IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL 49 OF 1983

BETWEEN

WILLIAM J. BUTLER.....APPELLANT

AND

MAURA KATHLEEN BUTLER.....RESPONDENT

(Appeal from the High Court at Nairobi, Porter Ag J)

JUDGMENT

On November 2, 1982, Mr Justice Porter, of the High Court in Nairobi, awarded Maura Kathleen Butler (the respondent) Kshs 1,600,000 damages and William J Butler (the appellant) comes to this court for orders that they be varied by substituting a sum of Kshs 500,000, which he tendered before trial, and that he be awarded the costs of the appeal and the costs of the suit in the High Court limited to costs incurred after the date when the respondent accepted the Kshs 500,000.

The respondent and her husband, Michael Deryck Butler, were travelling in their Peugeot 504 saloon, driven by her brother-in-law, the appellant, on June 23, 1979, at 11.30 pm when the appellant lost control of it along the uplands-Longonot road. She and her husband were thrown clear but he was killed. The appellant escaped and collected a *matatu*, which then took them to Limuru Police Station where she was transferred to a lorry, which took her back to Nairobi Hospital where she was admitted at 10.00 am. She was fully conscious and in great pain because she had fractured her pelvis on her left side and her thoracic spine. Later, she had urinary infection and paralysingly severe colic due to an obstruction of her bowels.

She left hospital on July 12, 1979 walking on crutches and the condition of her pelvis steadily improved until the crutches could be cast away in early October that year, but then, it became apparent that the other fracture was not mending because she suffered great pain in that area. So she was sent off by her orthopaedic surgeon to a consultant neurosurgeon. He operated on her dorsal spine, fixed the pedicles with plates and screws at three points in her spine where there were compressed fractures, and discharged her on October 19, 1979. At the end of January, 1980, she had no pain and x-rays showed the plates and screws were safe and sound, so at the end of May, 1980, he thought she would suffer no permanent disability. He was optimistic.

She travelled to England in October, 1980, where she was admitted to hospital because the same pains returned and a surgeon removed the plates and screws which were loose and rubbing her spine, and that gave her some relief. Two months later, back in Kenya, the pain ebbed into the area between her shoulder blades and in her head, so, she returned to the Nairobi neurosurgeon, who took more x-rays and he

thought the cervical spine looked all right, but wondered if she had a disc lesion due to a 'whiplash' injury caused by the June 1979 accident. She was treated medically from early November 1981 onwards, advised to wear an ungainly collar and warned he might operate once more, this time to fuse the cervical vertebrae.

She was seen by a Consultant Orthopaedic Surgeon chosen by the advocate for the appellant, on October 11, 1982, and his prognosis was that she had sustained multiple serious injuries involving cerebral concussion, lacerations with a slight dent over the right side of the forehead, bruising of both eyes, a partial dislocation or sprain of the right shoulder, lacerations of both elbows and of her right foot, a fracture of the left side of the pelvis, compression fracture of three segments of her backbone and a whiplash injury of the cervical spine. Her skull was, fortunately, not fractured. She suffers from headaches, giddiness, nausea, nervousness, loss of memory, depression, irritableness and insomnia. She finds it difficult to cope with her work and day-to-day problems. Her neck is stiff and painful and she has pain in her shoulders and both arms. There is weakness in both hands, which means she could not drive a car or type or carry a shopping basket. All this will continue for a long time and will probably get worse. She will develop osteoarthritis in her spine. He summarized the operations she had had for her back and noticed her spine was now beginning to curve forwards. The left side of her pelvis had united successfully, but she would continue to have pain in it for some time to come. The lacerations on her face, elbows and right foot had been stitched and had healed leaving permanent scars and this slight dent over her forehead.

When the trial began, the appellant admitted liability and the issue that remained was what award of damages should the learned judge make in favour of the respondent?

She claimed as the personal representative of the estate of her husband, under the Fatal Accidents Act for herself as widow and for her daughter by her first husband, whom the second husband, the deceased, intended to adopt and had signed the documents in support of an application for an adoption order. They were both his dependants before he died. The respondent was 31 when she brought this claim and her child 11. The deceased was 37 years old, a farmer at Nakuru in partnership with his father, in good health and the sole support of the respondent and the child, whose joint dependency was estimated to amount to about Kshs 126,800 a year, at the least. The respondent also claimed for damages for her own injuries, which I have just set out in detail. The advocates for the parties further agreed that special damages for the Fatal Accidents Act claim would be Kshs 5,000 and for her personal claim Kshs 40,881. They also agreed that the multiplier for the Fatal Accidents Act claim should be 15. The appellant had offered Kshs 500,000 in full and final settlement of the Fatal Accidents Act claim, which the advocate for the respondent declared should be treated as having been paid into court and accepted with the usual consequences. Finally, the respondent, for personal reasons, asked the learned judge to limit her award under each claim to Kshs 800,000 including special damages and costs and these were the sums which she was, in fact, awarded by the learned judge at the end of the day, but without these limitations, she would have been awarded more under each head. Thus, when he dealt with the Fatal Accidents Act claim, he decided the dependency of the respondent and her daughter was Kshs 53,500 a year, from the date of her husband's death to the date of the trial and Kshs 983,000 a year onwards and after multiplying it by 15, he would have made an award of Kshs 1,325,140 had it not been limited to Kshs 800,000.

