IN THE SUPREME COURT OF UGANDA

MENGO

(CORAM: MANYINDO, D.C.J. ODOKI, J.S.C. & ODER, J.S.C.)

CIVIL APPEAL NO. 30 OF 1993

BETWEEN

UGANDA ELECTRICITY BOARD:: APPELLANT

AND

G.W.MUSOKE:: RESPONDENT

(Appeal from the judgment of the High Court of Uganda (Soluade. J) dated 27 April 1992

in

Civil Suit No 241A of 1991)

JUDGMENT OF ODOKI JSC:

This is an appeal against the decision of the High Court whereby it awarded to the respondent general damages under the Law Reform (Miscellaneous Provisions) Act.

The brief facts of the case were that on 30 August 1988, the respondent's son called Bosco Mwanje, aged 14 years, was electrocuted when he stepped on the appellant's live electric cables left lying on the ground in Lugazi township. The respondent filed an action in negligence on behalf of himself and his family claiming special and general damages for loss suffered as a result of death f his son. The action was brought under the Law Reform (Miscellaneous Provisions) Act. AS the appellant failed to enter an appearance or file a defence, an interlocutory judgment was entered and the case proceeded to formal proof for assessment of damages.

The learned judge awarded the respondent a total of Shs. 12,690,000/ out of which Shs.190,000/= was special damages for funeral expenses, Shs.5.5 million general damages for loss of expectation of life and Shs. 7.0 million for loss of services to the family.

The learned judge apportioned the damages amongst the members of the family as follows:-

G.W. Musoke (father, 36 years)	- 6,000,000/=
Rose.M. Nakyanzi (Mother, 30 years)	-4,000,000/=

G. Senabulya (brother, 18 years)	-345,000/=
Z. Kavuma (brother, 16 years)	-345,000/=
Namuju (Sister, 10 years)	-400,000/=
J. Nalubowa (Sister, 8 years)	-400,000/=
S. Baseke (brother, 7 years)	-600,000/=
E. Kalyango (brother 7 years)	-600,000/=

It is against that decision that the appellant has appealed to this court on two grounds namely,

1. The learned judge erred in awarding general damages to persons who were not dependants on the deceased.

2. The award and assessment of damages f or loss of expectation of life and loss of services were wrong in law.

On the first ground, Mr.Kanyemibwa, learned counsel for the appellant, criticised the learned judge for holding that the deceased's brother ad sisters were dependants when he said in his judgment,

> "In Annexture A attached to the plaint are the names of the parents, brothers and sister. Since the brothers and sisters are still living with their parents, they qualify as dependents"

Counsel for the appellant submitted that the children were not dependants of the deceased but of his father, and as it had not been proved that they were depending on the deceased, the awards to them were unjustified.

It was his contention that if any damages were to be awarded, they would be given to the parents. He relied on the case of Kassam V. Kampala Aerated Water company Ltd (1961) EA 291.

Mr. Serwanga, learned counsel for the respondent, did not agree with the contention of Mr. Kanyemibwa. He submitted that this action was brought under Section 7 of the Law Reform (Miscellaneous Provision) Act. cap.74, which provides,

> "If the death of any person is caused by any wrongful act neglect or default of any person, is such as would if death had not ensued have entitled the person injured thereby to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued hall be liable to an action f or damages, notwithstanding the death of the person injured and although the death was caused under circumstances as amount in law to a felon"

Counsel further submitted that Section 8 of he Act allows members of the family of deceased to sue and recover damages whether they are dependants or not. Section 8 of the Act provides,

> "(1) Every action brought under the provisions of Section 7 of this Act shall be for the benefit of the members of the family 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 any of the members (if more than One) of the family of the deceased.
>
> (2) In every such action the court may give such damages as it may think proportioned 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 cots not recovered from the defendant, shall be divided amongst the aforesaid parties in such shares as the court shall find and direct"

Counsel contended that according to Section 2 of the Act, the definition of "members of the family" was the same as contained under the First Schedule to the Workman's Compensation

Act, cap.107, and that it included not only father and mother but also brothers and sisters, among others.

It is necessary to give a brief historical background to the Law Reform (Miscellaneous Provisions) Act, in order to understand the intention and purpose of the Act. According to the common law death could not give rise to a cause of action on other persons even if they were dependants on the deceased. This rule was derived from the ruling of Lord Ellenborough in Baker V. Bolton 1808 I Camp. 493, that in a Civil court, death of a human being could not be complained of as an injury.

In Baker V. Bolton (Supra) the plaintiff and his wife were passengers on top of the defendant's stagecoach which overturned through the negligence of the defendants causing bruises to the plaintiff and death to his wife, a month later. The plaintiff recovered £ 100 for his own bruises and for the loss of his wife's society up to the moment of her death but nothing for such loss after that event. This decision was later approved by the House of Lords in Admirality Commissioners V. S.S. America (1917) A.C. 38

The development of railways in England led to an increase in the number of accidents which were both fatal and non-fatal. This made a change in the law imperative because while those who survived in an accident could recover substantial damages, the dependants of those who were killed could recover nothing.

Therefore in 1846, the Fatal Accidents act (Popularly known as Lord Campbell's Act) was passed which virtually overturned the harsh common law in so far as those dependants who were specified in the Act were concerned.

The Fatal Accidents Act gave a new right of action f or the benefit of the members of the family of the deceased which had to be brought by and in the name of the executor or administrator of the deceased or by' and in the names of all or any of the members of the family. This cause of action was entirely different and separate from the cause of action

which survived for the benefit of the deceased's estate and these two causes of action were usually joined in the same action.

The provisions of the Fatal Accidents Act were incorporated in the law of Uganda in 1953 by the Law Reform (Miscellaneous Provisions) Act. in Sabani Kibenga V Crispus Juko, Civil Suit No.35/66 reported in (1972) HCB 65 the High Court held that the common law principles still hold good in Uganda whilst the Act provides exceptions to the common law.

It seems to me that the Purpose of the Act was to provide a new cause of action which would enable dependant of the deceased to claim compensation for the loss suffered as a result of his death. It is true that section 8 of the Act does not use the word "dependants", but "members of the family". In my view, however, the intention was to provide for members of the family who were dependants of the deceased and therefore who had suffered pecuniary loss as a result of his death. In each case the question to ask is what pecuniary loss the member of the family has suffered. He would claim to have suffered pecuniary loss if he had lost dependency on the deceased. Damages were not generally awarded as solitium for the bereavement of the family.

In the present case general damages should not have been awarded to the deceased's brothers and sisters because they were not his dependants. The learned judge misdirected himself when held that the brother and sisters qualified as dependants because they were still living with the deceased's father, the respondent. It was not shown what pecuniary loss or dependency they had lost. Therefore, the award of damages to them was erroneous in law. The first ground of appeal must succeed.

On the second ground of appeal, learned counsel for the appellant submitted that the learned judge was not justified in awarding damages for loss of service when they were neither pleaded nor proved. He contended that there was no evidence to support the learned judge's finding that the service rendered by the deceased to his father were of pecuniary value.

Counsel criticised, the learned judge f or taking judicial notice of the fact that parents in African societies expect their children to look after them in old age. He argued that under section 55 of the Evidence act. There was no provision authourising court to take judicial notice of a custom which ha to, he proved, as was held in Kimani V. Gikanga & Another (1965) EA.735.

As regards the, award of damages for loss of expectation of life, learned counsel for the appellant submitted that such damages were awarded for loss of prospective happiness of the person who has lost his life and go to either his parents or his estate. He relied on the decision in Beham V. Gambling. (1941) 1 All, E.R.7.

Counsel submitted that damages for loss of expectation of life had to be moderate and therefore the sum of Shs 5.5 million awarded by the learned judge was excessive. He suggested that the respondent should have been awarded Shs. 300,000/=

It is clear that the, respondent did not specifically claim damages for loss of services or for loss of expectation of life. . I think that these damages should hare been specifically claimed in the plaint.

In assessing damages for loss of services and loss of expectation of life, the learned judge said,

> "The deceased at the time of his death was aged 14 years. As the learned counsel rightly pointed out, his age and loss of services which he rendered to his parents as is customary in African Society, Complied with their expectations - that he would sustain them in their declining years should be considered by the Court. I accept this submission. Judicial notice could be taken of the fact that Ugandan children like other African ones who are educated at considerable sacrifice by their parents are expected to make some return vide Nasari Kasunsula V. Rai Rai Singh & Another, Civil case No 274 of 1960. Digest of Civil Cases in the High Court of Uganda 1907-1967. That the court has to decide is whether there was evidence which justifies the

> conclusion that the services of the deceased were of pecuniary value. The evidence of PWI was that on the day in question he had sent him to buy bread, an indication of one of the services which a Ugandan child undertakes, and which I consider amounting to pecuniary value. Further on in his evidence he said that he would have expected him when he became a man to help him and the family. The deceased Bosco was in primary 4 and did very well at school.
> However, in considering the amount damages one has to take into account consequences and uncertainties of the deceased life and for the plaintiff expectation of life."

It will be seen from the above quotation that the learned judge awarded the respondent damages for loss of services for two reasons. The first is that the deceased was rendering serviced which were of pecuniary value, and the second is that the deceased was expected in future to give financial support to his parents when they grew old.

As regards the first reason, the only evidence to support it was that the deceased had been sent to buy bread.
There was no evidence that the deceased rendered services whether customary or social. It cannot be seen how sending a child to buy bread can be a service of pecuniary benefit unless there was evidence that had he not done so as a servant or someone else would have been paid to undertake the service. It cannot be said that any service carried out by a child for the benefit of his family has a pecuniary value capable of being compensated as pecuniary loss.

In Wilson Kabega V. Uganda Transport Company Ltd Civil Suit No. 434 of 1970 (unreported) the plaintiff brought an action on his own behalf and on behalf of the deceased's mother, stepmother and two brothers and seven sisters, to recover damages for the death of his son aged 13 years who was killed in a traffic accident. He claimed damages for loss of prospective financial benefits and services as a result of the deceased's untimely death. The evidence relating to loss of services was that the deceased used to prepare tea for his young brothers; he fetched water, made blocks and swept the house and courtyard. During holidays along with his brothers, he would pick coffee and cultivate potatoes. He also used to teach his brothers at home. The plaintiff admitted in his evidence that all the work done by the

deceased was now done by his other children and there had been no need to employ a servant.

In disallowing the claim for loss of services, Phadke J said,

> "The small household work which the deceased did in company with his brothers and sisters was such as all children in all families willingly and helpfully do as a discipline of family life in its numerous activities. I consider that to take a materialistic view of such work and place a monetary value upon it as a domestic service akin to that of an employee would be to forsake a proper sense of proportion in judging of the normal pattern of daily life in a family which pivots around the Voluntary and combined efforts of all family members. The evidence is that there has been no direct pecuniary loss"

I respectfully agree with those observations. I find that; in the present case, the respondent failed to establish that he lost any service of a pecuniary value.

As to loss of prospective financial assistance the respondent stated that he expected the deceased when he became a man to look after him in old age. The learned judge then took judicial notice of the fact that African children who were educated at considerable sacrifice were expected to make a contribution to their families when they complete school.

In doing so he relied on the case of Nasari Kasansula V. Rai Singh & Another (supra and Suleimani Muwanga V. Walji Bhemji Jiwani & Another (1964) EA 177.

In Muwanga V. Jiwani (supra) the deceased, a girl aged l3years old, was killed through the negligence of the respondent. The paternal uncle brought an action as a personal representative claiming damages for loss of services and expectation of life. The High Court awarded the plaintiff Shs 5,000/= for loss of expectation of life Shs 5,400/= to the deceased's mother for loss of service, and Shs 2,700/= to the grand parents for loss of services.

In assessing damages Udo Udoma C.J, said at p.177,

> "I think it is right also that the court should take judicial notice of the fact that African children are usually educated by their parents and guardians at considerable expense involving more often than not great personal sacrifice Such children are naturally in turn expected to assist in domestic work while at school, and after School on gaining employment, to make contribution towards the maintenance of the family, the term family being used here,
> not in the European sense, but in the African sense, which anthropologists usually refer to as the kindred or extended family"

Mr. Kanyemibwa submitted that the learned Judge was wrong in following the above observations of Udo Udoma C.J. because they did not fall within the provisions of Section *55* of the Evidence Act. He relied on the decisions of the High Court in Kabega V. Uganda Transport Company Ltd (Supra) where Phadke J declined to follow the observations of Udo Udoma CJ and said,

> "It was submitted that I should accept these observations and follow them, but with the greatest respect to the learned Chief Justice I feel unable to do so. The subject matter of these observations does not fall under the provisions in Section 55 (1) of the Evidence Act (cap 43). The learned Chief Justice did not state his reasons and did not refer to any well established practice in Uganda or to any precedent or to appropriate books or documents of reference. If the learned Chief Justice intended to take judicial notice of what he considered to be a custom or customary law in Uganda, he did so without there being any evidence in proof of it In Ernest Kinyanjiri Kimani V. Muiru Gikenya & Another, (1965) EA 735, it was held by the Court of Appeal that where African custom or customary law is neither notorious nor documented it must
> be established for the court's guidance by the party intending to reply upon it I am mindful that apart from statutory provisions and well established practice and precedent judges have a wide discretion to take judicial notice does not fall in such a category"

I agree with the above observations. There was no proof that there existed a custom that children who were educated by their parents were required to support their parents and families on completion .of school. There to be evidence to establish the existence or otherwise of a certain custom and it was wrong to presume the existence of any custom. Section 55 of the Evidence Act was silent on power of the court to take judicial notice of notorious facts. In my view, however, the court should have power to take judicial notice of notorious facts. The problem is how to establish that a particular fact is notorious or common knowledge as not to require specific proof. In the present case it was not established that the practice where children provide financial support to their parents was notorious, prevalent, or common, to all children. It may be common in some communities and less common in others. It may well be less common at the material time than it was in the past. In these circumstances, I do not find that the learned judge was justified in taking judicial notice of that so called custom or practice.

What was needed was to establish by evidence that there was a reasonable prospect of pecuniary benefit, not merely a fanciful probability as was held in Barnett.V. Cohen, (1921) 2. K.B 461. In that case a father claimed damages for the loss suffered by him as a result of the death of his son aged 4 years. The father intended to give the child whom he considered an intelligent boy good education and his claim for damages rested on his anticipation of the services and pecuniary aid of the son in future was held that it is not sufficient for the plaintiff to prove that he has lost by the death of the deceased a mere speculative possibility of pecuniary benefits; in order to succeed it is necessary for him to bow that he has lost a reasonable probability of pecuniary advantage. In dismissing the claim, McCardie J made the following observations,

> "The boy was subject to all the risks of illness, disease, accident and death. His education and upkeep would have been a substantial burden to the plaintiff for many years if he had lived. He might or might not have turned out a useful Youngman. He would have earned nothing till about sixteen years of age. He might never have aided his father at all. He might have proved a mere expense. I cannot adequately speculate one way or the other. The whole matter is beset with doubts, contingencies and uncertainties"

In the present case the only evidence adduced was that the deceased was in Primary 4 and did well at School. The deceased's health and habits were not known. It is not possible to speculate whether he would have successfully completed his studies and been in a position to assist his parents. He may or may not have been useful to them. He may have turned to be a burden to them. I agreed with MacCardie J. that "the whole matter is beset with doubts contingencies and uncertainties"
Accordingly I hold that the respondent failed to adduce such evidence as would have afforded the learned judge a reasonable basis on which to infer that pecuniary loss
had been inflicted on him and members of his family. The learned judge was therefore not justified in awarding them damages for loss of services.

On the second head of damages for loss of expectation of life, both counsel agreed that the award is made on the basis of loss of prospective happiness by the deceased. The leading authority on this matter is the House of Lords decision in Benham V. Gambling (1941) 1 ALI.E.R.7. In that case a boy aged two and half years was killed in road accident. His father claimed damages arising out of the diminution of the child's expectation of life. The child was a normal healthy child living in a country
village off the main road where the risk of being exposed to road dangers and to certain diseases would be less than in a crowded centre. His father was in a steady employment and had reasonable prospects of continuing in it. The trial judge awarded damages at the sum of £1200. This award was affirmed by the court of Appeal. On appeal to the House of Lords it was held that the proper assessment of such damages in this case where the prospects of the boy were particularly favourable was £ 200. It was held further that the assessment of such damages is not compensation for loss of years or for loss of future pecuniary prospects, but it is for fixing, upon common sense principles, of a reasonable figure for the loss of prospective happiness.

Viscount Simon L.C, enunciated the following considerations which should guide the court in assessing damages f or loss of expectation of life especially in case of a child:-

1. Before damages are awarded in respect of the shortened life of .a given individual, it is necessary for the court to be satisfied that the circumstances of

the individual life were calculated to lead on balance, to a positive measure of happiness of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him a future of unhappiness or despondency that would be a circumstance justifying a small award.

2. In assessing damages for this purpose the question is not whether the deceased bad the capacity or ability to appreciate that his future life on earth would bring happiness.
The test is not subjective, and the right sum to award depends on an objective estimate of the kind of future on earth the victim might have enjoyed, whether he bad justly estimated that future or not. No regard must be to financial losses or gains during the period of which the victim has been deprived.
The damages are in respect of loss of life, not of loss of future pecuniary prospects.

3. The main reason why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainity about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to hare settled prospects, having passed the risks and uncertainities of childhood and having in same degree attained an established character and firmer hopes, his or her future becomes more definite and the to which good fortune may probably attend him at any rate becomes less incalculable.

4. Stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth is that in rutting a money value on the prospective balance of happiness in years that the deceased might have lived the judge is attempting to equate incommensurables. Damages which would be proper for a disabling injury may be much greater than for deprivation of life. These considerations lead o the conclusion that in assessing damages under this head, whether in the case

of a child or an adult, a very moderate figure should be chosen.

In the present case it is necessary to consider what kind of life the deceased would have enjoyed had be not been killed. There is no evidence that the deceased would have had an unhappy life. According to his father he was doing well in school and was assisting in domestic work. On the other hand his father was a farmer aged 37 years with ten children. He had divorced two wives and was living with one. It is not known what his income was or what type of farmer he was. The deceased was aged 14 but was still in primary 4. This shows that; his education progress was rather low. It is not known how far he would have reached in his education. It is not known whether his brothers and sisters were at School. The conclusion which can be reached here is that the deceased could have enjoyed average happiness, subject to the normal risks and uncertainties. I agree that damages for loss of expectation of life should be moderate.

The learned judge awarded Shs 5.5 million for loss of expectation of life. Mr. Serwanga learned counsel for the respondent supported this amount, submitting that it was modest, and that the respondent and his family were entitled to damages for bereavement. I have sympathy with the view of counsel for the respondent. AS it is acknowledged in Winfield on Tort, 12th edn. page 625, the principal function of awarding damages for loss of expectation of life was to provide in an indirect way for damages for bereavement in certain cases, because under the common law and the fatal Accidents Acts, no claim for solutium or bereavement could be entertained. In England today, the claim for damages for bereavement has replaced a claim for loss of expectation of life, a reform introduced by amendments made to the Fatal Accident Act 1976 by the Administration of Justice Act 1982. A sum of £ 3,500 has been fixed by statute as damages for bereavement (see Winfield on Tort) (supra) page 625.

In Uganda, however, the law is still that damages are not awarded for bereavement. They are awarded f or loss of expectation of life. I would for myself think that time has come to recognize that parents are bereaved by the loss of children whom they naturally love and value and for whom they sacrifice so much. I would think that damages for bereavement should now be recognised or at least taken into consideration when assessing damages for loss of expectation of life. A modest figure should be fixed for this head preferably not more

than one million shillings.

In the present case I am of the opinion that the learned judge took into account wrong factors and applied wrong principles and thereby arrived at a wholly erroneous estimate of the damages suffered. (see Channan Singh and Another V. Channan Singh and Another,(1955) 22 EACA 125 and Kimothias Bhamra Tyre Retreaders and Another (1971) EA.81) The amount of Shs. 5.5 million awarded to the respondent for loss of expectation of life was so inordinately high as to call for interference.
I consider the sum of Shs.One million to be an adequate award under this head. The amount would be apportioned as follows: Shs 600,000/ to the respondent G.M. Musoke, Shs 40,000/= to the deceased's mother Rosemary Nakyanzi.

In the result, I would allow this appeal, set aside the award of general damages made by the High Court and substitute and award of Shs 1,000,000/= as general damages for loss of expectation of life. I would award the costs of this appeal to the appellant.

Dated at Mengo this 7th day of September 1994

B.J. ODOKI
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

A.L KYEYUNE
REGISTRAR SUPREME COURT

IN THE SUPREME COURT OF UGANDA

MENGO

(CORAM: MANYINDO, D.C.J. ODOKI, J.S.C. & ODER, J.S.C.)

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JUDGMENT OF MANYINDO - DCJ:

I have read the Judgment of Odoki - JSC, just delivered and I agree with it. I also agree with his observation, albeit obiter, that the relevant statute should be amended to allow for recovery of damages for loss of consortium in appropriate cases. AS Oder - JSC, also agrees with the judgment of Odoki - JSC, the appeal is allowed in terms proposed by Odoki - JSC.

Dated at Mengo this 7th day of September 1994.

S.T. MANYINDO

DEPUTY CHIEF Justice

I certify that this is a true copy of the original

A.L. KYEYUNE
REGISTRAR SUPREME COURT.

IN THE SUPREME COURT OF UGANDA

MENGO

(CORAM: MANYINDO, D.C.J. ODOKI, J.S.C. & ODER, J.S.C.)

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JUDGEMENT OF ODER, J.S.O.

I have had the benefit of reading in draft the judgement of Odoki, J.S.C.

I agree with him that the appeal should succeed and the Respondent should be awarded Shs. 1,000,000/= as general damages for loss of his Deceased son's life.

Otherwise I have nothing more to add.

Dated at Mengo this 7th day of September, 1994.

A.H.O. ODER,
JUSTICE OF THE SUPREME COURT