



Irungu & another (Suing as administrators of the Estate of the Late Joseph Kamau Muthua) v Nganga & another (Civil Appeal 114 of 2023) [2024] KEHC 13521 (KLR) (Civ) (28 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA**

CIVIL

CIVIL APPEAL 114 OF 2023

CM KARIUKI, J

OCTOBER 28, 2024

BETWEEN

EUNICE WAMBUI IRUNGU & EUNICE NYAMBURA (SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE JOSEPH KAMAU MUTHUA) APPELLANT

AND

PETER NGARUIYA NGANGA 1ST RESPONDENT

PAGAMWA TULAGA LIMITED 2ND RESPONDENT

JUDGMENT

1. The Appellants being aggrieved and dissatisfied with the judgment of the court in Engineer Civil Case No. E004 of 2021, delivered on the 20th of July 2021, filed the instant appeal. The appeal is based on the award of loss of dependency wherein it is contended that the learned magistrate erred in law by using the Minimum Wage Regulations (2018), which placed the deceased's minimum wage at Kshs. 13,572.90. It was stated that the Kenya Forest Service salaried the deceased and was earning a basic salary of Kshs. 23,837, and there was a letter from the Kenya Forest Service highlighting how much he was earning at the time filed on the court record.
2. Appellants' Written Submissions
3. The Appellants clarified that the said suit is against Peter Ngaruiya Nganga and Pagamwa Tulaga Limited and that an amended record of appeal has been filed to that effect. The firm of Frank Karanja & Co. Advocates filed a notice of appointment on 15 February 2023 to represent the 2nd Respondent, who, before the amendment was made, was Engineer Tulaga Limited. Engineer Tulaga Limited, therefore, is not a party to the suit after the amendment was made.



4. Issues for determination
5. Whether the learned magistrate erred in law in the Judgment in Engineer Civil Case No. E004 of 2021, delivered on the 20th of July, 2022, on the basis of loss of dependency and whether the Appellants are entitled to the relief sought.
6. Whether the Appellants are entitled to the cost of the suit?
7. On the first issue, it was submitted that under Section 4(1) of the *Fatal Accidents Act* Cap 32 Laws of Kenya stipulates that every action should be for the benefit of the family of the deceased. The Appellants stated that the learned judge erred in law in the Judgment Engineer Civil Case No. E004 of 2021, where the loss of dependency was calculated using the Minimum Wage Regulations (2018), which placed the deceased minimum wage at Kshs. 13,572.90. In this circumstance, this court has the authority to interfere with the award of the trial court if wrong principles were used in the assessment of the damages. Reliance was placed on *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55*, *Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47*
8. The Appellants argued that the only circumstance in which the Minimum Wage Regulations should be adopted is where there is no proof of monthly income. They cited the cases of *Isaack Kimani Kanvingi & another (suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) vs Hellena Wanjiru Rukanga [2020] eKLR*
9. It was asserted that the Appellants filed a death certificate accompanied by a letter from the Kenya Forest Service indicating how much the deceased was earning when working for the Kenya Forest Service. The deceased was earning a basic salary of Kshs. 23,837.00, and as such, the Minimum Wage shouldn't have been adopted in the first instance. There was sufficient evidence to support this claim.
10. On costs of the suit, the Appellants averred that they have suffered a miscarriage of justice to that effect and seek redress on the same. Under Section 26(1) of the *Civil Procedure Act*, the court has the discretion to award and fix the rate of interest to cover two stages, namely:
 11. The period from the date the suit is filed to the date when the Court gives its judgment and
 12. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion, fix.
13. Further, in the case of *Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR*. The authority and discretion of a Court to award interest on costs is provided for in Section 27(2) of the *Civil Procedure Act*.
14. In conclusion, the Appellants urge this honorable court to allow the Appeal herein by the Appellants together with interests and costs to the Claimant.
15. Respondents' Submissions
16. Did the learned magistrate use the wrong principle in computing the loss of dependency?
17. On this issue, the Respondents referred the court to the judgment of the lower court on page 112 (the 2nd line) & 113 (last paragraph) of the Amended Record, where the court on these two occasions indicated that a document allegedly from Kenya Forest Service was not in the court file. Likewise, they stated that the learned magistrate also suggested that the death certificate had not been produced. In the absence of the above, the learned magistrate had no option but to resort to the Minimum Wage



- Regulations (2018). Further, just as the court noted in its judgment, no document from the Kenya Forest Service or even a death certificate was served upon the Respondent in the lower court matter.
18. It was contended that the Appellant neither filed nor produced any document from Kenya Forest Service- be it a letter or a pay slip. That the Appellant is simply being mischievous and trying to introduce evidence that was absent in the lower court matter. To further demonstrate the dishonesty of the Appellant, the Respondents invited the court to peruse the amended record of appeal on pages 30 and 41 (wrongly numbered 34) of the Amended Record and note the following: -
 19. While in their List of Documents (pg. 30, item 6), they refer to a letter from the employer, the document appearing on page 41 (wrongly numbered 34) is a "payslip." These are two different documents. It was stated that the magistrate could not have failed to see all the other documents and missed this all-important document.
 20. This document was not only missing from the lower court file but also from the pleadings served upon the Respondent.
 21. This also applies to the purported death certificate filed in this court but not in the lower court.
 22. The Respondent stated that, in fact, the Appellant conceded that the documents in issue were not filed before the court, as demonstrated in their application on 19th August 2022, to admit the documents post-judgment (pages 87-99 of the Record). Therefore, the Appellant cannot be allowed to introduce evidence at the High Court when the same was not produced before the Lower Court. They urged the court to reject the invitation to sanitize this sharp practice, illegalities, and abuse of the court process, especially taking into account that parties are bound by their pleadings.
 23. On whether the court declined to consider the Appellant's submissions, the Respondents referred the court to page 110 of the Record, where the court observed that the Appellant failed to comply with the directions of the court in terms of the timelines for filing submissions.
 24. Is the Appeal properly before the Court?
 25. Through an application dated 19th August 2022 (which application was not even served upon the Respondent) appearing on pages 87-99 of the Record, the Appellant herein sought an order of the Review of the Lower Court Judgement.
 26. The Respondents submitted that it is trite law that a party to a suit who feels aggrieved by a decision has a choice between seeking an order for review and preferring an appeal. His choice would be between the two modes of procedure further, that a party who chooses to apply for review of a decision cannot also file an appeal against the same decision. The Appellant cannot have her cake and eat it, for which reasons the instant appeal cannot lie and ought to be dismissed with costs.
 27. Analysis and Determination
 28. I have considered the material placed before me in this matter.
 29. From the trial record, it appears that the Appellants herein applied for a review of the trial court's judgment on 19th August 2022. The same seems to have been undetermined, and as stated by the Respondents, the application was not served to them. It appears that the Appellants abandoned the application and filed the instant appeal.
 30. As stated by the Respondent, a person cannot exercise both the right of appeal and review at the same time. (See Orero vs. Seko [1984] KLR 238). Further, the Court of Appeal in the case of Gerald Kithu Muchanje vs. Catherine Muthoni Ngare & Another [2020] eKLR determined that:



- a. “Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for a review of a judgment and decree, such a party cannot after the review application is rejected, exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry, but he cannot be permitted to do so. There is no doubt that this will cause prejudice to the Respondents. Litigation must come to an end somehow, and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another (2015) eKLR*, the court stated that “From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It, therefore, follows that the Appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...”
31. While I agree with the court in the determination above, in my considered opinion, the review application was abandoned by the Appellants in 2022 and, therefore, remains undetermined. I will exercise my discretion in the interest of justice to determine the instant appeal and disregard the review.
32. The Appellant's main contention is that the learned magistrate erred in law when determining the award of loss of dependency by using the Minimum Wage Regulations (2018), which placed the deceased's minimum wage at Kshs. 13,572.90. It was stated that the Kenya Forest Service salaried the deceased and that he was earning a basic salary of Kshs. 23,837. Furthermore, a letter from the Kenya Forest Service highlighting how much he was earning at the time was filed on the court record.
33. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55* set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-
 - a. “It is trite law that the assessment of general damages is at the discretion of the trial court, and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would award different figure if it had tried the case at first instance. The Appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
34. In her judgment, the learned trial magistrate stated as follows:-
 - a. “.....I have considered pw1's evidence, and she did not avail any proof to show the deceased was a KFS officer and the salary earned. Despite this, I have been persuaded by the case of *Pleasant View School Limited vs. Rose Mutheu Kithou & Another* that “while this court was of the view that the Respondent could have done better by adducing some court of documentary evidence of the deceased's income, it could not begrudge them for not adducing the same in evidence due to informal nature of business the deceased was engaged in.”
 - b.



- c. On loss of dependency, as noted above, the plaintiff relied on a document from the employer, but I cannot trace this document on the court file. I can also not trace the death certificate as it would have assisted the court on this issuer. However, I have been convinced that the deceased was employed and may have earned an income. I have therefore opted to be guided by the minimum wage regulation (2018) and award Kshs. 13,572.90/- payable to a general laborer as the multiplicand.....”
35. The Respondents referred the court to the judgment of the lower court on page 112 (the 2nd line) & 113 (last paragraph) of the Amended Record, where the court, on these two occasions, indicated that a document allegedly from Kenya Forest Service was not in the court file. Likewise, they stated that the learned magistrate also suggested that the death certificate had not been produced. In the absence of the above, the learned magistrate had no option but to resort to the Minimum Wage Regulations (2018). Further, just as the court noted in its judgment, no document from the Kenya Forest Service or even a death certificate was served upon the Respondent in the lower court matter.
36. The Court of Appeal in *Chunibhai J. Patel & Another vs. P. F. Hayes & Others* [1957] EA 748, 749 stated the law on the assessment of damages under the *Fatal Accidents Act* and held:-
- a. The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e., his income less tax), and the proportion of his net income which he would have made available for his dependents. From this, it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase.
37. Additionally, in the case of *Francis Righa Vs. Mary Njeri* (Suing as the Legal Representative of the estate of James Kariuki Nganga (2021) eKLR, the Court of Appeal had this to say on the choice of multiplier and multiplicand to be adopted in assessing damages for loss of dependency:-
- a. “...on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of *Roger Dainty v Mwinyi Omar Haji & Another* 2004 that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.”
38. Further, in the case of *Nyamai Petronila & another vs. Monica Usyoki & Another* [2020] eKLR:-
- a. “In this appeal, the Appellant contends on the loss of dependency that though the certificate of death shows that the deceased was aged 49 years old and was a plumber, there were no records to show previously his monthly earnings. On multiplicand, it was submitted that the court erred as it used a multiplicand of Kshs. 10,000/- since there was no evidence of the deceased’s earnings and there was no evidence of the deceased’s employment. The court was urged to use the Multiplier approach in assessing damages, which is a useful and practical method where factors such as the age of the deceased and the amount of annual monthly dependency are known. The Court was urged to assess the deceased income using the minimum wage of Kshs. 4,854/- which was the applicable minimum wage at the time of his death as published under Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013. In this regard, the Appellant relied on HCCA No. 108 of 2008 – *Machakos Philip Mutua vs. Veronicah Mule Mutiso* [2013] eKLR, where it was noted that “... in the absence of evidence of monthly earnings of the deceased, the estimate would be like for any unemployed person where the rate is usually like a wage of an unskilled employee.”



39. I have thoroughly perused the trial court record to ascertain whether the Appellants' assertion of the death certificate and letter indicating the deceased's earnings from Kenya Forest Service was indeed on record. It is my finding that these documents were not on record, and the Appellant's averments are falsehoods. The learned trial magistrate even alluded to the same and went on to properly rely on the minimum wage, given the fact that the income of the deceased was not straightforward and was unascertainable.
40. It is my considered view, and I agree with the Respondents, that the Appellants are attempting to hoodwink this court by claiming that these documents were filed in the trial court yet improperly introducing them in this court in order to rely on them for a favorable outcome. I agree with the Respondents that the Appellant is simply being mischievous and trying to introduce evidence that was absent in the lower court matter. They, therefore, cannot benefit from the same. I find that the trial magistrate correctly applied the law to the issue of loss of dependency, and thus, I will not disturb the award under that head. The upshot is that;
- i. In view of the foregoing, I find that the appeal fails with costs to the respondents.

JUDGMENT, DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 28TH DAY OF OCTOBER 2024.

CHARLES KARIUKI

JUDGE