Then, he turned to her claim for her injuries. Special damages had been agreed, it will be recalled, at Kshs 40,881. Damages for further medical expenses, including another operation, he fixed at Kshs 10,000 which he called a very low figure. He then summarized the pain, suffering and injuries she had endured, and came to the conclusion that without the limitation that she set, he would have awarded her Kshs 280,000.

He then dealt with her loss of earning capacity which he made a separate head in his calculations. He found that after the accident in which her husband died, she would have had to start looking for work to support herself and her daughter but with her injuries, she would never be able to find a suitable job. She was a Kenyan citizen and a partly trained nurse and if she had been employed, she might have earned something like Kshs 6,000 a month as a secretary or in some administrative position in a local hospital. So he took Kshs 60,000 a year and multiplied it by 10, and said he would have awarded her Kshs 600,000

as damages for loss of earning capacity.

He then set out the figures he had reached in this form: (but I have changed his pounds into shillings)

	Shs
Pain and suffering	280,000
Loss of earning capacity	600,000
Future medical fees	10,000
Agreed special damages	40,880
Total	930,880

He was limited, however, to Kshs 800,000 for the Fatal Accidents Act claim and Kshs 800,000 for an award for her injuries, so he entered judgment for Kshs 1,600,000 instead of Kshs 2,256,020. The appeal from the award under the Fatal Accidents Act was abandoned.

So far as the appeal from the award for the respondent's personal injuries was concerned, there was no complaint about the sum the learned judge gave for pain and suffering, which was Kshs 280,000, or the award for future medical fees, which was Kshs 10,000, nor, of course, Kshs 40,880 for special damages, which were agreed. The only complaint that remained was that against the figure of Kshs 600,000 for loss of earning capacity.

Mr Guram, for the appellant, said the learned judge erred in law in making it a separate head, when it should have been just part of the general damages. The judge, he continued, calculated it on the basis of the salary she might have earned as a secretary or as an administrator, less a sum for the changes and chances of this fleeting world, and multiplied it by 10, when he should have plucked some appropriate figure from the air.

Mr Noad, for the respondent, said that the award was very low for the respondent under both headings, and the judge had done the best he could and whatever his approach, the result could not be described as excessive in the circumstances of the case. There was no cross-appeal on the sums awarded because it was the maximum under the agreed limit for each claim. Mr Noad explained that he would have cross-appealed on the award for personal injuries if Mr Guram had given notice that he would only complain of the sum for 'loss of earning capacity' because he wished to submit that if the court were to reduce that sum, it should raise the figure for one or other of the items under the same claim.

Now, there was no evidence of what the respondent had earned before the accident either as an unqualified nurse or the wife of a farmer at Nakuru, so this was not a claim for 'loss of future earnings'. It was, as the learned judge described it, for a 'loss of earning capacity' which she suffered and this should be part of the general damages for her disabilities and not compensation, for future loss of earnings. The respondent would be at a considerable disadvantage or, indeed, without any hope in the labour market because of her injuries. There are no reported decisions of any court in this part of the world for all this.

The English law on the issue is this: The respondent brought this action for damages and she had to prove her damages. Lord Goddard CJ in *Bonham Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177.

Sometimes it is impossible, though the justice of the case requires some award to be made or as Holreyd LJ said, in *Daniel v Jones* [1961] 1 WLR 1103, 1109:

"…. Arithmetic has failed to provide the answer which common sense demands."

A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The English Court of Appeal made an award under this head in *Ashcroft v Curtin* [1971] 1 WLR 1731, and by now, it is not a new principle in that jurisdiction.

Ashcroft was a skilled precision engineer who, at the age of 57, was injured by Curtin in a traffic accident. He was left with tinnitus and disturbance of his balance for the rest of his life. 'He was no man at keeping accounts' so he could not quantify his private company's loss but had he had to find work outside his company, for which he had been trained since he was 14, which was a real risk, he would be greatly handicapped and he was entitled to compensation, which was put by the Court of Appeal, in late July, 1971, at Pound Sterling 2,500.

It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way:

"… compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages."

Lord Denning MR in *Fairley v John Thompson (Design and Contracting Division) Ltd* [1973] 2 Lloyd's Rep 40, 42 (CA).

These sums used to be included as an unspecified part of the award of damages for pain and suffering and loss of amenity. The figures were 'plucked from the air'. Later, in England, damages under this head had to be separately quantified: *Jefford v Goe* [1970] 2 QB 130, and no interest is recoverable on them: *Clark v Rotax Aircraft Equipment Ltd* [1975] 1 WLR 1570.

Guidance on the principles for assessing such damages were given by the same Court of Appeal in *Moeliker v Reyrolle & Co* [1977] 1 WLR 132 by Brown LJ in this form.

The question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible, but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can. The respondent has incurred Kshs 25,527.50 in further medical expenses since the end of May, 1983, according to invoices which were produced, by consent on her behalf, under rule 29 Court of Appeal Rules.

I turn to the English awards which were cited. O'Connor J awarded Pound Sterling 15,000 for pain and suffering and loss of amenities to Mrs Hall, aged 40, an inspector in British Oxygen on November 6, 1973, which was affirmed by the Court of Appeal on June 21, 1974. She sustained a severe sprain of the ligaments in her neck in a car accident which aggravated a pre-accident cervical lesion, another sprain in her spine, and shock. She had a protruding disc removed and her left greater occipital nerve removed. In consequence, she was left with a painful stiff neck, she could not move and a collar she had to wear day and night. So, having had a full life, she was reduced to helplessness. *Hall v Lord Halsbury* [1973] *Kemp and Kemp on Damages,* 1975, 4th edition, Volume 2, Case No 6-011/1.

Talbot J awarded Miss Walters, 21, a nurse, Pound Sterling 18,000 for pain, suffering and loss of amenities on May 21, 1982, including damages for the termination of her nursing career. She was knocked down on a zebra crossing and the head and neck of her femur was displaced into her pelvis. She was operated on for pain in her left hip and then had to endure a shortening of her left leg by half an inch, and another operation, to replace her left hip was likely. *Walters v Schirmer* [1982] Kemp and Kemp

(*ibid*) 8-310/1.

The Court of Appeal upheld Hodson J's award of Pound Sterling 20,000 for pain and suffering and loss of amenity for Harrison, 42, injured in a motorcycle racing accident. He had severe compression of one thoracic vertebra and damages to two more and other injuries to his left ribs, his scapula and knee. *Harrison v Vincent* [1982] Kemp and Kemp, 2-204.

This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. *Kimothia v Bhamra Tyre Retreaders* [1971] EA (CA-K); *Tayab and Ahmed Yakub & Sons v Anna May Kinanu* Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA) March 30, 1983. The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.

Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. *Bhogal v Burbridge* [1975] EA 285 (CA-K). None, alas, has been cited to us.

The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.

But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. *H West & Sons Ltd v Shephard* [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in *Tayab* (*supra*).

In my opinion, the judge approached this head of damages with the right principles in mind. His conclusions are supported by the evidence. Standing back and looking at his award, in the circumstances, it was the right one. The result is that I would dismiss this appeal with costs but order that the interest be recalculated. Chesoni Ag JA and Nyarangi Ag JA agree and these now become the orders of the court.

Chesoni Ag JA. This appeal is only against the award of Kshs 600,000 for loss of earning capacity. The facts and counsel's arguments are meticulously set out in the draft judgment of my learned brother, Kneller JA, which I had the privilege of reading. The appellant's contention is that the award for general damages for pain and suffering, which is Kshs 280,000, should be considered as having included an award for loss of earning capacity.

There was no dispute that the respondent suffered serious multiple injuries causing her disfigurement, and, on her own unchallenged evidence, she will find it difficult to work. She could take shorthand and type and as a personal secretary, she could earn between Kshs 6,000 and 8,000 per month, but now she could have a job at half that salary. The doctor said she cannot now type for a long time, so the learned judge correctly found she had lost some earning capacity. Whether at the time of the accident she was using her earning capacity or not is immaterial. She had it and could put it into use whenever she wanted, now it was diminished and she was entitled to compensation for the loss she had suffered. As Lord Goddard correctly said in *British Transport Commission v Gourley* [1956] AC 135 at 206:

"in an action for personal injuries, the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of pocket expenses and loss of earning incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. <u>This includes compensation for pain and suffering and the like, and if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future</u>." (underlining is mine).

Loss of earning capacity or earning power may and should be included as an item within general

damages, Lord Denning MR in *Fairley v John Thomson* [1973] 2 Lloyd's Rep 40 at 42 (CA) but where it is not so included, it is not improper to award it under its own heading as the learned judge in this case did. Indeed, the judge should have said "general damages" for pain, suffering including loss of earning capacity, Kenya Pounds 44,000, a figure, in view of the result of the injuries suffered in this case, I would not consider too excessive as to justify this court's interference. What a victim whose earning capacity is diminished through an accident loses is an interest which, if not saleable on the labour market, has an assessable value. It is, therefore, an economic loss of the same class as the "lost years", for which the wrongdoer should fairly compensate the victim. Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite heading of general damages or as an item on its own, as loss of earning capacity. At any rate, what is in a name if the damages are payable?

In *Zablon W Mariga v Morris Wambua Musila* Civil Appeal No 66 of 1982 (unreported), this court said that the assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would or he has taken into consideration matters he ought not to have considered, or not taken into account those matters he ought to have considered and in the result, arrived at the wrong decision. Nothing of the sort has happened in this case. Although this is not an assessment for interfering with the learned judge's award of 39,000 pounds for loss of earning capacity under its own heading as such. The award of Kenya Pound 14,000 as general damages for pain and suffering, was so low that it could, for certain, not have included the award for loss of earning capacity. In view of what I have said above, I agree that this appeal should be dismissed with the orders proposed in the judgment of my learned colleague, Kneller JA.

Nyarangi Ag JA. The facts of this appeal are fully set out in the judgment of Kneller JA.

The burden of the argument of Mr Guram, for the appellant, was about the element of loss of earning capacity as opposed to loss of future earnings. Mr Guram's contention was that there is great material distinction between compensation for future loss of earnings and future earning capacity. It was argued that as regards future loss of earnings, a multiplier is applied to the annual sum lost and the result is the compensation, but that a plaintiff is compensated for loss of future earning capacity in general damages. Mr Guram submitted that the item of pain and suffering relating to disability would cover loss of earning capacity. There was quarrel with the approach of the trial judge and a complaint that there should have been evidence on capacity to work. In reply, Mr Noad, for the respondent, argued that the trial judge bent over backwards to be fair to the appellant, that the plaintiff gave evidence on loss of earning capacity and provided clear evidence of a disabling loss of future earning capacity, furnished an estimate of a secretary's income from a salary and the defence offered no evidence to displace the diminution. Mr Noad thought that the important factor is that the respondent cannot now think of what to do and that the figure of Kshs 800,000 looked at globally is not excessive.

There was no evidence before the trial judge, that the respondent had before been in salaried employment. There could therefore be no claim for 'loss of future earnings'. However, having been injured to the extent of not being able to find a suitable job, the respondent had lost her capacity to earn. I would liken loss of earning capacity to the doctrine of 'lost years' whereby a victim, whose capacity is lessened by the negligence of the defendant, is entitled to be compensated for the 'lost years'. In my judgment, the decisions in the *Picket v British Rail Engineering Ltd* [1979] I All ER 774 and Civil Appeal No 66 of 1982 provide clear authority for separate compensation for loss of earning capacity which, as I have already observed, is akin to the loss of the whole period for which a person has been deprived of his ability to earn.

The trial judge held, on the evidence available, that the respondent's visible occupation would have been to work as a secretary and that she could expect a net figure of Pounds 3,000 per annum. The trial judge was here doing his best, to assess in monetary terms, the loss of earning capacity. It was immaterial that the respondent had not been in salaried or similar employment. This type of claim could, as Kneller JA says, be a claim on its own and the figure need not be plucked from the air, because the plaintiff would be expected to furnish the material on which a reasonable figure could be based. The figure of Kshs 800,000

must be the result of a mathematical calculation, using such relevant factors as the respondent's age and secretarial qualifications and the nature of her injuries. It appears that for once, arithmetic succeeded to provide the answer demanded by common sense: See *Daniel v Jones* [1961] 1 WLR 1103 and *Ashcroft v Curtin* [1971] 1 WLR 1731. The trial judge approached the aspect of the claim correctly and it has not been demonstrated that the award should be interfered with: *Butt v Khan* Civil Appeal No 40 of 1977 and *H West & Son v Shephard* [1963] 2 All ER 625 at page 635.

Awards by foreign courts can only serve as a guide. In appropriate cases, local conditions such as levels of earnings, lack of a national comprehensive social security and effect of extended family system, would affect assessments in a very real way.

I agree that the conclusions of the trial judge are supportable on the evidence and that the award is just about right. I would therefore dismiss the appeal. I concur with the order proposed by Kneller JA on costs.

Dated and Delivered at Nairobi this 5th day of July 1984.

A.A.KNELLER

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JUDGE OF APPEAL

AG. Z.R.CHESONI

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JUDGE OF APPEAL

AG. J.O.NYARANGI

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JUDGE OF APPEAL

I Certify that this is a true

copy of the original.

DEPUTY REGISTRAR