IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Law JJA & Simpson Ag JA)

CIVIL APPEAL NO. 46 OF 1980

BETWEEN

LALJII..APPELLANT

AND

TOKA..RESPONDENT

JUDGMENT

Law JA The appellant was a passenger in a car which on January 21, 1976, collided with a lorry on the Mombasa-to-Malindi road. The appellant sustained serious injuries and sued the drivers and owners of the two vehicles for damages for negligence. The learned judge Kneller J found negligence proved against both drivers, and apportioned the blame as to 25% against the driver of the car and 75% against the driver of the lorry. There has been no appeal against the finding of negligence or the apportionment of blame. This appeal is concerned only with the quantum of damages, both special and general, awarded to the appellant, which he complains are so low as to form an entirely erroneous estimate.

The appellant was aged twenty nine at the time of the accident. He is a businessman, and an equal partner with his elderly father, who is semi-retired, in the firm of Mohamed Lalji and Company, which carries on wholesale and retail trade in and around Homa Bay. The injuries suffered by the appellant consisted of compressed fractures of thoracic vertebrae Nos 4, 5 and 10, and an injury to the hard palate of the mouth resulting in traumatic occlusion, so that his teeth, instead of having “plane” or “surface” contacts, have “point” contacts, involving considerable pain and a 50% disability which may be cured by an operation involving refracturing and repositioning one of the jaws, with a possibility of some degree of permanent disability.

The appellant was an inpatient for five weeks and has made a good recovery from his back injury, although he still suffers from pain and weakness, and from some degree of Kuphosis, or curvature of the spine. Osteoarthritis is likely to develop. For all these injuries, the learned judge awarded general damages of Kshs 75,000. He refused to award anything in respect of loss of earning power in the future, dismissing the claim under this head as “fanciful”.

He was referred to awards in unreported comparable cases of injury to the mouth, such as *Shah v Kamau* (Nairobi Civil Case 289 of 1970) in which the plaintiff was awarded Kshs 100,000 general damages, and *Cooke v Muquel and others* (Mombasa Civil Case 250 of 1973) in which general damages of Kshs 120,000 were awarded. In Shah’s case the award took into consideration the likelihood of having to undergo “a serious and delicate surgical operation with its accompanying hazards and the considerable expense involved.” In *Cooke’s* case the plaintiff was a young unmarried woman, who had lost nine teeth,

undergone a painful operation, who would need plastic surgery and whose matrimonial prospects might be affected. Kneller J expressed the view that, these cases were "more serious" than that of the appellant. That may be so, but in addition to his mouth injuries, the appellant has the added inconvenience of his back injury, with the resulting Kuphosis and likelihood of osteoarthritis. Furthermore, the learned judge made no award for the expense of a surgical operation, which the appellant's dental surgeon considered necessary and which, Mr Dhanji for the appellant informs us, the appellant is undergoing or is about to undergo.

The learned judge had the advantage of seeing the appellant when he gave evidence, and said that the appellant "did not persuade this court this operation was necessary". With respect, the medical and dental reports were agreed, and the appellant's evidence that his teeth did not meet, that they were loose and painful, and that he intended to have the operation, were not challenged. The learned judge did however say that if he was wrong on this point, he would have awarded an additional Kshs 20,000 for the operation. I would award the appellant this amount.

In my view, and with great respect to the learned judge, and having regard to the effects of inflation, the general damages awarded to the appellant in this case were manifestly inadequate and represent an erroneous estimate, but before expressing an opinion as to what those general damages should be, it is necessary to examine the grounds of appeal which complain that the learned judge did not make any award by way of special damages in respect of the appellant's loss of salary and loss of profits between the date of the accident and the date of trial (quantified in the memorandum of appeal at Kshs 150,000) or by way of general damages for loss of future earnings (quantified in the memorandum of appeal at Kshs 225,000. As to the first item, I would merely repeat what Lord Goddard CJ said in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177:

"Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying "This is what I have lost, I ask you to give me these damages'. They have to prove it."

In the instant case the appellant produced particulars which were inconclusive. They did not show that the appellant had lost any income, by way of loss of salary or profits; on the contrary, they seem to indicate that payments to him increased in the three years following the accident. I agree with the learned judge that the appellant did not prove any loss of earnings or profits consequent upon the accident. But I am not so sure that the appellant has not made out a case for an award in respect of future earnings, on the basis that his earning-power has been reduced by reason of his injuries. It does not seem to be disputed that the appellant cannot work as efficiently as he used to; he can no longer drive 200 miles a day, soliciting orders and making deliveries; he cannot lift weights; nor can he sit or stand for long periods without undue discomfort. As the learned judge observed, the firm could employ a driver and a salesman to do the driving, to canvas orders and make deliveries. This alone, in my view, is sufficient to show that the appellant has suffered in regard to future earnings, as part of his former activities can only be performed in the future at the expense of the appellant and his firm. He has, in my view, made out a case for some sort of award in respect of his diminished earning-power. As in *Ashcroft v Curtin* [1971] 3 All ER 1208, this loss cannot be quantified on the basis of the material available to this Court, some sort of figure will have to be "plucked out of the air" and added to the general damages as reasonable and proper compensation under this head.

Taking into consideration all the matters set out above, I would dismiss this appeal so far as special damages are concerned, but I would allow it so far as general damages are concerned. I would set aside the award of Kshs 75,000 made by the learned judge in favour of the appellant, and substitute to an award of Kshs 175,000 made up as follows —

For the mouth injury	Kshs 75,000
For future operation costs	Kshs 20,000
For the back injury	Kshs 50,000

For loss of earning-power	Kshs 30,000
Total	Kshs 175,000

I would amend the decree by deleting paragraph 1 and substituting the following-

"1. That the defendants do pay to the plaintiff Kshs 175,000 general damages together with interest thereon at the rate of six per centum per annum from June 24, 1980, until payment in full;".

I would award the appellant the costs of this appeal, to be paid by the respondents.

As **Madan JA** and **Simpson Ag JA** agree, it is so ordered.

Dated and Delivered at Mombasa this 3rd day of February 1981.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

A.H.SIMPSON

..

AG. JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR