



IN THE COURT OF APPEAL

AT MOMBASA

CIVIL APPEAL 59 OF 2004

**ROGER DAINTY (as Administrator of the Estate of the Late
JAMES GEORGE WILLIAM CAMPELL) APPELLANT**

AND

1. MWINYI OMAR HAJI

2. MWINYI HAJI FAKI RESPONDENTS

***(Appeal from the Judgment of the High Court of Kenya at Mombasa (Lady Justice Khaminwa) dated
21st day of November, 2003***

in

H.C.C.C. NO. RD 107 OF 1999)

JUDGMENT OF THE COURT:

This appeal is against the quantum of damages awarded by the superior court (J. Khaminwa, J) to the estate of James George William Campbell (deceased). The appellant is dissatisfied by the award of Shs.3,756,000/= as lost years under the Law Reform Act. He complains that the award is inordinately too low and by this appeal seeks the enhancement of the damages.

On 22nd August, 1998 the deceased was driving motor vehicle registration No. KAJ 414W – Toyota Carina belonging to his employer (Spanfreight Shipping Limited) towards Mtwapa along Mombasa – Malindi road. When he reached Shanzu at about 5.00 a.m. his vehicle had a head on collision with an oncoming motor vehicle registration No. KAB 342M Mitsubishi Canter which was being driven by Mwinyi Haji Faki (2nd respondent) from Kilifi towards Mombasa. The deceased died instantly. The deceased was survived by his parents George Herbert Lorne Campbell and Elizabeth Ann Campbell who gave a power of Attorney to the appellant to apply for a grant of letters of administration for the estate of their son.

The appellant duly applied for and was given a limited grant of letters of administration on 31st May, 1999. Thereafter the appellant and M/s. Spanfreight Shipping Limited filed a joint suit. The latter claimed Shs.390,000/= for the loss of the vehicle which the court awarded. On his part, the appellant claimed damages under Law Reform Act for the loss sustained by the deceased's estate due to the negligence of the respondent. The respondents denied negligence. The superior court after trial apportioned liability at

20% against the deceased and 80% against the respondents. There is no appeal or cross appeal against that apportionment of liability.

The deceased was 27 years old at the time of his death. He was not married. He was a BA (Hons) University graduate and was employed by Spanfreight Shipping Limited as a Management Trainee. He had worked for 9 months before the accident. His total monthly earnings were Shs.130,800/= which included a basic pay of Shs.81,300. The appellant was also employed by a company representing Spanfreight Shipping Limited. According to the appellant's assessment, the deceased was being sent for assignments in other parts of Africa and could have easily reached very senior position in the company. He anticipated that deceased's salary would have doubled or trebled within a very short time. The retirement age in his view was 65 years. Christopher Edward Alan Barnes who worked for Spanfreight Shipping Limited stated that deceased's work was satisfactory; that deceased was highly motivated; that his health was good and his prospects were good.

The appellant's advocates suggested a multiplier of 25 at the trial while the respondents' advocates suggested a multiplier of 10. The learned Judge accepted a multiplier of 10 saying,

“Regarding lost years there is no guarantee of life for any period of these days (sic) expectations of life is reduced by the many risks now to be encountered within modern living. The multiplier proposed is quite high then and it is my view that for a 27 years old person he could have been expected to continue in life for perhaps a further 15 years. Therefore I find the multiplier of 10 would be reasonable”.

In assessing a suitable multiplicand, the learned judge took into account that deceased's monthly basic pay was Shs.81,300/= and that the deceased's living expenses and tax liability had to be deducted. After assessing the monthly tax liability at Shs.9,000/= and deceased's living expenses at Shs.50,000/= she found that Shs.31,300/= would be what the estate would be entitled to. The multiplicand and the multiplier selected yielded a sum of Shs.3,756,000/=.

There are four grounds of appeal namely:

(a) The learned trial Judge erred in law in applying a multiplier of 10 years only in the case of the deceased who at the time of death was 27 years.

(b) The learned trial Judge erred in law awarding damages for lost years in that such damages were to be awarded and calculated in accordance with the provisions of the Law Reform Act (as opposed to Fatal Accidents Act).

(c) In considering the general damages to be awarded for lost years the learned trial Judge erred in law and in fact in not taking into account the clear and uncontrorveted evidence about the good and sanguine prospects concerning the deceased's career and the prospects of earning higher salary and benefits.

(d) The appellant will further submit that the amount of general damages awarded for the lost years is so inordinately low as to represent an entirely erroneous estimate and in reaching such low figure the learned trial Judge must have acted on wrong principles of law.

The cases of ***KITAVI V COASTAL BOTTLERS LIMITED*** [1985] KLR 470, ***SHABAN V CITY COUNCIL OF NAIROBI*** [1985] KLR 516; ***HASSAN V NATHAN MWANGI KAMAU TRANSPORTERS*** [1986] KLR 457, among others cited by the appellant's counsel correctly state the principles on which an appellate court would disturb an award of damages made by a trial court. In the ***Hassan's case (supra)*** in particular, the court stated that the appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking increase must show that in reaching that inordinately low figure, the judge proceeded on a wrong principle or misapprehended the evidence in some material respect. Furthermore this Court is aware that inordinately high awards should be avoided as they will lead to monstrously high premiums for insurances and hurt the body politic (***Hassan's case (supra)***).

The principles on which damages for lost years under Law Reforms Act are assessed are admirably articulated by Lord Scarman in **GAMMEL V WILSON** [1981] 1 All ER 578 at page 593 paragraphs g – j thus:

“The problem in these cases which has troubled the judges since the decision in Picketts case, has been the calculation of annual loss before applying the multiplier (i.e. the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in the House in Picketts case. The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of death would suggest was reasonably likely to achieve. Subtle mathematical calculations, based as they must on events or contingencies for a life which he will not live, are out of place, the judge must make the best estimate based on the known facts and his prospects at time of death”.

Mr. Satchu, learned counsel for the appellant, submitted that the superior court erred in principle in failing to take into account the multiplier applied in other cases which according to him show an established practice. He referred to several decisions of the High Court mainly dealing with loss of dependency under the Fatal Accidents Act where higher multipliers for similar age have been applied and urged us to apply a multiplier of 17 – 20 years.

The decisions of the High Court referred to include the case of **MUSA ALULWA V THE ATTORNEY GENERAL & ANOTHER** Nairobi H.C.C.C. No. 1597 of 2000 where a multiplier of 20 was applied to a 26 year old man.

We do not, with respect, agree with Mr. Satchu that courts have established as a matter of practice the appropriate multiplier to be applied to different age groups of victims of accidents. What is a reasonable multiplier in our jurisdiction is a question of fact to be determined from the peculiar circumstances of each case. By way of analogy, in **BORU V ONDUU** [1988-1992] KAR 299, the court was asked to follow the pattern of court decisions showing that in claims for loss of dependency under the Fatal Accidents Act, the court had, as a rule, taken one third of a deceased net income as his living expenses and two thirds of his net income as dependency rule. The court rejected the rule and re-asserted that dependency is a question of fact. *Hancox CJ* said in part at page 291:

“The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyse the available evidence as to how much deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation”.

To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life.

It has not been shown that in the circumstances of this case, the learned Judge either erred in law or proceeded on a wrong principle or that she misapprehended the evidence in some material respect. There is no justification for interfering with the Judge’s of determination of the reasonable multiplier. It is not to be forgotten that the deceased was on a contract of three years and the question of his working upto 65 years did not really arise.

In elaborating, the second ground of appeal, Mr. Satchu submitted that the learned Judge erred in law in applying a multiplicand of Shs.31,300/= instead of Shs.81,300/=. He contended that the learned Judge confused the appellant’s claim for damages for lost years on behalf of the estate with a claim for loss of dependency under the Fatal Accidents Act.

In essence, the appellant’s case is that the learned Judge erred in deducting Shs.50,000/= as deceased’s living expenses from the monthly basic pay of Shs.81,300/=. The appellant’s counsel did not however, cite any law to support his contention that the deceased living expenses should not have been deducted. Where the working life of a living plaintiff has been shortened by injury he suffers loss of prospective

earnings and is entitled to an award for the “lost years” being the period which he could have worked had he not suffered the injuries. In such a case, the plaintiff’s living expenses are not deducted from his net salary in assessing the appropriate multiplier – (see the case of **MARIGA V MUSILA** [1984] KLR 251. Conversely, in computing a deceased’s loss of earnings in the lost years both under the Fatal Accidents Act and under Law Reform Act, the deceased’s estimated living expenses in the lost years are deducted for the reason that they cannot constitute part of deceased’s estate. This is clear from the case of **PICKETT V BRITISH RAIL ENGINEERING LTD** [1980] Al 136 and **GAMMELL V WILSON** (supra). The local courts have been invariably excluding the deceased’s living expenses in the lost years for the reason that they cannot constitute part of the deceased’s estate – see **HASSAN V NATHAN MWANGI KAMAU TRANSPORTERS & 4 OTHERS** [1986] KLR 457 and **STELLA P MUKA V VISHRA RANJI HALALE & ANOTHER** H.C.C.C. No. 1870 of 1984 Nairobi (unreported). So the living expenses were correctly excluded in this case as not forming part of the deceased’s estate.

However, the learned Judge ascribed a considerable portion of deceased’s basic income as part of the living expenses. The deceased was, in addition to the basic monthly pay for Shs.81,300/= getting a car benefit of Shs.9,000/=, housing benefit of Shs.36,000/= and medical insurance. It seems that he had been given a company car. He was single. There was no evidence as to his monthly expenditure. In the circumstances there was no material to justify the assessment of the deceased’s monthly living expenses at Shs.50,000/=. In our view, the learned Judge erred in principle in computing the deceased’s living expenses at an inordinately high figure of Shs.50,000/= and thereby came to an erroneous estimate of the appropriate multiplicand. This justifies our interference.

In the circumstances, a reasonable monthly living expenses should have been Shs.29,000/= inclusive of tax giving a multiplicand of Shs.52,300/= and when a multiplier of 10 is applied to that sum, the loss of earning to the estate in the lost years would be Shs.6,276,000/=.

For the above reasons, we allow the appeal only to the extent that the award of Shs.3,756,000/= as damages for lost years is set aside and substituted with an award of **Shs.6,276,000/=**. The appellant has had the damages almost doubled. We would give the appellant two thirds (2/3) costs of this appeal.

Dated and delivered at Nairobi this 30th day of July, 2004.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR