IN THE COURT OF APPEAL

AT NAKURU

(Coram: Hancox, Nyarangi JJA & Platt Ag JA)

CIVIL APPEAL NO. 85 OF 1983

Between

KIGARAGARI..APPELLANT

AND

AYA...RESPONDENT

(Appeal from the High Court at Eldoret, Mbaya J)

JUDGMENT

This is an appeal against the quantum of damages. Liability is not contested. The grounds of appeal may be summarized as follows: the judge erred in not distinguishing the cases cited on amount of damages, erred in assessing general damages excessively highly at Kshs 250,000, and in awarding Kshs 51,000 as loss of earnings as the respondent was not employed on permanent terms, erred in not appreciating that the respondent could obtain other employment, was unduly influenced by the fact that the respondent could not remarry, and the judge erred in awarding Kshs 342 special damages without any supporting evidence. The appellant's advocate asked this court to disallow special damages, reduce general damages and reduce the sum awarded as loss of earnings.

Mr Kiarie, for the appellant, said although the injuries to the respondent resulted in amputation of her right leg, there was no evidence of further pain after amputation and submitted that on the principle in *Bhogal v Burbidge*, [1975] EA 285 the award for general damages is so excessive as to merit interference to the extent of being reduced. Mr Kiarie complained that the judge had applied decisions in the cases which were cited to him when in fact those decisions were distinguishable on facts, the particular cases being *Mahindra v Miwani Sugar Mills Limited*, NRB HCCC 646/72 (unreported) and *Ugenya Bus Service v Gachoki*, CA No 66 of 1981 (unreported) and argued that the judge overlooked to make an award in keeping with awards made for similar injury having failed to consider awards such as in *Kahindi Nyale & Another v Chezi* CA No 8 of 1971 (unreported) and in Ahmed v Nairobi Deluxe Services & Others, CA No 25 of 1976 (unreported). On the loss of earnings, Mr Kiarie submitted that on the evidence, it was not possible to determine the degree of disability that in any case it was not total loss of 100% and that the multiply applied by the judge was on the higher side. As regards loss of prospects of marriage, Mr Kiarie argued that that matter had not been specifically pleaded and could not therefore be taken into account and that in any case, the respondent did say she could not under her custom have got married. Mr Kiarie's final submission and plea was for this court to find that on the facts and on the decision for similar injuries, the award should be equated with that in *Dick v Koinange* [1973] EA 355.

Mr Shah for the respondent had earlier conceded that the special damages were not proved nor agreed.

Also Mr Shah pointed out rightly that the decree as drawn did not comply with the judgment of the High Court because interest on damages was from the date of assessment by the court. Mr Shah suggested suitable deletions as a result of which the amount of Kshs 439,324 reads Kshs 301,000 together with interest thereon. On loss of future earnings, Mr Shah observed that the multiplier is perhaps on the higher side but did not think it was so high as to be interfered with, remembering that the minimum wage is Kshs 500 per month and that minimum wages are periodically changing. Mr Shah said the respondent did not exaggerate her claims, appeared to have minimized and asked that the appeal be dismissed with costs, and that the respondent should have a higher percentage of costs having conceded special damages.

But, who is the respondent? What was she, what is she now doing and what happened to her? The respondent (Agripina) whose husband died in 1969 leaving her with three children, a son now aged 23, and two daughters now aged 19 and 17 respectively, had turned to doing casual work in houses thereby earning Kshs 250 per month to support herself and her children. That is because on March 6, 1977, while walking off the side of Murubi Road in Kitale town, she saw a vehicle which came and knocked her unconscious. She later found herself in hospital with her leg amputated. She stayed in hospital for 26 days. Now she uses crutches to walk and could no longer do casual work and she could no longer do the tailoring she used to do at night as she could not use a hand machine. She was aged 30 when she gave evidence before the judge. She could not have sexual intercourse. There was medical evidence that the respondent's leg was amputated above the knee because the tissues were damaged beyond repair. The respondent was fitted with an artificial leg on March 1982. But she could still not walk properly or comfortably and she constantly felt mental strain.

Recently, in *Idi Ayub Shabani v Nairobi City Council,* Civil Appeal No 52 of 1984 (unreported) this court had occasion to refer to valid observations made in the course of submissions that this court should develop the common law of Kenya in a consistent way as regards damages. I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees. The warning in *Rahima Tayab & Another v Anna Mary Kinanu*, Civil Appeal No 29 of 1982, was:

> "if the sums get too large, we are in danger of injuring the body politic ... as large sums are awarded so premiums for insurance rise higher and higher."

See also *Lim Poll Choo v Camden & Islington Area Health Authority*, [1979] 1 AER 332.

