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**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

**[CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, AND MUKASA-KIKONYOGO - JJ.S.C. CIVIL APPEAL NO. 8 OF 1999**

**BETWEEN**

**ROBERT CUOSSENS:::::::::::::::::::::::: APPELLANT**

**AND**

**ATTORNEY GENERAL:::::::::::::::::::::: RESPONDENT**

***{Appeal from the decision of the Court of Appeal at Kampala***

***(G.M. Okello, Lady Justice A.E. Mpagi-Bahigeine and J.P. Berko - JJ.A.) in Civil Appeal No. 19 of 11999).***

***JUDGMENT OF ODER – J.S. C.***

This is an appeal by Robert Coussens against the decision of the Court of Appeal dismissing his appeal against the judgment of the High Court in a suit he had instituted against the Attorney General of Uganda, the respondent in this appeal.

The appellant Robert Coussens, an American national and a professional deep sea diver, was in Uganda when he was negligently shot and severely injured by members of the Uganda Police Force who had allegedly mistaken him for a car thief. The appellant sustained very severe injuries from the gunshots. Medical evidence established that he could no longer work as a sea diver. He instituted a suit in the High Court against the Attorney General (the respondent) claiming special and general damages for personal injuries. He claimed that as a professional deep sea diver, he was earning in the United States of America (U.S.A.) US $ 72,000 per year. He had expected to pursue that career for the next twenty years. He was 25 years old at the time of the incident in which he was injured. According to him, he could not now work to earn that amount of money. He could only earn U.S. $ 22,000 per year. In paragraph 12 (a) of his Amended Plaint, the appellant prayed for US $ 1,025,000 as general damages, this being loss of income which he would have earned over a period of the next 20 years at the rate of US $ 50,000 per year if his health was normal. The figure is arrived at by reducing US $ 72,000 by U.S. $22,000.

The learned trial Judge heard the suit and gave judgment for the appellant, but he declined to award general damages in the amount claimed as loss of earning. His reason was that the appellant did not prove that he was earning any money at the time of his injury. After considering a number of comparable local cases the learned trial Judge thought that this was a unique case and awarded Shs. 50,000,000= to the appellant as general damages.

The appellant was dissatisfied with the High Court award and appealed to the Court of Appeal which dismissed his appeal. As set out in the Memorandum of Appeal, the grounds of appeal are as
follows.

***"1. The learned Justices of the Court of Appeal erred in law when they confirmed the trial Court holding that the appellant was not entitled to an award of loss at income because he was not working at the time he was shot by the Police.***

***2. In the alternative but without prejudice to the foregoing grounds the learned Justices of the Court of Appeal erred in law when they confirmed the award of general damages granted by the trial Court.***

It is proposed to ask this Honourable Court for orders that -

1. The order of the High Court be varied to include an award of loss of income of
US $ 1,025,000.
2. Grant a higher award of general damages to the appellant.
3. The costs of the appeal be granted to the appellant."

During the hearing of the appeal, however, Mr. John Matovu, Counsel for the appellant, applied for and was granted leave to amend the Memorandum of Appeal under rule 43(2) of the Rules of this Court. The amendment was effected by substituting ground two with a new ground of appeal. The new ground is not alternative but consecutive, to ground two. It reads:

***"2. The learned Justices of Appeal erred in law when they failed to re-evaluate and assess the evidence as a first appellate Court should have done."***

The learned Counsel for the appellant also applied for an adjournment, but the application was objected to by Mr. Cheberion, Commissioner for Civil Litigation in the Attorney General's Chambers. The Court refused the application for adjournment and the hearing of the appeal proceeded.

In his submission, Mr. Matovu first argued the first ground of appeal. He contended that the learned Justices of Appeal took a wrong view of the law by deciding that the appellant did not prove his future income. That view was wrong because loss of future income was an aspect of general damages which does not have to be strictly proved like special damages. Secondly, the learned Counsel contended in the alternative that the appellant did, in fact, adduce evidence sufficiently to enable the Court of Appeal to make a finding that loss of prospective income had been proved. Such evidence is available from the testimonies of Professor Maurice Denison (p w 1); the appellant himself (p w 2), Ibrahim Ayub (p w 3) and John Lungu Antonio (p w 4). Mr. Matovu referred to ***British Transport Commissioner* Vs *Gourley; [1956J. A.C.185 at 193 - 202 and 211; Mcgnegor on Damages.*** 15th Edn. Page 44; and ***Kemp and Kemp on Damages.*** These authorities, according to the learned Counsel, show that there are two aspects of prospective loss of income. The first is future loss, which is uncertain and has to be estimated. The second is loss of income after the incident up to trial of the suit. This can be easily estimated, unlike future loss. In the instant case, the Court of Appeal erred to have confirmed the trial Court decision that the appellant had not proved his income claimed to have been lost.

On the second ground of appeal, the appellant's learned Counsel submitted that grounds of the appeal before the Court of Appeal required that Court to re-evaluate evidence relating to the appellant's income alleged to have been lost. As the record shows, the Court of Appeal did not subject the evidence to fresh scrutiny in order to make its own finding as to whether or not the appellant's loss of income had been proved. As the first appellate Court in the case, the Court of Appeal ought to have done so. It did not. This was an error.

In reply', Mr. Chebrien Barishaki submitted under the first ground of appeal that in claims for loss of income resulting from personal injuries, two types of incomes are recognised by the Courts. The first is income lost between the time of injury and trial of the suit. This should be actual income lost. The second is prospective income subsequent to trial. The learned Counsel referred to: ***Daly vs. General Steel Navigation Co. Ltd. [198313. All. R.*** 696. Courts have held in this and other cases that the starting point in assessing loss of earnings is to find how much the claimant was earning before the incident complained of: ***Bullingha vs. Hughs [1949] I K B 643.*** The objective of damages is to put the injured person back to the position where he or she was before the injury. In the instant case, the learned Counsel contended, the appellant was unemployed. Seven months before his injury, the appellant was

not working. Consequently, there was no material on which the trial Court and the Court of Appeal could make a mathematical calculation for purposes of ascertaining pre-trial and future earnings. There was no evidence of earning before the appellant was injured. Secondly, the respondent's learned Counsel submitted that as there was no evidence to show the appellant's earning before his injury assessment of loss of such income becomes a matter for the Court's absolute discretion. The trial Court's award of Shs. *50m1*= as general damages was based on comparable awards in past cases of a similar nature. Further, the trial Court was alive to what it thought to be the uniqueness of the case. It followed correct principles in making the award. The award it made was not reasonably too low or too high. There was therefore, no reason for the Court of Appeal to interfere with the award. In the circumstances, it rightly up-held the award of general damages of Shs. *50m1*= for the appellant.

Under the second ground of appeal, the respondent's learned Counsel submitted that the only relevant evidence is that which was adduced to prove quantum of damages. That is what the Court of Appeal had a duty to re-evaluate. Such evidence came from the appellant [p w 2] and John Lungu Antonio [p w 4]. The appellant testified that he was earning US $ 960 per week from Mary-land Diving Services. PW 4's evidence was to the effect that the appellant was well qualified internationally as a deep sea diver, who could work anywhere; that if he worked as such in the North Sea and in Singapore, he could earn US$ 100,000 per annum, or US$ 80,000 at Mombasa; and that pw4 offered the appellant work at Mombasa, but the latter declined to take it. The learned Counsel contended that the Court of Appeal did, in fact, re-evaluate the evidence available before it and reached the same conclusion as that of the trial Court.

In his reply, Mr. Matovu, contended that the fact that the appellant was not working at the time of his injury, was not a bar to awarding prospective earnings, because he only had to prove his capacity to work before the injury and to prove that but for the injury, he would have continued to earn what he was earning before. Since awarded of damages is based on the principle of restitutio in integrum, the appellant should be compensated for loss of earnings during the period between injury and trial and after trial. The Court of Appeal erred not to have done so. In what appears to be an alternative prayer, the appellant's learned Counsel submitted that if this Court considered $1,002,500 to be too high it should award the

appellant US $ 500,000 as loss of earnings. The learned Counsel however, did not elaborate the basis of his suggestion for the lower figure.

The essence of this appeal, as I see it, is whether the appellant should have been awarded US$1,025,000 as general damages for loss of income.

The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered. The heads or elements of damages recognised as such by law are divisible into two main groups: pecuniary and non-pecuniary loss. The former comprises all financial and material loss incurred, such as loss of business profit, loss of income, or expenses such as medical expenses. The latter comprises all losses which do not represent inroad upon a person's financial or material assets such as physical pain or injury to feelings. The former, being a money loss is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter, however, is not so calculable. Money is not awarded as a replacement for other money, but as a substitute for that which is generally more important than money: it is the best that a Court can do, damages have to be measured in order to arrive at what compensation should be awarded.

The general rule regarding measure of damages applicable both to contract and tort has its origin in what Lord Bluckbum said in: ***Livingstone vs Ronoyard's Coal Co. (1880) 5.App. cas 259.*** He there defined measure of damages as:
***"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in f he had not sustained the wrong for which he is now getting his compensation or reparation."***

This statement has been consistently referred to or recited with approval in many subsequent cases. In ***British Transport Commission vs Gourley [1956] A. C. 185*** Earl Jowitt put it this way at page 197.
***"The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of*** *money* ***as will put him in the same position as he would have been f he had not sustained the injuries. See per Lord Blackburn in: Livingstone vs Rowyards Coal [1880] 5 App Cas. 2539."***

In cases of pecuniary loss, such as claimed in the present, it is easy enough to apply this rule in the case of earnings which have actually been lost, or expenses which have actually been incurred up to the date of the trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages. In this category falls income or earning lost between the time of injury and the time of trial. But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of the trial. It is therefore, awarded as part of the general damages. The plaintiff no doubt would be entitled in theory to the exact amount of his prospective loss if it could be proved to its present value at the date of the trial. But in practice since future loss cannot usually be proved, the Court has to make a broad estimate taking into account all the proved facts and the probabilities of the particular case. All this was stated very clearly by Lord Reid with reference to loss of future earnings in his speech in**: *British Transport Commission vs Gourley (1956) A.C. 185 atp. 212; (1955)* 3 *A11E.R. 796 atp. 808:***

*"if[the plaintiff] had not been injured, he would have had the prospect of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened. In many cases the amount of that income may be doubtful even if he had remained in good health and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all not only in respect of loss accrued before the trial but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate of the present value of his prospective loss".*

In the ***British Transport Commission*** case (Supra) the respondent was gravely and permanently injured in a railway accident for which the appellants accepted liability. The respondent was a partner in a firm of Civil Engineers; he was eminent in his profession and was earning a large professional income. Until sometime in the year following the accident, he was unable to take any effective part in the business of the firm. On his return to work on account of his physical condition, a reduction was made in the apportionment of profits he was entitled to receive.

The trial Judge awarded the respondent £ 37,720 in respect of loss of earnings up to the date of the trial and his prospective future loss based on his annual earnings at the time of his injury.

An estimate of prospective loss must be based in the first instance, on a foundation of solid facts; otherwise it is not an estimate, but a guess. It is therefore, important that evidence should be given to the Court of as many solid facts as possible. One of the solid facts that must be proved to enable the Court to assess prospective loss of earnings is the actual income which the plaintiff was earning at the time of his injury. The method of assessment of loss of earning capacity after the facts have been proved is, in my view, persuasively stated by: ***Mcgregor on Damages'14th Edn. in paragraph*** *1164 (page 797).* as follows:

*"The Courts have evolved a particular method of assessing loss of earning capacity, for arriving at the amount which the plaintiff has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the plaintiffs present annual earnings less the amount if any, which he can now earn annually and multiply this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodic payments over the years. This figure has long been called the multiplier; the former figure has now come to be referred to as the multiplicand. Further adjustment however, may have to be made to the multiplicand or multiplier on account of a variety of factors; viz, the probability of future increase or decrease in the annual earnings the so called contingencies of life and the incidence of inflation and taxation."*

Discussing the *"multiplicand"* in conditions of diminution of annual earnings the learned author says in paragraph 1168:

***The starting point in the calculation has long been the amount earned by the plaintiff before the injury; however, Cookson vs Knewles (1978) 2WL.R.978 (HL) in the related field of Fatal accidents would seem to confirm that now, through the stimulus of inflationary conditions, the starting point has become the amount that the plaintiff would having been earning at the date of the trial had he not been injured………….. What the plaintiff is earning per annum at the time of injury will generally be easy to calculate where he is employed at a wage or salary; similarly, the amount which he is capable of earning in the future is often made clear by the terms of***

***such post injury employment (f any) as he has entered into before his case is brought to trial”***

The method of assessment of loss of income or earnings above referred to applies equally to claims based on personal injury as well as to those for loss of dependency arising from fatal accidents. A few examples will in my view suffice to make the point. I have been unable to find relevant cases from our jurisdiction. Consequently, the authorities I have referred to are mostly from the English jurisdiction, which are of great persuasive value. One of the earliest reported cases on the subject is that of: *Phillips vs* ***The London and South Western Railway Company (1879 -80) 5. Q.B.D. 78.*** The Plaintiff, a doctor brought an action for damages for pecuniary loss due to personal injury sustained in a railway accident negligently caused and for which the defendant was found to be liable. The Court of Appeal upheld an order for a new trial because the damages found by the jury was so small as to show that they must have omitted to take into consideration the plaintiffs proper annual income as an element of damage. The jury’s error arose from misdirection by the trial Judge to it regarding the plaintiff’s annual professional earnings.

The case of ***British Transport Commissioner*** (supra) to which I have already referred to was one in which the plaintiffs claim was for loss of future earnings due to personal injury. The case of: ***Davies and Another vs Pewell Duffryu Associated Collieries Ltd. (1942) 601 (HL),*** concerned fatal accidents. There, two employees of the respondents were fatally injured by an explosion in the respondent’s mines. Each of their widows sued as administratrix of her deceased husband. Each claimed damages under the Fatal Accidents Act 1846 to 1908 on behalf of the deceased’s dependants; and under the Law Reform (Miscellaneous Provisions) Act 1934 in respect of the deceased’s shortened expectation of life. Having decided the question of liability in favour of the plaintiffs, the learned trial Judge proceeded to consider the question of the damages to be awarded in each case. The deceased Davies was a man of 23 years of age, in sound health and regular employment, earning an average weekly wage of 2,2s. 4d, the whole of which he gave to his wife who handed him back *5s.* as pocket money. The deceased Williams was 42 years of age, also in sound health and regular employment, and his average weekly earnings were £3,15s. *5d;* the whole of which he gave to his wife who handed him back small sums not exceeding half a crown a week for pocket money. The widows were each dissatisfied with the amount of damages awarded by the learned trial Judge as inadequate, and cross appealed to the Court of Appeal which dismissed the Cross

appeals. The respondents had appealed against the decision on liability. The widows appealed to the House of Lords. In his speech, Lord Wright said at page 617:

***"There is no question here of what may be called sentimental damage, bereavement, pain or suffering. It is a hard matter of pounds, sterling and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years purchase. That sum however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again remarried and thus ceased to be a dependant and other like matters of speculation and doubt."***

***Browning vs The War Office and Another (1963) 1*** Q. ***D. 750,*** is another important relevant case. On August 5, 1958, the plaintiff, a Technical Sergeant in the U.S.A. Air Force stationed in England, was severely injured in a motor collision through the admitted negligence of the drivers of the vehicles one of whom was a serving soldier in the British Armed Forces. From the date of the accident until his discharge from the Air Force on June 10 *1959,* on ground of disability, the plaintiff received his full pay of450 per month. After his discharge he became entitled and received as of right under U.S. Law, a disability pension (veteran's benefit) amounting to nearly half of his full pay; he was also able to pursue a gainful employment as a Civilian. On the trial of an action by the plaintiff claiming damages against the War Office and the driver of one of the vehicles, the damages awarded by the Judge included £ 25.111 for pecuniary loss being computed on the basis of the plaintiffs pay before the accident, but wholly disregarding the disability pension. The trial Judge disregarded the pension holding that he was bound by an earlier Court of Appeal decision in: ***Payne vs railway Executive (1951) 2 All E.R. 901*** that a naval disability pension awarded to a sailor injured in a railway accident should not be taken into account in assessing the damages payable to the defendants because the pension was a benefit accruing to the sailor in respect of his past service and was a fortuitous circumstance analogous to accident insurance moneys the benefit of which should not be appropriated by the wrong doers in reduction of damages. On appeal, the Court of Appeal decided that the disability pension must be taken into account. The assessment was in accordance with the principle authoritatively laid down in: ***British Transport Commission***

***vs Gourley (supra)*** that damages for financial loss in actions for negligence should compensate the injured person for his loss and not punish the defendant for the tortfeasor's wrong doing.

The case of: ***Browning vs The War Office*** (supra) is relevant to the instant case for another reason. It is that a plaintiff who is not earning income at the time of injury would not receive an award of damages for loss of earnings. *Diplock, L.J.* put it thus on page 766:

***A plaintiff is not entitled to damages for loss of capacity to earn money unless it is established that he worked, but for his injuries, hence exercised that capacity in order to earn money. A plaintiff, who at the time of his injuries has retired from gainful occupation and who, if injured, would never have returned to gainful occupation, has suffered no pecuniary loss from being disabled from doing what he would in any event never have done. To call it damages*** **for" loss of earning"** ***in the present case is petitio principi. It assumes that only something which can be accurately described as*** **"earnings"** ***is a factor to be taken into account, which is the very issue in this appeal. I prefer therefore, the mental expression*** **pecuniary loss."**

***Cookson vs Knowles (1979) AC 556*** was a case of claim due to a fatal accident.
The plaintiff, as widow and administratrix of the deceased, claimed damages under the Fatal Accidents Act 1846 - *1959* and the Law Reform (Miscellaneous Provisions) Act, 1934 (on which our statute of the same title (Cap. 74), is modeled). The claim was based on negligence causing death of the deceased in a motor accident on December 14, 1973. The deceased was then aged 49 and earning £1,820 a year as a Woodwork Machinist, the plaintiff aged 45 and earning £900 a year as a Cleaner at the local village school with her husband's help for heavy work. They had three children. At the trial, on May 27, 1976, liability was admitted. The Judge took the combined earnings of husband and wife as they would have been at the date of the trial had the deceased lived, totaling £3,374. He took the dependency as two thirds of £3,374. And using a multiplier of 11 on the resulting figure of £2,250 awarded a capital sum of £2,750. He also gave interest at 9 percent on that sum from the date of death to the date of trial, making a total of £5,412 interest.

On the defendant's appeal, the Court of Appeal reduced the damages to £21,322 and the interest to £505, holding that in Fatal Accidents cases, the pecuniary loss to the widow ( and children should be divided into two parts, that from the date of death to the date of trial on

which interest should run at half rate and that from the date of trial onwards calculated by taking the amount which the deceased would then have been earning had he lived and using the appropriate multiplier for that date without regard to inflation, and that no interest should be payable on the loss from date of trial onwards.

On appeal by the plaintiff and cross-appeal by the defendant, the House of Lords, dismissing both the appeal and the cross-appeal, held that in normal Fatal Accidents cases, the damages ought, as a general rule, to be split into two parts: (a) ***the pecuniary loss which it was estimated the dependents had already sustained from the date of death up to the date of trial ("the pre-trial loss*** '9, ***and (b) the pecuniary loss which it was estimated they would sustain from the trial awards ("the future loss").***

In: ***Graham vs Dodds (1983) 2 AH E.R. 953,*** a more recent House of Lords case, it was held, inter alia, that in assessing the future loss of dependence in a fatal accident in that case - where the deceased was earning £66 as net pay per week assessment of loss of dependency to his widow and children should be made on a multiplier starting from the date of death and not from the date of trial. The case of *Cookson vs Knowless* (supra) was applied.

In: ***Fletcher vs Autocar and Transporters Ltd. (1968) 2 Q.B.D.322***, the plaintiff was a Chartered Quantity Surveyor. On July 4 1964, he was severely injured in a motor accident due to the defendant's negligence. As a result of the injuries he received which included severe brain damage, he was transformed from an active hardworking man earning between £3000 to £4000 a year after tax deduction to a man unable to work and was wholly dependent on his wife. The trial Court awarded damages which on appeal was held to be excessive. The Court of Appeal allowed the plaintiff damages of £22,000 as loss of future earnings. *Diplock L. J. on page 346,* set out how the plaintiff's loss of future earnings should be calculated as follows.

"There is no magic about the *actuarial* calculation. It is based on the following assumptions each of which is treated as a certainty:

(1) *That the plaintiff would have continued to engage in full practice in partnership as a Quantity Surveyor until June, 1977, when he would have attained the age of 69% years.*

(2) *That his share in profits of the partnership after deduction of tax, would be £4000 per annum in each of these 10 years.*

(3) *That in order to earn those profits, he would be put to no expense not deductible for tax purposes from the profits of the partnership.*

(4) *That interest rates, tax rates and structure, and the value of money would remain unaltered throughout the 10 years.*

With these assumptions as data, the rest is pure arithmetic. The first three assumptions are special to the plaintiff, the fourth is general. The reliability of
each as a basis for the calculation depends upon the degree of probability of its being right. On this, the actuary can throw but little light."

***Pope vs D. Murphy & Son Ltd. (1961) 1 Q.B. 222*** was a case of claim for damages due to personal injury. The plaintiff was injured in a motor accident and suffered injuries which shortened his expectation of life. In an action brought by him for damages for inter alia, loss of future earnings, the defendant contended that damages under this head could only be based upon the expectation of life which was left to the plaintiff as a result of the accident. It was held that the proper approach to the question of loss of earning capacity was one which compensated the plaintiff for what he had in fact lost, that what he had lost in this case were prospective earnings for the reminder of his normal expectation of working life assessed on the basis of what he was earning at the time of his injury. Accordingly, it was wrong to limit the damages for loss of future earnings to the period of the shortened expectation of life. This case was referred to with approval by the House of Lords in: ***Parry vs Cleaner (1970) A.C. 1*** in which Lord Morris of Berth - Y - Guest said at page 22:

***'in my view, the general principle and the general approach in calculating monetary loss in a case such as the present is that an injured person should receive such an amount of money as will put him in the same position as he would have been in f he had not received the injuries (see: British Transport Commission vs Gourley (1956) A. C. 185, 197). A plaintiff should receive such a sum in money as will represent the actual loss which has resulted to him in consequence of the defendant's negligence. This was described by Diplock L. J in Browning vs War Office (1963) IQB 750, 766 as***

***“the difference, between the money which the plaintiff would have received had he been able to continue the gainful occupation which lie would have followed if he had not been physically injured, and the money which he has received or will receive (on the assumption that he has acted or will act reasonably) while his ability to carry on that occupation is extinguished or reduced by his physical injuries.”***

Other personal injury cases in which assessment and award of damages for loss of earnings or income was based on earnings or income at the time of injury are: ***Picket (Administratrix of the Estate of R. H. Picket - deceased) vs British Paul Engineering (1978) WLR 3, 955 (HL); Lim Pot Choo vs Comden and Isligton Area Health Authority (1979) 3 WLR 44 (HL); Mitchell vs Mulholland and Another (1972) IQBD 65.***

In the instant case, the appellant’s claim for damages for loss of income was set out in his amended plaint as follows:

***“12 By reason of the negligence on the defendant’s servants/employees, the plaintiff suffered special damages.***

***<u>Particulars of Loss damages:</u>***

***At the time of the shooting the plaintiff had won himself a job as a Deep Sea Diver at the remuneration of US$720,00-(United States Dollars seventy two thousand) per year in a career he would have persued for a period of 20 years.***

***The plaintiff can now earn an expected non diving income of US$ 22,000 per a year diving income less expected alternative income - US$ 50,000, loss of income for 20 years US$ 1,025,000 (United States Dollars one Million and twenty five thousand).”***

“But in the prayer, the amended plaint asked for:

***“(a) (I) General damages as pleaded in paragraph (12)(a) above for loss of income.”***

On the basis of the law as applied in the authorities I have referred to, one of the material factors on which the present appellant’s claim for loss of income had to be assessed was actual income (if any) which he was earning at the time of the injury inflicted on him by the negligence of the members of the respondent’s Policemen. There is no doubt that the

appellant was a well qualified Deep Sea Diver. This clearly comes out from his evidence, that of Professor David Maurice Denison ((PW1) and John Lungu Antonio (PW4). However, the appellant should be compensated not for what he would have been earning as a Deep Sea Diver at the time of his injury; but for income which he was earning but lost and would have continued to lose due to his injury. His evidence in this regard, is as follows:

*"At the time I got shot, I was earning $960 per week from Maryland Diving Services. I do not have the documents with me but I can ask the Doctor to send them to me. $ 960 is not the highest a Diver can earn. As commercial diving can be potentially dangerous, they need experienced divers. The more experienced a diver gets, the more valuable he is. As an International Diver, when one works offshore, he can earn 60 - 70 (sic) US Dollars tax free a year. As a saturative diver, one can earn 90 - 100,000 US Dollars a year. I was 25 years old when I had the accident. A Professional Diver may work up to 55 years old. My chances of employment now are greatly diminished."*

After some interruption, the appellant's evidence continued:

***"I would like compensation for the income I will lose as a commercial diver ie 72,000 US Dollars for approximately 20 years. With my current situation I could earn no more than 22,000 US Dollars per year. I would like compensation for 1 year of 2 diving pay as I could not work at all and 19 years of the difference in what I earn now is 50,000 US Dollars per year."***

After further interruption, the appellant's testimony continued:
*"The figure of 960 US Dollars a week was my recollection of the wages. My weekly pay cheque in America varied depending on the type and amount of work I actually did. I have record from Maryland Diving Service showing what I was earning. The wages I earned vary from 948 US Dollars, 691, 660, and 794, 750, 618, 552, 896, 1098, 1124, 1073, 1106, US Dollars per week. The record was sent by fax on 10" October, 1997."*

The covering letter and wage record referred to by the appellant in his evidence were admitted in evidence at the trial as exhibit P. 11. Unfortunately, the copies thereof attached to this Court's record are completely illegible. Consequently it has to be assumed that the documents reflect what the appellant said in his evidence.

In cross-examination, the appellant said inter alia:

***"Before the incident, I had stayed in Uganda about 6 or 7 months for that period I was visiting my family. That time I was not employed. I was not earning any money that time. I was not getting any allowance or payment from Maryland Diving Company. I was in Maryland about 2 years, in 1993 and 1994. My qualification is off shore work and Maryland Diving is in shore work hence low paid. I had not seen my family for over 41/2 years and so I came to visit them. As a professional diver, I can facilitate off (sic) I came to Uganda to visit my family and do some Course. If I was taken to America, I would earn 200 US Dollars per week. As a diver, one can earn as much or as little as one wishes. I can also do some farming with my qualification and situation I can only earn 22000 US Dollars a year As a professional diver, I would be subjected to repair chassis (sic.). The scars would be seen on my lung. Age is irrelevant. The amount earned depends on experience. I had done 20 years of diving at 72,000 Dollars a year. My qualification would earn me 60 - 70,000 Dollars a year."***

The sentence ***"I had done 20 years of diving at 72,000 US Dollars a year"*** appears to be a misprint. Its proper meaning appears to be that the appellant would have worked for 20 years at 72,000 US Dollars a year.

In his testimony, Professor David Maurice Denison (PW1) did not and could not say anything about the appellant's earnings before the incident. The reason is obvious. The Professor did not know anything about the appellant's employment. He was an expert witness called to give expert evidence about the appellant's unfortunate injuries and how the injuries permanently rendered the appellant unfit to work as a diver. However, PW apparently had some knowledge about diver's pay. This is because he was trained by the Royal Navy as a Ship Diving Officer. He was also a Research Diver for Scripts Institute of Oceanography in California. He had also led many Scientific Diving Expeditions. Regarding Diver's pay, PW2 said this in evidence:

*"I am conversant with Diver pay because, I am involved in many Litigative (sic) Ordinary Commercial Divers who make many shorter dives can expect to earn 60, - 70,000 US Dollars a year. There are how many saturative divers who are about 50 years old and many of those will continue to work as Diving Supervisors for ä further 5 years or so."*

John Lungu Antonio (PW4) was the only other witness whose evidence was relevant to the matter under discussion. He is a Deep Sea Diver and Managing Director of a diving company. He said in evidence:

***"I know Robert Coussens. I came to know him in 1995, when I came to Kampala to do an examination of the damages on the way which was doing along Port Bell. I told him to go for a dive with me at Port Bell because I wanted to test him found his preferences (sic) as a diver exceptional in difficult circumstances. We were diving underneath the water with zero visibility. I saw his Certificate I would say he is an International Diver and he could get work anywhere. I offered him a situation whereby he would be an agent of a Dive Company, do some work and retain some commission, I did put it in writing. This is the letter I wrote [Exhibit P.12)……………When I eventually offered him some work at Mombasa, he declined to take it. In my opinion, f he did the kind of work we do at our Coast, he would get 70,80, 000 US Dollars a year. If he had given to it North Sea or Singapore, he would easily get 100,000 US Dollars a year."***

In his judgment, the learned trial Judge considered the appellant's evidence to the effect that his loss of income was 50,000 US Dollars per annum, which he would have continued to earn for 20 years had he not been incapacitated by the injuries. The learned trial Judge then made the following findings:

***"Indeed this formula would be applicable in case of loss of earnings and loss of earning would be calculated based on what the plaintiff was earning at the time of the incident. In this case at the time the incident occurred the plaintiff was not working. There is no evidence to show that if he had been working he would be earning 72,000 US Dollars per annum. PW4 Lungu told Court that he had offered the plaintiff, as an agen3thenJ and if he had found a job he would be paid on commission basis. If he was working at Mombasa he would earn 200 US Dollars per day."***

The learned trial Judge then considered previous cases in which general damages had been awarded for personal injuries and awarded the appellant Shs. 50,000,000/= as general damages.

The Court of Appeal agreed with the finding of the learned trial Judge. The relevant part of the judgment of Okello JA, who wrote the leading judgment with which the other two members of the Court agreed, says:

*"In the instant case, the appellant's claim for loss of earning was claimed in the amended plaint as general damages. That being so, the assessment is a matter for the discretion of the trial Judge. That is the principle stated in the above cases and that is exactly what the trial Judge did. He considered the appellant's condition after the injuries, his inability to apply fully his professional skills and comparable local cases and awarded him general damages of Shs. 50,000,000/=. The appellant cannot fix a figure for the trial Judge to swallow.... I cannot fault the learned trial Judge in the principle he adopted f the appellant had claimed his loss of earning as a special damage as he had done in his original plaint and proved, he would have been awarded that.*

*……it is trite law that an appellate Court can interfere with the exercise of discretion of the trial Judge only where he has acted on a wrong principle or where the award is manifestly low or high as to occasion a miscarriage of justice. See: Mbo2o vs Shah (1968) E.A. 93 at 96, quantification of general damages is one such exercise of discretion by a trial Judge. In the instant case the trial Judge acted on a correct principle as shown above."*

The passage of the judgment of Okello, JA, to which I have referred, indicates an erroneous view on the part of the learned Justice of Appeal that the appellant's claim for loss of earnings should have been pleaded and proved as special damages. As the authorities to which I have referred in this judgment clearly indicate pre-trial loss of earnings may be claimed and proved as special damages while post - trial loss should be claimed as general damages, assessment of which is left to the discretion of the trial Court, based on relevant facts having been proved. One of such facts which must be proved is the actual earning or income at the time of the injury. However, pre-trial loss of earnings may also be left to the trial Court for assessment together with post trial loss as part of general damages.

That error however, in my view, does not detract from the Court of Appeal's apparent

finding that the appellant did not prove his claim of loss of earnings of which that passage is indicative. It is quite clear that the Court of Appeal, as appears from the passage of the judgment in question, re-appraised the evidence in the case and agreed with the learned trial Judge's finding that the appellant did not prove that his income was 72,000 US Dollars at the time of his injury.

Consequently, the Court of Appeal found that the learned trial Judge had exercised his discretion correctly by awarding the appellant general damages in the sum of Shs. 50,000,000, an award which the Court of Appeal had no reason to disturb. The error in question, in my view, has caused no miscarriage of justice.
I am unable to say that the Court of Appeal erred in doing so. The appellant testified that his weekly wages in America varied between 948 and 1106 US Dollars. Even if it is assumed that the latter figure was the appellant's weekly wages, his annual income would still be 57,512 US Dollars. This is still far less than 72,000 US Dollars which the appellant claimed in his plaint and tried to prove by evidence. If the figure of 57,512 US Dollars is reduced by 22,000 US Dollars, the appellant's loss of income per year would be 35,512 US Dollars.

The figure of 72,000 US Dollars was clearly based on speculation by all concerned - the appellant and his witnesses PW1 and PW4. From the evidence adduced in support of the appellant's case 72,000 US Dollars is what a deep sea diver of the appellant's qualification would earn in places such as the U.S.A. the North Sea, Singapore and Mombasa. Available evidence did not prove that 72,000 US Dollars was the appellant's actual earnings at the time of his injury.

The other facts which militate against the appellant's claim of 72,000 US Dollars are that he was in fact, not working at the time of the incident. He was not earning any income. He had stayed in Uganda for 6 to 7 months visiting his family. While in Uganda he was offered a job by PW4 but he declined to take the job. In his evidence, the appellant did not say whether, when, and where he would resume work. All this went to disprove the loss of income which he claimed he had incurred.

The appellant's loss of income not having been proved according to the law stated in the decided cases I have referred to in this judgment, the learned trial Judge whose findings

the Court of Appeal agreed with awarded the appellant general damages of Shs. 50,000,000=. This sum represented general damages without loss of income.

In the circumstances, I am unable to fault the Court of Appeal's confirmation of the award of Shs. 50,000,000= to the appellant as general damages.

I turn now to trial Court's discretion in matters of damages. The law is now well settled that an appellate Court will not interfere with an award of damages by a trial Court unless the trial Court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. The earliest authority on this point I have been able to find is ***Phillips vs London South Western Point Way Company*** (supra), in which James L. J. said on page 85:-

*"The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which generally speaking is considered to be within their exclusive province, that is to say the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less. Still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice, be subject to the supervision of a Court of first instance and f necessary of a Court of Appeal in this way that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for consideration by another jury."*

In: ***Owen vs Sykes (1936) I.KB.192*** the Court of Appeal of England felt that although if they had tried the case in the first instance they would have probably awarded a smaller sum as damages yet they would not review the finding of the trial Judge as to amount of damages as they were not satisfied that the trial Judge acted upon a wrong principle of law, or that amount awarded as damages was so high as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. The Court of Appeal followed the case of- ***Flint vs Lovell (1935) I.KB.354***.

This principle has been applied in East Africa and Uganda see: ***Maljibhai vs The Patidar Samaj & Anor (1944)EHCA. 1.,Mitford Bowker (1947) 14 EHCA 20; Watson vs***

***Powles (1968) IQ 596,* and *Obongo vs Municipal Council of Kisumu (1971) E.A.*.. *91 at 96*.**

In the instant case, Okello JA, who wrote the leading judgment with which other members of the Court agreed referred to this principle in the passage of his judgment set out above.

In my view the Court of Appeal correctly refused to interfere with award of Shs. 50,000,000 which the learned trial Judge in his discretion had given to the appellant.
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For the reasons I have given, grounds one and two of the appeal should fail. In the result, I would dismiss the appeal. I would order that each party should bear its own costs in this appeal. Costs in the Court of Appeal should go to the respondent as ordered by that Court.

***Dated at Mengo this 3rd day of March 2000.***

**A. H. 0. Oder**
***JUSTICE OF THE SUPREME COURT***

**JUDGEMENT OF TSEKOOKO,JSC**

I have the benefit of reading in draft the judgement prepared by my learned brother Oder JSC, and I agree that the appeal should be dismissed. I also agree with other orders proposed by him.

Delivered at Mengo …..this day of…….2000.
**J.W.N.Tsekooko**
**Justice of the Supreme Court.**

**JUDGEMENT OF KAROKORA, J.S.C**

I have read in draft the judgement prepared by my learned brother,Oder JSC. I concur with it and the orders he proposed. I have got nothing useful to add.

Dated this 3rd day of March 2000.

A.N.KAROKORA.
JUSTICE OF THE SUPREME COURT.

**JUDGEMENT OF TSEKOOKO, JSC.**

I have had the benefit of reading in draft the judgement prepared by my learned brother Oder JSC, and I agree that the appeal should be dismissed. I also agree with the other orders proposed by him.

Delivered at Mengo…….this day of…….2000

**J.W.N Tsekooko**
**Justice of the Supreme Court.**

**JUDGEMENT OF MUKASA- KIKONYOGO**

I have had the benefit of reading in draft the judgement of Oder, J.S.C with which I agree that the appeal should fail. I also agree with other orders proposed by him.

Delivered this 3rd day of March 2000.

Laetitia E.M.Mukasa –Kikonyogo
**Justice of the supreme court.**

**JUDGEMENT OF KANYEIHAMBA**

I have the benefit of reading in draft the judgement prepared by my learned brother Oder JSC, I agree that the appeal should be dismissed. I also agree with the other orders proposed by him.

Delivered at Mengo….this day of…..2000