislocated during that time. The sore was caused by the respondent's confinement to bed. On my part from what I can make out from the transcript I would agree with Mr Gautama that the appellant has not persuaded me that the learned judge was wrong and I am satisfied that the judge made a proper use of his advantage of seeing and hearing the witnesses who appeared and testified before him. The evidence of Mr Beecher that the pressure sore developed during the respondent's stay in the hospital was never rebutted by the appellants. The evidence showed (at least by inference) that apart from the trainee nurses the medical staff at the hospital knew or ought to have known that the respondent's immobile position raised the risk of the pressure sore occurring if his position was not changed from time to time. They also knew that they could prevent its occurrence by providing the services of a physiotherapist, yet they did nothing to prevent it and when it was realised it had occurred there was no evidence of steps taken immediately to treat it notwithstanding the allegation of the respondent being a latent diabetic. But that was not all established by expert evidence and the tests Mr Beecher carried out in the laboratory were negative. The hospital did not call Dr Mwinzi to support Mr. Suleman's opinion. In the circumstances the learned judge was entitled to make the conclusion he reached. Although this is the final, it is also the first appeal and in the circumstances this court is entitled to make its own evaluation of the evidence on record and be satisfied that the question of liability is properly established. After an assessment of the recorded word I agree with the learned judge's finding that the pressure sore was caused by negligence on the part of the appellant hospital. Mr Suleman and the nursing staff who treated the respondent fell short of the standard of a reasonably skilful medical man, in short, they were deserving of censure. Negligence on the part of the appellant was established, and there was no evidence of any other factor contributing to the cause of the pressure sore on the respondent's foot. Was the respondent entitled to any damages as a result of the appellant hospital's negligence? If so, to what extent? Mr Georgiadis contended that even if the pressure sore occurred as a result of negligence on the part of the hospital and it took five to six months to heal before Mr Beecher could operate on the respondent, there was no evidence that the delay was the cause of the subsequent operations the respondent went through.

Mr Beecher said this in his evidence:

> "***As a result of my investigation in 1976, I was able to suggest a course of treatment that I felt should be followed which basically consisted of replacement of this destroyed hip joint by an artificial hip joint. However, this could not be under-taken straight away because infection is the gravest hazard in carrying out this operation and I was unwilling to undertake the operation in the presence of the pressure sore on the foot which provided a potential source of infection to the operation side. So I had to wait 6 months until the pressure sore had healed." (underlining emphasis mine)***

He also said:

> "***The presence of a laceration in his foot caused delay in his treatment. The delay must be considered as to be a factor in the need for re-operation at a later date. No other factors the main reason why the bone did not stand up to the artificial hip-joint as well as could be hoped and expected was delay in doing the aritificial hip joint operation. One of the causes of delay was the pressure sore. (underlining mine). Another cause of delay appears to have been the fact that the***

hip was re-dislocated at some stage after it had been reduced and put on retraction was not recognized until January, 1976 because it was not re-Xrayed until that time.”

The evidence of Mr Beecher showed that the delay in inserting the artificial hip joint caused the bone not to stand up well to the artificial hip joint as it was expected. One of the factors that caused the delay in inserting the artificial hip joint was the presence of the pressure sore which posed the risk of infection to such an operation. That evidence further showed that the delay made subsequent operations necessary and these to me include the two carried out overseas in Britain. I would treat the first operation(s) by Mr. Beecher as not being necessitated by the delay but the second operation was and when the two performed in Britain are taken into account at least three of the four subsequent operations were partly brought about by the delay in carrying out the first Beecher operation. That evidence was not challenged and in my view at least three of the subsequent operations I have specified were as a consequence of the pressure sore. I am satisfied the nexus was established. There were two sets of pain and suffering. The first was the one experienced directly from the accident on October 12, 1975 and the second was that caused through the pressure sore and the subsequent operations and the respondent is entitled to damages for the second set of pain and suffering too. There was no overlapping between the award of damages in H.C.C.C. No. 2477 of 1977 and in this case.

The evidence of Mr Beecher was not that the pressure sore was the sole cause of the subsequent operations the respondent underwent. It did not alone have to be to support an award of damages for if it were the sole cause the damages would have been quite high. It was one of the causes and the main one. Were the damages of Kshs. 800,000.00 excessive? In making the award the learned judge was exercising a discretion. In the circumstances this court ought to interfere with his award only if any one of more of the following factors exists, namely, that:

(a) the award is manifestly excessive or in-ordinately low as to amount to erroenous assessement; or

(b) the award emanates from an erroneous application of the law or principles applicable in assessment of damages; or

(c) the judge failed to consider relevant factors and took into account matters he ought not to have considered.

See Iianga v Manyoka [1961] E.A. 105 and Lukenya Ranching and Farming Cooperative Society Ltd v Kavoloto [1970] E.A. 414 at p.418. There was no authority local or foreign cited to us which is directly in support of the award of or near Kshs. 800,000.00 for a similar damage but as Mr Malik pointed out the award was for an element of pain and suffering and loss of amenities. There was no evidence that the respondent, who is still in employment , had lost future earnings or that he had lost his chances for further promotion.The learned judge took into account the added ill-effect to the respondent’s career, which he ought not to have considered as it was not proved. Had he not considered it the figure awarded for pain and suffering and loss of amenities alone caused by the appellant negligence would not have been Kshs 800,000.00 which in the circumstances of this case is manifestly excessive. I would for this reason allow the appeal and reduce the award to Kshs. 200,00.00. I have no reason for interfering with the special damages and would not do so. I agree with Kneller J.A that the cross-appeal and application to adduce additional evidence should be dismissed, and the order as to costs should be that which he has proposed in his judgment.