



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 182 OF 2017

PIUS WASWA ONYANDI

**(Suing as the Administrator of the Estate of the ZAITUN NAFULA
JAVAN DECEASED).....APPELLANT**

VERSUS

MOHAMED HASSAN.....1ST RESPONDENT

KENYA POWER & LIGHTING CO. LTD.2ND RESPONDENT

(An Appeal from the Judgment of Hon. Kyambia, Senior Principal Magistrate, delivered on 8th September, 2017 in Mombasa Chief Magistrate's Court Civil Cause No. 2205 of 2014).

JUDGMENT

1. The suit in the lower court was filed by the plaintiff (appellant) as the administrator of the estate of his deceased wife, Zaitun Nafula Javan. The case against the 1st and 2nd defendants (1st and 2nd respondents) was that the deceased died on 12th May, 2014 as a result of electrocution at the 1st respondent's building at VOK – Maweni sub-location in Mombasa County. The deceased's death as per the plaint filed on 7th November, 2014 was attributed to the negligence, recklessness and carelessness of both the respondents.

2. On 20th January, 2015, the 1st respondent filed his statement of defence and denied that the deceased was anywhere near his premises on the material date. In the alternative, he averred that the deceased was struck by lightning and was not electrocuted by electricity as alleged.

3. The 1st respondent further averred that the generation and transmission of electricity in Kenya was the sole mandate of the 2nd respondent, the Kenya Power & Lighting Company Limited. The 1st respondent denied the particulars of negligence enumerated in paragraph 5(ii) of the plaint and put the appellant to strict proof thereof.

4. The 2nd respondent failed to enter appearance within the time required and an interlocutory Judgment was entered against it on 5th February, 2015.

5. In the Judgment of the lower court, the appellant's suit as against the 1st respondent was dismissed with costs. Judgment was entered for the appellant as against the 2nd respondent in the sum of Kshs. 495,560/=. The appellant was also awarded costs and interest.

6. The appellant was dissatisfied by the decision of the Trial Magistrate and on 14th September, 2017 he filed a memorandum of appeal raising the following grounds of appeal-

(i) That the learned Magistrate totally erred in law and fact by dismissing the appellant's case as against the 1st respondent (1st plaintiff) (sic) based on the assertion that he had no duty of care to the deceased which was against the law and common law;

(ii) That the learned Magistrate totally erred by not attributing negligence to the 1st respondent, the negligence of dangerously wiring his house without the necessary certificate of wiring and having electricity without properly wiring his house (sic);

(iii) That the learned Magistrate erred in law and fact by relying on the evidence of a witness who was not truthful, was not

established as an employee of the 1st respondent and his evidence was hearsay with no evidence of employment;

(iv) That the learned Magistrate erred in law and fact by awarding damages and special damages that were inordinately low in the circumstances of the case and fell into error;

(v) That the learned Magistrate erred in law and fact in his findings on the aspect of the house being covered by mabati, where no evidence was brought forth on this matter nor was it proved, hence he fell into error;

(vi) That the whole Judgment by the learned Judgment (sic) was arrived at wrongly not based on facts and the law and as such fell into error;

(vii) That the learned Magistrate was wrong on both liability and the quantum of Judgment (sic) granted, hence fell into error.

7. The appellant's prayer is for the appeal to be allowed and for the whole Judgment by the Senior Principal Magistrate to be set aside and for the appeal to be allowed with costs.

8. On 25th October, 2019 the law firm of Ambwere T.S & Associates filed written submissions on behalf of the appellant. The 1st respondent's submissions were filed on 14th February, 2020 by the law firm of Munyao Muthama & Kashindi Advocates.

9. In highlighting submissions for the appellant, Mr. Ambwere stated that on the issue of liability, the 1st respondent was negligent in allowing an incomplete building which had no certificate from the Kenya Power and Lighting Company Limited (2nd respondent), to be supplied with electricity. He also submitted that the learned Magistrate was wrong when he concluded that the deceased who was electrocuted had trespassed into the premises of the 1st respondent, as there was no evidence to that effect and the said issue had not been pleaded or raised during the hearing.

10. It was submitted for the appellant that from the evidence which was adduced, the 1st respondent's house was right at the road and that there was no barrier or gate. It was indicated that photographs of the said house which was under construction were produced.

11. Mr. Ambwere submitted that the gross damages awarded of Kshs. 495,560/= were manifestly low for a life lost through negligence by way of electrocution. He prayed for an award in the sum of Kshs. 1.2 Million for the life lost. He urged this court to look at the authorities they had relied on in their written submissions and for the appeal to be allowed.

12. Mr. E. Nyongesa Advocate, highlighted submissions on behalf of the 1st respondent. He stated that during the trial, the appellant testified that there were iron sheets which had been erected around the 1st respondent's house and that was enough to show the public that the building was under construction. He submitted that the deceased entered the building without the permission of the 1st respondent and as such, she was a trespasser. It was stated that for the said reason, the owner of the building owed her no duty of care. It was stated that the deceased was standing outside in a pool of rain water which she was drawing, at the time she died.

13. Mr. E. Nyongesa stated that the evidence adduced before the Trial Court by the 1st respondent's witness (DW1) was to the effect that the deceased was struck by lightning, and that DW1 testified that there was no indication that there was electricity in the house. He pointed out that no post mortem report was produced to prove that the deceased was electrocuted by electricity and not by lightning.

14. It was further submitted that the deceased was not employed but depended on the appellant. It was indicated that she was not providing for the appellant or any other person. Mr. E. Nyongesa wondered why the appellant had accepted payment from the 2nd respondent yet he had filed an appeal.

15. In response to the submissions made by Mr. E. Nyongesa, Mr. Ambwere submitted that there is a difference between death caused by lightning and death which is caused by electricity. He asserted that no one challenged the cause of the deceased's death. He also submitted that non-production of a post mortem report was not an issue before the lower court.

ANALYSIS AND DETERMINATION

16. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced before the lower court and reach its own independent decision, while bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In the case of **Oluoch Eric Gogo v Universal Corporation Limited** [2015] eKLR, the Court restated the duty of the 1st appellate court as follows-

“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another [1968] EA 123. My duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect ... from the above decisions which echo Section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.”

17. The issues for determination in this appeal are-

(i) If the 1st respondent was liable for the death of the deceased;

(ii) If general and special damages awarded against the 2nd respondent should be disturbed; and

(iii) If general and special damages, interest and costs should be awarded to the appellant as against the 1st respondent.

18. In the lower court case, PW1 was Pius Waswa Onyando, a resident of VOK, Mombasa. He was the deceased's husband. He indicated that he used to work as a watchman. He stated that on 12th May, 2014 at 3:00p.m., it was raining and that he was at his house. He testified that there was some water coming from an unfinished building and his wife was electrocuted. He indicated that the house belonged to the 1st respondent, Mohamed Hassan. PW1 produced a photograph he took of the said house. He stated that when his wife was electrocuted, he took a piece of wood and pushed her. That he then rushed her to Coast Province General Hospital (CPGH) but by the time they reached the said hospital, she had passed on. He indicated that his wife died out of electrocution. He produced her death certificate.

19. He stated that he incurred funeral expenses in the sum of Kshs. 427,500/=. PW1 blamed the respondents for installing power in an unfinished building and stated that there was no warning of the installation of electricity and that there was no lightning arrester at the 1st respondent's house. He indicated that his wife left 4 children and that she was doing normal jobs and was getting Kshs. 8,000/=.

20. PW2, Martin Shatimba, was a son to PW1 and the deceased. His evidence was that he was informed by his father (PW1) that his mother had been electrocuted. He travelled to Mombasa and saw her. He stated that he used to do casual labour and that their mother was helping him as well as his brothers and sister. He stated that he lost motherly love through her death.

21. The 1st respondent called Omar Mbwana Mohamed as his witness. He testified as DW1. He stated that he was a caretaker of the 1st respondent's house. He offered himself for cross-examination based on his statement which was filed in court on 21st January, 2015. He adopted it as his evidence before the lower court.

22. On being cross-examined, PW1 stated that the deceased was standing on the door of the house which he was taking care of. His evidence was that he was at a neighbour's house which was about 5 meters away as there was nowhere he could take shelter since the 1st respondent's house was incomplete. He stated that at the said time there were tenants occupying the house and the house was not complete. He also stated that the deceased was fetching water from the balcony and that her death was as result of lightning, which also damaged the house.

23. DW1 further stated that the people who were sheltering from rain rushed and took the deceased to a Tuktuk. It was his evidence that the power lines were properly installed in the 1st respondent's house after approval was given by the 2nd respondent. He stated that there was an earth wire installed at the said house.

If the 1st respondent was liable for the death of the deceased.

24. In the case of **Donoghue v Stevenson** [1932] AC 580, it was stated that every person must take reasonable care to avoid acts or omission which can reasonably be foreseen as likely to injure a neighbour.

25. DW1's position was that the 1st respondent's house was fenced off with iron sheets. PW1 on being cross-examined stated that there were iron sheets put around the house to prevent people from accessing it.

26. This court has looked at the photograph which was produced by PW1 as exhibit No. 1. It is the photograph of an incomplete house which is partly fenced off with iron sheets. On the unfenced part of the house, there is a balcony with a protruding pipe. DW1 said that the deceased was fetching rain water pouring from the balcony and she was standing on the door of the house he was taking care of. PW1 also said that his wife was collecting rain water.

27. Looking at the said photograph (exhibit No.1), it is evident that the deceased could not have fetched rain water which was coming from the balcony if she was standing on the door of the 1st respondent's house under construction. It is evident from the photograph that the balcony extends outwards and the area beneath the balcony was not fenced off with iron sheets. This court therefore has no difficulties in reaching the conclusion that the house under construction was not fully fenced off so as to deter any persons from carrying out any activity outside the said house. It is therefore apparent that the 1st respondent failed to take adequate steps to prevent members of the public from accessing the house which was under construction.

28. DW1 asserted that the deceased was electrocuted by lightning. PW1 on the hand, testified that she was electrocuted by electricity. The death certificate confirms that the deceased died as a result of electrocution.

29. In the case of **Kanyungu Njogu v Daniel Kimani Maingi** [2000] eKLR, it was held thus-

“..... when a court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that probability was more probable than the other.”

30. In this case, DW1 stated that the 1st respondent's house had electricity and that the power lines were properly installed after the 2nd respondent approved the installation of electricity. DW1 claimed that the lightning which electrocuted the deceased also damaged the 1st respondent's house. Had DW1 produced a certificate from the 2nd respondent confirming that it had certified that that electricity had been properly installed in the 1st respondent's house, then the Trial Magistrate would have held that it was more probable that the deceased was

electrocuted by lightning and not electricity.

31. DW1 made a sweeping statement that the 1st respondent's house was damaged by lightning. If indeed lightning struck the deceased when she was collecting rain water which was coming from the balcony, the damage caused by lightning would be visible and would be identifiable from the photograph produced by PW1. The alleged damage caused to the 1st respondent's house was not pointed out by DW1 and the incomplete house seems to be intact on the said photograph.

32. From this court's analysis and re-evaluation of the lower court proceedings, it is discernible that DW1 was not a truthful witness. His evidence was that the 1st respondent's house was incomplete and was still under construction and that he had to seek shelter at another house when it was raining. In the same breath, he said that there were tenants living in the 1st respondent's house. Looking at exhibit No. 1, the ground floor of the said house has no doors or windows. The upper floor is incomplete, with no roof. One is left wondering what kind of tenants were occupying a house which was still far from completion. I therefore conclude that DW1's evidence was geared towards achieving a narrative to the effect that the deceased's death was brought about by electrocution due to lightning.

33. In the case of **Donoghue v Stevenson** (supra), Lord Atkin while explaining a person's liability for negligence and persons who may claim redress stated thus:-

“Rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question “who is my neighbor” receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

34. This court's finding from the circumstances of this case and in applying the principles in the above decision is that the 1st respondent failed to reasonably foresee what was likely to arise by his failure to properly have electricity installed in his incomplete house and to take reasonable care by fully fencing off the premises at which the deceased was electrocuted. This court's finding is that the Trial Magistrate misapprehended the evidence and applicable law on negligence and thereby arrived at an erroneous finding by holding that the 1st respondent was not liable for the death of PW1's wife. The deceased cannot be said to have trespassed into the 1st respondent's house when it was clearly not completely fenced off. Having analysed the evidence and the law on negligence, I hold the 1st and 2nd respondents jointly and severally liable for the death of the deceased.

35. The 1st respondent's Counsel's argument on the issue of liability does not persuade me that he was not liable. I however do agree with him that the decision in **Rylands v Fletcher** (supra) which was cited by Counsel for the appellant does not apply in the circumstances of this case.

If general and special damages made against the 2nd respondent should be disturbed.

36. On the issue of quantum of damages, Mr. Ambwere in his written submissions prayed for a gross award in the sum of Kshs. 1,930,000/=. He prayed for Kshs. 1,400,000/= for loss of dependency and general damages for unlawful death. He urged this court to adopt a multiplier of 14 years. He relied on the decisions in **Francis Mutua Singi v Kenya Ports Authority**, Mombasa High Court Civil Case No. 52 of 1999 and **Onesmus Maingi & Another v Susan Kendi Mbui**, Meru High Court Civil Case No. 144 of 2001.

37. The 1st respondent opposed the appeal herein and was of the view that the lower court decision should not be disturbed.

38. The deceased was 46 years when she died. Looking at decision of persons who were close to the deceased's age at the time she died, this court will be in a position to ascertain if the multiplier adopted was reasonable.

39. In the case of **Richard Macharia Nderitu v Philemon Rotich Langas** [2013] eKLR, the court applied a multiplier of 10 years in the instance of a 47-year-old deceased person. In **Patricia Mona & Another v Samuel OPott Omondi & Another** [2014] eKLR, a multiplier of 9 years was applied for a deceased who was 47 years old.

40. In the case of **Nelly Nduku Mutua** (suing as the legal representative of the estate of James Mutua Makenzi – deceased) **v Africa Line Transport Co. Limited & another** [2019] eKLR, the court adopted a multiplier of 10 years for a deceased who was aged 48 years. In the most recent case of **Crop Africa Limited v Joseph Murangiri** [2020], the court adopted a multiplier of 11 years for a 47-year-old deceased person.

41. This court is in concurrence with the appellant's Counsel that the multiplier of 8 years adopted in this case by the trial court was too low. The deceased was a maid. Being a woman, she would have been capable of doing the said work up to the age of 60 years or beyond. Taking into account the above legal precedents and vagaries of life, I substitute the multiplier of 8 years with 12 years.

42. The deceased's husband used to work as a watchman and it can safely be concluded that both the deceased and PW1 were shouldering expenses for their homestead. The multiplicand of 1/3 applied was therefore apt.

43. Having considered all the parameters necessary, the loss of dependency and general damages for the unlawful death of the deceased works out as follows– $8,580 \times 12 \times 12 \times 1/3 \times 12 = 411,840/=$.

44. I agree with the submission made by Counsel for the appellant that the deceased must have suffered excruciating pain before she died as a result of electrocution. I therefore enhance the award for pain and suffering to Kshs. 50,000/= as prayed.

45. The claim for an enhancement of special damages for the costs incurred in funeral expenses is untenable. In the case of **Jacob Ayiga Maruja & another v Simeon Obayo** [2005] eKLR, the Court of Appeal held as follows in regard to funeral expenses-

“We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs.117,325/= awarded by the learned trial Judge as “funeral expenses and other expenses” were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.”

46. In this case, considering the deceased’s station in life as a maid, it was unlikely that the cost of Kshs. 380,000/= was incurred for funeral expenses. If it was, proper documentation in terms of receipts should have been kept and produced in evidence. The said amount was exorbitant and was properly disallowed. I find that the sum of Kshs. 101,000/= which was awarded by the Trial Court in special damages was reasonable.

47. Taking into account the enhancement of the multiplier and the award for pain and suffering, the gross award made is as follows-

(i) Loss of dependency and general damages for unlawful death	Kshs. 411,840/=
(ii) Pain and suffering	Kshs. 50,000/=
(iii) Loss of expectation of life	Kshs. 100,000/=
(iv) Special damages	<u>Kshs. 101,000/=</u>
Gross award	<u>Kshs. 662,840/=</u>

48. The appellant is also awarded costs of the lower court case and this appeal. He is also awarded interest at court rates. The gross award, costs and interest shall be shared on a ratio of 50:50 by the 2 respondents herein. The appeal succeeds to the above extent.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 22nd day of January, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of-

No appearance for the appellant

Mr. Eliud Nyongesa for the 1st respondent

No appearance for the 2nd respondent

Mr. Oliver Musundi - Court Assistant.