

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMABAY

CIVIL APPEAL NO. E003 OF 2025

**PETER REGE OKULLO (Suing as the Administrator of the Estate
of TOBIAS OMONDI OBEL-Deceased).....**

.....APPELLANT

VERSUS

KENNEDY OCHIENG KISERA

(alias KENNEDY OCHIENG BASELA).....

RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon.S.O. Ongeru (SPM)
in Oyugis Civil Suit No. 185 of 2022 delivered on 27th November, 2024)*

JUDGMENT

Background of the Appeal

1. By a plaint dated 15th September 2022, the Appellant instituted proceedings against the Respondent, seeking general damages under both the Law Reform Act and the Fatal Accidents Act, together with costs of the suit and interest thereon.
2. The Appellant's case was that on or about 23rd December 2019, the deceased was at a posho mill in Kendu Bay town, off the Kisumu-Homa Bay Road, when motor vehicle registration number KCQ 841V was negligently driven and/or controlled by the Respondent and/or his

servant, agent, or employee, causing the vehicle to veer off the road and fatally knock down the deceased.

3. In his statement of defense dated 19th December 2022, the Respondent denied ownership of motor vehicle registration number KCQ 841V, denied the occurrence of the alleged accident, and denied any negligence on his part. In the alternative, and without prejudice to the foregoing, he pleaded that if the accident occurred at all, it was wholly caused or substantially contributed to by the negligence of the deceased.
4. In a judgment delivered on 27th November 2024, the learned trial magistrate found the Respondent 100% liable for the accident and awarded the Appellant damages for pain and suffering in the sum of Kshs. 80,000/=, damages for loss of expectation of life in the sum of Kshs. 140,000/=, together with costs of the suit and interest. The court declined to make an award under the Fatal Accidents Act on the ground that the alleged dependent did not testify.
5. Being aggrieved by the said judgment, the Appellant lodged the present appeal by way of a Memorandum of Appeal dated 16th January 2024, seeking orders that the appeal be allowed with costs and that the judgment of the learned trial magistrate be set aside.
6. The appeal is anchored on the following five grounds: -

a) THAT the learned trial magistrate grossly misdirected himself in treating the evidence before

him superficially and consequently coming to a wrong conclusion on the same.

b) THAT the learned trial magistrate failed to consider the evidence adduced to award for loss of dependency.

c) THAT the learned trial magistrate misdirected himself in ignoring the principles applicable thereby proceeding in(sic) wrong principles.

d) THAT the learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him, specifically an award for loss of dependency, and in particular the evidence presented on behalf of the Appellant.

e) THAT the learned trial magistrate failed to apply judicially and to adequately evaluate the evidence tendered and thereby arrived at a decision unsustainable in law.

7. The appeal was directed to and has been canvassed by way of written submissions which may be summarized as below;

Appellant's Submissions

8. In contending that the learned trial magistrate erred in failing to award damages for loss of dependency under the Fatal Accidents Act, the Appellant submits that the court's finding that the relationship

between the deceased and the alleged dependent was too remote to sustain a dependency claim was erroneous and untenable in law. The Appellant argues that section 2(1) of the Fatal Accidents Act expressly defines a “parent” to include a stepmother, and as such, the relationship relied upon could not be deemed remote or legally irrelevant.

9. The Appellant further submits that the trial court erroneously relied on the decision in **David Sakari Wasike (suing as the Legal Representative of the Estate of the late Jentrix Nakhumincha Simiyu) v Barisi (Civil Appeal No. 146 of 2017) [2020] KECA 145 (KLR)**, to conclude that dependency had not been proved merely because the stepmother did not testify. The Appellant contends that this conclusion was founded on a misapprehension of the law of evidence, as there is no legal requirement that a dependent must personally testify in order to establish dependency.
10. It is the Appellant’s additional submission that he testified, without contradiction or challenge, that the deceased used to support his stepmother. This evidence was neither rebutted nor discredited during cross-examination, and in the absence of any contrary evidence, the trial court ought to have accepted it as sufficient proof of dependency.
11. The Appellant further submits that although the deceased was aged 19 years, had completed Class Eight, and was awaiting admission to Form One, this fact did not disentitle the estate from an award for loss

of dependency. The Appellant points out that courts have consistently awarded damages for loss of dependency in respect of minors, as demonstrated in **Fredrick Kimokoti Imbali & 2 others v AKW & another (suing as legal administrators of the estate of the late AK (Deceased)) [2019] eKLR** and **Daniel Mwangi Kimemi & 2 others v JGM & another**, among others.

12. Reliance is also placed on the decision in **Leonard O. Ekisa & another v Major K. Birgen [2005] eKLR**, where the court held that dependency is a matter of fact which need not be proved by documentary evidence and that each case must be determined on its own peculiar circumstances.

13. In the premises, the Appellant prays that the appeal be allowed as prayed and an award be made for damages for loss of dependency.

Respondent's Submissions

14. The Respondent supports the decision of the learned trial magistrate in declining to make an award for loss of dependency under the Fatal Accidents Act. He submits that loss of dependency is a question of fact which must be specifically proved, and that no evidence was tendered to demonstrate that any person depended on the deceased.

15. The Respondent contends that the Appellant failed to adduce any credible evidence to establish actual dependency. In this regard, reliance is placed on the decisions in **James Mukolo Elisha & another v Thomas Martin Kibisu [2014] eKLR** and **Dickson**

Taabu Ogutu (suing as the legal representative of the estate of Wilberforce Ouma Wanyama) v Festus Akolo & another [2020] KECA 884 (KLR), where the courts emphasized that dependency must be proved as a matter of fact.

16. The Respondent also refers the court to the decision in **David Sakari Wasike (suing as the Legal Representative of the Estate of the late Jentrix Nakhymicha Simiyu) v Barisi (*supra*)**, where it was held that;

“The position in law as to who a dependant is under the Fatal Accidents Act and which we fully adopt is as set out in section 4(1) of the Act. It provides 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 ... be brought by and in the name of the executor or administrator of the person] ...”

16. In light of the above provision, the appellant was obligated to prove the existence of the alleged deceased’s mother which in our view, the appellant failed to establish by failing to call the alleged mother to appear in court to testify to prove her dependency on the deceased. Neither was she named as a dependant in the chief’s letter tendered in evidence and appraised by the trial court. The trial Judge

cannot therefore be faulted for holding and correctly so in our view that dependency in favour of the alleged mother as the only person who qualified as a dependant under the law had not been proved to the required threshold.

17. We associate ourselves fully with the position taken by the court in the case of Gerald Mbale Mwea vs. Kariko Kihara & Another [supra] wherein it was stated, inter alia, that: “The issue of dependency is always a question of fact to be proved by he who asserts it.”

18. See also the case of James Mukolo Elisha & Another vs. Thomas Martin Kibisu [supra] where this court stated:

“The respondent did not adduce any documentary evidence to show that any of the persons listed under paragraph 6 of the *Plaint* were actually dependants of the deceased. In the result, we allow the appeal and set aside the judgment of the trial court dated 29th November, 2001, as far as the award for general damages under the Law Reform Act and Fatal Accidents Act is concerned.”

17. He urges the court to uphold the trial court’s finding that dependency was not proved in the present case, and to dismiss the appeal in its entirety.

Issue, Analysis, And Determination

18. The sole issue for determination in this appeal is whether the deceased's stepmother was a dependant entitled to damages for loss of dependency under the Fatal Accidents Act.

19. An award for loss of dependency is made pursuant to the provisions of the Fatal Accidents Act. The settled position of the law which remain indubitable is that dependency is a matter of facts to be proved by evidence. There is no presumption at all or inferences to be made. A claimant either avails the evidence or forgoes the claim by dismissal.

20. The principles upon which an appellate court may interfere with findings of fact are well settled. In **Ephantus Mwangi & another v Duncan Mwangi Wambugu [1982] 1 KAR 278**, Hancox J.A. (as he then was) stated that:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings he did.”

21. The position in law as to who qualifies as a dependent under the Fatal Accidents Act is set out in section 4(1) of the Act, which provides that every action brought under the Act shall be for the benefit of the wife, husband, parent, and child of the person whose death was so caused.

Section 2(1) of the Act further defines a “parent” to include a stepmother.

22. However, before the court can proceed to determine the extent of dependency, it must first be established that the person alleged to be the dependent, in this case, the deceased’s stepmother, indeed existed and fell within the category of dependents recognized under the law.

23. It is trite that he who alleges must prove. Section 107 of the Evidence Act, Cap 80 Laws of Kenya, provides that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

24. In paragraph 6 of the plaint, one Grace Nambia Obel was identified as the mother of the deceased. However, the Chief’s letter dated 24th August 2020 (PEXh 4) introduced the Appellant as the paternal uncle and foster father of the deceased. Notably, although the deceased was said to have been survived by a stepmother, the Chief’s letter made no mention of such a person. That could have been straightened by the said step-mother attending court and asserting her dependency. That was never done.

25. Instead, the Appellant testified as PW1 and adopted his witness statement as the evidence in chief. In the said statement, he described the deceased as his son and stated that the deceased had completed primary education at Rongo Nyagowa Primary School and

was awaiting admission to Form One. Upon further examination, he stated that the deceased lived with him because both his parents had died.

26. It was only during cross-examination that the Appellant disclosed that Grace Nambia Obel was the deceased's stepmother and that she had been married to the deceased's father as his third wife. He reiterated that both of the deceased's biological parents were dead.

27. Other than the oral testimony of PW1 during cross-examination, no documentary evidence was adduced to support the alleged relationship between the deceased and the said stepmother. No evidence was produced to demonstrate her existence or her dependency on the deceased. The Chief's letter did not mention her at all. Further, despite being listed as a dependent in the plaint, she neither filed a witness statement nor testified in court. Moreover, the Appellant's own witness statement made no reference to her, and she was not listed in the Plaintiff's list of witnesses. This omission raises serious doubt as to her existence and alleged dependency. On the evidentiary scale, there was never evidence that the deceased supported anybody as a dependant.

28. While it is true that courts have in the past awarded damages for lost expected dependency to the dependants of minors, with no income, such is done in cases where the evidence demonstrate a chosen a prospective professional path. That aspect must also go into evidence

to the satisfaction of the court. In this matter no attempt was made in that direction. It is time for counsel to remember that our law require that claims presented to court be supported with evidence to satisfy the standard of proof on a balance of preponderance.

29. In this regard, this Court associates itself with the decision in **David Sakari Wasike (suing as the Legal Representative of the Estate of the late Jentrix Nakhumincha Simiyu) v Barisi [2020] KECA 145 (KLR)**, which was relied upon by the trial court, where it was held:

“In light of the above provision, the appellant was obligated to prove the existence of the alleged deceased’s mother, which in our view, the appellant failed to establish by failing to call the alleged mother to appear in court to testify to prove her dependency on the deceased. Neither was she named as a dependent in the chief’s letter tendered in evidence and appraised by the trial court. The trial Judge cannot therefore be faulted for holding, and correctly so in our view, that dependency in favour of the alleged mother as the only person who qualified as a dependent under the law had not been proved to the required threshold.”

30. Indeed, the Appellant testified that he lived with the deceased after the latter’s parents had died. This evidence, if anything, suggests that

even if the alleged step-mother existed, she was not dependent on the deceased.

31. In the circumstances, having considered the evidence on record, the grounds of appeal, and the relevant authorities, this Court finds no basis to interfere with the findings of the trial court. The decision to decline an award for loss of dependency was supported by the evidence and the applicable legal principles.

32. Accordingly, the appeal lacks merit and is hereby dismissed with costs.

Dated, signed and delivered at Lodwar this 13th day of February 2026

Patrick J O Otieno

Judge