IN THE COURT OF APPEAL

AT NAKURU

(CORAM: AKIWUMI, TUNOI & SHAH JJ A)

CIVIL APPEAL NO 182 OF 1993

BETWEEN

AKAMBA PUBLIC ROAD SERVICES LIMITED.....APPELLANT

ANTHONY M. SYANDA .....APPELLANT

HANNINGTON M. KYALO .....APPELLANT

AND

PENINAH K. KIMENGICH.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nakuru (Lady Justice R N Nambuye) delivered on the 15th February, 1993

in

Nakuru HCCC No 413 of 1989)

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JUDGMENT

The background to this appeal is short and can be conveniently set out.

On 19th day of March 1988 one Dr Jacob Martinus Cherongony Kemengich who was a fare paying passenger in motor bus registration number KVY 204 owned by the first appellant, died as a result of the said bus KVY 204 being involved in an accident along Nakuru/Eldoret road.

The liability of the defendant is not in issue. Nor is the sum of Shs 70,000/= awarded for loss of expectation of life.

On 15th February 1993 Nambuye J delivered judgment in Nakuru HCCC No 413 of 1989 awarding general damages for loss of dependency under three separate heads as follows:

(a) Civil Service income- Kshs 501,586/=

(b) Farming activities income Shs 392, 218/75

(c) Private practice income Shs 555,210/13

Total Shs 1, 576,624/88

We note that the total is wrong. It ought to be Shs 1,449,014/88. the trial judge also awarded a sum of Shs 57,610/00 as expenses arriving at such a figure as follows:?

Cost of coffin, preparation of

grave and allied funeral expenses .....Shs 40,000/00

Cost of transporting body to place

of burial ..... Shs 15,000/00

Miscellaneous..... Shs 2,500/00

Total ..... Shs 57,500/00

The appellants have challenged, on appeal to this Court, the said figures of Shs 1,576,624/88 and Shs 57,500/= as being respectively manifestly excessive and not proven.

We will first deal with the objections to loss of dependency figures.

Mr Gaya, for the appellants, took serious exceptions to the manner and method in which the learned trial judge arrived at the said figures.

It would be proper to say Mr Gaya's objection to the manner and method adopted by the learned trial judge was correct. What the learned did was to use a tortuous and a wrong mode of arriving at the figure she arrived at. What she did was to apply a seven year multiplier for calculating the loss of civil service income of the deceased suffered by the dependants of the deceased. In doing so she increased the income (salary) at the time of the death by 5% and then deducted the tax element and arrived at a figure of Shs, 501,586/=.

The learned judge then embarked upon calculating loss of farming income and concluded that such loss (net) to the dependants was Shs 392,218/75. She used a 5 year multiplier under this head of damages.

Then again she proceeded to calculate alleged loss from a contemplated business to be run by the deceased and again used a further seven year multiplier in arriving at a net figure. Under that head of damages, of Shs 555, 210/13.

The learned judge put in much effort and did a lot of calculations in arriving at an overall figure of Shs 1,576,624/88 but that is not the correct way to arrive at loss of dependency figure.

The proper method to calculate loss of dependency is to deal with the issue on broad lines where the number of imponderables make mathematical calculations inappropriate. This was stated by the Privy Council in the celebrated case of *Kassam vs Kampala Aerated Water Co Ltd* [1965] EA 587. At page 590 their Lordships said:

"As an arithmetical exercise the above calculation may be difficult to fault. But pure arithmetic does not always in such cases lead to a just result where there are so many imponderables. The aim in a assessing damages in a case such as the present is to estimate the loss of reasonable expectation of pecuniary benefit. This must in most cases be a matter of speculation and may be conjecture. The more usual method of assessing damages is that adopted by the trail judge of estimating total dependency as a lump sum....."

We are of the view that the learned trial judge's approach was such as to give a 19 years multiplier, in stages, which is not correct and we have no choice but to, in this case, substitute our own method of calculating loss of dependency figure, using our jurisdiction under s 3(2) of the Appellate Jurisdiction Act (Cap 9).

The deceased was earning, as Deputy Director of Veterinary Services (with the Ministry of Livestock Development), a salary of K£6378 per annum. He had at the time of his death (and his dependants still have) 5 farms that is, 2 farms of 10 and 50 acres in Kitale, 2 farms of 4 and 27 acres in Baringo and one farm of 17 acres in Rongai. He had employed a manager to help the family run the farms. We are not satisfied that the deceased was fully personally responsible for running them. That would have too much as he was holding the important position of Deputy Director of Veterinary Services.

The chances of the deceased actually running a successful business (after retirement from civil service) were rather remote to enable the learned judge to arrive at any figure for loss under that head of damages.

The deceased had six sons the elder ones being 20, 18 and 16years of age at the time of his death. He had managed to educate his children decently, and the first born is qualified in veterinary science. The second borne was, at the time of trial, in the University of Nairobi pursuing studies in Agricultural Engineering. The third born son was pursuing studies to become a pharmacist. Other sons were also being decently educated.

There can be no doubt that the deceased was not a man of insubstantial means. His death would no doubt have brought about losses on the farming side apart from the total loss of salaried earnings and the prerequisites that go with such a job. It was not unlikely that he would have become Director of Veterinary Services.

When asked if the deceased could be earning at least a net sum of Ksh 240,000/= a year (or Shs 20,000/= a month) Mr Gaya quite correctly, in our view, conceded that he(the deceased) could well have earned such a figure or even more. We can and ought to comment that Mr Gaya's conduct as advocate is such as it ought to be that is that of a good advocate.

This means that the family lost an annual support (multiplicand) of Shs 160,000/= which in view of the position the deceased held before his death and what he could have earned, is not too much. We think that even though such a figure would be on a conservative side, would be a correct figure.

The deceased was 48 years of age. He was healthy. He would have worked (in the civil service and thereafter) for at least 15 years. Taking into account accelerated receipt of damages (funds) we think (in this particular case) a multiplier of 10 years would not be out of place so that had the learned trial judge approached the issue of loss of dependency correctly she could have come to a figure of Shs 1.6 million. Instead, by applying an incorrect method, she arrived at a figure of Shs 1,576,624/88, which as pointed out should be Shs 1,449,014/88.

However, the difference, in these figures, in the end not being substantial, we would not disturb the award under the head of damages for loss of dependency. A trial judge's approach in arriving at damages should be on broad lines particularly in case such as this one.

The next head of damages upon which Mr Gaya took issue is that of funeral expenses.

It did appear at first instance that the funeral expenses awarded were on the high side considering that the deceased's employer (the Ministry) assisted in funeral arrangements. However, on reflection, for a man of deceased's standing in life, we think the figure awarded was not inordinately high.

Mr Gaya's complaint about there being no vouchers and receipts merits mention. Whilst it is generally necessary that special damages must be strictly proved, we are not persuaded that no such expenses were incurred. It is difficult to keep such receipts and vouchers when the main bread-winner of the family dies. The deceased would have been dressed in new suit, tie, shirt, shoes. These items cost money. Coffin costs

money.

Mr Gaya suggested a figure of Shs 20,000/=. However, we think as we have pointed out, that Shs 40,00/= in this instance is not on the high side. We are not unmindful of the decision in *Kampala City Council vs Nakaye* [1972] ES 446, in which case the then Court of Appeal for East Africa (per Lutta JA) at page 449 letter H said:

> " It is settled law that special damages must not only be pleaded but also must be proved ..... Secondly in regard to the question of value of the articles, household and personal, of the plaintiff, the latter gave evidence as to what she paid for the articles in question and stated that the receipts in respect thereof had been removed or lost as a result of the demolition of the house, and the judge believed her."

As the learned trial judge considered and to a certain extent accepted the evidence of the widow as regards specials (vouchers whereof could not be produced for reasons stated) we would not want to interfere with the figures the learned judge awarded, save to substitute a figure of Shs 1, 449,014/88 (to be exact 1,449, 014/90) in place of Shs 1,576,624/88.

The appeal in the end result fails and is dismissed. As the appellant has succeeded in showing that the learned judge adopted a wrong method of calculating the loss of dependency figures we would allow the respondent two-thirds of and not full costs of the appeal. It is so ordered. To leave no room for doubt the judgment in respect of loss of dependency shall be Shs 1,449, 014/90. Other awards remain undisturbed.

Dated and delivered at Nakuru this 24th day of November 1995 .

A.M AKIWUMI

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.B SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of theoriginal.

DEPUTY REGISTRAR