



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, TUNOI & O'KUBASU, J.J.A)**

**CIVIL APPEAL NO. 64 OF 2000**

**BETWEEN**

**1. THETA TEA COMPANY LIMITED )**

**2. ALBERT W. WANJALA ) .....APPELLANTS**

**AND**

**FLORENCE NJAU NJAMBI .....RESPONDENT**

**(Appeal from the Judgment and decree of the High Court of**

**Kenya at Kitale (Lady Justice Nambuye) dated 7th**

**July, 1999**

**in**

**H.C.C.C NO. R. 15 OF 1997)**

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**JUDGMENT OF THE COURT**

In her plaint dated 30th June, 1994 and lodged in Kitale High Court on 1st July, 1994, Florence Njambi Njau, the respondent herein, had alleged that she was the widow of the late Francis Njau Kaburi who was killed in a road traffic accident on 26th February, 1994, and she claimed, among other things, damages in respect of loss of dependency for herself and her nine children. According to that plaint, the respondent's deceased husband was, prior to his demise, a businessman aged forty years and that he earned a monthly income of **Ksh.10,000/=** from his business. It is this aspect of the matter we are concerned with in this appeal, the respondent having conceded grounds one and five of the grounds of appeal. Those two grounds dealt respectively with the awards by the learned trial Judge (Nambuye J.) of special damages which were neither pleaded nor proved, and damages under the Law Reform Act. The respondent conceded that she had not obtained a grant of letters of administration in respect of her late husband's estate. The two appellants, Theta Tea Company Ltd. and Albert W. Wanjala, abandoned ground one of their grounds of appeal and only grounds two and three of the grounds of appeal were contested before us. Those grounds are:-

"2.THAT the learned trial Judge erred in law in using wrong principles for assessment of damages, such

that the amount awarded was excessive in the circumstances.

3. THAT the learned Judge erred in law in awarding damages for loss of dependency without proof thereof."

Mr. Nyagaka for the appellants argued these two grounds together. He took us through the evidence of the respondent and pointed out to us, correctly, that in the whole of that evidence there is no mention at all of any particular or general sum representing the monthly income of the deceased and how much of that income the deceased made available to the respondent for her upkeep and the upkeep of their nine children. Mr. Nyagaka's contention on this aspect of the matter was that the burden was upon the respondent to prove, of course upon a balance of probabilities, the extent of their dependency upon the deceased and Mr. Nyagaka maintained that the respondent in fact failed to prove any dependency.

We may usefully start by quoting the words of Lord Goddard, C.J in **BONHAM CARTER V HYDE PARK HOTEL LTD, (1948) 64 T.L.R 177**, which were cited with approval by this Court in **KENYA BUS SERVICES & ANOTHER V FREDRICK MAYENDE (1988-92) 2 KAR, 232**. Lord Chief Justice Goddard said:

"Plaintiffs must understand that if they bring actions for damages, it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying 'this is what I have lost, I ask you to give me the damages'. They have to prove it."

In the present appeal, the respondent had pleaded in her plaint that her deceased husband was earning an average of Shs.10,000/= monthly from his business, and having made that claim in her plaint, the burden was on her to prove it. In her evidence all she said was that the deceased had been in business and that she and her children were dependant on him. Mr. Nyagaka tells us this was not enough. Mr. Kidiavai for the respondent contends it was enough, all other circumstances being taken into account. The business was that of selling second-hand clothes. No records were kept and it would be unrealistic for anyone in Kenya to hold that because no records were or could be produced, no business was ever conducted. Nor can failure to produce income tax returns warrant the conclusion that no business was being conducted. The learned trial Judge found as a fact that the deceased was dealing in second-hand clothes and then dealt with the matter in this way:-

"..... The deceased was aged 40 years, alleged to have been doing business assisted by the wife. It has been argued by the defence that it has not been shown that the deceased used to earn any living (sic) evidenced by the fact that there are no records exhibited. That in itself does not mean that the deceased was not fending for the family. The wife says they depended on him and there is nothing to controvert that. Failure to produce records does not mean that the deceased was not fending for the family. All it shows is that his income or financial contribution cannot be determined by using a multiplier.

In case of this nature lumpsum payments will suffice. Counsel for the defence has submitted that the principle in the case of **SHEIKH MUSHTAQ HASSAN V KAMAU TRANSPORTERS AND ANOTHER, (1982-1988) 1 KAR 949** cannot be applied to this case.

I have perused that authority and find that was a young boy who had just finished school and he was expected to earn some money for the family's benefit but since he had not yet started earning, it was difficult to use the principle of a multiplier and the court settled on a lumpsum payment. The principal consideration in that case was that contribution by a family member to the welfare of the good of the family is a common practice in the African community and it is in fact expected and no monetary compensation can replace that. That authority is relevant to the circumstances herein because the deceased rendered services to his family as a husband and father and by his death the family has lost his support since his income is not quantifiable. The best way to deal with damages is by an award of a lumpsum payment which I have assessed at Shs.320,000/=.

We broadly agree with these views of the learned trial Judge though we must nevertheless point out that in the case of **Sheikh Mushtaq Hassan**, ante, there was no claim in the plaint that the deceased (a

school-boy) was earning any particular amount per month, while in the appeal under consideration it was specifically pleaded that the income of the deceased from his business was Shs.10,000/= per month and if the respondent was serious with that averment, one would expect her to prove it. But we agree that the principle must be the same and that is where it is proved that a claimant was dependant on a deceased party but the amount of the dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that were to be so, a lot of Kenyans would be denied substantial justice, taking into account our level of literacy and such like factors. The Privy Council did, to some extent, recognise this when they said:-

"The question of damages for the loss of support is essentially a jury question. Mathematical calculations can never lead to a precisely accurate estimate for the loss suffered" - see GULBANU KAJABALI KASSAM V KAMPALA AERATED WATER CO. LTD [1965] EA 587."

By calling it "a jury question" we understand their Lordships to have been saying that the issue is one of facts to be decided on broad principles. The respondent proved her dependency and that of her children on the deceased. She was not able to quantify the amount of the dependency. The learned trial Judge was, in our view, perfectly entitled, in the circumstances, to arrive at a lumpsum. Mr. Nyagaka conceded that the sum of Shs.320,000/= awarded by the learned Judge was not so inordinately high that it calls for our interference.

In the event, this appeal succeeds to the extent that the special damages of **Shs.20,150/=** and **Shs.25,000/=** awarded under the Law Reform Act are set aside as the respondent concedes they were not awardable. We, however, dismiss the appeal as respects the award of **Shs.320,000/=** as loss of dependency. We award to the respondent one half of the costs of the appeal.

These shall be our orders in the appeal.

**Dated and delivered at Nakuru this 20th day of September, 2002.**

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**