



**Gichure v Mbathu & another (Civil Appeal 112 of 2015)
[2024] KEHC 9429 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 112 OF 2015**

J WAKIAGA, J

JULY 16, 2024

BETWEEN

JOHN CHEGE GICHURE APPELLANT

AND

JOSEPH NDUATI 1ST RESPONDENT

ELIJAH THUO MBATHU 2ND RESPONDENT

(Being an appeal against the judgement of the honourable Mr. J.O Magori Principal Magistrate Kangema Law Courts delivered on 25th November 2015 in RMCC No 46 of 2014)

JUDGMENT

1. By a plaint dated 14th October 2014, the Appellant sued the Respondents for general and special damages arising out of a road traffic accident on the 16th October 2011 involving motor vehicle registration number KBL 058 K wherein the deceased Jane Wambui Chege was traveling along Wanjereri -Kihoya road, which went off the road and overturned as a result thereof occasioning fatal injuries to the same. It was pleaded that the said accident was occasioned by the negligence of the Respondents.
2. By a statement of defenced thereon dated 10th December 2014, the Respondents denied the occurrence of the accident, the ownership of the motor vehicle and particulars of negligence contained in the plaint.
3. By a judgement dated 25th November 2015, the Court found the Respondents liable at 100% and general and special damages as follows:

Loss of Dependency Kshs 600,000

Loss under law reform.... Kshs 120,000



Special damages Kshs 33,390

4. Being dissatisfied by the said judgement, the Appellant filed this Appeal and raised the following grounds of appeal;
 - a. That the learned trial Magistrate erred in law and in fact in assessing the applicable dependency ratio.
 - b. That the learned trial Magistrate erred in law and facts in deducting the award under the heads of loss of expectation of life and pain and suffering from the head of loss of dependency.

Submissions

5. Directions were given on the disposal of the appeal by way of written submissions and on behalf of the Appellants it was contended that the Court erred in using 1/3 since the deceased had only one child as a Dependant and further in deducting the award under the fatal accident from the loss of dependency contrary to the decided case in support of which the following cases were submitted: *Crown Bus Services Ltd & 2 others v Jamilla Nyongesa* [2020] eKLR on when the Court of appeal will interfere with the decision of the Court, *Patronila Muli v Richard Muindi Sava & another* [2021] eKLR and *Melbrimo Investment Co Ltd v Dinah Kemunto & another* [2022] eKLR in support of 2/3.
6. The Respondent did not file any submissions.
7. The being a first Appeal, the Court is required to re-evaluate the proceedings before the lower Court and to come to its own conclusions thereon, while giving allowance to the fact that unlike the trial Court, it did not have the advantage of seeing and hearing witnesses.
8. On behalf of the Appellant PW1 John Chege Gichure stated that the deceased was his wife and at the time of her death their younger child was aged 16 years. The deceased was a farmer and planted tea beans and fruits.

He produced her bank statement in support of her income of about Kshs. 20,000 per month. In cross examination he stated that he had retired from his job and their last born was now dependent up on him.
9. The Respondent did not tender any evidence.
10. In deciding for the Appellant on the claim under the *Fatal Accidents Act*, the trial Court had this to say

“the deceased died at the age of 55 years and had 8 children. Seven of the children were adults but one child was aged 16 years The deceased was a farmer getting agricultural income per month. There is no conclusive documentary evidence to proof(*sic*) the exact income. The Plaintiff’s Advocate proposed that an income of kshs 15,000 per month be adopted, though the Plaintiff estimated the income to about kshs 20,000 per month. The Defendant’s advocate proposed that an income of kshs 10,000 per month be adopted. In my view from the Plaintiff’s evidence and documents presented I find the proposed figure of kshs 15,000 per month to be realistic. The deceased in my view would have continued with her farming up to the age of 65 years. I therefore adopt a multiplier of 10 years.

The deceased had only one minor dependant at the time of the accident hence only 1/3 of her income would have been used on the dependant”.



Determination

11. From the proceedings and submissions herein, I have identified the following issues for determination:
 - a. Whether the trial Court was right in adopting the 1/3 ratio on dependency.
 - b. Whether the Court applied the correct principles in deducting the award under the fatal accident from the loss of dependency.
12. For record purposes, there is no appeal on liability. From the evidence tendered before the trial Court, the deceased was a passenger aboard the Respondent's motor vehicle and the accident was self-involving. The Respondent's driver was charged and convicted of the offence of causing death by dangerous driving. I therefore find no fault with the Court's determination on liability which I herein affirm.
13. On the issue of the ratio, I agree with the submissions by the Appellant that the Court fell into error in deciding to use the 1/3 ration on account that the deceased had only one child, against the general principles that the deceased would ordinarily use 1/3 on herself and 2/3 on her Dependents and that the action under the *fatal accidents act* is brought for the benefit of the husband child wife and parents. In this time and age, it cannot be said that a husband is not entitled to depend on his wife, the Court having taken judicial notice of the "woman eater" principles.
14. The Court having applied wrong principles in assessing the award herein, the decision is one which ought to be upset by the Court on appeal, which I hereby do and substitute the Courts determination on loss of dependency as follows; $15,000 \times 12 \times 2/3 \times 10 = \text{Kshs.}1,200,000$.
15. On the issue of deduction, the generally accepted principle which find my favour is that the award is taken into account, which does not mean that it is necessarily deducted, in this I find support in the decision of the Court in the case of *Crown Bus Services Ltd & 2 others v Jamilla Nyongesa (supra)* and would agree with the Appellant that the Court fell into error for which once again the appeal under this ground is allowed.
16. In the final analysis, I allow the appeal herein and set aside the trial Courts award on damages and substitute the same as follows:

Loss of expectation of life	Kshs. 100,000
Pain and suffering	Kshs. 20,000
Loss of dependency	Kshs. 1,200.000
Special damages	Kshs. 33,390
Total	Kshs. 1,353,390.

17. The Appellant is entitled to the cost of this appeal and it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 16TH DAY OF JULY 2024

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Kibunja for the Appellant

No appearance by Kairu & McCourt for Respondents



