



**Kenya Power and Lighting Company v Mugwongo (Sued as the Legal Representative of the Estate of Stephen Kinyua - Deceased) (Civil Appeal E081 of 2023) [2024] KEHC 14659 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14659 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E081 OF 2023  
CJ KENDAGOR, J  
NOVEMBER 22, 2024**

**BETWEEN**

**KENYA POWER AND LIGHTING COMPANY ..... APPELLANT**

**AND**

**JACOB MURIUNGI MUGWONGO ..... RESPONDENT**

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN  
KINYUA - DECEASED**

*(Being an appeal from the Judgment and Decree of the trial court, Hon. S. K Ng'etich in Nkubu SPMCC No. E070 of 2021 delivered on 3rd May, 2023)*

**JUDGMENT**

**Background**

1. On 30<sup>th</sup> April, 2016 Stephen Kinyua (Deceased) was electrocuted by live electric cables as a result of which he sustained fatal injuries and succumbed. The Respondent, Jacob Muriungi Mugwongo, is the father of the Deceased. He blamed the Appellant for the electrocution. He obtained a Limited Grant of Letters of Administration Ad Litem to institute the suit. The grant was issued on 4<sup>th</sup> June, 2019. One of the terms of the grant was - limited to the purpose of filing suit within six (6) months of today. The Respondent filed the suit against the Appellants on 26<sup>th</sup> November, 2021, seeking Special damages of Kshs.271,630/= and General Damages under the *Fatal Accidents Act* and the *Law Reform Act*.
2. The Trial Court delivered a Judgment in favor of the Respondent against the Appellant on 3<sup>rd</sup> May, 2023. It awarded the Respondent special damages of Kshs.270,830/=, Pain and Suffering Kshs.20,000/=, Loss of Expectation of Life Kshs.100,000/=, and Loss of Dependency Kshs. 3,000,000/=.



3. The Appellant was dissatisfied with the Lower Court's Judgment and appealed to this Court vide a Memorandum of Appeal dated 26<sup>th</sup> May, 2023. It listed four grounds of appeal, which are as follows;
  1. That the learned trial magistrate erred in law and fact by failing to find that the [Respondent] lacked the locus standi to bring the suit on behalf of the estate of the Deceased in the absence of a valid grant of letters of administration as at the time of filing the suit.
  2. That the learned trial Magistrate erred in law and fact by failing to find that the [Respondent]'s claim under the *Fatal Accidents Act* was untenable in the absence of a valid grant of letters of representation.
  3. That in the alternative the trial court award of damages in the sum of Kshs.3,000,000/= for Loss of Dependency is inordinately excessive thus amounting to an erroneous estimate of the damages payable in the circumstances of this matter.
  4. That the trial Court award for Loss of Dependency is against the law and weight of evidence on record.
4. The Appellant asked this Court to allow the appeal with costs. It also asked the Court to set aside the trial court's award for Loss of Dependency, and in the alternative the award be discounted to a reasonable minimum. The appeal was canvassed by way of written submissions.

#### **The Appellant's Written Submissions**

5. The Appellant submitted that the Respondent lacked Locus Standi to institute the suit on behalf of the Deceased. It argued that the Grant of Letters Ad Litem relied on by the Respondent to institute the suit was not operative at the time of instituting the suit. They submit that the Grant had a condition that the intended suit had to be filed within 6 months from the date it was issued. They submitted that he did not file the suit within the 6 months given by the grant because he filed it almost 2 years after the 6 months had lapsed.
6. In addition, the Appellant submitted that the lower Court's award of Kshs.3,000,000/= for Loss of Dependency was not justified and that this Court should review that award downwards to Kshs.800,000/=. It submitted that the award is very high because the Respondent had not proved the Deceased's income or earnings. It also found the award unjustifiable because the Respondent did not prove dependency.

#### **The Respondent's Written Submissions**

7. The Respondent submitted that he had locus at the time of filing the suit. He argued that the Limited Grant Letters Ad Litem are still valid and in force until the suit herein is heard and determined. He also submitted that the Appellant never disputed the validity of the Grant in question. He argued that, at the lower Court, the Appellant did not seek to have the suit struck out or dismissed for want of locus. He argued that the Appellant cannot raise new issues that were not raised before the trial Court in its Defense, at the hearing of the suit or in its submissions.
8. The Respondent also submitted that the trial Court's award for Kshs.3,000,000/= for Loss of Dependency should be allowed to stand. He argued that there was enough evidence to show that other family members depended on the Deceased. He also argued that the award is reasonable considering the age of the Deceased. In the alternative, he submitted that the court should raise the award higher to Kshs.4,720,392/= considering the harsh economic times and an inflation rate of 10 per cent.



## Issues for Determination

9. I have considered the grounds of appeal and submissions by both counsels for the parties and I am of the view that the issues for determination are;
  - a. Whether the Respondent had the Locus Standi to institute the suit
  - b. Whether the award of Kshs.3,000,000/ for Loss of Dependency was a reasonable estimate
  - c. Whether the Respondent is entitled to a share of the award for Loss of Dependency
10. It is trite law that the first appellate court has to re-evaluate the evidence in the subordinate Court on points of law and facts and come up with its findings and conclusions. As the Court re-evaluates the evidence, it must bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

## Whether the Respondent had the Locus Standi to institute the suit

11. The Appellant submitted that the Respondent lacked Locus Standi to institute the suit on behalf of the Deceased because the Grant was not operative at the time of instituting the suit. They submit that the Grant had a condition that the intended suit had to be filed within 6 months from the date it was issued and that the Respondent did not file the suit within the 6 months given by the grant. On the other hand, the Respondent argued that the Grant was operative and valid at the time he filed the suit. He argued that under the *Law of Succession Act*, Cap 160, a Grant for purposes of filing a suit cannot be limited as to time.
12. I have perused the file, and I have seen the Limited Grant of Letters of Administration Ad Litem filed by the Respondent. The Grant shows that it was issued by the Senior Resident Magistrate’s Court at Maua on 4<sup>th</sup> June, 2019. It also contained a condition in the following terms: “Limited to purposes of filing suit within six (6) months of today.” Essentially, parties in this case dispute the meaning or legal implications of this condition or phrase in the Grant. The Appellant argued that this condition meant that the suit had to be filed within 6 months of the Grant, while the Respondent argued that the *Law of Succession Act* does not contemplate such time limitations on Grants obtained to file a suit.
13. The Court in *(Deceased v Land Adjudication Settlement Officer Igembe Tigania West & 20 others* [2022] KEELC 15365 (KLR) faced a similar question. In the case, the Appellant obtained a limited grant ad litem. The Grant had a time frame of 90 days for him to institute the suit. The Appellant filed the suit after the expiry of the 90 days. The Respondents raised a preliminary objection that the Appellant did not have locus standi to institute the suit because the 90 days stated in the Grant had lapsed. The Court dismissed the preliminary objection on the ground that the Grant had not expressly stated that the suit must be filed within the 90 days. It stated:

“There is no evidence that the said limited grant has been invalidated by a competent court of law through an application for setting aside or revocation. The grant does not expressly



state the suit must be filed within 90 days. It qualifies itself by using the words “and until further representation were granted by this court” by the plaintiff”.

14. The rule established in *Deceased v Land Adjudication Settlement Officer Igembe Tigania West & 20 others (Supra)* means that time limitations imposed on a Limited Grant must hold where the grant expressly says so. Applying this rule to the current case, the Grant in question had a very express and bolded condition in the following terms: “Limited to purposes of filing suit within six (6) months of today.” In my view, this was an express condition on the Grant.
15. However, I also relooked at the Grant to ascertain whether the condition was absolute or qualified. I have established that the Grant also contained the following words: “and until further representation granted by this court.” In my view, I hold that the effect of this sentence or phrase was to qualify the timeline condition imposed on the Grant. This view is in tandem with the holding of the court in *Deceased v Land Adjudication Settlement Officer Igembe Tigania West & 20 others*, where the court held that the 90 days’ timeline had been qualified by the terms “and until further representation were granted by this court.”
16. I have found that the 6 months’ timeline was qualified. Thus, I conclude that the Respondent did not have to file the suit within 6 months of the Grant, as submitted by the Appellants. Thus, the Respondent had locus Standi at the time of filing the Claim at the trial Court.

#### **Whether the award of Kshs.3,000,000/ for Loss of Dependency was a reasonable estimate**

17. In arriving at my decision on whether I should review or interfere with the quantum of damages, I am guided by the Court of Appeal’s decision in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55*. In the case, the Court held that an appellate Court should exercise caution and restraint when it has been called upon to review the trial court’s award of damages. It stated:

“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 have awarded a different figure if it had tried the case at first instance. The appellate 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.”

18. Similarly, this Court appreciates the observations of the Court of Appeal in *Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47*, where the Court outlined the exceptional circumstances on which an appellate court can interfere with the award of damages. The Court said:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”



19. The above authorities underscore that an appellate Court can interfere with an award of damages if the same is a wholly erroneous estimate of the damage suffered by being so inordinately high or low.
20. Courts have established parameters that should help a court determine whether a particular award of damages is an erroneous estimate of the damage suffered. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR, the Court held:
  1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  2. The award should be commensurable with the injuries sustained.
  3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
  4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
5. Similarly, in the case of *Penina Waithira Kaburu v LP* [2019] eKLR, the Court outlined factors that should guide a Court in arriving at the correct estimate of quantum of damages. It held:

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.”
21. One principle runs across the above authorities: Generally, the Courts should make similar awards for persons who have suffered similar injuries. The principle calls upon the court to conduct a comparative analysis of injuries sustained and the extent of the awards made for similar injuries in previous decisions. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR summarized this principle in the following terms; “comparable injuries should attract comparable awards”
22. Some of the undisputed facts are that the Deceased was 31 years old and had a child, Trizah Kathambi. The Deceased was a mechanic, but there is no proof of actual earnings per month.
23. This case bears similarity with the case of *Mbithuka Benson v Nzuki Muthama & another* [2020] eKLR, where the High Court awarded Kshs.901,132/= for Loss of Dependency for a Deceased who was 26 years old at the time of death and a mechanic. he award was made 4 years ago. The facts in Mbithuka are similar to the current case in terms of the age range and the work of the Deceased. The only distinguishing feature between the two is the issue of liability. In Mbithuka, the Deceased had a 20% liability, while in the present case, the Deceased did not have any blame. The Appellants were found 100% liable to the fatal accident.
24. This case also bears similarity with the case of *Francis Njeru v Geoffrey M Ndegwa Muiruri* (Suing as the legal representative of the Estate of Alex Mugo Muiruri (Deceased) [2020] eKLR, where the High Court awarded Kshs.901,032/=for Loss of Dependency for a Deceased who was 33 at the time of death and a mechanic. The award was made 4 years ago. The facts in Francis Njeru are similar to the current case in terms of the age range and the work of the Deceased. The only distinguishing feature



between the two is the issue of liability. In Francis Njeru, the Deceased had a 35% liability; in the present case, the Deceased did not have any blame. The Appellants in both cases were found 100% liable to the fatal accident.

25. Lastly, the facts of this case are similar to that of *Kool v Kinyanjui & another* (Suing as the Legal Representative of the Estate of James Muniu - Deceased) & another (Civil Appeal E005 of 2022) [2023] KEHC 17630 (KLR) where the High Court awarded Kshs.2,714,400/= for Loss of Dependency for a Deceased who was 35 at the time of death and a mechanic. The facts in *Kool v Kinyanjui* are similar to the current case in all aspects; the age-range of the Deceased and the work of the Deceased. In both cases, the Deceased were did not carry any blame for the fatal accident because the Appellants were in both cases 100% liable.
26. Based on the above authorities, I am of the view that an award of Kshs.2,500,000/= for Loss of Dependency is the most suitable estimate for the award. I thus review the Lower Court's award of Kshs.3,000,000/= to Kshs.2,500,000/=.

### **Whether the Respondent is entitled to a share of the award for Loss of Dependency**

27. Before I pen off, I ought to address on who is entitled to the award for Loss of Dependency. The lower court had directed that Trizah Kathambi (Deceased's daughter) is the only one entitled to the full amount awarded for Loss of Dependency. The court reasoned that it had found her to be the only proved dependent of the deceased. It also held that the Respondent had failed to produce any evidence to show that he was being supported by the Deceased.
28. I do not agree with the lower Court's position on this issue. I note that the trial Court rightly concluded that the Respondent was the Father of the Deceased. In the Plaint dated 23<sup>rd</sup> November 2021, the Respondent claimed that the Deceased was the sole bread winner of his family supporting his mother and siblings. He maintained the same claims in his witness statement filed in court. This was not challenged through cross-examination. The court is being invited to assess whether these claims alone, without any documentary evidence, are enough prove that the Respondent was dependent on the Deceased.
29. Courts have on several occasions addressed on the issue of proof of dependency between parents and their children. In *Leonard O. Ekisa & another vs. Major K. Birgen* [2005] eKLR, the Court held that dependency need not be proved by documentary evidence. It stated:

“Though Mr. Magare for the defendant has argued that dependency was proved on only one person, that was the wife of the deceased, I differ from his contention. Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances”.
30. This view was previously expressed by the Court of Appeal in *Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others* [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:

“In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian



communities in Kenya. This particular custom is broadly accepted, respected and practiced thorough out Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful others' welfare”.

31. In the end, I hold that the Respondent did not have to provide hard evidence or document to show that he was being supported by the Deceased. In the circumstances, I hold that the Respondent was a dependent of the Deceased and as such he is equally entitled to a share of the award for Loss of Dependency.
32. The *Fatal Accidents Act* gives the Court the power to direct how an award for damages is to be shared amongst dependants. Section 4 *Fatal Accidents Act* which 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 judgement shall find and direct.”
33. The net amount of General Damages awarded (comprising Pain and Suffering Kshs.20,000/, Loss of Expectation of Life Kshs.100,000/, and Loss of Dependency Kshs. 2,500,000/=) should be shared between the Respondent and Trizah Kathambi in the ration of 50:50.
34. The award on special damages was not challenged, and therefore, the same is upheld.
35. All the other awards not specifically set aside remain as awarded by the trial Court.
36. The Appellant is awarded the cost of the appeal, assessed at 45,000/=, while the Respondent will have full costs in the lower Court.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE ON THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

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**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant; Beryl

Mr. Gitari, Advocate for Appellant

Mr. Gikonyo, Advocate for Respondent

