



REPUBLIC OF KENYA



KENYA LAW
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**Simon (Suing as the administrator of the Estate of Sammy Maweu Muthama
(Deceased) v China Road & Bridge Corporation of Kenya (Civil Appeal
E029 of 2022) [2023] KEHC 20215 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E029 OF 2022
GMA DULU, J
JULY 14, 2023**

BETWEEN

**JULIANA MWENDE SIMON (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF SAMMY MAWEU MUTHAMA (DECEASED)). APPELLANT**

AND

CHINA ROAD & BRIDGE CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. In a judgment delivered on the 30th June 2022, the Magistrate's court entered judgment for the plaintiff (now appellant), but found that no marriage with the deceased was proved, and thus declined to grant damages under loss of dependency.
2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel M/s Mutunga & Muindi Company Advocates on the following grounds: –
 1. The court erred in law and in fact in dismissing the claim by the estate of the deceased on loss of dependency contrary to the evidence placed before the court.
 2. The court erred in law and fact in raising the degree of proof in a civil suit to that of beyond any reasonable doubt to the detriment of the plaintiff.
 3. The court erred in law and fact in holding that the plaintiff was not dependent to the deceased, as contemplated by the law yet the same court held that she was wife to the deceased.
 4. The court erred in law and fact in relying on the case of Rahab Wanjiru Nderitu =Versus= Daniel Muteti & 4 Others (2016) eKLR when the two cases were completely different.
 5. The honourable court erred in law and fact and misapplied the law on dependency in a fatal injury claim yet there were other dependants upon the deceased over and above the plaintiff



whom the defendants admitted were entitled to an award on dependency i.e. the deceased's parents.

6. The court erred in law and fact in failing to assess what it would have awarded on loss of dependency to the deceased's estate if it had allowed the claim.
7. The honourable court erred in law and fact in giving a contradictory judgment on the plaintiff's status as to dependency in a road traffic fatal injury claim.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mutunga & Muindi Company Advocates for the appellant, and submissions filed by Isaka & Associates Advocates for the respondent.
4. This being a first appellate court, I am enjoined to reconsider the evidence on record afresh, evaluate the same and come to my own independent conclusions and inferences, see *Selle =Versus= Associated Motor Boat Company Ltd* (1968) EA 123.
5. In proving their case, the appellant called three (3) witnesses, PW1 Cpl. Juba Mwarabu, PW2 Victor Mbondo, and PW3 Juliana Mwendu Simon. The respondents called one witness DW1 Edgar Usagi Aleme.
6. From the grounds of appeal, and submissions of counsel on both sides, the main issue in contest is the decision on loss of dependency under the *Fatal Accidents Act*. On this, the trial Magistrate in the judgment acknowledged that the respondent had paid the parents of the deceased compensation of Kshs. 3,000,000/=, and proceeded to state as follows with regard to the appellant:-

“In my view, although the defendants claim that she was a stranger and not a wife, the consent recorded in the Makindu court case in the burial dispute, and the fact that she was also notified of the accident and involved in the burial arrangements raises doubts in the defendants claim. However, dependency is a question of fact. I am guided by the holding in *Rahab Wanjiru Nderitu =Versus= Daniel Muteti & 4 Others* (2016) eKLR where the court held that dependency must be proved. The plaintiff might have proved a close relationship with the deceased. However, there is no evidence of any marriage, customary or otherwise. She claims they were engaged. I am not persuaded that she is thus entitled to claim under this head. I make no award here.”

7. In my view, with all due respect, I do not agree with the reasoning of the trial court, on this head of damages. Firstly, the trial court clearly stated in the judgment that the appellant was wife to the deceased at death, so the Magistrate could not again find no proof of marriage. Secondly, the place to contest the marriage of the deceased and the appellant was in the proceedings for letters of administration ad litem, and there is no evidence that the parents of the deceased contested that, even during the proceedings herein wherein they were joined as parties.
8. Thirdly, though it is important to prove dependency, such proof is on the balance of probabilities. In any event, for a husband and wife, the presumption is that they depend on each other unless there is evidence to the contrary, which is not the case herein.
9. I thus find that the award under loss of dependency should have been made, even if it was not all payable to the appellant, because parents can also be dependants based on actual facts of the case.
10. The appellant's counsel has proposed loss of dependency as Kshs. 46,117.00 (the net salary) x 12 months x 30 years x 2/3 = Kshs. 11,068,104.00 based on the age of the deceased being 34 years at death.



11. In my view, considering that the payslip relied upon does not indicate that the deceased was on permanent and pensionable employment, and there being no letter of employment produced, one cannot say that the deceased could with certainty be employed by some employer up to 60 years. The SGR project mentioned in evidence where the respondent was a sub-contractor, was also a period based project. Thus though the deceased might still be employed beyond the initial contract, there is no indicated guarantee of such continuous employment.

12. In my view, in the circumstances of this case, a court would be reasonable to find that the deceased would work up to 50 years. I so find that he would work to 50 years, which means a multiplier of 16 years. Thus loss of dependency will be as follows:-

Kshs. 46,117.10 x 12 months x 16 years x 2/3 = 5,902,989/=

This loss of dependency is inclusive of the Kshs. 3,000,000/= already paid to the parents of the deceased.

13. The final award to the appellant will thus be as follows:-

Liability 70%:30%

1. Pain and suffering Kshs. 20,000/=
2. Loss of life expectancy Kshs. 100,000/=
3. Loss of dependency Kshs. 5,902,989/=
4. Special damages Kshs. 550/=

Kshs. 6,023,539/=

Less 30% Kshs. 1,807,062/=

Kshs. 4,216,477/=

Less paid to parents Kshs. 3,000,000/=

Payable to appellant Kshs. 1,216,477/=

I also award the appellant costs and interest at court rates until payment in full, payable by the respondent.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF JULY 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Mr. Muindi for the appellant

Mrs. Isika for the respondents

Mr. Otolu court assistant

