Case Number:	Civil Appeal 46 of 1983
Date Delivered:	10 Sep 1985
Case Class:	Civil
Court:	Court of Appeal at Malindi
Case Action:	Judgment
Judge:	John Mwangi Gachuhi, James Onyiego Nyarangi, Alan Robin Winston Hancox
Citation:	Southern Engineering Company Ltd v Mutia [1985] eKLR
Advocates:	Mr. Inamdar for the Appellant Mr. Gautama for the Respondent
Case Summary:	**Southern Engineering Company Ltd *v* Mutia** **Court of Appeal, at Mombasa** **September 10, 1985** **Hancox, Nyarangi JJA & Gachuhi Ag JA** **Civil Appeal No 46 of 1983** *(Appeal from the High Court at Mombasa, Schofield J)* ***Damages*** *– assessment of – for personal injuries – relevance of English decisions on awards of damages – when proper to consider awards of damages of foreign jurisdictions – how foreign awards applied - matters the courts should consider – similarity of conditions between Kenya and other jurisdictions - circumstances in which appellate court will set aside award.* ***Damages*** *– quantum of – for pain, suffering and loss of the amenities of life - severe mutilation of left hand – amputation of thumb, ring and middle*

fingers – award of Shs 225,000 – whether award inordinately high.

The respondent, a man aged 39 years, met with a sawing accident while carrying out his duties as an employee of the appellant. He lost the thumb, ring and middle fingers on his left hand by amputation and save for the index finger which could be moved passively, the remaining fingers suffered permanent deformity.

In the respondent's suit against the appellant for compensation, he testified that as a result of his disability, he could not carry out any work involving the use of both hands, and that the appellant had assigned him new duties at a store.

The trial judge considered two Kenyan cases involving similar injuries to the left and right hands and awarded the respondent Shs 225,000 for pain, suffering and loss of the amenities of life, among other relief. On the appellant's appeal against this award, his advocate argued that it was inordinately high and that the judge had erred in relying on the two Kenyan cases because they had been decided after a consideration of English decisions which he said was a bad practice because the conditions in Kenya differed from those in Britain.

Held:

1. The measurement of the quantum of damages is a matter for the discretion of the individual judge which has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant the case in question.
2. In considering the correctness or otherwise of an award of damages appealed from, the appellate court would require the appellant to show that the award was so inordinately high as to represent an entirely erroneous estimate of the compensation to which the respondent was entitled.
3. In instances where there are Kenyan decisions on awards for personal injuries in which the main essentials bear comparison with the facts of the case before the court,

and they otherwise bear a reasonable measure of similarity to it, Kenyan decisions should be used to the exclusion of others, save those from a neighbouring jurisdiction with similar conditions to Kenya (Per Nyarangi JA: such jurisdictions being Uganda and Tanzania). Only when there are no local decisions on the point should resort be had to English or other authorities (Per Nyarangi JA: such being Commonwealth or USA authorities), and then only as helpful indicators or some sort of parameter.

4. The trial judge did not err in referring to the Kenyan cases which had been decided after reference to English decisions because the judge deciding those cases had used the English decisions only as helpful indicators.
5. The trial judge erred in failing to appreciate that there were essential differences in degree between the injuries in the cases he relied on and those in the instant case, the latter injuries being less severe. Had the judge appreciated this, his award for pain, suffering and loss of the amenities of life would have been considerably less.

Appeal allowed, award of damages for pain, suffering and loss of the amenities life reduced to Shs 160,000.

Cases

1. *Otieno v Cabroworks Ltd* High Court Civil Case 628 of 1978 (unreported)
2. *Mutuya v Wilfred Mbika & Another* Mombasa High Court Civil Case No 442 of 1980 (unreported)
3. *Mariga v Morris Wambua Musila* Civil Appeal No 66 of 1982; [1984] KLR 251
4. *Shabani v City Council of Nairobi* Civil Appeal 52 of 1984; [1985] KLR
5. *Pickett v British Rail Engineering Ltd* [1979] 1 All ER 774; [1980] AC 136
6. *Jag Singh v Toong Fong Omnibus Co Ltd* [1964] 1 WLR 1382; [1964] MLJ 463
7. *Dharam Kaur v Samuel Groves & Co* [1980] CLY 698
8. *Beadle v Letraset* [1981] CLY 637

9. *Tomes v West Midland Regional Health Authority* [1977] CLY 789
10. *Nyambai v Francis Njagi* High Court Civil Case No 579 of 1980 (unreported)
11. *Gugu v Pan Afric Hauliers* High Court Civil Case No 213 of 1981 (unreported)
12. *Clare v Lambeth, Soutwark & Lewismam Area Health Authority* [1978] CLY 753
13. *Kimothia v BhaMr.a Tyre Retreaders and Another* [1971] EA 81
14. *Mugo v Attorney-General* High Court Civil Case No 1698 of 1980 (unreported)
15. *Mworia v Corrugated Sheets Ltd* [1975] EA 240
16. *H West & Son Ltd & Another v Shephard* [1964] AC 326; [1963] 2 All ER 625
17. *Butt v Khan* Civil Appeal No 40 of 1977; [1981] KLR 349
18. *Opuka v Akamba Public Road Services Ltd* High Court Civil Case 1084 of 1976
19. *Gakere & Another v Peter Joseph Ngigi* Civil Appeal No 36 of 1980; [1981] KLR 306
20. *Bhogal v Burbidge* [1975] EA 285
21. *Ugenya Bus Services v Gachoki* Civil Appeal 66 of 1981 (unreported)
22. *Dimmock v Miles* (1969) Civil Appeal No 436 (CA) (UK) (unreported)
23. *Juma v Kenya Glassworks Ltd* Civil Appeal 1 of 1980 (unreported)
24. *Selvanayagam v University of The West Indies* [1983] 1 WLR 584; [1983] 1 All ER 824
25. *Ratnasingam v Kow Ah Dek* [1983] 2 MLJ 297
26. *Lee Ting-Lam v Leung Kam-Ming* [1980] WLR 657
27. *Harris v Empress Motors Ltd* [1983] 1 WLR 65; [1983] 3 All ER 561
28. *Skelton v Collins* (1966) 115 CLR 94

Texts

Kemp, D.A. (Ed) (1982) *Kemp& Kemp: The Quantum of Damages in Personal Injury and Fatal Accidents Claims* London: Sweet & Maxwell 4th Edn Vol I

Statutes

	No statutes referred to. **Advocates** 1. *Mr. Inamdar* for the Appellant 2. *Mr. Gautama* for the Respondent
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed.
History County:	Mombasa
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL AT MOMBASA

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

CIVIL APPEAL NO. 46 OF 1983

Between

SOUTHERN ENGINEERING COMPANY LTD .....APPELLANT

AND

MUTIA.....RESPONDENT

(Appeal from the High Court at Mombasa, Schofield J)

JUDGMENT

September 10, 1985, **Hancox J A** delivered the following Judgment.

The Respondent, who was aged 39 years at the material time and was a family man with six children, was employed by the Appellant Company, the Southern Engineering Company Ltd, as a casual labourer in 1976. The Appellants marine engineers, ship repairers, boat builders, and have a factory and shipyard at Mbaraki.

From March 1, 1978, the respondent was engaged on permanent terms by the Company as a mason and also to assist in the carpentry part of the business. When there was no masonary work he would be assigned to the carpentry section, the foreman of which was Mr. Andrew Muli. Mr. Muli would detail the work which the Respondent was to do when he was engaged in the carpentry section, which was, on average, two days per month. This work included the operation of a circular saw in which the Respondent received no specific training, but he did obtain instructions from Mr. Muli. He also watched other persons working on the machine and learned how to use it. It appears that there was no guard provided on the circular saw, and that nobody told him to use a guard.

On March 27, 1979, over a year after he was employed on a permanent basis, the Respondent met with an accident while attempting to split a length of timber with the circular saw by pushing it towards the rotating blade. The piece of timber had a knot in it, and suddenly moved forward, and the Respondent's left hand was caught by the saw. He had no prior instruction as to how to deal with timber which had a knot in it.

The Respondent suffered severe mutilation of his left hand, losing the thumb, ring and middle fingers by amputation. The remaining fingers have a permanent deformity and the index finger can only be moved passively but not actively. The result is that, according to the orthopaedic surgeon who treated him, Mr. D S Brahmbhatt, the Respondent's left hand is functionally useless. The degree of disability which he suffered was stated by Mr. Brahmbhatt to be 30% on May 4, 1979, just over a month after the accident, but this was revised upwards in the next report dated March 4, 1981, almost two years after the accident, at approximately 45%.

The Respondent gave evidence a to the state of his incapacity as a result of the accident. He lost the job he previously had and was eventually given work in the Company's store. He cannot do any work or

activity which involves both hands. He cannot, for instance, ride a bicycle. He cannot cook or cut meat, and he has difficulty in dressing. He can do some work on his shamba with a panga, and this was rightly taken into account by the trial judge in considering the loss of his future earning capacity, which he assessed at Kshs. 86,400.00. There was no appeal against this part of the learned Judge's decision, or as regards the special damages, which were agreed. Neither was there any appeal on the issue of liability.

The only matter, therefore, with which we are concerned in this appeal is the learned Judge's award of Kshs. 225,000.00 for pain, suffering and loss of the amenities of life, which the Appellant Company claim in Grounds 2 and 5 of the Memorandum of Appeal is so inordinately high as to represent an error of principle in awarding them, and to be an entirely erroneous estimate.

Since, as I understood him, Mr. Inamdar, who appeared for the Appellant in the appeal, conceded that some allowance had to be made for inflation in any comparison with previous awards for similar injuries, and eventually abandoned Ground 4, the only other ground of appeal which is realistically for our decision is the third one, which is couched in somewhat curious terms. It first says, correctly, that the trial Judge in this case (Schofield J) relied on two awards in respect of similar injuries to the right and left hand respectively which had been made, also in Mombasa, by Kneller J as he then was, in *Joanes Otieno v Cabroworks Ltd* High Court Civil Case 628 of 1978 and *Mativo Mutuya v Wilfred Mbwika and Another*, High Court Case 442 of 1980. However this ground goes on to say that Schofield J erred in failing to appreciate that those two awards were based on faulty reasoning and inadequate evidence, and were themselves out of line with the general level of awards made in Kenya for comparable injuries. Framed as it was, it would lead all but the most perspicacious to conclude that this was an attack on Kneller J's reasoning in those cases.

It turned out, however, when Mr. Inamdar developed his argument, that the gravamen of his complaint was not against Kneller J's instrinsic reasoning, but against his reliance on English decisions when he was measuring the damages in those cases. Moreover Mr. Inamdar was able to point to a number of decisions of this Court, some of them very recent, in which English case law had been if not used, certainly referred to for the purpose of the assessment of damages, notably *Zablon Mariga v Morris Wambua Musila* Civil Appeal 66 of 1982. In *Idi Ayub Omar Shabani v City Council of Nairobi*, Civil Appeal 52 of 1984, all three Judges of Appeal cited *Mativo Mutuya's case*, apparently with approval, which implied that this Court accepted in principle that English awards were relevant to the conditions obtaining in this country, which are in truth vastly different.

Mr. Inamdar submitted that there was a considerable body of case law in Kenya regarding awards for damages. Accordingly, whatever moment in time may have been the starting point for this to happen, the time had now arrived when its Courts should no longer pay regard to cases from the United Kingdom if they were concerned, as in the instant case, with that which he called "value judgments that is to say those which were expressed in monetary terms. These should reflect the values and conditions existing in the country in which the award is being made.

It was apparent, Mr. Inamdar said, that in many cases until now in the High Court and Court of Appeal regard had been had to English decisions, to be used, at the very least, as a guide in arriving at an award. This, he submitted, was a bad practice because conditions in Kenya differed socially, economically and industrially, and, indeed, in almost every sphere, from those applicable in Britain.

He conceded that it may still be right to follow and apply English decision in Kenya, since they are both common law countries, where some principle of law is involved, as for instance in *Zablon Mariga's case (supra)* where this Court applied the *Pickett v British Rail Engineering Ltd* [1979], 1 All ER 774, concept

of the lost years in upholding the decision of the Judge at first instance on this aspect. But in a case concerning the quantum of damages it was incumbent on the Court, when considering the case of the average Kenyan, as opposed to a highly skilled person such as a surgeon or a lawyer, to award him a sum which is his due in accordance with the conditions prevailing in Kenya, and with his concept of the value of money and that which a particular monetary unit would buy. Any other course, Mr. Inamdar said, would result in the award not being fair to both parties to the case. There is support for Mr. Inamdar's view in the opinion of Lord Morris in *Jag Singh v Toong Fong Omnibus Co Ltd* [1964] 1 WLR 1382, at p 1386, when he said:

"As far as possible it is desirable that two litigants whose claims correspond should receive similar treatment just as it is desirable that they should both receive fair treatment. Those whom they sue are no less entitled."

Accordingly, apart from the exceptional instance where no local decision is available, on the point at issue, (and even then, Mr. Inamdar said, it should be possible, if confronted with an unusual situation, for a Judge to be able to rely on his own ingenuity and skill to arrive at a correct figure) he invited this Court to rule that in future regard should only be had to Kenya decisions, and not to English awards, even by way of guidance.

In the instant case it is said that there were five decisions cited to Schofield J of which he in effect discarded three. All these were Kenya decisions and it appears that no English cases were cited to Schofield J on the issue of the quantum of damages. There is no dispute about that. However the two decisions on which the learned Judge relied in assessing quantum, and on which he obviously based his award, were those of Kneller J sitting in Mombasa at first instance, to which I have referred. In *Joanes Otieno v Cabroworks* the injured plaintiff was a labourer aged 29 at the time of the accident in which is right hand was severely injured by being caught in the rollers of an embossing machine. The injuries to that hand were, if anything, worse than in the instant case, except that the thumb remained intact, and it was of course an injury to the right and he was said to have been right handed. The general damages for pain, suffering and loss of amenities awarded by Kneller J were Kshs. 225,000.00 as in this case. Three English decision were cited to him by Mr. Talati who then appeared for the plaintiff.

These were *Dharam Kaur v Samuel Groves & Co* [1980] CLY 698, where the female plaintiff aged 47 suffered amputation of two fingers of the right hand, and received Pounds 13,500.00 that is to say the equivalent Kshs. 270,000.00 if parity is assumed; *Beadle v Letraset* [1981] CLY 637, where a man aged 36 suffered amputation thought he metacarpals of his right hand, leaving him with an unsightly mobile stump, and was awarded Pounds 20,000.00 (Kshs. 400,000.00); and *Tomes v West Midland Regional Health Authority* [1977] CLY 789 in which a married woman of 42 lost all the fingers and half the thumb of her right hand and received Pounds 12,000.00 (Kshs. 240,000.00).

Although Kneller J cited two local decisions of his own at Mombasa, *Yongo Nyambai v Francis Njagi* HCCC 579 of 1980, and *Sevllino Gugu v Pan Afric Hauliers* HCCC 213 of 1981, these involved much less serious injuries (the latter being undisputed evidence on formal proof) and a reading of the relevant portion of his judgment in *Joanes Otieno's case* in any view shows very clearly that Kneller J paid attention to the English decisions as bearing a reasonable degree of similarity to the one he was considering.

The position was similar in the second case on which Schofield J relied, *Mativo Mutuya v Wilfred Mbwika and Another*. That was a traffic accident in which the plaintiff had his left hand and forearm crushed and the award for pain, suffering and loss of amenities was Kshs. 250,000.00. However Kneller J's approach to the problem in that case was slightly different. He paid regard to two English cases, *Clare v Lambeth,*

Soutwark & Lewismam Area Health Authority [1978] CLY 753 and *Beadle v Letraset*, which I have already set out. In the former a boy of 8 was incorrectly treated in hospital for a fracture and was left with a mutilated, stiff and almost useless left forearm and hand. He was awarded Pounds 15,000.00 (Kshs. 300,000.00). The Judge, after making due allowance for inflation, considered that the appropriate award in England in August 1982 would be between Pounds 24,000.00 and Pounds 25,000.00. He then halved that figure so as to reflect the differences between the circumstances of artisans and manual workers in England and Kenya, and awarded Kshs. 250,000.00.

Mr. Inamdar argued that the mere fact that Kneller J used the English decisions in *Mativo Mutuya's case*, as the basis for his award, notwithstanding that he divided it by two so as to bring the figure into line with local conditions, showed that he was considerably guided by those decisions, and that there was no warrant for dividing that sum by two, or by any other arbitary figure, which would not have the same effect as if the figure had been arrived at by basing it upon local awards and conditions. The fallacy of this approach, Mr. Inamdar said, was manifest if the test stated by Law J A in *Kimothia v BhaMr.a Tyre Retreaders and Another* [1971] EA 81, namely the relation of the plaintiff's gross annual earnings to the figure awarded, is adopted, because the amount of the awards in the English cases cited in *Mativo Mutuya's case* was taken to be Pounds 25,000.00, in 1982, which was only just over three times the average gross income for an English workman, as shown by the cutting from The Times included in his bundle of authorities. In the instant case the Respondent's gross income before the accident was Kshs. 14,000.00 per annum. If divided into the award that would represent over fifteen and a half times the Respondent's gross income.

An approach Mr. Inamdar favoured in this case was a comparison with the case of *Selmith Mugo v Attorney-General*, High Court Civil Case 1698 of 1980, a decision of my own at first instance, in which a youth of fourteen had his entire right arm amputated and was awarded Kshs. 180,000.00 in November, 1982, just two months before the decision in this case. On that basis he said, plus the two earlier cases of *Kimothia v BhaMr.a Tyres Retreaders (supra)* and *Mworia v Corrugated Sheets Ltd* [1975] EA 240, as increased to take account of the fall in the value of money, a just and fair award in the instant case would be in this region of Kshs. 150,000.00.

Finally, Mr. Inamdar emphasised the undesirability of very high awards and the consequent, injury to the body politic in a country like Kenya, and that the Courts have a duty to avoid the obvious danger that sums awarded by way of damages will get out of hand. Unless local decisions only were consulted it would be impossible to achieve that degree of uniformity which is so essential when awards of damages are being considered.

Having, I hope, summarised Mr. Inamdar's submissions in this case adequately and fairly, bearing in mind the manifest importance of the proposition he advanced, I now turn to those of Mr. Gautama on behalf of the Respondent. He said the time had not yet come to depart from the practice which this Court had followed for the past eighty or ninety years and which was obviously derived from both the English and Indian systems of law, and to jettison all the English authorities on quantum of damages. To do this, he said, would be to adopt an isolated and insular approach which was out of place for a country like Kenya in a modern and fast changing world.

The Courts in Kenya, Mr. Gautama said, had never blindly or slavishly followed English decisions but had paid regard to them as part of the exercise of their discretion in assessing the right amount to be awarded in personal injury cases, and that the real value of these decisions had been in their reasoning. To law down as a rule of law that the Courts may not in future look to English decisions for guidance would be unreasonably to circumscribe or fetter the essential element of the discretion of each Judge as he approaches the difficult task of measuring damages in any given case. Indeed, many of the common

law countries such as Australia, Canada, the United States of America, and even India, still relied on English cases in the development of the law in their respective countries.

It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question. This is shown by a passage from an English case in the House of Lords to which reference has often been made in this Court, but which I think illustrates Mr. Gautama's point that it is the quality and calibre of the judgment in question which is its most important factor, and that the reference to other and possibly to outside decisions is, in a sense, incidental to that. The passage is from Lord Morris' speech in *H West & Son v Shephard,* [1964] AC 326 at page 353, and reads as follows:-

"The difficult task of awarding money compensation in a case of this kind is essential 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 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."

As Mr. Gautama rightly said the onus is on the Appellant Company in this case to show that the award of Schofield J was so inordinately high as to represent an entirely erroneous estimate of the compensation to which the Respondent is entitled – see Law JA in *Butt v Khan*, Civil Appeal No 40 of 1977 – a test which has since been accepted as the standard one to be applied by this court in approaching the difficult question of considering the correctness or otherwise of an award of damages on an appeal therefrom.

Of course, as Mr. Gautama said, it is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries. No two cases are precisely the same, either in the nature of the injury or in the age, circumstances of, or other conditions relevant to, the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award. The duty in this respect is well stated, again by Lord Morris in *Jag Singh's case (supra)* at page 1385, as follows:-

"It need hardly be emphasised that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made. If, however, it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardised or that there should be any attempt to rigid classification. It is but to recognise that since in a court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

The award in the present, was in any case, Mr. Gautama submitted, by and large in line with the other decisions in Kenya on similar injuries. The award in *Joanes Otieno v Cabroworks*, where the accident occurred on September 14, 1978, and the date of the judgment August 27, 1982, was Kshs. 225,000.00, and that in *Mativo Mutuya v Wilfred Mbwika and Another*, in which the accident took place on March 31,

1980, and the judgment on August 20, 1982, was Kshs. 250,000.00. Even the award in *Silmith Mugo's case*, in which Judgment was given three months later, was not grossly disparate to the present one, given the individual exercise of discretion by different Judges. Even if the award of Sheridan J ten years ago in *Mworia v Corrugated Sheets Ltd (supra)* was considered the Kshs. 50,000.00 assessed in that case for serious injury to the plaintiff's left hand would probably have been even greater than the instant award today, bearing in mind the incidence of inflation, which it is now well settled should be taken into account when comparing earlier awards. Going even further back in time, the Kshs. 20,000.00 awarded by Harris J in *Kimothia v BhaMr.a Tyre Retreaders* [1970] EA 408, which was upheld on appeal, and in which Law J A made that which seems to have been the first pronouncement regarding foreign awards, was commensurate with the present sum, bearing in mind an even greater fall in the value of money since then. I observe that, even, in the "useless claw" case (*Opuka v Akamba Public Road Services Ltd* High Court Case 1084 of 1976), Muli J made an award of Kshs. 170,000.00 in July, 1977.

After taking us through an exercise of comparing the prices paid by the average man in the street for certain basic commodities over the years, the next case Mr. Gautama referred to was *James Macharia Gakere and Another v Peter Joseph Ngigi* Civil Appeal 36 of 1980, in which there were quite different injuries arising from an accident to the Respondent on July 13, 1975. Simpson, Ag J A, as he then was, who delivered the leading judgment, upheld an award of Kshs. 220,000.00 for general damages (less 10% for contributory negligence). At page 8 of his judgment Simpson Ag J A, in reference to the earlier case of *Bhogal v Burbidge* [1975] EA, 285, said:

"The learned Judge in the present case made no mention of inflation. Whether or not he had it in mind there is no doubt that, had the case been heard today, "(i.e January, 1981)" the Court could have awarded Mr. Burbidge a very much higher figure."

In that same case Madan J A made the pronouncement to which Schofield J referred at the end of his judgment in the instant case which, Mr. Gautama submitted, showed a very definite upward trend in the thinking of this Court as regards sums to be awarded in personal injury cases.

Even more definite regarding the upward trend was the statement made by Madan JA twenty-one months later in *Ugenya Bus Services v Gachoki* Civil Appeal 66 of 1981, where there was a hand injury but also the amputation of the right leg, as follows:-

"I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs. 20,000.00 for the loss of a forearm or Kshs. 50,000.00 for the loss of an eye. Even without the curse of inflation they were niggardly. I remember but ignore them. We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives."

The foregoing was further reinforced, if such reinforcement were needed, Mr. Gautama said, by the citation of the words of Sachs LJ in the 4th Edition of *Kemp & Kemp on Damages,* Volume I, where he said: in *Dimmock v Miles* [1969] CA No 436:

"the notional scales applied by judges when assessing damages in personal injury cases are nowadays apt to change with ever-increasing rapidity. One, but only one, of the causes of such changes is the ever-decreasing worth of monetary units."

This indeed was no more, and no less, what the learned Judge said in the instant case at the very end of his judgment. Accordingly Mr. Gautama urged us to uphold the learned Judge's figure in this case and to dismiss the appeal with costs.

Notwithstanding the phraseology of Ground 3 of the Memorandum of Appeal, to which I have already made reference, it seems to me that Schofield J could not be criticised for considering, the decisions of his predecessor in Mombasa in *Joanes Otieno's case and in Mativo Mutuya's case*, both of which involved injuries which, to use Lord Morris' words, bore a reasonable measure of similarity to the instant one, notwithstanding that one case involved the right hand and in the other the arm was crushed as well as the hand: always remembering that the range of such cases, at this stage of the development of Kenya common law, is of necessity much narrower than in England.

Neither do I think that it is correct to say that Schofield J, discarded or disregarded the three earlier Kenya cases, but rather that he considered them in the way I indicated when summarising Mr. Gautama's submissions on behalf of the Respondent, namely that they occurred several years ago, and that in the light of recent authorities some allowance for the effects of the fall in the value of the Kenya shilling has to be made when comparing those awards with the present day.

However, that, as I said, is not the burden of Mr. Inamdar's argument, which is that Schofeild J, as it were, secondarily relied on English authorities by applying Kneller' J's two decisions, which as I think I have shown, clearly did apply them directly. Mr. Gautama argued that there was all the difference between halving the English awards by a simple arithmetic, and stating that the pattern of the awards in Kenya is "usually about half" those in England. He said it was a perfectly proper exercise for Kneller J, to have undertaken in relation to the authorities cited to him in *Mativo Mutuya's case.*

I have referred to Law J A's words in *Kimothia v BhaMr.a Tyre Retreaders and Another*, in which he also said that awards made by foreign Courts, though helpful as a guide, do not necessarily represent the standards which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as wages , rents and cost of living generally, may be very different. More recently Madan J A said in *Mohamed Juma v Kenya Glass Works Ltd* Civil Appeal 1 of 1980, at page 3 of his judgment:-

" I treat with respect the awards of general damages for injuries made in other jurisdictions as helpful indicators. Those awards are made taking into account the socioeconomic conditions in their own country which are usually not close enough to the conditions in Kenya to be reasonably comparable. We are mature. We have to reach our own measures of damages for different types of injuries and compensations for personal loss such as will fit in with the demanded, the conditions, the exigencies, the circumstances and our peculiarities so that they will groove in realistically with the pattern of life in Kenya."

When I was considering a similar submission in *Idi Ayub Omar Shabani v City Council of Nairobi (supra)* I said, after referring to *Chan Wai Tong v Li Peng Sum* [1985] WLR 396, that since the most conveniently assembled awards of damages in injury cases appeared in the reports and collections of reports of English authorities, which are widely available in Kenya, it was natural that practitioners would gravitate towards them; a practise which I thought then should not be discouraged, provided the differences between the conditions obtaining in Kenya and England were borne in mind.

Mr. Inamdar was good enough to say that he only has a limited quarrel with that which I said in that case, in the light of *Chan Wai Tong's case;* in which the Privy Council quoted Lord Morris words in *Jag Singh's case*, at page 1385 of the report, as follows:-

"In deciding this appeal their Lordships think that three considerations may be had in mind:
(1) That the law as to the factors which must be weighed and taken into account in assessing damages is in general the same as the law in England.
(2) That the principles governing and defining the approach of an appellate court that is invited to hold

that damages should be increased or reduced are the same as those of the law in England.
(3) That to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."

So there are two pronouncements of considerable weight, the Privy Council's decision and the words of Madan JA in *Juma v Kenya Glass Works Ltd,* regarding the use of case decided in other jurisdictions for the purpose of assessing damages, the one in which it is said that it should be limited to those from a neighbouring jurisdiction where similar conditions exists, and the other that those from, for example, the United Kingdom, may be treated as helpful indicators.

Chan Wai Tong's case, concerned an award for pain, suffering and loss of amenties of Pounds HK 27,500.00 to a female passenger in a minibus who, as a result of the negligence of the driver, suffered severe back injuries. This was increased to HK Pounds 90,000.00 on appeal on the ground that the disability fell into the category of "serious injury", within the guidelines laid down by a parallel division of the Court of Appeal, and the Privy Council upheld that award. In the course of the opinion, delivered by Lord Fraser, the Board referred to two other recent Privy Council cases, *Selvanayagam v University of the West Indies* [1983] 1 WLR 584 and *Ratnasigara v Kow Ah Dek,* at page 1235 of the same volume. In the former a University professor suffered severe injury to his ankle by falling into an unlighted trench. The board declined to substitute its own figure for the erroneous award of the trial Judge on the ground that they lacked sufficient knowledge of local circumstances, and indeed, of the character and personality of the claimant, and therefore remitted the case for re-assessment to the High Court of Trinidad and Tobago.

However in the latter case, which involved a teacher who was seriously injured in a motor accident, the Board held that the protracted delay in the conclusion of the claimant's case was such that finality had become a priority in order to do justice. They in effect inverted the test they had themselves used in the earlier, 1983, case and decided that they:

"would not be deterred from making their own assessment of damages unless it can be demonstrated that they do not have the material or the knowledge of the circumstances to reach a reasonable and just conclusion …. It therefore the need arises, their Lordships are in a position to make their own assessments and will do so."

It does not appear, however, in that case that they needed to do so as regards the award for pain, suffering and loss of amenities, for the only question in dispute remaining for the Boards decision was the award for loss of future earnings: a matter not now in dispute in the instant appeal.

In confirming the award of the Court of Appeal of Hong Kong in *Chan Wai Tong's case* the Privy Council specifically approved this statement of Cons JA in an earlier case:

"We think it is now accepted without question that in this "(i.e. the Honk Kong)" jurisdiction the appropriate standards are to be found in the decision of the Courts of this Colony and not in those of England and Wales or any other jurisdiction."

They therefore, as if by express disapproval, rejected the Court of Appeal's disagreement in the case which they were considering with the earlier statement of Cons J A in *Lee Ting-Lam v Leung Kam-ming* [1980] WLR 657, which I have just set out. They, however, decided that the wording of the passage in which the disagreement was expressed showed that the opinion of the Court of Appeal in favour of paying attention to the level of awards outside Hong Kong, and especially in England, had not

affected their reasoning in arriving at the HK 90,000.00 figure, which was on the basis of it being bracketed into the serious injury category.

I revert to the issue which has been realised, directly for the first time in Kenya as far as I am aware, in the instant case. I do not know what the position is in Honk Kong regarding the sufficiency or otherwise of local decisions. There was no material adduced to guide us on that point. I have demonstrated that both the decisions of Kneller, J, not only “paid attention” to the English cases cited but in fact allowed them to be used as guidelines, even if in the first case the level of the awards was halved, whereas no such fraction was applied in the second, in which the Judge expressly referred to Law JA’s earlier test in *Kimothia v BhaMr.a Tyre Retreaders (supra)*. The question for our decision is, was he right in so doing"

For my part I cannot say that in my opinion Kneller, J, (as he then was) erred in paying regard to the English decisions cited to him in those two cases. But they were three years ago. Madan, J.A’s observation in *Juma’s case*, that they were to be used as helpful indicators, was made two years before that, and I think with respect that that was all Kneller J did. He did not apply the same yardstick in both cases. In the former he referred to *Clare’s case* in which , in 1978, the plaintiff was awarded Pounds 15,000.00 (Kshs. 300,000.00, assuming parity) and *Beadle v Letraset* in which, in 1981, the plaintiff received Pounds 20,000.00 (Kshs. 400,000.00). He brought that up to 1982 and reduced the sum so arrived at fortuitously by half so as to take account of Kenya conditions. In the latter case, *Joanes v Cabroworks*, he referred additionally to *Dhram Kaur v Groves*, a 1980 case, where the plaintiff received Pounds 13,500.00 (Kshs. 270,000.00), and to *Tomes v West Midland Health Authority* where the award in 1977 was Pound 12,000.00 (Kshs. 240,000.00). In that case his award was similar to the English cases. This analysis shows that all Kneller, J did in my opinion, was to use those English decisions as helpful indicators.

What, then, is the position at the present day, fortified as we are by more decisions of the Courts of Record and an ever increasing number of claims for personal injuries before them" In my judgment the position should in future be that in cases in which there are Kenya decisions on the point, in which, as Lord Morries said, the main essentials bear comparison with the facts of the one before the Court, and they otherwise bear a reasonable measure of similarity to it, Kenya decisions should be used to the exclusion of the others, save those from a neighbouring jurisdiction with similar conditions to Kenya. Only when there are no local decisions on the point should resort be had to English or other authorities, and then only as helpful indicators, as Madan J A said. I refer of course to awards for personal injuries only. To that extent only, then, do I reiterate that which I said on the subject in *Idi Ayub Omar Shabani v City Council of Nairobi (supra).*

Applying the principles I have endeavoured to extract to the present situation I find not only that Schofield J did not err (save in the respects stated below) in referring to Kneller J’s two decisions less than six months earlier, but that Kneller J did not err in his decisions, both of which, in August 1982, paid attention to the English decisions cited to him by way of helpful indicators.

Accordingly did Schofield J, err in his award, apart from his secondary reliance on the English decisions cited by Kneller J" The injury was undoubtedly a severe one but the Respondent retains his mobility, his ability to work on his shamba and his general enjoyment of the amenities of life. True he cannot work at his former trade as a mason or carpenter, according to the evidence, but there are still many things he can do. Moreover the injury was not to his right hand, he being a right handed man, but to his left. In that respect Schofield J failed to appreciate that there was an essential distinction between *Joanes v Cabroworks* and the instant case, and that in that case the injuries to the hand were more severe. The degree of disability in that case was assessed at only 32% to 35%. In the instant case it was, incredibly,

assessed at 45%. Whether this was of the hand only, or overall disability, is not clear. As regards *Mativo Mutuya's case* not only the hand, but, the left arm also, was crushed in the accident. This involved lacerations to the arm and subsequent skin grafting. There was a loss of movement in the left elbow. Those were all in addition to the left hand injury which involved loss of movement in all the fingers save the little finger. The only use the left arm had was to push or pull objects or to move from side to side something in both his hands.

In my view Schofield J did not err in referring to Kneller J's decisions buthe did err in failing to appreciate that there were essential differences in degree between the injuries in those cases and in the instant one. I would regard the injuries in this case as less serious than in either of Knellers J's cases, and, had Schofield J appreciated this, he would have awarded considerably less by way of damages for pain, suffering, and loss of amenities than he did. On all the available material in the case I would award the Respondent Kshs. 160,000.00 under this head and I would substitute that figure for Schofield J's award. I would therefore allow the appeal to that extent only.

As regards costs we have not heard any specific argument thereon. The award I have proposed is approximately seventy per cent of the High Court award. In these circumstances I would make no order as to the costs of this appeal.

Nyarangi JA The facts giving rise to this appeal, the submissions of the Advocates for the parties and the law have been related in such detail by Hancox, JA whose judgment I have had the advantage of reading in draft, as renders it unnecessary for me to add anything in that regard.

To my mind there is considerable merit in Mr. Gautama's general contention that we should not become inward-looking, parochial, insular and isolated in the course of developing a Kenyan jurisprudence. Decisions of English Courts are never blindly accepted and applied here. The quality of the judgments and the approach adopted by the English Courts in dealing with issues raised under legislation similar to some of our own persuade Kenyan courts to adopt a similar approach whenever and whenever local circumstances permit. Not that Kenya courts are alone in taking that course.

In *Harris v Empress Motors Ltd* [1983] 1 WLR 65 at page 70, McCowan J, referred to the case of Skelton v Collins [1966] 115 CLR 94 a decision of the High Court of Australia when dealing with the aspect of "Lost years" and awards under that head in respect of an adolescent, just embarking upon the process of earning. McCowan J found assistance in the view of the High Court of Australia that in those circumstances the value of 'Lost years', might be real but would probably be assessable as small. It would appear from the judgment of McCowan J that earlier decisions of English Courts had not had an opportunity to consider that particular aspect of 'lost years 'as a head for claim by a newly employed adolescent. Reliance on ingenuity per se would in my view stultify argument and thought. Mr. Inamdar, who argued the novel submissions ably and ingeniously had yet to support his contention with decided cases.

I completely agree with Hancox, J A in his view that as regards awards for personal injuries, where there are Kenya decisions on the point, particularly where this Court of last result has decided on the point, and if there are no valid grounds for distinguishing on facts, then the Kenya decision should be preferred and used to the exclusion of the others, with the exception of decisions of the highest courts of the neighbouring countires of Uganda and Tanzania whose conditions are similar to Kenya. To that extent, I would approve the principle in *Chan Wai Tong's* Case and hold that the proper standards for awards for personal injuries are to be found in the appropriate decisions of the Courts of Kenya or exceptionally, decisions of the highest Courts of Uganda and Tanzania.

If there are no Kenyan decisions on the point, English or Commonwealth or USA authorities may be used as some sort of parameter.

I agree with Hancox JA for the reasons he gives that the award of Kshs... 225,000.00 was plainly based on a mistaken view of the material injuries and that this Court should interfere and reduce the award to Kshs. 160,000.00. I agree with the order proposed by Hancox JA on costs.

Gachuhi JA I also agree.

Dated and delivered at Mombasa this 10th day of September, 1985.

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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AG. JUDGE OF APPEAL