IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., NSEKELA, J.A. AND KAJI, J.A.)

CIVIL APPEAL NO. 80 OF 2002

BETWEEN

THE ATTORNEY GENERAL.....APPELLANT

AND

ROSELEEN KOMBE (as the Administratrix
Of the late LIEUTENANT GENERAL
IMRAN HUSSEIN KOMBE, Deceased).....RESPONDENT

(Appeal from the decision of the High Court
of Tanzania at Moshi)

(Mchome, J.)

dated the 4th day of October, 2001

in

Civil Case No. 80 of 1999

J U D G M E N T

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NSEKELA, J. A.:

The respondent Roseleen Kombe is the widow and administratrix of Lieutnant General Imran Hussein Kombe, now

deceased. She instituted Civil Case No. 8 of 1999 in the High Court seeking to recover compensation under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap. 360 as amended, for her own behalf and for the benefit of named dependants. These were five daughters, Sophia, Sonia, Salgha, Sharifa and Sheira; the deceased's mother Saadi Hussein and two grandchildren. All of them qualified under the definition of "dependant" in Section 2 of the Ordinance as amended by the Second Schedule to the Law of Marriage Act, 1971. This fact was not in contention.

Briefly, the facts of the case are not in dispute. The deceased was murdered by two policemen on the 30.6.1996 who were in the course of their employment. This crucial fact was admitted by the appellant Attorney – General. The deceased was a very high ranking army officer who rose to the rank of Lieutnant – General and had held the post of Director – General of Intelligence. He met this tragic death shortly after being relieved of this latter post. The learned trial judge (Mchome, J.) awarded to the administratrix general damages

in the sum of shs.300 million to be apportioned by the respondent to other dependants –

> "as they have agreed and as compensation for the loss of profit from the failed projects".

The appellant Attorney – General was aggrieved by this decision and filed two grounds of appeal, namely –

> "1. The High Court erred in law in fact (sic) in finding the Government is vicariously liable on unauthorized and wrongful killing of the deceased without tortfeasors being sued.
>
> 2. The High Court erred in law and in fact in awarding general damages to the tune of shillings three hundred million (300,000,000) to the dependants without proof of the dependence of the

dependants and as compensation for the loss of profit from non – proved projects of the deceased."

At the commencement of the hearing of the appeal, Mr. Kamba, learned Principal State Attorney, abandoned the first ground of appeal and so we are left with the second ground of appeal. The question of the liability of the appellant was thus not contested. The respondent on her part, through Mr. Ng'maryo, learned advocate, filed a cross appeal containing two ground of appeal –

"1. That the High court erred in law in requiring further proof of the plaintiff's averments as regards the criteria for assessment of the quantum of damages when those averments were in law admitted by the defendant.

2. That the High Court erred in law and in fact in assessing the general damages at Tshs.300,000,000/=. Had the High Court properly considered the facts of the case and the uncontroverted evidence before it, it would have awarded a much larger sum as general damages to the plaintiff."

Mr. Kamba, learned Principal State Attorney submitted that principles to be used in the award of damages were expounded in the case of Davies v. Powell Duffryn Associated Collieries Limited, (1942) AC 601. The basic principle he said, was that the court is confined to the loss of reasonable expectation of pecuniary benefit sustained by the family of the deceased, and that the court should not take into account the mental suffering of the survivors. He added that the respondent had not proved anything as regards damages suffered by the dependants. The daughters, Sofia and Sonia, had reached majority age. He also submitted that there was

no evidence on the income generated from the purported projects accruing to the deceased. The learned Principal State Attorney criticized the learned trial judge for relying on conjecture and that damages should be revised downwards, citing (CAT) Civil Appeal No. 7 of 1997 between Silas Simba v (1) Editor, Mfanyakazi Newspaper (ii) Mahamudi Mwinyi *(unreported).* The learned trial judge, he complained, was not guided by any principles and the court should therefore intervene in the assessment of damages. He was of the view, however, that an award of damages in the sum of shs.200 million, would meet the justice of the case.

On his part, Mr. Ng'maryo, learned advocate for the respondent, submitted to the effect that damages are based on the pecuniary loss suffered by each dependant and the calculation could be based either on a lump sum or on individual calculations. Persons entitled to receive damages are the dependants as defined in the Second Schedule to the Law of Marriage Act, 1971. He added that the evidence of PW1, the widow, was not challenged in any material respect by the appellant. The averments in the plaint on the extent

of the pecuniary loss were also not controverted by the appellant. As regards the apportionment of damages among the dependants, the learned advocate was of the view that the task could be undertaken by PW1, the administratrix of the estate of the deceased.

As stated before, the respondent had a cross – appeal containing two grounds. First, the respondent complained that there was no need for further proof on the quantum of damages since the appellant had admitted them. The second complaint was to the effect that general damages assessed at shs.300 million were on the low side and should be enhanced to shs.600 million taking into account the inflation factor.

The learned Principal State Attorney countered these submissions. He reiterated that the amount of pecuniary loss for each dependant should have been assessed and that averments in the pleadings had to be proved, and if not, they are of little evidential value. The purported salary of the deceased to the tune of shs.72 million per annum had been denied and so the respondent was duty

bound to prove the same. As regards the valuation report, Mr. Kamba urged the Court not to act upon it since the learned trial judge had discredited it.

We propose to deal with the appeal by the appellant. The only issue before the Court is the quantum of damages payable to the dependants. The first question for decision, is what are the principles governing the assessment of damages under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360 as amended? R. F. V. Heuston, the learned author of Salmond on the Law of Torts (17th edition) at page 585 stated –

> "The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend upon the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The

> balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainities."

These principles were enunciated by Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd. (1942) AC 601 at page 617. Viscount Simon restated them in Nance v. British Columbia Electric Railway Co. Ltd. (1951) AC 601. We wish also to quote what Lord Pearson stated in Taylor v. O'Connor (1971) AC 115 at page 140 -

> "There are three stages in the normal calculation, namely, (1) to estimate the lost earnings, that is, the sums which the deceased probably would have earned but for the fatal accident; (2) to estimate the lost benefit, that is, the pecuniary benefit which

> the dependants probably would have derived from the lost earnings, and to express the lost benefit as an annual sum over the period of the lost earning; (3) to choose the appropriate multiplier which, when applied to the lost benefit expressed as an annual sum gives the amount of the damages, which is a lump sum."

This is the normal practice followed in assessing damages in fatal accident cases which has been recommended for the sake of uniformity and certainty.

We now turn to consider the evidence of PW1, Roseleen Kombe, who was the sole witness. During her examination in chief, PW1 did not shed any useful information on the income of the deceased from his salary as well as income derived from their projects. When examined by the court, PW1 candidly admitted that

"My husband was receiving a salary which I do not know. It was top secret."

She did not testify as to how much the deceased was giving her for the upkeep of the family, that is herself and the rest of the dependants listed in the plaint. We would like to point out as well that none of the dependants testified during the trial in the High Court. This was undoubtedly vital information, which the trial court would use in the calculation of the amount of damages payable to the dependants. At the instance of the court, PW1 was requested to produce the projects write – up. What emerges from her evidence on this aspect is that the projects were in their early implementation stages and largely financed by bank loans, which were still outstanding at the time of the deceased's death. It would seem that these projects are now in financial doldrums. There is thus no evidence at all as to how much income was derived from these projects and what income was to the deceased for his own use and the family.

In considering the quantum of damages to be awarded to the respondents and other dependants, the trial judge cited a number of decided cases including the familiar passage from Lord Wright's judgment in Davies v. Powell Duffryn Associated Collieries Limited (1942) AC 601 at page 617. The learned trial judge observed thus –

> "From the authorities I have cited above it is necessary to know as much as possible the deceased's income and how much he was spending on his widow and other dependants in order to be able to assess how much has to be awarded them in damages to make them in a position like they would have been if the deceased has (sic) not died. The court has not been helped much by the plaintiff in this respect." *(emphasis supplied)*

With respect, we agree with the learned trial judge. Then the learned trial judge proceeded on to consider the five "economic projects" listed in paragraph 16 of the plaint whose total financial investment was Shs.2,243,000,000/=. PW1 however did not give any evidence to prove this investment. However what is important for our purposes is the income derived from these projects to the deceased for his own use and the family. As regards these projects, the learned trial judge had this to say –

> "In business or commercial undertakings there are chances of making profit and also those of making loss. It will be unrealistic to assume the projects would reap maximum profit if the deceased had not died. The plaintiff is apparently aware of this reality. That is why in her notice to the Attorney General she was ready to settle at the amount of shs.690,000,000/= as damages instead of the estimated 2.24 (sic) shillings projects

> value. Though the evaluation of the projects is speculative and exaggerated indeed the projects or at least some of them would have made some profit had the deceased, their engineer, not been killed."

It is evident from decided cases that the measure of damages is the loss of the pecuniary benefit which the dependants would have got from the deceased if the latter had not died, for example support by way of maintenance, education of children and the like. The starting point for the assessment of damages is the amount of the dependency ascertained by deducting from the earnings of the deceased, the estimated amount of his own personal and living expenses. The evidence adduced by the sole witness PW1 regarding the income of the deceased and the amount of loss caused to her and other dependants was in our view wholly unsatisfactory. In fact there was no such evidence! Obviously, the learned trial judge could not embark upon the calculations envisaged in the Davis case, supra, because there was no such evidence.

The deceased husband was a distinguished military and public officer for all his working life and towards the end of his illustrous career that was tragically cut short by overzealous policemen he was preparing to join the business fraternity upon his retirement. PW1 testified that the deceased's salary and fringe benefits were "top secret", yet in the plaint, it was averred that the deceased's net income as Director of Intelligence (inclusive of fringe benefits) was Shs.72,000,000/= per annum. Surely such unproven figures on the required standard in civil cases could not form the basis for calculation of damages. In the written statement of defence, this income was disputed. The same problem arises as regards the income from the listed projects. The figures in the plaint are investment figures in the purported projects. The critical question is how much was the deceased earning as net income from these projects? The learned trial judge did not ascertain the deceased's income as Director of Intelligence as well as from the purported projects. The second stage would have been to make an estimate of the amount required by the deceased for his personal and living

expenses. The learned trial judge did not make this estimate as well. The persistent problem is that during the trial there was no evidence adduced on the income of the deceased and how much he was spending on the dependants.

A question we ask ourselves, was the learned trial judge right in his assessment of the damages? From the passage in his judgment we have quoted, the learned trial judge was well aware of the principles to be used in undertaking such an exercise. However, he did not attempt to do so. On the evidence available, it was an impossible task. From PW1's scanty evidence, it was not known what was the deceased's income both from his salary as well as the projects. As regards the latter, the learned trial judge did not have before him the accounts for those projects in order to gauge whether or not they were developing and prosperous. There was no evidence before the trial court on the deceased's income from these projects by way of salary, director's fees, dividends and the like. All this leads to the inevitable conclusion that the learned trial judge's award of general damages was not founded on known principles in fatal

accident cases. Such an assessment must be made on actual known figures.

Section 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance provides as under –

> "(1) Every action brought under the provisions of this Part shall be for the benefit of the dependants of the person whose death has been so caused, and shall be brought either by and in the name of the executor or administrator of the person deceased or by and in the name or names of all or any of the dependants (if more than one) of the person deceased.
>
> (2) In every such action the court may give such damages as it may think proportionate to the injury resulting from such death to the parties

respectively for whom and for whose benefit such action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the aforesaid parties in such shares as the court shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint." *(emphasis supplied)*

After evaluating the evidence before him and purportedly considering the applicable principles of law, the learned trial judge awarded, inter alia,

"General damages Tshs.300,000,000/= (three hundred million) to cover all the listed dependants to be distributed by their representative, the plaintiff, among them, as

they have agreed and as compensation for the loss of profit from the failed projects."

We have two comments to make on this. First, we hope we have amply demonstrated that the learned trial judge did not make any calculations of damages based on the principles explained in the decided cases, of which he was aware, notably Davis v. Powell Duffryn Associated Collierieris Ltd. (1942) AC 601. We do not know what principle he used to reach the said amount of Shs.300 million general damages. We do not entertain any doubts that this was an error of principle in his award of the damages. There are known principles to be followed, which he did not. The second comment relates to the division of the damages among the dependants. This apportionment was left to PW1, probably because she was the administratrix of the estate. The court can award a lump sum and when that sum has been ascertained the court can proceed in the absence of agreement, to apportion the amount among the various dependants. This agreement must be recorded and form part of the award of the court. The apportionment among the dependants is an

essential part of the judgment since each dependant has a separate judgment, equal to the amount of damages apportioned to him/her. The procedure that was adopted by the trial court was wrong. Even where the dependants agree on the apportionment of damages, which is a good thing to do, such an agreement should be incorporated in the court's award.

We now come to the cross – appeal. Both grounds in the cross – appeal need not detain us. The first complaint was to the effect that the respondent's averments on the quantum of damages were not challenged by the appellant. Paragraph 10 of the written statement of defence cannot by any stretch of imagination be taken to be an admission that the deceased as Director of Intelligence was earning Shs.72 million per annum as income. The question of the quantum of damages was challenged in the defence. It was the second issue which had been framed and recorded for determination by the court. The second ground of appeal sought the enhancement of general damages. We think we have sufficiently dealt with this matter in connection with the appellant's ground of appeal. There

was simply no iota of evidence before the trial court which would form the basis for calculating general damages as provided for under the Law Reform (Fatal Accidents Miscellaneous Provisions) Ordinance, Cap. 360. So the question of enhancement of damages does not arise. This ground also fails.

Rule 36 of the Court Rules provides as under –

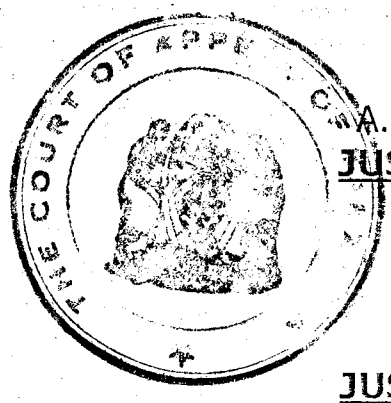
> "36. The Court may, in dealing with any appeal, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court or remit the proceedings to the High Court with such directions as may be appropriate, or to order a new trial and make any necessary incidental or consequential orders, including orders as to costs."

On our part, we are satisfied that the learned trial judge did not follow established principles in the calculation of damages under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360 as amended. We have seriously considered stepping into the shoes of the learned trial court so that this Court make the assessment itself under Rule 34 (1) (a), but this is not possible since the evidence before the trial court was far from satisfactory. Since the liability of the appellant was admitted, our sense of justice demands that there should be an assessment of damages according to law. An order for a retrial limited to the assessment of damages would have been an appropriate one. However, it will be recalled that Mr. Kamba, learned Principal State Attorney, submitted that the appellant would be prepared to pay Shs.200 million as damages to the widow and other dependants.

In the event, we allow the appeal with costs and dismiss the cross – appeal. The appellant is ordered to pay Shs.200 million as damages to the widow and dependants of the deceased herein. The

apportionment of the said amount between the widow and the dependants to be done by the learned trial judge (Mchome, J.).

DATED at DAR ES SALAAM this 17th day of November, 2004.



A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

S. A. N. WAMBURA
SENIOR DEPUTY REGISTRAR