



IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPEAL NO. 66 OF1982 & 88 OF1983

BETWEEN

MARIGA.....APPELLANT

AND

MUSILA.....RESPONDENT

(Appeals from the High Court at Nakuru, Mead J)

JUDGMENT

The respondent in the main appeal in this case received serious injuries as a result of a collision between a Toyota Saloon car, KNM 843, in which he was travelling as a passenger in the rear seat, and a Datsun Pick-Up, KLV 165, on the road from Ol Joro Orok to Ol Kalou at about 7.30 pm on November 20, 1976. The driver of the Toyota Saloon was held by the trial judge to be wholly to blame for the accident and he appeals against the total award of general damages of Kshs 1,959,036 for his negligence. There is no appeal on liability or against the award of Kshs 6,719 as special damages. The driver of the Datsun, who put in a defence at trial, was exonerated from any finding of negligence, is not a party to the appeal and is not concerned in it, save as to the question of his costs, which were ordered by the learned judge to be paid by the respondent, subject to his right of recovery thereof from the appellant. In other words the judge, who did not have the benefit of any addresses on the point, made that which is called a *Bullock* order as to costs, and not a *Sanderson* order, which Mr Varia, who appears on behalf of the respondent, has submitted should be done. This forms one of the two grounds of that which is now the cross-appeal, which we consolidated and heard together with the appeal.

The award, which was a very high one, so far as that which Mr Varia termed as the pecuniary loss aspect commenced at January, 1978, from which time the respondent lost an increment which he would otherwise have earned in his pre-accident capacity of production superintendent at the Union Carbide factory, but from January 1979 onwards covered the differential in salary between that which he henceforth received as a statistical analyst, (as the company could no longer keep him on as a production superintendent), and that which he could have received as production superintendent.

The pecuniary loss award under the learned judge's judgment, may conveniently be classified into seven main headings as follows:-

I. January to December, 1978, loss of increment at Kshs 323 per month: Kshs 3,876

January to December, 1978, loss of recently introduced car allowance to which the production superintendent was entitled of Kshs 1,000/- a month Kshs 12,000

II. January to December, 1979, loss of differential in salary of Kshs 3,297 per month Kshs 39,564

Loss of car allowance (Kshs 1,000/- x 12) Kshs 12,000/-

III. January to December, 1980, loss of differential in salary of Kshs 9,595 per month Kshs 115,140

Loss of car allowance Kshs 12,000

IV. January to October 19, 1981, (the date of the High Court judgment),

loss of differential in salary of Kshs 7,778/- per month: Kshs 75,187/-

Loss of car allowance: Kshs 9,667/-

V. October 1981 to October 1986, Being the five years during which the judge found that the respondent would have continued as production superintendent:

Loss of differential in salary of Kshs 7,778/-

Per month: (93,336/-) per annum: Kshs 466,680/-

Loss of car allowance: Kshs 60,000/-

Less estimated additional

Income tax at Kshs 46,033/- per annum: Kshs 230,165/-

Total: Kshs 296,515/-

VI. 1986 to 1994 Being the period during which the judge found the respondent would have had a “strong possibility” of being promoted to the post of assistant plant manager. Loss of differential in salary of Kshs 10,278 per month (Kshs 123,336 per annum) (no car allowance provided for) Kshs 986,688

Less, estimated additional income tax at Kshs 56,833 pa

Kshs 454,664

Total Kshs 532,024

Making a total net loss of Kshs 828,539 for the period 1981 to 1994. The judge averaged this at Kshs 63,733 per annum for those 13 years and then for some reason, took a multiplier of 9 in view of the respondent’s reduced working life expectancy. This gave the figure of Kshs 573,597 at item 2 in the judge’s summary. I shall return to this later. Kshs 573,597

VII. 1994 to 2004, that is to say from age 55 to 65, for which period the judge found the respondent would have worked had he not suffered the accident. These constitute the “lost years” under the principle of *Pickett v British Rail Engineering Ltd* [1979] 1 All ER, 774. For this period the judge found the respondent would have worked as an assistant plant manager and would have earned Kshs 17,415 per month, or Kshs 208,980 per annum, after tax Kshs 138,672. This was taken as Kshs 138,000, less one third estimated living expenses (also on the authority of *Pickett v British Rail* per Lord Wilberforce at p 782A) making Kshs 92,000, or Kshs 90,000 as a round figure, giving, for the 10 lost years, Kshs 900,000.

This item, however, was reduced to Kshs 500,000 in view of the fact that the respondent was getting a lump sum thirteen years ahead (or at the maximum 23 years in advance) which, as Mr Couldrey for the appellant emphasized, with detailed percentages and figures, in the course of his address, he could invest and produce an income: Kshs 500,000

As regards the non-pecuniary loss category, which Mr Varia adopted, that is to say the damages for pain, suffering and loss of the amenities of life, resulting from the serious injuries to the respondent, the details of which have been set out by my learned colleague Chesoni Ag JA, and the judge's statement of which was not, as I understand him, factually disputed by Mr Couldrey, the judge awarded: Kshs 600,000

The grand total for both the pecuniary and non-pecuniary loss awards (although I think there are some arithmetical inaccuracies) was stated by the judge to be Kshs 1,959,036 for general damages, and the decree reflected this sum.

Mr Couldrey, as I said, arguing the case for the appellant, did not dispute items II to VI of the pecuniary loss award, and I take it that in this undisputed area there is included item I, since these are, in truth, special damages (see Law JA in *Bhogal v Burbridge* [1975] EA at p 285). Neither did Mr Couldrey dispute the likelihood of the respondent's promotion, (which he thought was a more solid prospect than in *Attorney-General v Joseph Waiyera*) an item which this court held was speculative and, as such, irrecoverable on the facts in *Attorney-General v Joseph Waiyera*, Civil Appeal 45 of 1982, so that the field of battle was fairly and squarely set as regards item VII, the award for the lost years, and the award for pain, suffering and loss of amenities.

Before coming to the first of these I pause to refer to items V and VI, since I did not understand during the course of the argument, and still do not understand, why the judge used a multiplier of 9 when he had already found the period covered by the loss of earnings, that is to say by the reduced earnings, of the respondent to be 13 years. It may be that this was derived from *Huskisson v Holmes* [1974] Kemp & Kemp Vol 2 case 1 – 401 which the judge mentioned at this juncture. That was a case of injuries which may be fairly described as catastrophic to a young man injured just before his twenty-ninth birthday. Kilner Brown J divided the remainder of the plaintiff's expectation of life of thirty years into three separate periods, age 30 to 40, 40 to 50 and 50 to 60. The plaintiff had, as here, been kept on by his employers, though his working life was estimated at fifteen years. Accordingly the judge estimated the net loss for each of the three ten year periods, scaled down to the fifteen years of his estimated working life left, and arrived at a figure of 45,500 sterling pounds.

In my view, with the utmost respect, the learned judge in the instant case misapprehended the effect of *Huskisson v Holmes*, for in the case the judge was relating the figures for the fifteen years' working life to the total life expectancy of thirty years, whereas in the relevant portion of his judgment Mead J was dealing only with the working life expectancy, and not with the total life expectancy, since that formed item VII in respect of the lost years, which was separately considered. Indeed this is hardly surprising, for *Huskisson v Holmes* was decided five years before *Pickett v British Rail*, which was in the period during which *Oliver v Ashman* (infra) held sway, and therefore there were no lost years to consider.

In these circumstances, I think Mead J should have awarded the total of the differential in earnings for the thirteen years period from 1981 to 1994, which he found to be Kshs 828,539, and, should not have averaged the figures and used a multiplier of nine, producing Kshs 573,593 and he did. Had this been a live issue before us, I would have increased this part of the award to Kshs 828,539. Since, however, there is no cross appeal on this ground, and since, as I said, Mr Couldrey accepted, or perhaps, more correctly, did not dispute items V and VI (though he said that which I do not think to be correct, that the judge had adopted the calculation most favourable to the respondent) I would uphold this part of the learned judge's award. In passing, while not seeking to minimize the effect of the respondent's injuries, I observe that in *Huskisson v Holmes*, while the plaintiff was, as the respondent is, able to continue working, one of the greatest blessings still left to him as Mr Couldrey emphasized, the loss of amenities in the other case were such that not only could the plaintiff not walk at all (unlike the respondent), but also, and I take the following from the statement of facts in *Kemp & Kemp*:

“Before the accident he was a splendid physical specimen. He was over six feet in height, strong, well developed and good looking. He now complains that the brain damage has left him with impaired memory and concentration, and there is medical evidence of some brain damage. I cannot overlook this aspect, but I was unable to detect much indication of any such impairment.

Every day he (the plaintiff) goes to work and, whilst at the office, has to lift himself by his arms out of the motorcar and into the wheelchair. He works for three hours or so and does the return journey home, and his wife is waiting for him. He has to empty the container which has received his urine, and after his meal he returns to work, and in the evening, with his wife’s assistance, he gets into an apparatus of calipers and takes exercise in the garden of his home. He will have his evening meal; he will perhaps watch television or entertain his friends.

At night he has to be undressed, and in bed he has to have five pillows. Every four hours he has to be awakened by an alarm clock. At times in the night, with the assistance of his wife, he has to force his paralysed body into another position whenever it is apparent to him that his buttocks and legs are at risk of sores or a breakdown of the skin, and his bladder may have to be evacuated. Every other day he has to evacuate the accumulated faeces and anal passage may have to be cleared by manual manipulation. He is therefore a paraplegic with some degree of tetraplegia and some degree of brain damage. The doctors are agreed that he can expect to continue such an existence for another 30 years.”

Infinitely more distressing, I think, than the present respondent’s residual disabilities, though it has to be said that he initially suffered virtual total paralysis for an unspecified period. This was, as I understand it, a part of Mr Couldrey’s case that Mead J considered the instant case as one of paraplegia, and in doing so acted on a wrong principle in making his award for pain, suffering and loss of amenities. In *Huskisson v Holmes* the award was Sterling pounds 20,000 under this head, and Mr Varia would have it, no doubt, that figure should be multiplied by 3.37, or thereabouts, according to the table of the reduction in the value of money that he produced.

I consider it appropriate to turn now to the aspect of the lost years. Mr Varia invited this court to apply the decision in *Pickett v British Rail* as to the doctrine of the lost years on the basis of section 3(1) of the Judicature Act (cap 8) which provides, *inter alia*, that the jurisdiction of the courts shall be exercised in conformity with the substance of the common law in force in England on August 12, 1897, so far as the local circumstances and inhabitants permit. It does not require much perspicacity to appreciate that *Pickett v British Rail* is part to the common law of England developed after August 12, 1897.

It could, of course, be argued that paragraph (c) of this sub-section only applies the date of August 12, 1897, to statutes of general application in force as at that date, and does not so restrict the doctrines of common law and equity. But if that were the intention of the Legislature, surely this would have been made clear by the insertion of a comma after the word “equity” and before the phrase “statutes of general application”, so that the whole of that clause would be controlled by the date stated. Moreover I do not see that it is reasonable to interpret this provision in the Judicature Act, which came into force on August 1, 1967, well after independence, in a manner which would require the Kenya courts to exercise their jurisdiction in conformity with the continuing common law of England, as it is still being developed, when Kenya is perfectly capable of making its own law. Furthermore, the words “at that date” in reference to the procedure and practice observed in England makes the matter doubly clear.

Consequently, in my view, this court is not enjoined to apply *Pickett v British Rail* by statute. Kenya is, and has been for several years, developing its own common law, paralleled, one might say, to that of England, in areas not covered by its written laws. As part of this process these courts frequently pay attention to English decisions, and regard them as of high persuasive authority. In cases of damages for personal injury, for instance, they are frequently of great assistance because of the wide range of circumstances that they cover. But it must nonetheless not be lost sight of that it is the Kenya common law that is being developed and that there is no compulsion to apply present English decisions. If we consider it right to depart from them as Mr Couldrey urges we should do with regard to *Pickett v British Rail*, we shall do so. This accords with the principles stated by Sir Charles Newbold P in relation to this court’s predecessor in *Dodhia v National Grindlays Bank and Another* [1970] EA 195, at p 199, letter B.

From the decision by the House of Lords in *Benham v Gambling* [1941] All ER 7, until that of the Court of Appeal in *Oliver v Ashman* [1961] 3 All ER 323, the English Court adopted a parsimonious attitude to the loss by an individual of many years of normal life due to injury caused by another's negligence. The latter was a case where a young child lived, and the former one where it was almost instantly killed. In *Oliver v Ashman* the infant plaintiff, when aged twenty months, was injured in a road accident, resulting in brain injuries so that he was mentally defective and could hardly talk or understand what was said to him. His expectation of life was assessed at thirty years instead of sixty. He would need constant care. After reviewing the relevant authorities, including *Benham v Gambling*, Holroyd O' Pearce LJ, applying Slade J's decision in *Harris v Bright's Asphalt Contractors Limited* [1953] 1 AER 395, and following Lord Simon's statement in *Benham v Gambling*, at page 13, that:-

“Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects,”

held that Parker LCJ, who had tried the case, erred in taking into account, apart from the diminished expectation of life, the loss of earning during the years by which the child's life had been shortened.

He said at p 332:

“What is lost is an expectation, not the thing itself.”

Earlier he said, at p 330:

“On one view of the matter there is no loss of earnings when a man dies prematurely. He is no longer there to earn them, since he has died before they could be earned. He has merely lost the prospect of some years of life which is a complex of pleasure and pain, of good and ill, of profits and losses. On the other view, he has in addition to losing a prospect of the years of life, lost the income that he would have earned, and the profits that would have been his and had he lived.”

In *Pickett v British Rail*, however, Lord Wilberforce, with whom the rest of the house agreed, said that the main line of reasoning in *Oliver v Ashman* was unacceptable and had ignored the fact that a man in good health and sound earning, possessed an asset of present value, and should be compensated for the loss of the whole period for which he has been deprived of his ability to earn. Moreover, he held that in *Benham v Gambling* Lord Simon did not have in mind a claim by a living person for earnings during the lost years (a situation which seems also to have been excluded from the Administration of Justice Act, 1982 - cited by Mr Couldrey – which amended the Law Reform (Miscellaneous Provisions) Act, 1934, the counterpart of our Law Reform Act, (cap 26), and that *Oliver v Ashman* was based to some extent on a misconception of *Benham v Gambling*.

Consequently, the plaintiff (who had died before the appeal was heard so the benefit passed to his widow) was entitled to be compensated for the earnings he had lost during the period of which he had, by the defendant's wrong-doing, been deprived.

The only other case I desire to mention in this connexion is *Phillips v London and South Western Railway Co* [1879] 5 QBD 78, referred to in both *Oliver v Ashman* and *Pickett v British Rail*. In that case, the plaintiff, who was a passenger in a train, was injured as a result of a collision with an engine. The cynical would observe that while the railway slew its thousands, the motor vehicle has slain its millions. In that case, James LJ with whom the other members of the court agreed, supported the trial judge's direction to the jury that:-

“It (the award) is given, recollect, once for all, and once only, you must not forget that, and it must be given on the fairest estimate you can make of what the probable continuance of the plaintiff's professional income would have been”

and continued:

“That comes to this, you are to consider what his income would probably have been, and you are to take into consideration all the other contingencies to which a practice is liable. I do not know how otherwise the case could be put.”

This decision received the seal of approval by Lord Salmon, whose speech followed that of Lord Wilberforce, in *Pickett v British Rail*. It will be observed that *Phillips v London and South Western Railway Co* was a pre-1897 decision, and, if taken as part of the common law of England (and Lord Salmon so treated it) would, on the basis of the Judicature Act, be an authoritative decision.

Aside from that I am in no doubt that the doctrine of the lost years, whatever alarm the legislature in England may have felt about it when they passed the 1982 Act, should, in the case of a living plaintiff at least, form part of the law which these courts should apply. It is for this reason that I have refrained from dealing with *Gammel v Wilson* [1981] 1 AER 578 and *Harris v Empress Motors* [1983] 3 All ER, 501 in both of which cases the victim died before the action. Indeed, despite certain *dicta* in *Pickett v British Rail* suggesting the contrary, it seems that the English courts have since been constrained to apply the lost years' principle, even to cases of very young children, see for example *Conolly v Camden Area Health Authority* [1981] 3 All ER 250, per Comyn J, at p 255 (child of 5 reduced to mental deficient due to overdose of anaesthetic: 7,500 sterling pounds), *Croke v Wiseman* [1982] 1 WLR 71 per Griffiths LJ at p 83, and Shaw LJ at pp 84 and 85 (Boy of 21 months suffering cardiac arrest resulting in quadriplegia – 25,000 sterling pounds – Lord Denning MR dissenting on this point) and *Jamil bin Harvn v Yang Kamsiah bte Moer Rasdi*, (PC) Law Society's Gazette 18th March, 1984 at p 734 per Lord Scarman – (severe brain damage to girl of seven 33,816 dollars).

I am convinced that the rule which enables the lost years to be taken account of comes closer to the ordinary man's expectation than one which limits his interest to his shortened span of life. The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in a market, has a value which can be assessed.

I would therefore reject Mr Couldrey's submissions on this aspect of the case and uphold the learned judge's award of and assessment of damages for the lost years. I would not follow *Pickett v British Rail* as Mr Couldrey put it, slavishly, but because it is in my opinion right to do so. The judge rightly took into account, on the authority also of *Pickett v British Rail* (at page 782), that there should be a deduction to represent that which the respondent would have spent on himself during the lost years. In my view the scale of the deduction was right. The judge also rightly took into account that the respondent would be receiving a lump sum well in advance, which had an investment value. In the result, I would dismiss the appeal insofar as it relates to the award of Kshs 500,000 for the lost years, which, as far as I can discern, disposes of grounds 2,5 and 7 of the memorandum of appeal.

As regards ground 3, insofar as this does not relate to the loss of potential income for the lost years (that is to say that it relates to the loss from 1981 to 1994) I understood from Mr Couldrey that these items were not disputed by him on the appeal. The other undisputed ground of appeal, in the main appeal, is ground 6. It relates to sum of Kshs 279,439 which was stated in the judgment to be subject to income tax of Kshs 125,747, for which the respondent was stated to be accountable to the Commissioner of Income Tax. Both counsel are agreed that this sum should have been awarded net of tax and I would accordingly reduce the award for these items, forming head 1 in the judge's summary, to Kshs 153,692. It is in principle correct that damages for loss of income should in general be awarded net of tax if such income would ordinarily attract tax. See *Stove v Down's Surgical, PLC*, Law Gazette March 28th, 1984, page 893.

I now revert to the other disputed item in the main appeal, namely the award of Kshs 600,000 for pain, suffering and loss of amenities. I have read all the authorities cited by Mr Couldrey and by Mr Varia, ranging from probably the worst instance, involving the case of the Senior Psychiatric Registrar, aged 36, in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910, who was, if that is possible, reduced to a state worse than that of a quadriplegic, to the Kenya case of Mrs Tucker, *Geraldine Tucker v Josephine Mary Ledger*, a decision of Simpson J in 1971, HCCC 589 of 1971, who became a quadriplegic. In the former case Dr Lim was awarded a total of 254,765 Sterling pounds, reduced on

appeal to 229,294/64 Sterling pounds (the pain and suffering and loss of amenities element not being disturbed.) In the latter case Kshs 514,200 was awarded by way of general damages.

I appreciate that many of Mr Couldrey's authorities were cited for the purpose of showing that much more serious injuries and the consequences thereof have been attracting either similar or lesser awards for pain, suffering and loss of amenities. Some cases, of course, had less severe consequences, for instance in *Hall v Lord Halsbury*, Kemp & Kemp case 6-201, a 1973 case, the plaintiff had a whiplash injury to her neck and back and was left with

"A painful stiff neck, and she cannot move, and a collar which she has to wear night and day. It is accepted that if she exerts herself she gets feelings of giddiness and nausea. She gave a graphic example of that in saying when she tried to wash down a wall in one of the rooms of her house, but had to give it up and go to bed for a day. She tells me that if she travels by transport, 'buses or trains, or motor cars, and the ride is a bit bumpy – and they mostly are – it flares up trouble in her neck and head. She cannot go out alone, her social life has come to a standstill, she cannot swim, she cannot work, and her sexual life has been radically reduced. She said, with frank honesty: 'I am not that interested because of the pain I get.'"

She was awarded 15,000 Sterling pounds for her injuries, pain and suffering. However in *Aloni v National Westminster Bank* [1982] Kemp & Kemp case 1-211, which was tried after the instant case, though the accident occurred probably about the same time, the plaintiff, a former physical fitness instructor, was paralysed from the waist down at the age of 26 and received 35,000 Sterling pounds as general damages for pain and suffering, and 75,000 Sterling pounds as a result of her engagement being broken off, a part of the global award of 193,750 Sterling pounds. In *Hall's* case the partial disablement of the plaintiff's husband may have been a factor in the award. Perhaps the closest comparison, and Mead J regarded it as such, was in *Mondo v Jessa* [1969] EA p 156, where the plaintiff suffered paralysis in the lower limbs and bladder, and was awarded Kshs 300,000, to include the cost of future necessary accessories to his life. He was confined to a wheel chair. In a recent Kenya case, *Isabella Karungu v Washington Malele* CA 50 of 1981 fractures of both femurs, which had almost healed, and the loss of the respondent's arm were assessed at Kshs 20,000.

As I said, I do not seek to minimize the seriousness of the respondent's injuries. But it cannot be denied that the disabilities he is left with are not as catastrophic as the paraplegic or quadriplegic case and not as disastrous as those of the unfortunate plaintiff in *Huskisson v Holmes*. For one thing he has, if I may so call it, a measure of autonomy and can work. He can also, at present, and dress and undress himself, with assistance. It is essential, I think, to avoid an unduly emotive approach to these cases. As Lord Denning MR said in the Court of Appeal in *Lim Poh Choo's* case, [1979] 1 All ER at p 341.

"... if these sums get too large we are in danger of injuring the body politic; just as medical malpractice cases have done in the USA. As large sums are awarded, so premiums for insurance rise higher and higher."

This court is only entitled to disturb an award of damages, if, as Law JA said in *Butt v Khan* Civil Appeal of 1977:

"It is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

See also Briggs JA in *Channan Singh and another v Channan Singh and Handa* (1955) 22 EACA, at p 129. Fortunately we are spared the consideration of the other matter mentioned in Law JA's judgment in *Butt v Khan*, which was the then disparity between the Kenya Shilling and the English pound sterling. Now, as we stated in *Mrs Rahima Tayab and another v Anna Mary Kinanu* CA 29 of 1982 the currency is almost at par, so this further calculation does not fall to be made.

It is important to bear in mind, in considering an appeal on the quantum of damages, the following passage from Lord Morris's speech in *H West & Son v Shephard* [1963] 2 All ER 625, at p 635:-

“The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

Having correctly borne in mind all these principles, the views of my brethren Chesoni and Nyarangi Ag JJA (and in particular Nyarangi JA’s conclusion regarding the effect of impotency on the respondent), from whom I have misfortune to differ on this aspect of the case, coupled with the inflationary aspect as shown by Mr Varia’s table, I consider that the learned judge’s award for pain, suffering and loss of amenities in this case was manifestly too high I would reduce that item from Kshs 600,000 to Kshs 400,000, making the global sum Kshs 1,759,036 in respect of general damages, and allow the appeal to that extent only. I would dismiss it as to the remainder, save as to ground 6. As, however, both Chesoni and Nyarangi Ag JJA are of the view that the judge’s assessment in this respect was right, indeed possibly on the low side, the appeal against this item of the damages, must fail. This disposes of grounds 1 and 4 of the main appeal. As we are unanimous that the appeal should be dismissed on grounds 2,3,5 and 7 of the main appeal it is so ordered. As regards ground 6 it is ordered that this item be reduced to Kshs 153,692, net of tax, and we delete the direction that the respondent be accountable to the Commissioner of Income Tax, who is not in any event, a party to this appeal.

I now turn to the cross-appeal. The first ground is that the judge should not have awarded the second defendant’s costs against the respondent to be included in those to be recovered by him from the appellant. Mr Varia has argued that the second defendant’s costs should have been recovered not as a *Bullock* order (*Bullock v London General Omnibus Co* (1907) 1 KB, 264) but as a *Sanderson* order (*Sanderson v Blyth Theatre Co* [1903] 2 KB 533), which is said to avoid circuitry by ordering the unsuccessful defendant to pay them direct to the successful one, (though the orders in both those cases were similar). One consideration in favour of a *Sanderson* order seems to be that the order will be made if either defendant has induced the plaintiff to sue the other defendant as well. In *Sanderson’s* case the Court of Appeal upheld the trial judge’s order that the unsuccessful defendant, who had denied the architects, the successful defendant’s authority to request the supply of materials or the performance of the work by the plaintiff, should pay the architect’s costs. This form of order was used, quite recently, in *Dobie & Co v United India Insurance Co* [1964] EA 16 by Sir Udo Udoma CJ, in which the respective defendants adopted mutually conflicting defences, partly basing his decision on the fact, as he found, that it was unreasonable for the first defendants to have denied the authority of the second defendant, their agent, and partly because the first defendant, in so doing, had induced the plaintiff to join the second defendant as a party to the suit thus putting the plaintiffs in doubt as to whom to sue within the terms of order I rule 7. He held that the claims for relief against the two defendants were in the alternative.

One of the reasons behind the application of a *Sanderson* order appears to be the insolvency of the unsuccessful defendant, as instanced by the case of *Mayer v Harte* [1960] 2 All ER 840, in which *Sanderson’s* case was considered and the paragraph from the *White Book* cited to us approved by Willmer LJ at p 847. In that case the plaintiff’s house was contiguous to that of the first defendant. He instructed a builder (the second defendant) to repair his roof, and he in turn employed the third defendant (who was insolvent) to do it. The work was badly done and the plaintiff’s roof leaked as a result. The first and second defendants were held not liable and awarded costs. The third defendant was held liable in costs, and a *Bullock* order was upheld. Another consideration seems to be whether the plaintiff is in a genuine dilemma as to whom to sue, see Harman LJ in *Salisbury v Woodland* [1969] 3 All ER at p 881.

I find it difficult to say that there is any principle which requires that the judge must direct that the successful defendant shall recover his costs from the unsuccessful defendant. Costs are in the discretion of the court, subject to the proviso to section 27 of the Civil Procedure Act, (cap 21) and unless the discretion has not been judicially exercised this court cannot interfere. In this case it is said that as the second defendant was not insured at all, the appellant is the only one with any money. Even he is

apparently limited to Kshs 800,000/ under his insurance cover.

In my judgment, it was perfectly reasonable here for the respondent to sue both defendants, in accordance with order I rule 7 of the Civil Procedure Rules. There was a genuine dilemma. As a passenger he could not, on the facts, know whom the judge was going to hold responsible, or if blame would be apportioned between them. There is no evidence that either defendant induced him to sue the other. I consider there are no grounds for saying that Mead J exercised his discretion wrongly as to the mode of paying the costs. I agree that as the order for costs was already made and incorporated in the judgment Mr Varia had no opportunity to address the judge as to costs. But costs are normally dealt with in the judgment unless the judge for some reason wishes to hear argument on them separately or counsel so moves. In this case Mr Varia did not ask Mead J to reserve the question of costs until after the judgment, and in my view the judge was right to deal with them in the way he did. Moreover, it must be observed, the other defendant is not a party to the appeal and therefore no order which could be to his prejudice be made.

I now come to ground 2 of the cross appeal, which was that the interest rate on the damages should be varied to 12% in accordance with the practice note issued by the High Court. In the first place the practice note was a circular issued by the Chief Justice to judges on March 4, 1982, and recommended that they should consider awarding interest at 12% in view of the advantages of procrastination by defendants. It was not a direction and the judge's discretion was not affected. Secondly the circular was issued over four months after Mead J's judgment, in which he ordered that the special and general damages bear interest at the prescribed rates. The rates then prescribed were 6% by section 26(2) of the Civil Procedure Act, and this is reflected in the decree. I can detect no error in the judge's order in this respect and I would therefore dismiss the first and second grounds of the cross-appeal.

As regards the third ground, this was not seriously argued and in any event the judge was right in saying that there was no evidence of the pension, or reduced pension, that would have been paid to the respondent. The fourth ground has been covered by that which I have already said.

In the result I would dismiss the cross appeal with costs. I would also dismiss the main appeal save as to ground 4 which relates to the award for pain, suffering and loss of amenities which I would reduce, as I have said, to Kshs 400,000 and the global sum for general damages to Kshs 1,759,036 since, however, the majority of the court is, again as I have said in favour of upholding this item, and of dismissing the whole appeal, it is ordered that it be dismissed with costs.

Chesoni Ag JA. The respondent was a passenger in the appellant's motorcar when he was seriously injured in a motor accident between the appellant's and Kamau Muriithi's vehicle. He sued both the appellant and Kamau. There was no dispute that the respondent was entitled to damages. The issue was on the apportionment of liability and the quantum of damages. The facts of the case and the arguments advanced on appeal are meticulously set out in the judgment of Hancox JA, which I have had the advantage of reading.

The learned judge (Mead J) held the appellant liable for the accident and awarded the respondent total damages of Kshs 1,959,036 of which Kshs 600,000 was for the non-pecuniary loss of pain, suffering and loss of amenities of life; Kshs 500,000 for the "lost years". In his calculation the learned judge fixed the "lost years" at 10 at Kshs 90,000 pa which yielded Kshs 900,000 but the sum was reduced to Kshs 500,000 because the respondent was getting a lump sum which would earn interest, if invested, rather than having to earn it over the ten years.

The two main grounds of appeal argued by the appellant were that:

- (1) the general damages for pain, suffering and loss of amenities were excessive;
- (2) the learned judge erred in awarding damages for the "lost years".

Mr Couldrey for the appellant admitted that the respondent suffered serious injuries, but submitted that he was, nevertheless, not a paraplegic and although he was entitled to substantial damages he had continued

to work. He was a man of courage. The respondent had earlier in 1971 been involved in an accident, but the judge found that that one did not affect the accident the subject-matter of this suit and he ignored the earlier accident. The respondent suffered the following injuries:

1. A fracture of the cervical spine resulting in (a) paresis involving muscles of the left limbs with (b) loss of muscular power in the left limbs and (c) considerable reduction in mobility to the extent that he has now to walk with the aid of a stick (d) paresis has developed into permanent paralysis resulting in increased immobility.
2. He now suffers permanent urinary tract infection and chronic constipation.
3. Has been rendered impotent.
4. Has considerable difficulty in attending to his toilet requirements, bathing, dressing and undressing.
5. Suffers stiffness of the left ankle, and wasting of left quadriceps.
6. Suffers stiffness of the right knee that is held in a position of 30 degrees and cannot bend beyond a right angle.
7. Suffers a wasting of the left thenar and hypothenar muscles resulting in the left hand being very weak.
8. Can only walk about twenty yards without having to rest.
9. Cannot sit for long in any one position in comfort and has to change position.
10. Cannot take part in dancing or games, nor can he play darts as he did before.
11. He is severely restricted in social activities.
12. Cannot drive a motor car for long periods of time or distance.

The respondent was rendered unconscious at the time of the accident and recovered consciousness the following day in hospital where he stayed for six and a half months. He was treated with cervical traction and for an unspecified period he was totally paralysed in all four limbs.

Can it be said that with all these serious injuries the award of Kshs 600,000 for general damages for pain, suffering and loss of amenities is so high as to justify this court's interference with the judge's award? No two cases of motor accident are exactly the same for one to form a suitable precedent of the other. The facts, the injuries or even degree of similar injuries and the effect of such injuries are usually so different that it is necessary to consider each case on its own merit and peculiar facts even where the country, venue and circumstances are the same. For this reason past decisions in this type of cases are of little assistance in determining the quantum of damages, especially the non-pecuniary damages on pain, suffering and loss of amenities. In the English case of *Aloni National v Westminster Bank – Kemp & Kemp*, 4th Edn vols 1 & 2 case 1 – 211 35,000 Sterling pounds was awarded for pain, suffering and loss of amenities, but as pointed out by Mr Coudrey, that was a paraplegia case where the injuries were more serious and the plaintiff was younger than the respondent in this case by over 10 years. Another paraplegia case is *Walker v John McLean & Sons Ltd Kemp & Kemp* (ibid) 10402 where for pain, suffering and loss of amenities, including loss of expectation of life and loss of sexual function a sum of 35,000 Sterling pounds was awarded. *Moriarty v McCarthy* [1978] 1 WLR 155 at p 159 was not a paraplegia and for the same head of damages 20,000 Sterling pounds, were awarded. In that case the injuries prevented the victim from working and his personality changed. He was 30 years old at the time of the accident. *Lim Poh Choo v Camden and Aslington Area Health Authority* [1979] 2 All ER 910 the plaintiff, a medical doctor, aged 36 years suffered a cardiac arrest and irreparable brain damage, immediately after a minor gynaecological operation at a hospital controlled by the defendant health authority, due to the negligence of one of the defendant's staff. She became a helpless invalid and was

only intermittently sentient and her condition was such that she would require total care for the rest of her life either at home or in an institution. The House of Lords upheld the judge's award of 20,000 sterling pounds plus interest for pain, suffering and loss of amenities. In *Birkett v Hayes and another* [1982] 2 All ER 710, the plaintiff suffered grave head injury. The brain was devastated. General damages of 30,000 Sterling pounds were reduced to 22,500 Sterling pounds. There was contributory negligence to the extent of 25%.

The foregoing are awards by English courts and as was said by Law JA, in *Rahima Tayab & anor v Anna Mary Kinanu*, Civil Appeal No 29 of 1982 (unreported) this court has often said that awards by foreign courts do not necessarily represent the standards which should prevail in Kenya, where the conditions relevant to the assessment of damages may be very different: See also *Kimothia v Bhamra Tyre Retreads* [1971] EA 81. There are instances, however, where these foreign awards are useful guides, especially where local authorities are lacking. In the *Rahima Tayab* case the High Court's award of Kshs 800,000 for general damages was reduced by this court to Kshs 300,000. In that case Hancox JA considered that the global sum of Kshs 400,000 for pain suffering and loss of amenities, was appropriate. It was a case where the victim suffered injuries which Law JA described as not in themselves very serious and she made a good recovery from her physical injuries and was discharged from hospital after a month. She however, some eight months later, developed epilepsy. In *Attorney-General v Wayiera* Civil Appeal No 45 of 1982 (unreported) the sum of Kshs 384,000 was awarded for general damages and loss of future earnings. Though in the cases of *Mondo v Jessa* [1969] EA 156 and *Mohamed Shadik Ansari v Hashmat Ali Kadir* [1962] Uganda HCCC No 698 (unreported) the plaintiffs suffered injuries sufficiently serious as in the present case those decisions are in time and economic circumstances so old that they are of little assistance as a guide in assessing the damages in the present case. It is however noteworthy that in *Mondo* the general damages were Kshs 210,000 and in *Ansari* Kshs 250,000. Taking into account the value of the K£ then, these awards represent K£ 43,388 for *Mondo* and U£ 66,735 for *Ansari*, respectively. I have used the table supplied by Mr Varia in arriving at these figures whereby in 1969 the value of Kshs was 5.00 as opposed to 1.21 in 1981. These two cases were accepted as the closest guides and by their standard the general damages there were proportionately higher than in this case where they were 30,000 sterling pounds.

The respondent suffered serious injuries with permanent effects. He has been rendered impotent which to me is a continuous psychological pain and suffering. Pain and suffering in this kind of cases cannot be restricted to only physical pain. The results of the accident were so grave that they have caused irreparable injury of destroying the respondent's potency. An award of 30,000 Sterling pounds for a victim who has suffered the injuries the respondent has for pain, suffering and loss of amenities including loss of sexual function is modest. Mr Varia for the respondent cited what the court said in *Chanan Singh & Gujjan Singh v Channan Singh & Handa* (1955) 22 EACA 1 at p 129 para 3 that assessment of damages is more like an exercise of discretion and the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages unless it is satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts, or has for these or other reason made a wholly erroneous estimate of the damage suffered. I agree with that statement. It is not what the appellate court would have awarded, but whether the judge has acted on wrong principles. Having looked carefully at the authorities cited and on the facts of this case I am unable to say that the learned judge who, in my opinion, gave the matter most careful consideration, erred in principle or awarded a sum (ie 30,000 Sterling pounds) so grossly excessive as to justify interference by this court. In the premises, I would not disturb the figure of Kshs 600,000 for pain, suffering, loss of amenities including loss of sexual function.

As regards the award of Kshs 500,000 for "lost years" I agree with what my learned brother Hancox JA has said in his judgment. A victim whose earning capacity has been diminished by the defendant's negligence is entitled to compensation for the "lost years". This is a matter of not only sound logic but justice. The accident has diminished the respondent's capacity of earning. It is an economic loss for which the appellant must compensate the respondent. The learned judge quite correctly followed *Pickett v British Rail Engineering Ltd* [1979] 1 ALL ER 774 as to "lost years". The principles in that case represent substantial justice and sound logic.

It is a common sense approach to the issue. If a man through the negligence of another is deprived of the

capacity of earning for a period, he is entitled to fair compensation for the lost period occasioned by the wrongdoer.

One point raised in cross-appeal was that the learned judge ought to have awarded the costs of the second defendant who was found not liable, against the appellant directly, and that the interest awarded in the decree be varied to the revised rate of 12% per annum in accordance with the practice note by the High Court of Kenya. I need not say much on the award of costs. It is well established that the costs of and incident to all suits are in the discretion of the court or judge and the court or judge has full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for those purposes (section 27 Civil Procedure Act). The learned judge ordered the respondent (appellant in cross-appeal) to pay the costs of the successful defendant and add them to those to be recovered from the appellant in the main appeal. This is what is known as the *Bullock* order - see *Bullock v London General Omnibus Co* [1970] 1 KB 264. As said by *Udo Udoma CJ* in *D T Dobie & Co Ltd v United India Fire & General Insurance Co Ltd & another* [1964] EA 16 at p 19, in collision cases involving two vehicles, it is not unusual to join the owners of the vehicles concerned where negligence is imputed to both vehicles. In such a case, the court has to order the unsuccessful defendant to pay the costs of the successful defendant. This is known as the *Sanderson* order which was adopted in *Sanderson v Blyth Theatre Co* [1903] 2 KB 533. This court need not refer to *Mayer v Harte & others* [1960] 2 ALL ER 840 about the discretion of the court to award costs for all that is spelt out in section 27 of the Civil Procedure Act. It is a statutory provision and not a matter of case law. The learned judge had jurisdiction to exercise the discretion in awarding the costs and this court can interfere only when the lower court has exercised the discretion injudiciously eg has awarded so high or so low costs as to amount to injustice to one party or has acted on wrong principles: *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and others* (No 3) [1972] EA 162. It has not been shown that the learned judge exercised the discretion injudiciously or acted on any wrong principle. I would not, only on the ground that the second defendant was uninsured, interfere with the judge's order as to costs.

For the reasons given, I would dismiss the whole of the main appeal with costs and so would I too dismiss the cross-appeal with costs.

Nyarangi Ag JA. I have read the judgment of Hancox JA in draft. I desire to refer to two of the various issues in the appeal.

A man in good health able to earn and advance in his career but who is killed due to the negligence of another will have lost his earning capacity and ought to be adequately compensated for the lost years. To my mind, such loss arises directly from the act of negligence and should be so treated. In this action I would have been minded to award damages for the lost years even without the assistance or reference to the decision in *Pickett v British Rail*. Perhaps the English courts took so long to appreciate the inadequacy of the decision in *Oliver v Ashman* [1961] 3 All ER 323 because initially the claims for lost years were made on behalf of parties who had either lost life or whose life expectation had been considerably shortened by accidents. In my view it is necessary and just to compensate for lost years and the decision in *Pickett v British Rail* is correct and is applicable in Kenya.

The award of Kshs 600,000 for pain, suffering and loss of amenities was disputed and Mr Couldrey cited authorities in support of his contention that comparable or lesser awards have been made for more injuries. Hancox JA has analysed and discussed the authorities relied on by Mr Couldrey and Mr Varia. At the date of the accident, the respondent was aged 37 years and married with two children. As a result of the accident, the respondent suffered numerous serious injuries. He was *inter alia* rendered impotent. His wife was then aged thirty. The learned trial judge did not in my judgment accord sufficient weight to the sexual impotency. It was necessary to relate the defect of impotency to the age of the respondent and to that of his young wife. That was a consequence of the injuries which merited serious and separate treatment and not merely a passing remark. I cannot resist the thought that the trial judge misapprehended that part of the evidence. The impotency is a loss of amenity which affects the respondent's wife (a third party) in a manner which will have an adverse effect on the husband inasmuch as it will affect his relationship with his wife and have a potentially detrimental effect on the care she can give him.

All in all, the respondent suffered serious injuries and was entitled to substantial damages. The award of Kshs 600,000 for pain, suffering and loss of amenities made without giving due weight to the state of impotency is in my view on the lower side. Notwithstanding the misapprehension I have mentioned, there was no misdirection on the medical evidence and there would be no justification in re-assessing the damages: *Singh v Singh* (1955) 22 EACA 125. The trial judge dealt with all the other issues with utmost care. I would not therefore hold that the trial judge proceeded on an erroneous principle: see *Butt v Khan* CA 40 of 1977 as per Law JA, nor that the award made is wrong. *West v Shepard* (1963) 2 All ER 625, at page 635. See also *Singh v Kumbhar* (1948) 15 EACA 21, and *Marumba v Clark* (1952) 19 EACA.

The award of damages of Kshs 600,000 could not be said to differ widely from the amount usually given in similar cases. So, it may not be right for this court to disturb the award: *Mehta v Patel* (1954) 21 EACA 169. It follows that I would not alter the award for pain, suffering and loss of amenities.

In all other respects, I agree with the judgment of Hancox JA including the proposed order on costs.

Dated and Delivered at Nakuru this 18th day of May 1984.

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

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AG. JUDGE OF APPEAL

J.O.NYARANGI

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR