IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODER - JSC, KAROKORA - JSC, MULENGA - JSC KANYEIHAMBA - JSC, MUKASA -KIKONYOGO - JSC

CIVIL APPEAL NO. 3 OF 2000 BE TWEEN

IMPRESSA ING. FORTUNATO FEDERICE: : : : : : APPELLANT

A N D

IRENE NABWIRE - (Suing By her next Friend Dr. Julius Wambette: : : : : : RESPONDENT

(Appeal from the decision of the Court of Appeal (Kato, Mpagi-Bahigeine and Engwau, JJ.A) dated 22nd July 1999, in Civil Appeal No. 28 of 1998, varying the judgment of the High Court at Mbale (Kania, J) dated 18th December 1997, in Civil Suit No. 27 of 1995).

JUDGMENT OF ODER - JSC.

The second Respondent, Irene Nabwire, was seven years old when she brought an action in the High Court at Mbale, through her father Dr. Julius Wambette, as a next friend, against the appellant company for damages for personal injuries due to negligence.

On 15-10-95, the appellant's motor vehicle, a pick-up, registration No. KDA 248, knocked down the 2no Respondent when she was lawfully walking along Cathedral Avenue in Mbale Municipality. The pick-up was being driven by one Ali Gumasi, an employee of the appellant, acting in the course of his employment. As a result, the 2rj respondent sustained a compound fracture of the left femur, a closed head injury, leading to aphasia, shock and pain. She was admitted in Mbale Hospital when she was unconscious and generally in a poor condition of health.

During her hospitalization, the 2nd respondent was under the management of a team of doctors, one of whom was Dr. Jaffa Balyejussa (PW2) who testified that the patient remained in the ward for about a month. Her father, Dr. Julius Wambette(PW1) testified that she remained unconscious for three days. He also said that during the course of treatment, it was realized that she could not hear. She was also losing the ability to

speak, which she had mastered before the age of seven. She was discharged from Mbale Hospital on 11-11-95. When the 2nd respondent was discharged Dr. Balyejussa observed that the leg had healed. She had regained consciousness but she could neither communicate nor was she able to hear. Due to lack of facilities at Mbale Hospital, she was referred to an ENT specialist in Mulago Hospital Dr. Edward Turitwenka.

Before completion of hearing of the suit in the High Court, the appellant admitted liability, leaving only the assessment of quantum of damages by the trial court. The 2nd respondent's claims were for special and general damages and costs of the suit. The learned trial Judge awarded her Shs. 25M general damages for pain, suffering and loss of amenities with interest at court rate from the date of judgment until payment in full. Special damages of Shs. 5980, 000= with interest and taxed cost of the suit were also awarded in her favour. The appellant was aggrieved with the award of general damages as being too high and appealed to the Court of Appeal.

At the hearing of the appeal, Mr. Geoffrey Mutawe, Counsel for the appellant informed the Court of Appeal that the appeal was against the 2nd respondent only. There were six grounds of appeal as follows:

" ***1. The learned judge erred in law and in fact when he awarded an exorbitant sum to the plaintiff by way of general damages without evidence.***

2. The learned judge erred in law and in fact when he admitted and based his findings on hearsay evidence.

3. The learned judge erred in law and in fact when he relied on a medical report which had not been annexed to plaint at the institution of the suit.

4. The learned judge erred in law and in fact when he relied on a document which had not been tendered in evidence.

5. The learned judge erred in law and in fact when he relied on a report compiled over a year ago after the accident and nearly a year after the suit was filed.

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6. ***The learned judge erred in law and in fact when he misconstrued the hearing of order 11 Rule 6 of the Civil Procedure Rules."***

In its decision, the Court of Appeal reduced the award of general damages of Shs. 25M as being too high to Shs.20M. It also ordered that as the appeal was partially successful, each party should bear its own costs.

In the appeal to this Court five grounds are set out in the appellant's memorandum of appeal. They are:

1. ***The learned Justices of the Court of Appeal erred in law and fact when they held that the appeal partly succeeded.***

2. ***The learned Justices of the Court of Appeal erred in law and in fact when after reducing the award of general damages made by the High Court and as prayed by the appellant, ordered that the appeal partly succeeded.***

3. ***The learned Justices of the Court of Appeal erred in law and fact when they denied the Appellant who was successful in the Court of Appeal costs of the appeal.***

4. ***The learned Justices of the Court of Appeal erred in law and fact when they did not assign reasons as to why the appellant who had succeeded in having the award of damages by the High Court reduce$ was not entitled to costs.***

5. ***The learned Justices of the Court of Appeal erred in law and fact when they failed to exercise their discretion regarding costs.***

In essence, in my view, this appeal is only against the Court of Appeals decision and order that each party should bear its own costs.

Both parties to this appeal filed written statements of their arguments in support of their respective cases, under rule 93 of the Rules of this Court.

The appellant's learned Counsel argued that in the Court of Appeal, the appellant succeeded on the substantive issue and prayer of having the High Court award reduced. The learned Counsel relied on ***Uganda Electricity Board - vs - G. M. Musoke, Civil Appeal No. 30 of 1993 (CSU)*** ***(unreported).*** ***Imprestirling Imprest Federiki -vs - Haji Abdu Karimu Lugemwa, Civil Appeal No. 31/93 (S.C.JJ.)***
(unreported).

It is contended for the appellant that in the instant case the appellant's case succeeded in its entirety in the Court of Appeal. Consequently, the appellant should have been awarded costs of the appeal. The learned Counsel also referred to **section** 27(1) of the Evidence Act which gives to the trial judge a discretion on matters of costs, with a proviso that costs of any action shall follow the event unless the court or judge shall for

good reason otherwise order. Learned Counsel also relied on the definition of ***"Events"*** by ***Stroud's Judicial Dictionary of Words and Phrases, 4th Edition Vol.1, Page 948,*** in which the word "Event" is explained with reference to the phrase ***"Costs shall follow the event"*** as "the ***outcome or the result of the trial, and although there may be one verdict and one judgment, there still may be more than one event."*** The learned author also says that "the ***general costs of a trial or an inquiry would, as a rule, in the one case follow the judgment and in the other would follow the general result, or balance, of the findings."***

It is also contended for the appellant that the learned the Justices of Appeal did not give any reason why the appellant did not get costs, and that there are no grounds why the appellant as the successful party was not awarded costs.

The appellant's learned Counsel also relied on other authorities, including Kanobolic Group of Companies (U) Ltd. -vs- Sugar Corporation of Uganda Ltd. Civil Appeal No. 15/94 (SCU) (unreported); A.I.R. Commentaries, Civil Procedure Code Vol.1 Pages 630 - 638; Interfreight Forwarders (U) Ltd. -vs- East African Development Bank, Civil Appeal No. 33 of 1999 (SCU) (unreported) ; Potgieter -vs- Stumberg and Anor, (1967) E.A. 1609 (CA); Bhogal -vs- Burbidge & Anor (1975) EA. 285 (CA); and Foods and Beverages Ltd.. -vs- Israel Musisi Openya Civil Appeal No. 32 of 1992 (SCU) (unreported).

The written submission by the 2nd respondent's learned Counsel contended that the Court of Appeal was entitled to hold that the appellant had partially succeeded in the appeal before it. In the circumstances, that court was not faced with two options: either to dismiss the appeal by not reducing the award by the High Court or allow the appeal by reducing the award. On the question of costs, the 2nd respondent's learned Counsel agrees with the appellant's statement of the law as contained in its written submission, but the learned Counsel disagrees that the Court of Appeal erred to order that each party should bear its own costs after the award for damages was reduced.

The 2nd respondent's learned Counsel also contended that contrary to the appellant's allegation that the Court of Appeal did not give reasons for not awarding costs to the

appellant, the Court of Appeal actually did so. The reason it gave was that the appellant partially succeeded in the appeal.

It was further argued for the 2nd respondent that this court has no ground for interfering with the Court of Appeal's decision on costs, because the decision to award or not to award costs to a successful party is in the discretion of a court or judge. The appellant has not shown that the Court of Appeal did not have facts on which to base its reason or that the reason was not a good one. For his submission, the learned Counsel relied on ***Foods and Beverages Ltd. -vs- Israel Musisi Opeya*** (supra) ***Kiska Ltd. -vs- De Angelis (1969) E.A.6.;*** and ***Potgieter -vs- Stumberg and Anor*** (supra).

The law governing the issue of costs in litigation or suits is provided for in section 27 of the Civil Procedure Act (cap.65), which states:

> ***"27(1). Subject to such conditions as may be prescribed, and to the provisions of any law for the time being in force, the cost of any incident to all suits shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the court or judge has no jurisdiction to try to the suit shall be no bar to the exercise of such powers.***
>
> ***Provided the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***

In my view, the effect of the provisions of section 27 in question of the Civil Procedure Act is that the judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid. Of course, like all judicial discretions, the discretion on costs must be exercised judiciously. How a court or a judge exercises such discretion depends on the facts of each case. That is the basis on which in my view the **discretions in the numerous** cases to which the learned counsel on both sides have referred in this appeal were decided by the courts or judges concerned. The factors which determine the exercise of the discretion in favour of one party and against another in a case do not necessarily apply to any other case. If there were mathematical formula, it would no longer be discretion.

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In the instant case the Court of Appeal as the first appellate court considered and revaluated the evidence before it and decided that the award of general damages should be reduced and held, rightly in my view, that the appeal was thereby partially successful. For that reason it ordered that each party should bear its own costs. This was, an exercise of its discretion on the matter. It gave reasons for doing sol

In the circumstances, I am unable to say that the discretion was exercised on wrong principles or was not based on good reason.
In the result, I would dismiss this appeal.
I have had the benefit of reading in draft the judgments of my learned brothers, Mulenga, JSC, and Kanyeihamba, JSC. They both considered the issue of damages and held that the Court of Appeal erred by reducing the award of general damages from Shs. 25M which the learned trial judge had awarded to Shs. 20M.

In his lead judgment, in the Court of Appeal, with which Kato and Mpagi Bahigeine JJA, concurred, Engwau JA, gave **his reasons for reduction of the** award of general damages. It is not necessary for me to delve into his reasons for doing so in view of what I am going to say hereinafter.

In my considered opinion the issue of award of general damages does not arise in this appeal. It was not brought before the court by either party.

The appellant would have no reason to raise the issue, because the reduction of general damages was in its favour. Its appeal to this court is only against the Court of Appeal's order on costs. Only the respondent would have had a reason to be dissatisfied with the order for reduction of the general damages and therefore to cross-appeal against it, if it wished to do so. Rule 87(4) of this Court's Rules, provides for the procedure for a cross-appeal by a respondent who desires to contend that the decision of the Court of Appeal should be varied or reversed. The respondent net having cross-appealed in the instant case, my view is that there is no basis for this court to consider and reverse the Court of Appeal's decision and order reducing the award for general damages, however well intentioned the motive for wishing to do so;

and however much the Court of Appeal may have erred in reducing the award of general damages. Justice to the 2ru respondent, and criticism and correction of errors by the Court of Appeal would have been better properly done if the issue of general damages was made on issue before this court. As it is, it is not.

My second reason for that view is that neither the appellant nor the respondent has been heard on the issue of **whether or not** the Court of Appeal erred to have reduced the award of general damages. If there was a cross-appeal by the respondent in this court, which there was not, I have no doubt that both parties would have wished to be heard on the matter. To reverse the Court of Appeal's reduction of the award of general damages, to the prejudice of the appellant without giving him a hearing, in my view, is not very consistent with the principle of natural justice. A court decision in his favour is now being reversed without him having been heard before the reversal.

Thirdly a procedure by which this Court, on its own, takes up an issue on behalf of a party who should have cross appealed, but did not do so, and makes a decision in such a party's favour, in my view, creates a precedent with unforeseeable consequences.

For the reasons I have given, I am not in a position to say whether the Court of Appeal's decision reducing the award of general damages for the respondent from shs. 25 million to 20 million shillings was an error or not as the issue was not before this court.
As all the members of the court agree on the result of the appeal, it is dismissed with costs to the respondent here and in the court below.

In view of the position taken by Oder JSC., Karokora JSC and Mukasa-Kikonyogo, JSC (as she then was) there will be no order regarding general damages.

Dated at *Mengo this 2nd* day *of October 2001.*

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODER, KAROKORA, MULENGA, KANYEIHAMBA, MUKASA-KIKONYOGO, JJSC)

CIVIL APPEAL NO. 3 OF 2000 BETWEEN

IMPRESSA ING-FORTUNATO FEDERICI..... APPELLANT

VS

IRENE NABWIRE (suing through her next friend

Dr. Julius Wabwire) ..... RESPONDENT

(Appeal from the decision of the Court of Appeal Kato, Mpagi-Bahigeine and Engwau, JJA. Dated 22nd July, 1999 in civil Appeal No. 28 of 1998, varying the Judgment of the High Court (Kania J) at Mbale, dated 18th December, 1997 in Civil Suit No. 27 of 1995)

JUDGMENT OF KAROKORA, JSC.

I have had the benefit of reading in draft the judgment of Kanyeihamba, JSC and agree with him that the appeal should be dismissed with costs; because whereas under Section 27(1) of the Civil Procedure Act, costs follow events, courts have discretion to award costs to any deserving party or to deny them to any party who does not deserve to be awarded the costs. In the instant case there was nothing to show that the Justices of Appeal exercised their discretion wrongly when they denied costs to the appellant on the ground that the appeal had partially succeeded.

On the issue of general damages, I feel a bit uneasy and uncomfortable about the proposed order by Kanyeihamba, JSC that the general damages which the Court of Appeal had reduced to Shs. 20,000,000/ = should be restored to Shs. 25,000,000/= originally awarded by the High Court. I am not feeling uncomfortable because the amount proposed is grossly excessive or inadequate, but because

(1) The appeal before us was against denial of costs to the successful party, the appellant. There was no cross appeal under Rule 87(4) of the Rules of this court against reduction of general damages by the Justices of Appeal. The respondent could have cross-appealed against the reduction of the general damages of Shs.25,000,000/= awarded by the trial Judge to Shs. 20,000,000/=. The respondent never cross-appealed.
I think that taking it upon ourselves to increase or decrease the award of general damages without being moved by any of the parties to the case would render Rule 87(4) of the Rules of this court redundant and superfluous.

(2) The proposed enhancement of general damages from Shs. 20,000,000/= to Shs. 25,000,000/= when there was no cross-appeal and parties were not heard on that issue would offend one of the principles of rules of natural justice of “audi alterum partem” which enjoins courts not to condemn any party to litigation without first hearing from him or her on the issue.

(3) Therefore, as the issue of general damages was not raised and argued before us, I make no order regarding the same.

Dated at Mengo this 2nd September 2001.

IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

CORAM: ODER, KAROKORA, MULENGA, KANYEIHAMBA, MUKASA-KIKONYOGO, JJSC

CIVIL APPEAL NO. 3 OF 2000

B E T W E E N

IMPRESSA ING. FORTUNATO FEDERICI ::::::::::::::::::::::::::::::::APPELLANT

A N D

IRENE NABWIRE (*Suing through her next friend Dr. Julius Wambete*)::::::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from judgment of the Court of Appeal (Kato Mpagi-Bahigeine and Engwau JJA) in Civil Appeal No. 28 of 1998, dated 22nd July 1999).

JUDGMENT OF MULENGA JSC

I read the judgment of my learned brother, Kanyeihamba JSC, in draft. I agree with his conclusions that this appeal must fail, and also with his opinion that the assessment of general damages made by the High Court was wrongly reduced and that, that award should be restored. I wish, for emphasis to express my views on the case. As the background to the appeal is amply summarised in the said judgment of my learned brother, I need not repeat it in this.

This appeal was brought on four grounds. In essence, however, it raises only two issues for determination. The first issue is subject matter of grounds 1 and 2 which read thus:

> ***"1. The learned Justices of the Court of Appeal erred in law and fact when they held that the appeal partly succeeded.***
>
> ***2. The learned Justices of the Court of Appeal erred in law and fact when after reducing the award of general damages made by the High Court and as prayed by the appellant, ordered that the appeal partly succeeded."(emphasis is added).***

Needless to say that the two grounds amount to the same thing in substance, differing in text, simply because ground 2, (in contravention of r.81 (1) of the Rules of this Court) includes narrative. Be that as it may, the appellant's complaint in this regard is based on its contention, as set out in counsel's written submission, that its *"appeal in the Court of Appeal succeeded in its entirety.* That contention, in turn arises from the argument that by reducing the award of general damages from Shs.25,000,000/= to Shs.20,000,000/=, the Court of Appeal granted the only relief sought, and that consequently it allowed the appeal wholly, not partially.

The Court of Appeal did not give the reason for its holding that the appeal was partially allowed. In my view, however, it is not difficult to discern. Although the appellant obtained the result it had set out to get, that is not the only consideration in determining whether the appeal succeeded wholly or partially. The appeal against the judgment of the High Court, was preferred on six grounds of appeal. At the hearing, counsel for the appellant did not withdraw or abandon any of the grounds. He opted to make a joint submission on all of them. The Court of Appeal did not uphold all the grounds. It directly upheld only ground 2. It did not consider grounds 3,4,5 and 6 .In the judgment of Engwau J.A., with which the other two learned Justices of Appeal entirely agreed, however, ground 1, to the effect that the trial court had awarded an exorbitant sum for general damages without evidence, was rejected. The court held that there was sufficient evidence on which the trial court based its findings. I shall return to this holding later in

this judgment. For the moment 1 would stress that out of the six grounds of appeal, the appellant specifically lost on one ground, and succeeded on only one ground. In those circumstances, I am unable to agree with the contention that the appeal in the Court of Appeal succeeded *in its entirety.* In my view, for purposes of awarding costs, the extent or level of success of an appeal is not measured according to the relief obtained *per se.* The decision on the grounds of appeal in issue are a relevant consideration. I would therefore not fault the learned Justices of Appeal for holding that the appeal in the instant case succeeded partially. Grounds 1 and 2 therefore, ought to fail.

The second issue, which is subject matter of grounds 3 and 4 is based on the contention that the appellant, as the successful party, was entitled to have costs of the appeal. The contention is grounded in the proviso to sub-section *(1)* of section 27 of the Civil Procedure Act (Cap.65). Under the sub-section the court is vested with very wide discretion in the exercise of its power to award costs. The proviso to the sub-section is in directive terms thus:

> ***"Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order (emphasis is added).***

In the instant case the costs in the Court of Appeal did not *"follow the event"* because it was otherwise ordered, to wit, that the successful appellant was to meet its costs. The reason for so ordering is stated in the judgment of Kato JA, as a final order of the court, thus:

> ***"As the appeal has succeeded partially each party will meet his (sic) own costs of this appeal, (emphasis is added).***

The question that arises is: was this a "*good reason'* within the context of the proviso to s.27 (1) of the Civil Procedure Act? The thrust of the submissions by counsel for the appellant is that it is not such good reason. It was contended for the appellant, that even where an appeal succeeds only partially, costs have to be awarded to the successful party. We were referred to a number of cases, in which, upon partial success, a party was awarded full costs, and to others w here such party was awarded only a fraction of the costs. This clearly underscores the point that the rule that "*costs shall follow the event* is not absolute. It is subject to the court's discretion, which discretion is reserved in the proviso. It seems to me therefore, that if the factor of *"partial success* can be *"good reason"* for awarding to a successful party only a fraction of the costs, then, subject to the court's discretion, it can, in appropriate circumstances, be good reason for not awarding any costs to the successful party. A good example is where the success is minimal or technical. On that ground alone, I would refuse to interfere with the discretionary order, as the Court of Appeal did not act on a wrong principle in the exercise of its discretion.

I am constrained to add, however, that there was *"good cause"* which justified the order denying costs to the appellant, albeit it was not expressed by that Court. The success of the appellant was based on the narrow point that the trial court admitted, and placed reliance on, hearsay evidence. That so-called hearsay evidence, a medical report by Dr. Turitwenka, an ENT Specialist, had been received in evidence with the appellant's consent. The respondent did not fail to adduce direct evidence but was prevented by the appellant's conduct. When the appellant changed course, in the middle of the trial and admitted liability, the contents of the report were known. It was also known that the respondent's counsel intended to call three more witnesses who apparently included the ENT Specialist. In admitting liability the appellant's counsel could have made

reservation about the report, ID2, and/or sought to cross examine the author. He did neither. Not surprisingly, on his subsequent submission that the report should be ignored as hearsay, the learned trial judge observed, rightly in my view,:

> ***"In the instant case it is not at all the fault of plaintiffs (that) Dr. Turitwenka who compiled ID2 did not testify. 1D2 was admitted on the record for purposes of having it exhibited by the said Doctor. Before the plaintiffs could do this Mutaawe admitted liability and put the only issue for determination to be the matter of damages. This virtually meant he admitted the plaintiffs pleadings including the injuries sustained by 2nd plaintiff save for the quantum of damages."***

Clearly the success of the appeal was linked to, if not based on, the appellant's ineptitude at the trial. I would therefore, hold that the order not to award to the appellant costs of that appeal was not erroneous, but justified. Indeed the success was, as 1 will endeavour to show shortly, like a *mirage.* Grounds 3 and 4 therefore, also ought to fail.

I now turn to the order of the Court of Appeal reducing the general damages assessed by the trial court. Neither party questioned that order in this appeal. Counsel for the appellant intimated that the original intention to appeal to this Court against the quantum of damages was abandoned. The respondent, on the other hand, did not cross-appeal against the order. Ordinarily, this Court would not concern itself with an order against which there is no appeal. However, in exceptional circumstances, this Court ought to intervene, in a matter brought before it, where it is satisfied that an order ought not to stand by reason of illegality or on the ground that it manifestly defeats the ends of substantive justice. In my view, the order to reduce the general damages in the instant case, is such an order that ought not to stand in view of the basis and context in which it was made.

The learned trial judge assessed general damages after taking into consideration the evidence on the personal injuries sustained by therespondent. He concluded that the

damage the respondent had suffered included being rendered deaf and dumb. Significantly the conclusion was not based on 1D2 only, but on the whole evidence. This conclusion was roundly upheld by the Court of Appeal. In the leading judgment, Engwau J.A. made this clear. First he said:

> ***"The complaint that it was not proved that the respondent lost her speech or power of hearing as a result of the accident cannot he sustained in view of the clear evidence on record."***

He then went on to review the *"clear evidence"* which was given by Dr. Wambette, PW1, (father of the respondent) and that given by Dr. Balyejussa, PW2, who treated the respondent at Mbale Hospital and later eventually referred her to Dr. Turitwenka, the ENT Specialist who was author of exhibit 1D2. The learned Justice then added:

> ***"The complaint that the findings and conclusion arrived at by Dr. Balyejussa was not backed by evidence on the ground that he did not re-examine the respondent after discharging her, nor did her father (PWl) say that he took her back to Dr. Balyejussa for re-examination as per exhibit P2 (IDI), cannot be sustained because the exhibit was tendered and admitted in evidence by consent." (emphasis added)***

However, notwithstanding those two clear holdings, and without considering the view of the trial judge which I have just referred to, the learned Justice of Appeal ended his judgment with a holding which, with due respect, I consider to be contradictor) in terms. He said:

> ***"Clearly, the learned trial judge was wrong.....when he considered and admitted 1D2 in evidence when the same was hearsay and inadmissible in evidence. Dr. Turitwenka who compiled 1D2 never tendered it in evidence....Dr. Balyejussa also incorporated 1D2 into his medical report 1D1 (Exh.P2)> which should not have been the case. 1D2 should have been severed from 1D1 from the mind of the trial judge as hearsay and inadmissible in evidence. The learned judge was therefore wrong to take an account of that hearsay evidence, I have no doubt in my mind that it had influenced his mind when he made the award of 25m/= in general damages. In any case, the award, in my view is on the higher side. (emphasis is added).***

For that reason he reduced the damages to Shs. 20m/-. Kato JA, simply stated that

Shs.25,000,000 - was “excessive considering all the circumstances of this case." Both he and Mpagi-Bahigeine JA, agreed that "the award of Shs.20m = would be reasonable and appropriate in the circumstances of this case.

With the greatest respect to the learned Justices of Appeal, they misdirected themselves both on evidence and on the law. There was no legal requirement for the learned trial judge to sever from the evidence, and ignore, the contents of 1 D2 which was received on record by consent. It is trite law that a fact which is admitted, albeit adduced through hearsay, need not be otherwise proved. What is more, even if the contents of 1D2 were to be ignored, there was, as was held in the excerpts I have just reproduced from the judgment of Engwau JA, other ample and uncontradicted evidence from Dr. Wambette, and Dr. Balyejussa which proved that the respondent was rendered deaf and dumb as a result of the accident. The report, 1 D2 only served to confirm that other evidence, and was not the sole basis for the finding that the respondent was rendered deaf and dumb.

Secondly it is trite law that an appellate court does not alter damages assessed by the lower court, simply because it would have awarded a different amount if it had tried the case at first instance. An appellate court may lawfully interfere in the assessment of damages only in one of the following circumstances. First it may intervene where the trial court in assessing the damages, took into consideration an irrelevant factor, failed to take into account a material factor or otherwise applied a wrong principle of law. Secondly, it may intervene where the amount awarded by the trial court is so inordinately low or inordinately high that it is a wholly erroneous estimate of the damage sustained. See HENRY H. ILANG A vs M. MANVOKA (1961) EA 705 at p.713 C-F.

Clearly in the instant case, the Court of Appeal had no lawful justification in reducing the general damages assessed by the trial court. The learned trial judge, in assessing the damages, did not take into consideration any irrelevant factor, nor did he overlook any material factor. There was no basis for the view that the trial judge would have assessed a less sum if he had ignored ID2. The amount he assessed, was not so inordinately high as to be a wholly erroneous estimate of the damage suffered by the respondent. The learned Justices of Appeal only held it was on the higher side. That is not sufficient ground in law, for an appellate court, to interfere with the assessment by the lower court. And yet the reduction was quite substantial.

I would hold therefore, without expressing opinion on the adequacy of the assessed damages, that the order by the Court of Appeal to reduce the damages, was whole without legal or equitable basis, and was therefore wrong in law.

Should this Court allow or let such an order to stand? In my opinion it would be wrong to do so. It seems to me that this Court has an inherent *"overall duty to ensure that justice is done"* (which duty is referred to in s.6(5) of the Judicature Statute 1996). The duty is not only in criminal matters, but in civil matters as well. Where therefore this Court is seized of a case on appeal, it should not turn

a blind eye to a clear issue of an illegality or injustice, and fold its hands on the technical ground that there was no cross-appeal on that issue. To do so would be tantamount to upholding or endorsing such illegality or injustice. I am alive to the fact that, in the instant case, neither party in their written submissions addressed us on whether that order should stand or not. This Court should have invited them to do so. But the parties were heard fully in the Court of Appeal, on the substantive issue of whether the damages ought to be reduced or not, and their respective arguments are on record. Besides, what is in issue here is strictly not *inter parties* as such, but whether an unjust court order should be allowed to stand. In my view no miscarriage of justice would be occasioned by this Court holding that the Court of Appeal acted without legal basis and that the resulting injustice ought to be rectified. I would therefore, set aside the order of the Court of Appeal and restore the award of general damages made by the High Court. In effect I would hold not only that this appeal fails, but also that the appellant ought to have failed even in the Court of Appeal.

Accordingly, I would give costs of this appeal, and in the courts below, to the respondent.

Dated at Mengo the *2nd* day of *October* 2001.

J.N.Mulenga
Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODER, KAROKORA, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYOGO, J.J.S.C.)

CIVIL APPEAL NO: 3 OF 2000

B E T W E E N

IMPRESSA INGFORTUNATO FEDERICI :::::::::APPELLANT

AND

IRENE NABWIRE (suing through her next friend

Dr. Julius Wabwire) ::::::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the decision of the Court of Appeal (Kato, Mpagi- Bahigeine and Engwau, J.J.A. dated 22nd July, 1999, in Civil Appeal No. 28 of 1998, varying the judgment of the High Court (Kania J.) at Mbale, dated 18lh December, 1997, in Civil Suit No. 27 of 1995)

JUDGMENT OF KANYEIHAMBA

The facts of this case are not material in this appeal except in so far as will be stated in this judgment. Suffice to say that, following a plaint in the High Court for general damages, the appellant admitted liability and judgment was entered against it by the learned trial judge in the sum of Shs. 25,000,000 with costs. The appellant appealed to the Court of Appeal against the quantum of damages on the basis that it was excessive and had been arrived at without sufficient evidence.

The Court of Appeal reduced the award to Shs. 20,000,000 and stated in its

judgment that the High Court award of Shs. 25,000,000 was excessive and had been arrived at on the basis of hearsay evidence which was not admissible in the court. The court made an order that each party would bear its own costs. It is against the order on costs that the appellant has appealed to this court. There is only one ground of appeal, namely, that the learned Justices of Appeal erred in law when they ordered that each party bear its own costs instead of awarding the costs to the appellant who was the successful party in the appeal before them.

Counsel for both parties filed written submissions under Rule 93 of the Rules of this court. For the appellant, Messrs Ssawa, Mutaawe and Co. Advocates, submitted that when the appellant's appeal was allowed in the Court of Appeal and the award of general damages by the trial judge was reduced from Shs. 25,000,000 to 20,000,000, the appellant became a successful party who should have been awarded costs as a matter of law.

Counsel submitted that the law which has been reflected in a number of judicial decisions, is contained in the provisions of Section 27 (1) of the Civil Procedure Act, Cap 65, which stipulates that in any action, cause or other matter or issue, costs shall follow the event unless the court or judge, for good reason otherwise orders. Counsel further submitted that the learned Justices of Appeal did not give any reason as to why the successful party was not to get costs. In support of the appellant's arguments, counsel cited a number of authorities including **Uganda Development Bank v Muganga Construction Company (1981) HCB 35, Kanoblic Group of Companies. (U) Ltd. v. Sugar Corporation of Uganda Ltd Civil Appeal No. 15 of 94, (C.A), (unreported) Intefreight Forwarders (U) Limited v East African Development Bank. Civil Appeal No. 33 of 1999, (S.C.) (unreported), Potgieter v. Stumberg And Anor (1967) E A 609 and Foods and Beverages Limited v. Israel Musisi Opova, Civil Appeal No. 32 of 1992, (S.C.), (unreported).**

For the respondent, Messrs Dagira & Co. Advocates, opposed the appeal. They contended that the appellant had not shown that the Court of Appeal erred either in its decision or reasoning. It was also their contention that the award of costs is in the discretion of the court, and the appellant had not shown that the Court of Appeal failed to exercise its discretion judiciously when it ordered each party to bear its own costs. Counsel cited the case of **Donald Campbell v. Poliak** (1927) A C. 732, in support of their submissions.

In my view, it has not been shown that the court erred in the exercise of its discretionary powers to award costs. In the leading judgment of the court, Engwau, J.A., observed,

> *"When the hearing of the suit commenced in the High Court, the appellant company midway admitted liability. The learned trial judge at this stage, rightly, in my view, entered judgment against the appellant and set down the suit for the assessment of damages on 25 8 9[7] when both learned counsel addressed the court. The burden of proving quantum of damages was upon the respondent who could only be compensated to the extent of what has been proved. Mr. Mutaawe apparently conceded the injuries sustained by the respondent to consist of a compound fracture of the femur, closed head injury, shock 'pain ' and suffering. Clearly, even if Mr. Mutaawe had not conceded to those injuries, proof of the same lies in the evidence of Dr. Wambete, PW1, Dr. Jaffa Balyejusa PW2 and the documentary evidence IDi itself. I am therefore, satisfied that the respondent has proved these injuries on balance of probabilities. "*

He then gave two reasons for the reduction, namely, that the award was excessive and that proof of loss of faculties of speech and hearing had been based on hearsay evidence. The Justices of Appeal did not give reasons why they thought the award of shs. 25,000,00 was excessive. The receipt of the hearsay evidence without extra evidence was preempted by the appellant itself in admitting liability and therefore denying the respondent opportunity to adduce extra evidence. Moreover, the success of the appellant in the appeal before them was said by the Justices of Appeal to be only partial.

While it is trite that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles which Manyindo J, as he then was, applied in **Uganda Development Bank v. Muganga Construction Company** (1981), HCB 35, represent sound law on the issue of costs. In that case, the learned judge said,

> *"(1) Under Section 27 (1) of the Civil Procedure Act.*
> *(Cap 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially.*
> *(2) A successful party can only be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit. "*

It is clear that it was the conduct of the appellant which led to the trial court acting on the respondent's evidence including Exhibit P2. Under the circumstances of this case, the Justices of Appeal were correct to order that each party pays its own costs. In my opinion, they properly exercised their discretionary powers. In the result, the one ground of this appeal fails and I would dismiss the appeal.

However, I am constrained to consider the manner in which the Court of Appeal treated the evidence on general damages. In the plaint, Civil Suit No. 27 of 1995, the respondent claimed that she was suing in negligence for personal injuries and for the recovery of special and general damages and costs in the suit.

The personal injuries were caused on the 15 October, 1995, along Cathedral Avenue, Mbale, when the respondent was knocked down by the appellant's motor vehicle driven negligently by his driver. The particulars of injuries inflicted on the respondent were listed as (a) compound fracture of the left femur, (b) closed head injury leading to a phasia and hearing loss in both ears, (c) shock, pain and suffering. The plaint and the evidence adduced at the trial disclosed that after sustaining the above serious bodily injuries, the respondent was admitted to Mbale hospital unconscious, in a state of shock and was bleeding through the

ears and nose. She remained unconscious for three days. After she was discharged from hospital, she remained under treatment in the same hospital as an outpatient. During the course of her treatment, it was discovered that she could not hear. She was also losing the power of speech which she had mastered since the age of seven years.

Dr. Jaffa Balyejusa, PW2, testified that he referred the respondent to Mulago hospital to an Ear, Nose and Throat Specialist. This was during the hearing on 16th July, 1997. Then, the case was adjourned to 31st July, 1997 and when it resumed, Mr. Mutaawe, counsel for the appellant, informed court that the appellant had instructed him to admit liability and that the only aspect of the case to be still decided was the quantum of damages. Moreover, an expert doctor witness who was due to give evidence was not called because of the admission of liability made by counsel on behalf of the appellant. It is trite that where judgment is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or as in this case, to admit liability. In my opinion, admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the respondent, including loss of hearing and speech.

In his judgment, the learned trial judge in my view, carefully and correctly, assessed the evidence adduced on behalf of the parties. He then stated:

> *"what then is the quantum of damages the second plaintiff is entitled to in order to place her in as good position in money terms as she could have been, had she not sustained the injuries at the hands of the defendant or its agent or servant ? In assessing damages in cases of this nature, besides taking into account the degree of injuries suffered by the plaintiff and her disability assessed, the courts are guided by awards of cases of a similar nature. ”*

The learned judge proceeded to review a number of authorities expounding the principles by which the quantum of damages is determined. In the result, the learned trial judge awarded the sum of Shs. 25,000,000 in general damages for pain, suffering and loss of amenities, with interest at court rate from the date of his judgment till payment in full.

I now turn to the judgment of the Court of Appeal. The learned Justices

of Appeal appear to have placed great emphasis on the loss of speech and hearing. In his leading judgment, Engwau, J. A. said,

> *What appears to be most contentious issue here is the loss of the faculties of hearing and speech. Mr. Mutaawe contended that it*
> *was not proved that the respondent lost her speech or power of hearing as a result of the accident. He rightly submitted that the respondent was under a duty to discharge the burden of proof. He said that the evidence of respondent's father does not state categorically that she was hearing and talking before the accident. Dr. Balyejusa who treated the respondent never at any time heard her talk or hear because on admission to hospital she was unconscious and when she regained her consciousness, she failed to communicate with anyone. ID1 made by Dr. Balyejusa has, therefore, no legal consequences on the point. The report of Dr. Turitwenka, ID2 on this matter was also of no probative value as it was hearsay and inadmissible in evidence. This fact was conceded to by Mr. Dagira and yet the learned trial judge relied on it when making the award. "*

However, it will be recalled that in the passage cited earlier from the same judgment, the learned Justice also found that the evidence of Dr. Wambeta, PW1, Dr. Jaffa Balyejusa, PW2 and documentary evidence IDi had shown that the appellant had satisfactorily proved her case. Therefore, with great respect, the learned Justice's observation is not relevant to nor does it affect the learned trial judge's findings which were founded on admission by the appellant of more facts and evidence than those relating merely to loss of hearing and speech. The appellant's father gave evidence that his daughter had the faculties of hearing and speech before the accident and the appellant did not contradict that evidence. On the contrary, he instructed his counsel to admit liability. Additionally, this is a civil action in which the standard of proof is based on a balance of probabilities. Once the father and an independent witness, Dr. Jaffa, Balyejusa, testified that as a result of the accident, the respondent could no longer talk or speak, it became necessary for the appellant to show that the loss of these faculties was not attributable to the accident. In my opinion, it is not necessary to engage expert witnesses to show that a victim of an accident is deaf or dumb. Both can

be detected and have often been detected by lay persons through the powers of hearing, observation and communication. I notice however that the respondent did not cross-appeal on the reduction of quantum of damages and normally this court will not deal with a matter which was not raised in an appeal save in circumstances of such exceptional nature that failure to do so would result in gross injustice. In my view, this is such a case. The Court of Appeal was in error to hold that the award of Shs. 25.000.000 was on the high side without giving reasons and in reopening the matter of the hearsay evidence which had been voluntarily admitted by the appellant. In my opinion, this court has the power to correct that error. Section 8 of the Judicature Statute 1966, gives this court all the powers, authority and jurisdiction of the Court of Appeal when hearing and determining an appeal from that court. In consequence, and for the reasons I have given, I would therefore restore the sum of Shs. 25,000,000 awarded by the learned trial judge as general damages for injuries and pain suffered by the respondent. I would order that that sum together with the special damages also awarded in the High Court be paid by the appellant to the respondent.

I would order that the costs in this court and in the courts below be paid by the appellant to the respondent.

DATED AT MENGO T H I S 2nd D A Y OF OCTOBER 2001

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT