



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 50 OF 2016**

**KENYA POWER & LIGHTING CO. LTD .....APPELLANT**

**VERSUS**

**SOPHIE NGELE MALEMBA**

**WILHELM MAGHANGA GABRIEL**

suing as the administrators of the estate of the

Late **GABRIEL MGHALU MALEMBA.....RESPONDENTS**

*(Being an appeal from the Judgment of Honourable L. Mummasaba (Resident Magistrate delivered on 19<sup>th</sup> May, 2016 in the Principal Magistrate's Court at Mavoko in PMCC No.292 of 2013 )*

**JUDGEMENT**

1. The appeal herein arises from the judgement of Hon. Mummasaba (Resident Magistrate) in **Mavoko PMCC No. 292 of 2013** where judgment was entered against the Appellant and in favour of the Respondent in the total sum of **Kshs.1,982,185.80** being both general and special damages.

2. The Appellant being aggrieved lodged this appeal where it raised eight grounds of appeal namely:-

- (a) The Learned trial magistrate erred in both fact and law by finding the Appellant liable which finding was not supported by evidence.
- (b) The learned trial magistrate erred both in fact and in law by failing to appreciate that the Respondents had failed to call an eye witness evidence or otherwise prove their case on liability.
- (c) The learned trial magistrate erred in both fact and in law by ignoring the fact that the Respondent had failed to prove that the alleged offending transmission cables belonged to the Appellant and not any other licensed electricity transmitter including Kenya Electricity Transmission Company ltd (KETRACO).
- (d) The learned trial magistrate erred in both fact and in law by failing to appreciate that there was no evidence on record upon which it could find the Appellant liable for the subject incident.
- (e) The learned trial magistrate erred in both fact and in law by ignoring the fact that the Respondent had failed to prove the particulars of negligence alleged against the Appellant in the plaint.
- (f) The learned trial magistrate erred in both fact and in law by ignoring the Respondent's written submissions.
- (g) The learned trial magistrate's award of general damages for pain and suffering and loss of dependency are so manifestly excessive as to amount to erroneous estimates of the damages due to the Respondents.
- (h) The learned trial magistrate erred in both fact and in law by adopting wrong principles in assessing general damages for loss of dependency.

3. This being a first appeal, the duty of this court is to evaluate the evidence tendered before the trial court afresh and come to its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify and to make an allowance for that (see **Selle &**

**Another =Vs= Associated Motor Boat Co. Ltd & Another [1968] EA 123).**

4. Wilhelm Maganga Gabriel (PW.1) was an uncle to the deceased. He stated that the deceased was a Kenya Wildlife services Ranger earning a monthly net salary of Kshs. 13,464.35 and who died while in the course of his duties within Nairobi National Park. He stated that the deceased was electrocuted by a high voltage electric transmission cable that was hanging loosely. He went on to state that the death of the deceased was a direct result of the Defendant's negligence. He finally stated that the deceased had his siblings who depended on him namely a brother and three sisters whose ages ranged from 18 -28 years old as they were still attending school. On cross – examination, he confirmed that the deceased was not married and had no children and that his mother had been a single parent who had since passed on.

5. No.729772 Cpl. Richard Nyakundi (PW.2) was a police officer based at Mlolongo police station. He stated that the deceased was then patrolling the Nairobi National Park when he was electrocuted and died on the spot. He further stated that following the death of the deceased an inquest file was opened.

6. The Appellant did not call witnesses on its part and opted to close its case and relied on submissions.

7. The Appeal was canvassed by way of written submissions.

**Appellant's submissions.**

8. It was submitted for the Appellant that the trial court went into error when it held the Appellant solely liable in damages to the estate of the deceased when the Respondent had completely failed to prove the particulars of negligence and more particularly the aspect of causation. Learned Counsel for the Appellant faulted the trial court for coming to the conclusion that the Appellant was the owner of the powerline in question yet there was in existence another entity dealing with transmission of electrical power namely Kenya Electricity Transmissions company Ltd (KETRACO) and thus the Appellant is not the sole entity dealing with such transmission of power. It was therefore submitted that the Respondent should have blamed KETRACO and not the Appellant since the transmission cable belonged to KETRACO. Further it was submitted for the Appellant that the trial court had erroneously taken Judicial notice of matters and fact contrary to the law by dint of Section 60 of the Evidence Act since no eyewitness was called to testify and that the information on the Occurrence Book regarding the issue of a power line dangerously dangling at about 8 feet from the ground was not sufficient for the finding of liability against the Appellant.

9. On the issue of damages, it was submitted that the awards for pain and suffering (Kshs. 50,000/=) and loss of expectation of life (Kshs.100,000/=) were quite in order and are not contested. However as regards the award of damages for loss of dependency the same is contested. It was submitted that since the claimants herein are siblings of the deceased then they are not dependants by virtue of Section 4(1) of the Fatal Accidents Act as they are neither wife, husband, parent nor child of the deceased. Further, it was submitted that even if the claimants were to be deemed as dependants then a multiplier of less than 10 would have been applied since the dependants were turning into adults and could not be dependent upon the deceased for that long as they were expected to complete their schooling and start generating their own income.

**Respondent's submissions**

10. It was submitted that the Respondents evidence was not controverted at all by the Appellant as they neither filed witness statements nor tendered evidence in defence and therefore the trial court's finding on liability should not be faulted.

On the issue of the award damages, it was submitted that the trial court had exercised its discretion more particularly on the award for loss on dependency because the Respondent had proved that the deceased's siblings depended on him.

**Determination**

11. I have considered the evidence presented before the trial court as well as the submissions by both learned counsels for the parties. It is not in dispute that the deceased herein had died due to electrocution by a live high voltage transmission cable. This was confirmed by the details on the certificate of death wherein the cause of death is disclosed as 90% electric burns from a high voltage power line. The issues for determination are as follows:-

- (i) Whether the Respondent proved negligence against the Appellant;
- (ii) Whether the award on quantum of damages by the trial court was justified.

12. As regards the first issues, it is noted that no eyewitnesses were called to testify for the Respondent. However the incident of electrocution was indeed booked by the police and the occurrence Book produced as an exhibit. The certificate of death which was produced indicated that the cause of death was due to 90% electric burns from a high voltage powerline. It transpired from the evidence that the deceased who was a Kenya Wildlife Service Ranger had been in the company of two colleagues on patrol duties within Nairobi National Park when a low and unmarked live high voltage transmission cable came into contact with the deceased killing him on the spot. The occurrence Book indicated that the high voltage cable was dangerously dangling at about 8 feet from the ground. The Respondents witnesses maintained that the death of the deceased was a result of the Defendant's negligence.

It was the submissions of the Appellant's counsel that there existed another entity dealing with transmission of electric power namely Kenya Electricity Transmissions Company Ltd (KETRACO) which should have been sued by the Respondent since the Appellant only dealt with distribution and supply of power within the country. However, I note that the Defendant did not see it fit to take out third party proceedings by roping in the said entity so as to seek indemnity and or contribution. Indeed the occurrence book indicated that as soon as the incident took place, the Appellant was immediately alerted over the same. Further the Appellant opted not to file statements of witnesses and also did

not offer any evidence in defence. Hence I find the Respondents evidence was not in any way challenged and/or controverted. In the case of **John Wainaina Kagwe =vs= Hussein Dairy ltd [2013] eKLR** the court of Appeal held as follows:

“..... the Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross – examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondents defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident.....”

The vigorous submissions by the Appellants’ counsel both in the lower court and this court regarding the issue of liability are not persuasive in view of the fact that the Appellant had opted not to tender evidence in defence. In the case of **Daniel Toroitich Arap Moi =Vs= Mwangi Stephen Muriithi & Another [2014] eKLR** the court of appeal was categorical that submissions cannot take the place of evidence since the same are generally parties marketing language.

As the Respondent has shown that the high voltage power line had hung loosely about 8 feet from the ground, I find that the Appellant was clearly negligent in failing to ensure that such high voltage power lines were hoisted within safe distances from the ground to avoid them coming into contact with persons or animals within the Nairobi national Park. I find the death of the deceased was due to the negligence of the Appellant. The Appellant cannot pass the buck to a third party which it did not deem it necessary to join it into the proceedings so as to establish the extent of liability between themselves. Even though **Ketraco** might have laid the transmissions cables on behalf of the Appellant, the Appellant is still responsible for any electric power which pass through those cables. In any event it is common knowledge that the Appellant is the sole entity throughout Kenya that bills consumers for the use of electricity power supply and hence Ketraco is merely an agent of the Appellant. Under those circumstances, the Appellant still remains as the principal and was therefore properly sued by the Respondent. I am unable to fault the finding of liability against the Appellant by the trial court. I find the Appellant solely liable in damages to the estate of the deceased. The Respondent therefore proved negligence against the Appellant on a balance of probability. The Appellant owed a duty of ensuring that the high voltage power lines were hoisted far from the ground and that the breach thereof led to the death of the deceased. Hence the trial court’s finding on liability against the Appellant was quite sound.

13. As regards the second issue, it is noted that the Appellant’s counsel does not contest the award of damages on pain and suffering as well as loss of expectation of life which were assessed by the trial court at Kshs.50,000/= and Kshs.100,000/= respectively. That being the position, the said awards shall be upheld. The deceased died on the spot and was being relied upon by his three siblings since his mother had predeceased him. The assessment of damages is an exercise of discretion by the trial court and as the awards are not being contested by the Appellant, the same shall remain undisturbed.

14. The Appellant seems to take issue with the award of damages on loss of dependency under the Fatal Accidents Act. As far as the Appellant is concerned, the deceased’s brother and two sisters for whose action the claim was instituted are not dependents pursuant to the provisions of Section 4(1) of the Fatal Accidents Act that provide as follows:-

***“Action brought by virtue of the provisions of the Act shall be for the benefit of wife, husband, parent and child of the person whose death was caused.”***

The Respondent vide the plaint has named a brother and two sisters as dependants of the deceased. However owing to the class of dependants under Section 4(1) of the Fatal Accidents Act, I find the deceased’s siblings do not fall into the ambit of the law so as to benefit as dependants. The deceased was a known bachelor having not married and that his mother who was a single parent had already predeceased him. It transpired from the evidence before the trial court that the deceased was the sole breadwinner for his three siblings since the mother who had been a single parent had already died. It is quite common in various households in this country that dependency among family members is due to the high poverty levels. If the deceased’s mother had been alive then the burden of dependency would have been lessened. Further the deceased’s mother having been a single parent, left the deceased to be the sole bread winner for his mother and siblings. Had the mother been alive then the award of loss on dependency would have been given to her so as to assist the deceased’s siblings. The siblings were now looking upto the deceased for sustenance as their mother is already dead. The deceased being the first born doubled up as a parent so to speak by taking up the role of the deceased mother and took care of his three siblings. Under the circumstances this provides an exception to the provisions of Section 4(1) of the Fatal Accidents Act. It is my considered view that the legislature did not intend to lock out certain dependants from benefitting from the estate of a deceased who was the sole breadwinner for his/her family where the parent(s) are deceased and where it is shown by evidence that the deceased indeed was being relied upon by his/her siblings by virtue of the death of the parent(s). The Respondents evidence before the trial court was not challenged and or controverted since the appellant opted not to tender evidence. The Respondent indeed availed proof of dependency. The trial court was therefore not in error when it awarded damages for loss on dependency. However the multiplier adopted by the trial court was rather on the higher side bearing in mind that the deceased’s siblings were not expected to rely on the deceased for the rest of their lives since they were already turning out to be adults in their own right and were expected to fend for themselves by engaging in various income generating activities in order to sustain themselves in life. The Appellant’s counsel has suggested a multiplier of 10 years. I find the same to be quite reasonable. In any event the estate of the deceased was expected to receive death gratuity from the deceased’s employer namely Kenya Wildlife Services. The deceased was stated to be earning a net salary of Kshs.13,464.35 and since he was a bachelor then a dependency ratio of 1/3 would be reasonable. Hence the award on this head would work out as **Kshs.13,464.35 x12x10x1/3 = 538,574.00**.

Special damages of Kshs.1,075/= was specifically pleaded and proved. The award for loss of expectation of life (Kshs. 100,000/=) will be discounted so as to prevent a double compensation to the estate.

15. In the result, this appeal partly succeeds. The judgment of the trial court is set aside and substituted with judgement for the Respondent against the Appellant in the sum of **Kshs.589,964.00** made up as follows:-

- (a) Liability .....100%
- (b) Pain & suffering .....Kshs. 50,000/=
- (c) Loss of expectation of life..... Kshs.100,000/=
- (d) Loss of dependency ..... Kshs. 538,574/=
- (e) Special damages .....Kshs. 1,075/=
- Total ..... Kshs. 689,649/=

Discounted award on

Loss of expectation of life ..... Kshs.100,000/=

Net general damages .....**Kshs. 589,649/=**

As the Appeal has partly succeeded, the Appellant is awarded half cost of the appeal while the Respondent shall have full costs in the lower court.

Orders accordingly.

Dated and delivered at Machakos this 23<sup>rd</sup> day of **January, 2019.**

**D. K. KEMEI**

**JUDGE**