



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 190 OF 2003

**CHRISTHOPHER YORK ROBINSON (as Administrator ad litem of the
Estate of NICHOLAS YOR ROBINSON).....PLAINTIFF**

VERSUS

1. GENAIL INVESTMENTS INC

2. SHELA HOUSE MANAGEMENT LIMITED.....DEFENDANTS

J U D G M E N T

1. By a plaint filed in court on the 5/8/2003, the plaintiff sued the two defendants and sought general and special damages pleaded to have been occasioned when the deceased was invited into the 1st defendant's property managed by the 2nd defendant for the purposes of repairing a water pump housed at the bottom of a shallow well.

2. It is pleaded that for the purposes of effecting the repairs the deceased descended into the well and while there suffered electrocution resulting into his death. The said death is therefore blamed on the negligence of the 2nd defendant for which the 1st defendant is pleaded to be vicariously liable. The negligence alleged and attributed to the defendant included failure to take care of the deceased safety, allowing the deceased to descend into the well without warning of the dangers and when they ought to have known that it was unsafe and dangerous to do so and thereby exposing the deceased to dangers of injury; failing to switch off electric power to the well and failing to maintain proper electric wiring of the well to ensure no exposure to risk and lastly, failing to discharge the duty under common law under the occupiers Liability Act. It was then pleaded that an inquest conducted by Lamu Magistrates Court, No. 3 of 2002 determined that the cause of death was electrocution.

3. The plaint then set out the particulars pursuant to Fatal Accidents Act naming the deceased's parents, widow and orphaned child as well as the particulars of special damages in Kenyan, United Kingdom and United States of American currencies. Judgment was therefore sought for special damages, as well as general damages under both Fatal Accidents Act and Law Reform Act, costs and interests. That plaint was amended to properly describe the 1st defendant before the claim against that defendant was ultimately withdrawn.

4. For the 2nd defendant a statement of defence was filed in which all allegations in the plant were denied save for the description at paragraph 4 and the fact that it was responsible for the management of the premises so as to be an occupier as defined in law.

5. The presence of the deceased in the premises and on the well on the material day and his death are admitted but it is then pleaded that the deceased voluntarily agreed to repair the well and to enter the well as he had done previously hence any negligence on the part of the defendant was denied with a stress that having done the same repairs before, the deceased was conversant with the safety procedures including the existence of an externally fitted electrical switch, the need to have a head helmet fitted with a torch lamp to enable him see while in the well and a safety rope while the defendants staff were present to watch over him as he worked.

6. It was then pleaded that having been inside the well, on the previous occasion, the deceased came to know the presence of a loose but live wire and therefore the deceased caused his fatal injuries because he opted to descend into the well against advice by the manager that he waits for batteries for the safety helmet torch to be purchased and replaced. The defendant therefore attributed the fatal injury upon the deceased on his negligence by failure to have regard of own safety; failure to switch of the externally located electrical switch before descent, entering the well without adequate source of light and without alerting the defendant's staff of his descent or seeking their assistance with safety rope and failing to appreciate the danger posed by the loose live wire hanging on the wall of the well.

7. For the 1st defendant a statement of defence was lodged under protest on the basis that the amended plaint having been lodged on 21/01/2018 against the 1st defendant that is the date the suit is deemed filed against it and thus statute barred. The defendant equally denied

the capacity of the plaintiff to sue and further denied being the occupier of the premise even in it be the registered owner and thus denied being vicariously liable for the acts of the 2nd defendant.

8. Being not the occupier the 1st defendant pleaded inability to comment on the causation of the pleaded cause, opted to adopt the accounts as pleaded by the 2nd defendant but wholly denied any loss or damage to the plaintiff. However, as said before, the suit against this defendant was withdrawn on 25/11/2010 and therefore those pleadings are of no relevance to this decision.

9. With the advent of the Revised Civil Procedure Rules, parties filed lists of witnesses and witness statements. The plaintiff filed a list of four (4) witnesses with their statements while the 1st & 2nd defendants filed a list and statements of three witnesses. Parties also filed list of documents. The plaintiffs list and bundle is dated 31/10/2012 that by the 2nd defendant was dated 26/11/2012 and filed on the 5/12/2012. Based on the witnesses' statements, the plaintiff at trial gave evidence, and called one Ms Ann McFerran, PW2, whose evidence, as a friend to the deceased, was largely on what the deceased engaged in gainfully in Kenya. The bundle of documents filed by the plaintiff was admitted by consent as exhibit P1 and a death certificate as P6. The defendant on their side called three witnesses.

Evidence by the plaintiff

10. The plaintiff adopted his written statement as evidence in chief wholly. He said that he brought the suit on behalf of himself as the father and on behalf of the other dependants being mother, widow and child to the deceased. The widow was aged 31 when the deceased died while the son was aged 2. He said he was notified of the accident and death by his daughter in law and travelled to Kenya soon thereafter arriving in Nairobi within 24 hours but while in Nairobi they were met by a representative of Shella Beach who tried to delay them from proceeding to Lamu. The body was then flown to Nairobi Lee Funeral home where an autopsy was conducted at a cost of Kshs.20,000/=. He then proceeded to Lamu and at the scene where he saw three houses, met one Angelica who said the accident occurred while she had gone to get batteries for the deceased to use in his work on the water pump. He was also told that the deceased was living at the hotel when he was approached to assist with repair of a water pump housed inside a well. The approach was made because the guests were complaining about lack of water in the rooms. He was told that the approach was to the deceased because he had in the near past helped with the same task a week before the fateful day. The witness said the account given by Angelica was not coordinated and Angelica appeared guarded and not open.

11. It was largely a reported speech of what he was told because he was away in England when the death occurred. The body was then transferred to UK for burial and for further investigations by the coroner's office ensued. The plaintiff later visited the scene in the company of two Chartered Electrical Engineers for purposes of an examination during which he took photographs produced as exhibits to show among other things that there was only one switch in the Board of the house. He then referred to the expert reports which criticized the electrical installations at the well as inadequate since the house was constructed with safety mechanisms lacking and therefore unsafe. The major criticism was that the fuses were improvised by copper wire.

12. He denied that the deceased was an electrician insisting he was a photographer for which assertions he produced photos said to have been taken by the deceased. He then produced documents to show that the deceased would earn and that between May to November 2000 he had accumulated UK\$25 469 in assets.

13. The went on to say that deceased had left England in a boat through suez-canal and ended up in Lamu before heading to Kilifi where he was employed as a spanner man at Kilifi Boat Yard working on engines. He said that in a span of three years the deceased capital assets had risen to nearly 100,000 UK Pounds thus an average of UK Ponds 30,000 per year.

14. He said the deceased was a jack of all trades and would dive the moorings to secure boats and also buy boats and sell at a profit and that at the time of his death he owned a boat called Tamasha which was valued at 65,000 UK Pounds.

15. On the widow, he said she became severely depressed was unable of giving evidence and was being cared for by the family. Of the son to the deceased the witness said he was good in school and expected to do well and go to the university to study psychology for 7 years at a yearly fee of 9000 UK Pounds. At his age, the deceased's son, he still had 9 years before he could begin to earn own income. The witness said the special damages claimed included the airfare and related expenses for the trips he made to Kenya including the transfer of the body to UK.

16. When cross examined by the defendant counsel, the witness said that he was retired having worked for 40 years and that he claimed expertise on nothing. He said that there were two inquests on the death in Kenya and UK.

17. On the conditions of the well he said the well was very dark and anybody going down there needed enough light. He said that according to Dr. Olumbe the cause of death was drowning but him the deceased was not electrocuted by the pump but by a loose live wire on the walls of the well.

18. The second witness for the plaintiff was one Anna McFerran, a Senior Lecturer at the University of London and journalist for 45 years. The witness said he met the deceased at Kilifi Boat Yard after which the witness learnt he was a photographer and when shown the photographs she was most impressed. She said she took the photos to England to the Editor of Sunday Times who was equally impressed and the deceased then started a working relationship with Sunday Times and to so work for three subsequent years. She and the deceased were later to work for an NGO called MEDIA TRUST who had a project on HIV and the deceased worked as a photographer. She was not sure of the deceased's earning but approximated same at UK \$400 to 500. She described the deceased as meticulous, patient and very happily living in Kenya and intended to settle in Kenya.

19. On cross examination the witness said that the deceased was a polished photographer who was paid for the photos he took but was not able to say how much he earned as such a photographer.

20. For the defendant three witnesses were called. The evidence by DW 1 was to the effect that on the fateful day he returned to the house to find Musaku and a cook called Charo Ndonia struggling to save the deceased. He said the same day he had noticed a problem with the water pump and in order to go down he had to switch off the power. However his efforts did not yield anything hence the deceased was contacted to help. The witness said it was the manager Angelica who went for the deceased in a boat. When the two came back it was realized that the torch to be used for descent was dim and so Angelica left to go and buy batteries as the witness himself went to light the barbeque fire. At that time he learnt that the deceased had descended into the well because the cook called him to say the deceased was shouting his name from the well. On checking he saw the light flushing in water and the deceased also in water but the electrical switch was on and he wondered why the deceased had gone down with the electric power to the well on. He and a colleague then went down brought up the deceased and noticed he was dead after a doctor present confirmed so. The witness discounted prospect of drowning in the well because the water was just knee high.

21. On cross examination the witness said he was employed as a steward and later summarily dismissed. He said the pump would break down often. He said one needed a rope to go down but on that day he went down without a rope. He was then taken through the photos on the location of the switches of electric power. He said he was to be there to assist the deceased but the deceased did not tell him he was ready to go down. He then said that something did not occur well. It was not planned well at all. He did not think Nick would go down on his own and that the main switch could not be put off because the entire house would be engulfed in darkness. On the hanging live cable on the wall of the well, the witness said when there is no proper earthing the system becomes dangerous and can shock. He then said the person who did the wiring did not do a good job by leaving the cables exposed.

22. When asked by the court whether the fact of the main switch being on even if the one at the pit was off, could pose danger, the witness said there would be danger because the whole system is connected to the well.

23. For the 2nd defence witness, Angelica Schuetz, said the deceased came to the house in July 2000 and was giving service to the house as and when there arose a job to be done. He was not specifically engaged as a technician. She said the deceased worked in the well on 3/8/2000 and corrected the problem which made the pump work well till 10/8/2002. Accordingly, on that day when there was a problem with the same pump she went for the deceased from his boat and came to the scene. At the scene the witness left to go for batteries for the deceased's torch only to come after 10 minutes and hear the deceased making noise in the well saying *'damn I am getting electrocuted'*. By the time her people went down the well the deceased was dead.

24. To the witness it was not the absence of light, rope and somebody at the top that caused the accident but the fact that power was on. She said two people went down the well to retrieve the body and were never electrocuted because the power was put off before they descended. She confirmed that inspections were done by the defendant as well as the plaintiff's technicians and reports prepared. The witness stressed that it was dangerous to go down the well without electric power being switched off and that the deceased should have taken the necessary precaution.

25. The 3rd witness for defence was one ARFAN KHERDIN who said he deals in supply installation and commissioning of diesel power generators. He was detailed to file a report about the accident and carried out of an inspection done in the presence of Kenya Police, the defendant and Kenya Power and Lighting Co. Ltd. He went down the well and found two water pumps with a hanging cable which he was told was ran by the deceased, and that at the time the deceased died the cable was submerged in water. He confirmed that even the report by Kenya Power had identified the hanging cable as a danger. He said the hanging cable remained a danger and recommended direct online starter and earth leakage protection circuit. He said the lack of earthing was a danger in the well. He said power isolation was the ultimate solution and safety measure.

Submissions by the parties

26. Both parties filed submission relying on decided cases. Those submissions were structured and fashioned on the statement of issues filed by the plaintiff on the 27/10/2003. Even if so structured, in my view the issues should actually be seven only. I say only seven because the fact of occupation of premises and invitation by the defendant (DW 2) is admitted, the injury itself is admitted. So the issues in my view having read the pleading and evidence offered are:-

- i. What is the locus of the plaintiff?
- ii. Was the 2nd defendant an occupier of the premises in terms of Occupiers Liability Act.
- iii. Did the defendant, as such occupier, owe a duty of care to the deceased?
- iv. Did the defendant observe and discharge that duty of care?
- v. Whose fault or negligence, between the deceased and the defendant, contributed to the deceased injury and to what extent?
- vi. Is the plaintiff entitled to any remedies? If so what is the quantum thereof.
- vii. What orders should be made as to costs?

Legal standing of the plaintiff?

27. That the plaintiff is the father and therefore a dependant of the deceased under Fatal Accidents Act is not in contention and should never be. Under the statute the plaintiff has clear standing to bring the suit on own behalf and on behalf of the other three named in the plaint.

28. On the other hand, under the Law Reform Act, the plaintiff obtained a grant in Mombasa High Court Succession Cause No. 38 of 2003 which even though issued as **Limited Grant Of Letters Of Administration And Ad coligenda Bona**, was expressly shown to have been intended for the purposes of *filing a suit for recovery of damages due and owing to the deceased's estate*. The efficacy of such a grant has been held by the Court of Appeal to be sufficient to maintain a suit of this kind [1]. Based on those two reasons, I do find that the plaintiffs standing to bring the suit cannot be faulted.

Whose fault led to the injury and death of the deceased?

29. This analysis when concluded should determine the issues numbered as **ii to v** in the issues isolated by the court above. The evidence led by both sides agree that the plaintiff was indeed invited to the defendant's premises by DW 2 for purposes of carrying out repairs on some water pump installed to pump water from a shallow well for use by the defendants' hotel guests.

30. That evidence is also unanimous that for one to undertake the task, one had to descend into the bottom of the well where the pumps were situated and that it being dark it was necessary to have a source of light. There is no doubt that having been so invited the defendant owed a duty of care under Occupiers Liability Act to the deceased to provide such care as is reasonably expected to ensure that the visitor is reasonably safe while using the premises for the purpose for which he was so invited. That duty of care is however not absolute without the corresponding duty on the visitor to also have regard for own safety and to avoid reasonably foreseeable harm and is definitely excluded where the visitor voluntarily assumes a risk or acts in a manner inconsistent and unexpected of a person in his standing or calling.

31. In this case, the deceased was said, without rebuttal, to have been to the bottom of the same well just some 7 days before the fateful day during which occasion he worked successful without any injury to him. On that day it is said by the DW 1 that the deceased identified a hanging wire that was agreed by all to have been a danger if live. It was however a sticky point as to whose duty it was to isolate the power supply to the well before one descended.

32. The quantity of evidence led begs the question who between the plaintiff and the defendant's employees it was to isolate to electric power using the external switch at the entrance of the well.

33. In my view I do find that while the defendant was under the legal duty to make the premises safe for its invitees, like the deceased, the deceased had the corresponding duty, being a person with knowledge of the inherent danger posed by electric power if handled without care, to have ensured that before he climbed down the well the risks appurtenant were eliminated or minimised. One sure way of minimization of the risk of electrocution was to isolate the power supply to the well using the available switch at the entrance of the well. That he apparently did not do because the evidence of DW 1 was that before they descended to try and rescue him, they did the isolation and no danger was visited upon him and his colleague. I therefore do find that as much as the defendant was expected to provide safe environment, which was evidently missing and thus a breach of its duty, owing to the admitted improper wiring, the deceased having known that state of affairs, had the equal duty to take mitigating steps. He did not. Accordingly, I do find that the deceased contributed to his own injuries and I apportion liability to him at 50%. I therefore enter judgment for the plaintiff against the defendant on liability at 50%:50%.

Special damages

34. The plaintiffs produced documents towards his discharge of duty to strictly prove the special damages specifically pleaded. Those receipts and invoices were duly produced in the presence and by consent of the defendants and on cross examination no issue was taken on their authenticity or propriety. I do take it that the defendant was content and satisfied with the sum claimed and I therefore do enter judgment for the plaintiff in the sum pleaded and proved as follows.

- a. Kshs. 255,984.00
- b. UK Pounds 14,244.34
- c. USd 1,821.00

General damages

35. As pleaded the plaintiffs claim is made under both Law Reform Act on behalf deceased's estate and Fatal Accidents Act on behalf of the dependants of the deceased including the plaintiff himself.

36. I will start with damages under law reform act and take regard of the fact that both parties agree in their submissions that the plaintiff is entitled to damages for pains and suffering and loss of expectation of expectation of life. The parting point on those submissions is the sum awardable under each head and the damages under the headings loss of consortium. Having taken note of the authorities cited by both sides and being aware that there is nothing established as conventional award under those head, but that the damages awarded by court must serve the purpose of being compensatory, I do award to the plaintiff the sum of Kshs.100,000 for pains and suffering the deceased having died within minutes.

37. In coming to that sum I have taken notice of the evidence of both DW 1 and DW 2 to the effected that the deceased was heard crying that he was being electrocuted. I also take notice that by the time DW 1 climbed down the well the deceased was still struggling with some movement in this chest. I do find that the deceased died a very painful death and the sum of Kshs.100,000 should suffice for pains and suffering, in the circumstances of this case. I also award the sum of Kenya Shillings 100, 000 for loss of expectation of life. That sum seem to have been thought as reasonable by both sides and on my own opinion I consider it reasonable.

How about loss of consortium?

38. This head of damages is due to the spouse of the deceased or victim of injury and purposed to compensate from the loss of what I would call the amenities and benefits of the married state. Like all claims a statement of claim must be made and evidence in support thereof tendered. It is ideally, in cases of death, a loss that only the widow or widower can attest to even if the ordinary nature of events may dictate that it be taken judicial notice of. But a judicial notice in a case like this must also flow from the pleadings because a court of law cannot purport to determine a matter not properly placed before it by the parties in their pleadings.

39. In this matter taking the uncontroverted evidence that the widow has suffered depression to the extent of being wholly dependent would have been a good basis to measure the extent of loss and effects upon the widow but there ought to have been a pleading to that effect. In the absence of any pleading this claim cannot be granted to the plaintiff. However, if there had been a pleading to that effect, I would have awarded to the plaintiff, on behalf of the widow, the sum of Kshs.5,000,000 taking into account the devastating injury capable of association with the death of her husband.

Lost years

40. Damages under this head is due under the law reform Act and measured as an approximate loss, based on evidence of what the deceased would have earned had he not died due to the fault of the defendant.

41. The usual and easy way is the now well established multiplier formula. However, the multiplier formula is not the only formula^[2], and best suitable where the income of the deceased is ascertained or ascertainable with some accuracy or near accuracy from the evidence led.

42. In this matter where as it was said that the deceased was a driver, a photographer and a hands person, a jack of all trades, there was to this court no cogent evidence of what would be his approximate and regular income to assist as a multiplicand. In addition he was a foreigner with no evidence of work permit in Kenya hence he was not a person legally entitled to work and derive income in Kenya so that one may adopt the minimum wage for the kind of work he was engaged in. For those reasons I do consider that this is an apt case for the court to consider an alternative way of assessing such damages.

43. That alternative way is to adopt a global award the court considers appropriate^[3]. In adopting this mode I have taken into account all that was said of the deceased. According to the plaintiff's evidence, PW 1 and PW 2, the deceased was a photographer and would also buy and sell boats at a profit. He would take photos for which he would be paid commissions on the other side the defendants witnesses said the deceased would work for them and was in possession of a boat he was to employ to take tourists to the reef for sight-seeing. He was a family man and had been out of this county for a period of about 4 years. All that evidence led me to conclude that the deceased had some income which his estate has lost upon death. That loss to the estate invariable reflects a loss on the dependants, especially the widow and son who evidence show would need continued support in the future. For the wife, until her medical condition improve and for the child when he get out of college to be able to earn on livelihood. Taking all into account, I assess loss to the estate at Kshs.4,000,000/= for damages for lost years.

44. In coming to this decision, I have taken the submissions by the plaintiff that these damages are best suited for assessment under the fatal accidents Act for the benefit of the dependants. That proposal to this court is not appropriate because, I have found that it is difficult to assign any sum as the multiplicand based on the evidence. It is also to me not clear in evidence to what extent the said dependants depended upon the deceased. I have noted that PW 1 gave evidence to the effect that it was him and the wife who lent to the deceased some 10000UK Pounds to buy a boat. No evidence was led whether that loan had been repaid and there was no evidence at all on how much assistance the parents got from the deceased. While I would not doubt dependency by the widow and her child on the decease, because nothing was put forth in evidence on what the widow engaged in for income, I appreciate that dependency is a matter of evidence which must be a ratio of the deceased's income devoted to the dependants. I reiterate that the evidence on record dictates against the application of the multiplier formula here.

45. The last point I want to consider is the computation of general damages by the plaintiff in UK pounds and my decision to award same in Kenyan currency. The loss sued for having been suffered in Kenya must be engaged on the economic scales of Kenya and its environment hence it would be inappropriate to assess damages on foreign currency unless for those specific special damages incurred and proved to have been incurred on those other currencies.

46. In conclusion, there is judgment entered for the plaintiff against the defendant summarized as follows:-

General damages

- **Pains & suffering Kshs - 100,000.00**
- **Loss of expectation of life Kshs - 100,000.00**
- **Lost years Kshs - 4,000,000.00**

Special damages

i. Kshs. 225,984.00

ii. GBP. 14,244.34

iii. USD. 1,821.00

47. Having apportioned liability at 50:50, the net award works out as follows

a. Kshs.4,455,984 x 50% = 2,227,992.00

b. GBP 14,744 X 50% = 7,122.17

c. USD 1,821 X 50% = 910.50

48. The sums awarded as special damages shall attract interest from the date of the suit till payment in full while general damage shall attract interest for the rate of this judgment.

49. I also award the costs of the suit to the plaintiff.

Dated and delivered at **Mombasa** this **29th** day of **May 2019**.

P.J.O. OTIENO

JUDGE

[1] [Equator Distributors vs James Muriu & Others \[2018\] eKLR](#)

[2] [Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003\[2007\] eKLR](#)

[3] [Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 \[1999\] eKLR](#)