

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 15 OF 2000

JOHN MBURE MUIRURIAPPELLANT

VERSUS

JOHN KIMANI

KENYA POWER & LIGHTING CO. LTD.)RESPONDENTS

JUDGMENT

This is an appeal from the Judgment of the lower court dated and delivered on January 19, 2000. The matters leading to the appeal are as follows:

The Plaintiff filed the suit in the lower court seeking general and special damages for fatal injuries sustained by one Johana Mwangi Muiruri (Deceased) on May 5, 1998. The action was brought on behalf of the Plaintiff and on behalf of the estate of the Deceased. The Plaintiff was stated in the Plaint as the only dependant of the Deceased. The parties entered a consent Judgment on July 29, 1999 by which liability was apportioned at 60:40 in favour of the Plaintiff. The case then proceeded for assessment of damages at the conclusion of which the Learned Trial Magistrate entered Judgment for the Plaintiff for Kshs. 73,794/= after contribution and awarded him 60% of the costs. The sum of the Judgment included an award for pain and suffering, loss of expectation to life and special damages.

The Plaintiff was aggrieved by the decision of the lower court and brought this appeal seeking to have the same varied and to be awarded “damages for loss of dependency and/or lost years.” The appeal was based on 13 grounds the gravamen of which was that the Learned Trial Magistrate erred in not awarding Judgment for loss of dependency and lost years. That was the substance of the arguments raised by the Counsel before me at the hearing of the appeal.

In refusing to award the claim for loss of dependency, the Learned Trial Magistrate was guided by the fact that the alleged dependants did not appear in court. Although no specific reference is made thereto, it is apparent that the lower court came to this conclusion on the basis of the authority in **Lusiya v. Kampala City Council** [1972] EA 240 which was relied upon by the Defendants in their written submissions. In that case, KIWANUKA, C. J. said as follows at page 241:

“Counsel should be warned that in cases of this kind when an action is filed claiming damages for dependency, all claimants must be produced in court. The court must see them and make sure that the ages stated in the Plaint are correct because these awards go by the ages of the children; and the courts should be on their guard to watch against fictitious claims where several children are alleged when in fact they are not there. I say this because Counsel told me in court that ordinarily, in cases of this kind, courts did not bother to ask for the children to look at them. In my Judgment this is wrong, because a court which is out to do justice to all the parties ought not to grant damages to claimants who have not appeared before it ...”

Mrs. Magana for the Plaintiff sought to distinguish this decision on the ground that in that case there had been a specific order for the production of the children by the court. That distinction is fair. I do not believe that the Hon. Kiwanuka, C. J. intended to make a general rule that in all cases, it was necessary to present the dependants before the court. If, for instance, dependency could be proved by documentary or other evidence, or where dependency is not challenged, clearly there would be no need to present the dependants before the court. However, the onus of proving his case, is on the Plaintiff, and where

dependency is indeed challenged, the obligation of producing the dependants in court lies with the Plaintiff.

Dependency is a matter of fact which must be proved. In this case, although the Plaintiff stated in the Plaintiff that he was a dependant of the Deceased, he admitted in his testimony that he was not as such. Nothing would have been easier than to call the alleged dependants to give their testimony on that question. Faced with these circumstances, it is not difficult to see why the trial magistrate was reluctant to make an award for loss of dependency. I am, therefore, unable to fault her on the decision she came to on that matter.

The question of lost years did not arise at the trial court and cannot be raised for the first time at this appeal.

There were also submissions advanced to the effect that the Plaintiff had not been accorded an opportunity to reply to the Written Submissions of the Defendant. On this question, I agree with Mr. Motende that this is a mute issue since the parties agreed to Written Submissions. There was no argument advanced as to how this prejudiced the Plaintiff in any way.

I, therefore, dismiss the Plaintiff's appeal with costs to the Defendant.

Dated and Delivered at Nakuru this 7th day of May, 2003.

ALNASHIR VISRAM

JUDGE