



Ndavi (Suing as the legal representative of the Estate of Maurice Nyambu Ndavi - Deceased) v Kenya Power & Lighting Company Limited (Civil Appeal 138 of 2022) [2024] KEHC 16338 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 138 OF 2022
JM NANG'EA, J
DECEMBER 19, 2024**

BETWEEN

WAYUA NDAVI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MAURICE NYAMBU NDAVI - DECEASED) APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

(Being an appeal from the Judgement and decree of the Chief Magistrate's Court at Mavoko (Hon. E. Kimaiyo Suter - PM) delivered on 15th September 2022 in Mavoko CMCC NO. 788 OF 2020)

JUDGMENT

Background to the Appeal

1. The appellant herein is challenging the said learned trial magistrate's judgement on both liability and quantum of damages assessed and awarded in his favour.
2. The summary of the case before the trial court is that the appellant sued the respondent company for general damages for pain & suffering, loss of expectation of life and loss of dependency; special damages of Kshs. 5,500, the costs of the suit and interest at court rates following an electrocution incident that occurred on 14th October 2019 in which the above named Maurice Nyambu Ndavi (the deceased) passed on. The respondent was accused of negligent acts and omissions resulting in the deceased's electrocution and consequent death, hence the suit.
3. The respondent filed defence traversing all the material particulars of the suit putting the appellant to strict proof of the allegations. In the alternative, it attributes any accident that may be proven to have occurred to negligence to the deceased.



4. The appellant gave oral evidence in court underscoring the averments in the suit. She, however, clarified on cross-examination by the defence that she did not witness the incident. The deceased was her son aged 18. The witness tendered her bundle of documents filed in court in support of her case. The documents include copies of Grant of Letters of Administration Ad Litem authorizing him to file this suit; the deceased's Post-Mortem report dated 25th October 2019 and his Death Certificate.
5. PW3 (Alex Ndiku Mwangi) told the trial court that he witnessed the accident as he was going to work. The deceased had attempted to jump over a trench dug along the road when he slid and fell into the trench. The ground on which the deceased was walking was slippery. PW3 alleged that the respondent's workers were on the site the previous day and left exposed wires with no warning of the danger they posed.
6. PW2 produce a video recording of the incident which she processed on instructions of the appellant's advocates. She also exhibited a certificate she issued in respect of the video processing she did. Under cross-examination by the respondent's advocate, the witness stated that the recording machine she used was under the control of the appellant's advocates.
7. A former Human Resources Manager of ISL Kenya Limited until 2020 (PW4) testified for the appellant and produced the deceased's Employment Contract dated 1st July 2018 with the same company. It shows that he was an employee of the company from 1st October 2018 earning a gross salary of Kshs. 30,000 per month which would be subject to all statutory deductions. The deceased was engaged on probationary terms for 3 months after which he was to be evaluated before confirmation in writing. The probation period was over at the time of his injury which occurred on 14th October 2019.
8. The respondent called three witnesses. DW1 produced his investigations report dated 18th November 2019 relating to the subject incident. The report confirms electrocution of the deceased in a trench they dug and in which they laid live electricity cables. The cables were energized to keep off vandals but they could cause electrocution if cut. DW1 also admitted that signs warning of danger were not erected at the scene. According to the witness the cables were not laid by the road but were laid about 30 to 40 metres away.
9. DW2 and 3 confirmed this testimony. The court was told that one of the cables had been punctured. It was suspected that the deceased was the one who cut the wire using a hacksaw found next to his body in a vandalism attempt. The incident was said to have been reported to the police who visited the scene and took possession of a hack saw and other tools the deceased was suspected to have used to cut the wires in the process getting electrocuted. It is therefore the defence evidence that the deceased was the author of his own misfortune.
10. In his judgement, the learned trial magistrate noted that the evidence of the eye witness (PW3) was not corroborated and questions why he didn't report the incident if he was indeed an eye witness. The trial court also faulted the respondent for not calling the police officers who visited the scene based on its report, and for leaving the wires exposed knowing that they could cause damage. The court further stated that upon seeing photographs of the cables in question she was convinced that they had been punctured and that there is no other explanation therefor other than that they had been cut by the deceased. In the circumstances the learned trial magistrate decided to apportion liability between the parties equally.
11. Regarding the quantum of damages, the trial court granted the appellant Kshs. 20,000 and Kshs.100,000 for pain and suffering and loss of expectation of life respectively.



12. For loss of dependency, the trial court adopted a multiplier and multiplicand of 15 years and the minimum wage of Kshs. 11,771 as Per the Regulation of Wages Order 2018 respectively.
13. The learned trial magistrate further awarded the appellant the pleaded special damages of Kshs. 5,500. After aggregating the awards and subjecting the total to the adjudged 50% contribution by the appellant, final judgement was entered for the appellant in the sum of Kshs. 415, 880 together with the costs of the suit and interest.

Grounds of Appeal

14. The appellants' Grounds of Appeal as stated in the Memorandum of Appeal filed on 5th October 2022 as amended may be condensed into only two as hereunder:
 - a. That the learned trial magistrate erred in law and fact by finding the appellant 50% liable for the deceased's electrocution against the weight of evidence adduced.
and
 - b. That the learned trial magistrate erred in law and fact by adopting the said minimum wage of Kshs. 11, 771 as the multiplicand in assessing loss of dependency instead of the deceased's monthly salary of Kshs. 30,000.
15. The appellant therefore prays for the appeal to be allowed.

Guiding Principles

16. It is trite law that the appellate court can only interfere with the finding and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd vs Oakdale Commodities Ltd (1997) eKLR Civil Appeal No. 198 of 1995*). The appellate court also has the duty of analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle vs. Associated Motor Boat Co. (1968) EA 123*. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited [1958] EA 424* underscored the same principles delivering itself thus:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

The appellant's Submissions

17. Learned Counsel for the appellant submit that the evidence adduced before the lower court proves that the respondent's absolute liability for the deceased's electrocution. Contrary to the trial court's observation, the video evidence tendered by the appellant does not show the presence of a hack saw the deceased allegedly used to cut the cables. On the other hand, the photographs produced by the respondent are said to have been taken days after the incident and so they are not reliable.



18. In support of their submissions Counsel for the appellant cite judicial determinations in Kenya Power & Lighting Company vs Stella Mgeni (2018) eKLR; Kenya Power & Lighting Company vs Joseph Khaemba Njoria (2015) eKLR and Kenya Power & Lighting Company vs EKO & Another (2018) eKLR. In these cases the respondent was found 100% liable in more or less similar electrocution incidents.
19. On the multiplicand used to compute the award for loss of dependency, the court is told that PW4's evidence that the deceased earned Kshs. 30, 000 per month at the material period is credible as the witness was the deceased's boss at ISL Kenya Ltd where they both worked. The appellant relies on the following decisions to wit; Mungai vs Mukuha (suing as Administrator and/or Personal Representative of the Estate of Duncan Wangugi (deceased)(2022) KEHC 12691(KLR) and Nathan Soire T/A Getembe Prime Distributors V. Lucia Nyoera Nyabayo & Peter Ooro Ongeru (suing as Legal Representatives of the Estate of Jacob Nyabayo Ongeru (deceased) (2016) eKLR. In these cases, letters or employment agreements from employers were considered sufficient evidence of earnings of an employee for the purposes of assessing damages suffered.

The Respondent's Submissions

20. The respondent's advocates' reply is that the lower court correctly determined the issue of liability and properly assessed damages for loss of dependency. It is contended that the respondent discharged its duty of care towards the deceased and other members of the public by surrounding the ditch containing the cables with a caution tape and ensuring that the cables were heavily armoured to prevent electrocution. Relying on the case of Rotich vs Mutai (Civil Appeal 15 of 2021 (2022) KEHC 14134 (KLR) (19 October (2022) (Judgement), the respondent submits that it met the famous "but for" test by showing that the deceased's electrocution was not the consequence of its negligence. Further reliance is placed inter alia on the judicial determination in PNM & Another (Legal Representative of the Estate of LMM vs Telkom Kenya Ltd & 2 Others (2015) eKLR in which the Court of Appeal held that where the circumstances of an accident give rise to the inference of negligence the defendant "has to show that there was a probable cause of the accident which does not connote negligence, or that the explanation for the accident was consistent with absence of negligence", in order to escape responsibility.
21. The respondent also finds common ground with the lower court for rejecting the salary of the deceased as the multiplicand in the computation of damages for loss of dependency. The appellant's evidence in this regard is attacked as inconsistent for the reason that the deceased' Death Certificate indicates that he was unemployed. Moreover, it is pointed out that there is no evidence of the deceased's confirmation in employment after his purported three months probation period commencing on 1/10/2018.

Analysis and Determination

22. Based on the submissions and the Record of Appeal, the appeal is against the trial court's judgement on liability and the award for loss of dependency. I will consider both Grounds of Appeal together.
23. The issues for determination in this appeal are two-fold:
 - a. Whether the trial court lawfully apportioned liability between the parties equally.
 - b. Whether the appellant proved that the deceased was earning Kshs. 30,000 at the time of his demise that could be used as a multiplicand in assessment of loss of dependency.
24. Whereas the appellant's evidence is that the deceased fell into the ditch as a result of the respondent's negligence, the latter counters that the deceased was electrocuted while vandalizing the electricity



cables. PW3's evidence that he saw the deceased attempting to jump over the trench before falling into it has not been discredited. Merely because he did not himself report the incident is not sufficient to impeach his testimony. The respondent has not called the police officers who are said to have taken custody of the hack saw the deceased allegedly used to cut the cables. I see no reason to doubt the evidence of PW3 which discounts the respondent's claim that the deceased was vandalizing the cables. The trial court's decision ascribing liability to the deceased therefore appears to be based on speculation rather than credible evidence. I accordingly concur with the appellant that the deceased was wrongly found equally to blame for his injury. Instead, I find the respondent wholly liable for the accident.

25. Regarding assessment of damages for loss of dependency, the deceased's Certificate of Death indicates that he was unemployed while PW4 states that he was an employee of ISL Kenya Ltd . Because of the inconsistency of the respondent's evidence on this fact, the trial court decided to use the minimum wage of 11,771 in terms of the Regulation of Wages Order 2018 as the multiplicand.
26. The evidence shows that the deceased was engaged by ISL Kenya on probationary terms and that he was to be confirmed in employment upon satisfactory job performance. If indeed he was such employee, there is no evidence that he was evaluated and confirmed on the job seeing that the probation period was over at the time of his demise.. It is not further shown if there were any deductions, including statutory charges, from his salary and what his net pay was after any deductions.

Determination

27. In the circumstances the trial court is not to be faulted for using an alternative method of assessing loss of dependency. It is trite law that where, as here, there is no clear evidence of the deceased's income, relevant prevailing minimum wage or a global/lump sum award may be adopted. I will not therefore disturb the learned trial magistrate's award for loss of dependency.
28. In the result, the lower court's judgement on liability is set aside and substituted with an order adjudging the respondent wholly liable for the claim. The trial court's award for loss of dependency stands. Regarding the costs of the appeal, the appellant has partly succeeded. It is directed that the parties will bear their own costs of the appeal.
29. Judgement accordingly.

J. M NANG'EA, JUDGE.

JUDGEMENT DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024 IN THE PRESENCE OF:

The Appellant's Advocate, Ms Okumu

The Respondent's Advocate, Mr. Karani Advocate for Ms Boru

The Court Assistant, Mr. Lepikas

J. M NANG'EA, JUDGE.

