



Githaiga & another v King'ori (Suing as the legal representative of the Estate of Lucas Kiminda) (Civil Appeal 18 of 2024) [2025] KEHC 3254 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 18 OF 2024
RC RUTTO, J
FEBRUARY 14, 2025**

BETWEEN

ALICE WANJIRU GITHAIGA 1ST APPELLANT

NGONG MUKUKU FARM LIMITED 2ND APPELLANT

AND

EUNICE KANUGU KING'ORI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LUCAS KIMINDA) RESPONDENT

(Being an appeal from the Judgment of Honourable Senior Resident Magistrate J. Agonda in Ruiru Civil Suit No. 64 of 2020, delivered on 16th September, 2021)

JUDGMENT

1. This is an appeal against quantum, parties consented on liability at 70:30 in favour of the respondent. thereafter, they filed written submissions on quantum. The trial court upon considering the respective submissions entered judgment in favour of the Respondent in the following terms:
 - a. General damages - Pain and suffering Kshs 100, 000
Loss of expectation of Life Kshs 150, 000
Loss of dependency Kshs 1, 200, 000
 - b. Special damages Kshs. 163, 751/=
 - c. Costs and interest of the suit.
2. The Appellant were aggrieved by this Judgment lodged this appeal citing the following grounds:
 - i. The Learned Magistrate misapplied the law on the classes of persons entitled to an award of damages under the *Fatal Accidents Act* and therefore made an award of damages where none should have been awarded.



- ii. The Learned Magistrate ignored completely the Appellants' submissions on the want of evidence on the nature of the relationship between the Respondent and the deceased and therefore an award of damages where none should have been awarded.
3. The Appeal was canvassed by way of written submissions. Appellants' submissions
4. The Appellants relied on their submissions dated 22nd July, 2024. They submitted on the two grounds of appeal.
5. The Appellants submitted that the trial court failed to address their submissions. It was their submission that the Respondent was not entitled to damages under section 4 of the *Fatal Accidents Act*, because the Respondent had described herself as the guardian of the deceased, but failed to adduce evidence to establish the duration or circumstances under which she assumed that role. The Appellants further contended that the Respondent was not an adoptive parent as defined under Section 2(3) of the *Fatal Accidents Act*, as no evidence was presented to support such a claim. Additionally, there was no mention of the whereabouts of the deceased's parents. The Appellants concluded that, given the speculative nature of the relationship between the Respondent and the deceased, she was not entitled to damages under the *Fatal Accidents Act*. In support of their argument, the Appellants relied on the case of Peter Ngwili Wambui (Suing as the legal representative of the Estate of Sammy Mboya Wambua (Deceased)) v Ali Mwanzia Kelly [2021] eKLR.
6. The Appellants further submitted that although there was consent on liability, this applied only to liability. They argued that the Respondent still bore the burden of proving quantum.
7. Counsel urged the court to allow the appeal as prayed.

Respondent's submissions

8. The Respondent relied upon their undated submissions filed on 29th November 2024 in which they set out the issue for determination as; whether the trial court erred in law and in fact in awarding damages under the *Fatal Accidents Act*.
9. The Respondent relied on the Chief's letter dated 16th July 2019, which recognized her as the surviving beneficiary of the deceased's estate, having served as the deceased's guardian until the date of their demise. Additionally, in her witness statement, the Respondent stated that she received a call from an unknown person informing her that the deceased had been involved in a road traffic accident. Counsel urged that this implied the Respondent had a parental relationship with the deceased.
10. The Respondent relied on the case of Mutete & Another v Bosire & Another (All suing as the personal representatives and legal administrators of the estate of Evans Nyang'au Maturu (Deceased)) (Civil Appeal E036 of 2023) [2024] KEHC 5155 (KLR) (25 April 2024).
11. The Respondent urged the court to find that the appeal herein lacked merit and dismiss the same with costs.

Analysis and Determination

12. After a carefully consideration of the evidence adduced before the trial court, the grounds of appeal, the judgment of the learned trial magistrate and the written submissions filed by the Appellants and Respondent together with the authorities cited. The issue arising for determination is whether the trial court erred by awarding general damages (loss of dependency) under the award *Fatal Accidents Act*?



13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
14. To begin with, the Appellants contest the award of quantum of damages on loss of dependency on the grounds that the award was made to an individual whose relationship with the deceased is uncertain and does not fall within the category of persons prescribed under Section 4 of the *Fatal Accidents Act*.
15. The Appellants argued that the award for loss of dependency should not have been granted, to the Respondent, since a guardian, was not recognized as a dependent under Section 4 of the *Fatal Accidents Act*. On the other hand, the Respondent contended that, by virtue of the Chief's letter dated 16th July 2019, she was recognized as the surviving beneficiary of the deceased's estate, having served as the guardian of the deceased until the date of their demise.
16. Having perused the entire Record of Appeal and the evidence adduced, this Court observes that at the time of the deceased death, the Deceased was still unmarried and without any children.
17. Section 4 of the Fatal Accident Act provides as follows: -
 4. Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought.
18. In the present case, the Respondent is described as a guardian, suing on her own behalf under the Fatal Accident Act and *Law Reform Act*. In the plaint the respondent describes herself as the guardian. In her witness statement, she states that she received a call from a known person that her adopted son Lucas had been involved in an accident and hence she should be recognized as a dependant. The Chief's letter dated 16th July 2019 attached as part of the respondents supporting documentation also recognizes the Respondent as a guardian of the deceased.
19. From the submission of parties on records, this court do note that both the appellant and the respondent submitted on the award of damages under the *Law Reform Act* and under the Fatal Accident Act. Specifically, on the damages under the Fatal Accident Act the appellant submitted that dependency is a question of fact which must be proven. That the respondent referred to herself as guardian and the deceased as an adopted son. That there was no evidence to prove adoption and thus they were not entitled to recover under section 4 of the Fatal Accident Act. They relied on the case of *Chania Shuttle Bus v Rebecca Mbogho* (Suing as the Legal Representative of the Estate of Joseph Mwanyikia Mbogho (2021)eKLR.
20. The trial court in awarding loss of dependency observed that "I do note that the deceased as a pupil did not have any spouse and/or child depending on him since he had not married, the only people who depended on him as at the time of his death were his parents. It is now well established in Kenya that parents can do recover for loss of dependency from the estate of their children."
21. From the evidence adduced there is no mention of any surviving parents of the deceased. Additionally, no other person has made a claim for benefits from the deceased, except for the Respondent, who, as confirmed by the Chief's letter and the letters of administration, is recognized as the legal representative



- or guardian. This court acknowledges that the *Fatal Accidents Act* imposes restrictions on the intended beneficiaries of a deceased's estate, as outlined above, namely the wife, husband, parent, and child of the deceased. Therefore, the Respondent, being none of the aforementioned, and in the absence of any claim or mention of the rightful dependants, is not entitled to awards under the *Fatal Accidents Act*.
22. The Court of Appeal in the case of Mwangi & another (Suing as the *Legal Representatives of the Estate of the Late Richard Mwangi Gathoni Deceased*) v Ngure & another (Civil Appeal 57 of 2020) [2023] KECA 448 (KLR) (14 April 2023) (Judgment) in dismissing a claim for award of general damages under the *Fatal Accidents Act* by a brother stated as follows:-
- “It is therefore clear that it is only in respect of claims brought for the benefit of the wife, husband, parent and child of a deceased under the Fatal Accident Act that ought to be brought in the name of the executor or administrator of the person deceased. Loss of dependency falls under Fatal Accident Act. Accordingly, the 2nd Appellant could not make a claim under the said Act for loss of dependency as he was not a dependant.”
23. In reaching this conclusion and for the reasons outlined above, the trial magistrate erred in awarding damages under the Fatal Accident Act. this decision was based on the incorrect assumption that the beneficiaries were the deceased parents, despite no evidence being presented to support this claim. I agree with the appellant's submission that the Respondent failed to prove that they she is a beneficiary within the category of dependants as provided under Section 4 of the *Fatal Accidents Act*.
24. This courts also notes that the Respondents sought for compensation under both the Fatal Accident Act and the *Law Reform Act*, thus the Respondent is entitled to compensation for lost years for the benefit of the estate under the *Law Reform Act*. In the case of Endege & another (Suing as the legal representatives in the *Estate of John Madede Endege (Deceased)*) v Benard & another (Civil Appeal 4 of 2021) [2024] KEHC 709 (KLR) (30 January 2024) (Judgment) the court while making reference to the case of Nyota Tissue Products v Benjamin Obonyo Mukati & 4 others [2020] eKLR; held as follows
- “I think it is convenient to discuss the correct position as regards award of damages for lost years and related loss of dependency. Lost years refers to damages for loss of prospective earnings recoverable by a person who is injured in such a way as to shorten his earning capacity, recoverable by the person during his shortened life and, upon his death, by the Estate under the *Law Reform Act* as damages for lost years. Damages for loss of dependency is a right under the *Fatal Accidents Act* for benefit of the dependants of the deceased injured person. ... “The rights conferred by Section 2 (5) of the *Law Reform Act* (Cap 26, Laws of Kenya) for the benefit of the estates of deceased persons are stated to be “in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*”. This does not mean that damages can be recovered twice over but that if damages recovered under the *Law Reform Act* devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the *Fatal Accidents Act*...”
25. Accordingly, where there is no evidence of dependency, the court has the discretion to make an assessment under the lost years. The Respondent did not provide proof of deceased earnings and in the circumstance this court finds that a global figure of kshs 1,000,000/- would suffice in the circumstance.
26. The appeal therefore succeeds in the following terms, the trial court judgment on the award of kshs 1,200,000/- loss of dependency under the Fatal Accident Act, is hereby set aside and substituted with a global amount of kshs 1,000,000/- for lost years under the *Law Reform Act*.



27. The award on special damages was not contested. I accordingly substitute the award as follows:

Pain and suffering - Kshs 100,000/=

Loss of expectation of life - Kshs 150,000/=

Lost years Kshs 1,000,000/=

Special damages - Kshs 163,751/-

Total - Kshs 1,413,751/=

Less 30% contribution - Kshs 424,125.30/=Balance – Kshs 989,625.70/=

Each party to bear their own costs of the appeal.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 14TH DAY OF FEBRUARY 2025

For Appellants:

For Respondent:

Court Assistant:

