



**Cherotich v Anzal Communications Ltd (Civil Appeal 98 of 2022)
[2024] KEHC 2175 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 98 OF 2022
PN GICHOHI, J
MARCH 6, 2024**

BETWEEN

JOSPHINE CHEROTICH APPELLANT

AND

ANZAL COMMUNICATIONS LTD RESPONDENT

(Being an Appeal from the judgment /Decree of Hon. M.W. Kamau Resident Magistrate Molo delivered on 25th July 2022 in Molo CMC No. E34 of 2022)

JUDGMENT

1. On 17th February, 2022, Josephine (Appellant) filed suit against Anzal Communications Ltd (Respondent) seeking special damages of Kshs. 352,550/= , general damages , costs and interest following the death of Johana Tanui Turtur (deceased). That claim arose from a fatal accident involving the deceased as a motorcyclist and the Respondent’s motor vehicle registration number KCN 238 U. The Appellant alleged that the accident occurred due to the negligence of the Respondent’s driver.
2. During the hearing, the Appellant called three witnesses in support of his case. In its defence, the Respondent denied the claim and called one witness in support of its case.
3. After the trial, the trial court delivered its judgement on 25th July 2022 where the Respondent was found liable at 100% . The Appellant was awarded damages as follows:
 - a. Pain and suffering Kshs. 50,000/-
 - b. Loss of expectation of life Kshs. 150,00/-
 - c. Special damages Kshs. 347,250/-Total Kshs. 547,250/-



4. The Appellant was also awarded costs and interest. However, the trial court dismissed the claim on loss of dependency on the ground that the claim was not proved. That is now the subject of this Appeal.

Submissions

5. Parties filed and exchanged submissions in this appeal. The Appellant filed submissions dated 14/06/2023. It was submitted that the Appellant was able to prove the issue of dependency when she testified on oath that she was wife to the deceased with whom they had ten children seven of whom were minors.
6. It was further submitted that the deceased used to earn an income and used to provide for her and the children and therefore, the estate of the deceased had suffered loss and damage as a result of the accident.
7. Further, and the Appellant cited several authorities and maintained that the Appellant had proved dependency. It was submitted that the Respondent did not contest loss of dependency and even proposed a dependency ratio of 1/3 an award of Kshs. 641,914.40.
8. The Appellant therefore submitted that trial magistrate appreciated that to apply for the grant ad litem, a chief's letter is a mandatory requirement but the court trial magistrate failed to appreciate that the grant ad litem in question was issued by a court of competent jurisdiction which must have considered the chief's letter before proceeding to issue the grant ad litem. The Appellant therefore submitted that it was not open to the trial magistrate to set the standard of proof too high than as set out in the case of *D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati f2014*] eKLR, that is , on a balance of probability.
9. The Appellant therefore urged the Court to set aside the trial court's judgment and substitute with this Court's assessment on loss of dependency and, award costs to the Appellant.
10. On their part, the Respondent filed their submissions dated 13th September 2023 . While citing several authorities including the case of *Rahab Wanjiru Nderitu v Daniel Muteti & 4 others [2016] eKLR*, the Appellant submitted that loss of dependency must be proved but the Appellant failed to do so in this case.
11. He maintained that the mere fact that the court issued ad litem to the Appellant then that suffices to be evidence that the Appellant was a wife of the deceased. That anyone with interest in a deceased estate can apply for ad litem.
12. Further, the Respondent submitted that the Appellant was misleading the Court when arguing that both parties had concurred that the Appellant deserved an award under loss of dependency. While reproducing his submissions before the trial court, the Respondent maintained that it urged the trial court deny the Appellant an award on loss of dependency.
13. The Respondent therefore prayed that the judgment by the trial court be affirmed and the Appeal be dismissed with costs.

Analysis and Determination

14. This being a first appeal, this Court is empowered to review and analyse the evidence on record and arrive at its independent conclusions. (See *Selle & another vs. Associated Motor Boat Co. Ltd. & others (1968) EA 123*).
15. This Court has considered the evidence on record and written submissions filed on behalf of both the Appellant and Respondent and the authorities cited therein.



16. The issue for determination is whether the trial court erred in law and fact when he dismissed the Appellant's claim for loss of dependency which is actually under the Fatal Accidents Act. Section 4(1) of the Act provides that :-

“Every action brought under the Act shall be for the benefit of the wife, husband, parents and children of the deceased whose death was so caused.”

17. From the evidence on record, it is a fact that the Appellant obtained ad litem before the Chief Magistrates Court Molo in Misc. Cause No. E02 of 2022. That document, in itself does not show the relationship between the Applicant and the deceased. The mere fact that it bears the Appellant's name does not mean she was the wife of the deceased.

18. When the Respondent denied in the statement of defence the Appellants claim pursuant to the Statute, the Appellant filed a reply to defence terming the defence a sham and left at that despite that the evidential burden lay in the Appellant to prove that she was the wife of deceased and that the ten children referred to were the children of the Appellant and the deceased.

19. It is also not sufficient for the Appellant to state that she provided the chief's letter and that is why she got the said grant. It is her alleging and therefore, she must prove that allegation to the required standard. The said grant gave her authority to file the suit but grant itself is not proof of dependency. It was incumbent upon the Appellant to avail the Marriage Certificate she claimed to have pursuant to her alleged Christian Marriage between her and the deceased.

20. She does not even claim to have lost or misplaced the said Certificate. Even if she had lost or misplaced, a certification for the Registrar of Marriages would suffice to confirm that the marriage was indeed conducted between the Appellant and the deceased. Short of that, the Appellant would have availed a letter from the area chief who knows his area residents well and can vouch for her that she was the wife of the deceased and that they had the said children. She did not avail any such letter.

21. Further, there was no document whatsoever to show the relationship between her and the children and, between the children and the deceased. In its judgment, the trial court reasoned while dismissing the claim under that head:-

“The Plaintiff gave evidence that she was the wife to the deceased and that they were married in a church wedding. She also stated that she and the deceased had had 10 children, 7 of which were under the age of majority. She listed her children in the plaint at paragraph 6 from where the court notes that she listed 6 children as being minors. The plaintiff never produced their birth certificates, notifications, the marriage certificate or Chief's letter as proof of her relationship with the deceased and that of her children with the deceased. The court takes judicial notice that to apply for grant ad litem, which the plaintiff successfully applied for, a chief's letter is a mandatory requirement. This means that the document was available to the plaintiff at the time of filing this suit and could have been included in her list of documents. Unfortunately, it was not. In absence of these documents, the court finds that dependency was not proved.”

22. This Court finds no err in that finding. Indeed, Janet Mulwa, in Rahab Wanjiru Nderitu (supra) held:-

“Any person who has a beneficial interest or otherwise in a deceased's estate may apply for grant of Letters of Administration. It is not always that the person so applying is a wife or husband, or indeed a relative of the deceased. Stating in evidence that one is a wife or husband of a deceased person without proof is not enough. If the plaintiff was indeed the



widow of the deceased as she stated, it would have been very easy for her to produce the marriage certificate she alluded to, or even the chief's letter to confirm customary marriage and the children's documents, say Baptismal certificates or school certificates. The above having not been done, the court is left with no option but to find that dependency has not been proved, following which no award on loss of dependency can be made.”

23. Further, in *Stephen Kivuti Kiura v Anastacia Murugi Muthui & another* [2021] eKLR L. Njuguna, J held while citing the case of *Rahab Wanjiru Nderitu supra:-*

It is trite law that dependency is a matter of fact and evidence has to be adduced to prove the same. Though the respondents listed the dependants, no birth certificates were produced or at the very least, a letter from the chief to show that the children exist.

The wife did not tender any evidence to show that she was married to the deceased either under the statute or under customary law.

To that extent, I find that no dependency was proved and no award ought to have been made under that head.

However, the awards for pain and suffering and loss of expectation of life are upheld and so are the special damages.”

24. In the circumstances herein, this Court is satisfied that the trial court was well guided by the law, case law and facts when it found that the Appellant failed to prove dependency. There is no basis for interference by this court.

25. In conclusion, the Court makes the following orders:-

1. The Appeal be and is hereby dismissed for lack of merit.
2. The judgment by the trial court is upheld.
3. The costs of this Appeal awarded to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 6TH MARCH, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellants

Ms Mbugua for Respondent

Ruto Court Assistant

