IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Simpson CJ, Law JA & Hancox Ag JA)

CIVIL APPEAL NO. 45 OF 1982

BETWEEN

ATTORNEY GENERAL.....APPELLANT

AND

WAIYERA.....RESPONDENT

JUDGMENT

This is an appeal and cross-appeal from the decision of the learned acting judge at Mombasa awarding damages to the respondent in respect of injuries and loss sustained in a traffic accident on December 21, 1978. The Attorney General was sued under the Government Proceedings Act (cap 40), as the other vehicle involved was a Ministry of Education lorry and its driver an employee of that ministry. No issue of liability arose on the appeal or the cross-appeal.

Schofield Ag J awarded the respondent, a senior electrical technician, damages totalling Kshs 682,627 and the other plaintiff, his employers, the East African Power and Lighting Company, Kshs 26,910 for damage to their vehicle which the respondent was driving at the time of the accident. They are not a party to this appeal.

The award of Schofield Ag J in favour of the respondent was as follows:

i. Loss of promotion to second assistant engineer 4 years @ Kshs 1,600 pm ..... Kshs 76,800
ii. Loss of promotion to first assistant engineer 4 years @ Kshs 3,500 pm ..... Kshs 168,000
iii. Loss of promotion to construction engineer 4 years @ Kshs 6,000 pm ..... Kshs 288,000
Making Kshs 532,800 (not Kshs 522,800)
iv. Skull fracture and eye injury ..... Kshs 100,000
v. Scars ..... Kshs 20,000
vi. Damage to three teeth ..... Kshs 10,000
vii. Special damages (of which Kshs 4,257 were pleaded and Kshs 25,660 for “loss of promotion” were not pleaded, but apparently became an issue by consent) ..... Kshs 29,857

(Not Kshs 682,657 as stated in judgment but Kshs 692,657)

The total period covered by the supposed losses of promotion equalled the twelve years used as a

multiplier by the judge earlier in his judgment.

The first three of these heads of damage were vigorously attacked by Mr Gatonye, now appearing for the Attorney General as the appellant, and the remaining four criticised as much too low by Mr Talati who now appears for the respondent. As to items (i), (ii), (iii) and (vii) above, the basis of Mr Gatonye's attack was that loss of future promotional prospects and earnings can never come under the heading of special damages, the definition of which he cited from *McGregor on Damages* and can at most be "taken into account" as loss of future prospects which a plaintiff is entitled to as part of his general damages against a defendant. I understood Mr Talati to concede that in his method of calculation the judge had adopted a fundamentally wrong approach, though he maintained his client was entitled to at least this much, if a proper assessment of the evidence of the loss of his earnings had been made and the correct multiplier taken.

For my part I have no hesitation in saying that loss of earnings on future promotion can never be part of an award of special damages, for the simple reason that they are not quantifiable or ascertainable at the date of trial. The term "special damages" means 'out of pocket expenses and loss of earnings actually incurred up to the date of trial'. As to this aspect of the general damages in this case, while the evidence may have suggested that the plaintiff might have achieved promotion but for his injuries, it did not go so far as to say that he would have done so. All his superior, Mr Keitany, said was:

> "He was in line for promotion before the accident. The accident more than anything else was the contributing factor to him missing promotion. Other things being equal, if he had continued with his course I cannot see what would have prevented him from reaching construction engineer."

Earlier he said:

> "The speed of promotion is not automatic. It depends on individual performance."

This is a far cry from the case of *Chambers v Karia*, Kemp and Kemp, Case 1-107 cited by Mr Talati, where promotion was stated to be "inevitable". While I would regard loss of possible promotion as a legitimate factor to be taken into consideration in assessing general damages, where it can be shown that a person has reasonable prospects of promotion in the ordinary course of events, I would not go to the extent of the mathematical exactitude which the judge applied in this case, by fixing the precise dates and periods of each promotion. This was speculative and not warranted on the evidence. As the respondent himself said:

> "The reason I feel the accident affected my promotion because of the length of time I have been without promotion. I have not asked anyone if that is so but it is my feeling. A number of us have been promoted, a number of us have not been. There is no laid down procedure for promotion after three years. We have seen people being hired from outside to take positions we could be promoted to."

The emphasis is mine. As Law JA said in *Oluoch v Robinson* [1973] EA at p 113 B, in relation to prospective increments (a matter which in some circumstances might be regarded as less uncertain than prospective promotion):

> "I cannot personally accept that submission" (that the respondent would have received increments had he not been injured). The respondent had no right to automatic increments; but only to the grant of increments being considered."

For these reasons I am of the view that the judge erred in awarding a specific figure to the respondent as "the benefit of lost promotion" as part of the general damages. By the same token that part of the special damages which was expressed by the judge to be loss of income from February 1981 to the date of hearing, at Kshs 1,600 per month, being the extra amount the respondent would have earned if he had progressed to second assistant engineer, which was based on the evidence of the Coast Area Manager, must also go. As I said, his evidence does not justify that finding and accordingly the appeal against the

Kshs 25,600 for this period (February, 1981 to May, 1982) as part of the special damages must in my view succeed. This leaves untouched the Kshs 4,257 special damages figure which was admitted at the outset of the trial.

The foregoing does not, of course, mean that the respondent is not entitled to anything for loss of prospects by way of future earnings. Far from it. While I do not accept Mr Talati's submission that the respondent's average loss per month is Kshs 2,000 as from now, I do consider that he has a claim, or an additional claim, for loss of earning capacity if he should ever lose his present job. In *Smith v Manchester Corporation* [1974] KLR 1 at p 8, Scarman LJ as he then was, quoted in *Moeliker B v Reyrolle* [1977] 1 All ER 9, (a case cited by both counsel to us) said it was wrong to describe that sort of earning capacity as a possible loss. He said:

> "It is an existing loss; the plaintiff is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present have to go into the labour market."

That passage seems to me to fit this case. The respondent has overcome his injuries and, to his credit, is obviously a hard working man, performing his job reasonably well, so he is not imminently in danger of being thrown onto the labour market. But there was credible evidence from Mr Keitany that there is a real risk of early retirement. After adverting to his right eye being impaired and the lack of feeling on that side of his head, he said:

> "We hope there is no relapse, but if there is any change it could result in early retirement ... If he goes blind in one eye the chances of his early retirement will be enhanced greatly."

It was open to the judge to make a finding of lost future earnings based on this evidence, and I apprehend that it is equally open to this court to do so now. There was evidence that the normal retiring age is fifty five. That was accepted by both counsel in this court (Mr Gatonye with some reluctance) as it was by Sachdeva J in *Fatehali Marali v Kenatco & Anor* HCCC 1179 of 1971, (where the plaintiff was thirty four years of age at the date of the accident and where the affected eye was virtually a total loss). I consider it is a fair inference, on the unchallenged evidence of Mr Keitany in this respect, that there is a real risk, not merely a speculative or forceful one (see Browne LJ in *Moeliker v Reyrolle* (supra) at p 16), that the respondent will, at some time before the end of his working life, ie age fifty five, be thrown onto the labour market. He is therefore, in my judgment, entitled to damages under this head. To assess them is no easy task. As Browne LJ continued:

> "I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages.
>
> > 1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life?
> > 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.
>
> It is impossible to suggest any formula for solving the extremely difficult problems involved in the second stage of the assessment. A judge must look at a particular case and do the best he can."

Assessing the evidence as best I can I take the view that there is a real likelihood of the respondent being out of job (that is to say losing the present one and being unable to get another) at age forty five, that is in about eight years' time. The lost years (see O'Connor LJ in *Chambers v Karia* (supra)) would therefore be ten, and I think that is the right multiplier/ multiplicand to apply, ("plucked from the air" to use Law JA's dictum). The only available evidence of his earnings is that he was at the date of the trial receiving Kshs 3,940 per month. He would get a reduced pension on early retirement, but there was no evidence as

to how much that would be. Neither is there any evidence as to what the respondents' expenses would have been on himself for the lost years (*Pickett v British Rail Engineering Ltd* [1978] 3 WLR 955). Another consideration is the income which the respondent can expect to receive from such part of the damages which he may invest, leaving the principal untouched. With this in mind, and the likelihood of his receiving a pension if he is retired prematurely, I would take the sum of Kshs 3,200 per month as his prospective loss, and multiply it by 120 months and I would give the respondent Kshs 384,000 under this head.

I now turn to the cross appeal, which involves the by no means easy task of assessing in money terms compensation for the severe injuries, pain, suffering and loss of amenities of life which the respondent sustained. Mr Gatonye accepted that the figure of Kshs 30,000 which the learned judge gave, was possibly too low by "Kshs 10,000 or 20,000", but not sufficiently or demonstrably so that that part of the award could be said to be made on wrong principles, so as to justify interference by this court (an "entirely erroneous estimate" see Law JA in *Butt v Khan* Civil Appeal 40 of 1977).

Mr Talati cited numerous authorities relating to the impairment or loss of an eye, fracture of the skull, coupled with scars and damage to teeth. I take the following statement of the respondent's injuries from the report of Mr Rasik Patel of February 22, 1980, which recited the findings of the doctor who examined him on admission to hospital:

> "1. Concussion and severe shock due to loss of blood.
>
> 2. Multiple cut - lacerated wounds on the forehead, right side face, lower chin, neck, right shoulder and right ear.
>
> 3. X-Rays showed multiple linear fractures of the skull - and also of frontal bone on the right side involving the upper orbital margin and fracture base skull.
>
> 4. He had CSF Rhinorrhoea - (leakage of the cerebrospinal fluid from the nose) - due to a fracture of the base skull. 5. The two right lower incisor teeth and one left upper incisor tooth were broken."

It will be sufficient to refer briefly to some of these authorities. In *Haji v Batweid* HCCC 856 of 1979, the first plaintiff received a head injury, lacerations, an injury to his right knee, and was left with residual giddiness and lack of ability to concentrate. Kneller J awarded him a total of Kshs 125,000 general damages. In *Juma v Kenya Glass Works*, Civil Appeal 1 of 1980 Kneller J's award of Kshs 50,000 for total loss of vision in one eye as, by a majority, increased on appeal to Kshs 70,000. In *Butt v Khan* (supra) Law JA with whom Wambuzi JA agreed, held that Kshs 400,000 was too much for a child who suffered a severely fractured skull, lost two teeth and had 50% residual permanent disability (though that conclusion was in part based on the disparity between Kshs 20 and the pound sterling). In *Lalji v Toka*, Civil Appeal 46 of 1980 the combined court adopted a figure of Kshs 75,000 as adequate damages for injury to the plaintiff's jaw and teeth.

As to the English cases, in *Marsden*, Kemp and Kemp, Case 3-683/1/4, £ 2,500 was awarded for scarring and consequent disfigurement in 1981; similarly in Bishop, Case 3-682/1/3. In *Re McCloskey*, Case 5-41, a fracture of the skull coupled with a loss of hearing in one ear resulted in an award of £ 10,000. Taking all these cases into account I consider the correct approach in this case is to award a global sum in respect of the respondent's pain, suffering and residual injuries. In my view, for all these injuries, the gravest being to his eye, the award of Kshs 130,000 to the respondent was manifestly too low. I would award him Kshs 225,000 under this head.

In the result I would allow the appeal to the extent of substituting an award of Kshs 384,000 for the figure of Kshs 522,800, (which should be Kshs 532,800) awarded by the learned judge under the heading of general damages for loss of future earnings and of reducing the award of special damages from Kshs 29,857 to Kshs 4,257. I would also allow the crossappeal to the extent of substituting an increased sum of Kshs 225,000 for the Kshs 130,000 given by the High Court.

The total of these amounts is Kshs 613,257; which represents the damages to which, in my opinion, the respondent is entitled in this case.

As regards costs, both the appellant and the respondent have had a measure of success and I would accordingly allow the appeal, with costs, and allow the cross-appeal, with costs.

Simpson CJ. I have had the advantage of reading in draft the judgment of Hancox Ag JA. I agree with it and with the orders proposed. As Law JA also agrees the appeal is allowed with costs to the extent of substituting Kshs 384,000 for the amount awarded by the learned judge under the heading of general damages for loss of future income and substituting Kshs 4,257 for the award of Kshs 29,857 in respect of special damages. The cross-appeal is allowed with costs to the extent of substituting Kshs 225,000 for the award of Kshs 130,000 made by the learned judge for pain, suffering and loss of amenities. The total award is therefore Kshs 613,257.

Law JA. I agree with the judgment prepared by Hancox Ag JA which I have read in draft and I concur in the orders proposed by Simpson CJ.

Dated and delivered at Mombasa this 3rd day of March, 1983.

SIMPSON

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CJ

E.J.E LAW

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JUDGE OF APPEAL

A.R.W HANCOX

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR