Privy Council Appeal No. 51 of 1961

Gulbanu Rajabali Kassam – – – – – – – *Appellant*

v.

Kampala Aerated Water Co. Ltd. – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH 1965

Present at the Hearing:
LORD GUEST
LORD UPJOHN
LORD WILBERFORCE
(*Delivered by* LORD GUEST)

This is an appeal from a judgment of the Court of Appeal for Eastern Africa allowing in part an appeal by the respondent from a judgment of the High Court of Uganda.

The action arose out of a motor accident on 31st August 1959 when Rajabali Kassam, the father of the appellant was killed. The appellant brought the action on her own behalf and on behalf of the other dependants:—

(*a*) Sadrudin Rajabali Kassam aged 20 years, son.
(*b*) Badrudin Rajabali Kassam aged 19 years, son.
(*c*) Zarina Rajabali Kassam aged 17 years, daughter.
(*d*) Shah Sultan Rajabali Kassam aged 15 years, daughter.
(*e*) Amirali Rajabali Kassam aged 12 years, daughter.
(*f*) Roshanali Rajabali Kassam aged 10 years, son.
(*g*) Nazma Rajabali Kassam aged 3 years, daughter.

The plaint alleged that the death of the deceased was caused by the negligence of the respondent's servant, the driver of the respondent's motor lorry, and claimed damages for loss of expectation of life under section 13 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953 (the equivalent of section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934) and under sections 7 and 8 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953 (the equivalent of sections 1 and 2 of the Fatal Accidents Act, 1846). The issue of liability was first tried by the learned judge and he found for the appellant and adjourned the hearing as to damages. After evidence had been led on the question of damages the learned judge awarded the appellant a round figure of £6,000 (Shs.120,000) with interest at 6 per cent from 30th September 1960, which sum included special damages. He also awarded costs to the appellant. He made no apportionment of the sum as between the appellant and the various dependants. The respondent appealed to the Court of Appeal for Eastern Africa when the Court allowed the appeal in part by reducing the general damages to Shs.35,913 which they apportioned among four dependants as follows:—

Shah . .	Shs.7,981
Amirali . .	Shs.7,183
Roshanali .	Shs.8,778
Nazma . .	Shs.11,971

In addition to the general damages of Shs.35,913 the Court awarded agreed items of Shs.1,000 general damages to the appellant personally, Shs.600 special damages for funeral expenses and Shs.320 for medical expenses, bringing the total to Shs.37,833. In the final result the Court reduced the award of damages from Shs.120,000 to Shs.37,833. The order for costs in the court below was not disturbed, but the appellant was ordered to pay three quarters of the respondent's costs of the appeal in that court.

The appellant complains that the award of the Court of Appeal is too low and asks for the trial Judge's award of £6,000 to be restored. No question as to liability arises.

The facts upon which the award has to be based are not seriously in dispute. The deceased who was aged between 40 and 45 years was a shop-keeper. The family consisted, in addition to the dependants already mentioned, of the deceased's wife and daughter, Dolatkhanu, who were both killed in the same accident as the deceased. The deceased's average income from his business from 1955 to 1959 inclusive was £744 per annum. The trial Judge concluded that out of that figure the deceased spent £558 or three-quarters of £744 upon his family. This figure was in effect accepted by the Court of Appeal when they took £572 as the annual dependancy, approximately £11 per week. The figure of 15 years as the remaining effective working life of the deceased taken by the trial Judge was also accepted by the Court of Appeal. None of these figures were seriously challenged by the respondent and there was no cross-appeal against the Court of Appeal's award. The deceased left estate the net value of which was Shs.89,425 and which, as he died intestate, would be divided according to the law of Uganda equally among his children.

The principles upon which an Appellate Court should act in reviewing an award of damages were clearly stated in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 by Lord Wright at page 617: " In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. 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, whether on the ground of excess or insufficiency."

Their Lordships therefore first address themselves to the question of whether the award of the Court of Appeal having regard to the considerations above mentioned can stand. It should be explained initially that the basis of the Court of Appeal's award differed from that of the trial Judge in several respects. Gould J. A. delivered the judgment of the Court of Appeal in an admirably clear opinion, making some intricate calculations based upon a mathematical basis. He considered each dependant separately and arrived at the conclusion that there were only four dependants, namely the youngest children. He then took the average dependancy of these four children at $11\frac{1}{4}$ years. As there were according to his view only four dependants he took 4/9ths of the total dependancy of £572 which he multiplied by $11\frac{1}{4}$. This figure was then discounted to represent the advantage to the dependants of obtaining the capital sum instead of the income over the years. This resulted in a figure of Shs.43,218. From this figure was deducted a sum amounting to Shs.7,305 representing the estimated value to the four dependants of the acceleration of their interest in the deceased's estate which was taken at Shs.89,425 plus the prospective value of the claim for loss of expectation of life under section 13 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, which claim had been abandoned by the appellant in the course of the hearing before the trial Judge. This left a final figure of Shs.35,913 or £1,795 which he apportioned among the four dependants.

As an arithmetical exercise the above calculation may be difficult to fault. But pure arithmetic does not always in such cases lead to a just result where there are so many imponderables. The aim in assessing damages in a case such as the present is to estimate the loss of reasonable expectation of pecuniary benefit. This must in most cases be a matter of speculation and may be conjecture. The more usual method of assessing damages is that adopted

by the trial Judge of estimating the total dependancy as a lump sum and thereafter apportioning it among the various dependants. Another method may be to assess each dependancy separately. This was the method adopted with the approval of the English Court of Appeal in *Muirhead v. Railway Executive* (reported in Kemp & Kemp, Quantum of Damages, Vol. 2 Fatal Injury Claims (2nd Edition) page 226), where figures existed for the degree of support of each child. But if the method of assessing the support for each dependant separately leads to a result which is so out of line with what would be a reasonable estimate of the loss of each individual dependant, this suggests that some step in the calculation must be erroneous. " In what is essentially a jury question, the overall picture is what matters. It is the wood that has to be looked at and not the individual trees " (*Daniels v. Jones* [1961] 1 W.L.R. 1103, Willmer L. J. at page 1113). Taking the Court of Appeal's apportionment of the figure of Shs.35,913 and assuming, as Gould J. A. did, the dependancy of the girls to the age of 25 and of the boys to the age of 21, this represents a figure of £40 or 15/- per week for each child which appears to be very much on the low side.

The figure of £1,795 awarded by the Court of Appeal represents only about three years purchase on the annual dependancy of £572. This is an exceptionally low multiplier and Mr. Eveleigh conceded that upon the basis of a 15 year working life a multiplier of 10 would not be unreasonable if the widow and children had survived, which he said was the conventional figure. Mr. Eveleigh, however, suggested that where no widow survived, she having been killed at the same time as the deceased, the lump sum method of calculation was inappropriate. In the case where the widow survived, he said, the widow's dependancy persisted at any rate during the remainder of the deceased's working life and her award went to provide for the younger children. Their Lordships see no reason in principle for this distinction and no reason why the support necessary for young children should in the absence of a mother be more sparingly estimated than if the mother had survived. It may be that the absence of a frugal mother may lead to a more expensive household budget.

The Court of Appeal reached the conclusion that there were only four dependants and scaled down the total dependancy accordingly. Their Lordships take the view that this scaling down very largely vitiated the whole calculation. At the death of the deceased there were not only four dependants, but eight. In addition to the four youngest children there were Sadrudin aged 20, Badrudin aged 19, Zarina aged 17, and the appellant aged 23. It is true that Zarina and the appellant were at the date of the hearing in September 1960 both engaged to be married, but at the date of the death of the deceased the eight children were all living in family with the deceased. " He kept us all ", the appellant said in evidence. Entries in the books of the deceased produced by his accountant showed sums in name of wages for Sadrudin, Dolatkhanu and the appellant, but these sums were clearly only book entries and never paid as appears from the account of the deceased's assets where the accumulation of salaries unpaid are credited to Dolatkhanu, Sadrudin, Badrudin and the appellant. The Court of Appeal relied upon the deceased's books as justifying their conclusion that the two elder boys and the appellant were not in fact dependant on the deceased. The trial Judge, however, declined to accept that these salaries were or would be paid to any of the children. He moreover found as a fact that had he not died the deceased would have " continued to pay out for the benefit of his children something between £10 to £12 per week ". Dependancy is very largely a question of fact, and their Lordships take the view that in the state of the evidence and having regard to the trial Judge's finding the Court of Appeal were not entitled to take the view that there were only four dependants. In their Lordships' view the trial Judge was entitled to make the finding which he did.

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 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 very largely cancel out. Warnings against the propriety of this type of deduction were given in *Daniels v. Jones* [1961] 1 W.L.R. 1003. The deduction for loss of expectation of life Shs.2,000 is of so little account that it can be ignored.

For these reasons their Lordships have reached the conclusion that the award of the Court of Appeal, carefully though it may have been calculated, represents an erroneous estimate of the loss suffered by the dependants of the deceased.

Their Lordships now turn to the learned Judge's award of £6,000 in order to see whether this has been made upon correct principles. Although the Judge mentions the figure of some Shs.120,000 as the value of the estate left by the deceased, it is plain that he has made no allowance therefor in his calculation, but for the reasons already given their Lordships would not however consider that his failure to take into account this factor vitiated his award. A more serious criticism can however be made of the fact that he has taken for all the dependants, aged as they were from 23 to 3 years, the period of dependancy at 15 years, the estimated remainder of the deceased's working life. This is plainly wrong as the eight dependants would not all be equally dependant for the 15 year period. The elder boys would soon become self-supporting, the girls would probably get married or go into employment, and the younger children would in time grow up and earn their own living. In fact only the youngest Nazma would be dependant for the whole period of 15 years. This indicates to their Lordships that the learned Judge's basis of calculating a £10 a week dependancy over a 15 year period is erroneous, and that his award for this reason cannot stand.

Their Lordships were invited by both parties in the event of neither the trial Judge's award nor that of the Court of Appeal commending themselves to the Board themselves to assess the total damages.

The question of damages for the loss of support is essentially a jury question which must be dealt with on broad lines. Mathematical calculations can never lead to a precisely accurate estimate for the loss suffered. Dealing with the matter in this way their Lordships have reached the conclusion that a figure of £3,500 (Shs.70,000) would fairly represent the total loss of dependancy among the eight dependants, namely the appellant, Sadrudin, Badrudin, Zarina, Shah, Amirali, Roshanali, and Nazma. This figure will have to be apportioned among these dependants, and their Lordships consider that as was suggested by the appellant it would be more appropriate that this should be done by the High Court of Uganda. The agreed items of general damages to the appellant of Shs.1,000 personally, Shs.600 special damages for funeral expenses, and Shs.320 for medical expenses awarded by the Court of Appeal were not challenged by the respondent. All these awards will carry interest at 6 per cent from 30th September, 1960

The order as to costs in the High Court of Uganda will not be disturbed, the appellant will have to pay one-half of the respondent's costs in the Court of Appeal, and the respondent will have to pay three-quarters of the appellant's costs before the Board.

(91724) Wt. 8069/113 80 4/65 Hw.

In the Privy Council

GULBANU RAJABALI KASSAM

v.

KAMPALA AERATED WATER CO. LTD.

DELIVERED BY
LORD GUEST

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW
1965