



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: BOSIRE, O’KUBASU & VISRAM, JJ.A)**

**CIVIL APPEAL NO. 48 OF 2003**

**BETWEEN**

**HANNAH WAMBUI (Suing on behalf of**

**The Estate of Ndung’u Nganga (Deceased) ..... APPELLANT**

**AND**

**KAGWE TEA FACTORY LTD ..... 1<sup>ST</sup> RESPONDENT**

**PETER GIKAMI WANJAMA ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment and decree of the High Court of*

*Kenya at Nairobi (Rawal, J) dated 15<sup>th</sup> July, 2002*

**in**

**H. C. Civil Suit No. 175 of 1999)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This is an appeal by **Hannah Wambui**, suing on behalf of the Estate of Ndung’u Nganga, deceased, from a judgment of the superior court (Rawal, J) delivered in Nairobi on 15<sup>th</sup> July, 2002 in which the appellant was awarded a sum of Kshs.89,120/= as damages arising out of the death of her husband in a road traffic accident which occurred on 9<sup>th</sup> March, 1998 along Karatina Ngenya Road in Githunguri District.

The appellant’s claim in the superior court was based under the Fatal Accidents Act and the Law Reform Act. In her plaint, the appellant (plaintiff in the superior court) averred that on 9<sup>th</sup> March, 1998 at about 8.00 pm her husband, Ndung’u Nganga, the deceased, was walking along the Karatina Ngenya

Road, when Peter Gikami Wanjama, the 2<sup>nd</sup> respondent, driving the motor vehicle reg. no. KAH 369Y belonging to Kagwe Tea Factory Ltd, the 1<sup>st</sup> respondent, negligently caused the accident, killing him almost instantly.

The learned Judge found that the aforesaid accident was indeed caused by the negligence of the 2<sup>nd</sup> respondent, and that the 1<sup>st</sup> respondent was vicariously liable for the same. The respondents have not challenged that decision, and the only issue before us is the quantum of damages awarded to the appellant. The appellant claims in this appeal that the superior court erred in not awarding any damages under the Fatal Accidents Act. In declining to award any damages for loss of dependency, the learned Judge said as follows:

**“The plaintiff gave evidence to show that the Deceased had twelve children out of which only three are minors and that he was earning income from Tea farming. According to her the income was Kshs.10,000/= per month and produced a Savings/Account Pass book to show such income by adding that all the income was not deposited. Having said that she conceded under cross-examination that she still cultivates the farm and is getting income from tea which had been earned by her husband. Her statement that apart from being a farmer the deceased was also a butcher has not been substantiated. In any event, the dependency is an issue of fact and has to be proved. The plaintiff has not shown any evidence as to how he was supporting her and the children. Furthermore, there is evidence that the income is still being earned and there is no loss to the dependants of the deceased. In absence of such evidence, I cannot grant any damages under the Fatal Accidents Act except the special damages already awarded.”**

Aggrieved by that decision, the appellant filed this appeal outlining three grounds of appeal, all complaining that the superior court erred in not awarding damages under the Fatal Accidents Act. That is the only issue before us. Mr. N. Munene, learned counsel for the appellant argued before us that the superior court failed to observe that in addition to farm income, the appellant had other income from the business of butchery that was used to raise his 12 children. Mr. Nyaga, learned counsel for the respondents submitted that there was no evidence of any other income before the superior court and asked us to follow the case of *Commercial Transporters Ltd vs Nzula Kiasio (Mombasa C. A. 233 of 2005)* in rejecting the appeal.

As this is a first appeal, this Court has the duty of re-evaluating the evidence, assess it and make our own conclusions bearing in mind though that unlike the trial court we neither saw nor heard the witnesses.

Having reviewed the record and re-evaluated the evidence, we find that there is merit in the complaint that the superior court overlooked evidence regarding the deceased’s additional income from his business as a butcher, although exact figures were not available. Here is what the appellant testified:

***“My husband was a peasant farmer. He used to live with me in the same farm. Tea was cultivated. It is still cultivated today. When I said my husband was getting income I meant income from tea. I am still getting income from tea. Apart from that my husband was a butcher. The bank – pass book I produced showed deposit from tea proceeds.***

***The death from my husband has affected our income. He used to hire workers. I am unable to do so which has affected the production. The work which he was doing, I cannot do as I have to do my work. I cannot generate the amount of income which he used to generate.”***

In our view, there was clear evidence that the deceased had income both from the farm, which the learned Judge indeed accepted, and from the butchery, which she did not accept. We think she erred in not doing so. It cannot be gainsaid that the deceased had some additional income. He had a wife and 12 children to support, three of whom were still under the age of 18 at the time of the hearing in the superior court. To sustain such a large family, the deceased must have had additional income. It would therefore

be reasonable to infer that the deceased supported his family through the additional income. He was 56 years old at the time of his death, and we think he would have continued this support for at least four years. We would apply a multiplicand of Kshs.3,000/= per month over a period of four years, giving an award of Kshs.144,000/= for loss of dependency under the Fatal Accidents Act.

Accordingly, this appeal is allowed and we hereby award Kshs.144,000/= to be paid to the appellant in addition to the sums awarded by the superior court. This award shall also carry interest in the same manner as the award made by the superior court in respect of damages under the Law Reform Act. The appellant shall have the costs of this appeal. Those are our orders.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of June, 2010.**

**S. E. O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**