



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 11 OF 2019**

**EDWARD MWENDA LAICHENA.....APPELLANT**

**VERSUS**

**JACOB GICHUNGE.....1<sup>ST</sup> RESPONDENT**

**KENYA POWER AND LIGHTING COMPANY....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the judgment and decree of Hon. G. N. Wakahiu, CM in the Maua CMCC No. 116 of 2011 made on 31/12/2018)**

**J U D G M E N T**

1. By a plaint dated 12/5/2011, the appellant claimed as against the 1<sup>st</sup> and 2<sup>nd</sup> respondent general, punitive, and aggravated damages for the wrongful death of **Judy Kagwiria Ngiri (deceased)**, and for loss of consortium and conjugal rights. He also sought damages under the Law Reform Act and Fatal Accidents Act, damages for loss of unborn child, Kshs.101,000/- special damages, plus costs and interest.
2. He alleged that on the night of 13/14<sup>th</sup> December, 2009, the deceased who was his wife, was electrocuted in the bathroom of the residential flat known as Mwonge House belonging to the 1<sup>st</sup> respondent. He blamed the respondents for the said accident and pleaded several particulars of negligence against them.
3. The respondents denied the claim and in their respective defences, blamed each other as well as the deceased for the accident. The 1<sup>st</sup> respondent further blamed one **Joel Mukobwa t/a Igembe Electrical Services** ("3<sup>rd</sup> party), who had undertaken the wiring of the said building. He took out 3<sup>rd</sup> party proceedings against him, but failed to pursue them.
4. The trial Court found for the appellant and awarded him Kshs.1,780,000/- general damages for loss of expectation of life and loss of dependency and Kshs.19,800/- special damages. The claims for aggravated, punitive damages and loss of consortium were dismissed.
5. Aggrieved by that decision, the appellant filed this appeal raising two grounds of appeal, *to wit, that the trial Court erred in awarding inordinately low damages and in failing to award punitive, exemplary and aggravated damages.* The parties filed their respective submissions which the Court has carefully considered.
6. As a first appellate Court, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See **Selle v Associated Motor Boat Co. & others [1968] E.A. 123.**
7. **Pw1 Edward Mwenda Laichena** married the deceased on 9/5/2009. They moved to live together in the subject building in March, 2009. On the fateful day, the deceased entered their bathroom to bath but did not come out. When he went to check on her, he found that she had been electrocuted. He called for transport but when they reached Maua Methodist Hospital, the deceased was pronounced dead.
8. He told the Court that the building had electrical problems which he had reported severally to the caretaker of the house. That a report prepared by the 2<sup>nd</sup> respondent's engineer had concluded that there had been poor workmanship and recommended disconnection of power to the building. The deceased had a salon from which she was earning Kshs. 20,000/= per month and a boutique wherefrom she would earn Kshs 50,000/= per month. In addition, she had a contract for training people for 3 months and earned Kshs. 40,000/=.
9. **Pw2 Doreen Kagendo Mwenda**, a tenant in the subject building, recalled waking up on the morning of 15/12/2019 to find police officers outside. She later learnt that the deceased had been electrocuted. That the building had a problem as the walls always had tingling sensations.

10. **Dw1 Regina Mukiri Gichunge**, the administrator of the estate of 1<sup>st</sup> respondent told the Court that, the wiring in the building was done by the 3<sup>rd</sup> party. She blamed the 2<sup>nd</sup> respondent and the deceased for the tragedy. That when they entered the house of the appellant on the material day, they found naked wires in the bathroom suggesting that the deceased had tampered with the wiring.

11. **Dw2 Henry Kiome** was the caretaker of Mwonge House. That he had seen the appellant enter his house with two people carrying wires. That when he entered the appellant's house, he found wires dangling.

12. The parties filed their respective submissions which the Court has considered. The 1<sup>st</sup> respondent submitted that this appeal was a non-starter as the parties had compromised the same vide Meru HCCA No. 12A of 2019 Regina Mukiri Gichunge & Fridah Kanini Gichunge (suing as legal representatives of Jacob Gichunge Muchiri v. Edward Mwenda Laichena (suing as legal representative of Judy Kagwiria Ngiri & Another and Meru HCCA No. 13 of 2019 Kenya Power & Lighting Company Ltd v. Edward Mwenda Laichena (suing as the legal representative of Judy Kagwiria Ngiri) & Another (hereinafter "the said appeals").

13. The 1<sup>st</sup> respondent further submitted that in the aforesaid appeals, the respondents in this appeal had settled the decretal amount decreed by the trial Court on condition that the appellant and his advocate will have no further claims against them. That the advocate executed a professional undertaking whereby the respondents withdrew their respective appeals.

14. On 28<sup>th</sup> November 2019, the 1<sup>st</sup> respondent filed a supplementary record of appeal. In it, the 1<sup>st</sup> respondent produced the memorandums of appeal in HCCA Nos. 12A and 13 of 2019 aforesaid, a replying affidavit of Christine Murithi sworn on 4/11/2019, a professional undertaking dated 4/4/2019 and Bankers cheques totalling Kshs. 2,137,949/- In additional, there was correspondence between the advocates in this matter.

15. I have looked at the said professional undertaking. The same was executed by **Kirimi Mbogo, Advocate** which read in part as follows: -

**"I, KIRIMI MBOGO of M/S MBOGO & MURIUKI ADVOCATES do hereby give my Professional Undertaking that neither our firm nor EDWARD MWENDA LAICHENA, his agents assigns, or successors in title will have any other claims howsoever against the Administrators/Administratrixes of the estate of JACOB GICHUNGE MUCHIRI or their agents, assigns or successors in title in respect of the accident that occurred on the night of 13<sup>th</sup>/14<sup>th</sup> December, 2009 to JUDITH KAGWIRIA NGIRI on top or in excess of Kshs.1,068,000/- ...".**

16. Pursuant to the said undertaking, the respondents paid their respective portions of the decretal amount and the said appeals were withdrawn.

17. The advocates did not respond to the said submissions by the 1<sup>st</sup> respondent. In the cases relied on by the 1<sup>st</sup> respondent of Equip Agencies Limited v. Credit Bank Ltd Nrb HCCC No. 773 of 2003 and Diamond Star General Trading LLC v. Ambrose Rachier t/a Racier & Amolo Advocates [2017] eKLR, the courts were emphatic that professional undertakings are significant and binding on the advocates as are on their clients.

18. In the present case, it is obvious **Mr. Kirimi Mbogo, Advocate** executed the subject professional undertaking promising not to pursue any further claims in respect of the accident the subject of this appeal on receipt of the decretal amount. He and his client received the decretal sum, banked and used the same. They tricked the respondents to pay the said amount and withdraw their appeals which were challenging the trial Court's judgment, then proceeded to prosecute the present appeal.

19. That is unacceptable! Both **Mr. Kirimi Mbogo**, advocate and the appellant are estopped from turning back on the agreement contained in the aforesaid undertaking. They are bound by it. It is an apprehensible conduct which must be discouraged at all costs. It will be a tragedy if courts will allow such conduct in the practice of law. The conduct of the legal profession will have been thrown out of the window.

20. As at the time **Mr. Kirimi Mbogo** was executing the professional undertaking, the present appeal had not been served. The same was only served in October, 2019, way after the respondents had paid the decretal amount and had their appeals withdrawn.

21. This Court had in its ruling of 21/11/2018 indicated that the professional undertaking was not applicable to the present matter. However, at the time of writing the said ruling, all the documents and facts relating to the subject professional undertaking had not been brought to the attention of the Court. Otherwise the court would have stopped the appellant on her tracks.

22. On the foregoing alone, this appeal does not lie and it is for dismissal.

23. However, this not being the last appellate Court, I have to decide on the other issues submitted to this Court if I am found to have been wrong on the foregoing.

24. The two grounds of appeal, *to wit*, that the trial Court erred in awarding inordinately low damages and in failing to award punitive, exemplary and aggravated damages estimated by the appellant at Kshs.15,000,000/- can be dealt with as one. This is so because they relate to the award on damages.

25. The appellant submitted on three sub-headings. On loss of dependency, it was submitted that the trial Court erred in applying Kshs.4,000/- as the multiplicand. That from the evidence adduced, the proper figure should have been Kshs.15,000/- per month. It was urged that a multiplier of 35 years should have been used. The appellant submitted for Kshs.300,000/- for loss of expectation and Kshs.100,000/- for pain and suffering. The cases of Chania Shuttle v. Mary Mumbi [2017] eKLR and RKO & Another v. Kenya Power & Lighting Co. Ltd [2015] eKLR were cited in support of those submissions.

26. The respondents submitted that the trial Court had applied the correct principles in arriving at the award it gave. That there was no obligation on the part of the trial Court to award any punitive, aggravated and or exemplary damages. Several cases were cited by the respondents in support of those submissions which the Court has carefully considered.

27. The principles applicable when an appellate Court is considering an appeal on quantum of damages are well known. They were settled in the case of **Bhatt v. Khan [1982-88] 1 KAR 1**. These are to the effect that the exercise of discretion of the trial Court in awarding damages can only be interfered with if it is shown that the trial Court applied wrong principles or that the Court failed to consider a relevant fact or that the damages awarded are too low or too high as to amount to wrong estimation of the damages.

28. In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727 at p. 730**, Kneller J.A. stated:-

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.**

29. In the present case, the trial Court considered the age of the deceased and used a multiplier of 35 years. It also relied on the minimum wage since there was no acceptable evidence on the deceased’s earnings. It is the cardinal principle of law that he who alleges must prove and this burden does not shift. The appellant’s submission that his evidence was not controverted does not hold water.

30. In their statements of defence and cross-examination, the appellant was put to strict proof. The appellant was unable to explain his figures on cross-examination. In this regard, the trial Court was entitled to rely on the minimum wage at the time. The least it could have done was to apply the global sum rule. I therefore find that the trial Court cannot be faulted in the conclusions it arrived at.

31. On the issue of exemplary and aggravated damages, there was no evidence to support the same. There were no acts or conduct of the respondents that was shown to constitute conduct sufficient to slap them with such damages.

32. Further, in his submissions, the appellant did not show that he was entitled to those damages. In **Obongo & Another V Municipal Council of Kisumu [1971] EA 91**, the Court of Appeal held:-

**“..... the power to award exemplary damages does not affect the power of the court when making an award of general damages to take into account the conduct of the defendant as an aggravating factor ... It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and it is to some extent an unreal one. It is well established that when damages are at large and the court is making general award, it may take into account factors such as malice or arrogance on the part the defendant and this is regarded as increasing the injury suffered by the plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.”**

33. On aggravated damages, the Court of Appeal in the **Miguna Miguna v The Standard Group Ltd & 4 others [2017] eKLR** also expressed itself as follows while referring to the case of **John v MG Limited [1997] QB 586**.

**“The aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurried defence of justification or failure to apologize.”**

34. In **Patrick Muiyah v Reginald Okumu [2019] eKLR**, the Court held that exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future

35. In this regard, I find that there was no evidence on which the trial Court would have awarded both aggravated and exemplary damages. There was no improper motive or conduct or aggravating circumstances that was proved on the part of the respondents, to warrant the awarding of the said kind of damages.

36. With regard to **loss of Consortium**, the Court of Appeal held in **Salvadore De Luca vs. Abdullahi Hemedi Khalil & Another [1994] eKLR**, that: -

**"So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife’s companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full."**

37. Consortium has been defined as companionship, love, affection, comfort, mutual services, sexual intercourse; all which belong to the married state (see **Chege Kimotho & Others v Maria Vesters & Another [1998] eKLR**). I have considered that the plaintiff married the deceased on 9th May 2009 and the deceased died on 14<sup>th</sup> December 2009, seven months later. At the time of the deceased’s death, the appellant was 28 years of age. He did not tell the Court if he had since married or not. I would have awarded Kshs. 40,000/= in this regard.

38. In view of the foregoing, I find the appeal to have no merit and the same is hereby dismissed with costs.

**SIGNED** at Meru

**A. MABEYA**

**JUDGE**

**DATED** and **DELIVERED** at Meru this 27<sup>th</sup> day of February, 2020.

**F. GIKONYO**

**JUDGE**