



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Appeal 24 of 2006**

**ESTHER NYAMBURA NJENGA (suing as the**

**legal representative of the estate of the**

**late HARRY NGANGA MBURU).....APPELLANT**

**VERSUS**

**CARNOS RASHID CHEPAURENGE.....1<sup>ST</sup> RESPONDENT**

**VALLEY BAKERY LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This is an appeal against the judgment of the Chief Magistrate delivered on 8<sup>th</sup> February 2006, in Nakuru CMCC No. 165 of 2003 in which he awarded the plaintiff a sum of Kshs.1,035,000/-. Liability was in that case apportioned at 70/30% against the Respondent and the hearing proceeded only on the assessment of damages. After hearing evidence, the learned trial magistrate awarded the Appellant Kshs.1,035,000/- which was reduced by 30% leaving a balance of Kshs.724,500/-.

Two main complaints emerged from the six grounds of this appeal. They are whether or not the trial magistrate erred in rejecting the Appellant's evidence on the deceased's earnings and whether or not the learned trial magistrate erred in rejecting as unproved the claim for funeral expenses.

On the first complaint, Mr. Karanja for the Appellant submitted that the learned trial magistrate misdirected himself in rejecting the oral evidence of PW2 and PW3 that they used to pay the deceased a sum of Kshs.6,000/- per month and daily allowances of Kshs.400/- making a total of Kshs.18,000/- per month. He said in the matatu industry there are no letters of appointment given by employers and the evidence of the employers in this case sufficed.

On the second ground, Mr. Karanja submitted that the fact that the deceased died and was buried was not in dispute. Even in the absence of documentary proof courts have awarded reasonable funeral expenses. He said in this case the sum claimed of Kshs.20,000/- was reasonable and the trial court should have allowed it. He urged me to allow the appeal.

For the Respondent, Mr. Murimi argued that this appeal is incompetent for the reason that contrary to **Order 41 Rule 1(2)** of the **Civil Procedure Rules** the six grounds of appeal in the memorandum of appeal have not concisely stated the Appellant's complaint as required. On the merits of the appeal he submitted that the court was right in taking the evidence of the deceased as KShs.6,000/- per month. He discredited the evidence of PW2 and PW3 as totally unreliable because they did not produce documents in support of the deceased's employment and while PW2 said the deceased had been driving their vehicle for two years, PW3 said he had driven for only five months. He also faulted the claim by those witnesses that the deceased used to work for 30 days a month without any offs.

As regards the claim for funeral expenses he submitted that the same having not been pleaded there is no way the trial

court could have awarded it. He urged me to dismiss the appeal with costs.

I have considered these submissions and the evidence on record. I would like to quickly dispose of the second issue which is whether or not the learned trial magistrate erred in dismissing the claim for funeral expenses. It is true as Mr. Karanja for the Appellant argued that even where there are no receipts produced courts award reasonable funeral expenses. This is because in such situations the family members are normally devastated and do not remember to keep receipts and records of the expenses they incur during that period. But being a special damage claim it must be specifically pleaded before it can be awarded. In this it was not pleaded so the trial magistrate was right in rejecting it.

On the first issue the learned trial magistrate rejected the evidence on the deceased's earnings on the ground that no documents were produced in support of the claim. He did not say why he rejected the oral evidence of PW2 and PW3 who were the employers of the deceased who testified that they used to pay him a total of Kshs.18,000/- per month. By that rejection the learned trial magistrate implied that oral evidence is not as good as any other evidence.

That is clearly a misdirection. Oral evidence is the testimony of living persons examined in court or before commissioners appointed by the court. It does not always mean words falling from lips of men. It may include signs made by a person who on account of some illness or physical injury is unable to speak. It also includes the evidence of deaf and dumb persons who have sufficient understanding who can testify by signs or through interpreters or by writing if they are literate. Oral evidence if credible is sufficient to prove a fact. It is only where there are contradictions in oral evidence which occurs in most cases that documentary evidence must be looked for in order to see on which side the truth lies.

It is trite law that a first appeal is by way of a retrial and the appellant expects and is entitled to the appellate court's re-examination of evidence adduced.—Jonas Akuno O'Kubasu-Vs- Republis Cr. App. No 69 of 1999, (CA KSM). This is how the Court of Appeal had made this point in *Selle & Another - Vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at 126,:

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's findings of fact if it appears that either he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally. (*Abdul Hameed Saif -Vs- Ali Mohamed Sholani* (1955) 22 EACA 270)”

It is also trite law that, on a first appeal, an appellate court has powers to examine and re-evaluate the evidence on record and will normally not interfere with the trial court's finding of fact unless it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding—***Mwanasokoni Vs Kenya Bus Services Ltd*, [1985] KLR 931.**

In this case, as it is contended that the trial magistrate misdirected himself in dismissing the oral evidence of PW2 and PW3, I have to re-evaluate the evidence on record. Having done so I agree with Mr. Karanja for the Appellant that the deceased's former employers, PW2 and PW3, stood to gain nothing by their testimony in this case. The trial magistrate had therefore no reason to reject their evidence.

Taking all the evidence on record into account I find that the deceased was working for an average of 20 days in a month. This is because the deceased was entitled to at least one day in a week for rest and cannot have worked for 30 days in every month as PW2 and PW3 claimed. Besides rest days, the vehicle the deceased was driving must surely at one time or the other been grounded for repairs and service. Twenty days of work would on the evidence of PW2 and PW3 give the deceased an income of Kshs. 14,000/- per month. Out of this sum I find that the deceased must have expended Kshs. 4,667/- of that it on himself. That left a balance of Kshs.9,333/- for his dependants.

Work in the matatu industry as we all know is not permanent and pensionable. So the deceased could not have worked in that industry upto his retirement age of 55 years. One may also correctly argue that he could have taken employment elsewhere after sometime. Taking all these factors into account I find that a multiplier of 15 is reasonable in this case. The loss of dependency therefore works to Kshs.1,679,940/-. In the circumstances I substitute a sum of Kshs1,250,958/- for the Kshs.724,500/- that the learned trial magistrate awarded. This sum is made out as follows:-

(a) Pain and suffering = Kshs. 5,000.00

(b) Loss of expectation of Life = Kshs . 70,000.00

(c) Loss of dependency (9,333 x 12 x 15) = Kshs.1,679,940.00

TOTAL = Kshs.1,754,940.00

Less 30% contribution = Kshs. 503,982.00

= **Kshs.1,250,958.00**

The Appellant shall also have the costs of the appeal.

**DATED and delivered at Nakuru this 28<sup>th</sup> day of October, 2008.**

**D. K. MARAGA**

**JUDGE**