



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO.112 OF 2008**

**TELKOM KENYA LIMITED.....APPELLANT**

**VERSUS**

**ESTHER MUNYILI NAVUNI.....RESPONDENT**

**[Being an appeal from Original Judgment from MASENO SRM'S Court:- J. M. NANGEA -SRM  
in Civil Suit No.108 of 2006.]**

**J U D G M E N T**

1. The respondent filed suit against the appellant seeking damages for the death of her husband on 4.2.06 who was knocked down by the appellant's motor vehicle registration No.KAJ 853S along Chavakali-Kapsabet road at a place called Losengeli. The respondent apparently did not witness the accident as she was not at the scene. PW2 however was cycling together with the deceased who was his father.
2. The appellant did file a defence denying that such an accident occurred. The parties however in the cause of the proceedings entered into a consent on the question of negligence whereby the same was entered at 70:30 percent in favour of the respondent and appellant respectively. All that remained for the trial court to do was to determine the issue of damages.
3. The court afterwards awarded the defendant. This sum of Kshs.224000/= as general damages vide the Fatal Accident Act. This prompted this appeal.
4. The memorandum of appeal has 6 grounds but substantively the gist of the appeal is that the trial court awarded the above sum of damages to the respondent adopted wrong principles of law.
5. As indicated earlier the award was under the Fatal Accident Act. The respondent did not obtain letters of administration of the deceased's estate and thus could not be granted any award in terms of the Law Reform Act. This fact was not disputed by the parties.
6. Section 4(1) of the Fatal Accident Act Chapter 32 of the Laws of Kenya states as follows:

**“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 proportional to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered after deducting the cost not**

recovered from the defendant shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct.

**Provided that not more than one action shall be for and in respect of the same subject matter of complaint and that every such action shall be commenced within three years after the death of the deceased person.”**

7. The deceased according to the evidence of the respondent was aged 60 years and a pastor earning a salary of between Kshs.45,00-50,000/= per month. He left behind the following Dependents:

- a. **Esther Munyuli Navuni aged 56 years.**
- b. **Boaz Amudala son aged 30 years.**
- c. **D A son aged 17 years.**
- d. **N V- daughter aged 15 years.**

8. In her testimony however she said that the deceased left 9 children namely Derrick Adalo, Philip, Douglas and others who were still in primary school.

9. Apparently as clearly submitted by the appellant she did not adduce any evidence to support that. She was married to the deceased and that the said enumerated children belonged to her and the deceased.

10. Section 8 of the Fatal Accident Act is worded as follows:

**“In every action brought by virtue of the provisions of the Act, the plaintiff on the record shall be required together with the statement of claim to deliver to the defendant, of his advocate, full particulars of the persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.”**

11. Upon perusing the proceedings I do note that the respondent failed to provide any evidence as envisaged by the above section of the Act. There is nothing to show that the children mentioned in the plaint or those enumerated in her evidence belonged to her and the deceased. There was no production of the birth certificates or anything to show that they were born by her marriage with the deceased.

12. Infact, on the question of dependency there is nothing exhibited indicating that the respondent, PW2 nor the children depended on the deceased. Further there was nothing to show that the deceased was a pastor earning a sum of Kshs,50,000/= per month or thereabouts. There was no payslip or any evidence from the PAG Church to indicate such.

13. Clearly it was the duty of the respondent under the provisions of Section 107 of the Evidence Act Cap 80 to establish these facts.

14. Consequently I do not find any sufficient evidence suggesting that an award would be given under the Fatal Accident Act. No dependency was proved. The Chief's letter produced by the respondent as an exhibit was formerly for purposes of picking the death certificate but does not in any way establish any dependency on the deceased.

15. In the premise I find that the award by the trial court was erroneous and not proven. See **JOSEPH WACHIRA MAINA VRS MOHANLAL HASSAN [2006] eKLR.**

16. The upshot is that the appeal is allowed. The lower court's judgment is set aside. The appellant shall have the costs of this appeal.

**Dated, signed and delivered this 10th November, 2015**

**H. K. CHEMITEI**

# **JUDGE**