

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E073 OF 2023

JACKSON MUSYOKA MWANGANGI

1ST APPELLANT

TAHMEED TRANSPORTERS LIMITED. 2ND

APPELLANT

-VERSUS-

FREDRICK MUTUKU KIVEVE &

MARTINA NDUNGE KITUA (*Suing as legal representatives of The Estate of The Late PATRICK MUA KIVEVE*) RESPONDENT

(Being an Appeal from the Judgment of Hon. Godfrey G L

Okwengu, Senior Resident Magistrate delivered on 3rd

August, 2023 in Kilungu PMCC No. E283 of 2021)

JUDGMENT

1. The present appeal arises from the judgment of the Senior Resident Magistrate delivered on 3rd August, 2023

in **Kilungu PMCC No. E283 of 2021**, in which the trial Court entered judgment for the Plaintiff after apportioning liability at 80:20 against the Defendants jointly and severally. The Court awarded general damages under the **Law Reform Act** comprising Kshs.100,000/= for pain and suffering and Kshs.150,000/= for loss of expectation of life, together with damages for loss of dependency in the sum of Kshs.6,063,552/= and special damages of Kshs.325,000/=. This yielded a subtotal of Kshs.6,388,802/= which, after deduction of 20% contributory liability, resulted in a net award of Kshs.5,111,042/= plus costs and interest.

2. Being dissatisfied with the said judgment, the Defendants lodged the present appeal. A reading of the Memorandum of Appeal shows that the Appellants do not challenge the finding on liability. The complaints raised are directed at the assessment of damages, in particular: the multiplicand adopted for loss of dependency and the awards made under the heads of pain and suffering and loss of expectation of life.

3. The said grounds of appeal were framed as follows:

- a. that the learned trial magistrate erred in law and in fact in finding that the deceased was earning Kes.38,280 at the time of death;***
- b. that the learned trial magistrate erred in finding that the deceased was employed at China Communications Construction Company;***
- c. that the learned trial magistrate failed to consider that the deceased had allegedly left employment in 2019 and that his income status at the time of death in 2020 was unknown;***
- d. that the learned trial magistrate failed to take into account authorities cited by the Appellants regarding net earnings;***
- e. that the award for pain and suffering was inordinately high in circumstances where the deceased died on the spot;***
- f. that the award for loss of expectation of life was inordinately high and contrary to cited authorities;***
- g. that the learned trial magistrate failed to consider or sufficiently regard the Appellants' submissions; and***

h. that, in all the circumstances, the learned trial magistrate failed to do justice.

4. Parties filed submissions.

Submissions:

5. The Appellants submit that the trial Court erred in principle in its assessment of damages, particularly in adopting a multiplicand of Kshs.38,280/= as the deceased's earnings. They contend that the evidence on record did not prove that the deceased was employed by China Communications Construction Company at the time of death, pointing to the testimony of the witness who stated that the employment contract had ended in 2019 and that he did not know the deceased's employment status thereafter.
6. It was further argued that no payslip, NSSF record for the year 2020, or employer's testimony was produced to confirm continued employment, and that the trial Court therefore relied on unproven income. In support of this position, reliance was placed on *Chetan Kiriti Modi & another v Catherine Wanjiru Gikaru [2018] eKLR* citing *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny,*

Pleasant View School Limited, Arthur Nyamwate Omutondi & others v United Millers Limited & others [2009] eKLR, Dennis Isoe Moruri v Nyanger Hospital & another, Evanson Ndungu Mukunya v JNM & MWN [2022] eKLR, Isaack Kimani Kanyingi & another v Hellena Wanjiru Rukanga [2020] eKLR and Tobias Odoyo Oburu v Jane Kerubo Miruka & another [2018] eKLR.

7. The Appellants urged that, in the absence of proof of earnings, the Court ought to apply the statutory minimum wage under the **Regulation of Wages (General Amendment) Order 2020**, proposing a multiplicand of Kshs.7,240.20/= and a reduced multiplier.
8. On the awards under the Law Reform Act, the Appellants argue that the damages for pain and suffering and loss of expectation of life were excessive given the evidence that the deceased died on the spot. They rely on *Mercy Muriuki & another v Samuel Mwangi Nduati & another [2019] eKLR, James Gakinya Karienyee & another v Perminus Kariuki Githinji, Harjeet Singh Pandal v Hellena Aketch Okudho [2018] eKLR and Kenya Wildlife Services v Geoffrey Gichuki Mwaura [2018] eKLR* to submit that only nominal damages ought to have been awarded,

proposing Kshs.30,000/= for pain and suffering and a reduced conventional sum for loss of expectation of life. They also invoke *Butt v Khan [1981] KLR 349* on the principles guiding an appellate Court in interfering with an award of damages.

9. The Respondents on their part submit that the matter had substantially been settled and that the appeal is incompetent for failure to attach a decree. They maintain that the deceased's earnings were proved through documents produced at trial, including a payslip, NSSF records and a letter of appointment, and that the Appellants had the opportunity to challenge that evidence through cross-examination but failed to do so.

10. It is their position that the trial Court properly applied the principles governing assessment of damages, relying on authorities such as *Havens v Patel (1961) EA 268*, *Kemfro Africa Ltd v Lubia (1987) KLR 30*, *Bor v Onduu (1988-1992) 2 KAR 288*, *Selle v Associated Motor Boat Co. Ltd [1968] EA 123*, *Gitobu Imanyara & 2 others v Attorney General [2016] eKLR* and *Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR*. The

Respondents further urge that the awards made were justified on the evidence and even invite the Court to enhance the quantum in line with their submissions before the trial Court.

Analysis & Determination:

11. I have considered the appeal and have evaluated and analyzed the record before the lower Court. The issues that arise for determination are therefore:

a. whether the appeal is incompetent for failure to include a certified decree and in light of the alleged consent said to have settled the matter;

b. whether there exists any basis for this court to disturb the award of damages made by the trial court.

12. This being a first appeal, the Court in **Okeno vs Republic 1972 Ea 32** laid down the role of this Court as follows:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya

vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424)"

- 13.** In the first instance, the Respondents have taken a preliminary point that the appeal is incompetent for failure by the Appellants to include a certified copy of the decree in the Record of Appeal. **Section 65(1)(b)** of the **Civil Procedure Act** provides as follows in this regard:

“(1) provides: Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court— (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact; Order 42 Rule 2 of the Civil Procedure Rules provides as follows: “Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”

- 14.** Further **Order 42 Rule 2** of the **Civil Procedure Rules** provides as follows:

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified

copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”

15. The jurisprudence on the matter is now all too settled. In ***Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR*** the Supreme Court stated:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

16. In *Chege v Suleiman [1988] eKLR*, the Court of Appeal held as follows:

“But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from ‘decrees and orders of the High Court’. And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.”

17. Further, in *Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another [2018] eKLR*, the Court stated:

“Despite the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue

regard to procedural technicalities, this court took the firm view that omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason that the word 'shall' in Order 42 Rule 2 of the Civil Procedure Act contemplates that the furnishing of the decree or order is mandatory and cannot be wished away."

- 18.** I have perused the Record of Appeal dated 17th May, 2024 and I note that although the Appellants annexed the pleadings, proceedings and the impugned judgment, there is no certified decree forming the basis of the appeal. This omission is significant because **Section 65(1)(b)** of the **Civil Procedure Act** provides that an appeal lies from a decree or part of a decree of a subordinate Court. The decree is therefore the juridical foundation upon which the appellate jurisdiction of this Court is invoked, as the above exposition of the law has shown.

19. The same reasoning was applied in ***Watu Credit Co Limited v Matere (Civil Appeal E055 of 2023) [2025] KEHC 2608 (KLR)***, where the Court held that failure to include a certified decree goes to the root of the appeal and renders it incompetent, the Court observing that without a proper record it cannot exercise its adjudicatory jurisdiction. The Court in the above matter held in its final finding that:

“This court is bound by the Supreme Court decision, failure to include a decree is fatal as the same goes to the root of the appeal and jurisdictional aspect of the court. The appeal is, therefore incompetent in the absence of a certified copy of the decree”

20. In ***Abdalla v Ewins (Civil Appeal 87 of 2021) [2024] KEHC 133 (KLR)***, the Court similarly held that where required documents are omitted from the record of appeal and no sufficient explanation is offered, the court is justified in striking out the appeal.

21. Even if I were to proceed to interrogate the trial Court’s assessment of quantum, the same difficulty would still arise from the state of the record placed before this

Court. The gaps in the record do not end with the decree. The very documents upon which the multiplicand of Kshs.38,280/= was founded are either missing or unclear from the Record of Appeal, thereby hampering a proper re-evaluation of the evidence as required of a first appellate Court.

22. The dispute on quantum turns largely on the deceased's alleged employment and earnings. Yet, although reference is made to an NSSF statement said to have been produced during trial, and which indeed appears to have been contained in the Respondent's List of Documents, the same is not contained in the Record of Appeal now before this court.

23. Equally, the letter of appointment from China Communications Construction Company, which the trial Court appears to have relied upon in accepting the asserted income, is not part of the documentary record available for scrutiny. Without sight of those documents, this Court is unable to ascertain their contents, authenticity, or probative value, nor can it meaningfully evaluate the Appellants' contention that the deceased's

employment status as at the date of death remained unproven.

24. Further, the post-mortem report, which is central to the claims under the, **Law Reform Act** is not clear from the record in terms of the precise circumstances of death and the duration, if any, between injury and demise. Discernibly, this lack of clarity complicates any meaningful evaluation of the award under the head of pain and suffering, given that the parties sharply contest whether death occurred instantaneously.

25. As the court in ***Abdalla v Ewins (Civil Appeal 87 of 2021) [2024] KEHC 133 (KLR)*** rightly held:

“The documents omitted from the record of appeal are not few. It does therefore appear to the Court that this is not a case of inadvertent omission. Were it so, the Appellant would have surely applied to file a supplementary record with a view to incorporating the said documents. Where there is an omission of required documents in the record of appeal and no sufficient explanation for the omission is

proffered, the Court will be justified in striking out that record of appeal.”

26. I have nothing more to add, save to associate myself wholly with the law as set out above.

Disposition:

27. In the result, the Appellant’s appeal hereby fails and is dismissed in its entirety. The Respondent shall have the costs of this appeal.

28. Orders accordingly.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this **18TH** day of **FEBRUARY, 2026.**

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HON. C. KENDAGOR

In the presence of:

Court Assistant: Beryl

Ms. Nyabuto, Advocate for Appellant

No appearance for Respondent

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