



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, AKIWUMI & SHAH, J.J.A.)
CIVIL APPEAL NO. 165 OF 1993

BETWEEN

ALLAN NJUGUNA
T/A MWIRERI MBAO STORES"APPELLANT
AND
1. VERONICA NYAMBURA KARUGA
2. JANE WANJIRU KARUGA
3. GRACE WANJIRU KARUGARESPONDENTS

(Appeal from the Judgment of the High Court of Kenya at
Nairobi (Justice Mbogholi-Msagha) dated 19th
November, 1992

in
H.C.C.C. NO. 5718 OF 1990)

JUDGMENT OF THE COURT

The deceased, John Karuga Kamau, was on 10th September, 1990, knocked down and fatally wounded by a matatu belonging to the appellant and which was being driven by his servant in the course of his employment. The deceased who was fortythree years old at the time of his death, was survived by three widows and eighteen children. The three widows, who are the respondents in this appeal, sued the appellant on behalf of themselves and their children as the dependants of the deceased under the Fatal Accident Act, and on behalf of the estate of the deceased under the Law Reform Act.

By consent, judgment was entered against the appellant in respect of liability in full, and the matter was then fixed for the assessment of general damages on 15th July, 1992. On that day, the only witness called for the respondents, was one Francis Mungo Waswa who ran a firm of Auditors, Accountants and Income Tax Consultants and who claimed to have been the deceased's accountant as far back as 1973. He said that he prepared the deceased's yearly accounts and produced those

showing the net income from the various businesses of the deceased for the years 1987, 1988 and 1989, which were, respectively, KShs.756,547.85, KShs.1,131,772.15 and KShs.1,602,940.20 but all subject to income tax. The income tax payable on these amounts were KShs.412,551.00, KShs.518,960.00 and KShs.757,550.00 respectively. The deceased's real income for the three years which rose substantially, therefore, came to KShs.343,996.85 for 1987, KShs.618,812.15 for 1988 and KShs.856,390.20 for 1989. The deceased's business enterprise comprised running a passenger bus service and a bar and lodging house, renting out commercial property and earnings from a farm. Mr Waswa also said that as an accountant, his assessment of the actual prevailing inflation was 25%.

In his cross-examination, Mr Waswa admitted not only that he was the deceased's income tax consultant, but also that he was the one who prepared the deceased's income tax returns. He identified the deceased's signature on his income tax returns for 1987, 1988 and 1989. Mr Waswa further confessed that:

"I admit I prepared returns that do not necessarily reflect the true income."

The income tax returns for 1987, 1988 and 1989, which had been prepared by Mr Waswa and signed by the deceased to show that he was responsible for the accuracy of the information given in the returns, proclaimed that for the year 1987, the deceased's business made a loss of ,531 which is KShs.10,620.00; for the year 1988, the deceased earned before tax, ,4061 which is KShs.81,220.00; and for the year 1989, the deceased earned before tax ,3923 which is KShs.78,460.00.

These false amounts which are far less than what Mr Waswa claimed were the deceased's real earnings could only have been declared purposely to evade the payment of income tax. Section 110 (1) of the Income Tax Act makes it an offence for a person "without reasonable cause", to, as Mr Waswa said he did when he filled the deceased's income tax returns by understating the deceased's income, and as the deceased himself, did, as he signed the income tax returns, "make an incorrect return of income by understating therein any income which should have been stated therein." Mr Waswa did not give any reasonable cause for doing what he or the deceased did nor indeed, could there be any reasonable cause for doing so. The general view that may be held that this is what all businessmen do, does not make Mr Waswa's and for that matter, the deceased's action, any less of a criminal offence.

The fact that under section 110(2) of the Income Tax Act "no

offence under this section shall be brought at any time subsequent to six years after the date of the commission of the offence", does not in any way, redeem what Mr. Waswa admitted that he and the deceased did in 1987, 1988 and 1989, from being a criminal act.

The direct evidence on which the respondents relied upon to base their claim for general damages under the Fatal Accidents Act, was therefore, not only that of a self confessed liar, but also of one who has committed a crime not once, but many times, in connection with the true declaration of the deceased's income. Apart from this suspect evidence, there was none given by any of the respondents or other dependants of the deceased, to show that they were the dependants of the deceased and in what manner. We must, however, assume that as is normal within the society of the deceased, he must have looked after his wives and children in some way.

Notwithstanding the foregoing, the learned Judge of the superior court in determining what amount would be a reasonable basis for computing the multiplicand, accepted the earnings of the deceased as shown not in the income tax returns for 1989, but the sum of Kshs.856,390.20 for the year 1989 as shown in that year's account prepared by Mr. Waswa.

His reasons for doing this were firstly, that the yearly accounts produced by Mr. Waswa showed that the deceased had obtained three substantial loans from three financial institutions amounting to Kshs.3,397,224.30 and that only a person of the financial standing of the deceased as disclosed in Mr. Waswa's yearly accounts, could possibly service such loans; that the yearly accounts produced showed an upward trend in the deceased's income over the three years 1987-1989; that there was undeniable inflation; and rather naively, that the understatements in the deceased's income tax returns which were made by Mr. Waswa, were nothing more than "the deceased like most businessmen evaded heavy taxation which his income obviously attracted". We take a different view from this.

Firstly, Mr. Waswa for reward, as the deceased's accountant and income tax consultant, together with the deceased, committed an offence under the Income Tax Act which must have been, to the learned Judge of the superior court as it is to us, perfectly obvious. It is unacceptable that a court should allow itself, to be party to an unlawful act by ignoring it and rather make an order to the benefit of the wrongdoer or those claiming through him. The deceased's "substantial loans" of Kshs.3,397,224.30 does not by itself, necessarily reflect the financial standing of the deceased as accepted by the learned Judge of the superior court. Perhaps the loans are still outstanding for all we know, for as is well known,

not all those who are granted substantial loans are able to repay them. This is a first appeal to this court and our assessment of the evidence before the learned Judge of the superior court as must be obvious by now, is different from that of the learned Judge.

Looked at in another way, the learned Judge failed to take into account the effect of the evidence of Mr. Waswa having regard to the fact that he was not only a self confessed liar, but also that he had deliberately committed a crime under the Income Tax Act which was not unrelated to his evidence as to the earnings of the deceased. This court will not interfere with the exercise of the discretion of a judge in determining the general damages to be awarded in a case such as the one before the learned judge of the superior court, unless the Judge has failed to take into account a matter which he ought to have, and where the general damages awarded are in the circumstances of the case, so inordinately high or low as to be a wholly erroneous estimate of the same.

In our view, the learned Judge's failure to take into account the damning aspects of Mr. Waswa's actions which we have already enumerated, and which led to the award of general damages which are inordinately high, having regard also to the lack of evidence as to the amount of money which the deceased can be said to have spent on his wives and children, entitles us to interfere with the exercise of his discretion in the matter.

This appeal is limited to the award of general damages under the Fatal Accidents Act. The main ground argued on behalf of the appellant that the learned Judge of the superior court erred in law and in fact in relying on the evidence and yearly accounts of the deceased produced by none other than Mr. Waswa, a self confessed liar and one who has committed an offence under the Income Tax Act, rather than on the income tax returns of the deceased that were admitted in evidence, does not therefore come to us a surprise. All we need say in view of our foregoing relevant observations, is that we prefer, on the basis of the evidence produced at the trial, to employ as the appropriate multiplicand, Kshs.100,000.00 a year or Kshs.8,333.00 a month, which counsel for the appellant thought, and which we also think, reasonable.

As we have earlier observed, though no evidence was given to show that the respondents and their children were dependent on the deceased, we are of the view that in the society of the deceased, a husband and father is expected to look after his wife or wives and children. We will in the particular circumstances of this case, assess what he spent on these dependants, to be two thirds of his earnings. Since the appellant does not contest the multiplier of 15 years employed

by the learned Judge of the superior court, and indeed, we think this not to be unreasonable in the particular circumstances of this case, we allow the appeal to the extent that the general damages awarded under the Fatal Accidents Act shall be reduced from what was awarded by the learned Judge of the superior court to the following namely, Kshs.100,000.00 x $\frac{2}{3} \times \frac{15}{1} =$ Kshs.1,000,000.00, with interest at court rates with effect from the date of the judgment of the superior court.

As the award of general damages under the Law Reform Act and special damages are not challenged, we do not disturb the same. However, whilst interest on the general damages awarded under the Law Reform Act and the special damages shall be at court rates, it shall in respect of the general damages, be from the date of its assessment, and in respect of the special damages, as from the date of filing suit. The appellant having succeeded to a considerable extent in this appeal, will have three quarters of his costs.

Dated and delivered at Nairobi this 14th day of February, 1997.

R. S. C. OMOLO
.....
JUDGE OF APPEAL

A. M. AKIWUMI
.....
JUDGE OF APPEAL

A. B. SHAH
.....
JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR.