IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gachuhi, Gicheru & Muli JJ A)

CIVIL APPEAL NO 42 OF 1990

Between

WILSON CHUMO.....APPELLANT

AND

MESSRS KAPSIMATWO EXPRESS.....RESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Eldoret (Mr Aganyanya J) dated 31st of October, 1989

in

Civil Case No R 21 of 1988)

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JUDGMENT

Muli JA. The appellant, Wilson Chumo, is the father of the deceased, Naomi Chebet Chumo, who was killed in a road accident involving the respondent's vehicle Reg No KYL 592 in which the deceased was travelling as a passenger. The accident occurred on the 21st November, 1987 along Eldoret/Kapsabet Road near Kapsabet.

The respondents admitted liability and the trial proceeded for the assessment of damages only.

The deceased left two young children, Winnie Chelagat and David Kiprono Chelulei aged 15 and 12 years respectively. The deceased was 36 years of age at the time of her death. The appellant was aged 72 years while his wife, the mother of the deceased, was about 56 years of age. The appellant instituted this suit for the benefit of the two dependant children and for himself and his wife as dependants of the deceased at the time of her death.

According to the evidence, the deceased was working at Unga Ltd at Eldoret as a nurse receiving a salary of Kshs 5,420/= per month gross. After P A Y E deductions her net take home was Kshs 4,827/=. She had a rented house at Eldoret and paid rent, water and electricity expenses. She had to sustain herself and must have bought food and other necessities.

The two children lived with their grandfather and grandmother. According to the appellant the deceased used to give him Kshs 800/= for himself and Kshs 400/= for her mother. The deceased must have

contributed for her two children's upkeep and maintenance although there was no evidence adduced to establish how much of the deceased's income was availed to them.

Mr Onyinkwa who appeared for the appellant filed some 4 grounds of appeal. In his grounds 1, 2 and 4 he complained that the learned trial Judge failed to give proper attention to the evidence adduced by the appellant and thereby applied a wrong principle of law. The evidence was there that the appellant received Kshs 800/= per month for himself while his wife received Kshs 400/= per month. There was no evidence adduced to establish as to whether any of these contributions included provision for the two dependant children or not. The uncontroverted evidence on record was that the sums of Kshs 800/= and Kshs 400/= pm were for the deceased's father and mother respectively for their "upkeep".

The learned trial Judge in his short judgment took into account dependency for the appellant only in the sum of Kshs 800/= per month but failed to take into account any dependency for her aged mother which according to the evidence was Kshs 400/= per month. He never even considered dependency for the deceased's two young children at the time of the deceased's death. They were aged 12 and 15 years respectively and the deceased must have provided or contributed to her children's maintenance, school fees, medical expenses not to mention the food they needed. This was a fatal misdirection. To take only Kshs 800/= per month as the multiplicand, the learned trial Judge fell into error of not taking into account relevant factors and thereby awarded a completely wrong assessment as well as inordinately low award in the circumstances of this case. Mr Machio did not seem to appreciate the violation of this principle. I would only refer him to the decision in *Kemfro Africa Ltd v AM Lubia* & *Olive Lubia* (1982-88) 1 KAR 727 Kneller JA as he then was p 730:

> "The principles to be observed by any appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka* [1961] EA 705, 709, 713; *Lukenya Ranching and Farming Co-operative Society Ltd v Kalovoto* [1979] EA 414, 418, 419. This Court follows the same principles."

Clearly the learned trial Judge failed to take into account relevant factors and thereby arrived at a wholly erroneous estimate of damages. He assessed damages for dependency at Kshs 182,400/= and awarded a conventional award of Kshs 60,000/= for her loss of expectation of life. He also awarded Kshs 5,000/= as funeral expenses.

Dealing first with the token award of Kshs 5,000/= for funeral expenses, these were not pleaded in the plaint and consequently they were not proved at the hearing. The learned trial Judge called them "special or reasonable funeral expenses" which he himself introduced as reasonable funeral expenses. This was an error. There was no evidence to show that any funeral expenses were incurred. It was a gratuitous award without the basis. I agree with my noble brother Gicheru JA that this award be disallowed and set aside.

This brings me to the issue of the general damages. Mr Onyinkwa for the appellant complained in ground 3 of his memorandum of appeal that the learned trial Judge was wrong in assessing dependency at 1/3 of the net income instead of 2/3. Dependency is a matter of facts and must be determined on the existing facts at the date of the death.

The ratio or formula 1/3 deceased's personal expenses and 2/3 for dependants or vice versa has the genesis in 1956 although the decision was not reported until 1961. See *Hayes v Patel* [1961] EA 129, 134 C. Sir Kenneth O'Connor, CJ as he then was-

> "I think Mr Haye's income from a farm which had been established was much more likely to increase than to decrease, and if I take future net annual earnings out of the farm, this is not an overestimate. I think that, in the circumstances of this case, it would be fair to allot this as between Mr Hayes and his dependants in the proportion of one-third for his expenses and two-thirds for

theirs. Mrs Hayes said she thought the proportion was about three-quarters to a quarter, but she also said she did not really know" (underlining is mine).

In *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & Five Others* (1982 – 1983) 1 KAR 946 Aragon J (as he then was) sitting in Mombasa assessed damages taking two-thirds as personal expenses of the deceased. The Court of Appeal allowed the appeal on other grounds.

The principles outlined by the then Chief Justice in *Hayes v Patel* (*supra*) were approved by the Court of Appeal in *Khemaney v Murlidhar* [1958] EA 268, Sir Owen Corrie Ag JA as he then was as follows:-

> ……., the principles applied by the learned Chief Justice, as he then was were as follows:
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> "The Court should find the age and expectation of working life of the deceased, and consider the wages and expectation of the deceased (ie his income less tax) and apportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the Court should apportion among the various dependants."

Upon an appeal against this judgment this Court held (1957 CA)

> "That the method of assessment of damages adopted by the learned Chief Justice was correct."

The long list of decisions indicate that the 1/3, 2/3 proportion for personal expenses and dependency respectively has been applied under the assumption that it is the rule of law. It is not. The same practice, although has been applied for a long time now it is not a rule of law. Dependency and ascertainment of personal expenses are matters of fact.

In the recent decision of this Court in *Jane Chelegat Bor v Andrew Otieno Onduu & 2 others* Civil Appeal No 17 of 1990 the Hon Chief Justice having reviewed the previous decisions in his judgment had this to say:

> "Kneller JA took the same view in *Hassan's* case (*supra*) at page 949 when he said:
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> "The sum to be awarded is never a conventional one but compensation for a pecuniary loss. I think this has to be right. The fact that in many of these cases the trial judge thought that the dependency rate should be two-thirds, in the case of a married man with children means simply that his or her assessment of the pecuniary loss suffered by the dependants because of their father's death and not that there was any rule to that effect".

What is the position then in the present appeal? The deceased was receiving a salary of Kshs 5,420/= per month. PAYE was deducted in the sum of Kshs 593/= per month leaving a net balance of Ksh 4,827/=. There were other statutory deductions but these were not shown. I will take this sum as her take-home remuneration. Out of this net income she had to maintain herself, buy clothes and food as well as meeting her medical expenses. In addition she had to pay rent, water and electricity charges. These were not quantified but they were there. She had to travel to and from her home as well as having something for herself for her social welfare. Taking the proportion of 1/3 as income which went to meet her personal expenses this works out as Ksh 1,649/= per month. Two-thirds of this would be dependency ie Ksh 3,218/= per month. I think the 1/3 ratio gives her too low a figure representing personal expenses for the deceased when she was alive and although the learned trial Judge applied this ratio he arrived at a very

low figure in the circumstances of this case. The inflationary trends do suggest otherwise.

The ratio of 1/3 for her personal expenses would yield an unrealistic low figure and also a high figure of dependency. The ratio of 3/5 for her personal expenses and 2/5 dependency would be realistic. Having taken the expected period at which the dependency was likely to endure, the 3/5 personal expenses and 2/5 dependency ratio was the most realistic one. The appellant was 72 years of age and his wife was about 55 and were to be independent not too far off in the future. I would assess the dependency at Kshs 1,930/80 per month ie Kshs 1,930/80 x 12 making a total sum of Kshs 23,169/60 – this will then be the multiplicand.

The deceased was 36 years of age when she died. She was in a steady employment and had prospects of promotions. She was healthy and would have been expected to continue with her employment until she retired. The possibility of securing alternative employment with high salary could not be ruled out. The age of retirement adopted by the learned trial Judge of 55 is not an authority for retirement. If she did she would have been engaged in gainful activities for a further period of her expected working life. The imponderables and uncertainties of life would also affect the expected future working life. On the other side of the scale, her employment could have been curtailed by illness, accident or death. Taking all the relevant factors into account and bearing in mind the dependants who are small children and aged parents, I consider the multiplier of 17 years purchase to be reasonable. Taking the annual dependency of Kshs 23,169/60 (ie 1,930/80 x 12) as the multiplicand and 17 years as the multiplier the total dependency works out at Kshs 399,883/20. To this will be added Kshs 60,000/= being the conventional figure for the loss of expectation of life and which I consider to be reasonable.

The result is that I would award general damages in the sum of Kshs 339,883.20 dependency and Kshs 60,000/= for loss of expectation of her life making a total of Kshs 453,883/20. I would allow this appeal, set aside the judgment appealed from and substitute therefor judgment for the appellant in the sum of Kshs 453,883/20 together with costs and interest from the date of the judgment which was 31st October, 1989.

Gachuhi JA. I have had the advantage of reading draft judgments of Gicheru and Muli JJ A and I agree with them that the appeal should be allowed.

This appeal concerns the assessment of damages arising from a road accident. It has been complained by the appellant that the Judge of the Superior Court erred in applying wrong principles of awarding damages and also failed to consider dependency of two infant children of the deceased mother in arriving at the award he made. The facts of the case are set out by Muli, JA. I would state that, although in several decisions by the superior court and by this Court dependency has been assessed at two-thirds of the deceased's income, this is not the law. Assessment of dependency is based on available evidence of what was the income of the deceased during his/her lifetime and the amount the deceased was spending for his/her dependants which due to the death it will be a loss to them. The dependants are mainly, the wife or husband as the case may be, and children. In some cases where claims have been made for the benefit of aged parents as dependants of the deceased such claim should be considered. There is no way by which it can be considered that the deceased would continue working up to the retirement age because there are unforeseen and possible intervening factors which would reduce the retirement age, such as death of natural causes, loss of employment or for any other cause. The dependants are paid lump sum worked out by applying one year's dependency which is multiplied with a number of expected lost years. The number of lost years should be decided by the Judge based on the age of the deceased and taking into account that dependants will be paid lump sum.

In the present appeal, the evidence before the Court was sketchy. The deceased who was employed as a nurse at a basic monthly salary of Kshs 5,420/= had a house at Eldoret which she had to maintain by paying rent, light, water and other expenses connected with it. There is evidence that she was paying her father Kshs 800/= and Kshs 400/= to the mother monthly but this evidence is not clear. There is no evidence of the amount she spent for her children's education and maintenance. From the evidence before the Court based on her pay slip that was produced to Court as exhibit, it cannot be reconciled that the deceased after deducting tax spent one-third of her income to herself and provided two-thirds of her

income to her dependants which the advocate wishes this Court to award as the dependency. The more probable computation would be, that she spent three-fifths on herself and provided two-fifths to her dependants. At the time of her death she was 36 years leaving two daughters aged 15 and 12 years and both parents. I think that in her case a multiplier of 17 would be more appropriate.

On the question of special damages it is trite law that the claim must be pleaded and proved. This was not done in relation to funeral expenses and the amount awarded cannot be upheld.

The amount of damages to be awarded have been suggested by Gicheru and Muli JJ A. Likewise, I would adopt them and allow this appeal.

The consequential order is that the appeal is allowed with costs. The judgment of the High Court is set aside and substituted with the judgment for the plaintiff in the sum of Kshs 453,883/20 together with interest at court rates with effect from 31st October, 1989, till payment in full.

Gicheru JA. The facts relative to this appeal have been set out in the judgment of Muli JA which I have had the advantage of reading in draft and I need not recapitulate the same. But on the core issue to this appeal, let me say this: dependency is a matter of fact and is dependent on the available evidence peculiar to each particular case. Considering that the deceased, Naomi Chebet Chumo, had to sustain herself as is outlined in the judgment of Muli JA, I think that two fifths of her monthly earnings of Kshs 4,827/= was availed to her dependants. The dependants dependency was therefore two-fifths and not two-thirds of the deceased's earnings as was urged before us by counsel for the appellant, Mr Onyinkwa. This dependency amounted to Kshs 1,930/80 per month or Kshs 23,169/60 per annum. The latter then was the multiplicand.

When the deceased died she was 36 years old. The age of retirement adopted by the trial Judge was 55 years. This was notwithstanding the absence of any evidence in this regard. 55 years is the normal retiring age of the employees of the Kenya Government Civil Service. Normal retiring age in the private sector may be higher than 55 years. However, even taking 55 years as the starting point, and considering the imponderables and the uncertainties of life such as curtailment of the deceased's employment by illness, accident or death and taking into account that her dependants were her two children and her aged father and mother, I consider that a multiplier of 17 would be appropriate. Taking the annual dependency as Kshs 23,169/60 and 17 as the number of years that dependency would have endured, the deceased's dependant's total dependency amounted to Kshs 393,883/20. To this sum would be added the conventional sum of Kshs 60,000/- awarded by the learned trial Judge for the deceased's loss of expectation of life. The aggregate would amount to Kshs 453,883/20.

Under section 6 of the Fatal Accidents Act chapter 32 of the Laws of Kenya, damages in respect of the funeral expenses of the deceased person are awarded if those expenses have been incurred by the parties for whom and for whose benefit the action is brought. In the instant appeal, damages in respect of funeral expenses were neither pleaded nor was any evidence led to the effect that they had been incurred. The award of Kshs 5,000/= by the trial Judge on this account was therefore without any basis. I would disallow the same and accordingly set it aside.

The upshot is that I would allow the appellant's appeal to the extent outlined above, set aside the judgment of the superior court and substitute therefor judgment for the appellant in the sum of Kshs 453,883/20 together with interests at court rates with effect from the date of judgment of the superior court, that is to say, 31st October, 1989. I would also award the costs of this appeal to the appellant.

Dated and delivered at Nakuru this 24th day of September, 1992.

J.M GACHUHI

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

M.G MULI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR