IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & GACHUHI JJA)

CIVIL APPEAL NO. 39 OF 1985

WARREN KENYA LTD & ANOTHER ………………..APPELLANTS

VERSUS

KABENA……......……………………………………RESPONDENT

(Appeal from the High Court at Nairobi, O'Kubasu J)

JUDGMENT

On March 14, 1979 at about 2.30 pm along Nairobi Kiambu Road, an accident occurred between two vehicles, one vehicle registration No KPV 595 was owned and driven by the deceased, Fredrick Nelson Kabena. The other vehicle, registration number KRJ 402 was owned by the first defendant and driven by the second defendant who are appellants in this appeal. The deceased died in hospital on March 19, 1979. The deceased had just retired from his employment with the then East African Power and Lighting Co Ltd. The respondent (the widow) filed an action in the High Court under the Fatal Accidents Act claiming damages for herself and the children. The High Court awarded to her the sum of Kshs 719,928 as general damages. The appellants have appealed to this court against the said award.

The appellants had filed four grounds of appeal one of which had three sub-grounds. At the conclusion of the appellants' argument, they were reduced to three grounds namely,

(1)The learned trial judge failed to take into account tax element in that the amount awarded should have been reduced by such amount of tax that the deceased would have been bound to pay from his income;

(2)Benefits derived from investment and taken over by the beneficiaries, which the beneficiaries will continue to enjoy should be deducted from the amount awarded

(3)An amount representing accelerated benefits from the assets which the beneficiaries have inherited, to which a conservation figure of Kshs 90,000 should also be deducted from the damages awarded.

During the hearing in the High Court the apportionment of liabilities was agreed as to 10% contributory negligence to the deceased and the appellants to bear 90% of the blame. In order to prove income of the deceased accounts were produced in evidence. The deceased had several businesses alongside his employment. He had several properties which were mortgaged. His monthly income was agreed in all at Kshs 10,000 per month. According to the evidence of the accountant the deceased was to pay Tax in the sum Kshs 2,075 per month. Mr Gitau for the respondent conceded that on the authorities referred to by

Mr Mac-Vickers and from *Kemp & Kemp* tax is deductable from damages awarded as in this case. The counsel for both parties agreed the multiplier of 10 years. Dependency was also agreed at 2/3 of the income. The first ground of appeal therefore was resolved by consent. Through mathematical calculation the final figure comes to Kshs 570,600, worked out as under:-

Agreed monthly income	Kshs 10,000
Less monthly tax	2,075
Net monthly income	7,925
Income per year 7925 x 12	95,100
Damages on 10 years purchase	951,000
Less 10% contribution	95,100
	855,900
Less 1/3 own expenditure	285,300
2/3 dependency	570,600
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(Judgment figure in the High Court should read Kshs 720,000 instead of Kshs 710,928.)

The other grounds put forward for deductions are the income from investment and the accelerated benefits which arguments do interlink and which can be combined together. In fact they were combined and argued together.

These accelerated benefits are mainly from the assets acquired after death.

It was submitted that the widow benefited by inheriting the assets earlier than she would have. These benefits are the assets as are listed in death duty affidavit. From the evidence it came out that because of heavy mortgages, two valuable properties were sold to discharge some of the debts due by the estate. Other businesses, because the widow could not run them, were closed. Such businesses required personal supervision and control of a man which the widow could not do. The matrimonial home and the land around it is one of the assets. There is no evidence of income from it. There are two other small items, which were taken over which are the investments in shares that earn Kshs 2,500 per annum and a rental income of Kshs 650 per month. The appellant would wish these items to be deducted. The total amount would be Kshs 10,300 for one year. There is a further figure of Kshs 90,000 representing accelerated benefits to be deducted as benefits from the estate. This is a random figure.

English cases referred to us support these deductions. The conditions under which the deductions are made in England are not the same here. England is a welfare state. There are other benefits that compensate these deductions. Though the courts do not now look into the possibilities of the widow's remarriage, the condition here is totally different, that there is no such a hope of a remarriage. In other cases, a beneficiary in England might have inherited in various ways and might have accumulated wealth which is not the same case here. In Africa, a widow inherits more problems rather than benefit. It is accelerated burden. A widow has to depend on herself and take the responsibility of looking after her family. She steps into the shoes of her late husband. Such deductions are not really supportable. In *Gulbanu R Kassam v Kampala Aerated Water Company Ltd*. [1965] EA 587 at page 591 letter C Lord Guest Stated,

"The Court of Appeal have made a deduction in respect of the acceleration of the benefit of the

deceased's estate to his children. Their Lordships' view is that this is a highly speculative matter, and having regard to the anticipated savings which might reasonably have been made expected to have been made by the deceased if he had lived, no deduction ought to be made on the score of accelerated benefit, as these two figures may largely cancel out. Warnings against the propriety of this type of deduction were given in *Daniels v Jones* [1961] 3 All ER 24. The deduction for loss of expectation of life Kshs 2,000, is of so little account that it can be ignored."

There is no evidence in the present case that the deceased had any savings which passed over to the beneficiaries. There is also no evidence of how long income from investments would last. In the case of *Allen v British Railways Board* October 16, 1979 reported in *Kemp and Kemp* vol 2 paragraph 27-308 at page 27092 O'Connor J said:

"The case of *Daniels v Jones* shows that accelerated benefit, as it is called, is a most difficult task. It is unnecessary to examine the case, but in that case the figures compared with the situation I am dealing with, were miniscule. In one sense the whole of the capital available to Michael Allan in 1975 was available to his family. It was inevitably going to be used in part to provide for the living expenses of the family, as for example, it had been in the year 1974/75. Out of the net income it would be quite impossible to meet the sort of expenditure which this family was going to incur and was going to properly incur. It is therefore said that the capital sum, the sekers shares, for example, were in one sense already available for the use of the family and that it is not a benefit which has come to the family as a result of the death."

The present case is in similar position. The income from Prestige Jewellers Ltd of Kshs 2,500 per year and the sum of Kshs 650 per month from Kiambaa /Muchatha/T303 were income the respondent and her children were enjoying during the lifetime of the deceased. Similarly the land at Tigoni where matrimonial home stands is where the deceased and his family were living. The mortgage on it has now been cleared from the sale of other assets. The property was heavily mortgaged to provide finance for the business. Any income had to be worked for and may be the respondent was working on the farm during the life time of the deceased. There is nothing new the family has acquired since the death of the deceased which they did not have before. Nothing have come to them by way of wealth which they did not have. On the other hand, they have lost most valuable properties which they should have inherited had the deceased lived to clear those mortgages and to provide everything for them. Having these two cases in view, the income if any form from investments and or any deductions under this head of accelerated benefits from the assets passed over should not be considered. There should be no deductions for accelerated benefits or deductions from investments.

In the final analysis the appellant had succeeded on ground one of appeal in showing that the trial judge erred in not taking into account tax element which should be deducted from the general damages awarded. I would set aside the judgment of the High Court and substitute thereof judgment for the plaintiff in the sum of Kshs 570,600 together with costs and interest thereon at court rates. As the appellant has partly succeeded on one ground of appeal and failed on other grounds, I would award one third costs on appeal to the appellant and two thirds to the respondent.

Nyarangi JA. I agree with the conclusion which Gachuhi JA has reached and respectfully entirely agree with his reasoning. The essential features of this case have been set out by Gachuhi JA. The result of the appeal depends, I think, on a decision on grounds 2 and 3 of the memorandum of appeal.

I would hesitate in making a deduction on account of the acceleration of the benefit of the deceased's estate to his children. The submission for some such deduction was founded entirely on decisions of English Courts which of necessity dealt with facts of a different society, different environment and in some cases a particular English statutory provision. The widow in Kenya in general faces an uphill task in that she assumes the responsibility of a father and a mother. The accelerated benefit is expended having regard to the dual role. The benefit even if accelerated does not really replace the contribution of the deceased man. Even if the money obtained from the accelerated benefit is invested, the interest would not generally meet all the expenses which have to be paid for, over and above the normal expenditure for basic needs. I do not think it would be right to calculate a deduction purely on anticipated savings which

the deceased might reasonably have been expected to have made if he had lived. It is common knowledge that there is no scheme for compulsory savings in the Civil Service of Kenya. It is speculative matter if the average Civil Servant saves and if so, for how long and finally how much. I am afraid I have to say though with the greatest respect to those who think otherwise that an approach of deducting for accelerated benefit would lead to unrealistic result. I am comforted by finding myself in agreement with the decision on that issue of the Privy Council in *Gulbanu Rajabal Kassam v Kampala Earated Water Co Ltd*, [1965] EA 587 at page 591, Letter D. It seems to me, also, that it would be difficult for ordinary reasonable people to draw a distinction between a deduction for accelerated benefit and estate duty which was abolished vide The Estate Duty (Abolition Act) 1982. I concur with the order proposed by Gachuhi JA on costs.

Platt JA. I have greatly benefited from studying the proposals of Gachuhi JA in draft. I must admit that I have entertained greater doubt on some points of principle, and the application of certain principles, but in the end I consider that no objection should be entered to the final conclusions. There are three matters to which I wish to draw attention.

The first is that I do not see any useful purpose in distinguishing the approach to the quantum of the dependency in Kenya from that in England because of the so-called welfare state in England. There is no evidence of any such difference, or any such extra benefit; and something as vague as the welfare state is not a matter of which these courts can take judicial notice, or indeed quantify. There is the wisdom of Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at p 617, to consider when he remarked:-

“There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future possibilities.”

That is a warning not to stray outside the path leading to what any particular litigant has lost. In deciding what has been lost by the litigant, it is also pertinent to note what that litigant has gained. The English cases are guides to the principles that govern the approach, except as to those principles already accepted and acted upon in Kenya, and thus have become part of the law of Kenya.

This then leads to the second point. I doubt whether it is true that in principle the courts are no longer concerned with the remarriage of the widow. I agree that that is the position of the Law Reform (Miscellaneous Provisions) Act 1971. The matter is put in this way in *Kemp & Kemp,* vol 1 1982 E A Cap 21 (21-602):

“Before the coming into force of the Law Reform (Miscellaneous Provisions) Act 1971, an important factor affecting the multiplier in the case of a widow’s claim in many cases was remarriage or the prospect of remarriage. That must now be ignored; but only in the case of a widow’s own claim. In the case of a widower’s claim, his remarriage or prospect of remarriage must still be taken into account. Similarly, when the court is assessing damages to be awarded to an infant child for a father’s death, it must take into account the benefit which the child is likely to receive from a step-father. The prospect of marriage is also a relevant factor when assessing the damages to be awarded to parents or the death of an unmarried child who was contributing to their keep.”

In *Radha Krishen Kemaney vs Murlidhar,* [1958] EA 268 the widow’s prospects of remarriage were held deductible. That was not considered in *Kassam vs Kampala Water Co Ltd.*, [1965] EA 587 which in other respects appears to have departed from *Khemaney’s* case.In the present appeal I would agree that there were no prospects of remarriage in fact.

The third question relates to the accelerated benefit of inheriting the deceased’s estate at so early an age.

That principle was certainly acted upon in *Khemaney’s* case where it was said at p 268:

“Then the capital sum arrived at should be discounted to allow for the prospect of remarriage of the

widow, or the acceleration of the receipt by the widow of what her husband left her by his death, with a deduction for the value of the deceased's estate, by which his dependants get the benefit."

However, Lord Guest took the view in *Kassam vs Kampala Aerated Water Co. Ltd* at p 587 –

"(ii) having regard to the anticipated savings which might reasonably have been expected to have been made by the deceased if he had lived, no deduction ought to have been made on the score of accelerated benefit, as these two sums largely cancel out."

He pointed out at p 591 that-

"Warnings against the propriety of this type of deduction were given in *Daniels vs Jones* [1961] 3 All ER 24."

But in that latter case a small deduction was made. It depends on the facts. It would be over sentimental not to notice that some dependants benefit enormously by the acceleration, just as some are greatly impoverished by the death of their supporter. Many factors affect the position of a man at the end of his life, which are not present in the middle of his life, which lessen the amount available for distribution to his dependants. It is going too far to say, as Mr Gitau appeared to contend, that the courts have rejected the principle of the reduction of damages by an accelerated benefit.

Having considered this matter it seems that the proper approach in this case is to hold that the learned judge had not fallen into such error in deciding not to make a deduction, that this court should interfere, even though, speaking for myself, I might have made one, had I been the trial judge. But taking the situation fairly and broadly I agree that it cannot be said that the learned judge acted on a wrong principle of law, or has misapprehended the facts or has made a wholly erroneous estimate of the damage suffered on this aspect of the appeal. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere….. (See Lord Wright in *Davies vs Powell Duffryn Associated Collieries Ltd,* [1942] AC 601 at p 617 as referred to in *Kassam vs Kampala Aerated Water Co Ltd* [1965]

In consequence I agree with the orders proposed by Gachuhi JA.

Dated and Delivered at Nairobi this 30th September, 1987

J.O. NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL