IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 285 OF 1992

BETWEEN:

SINEFA JANA ..... PLAINTIFF

and

MALAWI RAILWAYS LTD. .....1ST DEFENDANT
STAGE COACH (MALAWI) LTD. .....2ND DEFENDANT

Coram: D F MWAUNGULU, REGISTRAR
Chikopa, Counsel for the Plaintiff
Chisanga, Counsel for the Defendant

ORDER

This action is brought as a result of the death of Enock Jana who was killed when a bus belonging to Stage Coach (Malawi) Ltd, the second defendant, collided with a locomotive train belonging to Malawi Railways Limited, the first defendant. The plaintiff, the widow, brings the action on behalf of herself, Stefano Jana, the deceased's son, John Jana, the father and Elise Jana, the mother, under the Statute Law (Miscellaneous Provisions) Act. Judgment was obtained by consent. The only question I have to determine is how much should be the award.

The deceased was 25 years at the time of death. The plaintiff is twenty years. There is one child, Stefano, aged 6 years. The deceased's mother is 65 years, eleven years younger than her husband. The deceased was a carpenter in the village he came from. Later he moved to Blantyre. His earnings are not known. He gave his wife K300.00 per month for the upkeep in the house. He also gave his mother K50.00 a month. These earnings are disputed by Mr. Chisanga, counsel for the defendants.

Mr. Chisanga argued that the court has first to decide the likely income of the deceased. He cited a statement of law of Lord Wright in Davies vs. Powell Duffryn Associated Colliers Ltd. (1942) A.C. 601, 617.

> "The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on 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

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> give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase."

Mr. Chisanga submitted that no wages were proved in this case. The plaintiff only gave evidence on what the deceased gave her for upkeep. If the contention is that if wages are not established no award should be made then I have problems with the judgment. Of course if wages or salaries are proved the task is easier. I do not read in the words of Lord Wright any suggestion that if wages are not proved the court cannot accept evidence of the wife as to how much was spent on the upkeep. Mr. Chisanga further argued that accepting the plaintiff's evidence in this manner is a dangerous approach. It must be understood that the plaintiff is on oath. The issue is therefore a matter of credibility. A court, cannot throw out testimony invariably because of fear of fabrication. The opposite party is given the right to cross-examine in order to show that the witness should not be believed or to discredit and contradict the witness. The court must make findings of fact on the testimony. There are husbands who for all sorts of reasons do not reveal earnings to wives. The only way to establish loss of dependency is to prove how much was given for running the house (housekeep money) and the bills, if any, that were paid for water, electricity, etc. It would be unconscionable to expunge such testimony because of fear of fabrication. Mr. Chisanga submitted that in the absence of proof of earnings I should look at the average earning of a Malawian in the village. The deceased was, however, a carpenter. He was not just an average Malawian. There are times when I have looked at the problem as Mr. Chisanga suggests. These are cases where there is no evidence of the loss of dependency or the loss of dependency cannot be ascertained authentically like for example, a subsistent farmer who grows his own food and once on occasions looks for cash to buy other provisions of life apart from food. In this case, however, the plaintiff and the deceased's mother testified to what they actually received. They were very good witnesses. Cross-examination left them unscathed. Their claims are not unreasonable and in my view not inconsistent with the returns for an average carpenter. I accept their evidence.

The amount given to the plaintiff has to be reduced because part of that was used by the deceased. The amount given to the deceased's mother is stet. There were only three in deceased's household. One of them was a child aged 5. Much housekeep was spent on the plaintiff and her husband. I would put the deceased's share at ⅜. At K300 per month, the loss of dependency would be K2,250 per annum for the plaintiff and child. The loss of dependency for the deceased's mother and father would be K600 per annum.

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In relation to the plaintiff and child, I have also to consider the prospect of remarriage of the plaintiff. This is based on the decision of the Federal Supreme Court from an appeal from the High Court of Nyasaland in Bayliss vs. Jenkins (1923-61)1 A.L.R (M) 809. The decision is binding on the High Court. Bayliss vs. Jenkins was based on principles in English decisions. The exercise caused much consternation for Judges that Justice Phillimore had this to say in Brickley vs. John Allen & Ford (1967)2 Q.B. 637: 645:

> "I venture to suggest it is time judges were relieved of the need to enter into this particular guessing game."

Parliament intervened in 1976. Section 3(2) of the Law Reform Miscellaneous Provisions Act 1971 provides that "in assessing damages payable to a widow, in respect of the death of her husband in an action under this Act, there shall not be taken into account the remarriage of the widow or her prospects of remarriage." It does not say well of us to follow a borrowed principle which has been long abandoned from where we borrowed it from. No doubt, the problems experienced by English jurists are the same as of our jurists. Parliament should also intervene. The reasons for Section 3(2) of the English Act were better expressed by the plaintiff's lawyer in Thompson vs. Price (1973)1 Q.B. 838, 842. Boreham Judge said:

> "He does not dispute, as I understand it, that the law was as the defendant contends prior to the Act of 1971, but he says that the Act of 1971 has changed all that, and he puts his argument thus: the intention of that subsection is clear, and the intension is to relieve a judge completely of the duty of assessing a widow's marriage prospects - an unpleasant duty, it is said - and to relieve entirely the widow from the unpleasant experience of hearing her marrigage prospects assessed. The argument goes on: if the court accedes to the defendant's contentions, that unpleasant duty of the judge and unpleasant experience for the widow will remain wherever there is a dependent child. It does not in fact occur in this case because the plaintiff has already remarried; I do not have to assess prospects; the marriage is an accomplished fact."

Widows and Judges should be spared the peril. If Parliament intervenes it is important that the provision should apply to widow and widower alike. Widowers were not included in Section 3(2) of the Law Reform Miscellaneous Provisions Act 1971. Lord Justice Buckley thought this most called for

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consideration by the English Parliament (Hay vs. Hughes (1975)1 Q.B. 790, 817). On the law as it is now I am bound by Bayliss vs. Jenkins: the prospect of remarriage must be taken into account.

The present situation is akin to the one in Buckley vs. John Allen & Ford (Oxford) Ltd. In that case, much like here, the widow was not asked on marriage or prospect of her re-marriage. There is a long passage about the predicament occasioned by abstinence to ask her on this issue in the judgment of Judge Phillimore. Even at a time when Section 3(2) of the Law Reform (Miscellaneous Provisions) Act had not been passed the Judge, on paucity of evidence on the issue decided to disregard the issue. I do likewise. I will make no deductions for this lady's chance of remarrying. This goes for the child as well.

As for the award for the the deceased's parents, I have to take into account the fact that the assistance would not have lasted up to the deceased's working life. It can be assumed that the parents, 65 and 76 at the time of death would not live up to the time when the deceased, aged 25 at the time of death, would have ceased to work. In any event as the deceased's family grew, that assistance, ceteris paribus, would wane.

In Cookson vs. Knowles (1978)2 W.L.R. 978, the House of Lords confirmed the practice of the Court of Appeal that damages for loss of dependency should be made in two parts: from death to the time of trial and loss of dependency from the date of trial. Unfortunately, in this case the date of death was not pleaded in the statement of claim and omitted in the writ. The plaintiff's evidence suggests 1989 but the day and month are not referred to. In the absence of evidence of the date in fairness to the defendant I will take the last day of the year. Such that my calculation will start from January 1990. To the 24th of March 1992, this is 15 months. For the first part the plaintiff and the deceased's parents get K2,812.50 and K750 respectively.

For the second part, however, the multiplier is worked out from the date of death. In Cookson vs. Knowles (1978)2 W.L.R. 978, 990 Lord Fraser said:

> "But in a fatal accident case the multiplier must be selected once and for all as at the date of death, because everything that might have happened to the deceased after that date remains uncertain. Accordingly having taken a multiplier of 11 at the date of death and having used the period of two and half in respect of the period up to the trial, it is in my opinion correct to take eight and half for a period after the date of the trial".

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For the parents the correct award is K3,000. Having awarded K750.00 for the first part. I award K2,250 to them. For the plaintiff and her child the appropriate award is K38,250.00. After deducting for the award up to trial the award is K35,437.50. The widow and child, therefore, are awarded K38,250.00 and the deceased's mother and father get K3,000.00 for both of them. The widow's and son's share will be divided as to K24,945.65 to the widow and K13,304.35 to the son. This is because the father would be legally bound to maintain the son up to the age of 21, the next sixteen years after death. The wife's dependancy would have lasted up to the remaining thirty years of the deceased's working life. In any case it can be properly assumed that the mother would look after the child in the younger years. She does not have to draw the money that has been given to the child. Moreover, a widow loses more dependancy from the death of a husband because children grow out of family and have their own families. The widow remains. The child's share should be paid into court for investment.

Made in Chambers this 8th day of January, 1992.

D F Mwaungulu
REGISTRAR OF THE HIGH COURT