It is of course desirable that so far as possible comparable injuries should be about or nearly equally compensated: However, the comparison should be confined to decisions of local courts, other decisions, eg overseas ones serving merely as a guide: See *Bhogal v Burbidge & Another*, [1975] EA 285 at page 289, letter C.

The most prominent feature of the material injury is the amputation of the right leg. Except for the discomfort and inconvenience of using an artificial leg, the respondent does not require regular medical supervision in respect of the amputated leg. To that extent the respondent is in circumstances which differ from those in *Oluoch v Robinson*, [1973] EA 109 where the respondent required continuous treatment and where the award for general damages in 1973 was Kshs 220,000. The respondent was however aged 62, his probable useful working life was assessed at a further 6 years and received a further amount of about Kshs 30,000 for loss of wages. Clearly Agripina could not be said to have been in the same or comparable circumstances. In *Dick v Koinange,* [1973] EA 335, the appellant aged 45 when the trial was held, had her right leg amputated below the knee. She was awarded Kshs 130,000 which was reduced by 25%. That was in 1973, some 12 years ago. In *Vincent Macharia v Nairobi City Council*, HCCC 1959 of 1980, a child aged 4 years whose ankle and foot were amputated at a level a few inches above the ankle following a motor accident was awarded Kshs 400,000 for loss of amenities, pain and suffering and future expenses. The plaintiff in *Ahmed v Nairobi Deluxe Services & Others*, Civil Appeal No 25 of 1976 (unreported) who was awarded a total of Kshs 127,907 for pain and suffering, loss of amenities for replacement of

wheel chair, etc after an accident as a result of which her right lower leg at below knee level was amputated, was a village girl (no children) and her normal life span was so shortened that she had about 15 or 16 years to live from the date of accident. There was no evidence, no hint that the normal life span of Agripina had been shortened. And, in *Kahindi Nyale v Chazi*, Civil Appeal No 8 of 1971 (unreported) the plaintiff, a peasant girl aged 17 (no children) lost a leg after being struck by another bus as she descended from a bus. She was awarded $4000 general damages in 1971.

For this court to interfere it must be shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred: *Idi Ayub Shabani v City Council of Nairobi & Another* (*supra*). The appellant's case that the award for general damages is so manifestly excessive as to warrant a reduction was based on local decisions in judgments given ten or more years ago when money values were very different. For reasons already stated. *Oluoch v Robinson, Dick v Koinange, Ahmed v Nairobi Deluxe Services & Others* and *Kahindi Nyale v Chazi,* are in my judgment distinguishable on the facts from this appeal. That apart, the award of Kshs 22,000 made in 1973 in *Oluoch v Robinson* would today have to be increased by 50% to take account of inflation: *Ugenya Bus Service v Gachoki* Civil Appeal No 66 of 1981 and *Idi Ayub Shabani v City Council of Nairobi*: Mr Kiarie was so persuaded by the decision and award in *Dick v Koinange* that he specifically urged the court to reduce the award in general damages to a comparable award.

On the basis of the award in *Dick v Koinange,* the award of Kshs 30,000 made in 1973, before the scourge of inflation would have to be increased by unreasonable 50% to allow for the inflation, which sum is of course less than the Kshs 250,000. However, the difference in the two amounts would alone be no justification for interfering with the award of the Kshs 250,000, bearing in mind that the assessment of damages is basically a matter of judicial discretion and,

> "remembering that in this sphere there are inevitably differences of view and opinion" *H West & So Limited v Shephard* [1964] AC 326 at page 353 per Lord Morris.

I would say the award is adequate in the circumstances.

It follows then that in my view the appellant has failed to demonstrate that the judge's award is so manifestly excessive as to be reduced.

The judge appears to have stressed the fact that Agripina had lost all prospects of marriage at not too old an age. She could not have got married any way. I do not think that stress made much difference to the assessment. In any case, Agripina said she could no longer have sexual intercourse which is a substantial loss of amenity. The judge could very properly have borne that in mind and his assessment would in all probability have remained the same.

With regard to loss of earnings, there was not sufficient concrete evidence in support of the claimed monthly income of Kshs 250 which figure the judge utilized as the multiplicand. However taking into account the minimum wage of Kshs 500 which would, we were informed from the bar , have been applicable to Agripina at the material time, and accepting, as the judge did, that Agripina was not exaggerating or over estimating, the figure arrived at is not so excessive as to invite interference. I would accordingly dismiss this appeal with costs at the normal rate. **Hancox JA**. I have had the advantage of reading in draft the judgment of Nyarangi, JA. I

wholly agree with his reasoning and conclusions, and the awards of damages under each head by the learned judge were not excessive. I, too, would dismiss the appeal, and as Platt, Ag JA also agees the appeal is ordered to be dismissed with costs.

Platt Ag JA. I agree and have nothing to add.

Dated and delivered at Nakuru this 30th day of May, 1985

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR