



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Appeal 57 of 2007**  
**DHARA WHOLESALERS LTD.....APPELLANT**  
**VERSUS**  
**TERESIA KAIMENYI MUTHAMIA**  
**(suing as the Admin. of the Estate of Deceased)**  
**ZAKARIA KITHURE M'MBIJIWE.....RESPONDENT**

*(Appeal from the judgment and decree of J. Omburah the Senior Resident Magistrate of Meru CMCC NO.249 OF 2003)*

Appeal – Principles upon which the High Court will set aside an award by the lower court,

- : application of wrong principles of law or misdirection on a point of law or principle,
- : failure to consider some material fact in evidence before him.

**JUDGMENT**

This Judgment relates to an appeal by Dharam Wholesalers Ltd (the Appellants) against the judgment and decree of the learned Senior Resident Magistrate in Meru CMCC No.83 of 2003 on three grounds,

namely–

1. that the learned Senior resident Magistrate reached a wrong decision in law and fact contrary to the weight of the evidence before him,
2. that the learned magistrate erred in making a speculative award without proof of the alleged age, and earnings which were pleaded by the Respondent (Plaintiff) and particularly misdirected himself on the quantum that should have been awarded to the Respondent (Plaintiff), and
3. that the learned magistrate erred in law and practice in relying upon the evidence tendered by the Respondent which was totally contradictory and thus disregarded the evidence that challenged the evidence of alleged loss to the estate of the deceased.

The appeal was urged upon me by Mrs Narangwi learned Counsel for the Appellant, whereas Mr. Kiogora urged against the appeal for the Respondent.

For the appellant, Mrs. Narangwi argued that the award was speculative particularly on the amount or extent of the deceased's earnings at the time of his death. The Deceased (Zakaria Kithure M'Mbijiwe) was a tailor, and there was no evidence of his earnings at shs.20,000/= per month, or that the deceased used to support his wife (family) with Shs.5,000/= per month. Counsel argued that that was no basis for the court's application of the figure of Khs.4500/= as a

monthly wage. She submitted that the figure was speculative.

The second aspect of the learned Counsel's argument related to the deceased's age, that there was no evidence that the deceased was 44 years of age, or that he would work for another 11 years.

Counsel also attacked the ratio of 2.3 adopted by the lower court and stated that it was contrary to the evidence before court, and prayed that the appeal be allowed.

The appeal was opposed by Mr. Kiogora learned Counsel for the Respondent, Mrs. Teresia Kaimenyi Muthami. His argument was that the trial court applied correct principles on the award of damages and the multiplicand of 6 years from the income of shs.4500/= per month, that there was no misdirection in law, that as a self employed person, the deceased could as well have worked and retired well beyond 60 years of age, but retirement age of civil servants at 55 years of age was applied. He urged the Court to affirm the decision of the lower Court.

Those were the respective arguments. The grounds of appeal may be summarized into two issues as follows –

- (1) whether the learned trial magistrate reached a wrong decision in law and fact contrary to the light of the evidence,
- (2) whether the award by the learned magistrate was without proof of age and earnings, and eventual quantum was speculative, and without basis.

Before answering the above issues, it is necessary to restate the principles upon which a superior court will upset the findings of a lower court. A superior court will upset the decision of the lower court, if the latter has misdirected itself, on a matter of law or principle, or has omitted some material fact in evidence before him.

In this matter as submitted by Mr. Kiogora learned Counsel for the Respondent, there was no question of fact in issue. The question of liability was settled in the test case in Meru CMCCC No. 250 of 2003 when the case, the subject matter of the appeal was stayed pending the outcome of that case. The test case settled the question of liability as against the Appellant who was found 95% culpable for the accused whereas the Respondent's driver was found 5% negligent. The only issue before the lower court was the question of damages, special and general.

After considering the evidence and submissions by the Plaintiff's Counsel, (the Defendant's Counsel offered no submission on the question of damages), the court found for the Respondent in the sum of Kshs.533,575/=. It is this finding and award which the Appellant has attacked in his appeal on the three grounds set out above.

The first issue is therefore whether the learned Senior Resident Magistrate reached a wrong decision in law and fact contrary to the weight of the evidence.

This issue has partly been answered. The question of evidence had been settled in the test case (Meru CMCC No.250 of 2003). The only question before the court was assessment of damages and that was, the income of the deceased, and loss of dependency by his family.

The lower court found that as a tailor and a farmer the deceased had income from which he supported his family. The learned senior Resident Magistrate adopted a minimum wage of Kshs.4500/= per month. The learned Senior Resident Magistrate also found that the deceased was aged 44 years, and proposed a multiplier of 11 years as fair and that as the deceased was married he would apply a ratio of 2/3, which worked out to the sum of Kshs.396,000/=being a multiplication of the monthly over the years and 2/3 ratio, that is  $4500 \times 12 \times 11 \times \frac{2}{3} = 396,000/=$ .

The learned Senior Resident Magistrate also awarded the Respondent the proven damages in the sum of Kshs.17,575/=:, and entered judgment for the Respondent in the aggregate sum of Kshs.533,575/= (which figure should be Shs.413,575/= in my addition of those figures).

It is the award of Kshs.396,000/= which is the subject of Appellant's attack and complaint, that the award was speculative because there was no proof of either age or income of the deceased.

This was a civil suit and not a criminal trial. In a criminal trial, proof is on the basis of evidence beyond reasonable doubt. On the other hand proof is on the balance of probability in a civil suit.

So in matters of income of a self-employed person, like a tailor, a carpenter, or for that matter a housewife who looks after her husband her house, her children, and is given a monthly stipend, perhaps not in a lump sum, and has therefore no salary slip showing gross income and other deductions and a claim is made that the income was such and such a sum

without proof, the court will use its best judgment on the balance of probability of what such income should or might have been. An element of “speculation” on balance of all other probabilities, will be ascribed to determine the deceased’s income. Such a figure would not be a sum provable by a salary slip or a tax return, but the best estimate having regard to all the circumstances as stated above of the deceased and his family before his death. It cannot be regarded as speculative in the sense of being conjured up by the court without a base.

In the result therefore I must decline to allow the appeal on the ground that the income was speculative and without basis.

Similarly I must also decline the appeal on the other ground that the age of the deceased was not proved for the application of the multiplier of eleven (11) years when the age was shown as 44 years. The appellant had no evidence that the deceased was older than the age of 44 years shown in the Certificate of Death. There was no averment in the defence of either the Appellant or the 1<sup>st</sup> and 2<sup>nd</sup> Defendant of the age of the deceased if he was not 44 years of age. A Certificate of Death is a public document which a court is entitled to presume under Section 83 of the Evidence Act, and there is no reason to doubt that the deceased was aged 44 years at the time of his death.

In Kenya, the current benchmark for cession of a daily routine of work is the public service retirement age of fifty five (55) years of age. Unless a contrary publicly acknowledged retirement age is established by law or practice of which the courts may take judicial notice, that is the age upon which a multiplicand of the deceased’s family’s dependency will and is currently pegged. If the deceased was 44 years of age at the time of his death, he would have a fruitful working balance of eleven (11) years before he reached 55 years of age, or the acknowledged public sector retirement age as of the time of death. The figure of 11 years is therefore neither speculative nor unrealistic. I see no or little persuasive argument to the contrary.

In conclusion therefore, I see no basis for holding either that the learned senior Resident Magistrate reached a wrong decision in law or fact or contrary to the evidence before him, or that he made a speculative award without proof of either the age or earnings of the deceased. I hold that the learned Senior Resident Magistrate on the balance of probability came to the correct decision, and applied the correct principles of law.

Save that when dependence sum of Kshs.396,000/= is added to the Special damages of Kshs.17,575, (Kshs396,000/17575) the correct total figure is Kshs.413,575/= and not Kshs.533,575/= with costs to the Respondents. I would dismiss with costs to the Respondent, the Appellant’s Appeal dated and filed on 28<sup>th</sup> May 2008.

There shall be orders accordingly.

Dated, delivered and signed at Meru this 22<sup>nd</sup> day of May 2009

**M. J. ANYARA EMUKULE**

**(JUDGE)**