IN THE COURT OF APPEAL

AT NYERI

(CORAM: W. KARANJA, JAMILA MOHAMMED & KIMARU,

JJ.A.) CIVIL APPEAL NO. 172 OF 2019

BETWEEN

JUDAH GIKUNDA M'BAGINE.....APPELLANT

AND

ANTONY NYAGA.....RESPONDENT

(An appeal from the Decree and Judgment of the High Court of Kenya at Meru (D.S. Majanja, J.) dated 24th October 2018

in

Meru Civil Appeal No. 315 of 2013)

JUDGMENT OF THE COURT

Background

1) This is a second appeal from the judgment of the High Court (**D.S. Majanja, J.)** delivered on 24th October 2018 in Meru HCCC No. 315 of 2013. The appeal challenges the dismissal of the claim for loss of dependency under the **Fatal Accidents Act.**

2) The deceased, **Fridah Gacheri Gikunda**, then aged 22 years, sustained fatal injuries in a road traffic accident on 8th July, 2011 along the Meru– Chuka Road while travelling in motor vehicle registration number KBJ 987B belonging to the respondent.

3) The trial court found the respondent fully liable and awarded damages under the **Law Reform Act** for pain and suffering and loss of expectation of life. It however dismissed the claim for loss of dependency under the **Fatal Accidents Act (FAA)** on the basis that the appellant had not proved that he was a dependant within the meaning of **Section 4** of that **Act.**

4) On first appeal, the main thrust of the appeal was that the trial Magistrate failed to make an award of damages for loss of dependency under the FAA by holding that the appellant was a sister of the deceased and was, therefore, not entitled to benefit from the claim under **Section 4** of the **FAA** which described a dependant as **"wife, husband, parent or child."**

5) The High Court re-evaluated the evidence and affirmed the trial court's decision and held in part as follows:

> ***"I am convinced that the contention that the trial magistrate made a mistake in recording the evidence was not an error as alleged by the appellant as the tenor of the evidence in chief and the answers in cross- examination support such a conclusion. Even assuming that the mistake was in recording the word "sister" instead of "daughter" then the whole testimony would not make any sense…I find that the appellant testified on oath that the deceased was his daughter. His testimony was inconsistent with what was pleaded that he was a dependant when, in fact, he was not. I therefore find and hold that the trial magistrate, who had the***

benefit of hearing the witness, came to the correct conclusion and I affirm his decision. For the reasons I have given, I dismiss the appeal with costs of Kshs. 30,000/-"

6) Dissatisfied with this judgment, the appellant now urges this Court to interfere with the concurrent findings on the grounds, *inter alia* ,that the High Court erred in law and fact: by finding that the deceased was not the appellant's daughter despite having additional evidence on appeal which demonstrated that the deceased was indeed the appellant's daughter; by failing to find that the deceased would have completed school and financially assisted the appellant and his wife who was the appellant's mother; by finding that the trial court did not err despite having wrongly recorded that the deceased was the appellant's sister and not his daughter; and by failing to find that the appellant was entitled to an award of damages under the FAA.

7) The appellant sought orders that: the appeal be allowed; that the judgment and decree of the High Court be set aside and this Court do assess reasonable damages payable to the appellant under the FAA for loss of dependency and for pain and suffering; and that the costs of this appeal and High Court be awarded to the appellant.

Submissions by Counsel

8) At the hearing of the appeal, learned counsel **Ms. Mukaburu** appeared for the appellant and had filed written submissions. There was no appearance by counsel for the respondent and neither had they filed written

submissions, despite notice. **Ms. Mukaburu** adopted her written submissions with no oral highlights.

9) On the question whether the deceased was the appellant's daughter, counsel submitted that the deceased used the appellant's surname, Gikunda which clearly demonstrated that the appellant and his wife had taken care of the deceased all her life. Further, that no evidence was produced by the respondent to rebut the same and the findings of the High Court were, therefore, inaccurate in this regard.

10) Counsel further submitted that the High Court erred by failing to find that the deceased would have completed school and financially assist the appellant and his wife who was the deceased's mother. Counsel submitted that the deceased was a well performing student with a bright future that was stripped off by the actions of the respondent's employee. Counsel further submitted that as pleaded in the two courts below, the deceased assisted the family in their farming business when she was on holiday.

11) Regarding the relationship between the appellant and the deceased, counsel submitted that in the pleadings filed in the two lower courts, the appellant clearly stated that he was the deceased's father. Counsel further asserted that the appellant was the deceased's father and with his wife, the mother of the deceased were dependent on the deceased upon completion of her studies and gaining employment.

12) Counsel urged this Court to allow the appeal and award the appellant the orders as prayed in the memorandum of appeal.

Determination

13) This being a second appeal, our jurisdiction is confined to matters of law.

The settled position is that a second appellate court does not re-open concurrent findings of fact unless it is demonstrated that the findings were based on no evidence, were founded on a misapprehension of the evidence amounting to an error of law, or were reached through the application of wrong principles.

14) In ***Selle & Another v Associated Motor Boat Co. Ltd*** ***[1968] EA 123***,

the predecessor of this Court set out the duty of a first appellate court to re-consider and re-evaluate the evidence and draw its own conclusions. For second appeals, this Court has repeatedly stated the limiting principle in ***Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR*** and ***Stanley***

Maore v Geoffrey Mwenda ***[2004] eKLR***: that interference with concurrent factual findings is not warranted unless the conclusions are plainly wrong in law on the recognized exceptions.

15) The same approach is reflected in ***Karingo v Republic*** ***[1982] KLR 213***

and ***M'Riungu v Republic*** ***[1983] KLR 455***, where the Court emphasised

that a second appeal must be confined to points of law, and that a

complaint about facts only becomes a point of law if the findings are unsupported by evidence or disclose a misdirection in principle.

16) The Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR*** restated that an issue may be one of

law where there is a misapplication of legal principle or a conclusion not supported by the evidential record.

17) We have considered the record, the submissions filed, the authorities cited and the law. We discern the issue for determination in this appeal to be: (i) whether the High Court erred in law in affirming the finding that the appellant did not establish that he was a statutory dependant; and (ii) whether, in any event, the claim for loss of dependency was proved and assessable on the multiplier/multiplicand approach.

18) **Section 4** of the **FAA** provides as follows:

> **"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents, and child if 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 proportioned 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."

19) Section 4 of the FAA limits the beneficiaries of a dependency claim to a wife, husband, parent and child of the deceased. The claimant bears the burden of proving the qualifying relationship and the fact of dependency.

20) The question whether the appellant proved that the deceased was his daughter (as asserted in testimony) as opposed to a sibling (as found by the two courts below) is primarily factual. Both courts considered the pleadings and the record and reached concurrent findings that the qualifying relationship was not proved to the required standard.

21) We have considered whether the concurrent findings are assailable on a point of law. We are not persuaded that the appellant has demonstrated that the findings were based on no evidence, were reached by ignoring material evidence, or were the product of a wrong legal approach. The High Court addressed the inconsistency between the pleadings and the oral testimony and affirmed the trial court's conclusion. That was within its mandate as a first appellate court.

22) Even if the appellant had surmounted the statutory threshold on the category of beneficiaries, he still had to prove dependency as a matter of fact and quantify the loss on accepted principles. Dependency is not presumed; it must be proved by evidence demonstrating a reasonable

expectation of pecuniary benefit from the continued life of the deceased.

23) In ***Hassan v Nathan Mwangi Kamau Transporters & 4 Others [1986]***

KLR 457, the Court explained that the measure of damages under the **Fatal Accidents Act** is the reasonable expectation of pecuniary benefit, and the assessment must rest on evidence and reasonable inference rather than speculation.

24) The conventional method is the multiplier/multiplicand approach: the multiplicand represents the annual net benefit to the dependants from the deceased's earnings; the multiplier represents the likely remaining working years, adjusted for contingencies and the uncertainties of life; the product is then scaled by the dependency ratio. This approach is well illustrated in ***Kemfro Africa Ltd t/a Meru Express Service & Another v***

A.M. Lubia & Another [1982–88] 1 KAR 727 and numerous subsequent

decisions of this Court.

25) Where the deceased was a minor or a young person with no proven earnings, this Court has recognised that strict application of the multiplier/multiplicand method may be impracticable and may lead to undue speculation. In such situations, courts may adopt a global or conventional award, but the court must still be guided by evidence of education, prospects, and the nature of the dependency. The discretion must be exercised judiciously and with reasons.

26) In the instant case, the deceased was a 22-year-old student. No evidence of actual earnings was placed before the trial court. The claim was,

therefore, anchored on future prospects that she would complete her education, obtain employment (as a teacher was suggested), and support her parents. While such expectation may be genuine, the evidential foundation for selecting a multiplicand, a dependency ratio, and a multiplier was not laid.

27) Absent proof of actual earnings or a cogent basis for imputing earnings (for example, credible evidence of the course pursued, stage of training, likely entry-level remuneration and net contribution), any multiplier/multiplicand computation would have been largely conjectural. In that evidentiary context, the two courts below cannot be faulted in law for declining to make an award for loss of dependency.

28) Put differently, the dismissal of the dependency claim rested on two independent bases: first, failure to prove that the appellant fell within the statutory class of beneficiaries; and second, failure to prove and quantify dependency on a legally sustainable basis. Either basis is sufficient to dispose of the claim.

29) The remaining complaints regarding alleged recording errors and the language of testimony raise factual questions. They do not, on the material before us, disclose an error of law warranting our intervention on a second appeal.

30) For the foregoing reasons, the appeal is dismissed.

31) The order that commends itself to us on costs is that each party will bear its own costs.

Dated and delivered at Nyeri this 27th day of February, 2026.

W. KARANJA

.....
JUDGE OF APPEAL

JAMILA

MOHAMMED

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original
Signed
DEPUTY REGISTRAR