



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 693 OF 2016

KENYA POWER LIMITED.....APPELLANT

VERSUS

GRACE AKINYI OUMA ONYANGO & ANOTHER

(Suing as the Legal Representatives of the Estate of

MARK OUMA ONYANGO (Deceased).....RESPONDENTS

(Appeal from the judgment and decree of the Chief Magistrate's court at Milimani by Hon. Mr.P. Muholi (R M) delivered on 12th October 2016 in CMCC No.384 of 2012)

JUDGMENT

The appellant was aggrieved by the judgment of the lower court delivered on 12th August, 2016 in which an award of Kshs. 1, 147,524/= was made in favour of the respondents, who were the personal representatives and administrators of the estate of the late Mark Ouma Onyango who died as a result of electrocution, which was blamed on the negligence of the appellant.

Liability had already been settled at 30% on the part of the deceased and 70% on the part of the appellant. What was before the lower court was therefore assessment of damages.

In the Memorandum of Appeal dated 10th and filed on 11th November, 2016 the lower court was faulted for disregarding the authorities cited by the appellant and also for adopting an erroneous dependency ratio. The lower court was also faulted for awarding exorbitant and excessive damages, and that special damages were not proved to justify the award. The court was further faulted for relying on receipts in support of special damages, which had not complied with statutory provisions of law thereby rendering them inadmissible.

As the 1st appellate court, it is my duty to consider the evidence presented in the lower court with a view to arriving at independent conclusions. This I have done.

It is now trite law that the perimeters of interfering with awards made by trial courts are now settled. In the case of **Butt v Khan [1978] eKLR**.

The court stated as follows,

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at the figure which was either inordinately high or low.”

See also **Kemfro Africa Limited T/A Meru Express Services & Another vs. A.M. Lubia & Another (1985) e KLR**.

In arriving at the figures now subject to this appeal, the trial court was alive to the attendant circumstances. For example in the award for pain and suffering, the court observed that the deceased died instantly but still underwent some form of pain.

On loss of expectation of life, the court looked at the annexed authorities on this head. The court therefore cannot be faulted in that regard. The respondents produced a letter from the chief which specified the names of the dependants and despite some searching cross examination, it should be understood that proof in civil litigation is on a balance of probabilities. The defence did not offer any evidence to the contrary.

In deciding on dependency and pegging the same at 2/3 (two thirds) of the deceased earnings, the trial court gave reasons for the same. On

the earnings of the deceased, again the trial court relied on the minimum wage applicable at the time the deceased met his death. In picking the multiplier, the court justified why the figure of 20 years was applicable. However, I have noted that in calculating the loss of dependency, the court used the figure of 30 instead of 20 years. That is an error which should be corrected. In which case, the loss of dependency should work out to $Kshs. 6,743 \times \frac{2}{3} \times 12 \times 20 = Kshs. 1,078,880/=$.

I have not seen any reason to disturb the awards for pain and suffering, and loss of expectation of life. Special damages of Kshs. 1,000/= was also proved. The total award works out to Kshs. 1,179,880/= which shall be reduced by 30% leaving a balance of Kshs. 825,916/=.

In the end this appeal is dismissed except for the correction of the final figure due and payable to the respondents as set out above. Each party shall bear their own costs of this appeal.

Dated, signed and delivered at Nairobi this 25th Day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE