



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 35 OF 2018

KENYA POWER & LIGHTING COMPANY LTD.....APPELLANT

VERSUS

JAMES MULI KYALO AND AGNES MWONGELI KIMILU (Suing as personal

representatives of Estate of STANLOUS KIMILU KYALO (Deceased)...RESPONDENTS

(An appeal from the judgment and decree of Chief Magistrate's Court at Kajiado, (Hon. M. Chesang), (RM), dated 28th September, 2018 in Civil Suit No. 23 of 2017)

JUDGMENT

1. This is an appeal from the judgment and decree of Hon. M. Chesang, (RM), dated 28th September, 2018, delivered in C.M No. 23 of 2017. In that suit, respondents sued the appellant for general and special damages for the deceased's death through electrocution. The trial magistrate court found the appellant 100% liable and awarded Kshs. 10,000 for pain and suffering, Kshs, 85,000 for loss of expectation of life and Kshs. 4,000,000 for loss of dependency. The court also allowed special damages Kshs. 63,000/- as had been pleaded in the plaint.

2. The appellant was aggrieved with the trial court's judgment and lodged a memorandum of appeal dated and filed on 26th October, 2018 and raised the following grounds, namely;

- 1. The learned magistrate erred in law and fact by arriving at a finding on liability which went against the weight of evidence.**
- 2. The learned magistrate erred in law and fact by making a finding in favour of the respondent when they had not proved their case on a balance of probabilities.**
- 3. The learned magistrate erred in law and fact by shifting the burden of proof to the appellant.**
- 4. The learned magistrate erred in law and fact by calculating loss of dependency on the basis of daily income of Kshs, 1000/- when there was no evidence in support of the deceased's occupation or income.**
- 5. The learned magistrate erred in law by failing to deduct the damages awarded under the Law Reform Act from the total award.**
- 6. The learned magistrate erred in law by taking into account irrelevant factors in arriving at the deceased's earnings.**
- 7. The learned magistrate erred in law by awarding special damages when the same were not strictly proved.**
- 8. The learned magistrate erred in law by awarding advocates costs for taking out limited grant contrary to the provisions of section 6 of the Fatal Accidents Act.**
- 9. The learned magistrate erred in law by awarding damages that was too excessive in the circumstances and not commensurate with the loss suffered.**
- 10. The learned magistrate erred in law and fact by ignoring the appellant's submissions.**

3. During the hearing of the appeal, Ms. Chirchir, learned counsel for the appellant, submitted highlighting their written submissions dated 7th November, 2019 and filed on 8th November, 2019, that the trial court was wrong in finding the appellant 100% liable for the negligence on strict liability basis.

4. According to counsel, even though the appellant did not call evidence, the respondent was still required to prove their case on a balance of probabilities. Counsel submitted that there was no evidence on what happened; the respondents produced photographs which had no nexus with the scene of accident and that there was no evidence placing the deceased to the proximity of the power lines. Counsel also argued that the respondent's evidence was that the deceased was at a construction site which was however not identified; that the photographs do not show loose power lines and that power lines are high up and not on the ground as pleaded in their plaint. Counsel argued that the respondents did not show that the appellant failed in its duty leading to the deceased's electrocution.

5. On quantum, counsel submitted that the trial court was wrong in accepting deceased's income of Kshs. 1000/- per day when there was no evidence to support it. She argued that there was no evidence in what the deceased was doing and in the absence of such evidence, the trial court should have applied the minimum wage.

6. Counsel submitted that under Legal Notice No. 112 of 2017, (column 4), minimum wage is Kshs. 349.50 per day, thus the deceased's income would be Kshs. 8,398 per month which the trial court should have applied. She also argued that the multiplier of 25 used was higher. In counsel's view, the court should have taken into account the unpredictable nature of life and used a multiplier of 15 years.

7. On special damages, counsel argued that the respondents did not prove special damages as required. According to counsel, the only amount mentioned in the testimony was Kshs. 22,000/- for funeral expenses, while the rest of the amount was in the submissions. Counsel submitted that under section 6 of the Fatal Accidents Act, only funeral expenses costs are allowed and no other sums. Counsel faulted the trial court for not considering the appellant's submissions.

8. She argued that the trial court should have also subtracted the awards under the Fatal Accidents Act from that under the Law Reforms Act. She relied on several decisions to support her arguments and urged the court to allow the appeal and set aside the trial court's judgment.

Respondents' submissions

9. Mr. Wambugu, learned counsel for the respondents relied on their written submissions dated 8th November 2019 and filed on 11th November 2019 as well as the submissions and documents filed and produced before the trial court. He argued that the photographs had nexus with the scene of the accident and relied on the respondents' evidence on record and the authorities they cited. He submitted that the deceased worked as a mason, a fact that was stated in the death certificate and the post mortem report produced before the trial court. Counsel admitted that there was no eyewitness but argued that the death certificate showed that the cause of death was electrocution.

10. On quantum, Mr. Wambugu argued that there was evidence by the respondents that the deceased was earning Kshs. 1000/- per day and they cited authorities before the trial court on minimum wage since it is hard for casual workers to keep records. On the multiplier, he submitted that retirement age is 60 years; that they had asked for a multiplier of 31 years but the trial court used a multiplier of 25 years because the deceased was 29 years at the time of his death.

11. On special damages, counsel argued that although there were no receipts, he also urged the court to take into account the Advocate's Remuneration Order. He relied on Leonard Ekisa & Another v Major K. Birgen (HCCC No. 2/2003 [2015] ECLR (page 86 record of appeal) on funeral expense.

12. He also submitted that section 2(5) of Law Reform Act does not require that what has been awarded under the Fatal Accidents Act be subtracted of from awards under the Law Reform Act.

13. On their cross appeal, he submitted that the amount awarded was inordinately low and that the trial court should have used a multiplier of 31. He urged that the appeal be dismissed and cross-appeal allowed with costs.

Determination

14. I have considered the appeal, the cross appeal, submissions and the trial court's record. I have also considered the impugned judgment and the decisions relied on. This being a first appeal, it is by way of a retrial and parties are entitled to this court's reconsideration, reanalysis and reevaluation of the evidence afresh and its own conclusion on that evidence. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

15. In Williamson Diamonds Ltd and another v Brown [1970] EA 1, the court held:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

16. Further, in PIL Kenya Limited v Oppong [2009] KLR 442, it was held that:

“It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that”.

17. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the Court of Appeal stated that the primary role of a first appellate court is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the trial court are to stand or not and give reasons either way.

18. PW 1 Agnes Mwangeli Kimilu, widow to the deceased, testified relying on her witness statement filed together with the plaint, that when the deceased died, she visited the scene and realized that the electric wires were not secured and that he had died with his colleague. The witness blamed the appellant for the accident. She took photographs of the scene of accident which she produced as PEX 14. According to the witness she was told that electric wires were swinging due to wind and hit the deceased and his colleagues and they fell down to the ground.

19. The witness told the court that she had three children with the deceased; that the deceased was 20 years when he died; that he was a casual worker and that he was earning Kshs. 1000/- per day. It was also her evidence that the deceased used to work six days a week and that they spent Kshs. 22,000/- for funeral expenses which was raised by the family.

20. In cross-examination, she told the court that the deceased died when he was knocked by electric wires at the construction site. She admitted that she was not present when the accident occurred; that she had no evidence of the deceased's earnings and that she had no receipts at all. She told the court that it was the funeral committee that raised money towards funeral expenses.

21. The witness again admitted that the deceased was not in the photographs she produced; that he died on the spot and that she was told by people who were present that he was electrocuted. She testified that the deceased also used to take care of his elderly parents. The appellant did not lead any evidence.

22. In her written witness statement, she stated that the deceased called her on 14th October at around 9.00am, and informed her that he was leaving her (he was dying) and then stopped talking. A lady picked the phone and informed her that an accident had occurred and asked her to go to Kitengela Medical Services immediately. She rushed to the hospital where she found a gathering but no one told her what was happening. Shortly a police officer came and took her to an office within the hospital and interviewed her. A doctor came in and informed her that the deceased had been electrocuted and died. She was taken to where the body was. Cloths on the upper part of the body had been burnt beyond recognition and stuck on the skin. The body was taken to the mortuary.

23. The trial considered the evidence and submissions by parties, delivered a brief judgment, holding the appellant 100% negligent and made the awards already alluded to. The appellant faulted the trial court for finding in favour of the respondents. It contended that the trial court shifted the burden of proof to it, yet the respondents did not establish that it was to blame for the accident.

24. The appellant also argued that quantum was inordinately high and that the trial court failed to deduct the award under the Fatal Accidents Act from that under the Law Reform Act. The appellant also argued that special damages were not strictly proved as required.

25. The respondents supported the trial court's decision, arguing that they proved the case on a balance of probabilities and that the appellant did not call evidence to controvert their case. The respondents, however, faulted the trial court for applying a lower multiplier leading to an inordinately low, thus their cross appeal.

26. The has been called upon to determine whether liability was proved, if the quantum was inordinately high or low and whether special damages were proved.

Liability

27. As already adverted to, the trial court held the appellant 100% liable for the accident and stated:

“The plaintiff witnesses (sic) did not witness occurrence of the accident. However, the first written report indicates that the deceased died through electrocution. I disagree with the defendant's contention that there was no evidence showing the circumstances of the alleged electrocution so as to conclude that the defendant was negligent. This is in case of strict liability governed by the principles and enumerated in *Phylands v Fletchen* (sic) and it is not upon the defendant to prove that it did not owe the deceased the duty of care which it has not. Mere denials do not suffice. I therefore hold the defendant 100% liable for the accident.”

28. PW1 told the court that she visited the scene after the deceased's death and noticed that the electric wires were not secured. She however admitted that she was not present when the accident occurred and that the deceased and his colleagues died on the spot. She stated that she was told that electric wires were swinging due to the wind and hit the deceased and his colleagues who died as a result. She pictures of the scene produced as exhibits.

29. From that evidence, it was clear that the witness was not at the scene and therefore she did not know how the accident occurred as she only visited the scene after the accident had already occurred.

30. I have considered the evidence on record as well as submissions. The witness was not at the scene when the accident occurred. No eye witness testified and, therefore, there was no direct evidence on what actually happened. The appellant did not call evidence, but relied on its defence and submissions before the trial court. From both the death certificate and postmortem report, the cause of death was electrocution. The question is how did it happen?

31. The respondents sued the appellant for negligent death of the deceased which they attributed to the appellant. In *Machindranath Kermath Kersar v D. S Mylarappa & others*, Civil Appeal NO 3041 of 2008, **S.B Sinha, J.** writing for the Supreme court of India, stated on

the meaning of negligence:

“A suit for damages arises out of a tortious action. For the purpose of such action, although there is no statutory definition of negligence, ordinarily, it would mean omission of duty caused either by omission to do something which a reasonable man guided upon those considerations, ordinarily by reason of conduct of human affairs, it would do or be obligated to do, or by doing something which a reasonable or prudent man would not.” (See also *Municipal Corporation of Greater Bombay v Laxman Iyer* 2003 SCC 731, SCC P. 736 para 6).

32. In the context of this appeal, negligence would mean omission of duty by the appellant to do something which a reasonable man guided upon proper considerations, ordinarily by reason of conduct of human affairs, it would do or be obligated to do, or it did something which a reasonable or prudent man could not do.

33. The respondents testified that power lines were loose and swinging and caused electrocution leading to deceased's death. Both the death certificate and the post-mortem are clear that the cause of death was electrocution. In their plaint, they pleaded at paragraph 3 thus:

“on or about the 18th day of October 2014, while in the course of duty in a construction site in Kitengela, the deceased was electrocuted by a live electric wire where he sustained fatal injuries which led to his death. The accident was solely caused by the negligence of the Defendant as electric poles fell and live wires hang precariously which touched the deceased making him be electrocuted causing his death as particularised below.”

34. The respondents then particularised negligence attributable to the appellant. This included; allowing broken live overhead electric wires to fall and remain unattended; failing to warn the deceased and other members of society of the danger; failing to put preventive precautionary measures in place for peoples' safety and failure to maintain electric supply lines in good state of repair. They also blamed the appellant for failing to ensure that electric poles were not leaning precariously and that the electric lines were properly fixed and fastened.

35. To those averments, the appellant filed a defence and denied the respondents allegation. It stated at paragraph 3 of its defence, that it had no knowledge of the the averments in paragraph 3 of the plain (reproduced above), and, therefore, it did not admit them. It then went on to attribute negligence to the **“plaintiff”** for failing to take precaution; tampering with electric power lines; failing to take safety precaution when approaching the vicinity of power lines and going about the vicinity in a haphazard manner. It pleaded *volenti non fit iniuria*.

36. The appellant did not call evidence but relied on its pleadings and submissions to argue that there was no proof of negligence against it. It did not rebut the respondents' averments and evidence that the power line poles fell or were faulty leading to electrocution.

37. The appellant's responsibility, as far as the duty to maintain electric supply lines is concerned, is a matter of statutory obligation under the Energy Act, 2006. Sections 51 required the appellant as, licensee, or any person authorised by it, from time to time as it becomes necessary, to enter the land on which electric supply lines are laid, for the purpose of **inspecting** or **repairing** the lines, or removing lines where such electric supply lines are no longer required.

38. The respondents pleaded that power lines were defective or poles had fallen down but the appellant argued that it had no knowledge of such defects. It did not call evidence to controvert the respondents' evidence that the power lines had a problem. Instead, it attributed negligence to the **“plaintiff”** who were not the victims. It is clear that the appellant misapprehended the respondent's case and assumed that it was the plaintiffs who had been injured. The appellant had a statutory duty to maintain power lines and ensure that they are safe and secure. It did not lead evidence to that effect.

39. In ***Kenya Power and Lighting Company Ltd v Joseph Khaemba Njoria*** [2015] eKLR, the court held that there can be no question that the appellant (KPLC) has the responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is properly maintained to prevent accidents.

40. Section 52 of the Act is also clear that:

“The provisions of the Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by the loss or damage or breaking of any electric supply line, or by reason of any defect in any electric supply line.”

41. The appellant has a strict liability imposed on it by statute. That notwithstanding, the respondent's evidence was not clear how the deceased was electrocuted, though there is no denial that he died of electric fault. According to PW1, the deceased and his colleagues died on the spot, and therefore, there was no eye witness to assist the court on what went wrong leading to electrocution.

42. In the circumstance, I hold that the trial court was in error to wholly attribute negligence to the appellant. It is true that the appellant has a higher responsibility to ensure power lines or poles are well maintained. It was not made clear whether power lines fell abruptly while the deceased was working and caught him by surprise, or they had fallen and were lying on the ground when he was electrocuted. If the former, the deceased would bear no liability, but if the latter, he had a duty to be careful where possible and avoid the power lines.

43. In the circumstance of this case, doing the best I can, I hold that both the appellant and the deceased must bear responsibility for the accident in the absence of evidence to the contrary. The appellant must therefore shoulder 80% negligence and the deceased 20% contributory negligence.

Quantum

44. Regarding quantum, the trial court awarded Kshs. 10,000/- for pain and suffering and Kshs. 85,000/- for loss of expectation of life. It awarded Kshs. 4,000,000/- for loss of dependency, applying a multiplier of 25 and earnings of Kshs. 1000/- per day.
45. Counsel for the appellant mainly challenged the award on loss of dependency. She submitted that the trial court was wrong in accepting deceased's income of Kshs. 1000/- per day without evidence to support it. She argued that in the absence of evidence of earning, the trial court should have applied the minimum wage. In counsel's view, under Legal Notice No. 112 of 2017, (column 4), minimum wage is Kshs. 349.50 per day and, therefore, the deceased's income would have been Kshs. 8,398 per month. She also argued that a multiplier of 25 used was higher. According to counsel, the trial court should have taken into account the unpredictable nature of life and use a multiplier of 15 years.
46. The other complaint was that the trial court made double awards, by failing to deduct the award under the Fatal Accidents Act from that under the Law Reform Act as required by law. It relied on section 2(5) of the Law Reform Act and *Maina Kaniaru & another v Josephat M. Wangonde* [1995] eKLR, to support its position.
47. For the respondents, Mr. Wambugu argued that there was evidence that the deceased was earning Kshs. 1000/- per day and that it is hard for casual workers to keep records earning. On the multiplier, he submitted that retirement age being 60 years, they had prayed for a multiplier of 31 years but the trial court used a multiplier of 25 years, which was low. He urged the court not to interfere with earnings but allow their cross appeal on the multiplier and, therefore, quantum on loss of dependency. He also argued that there should be no deduction of the award made under the Fatal Accidents Act from that under the Law Reform Act.
48. I have considered respective parties' arguments on this issue. The appellant has not challenged awards on pain and suffering and loss of expectation of life. Even then this court, sitting on appeal, will not interfere with exercise of discretion of the trial court on damages simply because it is of the view that had it heard the matter itself, it would have made a different award. It will only do so if in exercising the discretion, the trial court took into account irrelevant factors or failed to take into account a relevant factor, or applied a wrong principle of law. For that reason, I will not interfere with awards under the heads of pain and suffering and loss of expectation of life.
49. On loss of dependency, the witness told the court that the deceased worked as a mason and earned Kshs. 1000/= a day. She did not have evidence on this. The appellant complained that the trial court should have applied the minimum wage in the absence of evidence of earnings. The respondents on their part held the view that it is difficult for casual workers to keep records of earning. He supported the trial court's decision for accepting Kshs. 1000 as the deceased's earning.
50. There is no evidence to controvert the respondents' assertion that the deceased worked as a mason. What is in dispute is what his earnings were. The law is that where one does not tender evidence of employment to prove monthly earnings, the Regulation on Wages General Order (Minimum Wages), should be taken into account as the court's point of reference.
51. In the deceased's case, there was no evidence that he earned Kshs. 1000 per day except what PW1 told the court. It is however true, that casual workers do not keep records of their earning. The trial court should have looked at the minimum wage and determine whether it could apply to the deceased's wage or to take the oral evidence from the witness on what the deceased earned.
52. The appellants has argued that the trial court should have used THE REGULATION OF WAGES (GENERAL) (AMENDMENT), ORDER, 2017 (Legal Notice No.112 of 2017). Column 4 covers among others; miners, stone cutters, turn boys, waiters, cooks, loggers, or line cutters. It provides for daily rates of Kshs. 393.95 and Kshs. 7,967.95 per month. The Order came into force on 1st of May 2017.
53. It is important to note that whereas the Order came into force on 1st May, 2017, the accident occurred in 2014 and therefore it could not apply to the deceased's case. It is also a fact that parties in areas such as construction industry, negotiate daily rates, depending on various parameters. In that case, a daily wage of **Kshs 1,000** would not be exaggerated. I see no reason to interfere with the trial court's decision on this aspect.
54. The other appellant's other complaint is that the multiplier of 25 the trial court used was higher. According to the appellant, a multiplier of 15 would have been appropriate. It has urged this court to adopt this multiplier. The respondents on their part argued that the multiplier of 25 is on the lower side and urge the court to use a multiplier of 31.
55. I have considered the arguments by both sides on this aspect. The deceased was 29 years when he died. The retirement age in this country is sixty (60) years for those in public service. He was a casual worker who would have continued to work even after sixty years. However other factors, including unpredictable life and vagaries of nature, must be taken into account.
56. In this appeal I am of the view that a multiplier of 25 was on the higher side. A multiplier of 20 would be appropriate, taking into account that life is not predictable. I also do not agree with the respondents that the multiplier used was lower. I will therefore interfere with the trial court's discretion on the multiplier it applied to the extent that the multiplier of 25 is set aside and replaced with a multiplier of 20.
57. Having come to the conclusion that the trial court's decision to accept the deceased's earning of Kshs. 1000/= per day, translating to Kshs.20,000/=, a month is upheld, the award under **Loss of dependency** would work out to; $20,000 \times 12 \times 20 \times 2/3 = 3,200,000/=$. Consequently, the trial court's award on loss of dependency of Kshs. 4,000,000/= is set aside and replaced with an award of **Kshs. 3,200,000/=**.
58. The appellant again argued that the trial court awarded damages under both the Law Reform Act and the Fatal Accidents Act, which is not allowed under section 2(5) of the Law Reform Act. The respondent did not see anything wrong with this. I have considered the awards made by the trial court. It is clear that the trial court awarded damages for **loss of dependency** under the Fatal Accidents Act and **loss of expectation of life** under the Law Reform Act. The court did not deduct the latter award from the loss of dependency, thus amounted to

double awards.

59. P.S Atryah, on *Accident Compensation and the Law*, 2nd Edition at P.88 states:

“[T]he law will not allow double recovery. In practice, this means the amount inherited by a person as a beneficiary of the deceased’s estate may be deducted from an award under the Fatal Accident’s Act on the legal justification pretext that the inheritance is a ‘gain’ from the death which must be set off against the loss.”

60. In *Kemfro v C A M Lubra and Olive Lubia* (1982-1988) KAR 727, the court held that:

“[T]he net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damage awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former act.”

61. Section 2(5) of the Law Reform Act provides:

“The right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accident’s Act or the carriage by Air Act 1932 of the United Kingdom”

62. Similarly, in *Maina Kaniaru & another v Josephat M. Wangonde* [1995] eKLR, the Court of Appeal stated:

“The rights conferred by section 2(5) of the Law Reform Act (cap 26 Laws of Kenya) for the benefit of the estates of deceased persons are stated to be “in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act.” This does not mean that damages can be recovered twice over but that if damages recovered under Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act. The House of Lords held in the case of *Davies and another v Powell Duffryn Associated Collieries Ltd* (1942) All ELR p 657 that in assessing damages under the Fatal Accidents Act, 1846, damages under the Law Reform (Miscellaneous Provisions) Act, 1934, must be taken into account in the case of dependants who will benefit under the latter Act”

63. From the authorities and the law, awards for loss on pain and suffering and loss of expectation of life go to the benefit of the deceased’s estates. These awards are therefore capped at a minimum so that an estate does not benefit twice from the same death namely; under the **Fatal Accident Act** and the **Law Reform Act**.

64. Taking into account the above legal position, it was prudent for the trial court to deduct the amount Kshs. 85,000 awarded under the **Law Reform Act** from the award on loss of dependency because the respondents who are entitled to the deceased’s estate, are the same persons for whose benefit the award under the **Fatal Accident Act** was made. I agree with the appellant that the award for loss of expectation of life is deductible from the award for loss of dependency.

Special damages

65. The appellant again faulted the trial court for allowing special damages as paid for in the plaint when they were not strictly proved as required by law. According to counsel, the respondents only pleaded Kshs. 63,520, as special damages, Kshs. 50/= for the Death certificate and Kshs. 63,470/= filing fees for Succession Cause No. 281 of 2016 plus costs to scale. The witness mentioned Kshs. 22,000/- for funeral expenses in her testimony. The respondents urged the court to take into account that section 6 of the Fatal Accidents Act recognises that funeral expenses are payable. They also urged the court to take into account the Advocates Remuneration Order and therefore not to interfere with the trial court’s decision on special damages.

66. It is trite law that a claim for special damages must not only be pleaded, it must also be strictly proved. This is because a claim for special damages represents what the party may have actually lost in the form of the amount used and he would want to be put back to the position he was had he not been forced to incur the expense, hence the need to strictly prove these claims.

67. In *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR, the Court of Appeal reiterated the fact that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.

68. It is a principle of law that a party who desires the court to award him special damages, must as a matter of law, strictly prove damages to the required standard. In the case before the trial court, the respondent did not adduce any evidence to prove his claim for special damages. There were no receipts to show that any money was expended to file succession proceedings and how much was paid. They merely pleaded special damages and left it to the trial court award them. That is not the strict proof that is required in law.

69. Addressing the issue in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* (supra), the Court of Appeal observed:

“The appellant apart from listing the alleged loss and damage, it did not...lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support

thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages.”

70. And in *David Bagine v Martin Bundi* (CA No. (Nbi) 283 of 1996), the Court of Appeal, referring to the judgment by *Lord Goddard CJ* in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177), once again observed that:

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

71. The respondents did not prove special damages with regard to filing of pleadings succession cause No. 281 of 2016. If advocates fees was paid, there was no difficulty to produce receipts for fee payment. However, the respondents having filed succession cause No 281 of 2016, they must have paid court filing fees. Advocate’s legal fee was subject to proof which was not done.

72. With regard to funeral expenses, there was no dispute that there was a funeral following the deceased’s death. The respondents stated that Kshs 22,000/= was used for the funeral expenses. The 1st respondent testified that the money was raised by the funeral committee, which they are entitled. The trial court was in error to allow special damages as prayed for, when some items were not proved, thus calling for interference.

73. On this item, the trial court’s award of Kshs. 63,520/= is set aside. The respondents are awarded Kshs. 5,000/= for court filing fees for the Succession cause and Kshs. 22,000/= for funeral expenses, bringing the award on special damages to **Kshs. 27,000/=**.

74. Flowing from the conclusions on each of heads under general damages above, the awards are as follow;

| | |
|------------------------------------|------------------------|
| Pain and suffering | Kshs. 10,000 |
| Loss of expectation of life | Kshs. 85,000 |
| Loss of dependency | Kshs. 3,200,000 |
| Sub total | Kshs 3,295,000 |
| Less | <u>Kshs. 85,000</u> |
| | Kshs. 3,210,000 |

75. To this amount add special damages of Kshs. 27,000 bringing the amount to Kshs. 3,237,000. This amount is subject to 20% contribution which brings the final award to **Kshs.2,589,600**.

76. In the end, the appeal partially succeeds. The trial court’s judgment and decree dated 28th September 2018 is set aside. In place thereof, judgment is entered for the respondents for **Kshs.2,589,600/=**, with interest from the date of the judgment of the trial court. The respondents shall also have costs of the suit before trial court. The cross appeal is dismissed.

77. As the appeal has partially succeeded, I order that each party bear their own costs of the appeal and cross appeal.

Orders accordingly.

Dated Signed and delivered at Kajiado this 18th day of December, 2020.

E. C MWITA

JUDGE