

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E237 OF 2024**

**CECILIA WANGECHI GITONGA.....**  
**APPELLANT**

**VERSUS**

**WILMA & SONS COMPANY LIMITED..... 1<sup>ST</sup>**  
**RESPONDENT**

**EPHANTUS MUNGAI..... 2<sup>ND</sup> RESPONDENT**

**(Appeal from the judgement and decree, of Hon. RL Musiega,  
Senior Resident Magistrate, SRM, of 19<sup>th</sup> January 2024, in  
Milimani CMCCC No. E1093 of 2021)**

**JUDGEMENT**

1. The claim, at the trial court, was by the appellant, against the respondents. It had its genesis in a road traffic accident, which happened on 28<sup>th</sup> July 2018, along Tom Mboya Street, Nairobi, between the deceased and a motor vehicle owned and controlled by the respondents. The claim was by the estate of the deceased, for compensation. Negligence was attributed on the respondents.
2. The respondents did not appear, nor file defence. Interlocutory judgement was entered, on 31<sup>st</sup> October 2022, and the matter proceeded by way of formal proof, in which the respondents were represented. The appellant testified. Judgement was rendered, on 19<sup>th</sup> January 2024. Liability was assessed at 50:50; pain and suffering at Kshs. 50,000.00; loss of expectation of life at Kshs. 100,000.00; special damages at Kshs. 164,500.00; plus, costs and interests.
3. The appellant was aggrieved, hence this appeal. The grounds touch on apportionment of liability, failure to consider

submissions, and failure to award damages for loss of dependency.

4. Directions were taken, on 2<sup>nd</sup> May 2025, for disposal of the appeal by way of written submissions. I have seen written submissions by the appellant, which I have read and noted the arguments made.
5. There are only 2 issues for determination: liability and loss of dependency.
6. The liability issue is fairly straightforward. Interlocutory judgement was entered, on 31<sup>st</sup> October 2022. What I see, from the record, is that that default judgment was never set aside. The *viva voce* hearing, that was conducted on 4<sup>th</sup> October 2023, was for the purpose of assessment of damages only. It was actually formal proof, going by the orders of 1<sup>st</sup> March 2023. A default or interlocutory judgement, in matters of this nature, personal injury, is, in fact, a judgement on liability. It resolves the issue of liability, leaving the issue of damages to be resolved at formal proof. The trial, by way of formal proof, is not conducted for the purpose of liability, but quantum. That being the case, the issue of liability was not available for determination, based on the material adduced at the formal proof. It was a mistake, therefore, for the trial court to assess liability at 50:50, for that issue had already been resolved at 100%, upon entry of the default judgment.
7. On loss of dependency, I will start by stating that the same was not pleaded in the plaint. Damages, with respect to it, are awarded on the basis of the Fatal Accidents Act, Cap 32, Laws of Kenya, on behalf of the dependants of the deceased, for the loss that they would have suffered on account of his death. Although it was pleaded, at paragraph 10 of the plaint, that the suit was brought under the provisions of the Fatal Accidents Act, that was not enough. It was not pleaded that

the deceased had dependants, or persons depending on him. The names and ages of the dependants were not pleaded. The age of the deceased was not pleaded, yet, it was critical, to demonstrate that he was an active person, who worked for a living, and who could be depended upon by others for sustenance. The work, he did for a living, was not pleaded, from which he drew income, upon which he could provide for his dependants. The income, that he made from his hustles, was not pleaded.

8. For a claim, under the Fatal Accidents Act, to stand, the facts that I have discussed above, in paragraph 7, ought to be pleaded, for it is upon those facts or disclosures that the trial court would extract the multiplier, the multiplicand and the dependency ratio, which are used for assessment of damages for loss of dependency. Even where the loss of dependency is to be assessed on the basis of the global approach formula, there would still be need to bring out facts on the age of the deceased, what he did for a living, the persons who were dependent on him, among others. These were not pleaded, and, without them, the trial court was handicapped, so far as assessment of loss of dependency was concerned. The trial court did not get it wrong, in not assessing loss of dependency, or awarding damages under the Fatal Accidents Act, on that head, in the circumstances.
9. The material, that the appellant pleaded, at paragraph 9 of the plaint, would only assist the trial court in assessing damages under the Law Reform Act, Cap 26, Laws of Kenya, for the benefit of the estate; and that would be with respect to pain and suffering, loss of expectation of life, funeral expenses, administration expenses, and the like. These particulars would be of no use, for the purposes of the claims under the Fatal Accidents Act.
10. Consequently, the appeal herein only succeeds to the extent of liability. The orders, in the judgement of the trial

court, of 19<sup>th</sup> January 2024, relating to liability, the assessment at 50:50, is hereby set aside, and substituted with an assessment of liability at 100% against the respondents. All the other orders remain intact. The original trial records shall be returned to the trial court. The appeal file herein shall be closed. The appellant shall have the costs. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN  
CHAMBERS, AT BUSIA, ON THIS 4<sup>TH</sup> DAY OF DECEMBER  
2025.**

**WM MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant, Busia.**

**Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.**

**Advocates**

**Mr. Gathaara, instructed by ZN Gathaara & Company,  
Advocates for the appellant.**

**Messrs. Kimondo Gachoka & Company, Advocates for the  
respondents.**