REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 329 OF 1999

KENYA POWER AND LIGHTING

COMPANY LIMITED.....APPELLANT

VERSUS

PETER GITHINJI NYAGA Suing as the legal

representative to the estate of

GEORGE MUHORO NYANGA.....1ST RESPONDENT

PAUL KARACHIA MWANGI.....2ND RESPONDENT

(Being an appeal from the Judgment delivered on 4th August,

1999 by Hon. Mr. C. O. Kanyangi (Senior Principal

Magistrate) Milimani Commercial Courts

in CMCC No. 9495 of 1995)

JUDGMENT

1. On 15th September, 1993 the deceased, George Muhoro Nyaga, was carrying out his duties as an employee of the Appellant, Kenya Power & Lighting Company Ltd (hereinafter KPLC) when he was fatally injured after motor vehicle registration No. KSN 334 allegedly owned by the 2nd Respondent, Paul Karachia Mwangi collided with the electrical cables that the deceased was fixing. The 1st Respondent sued as the legal representative of the estate of the deceased. He blamed the death of the deceased on the alleged negligence on the part of the Appellant and the manner the motor vehicle was being driven.

2. The Appellant filed a statement of defence and denied the allegations of negligence. The Appellant attributed the accident to the negligence of the deceased and the motor vehicle.

3. The 2nd Respondent who was sued as the registered owner of the motor vehicle did not file a defence

and interlocutory judgment was entered against him.

4. During the hearing of the case, Peter Githinji Nyaga testified on the 1st Respondent's side. His evidence was that he was the Legal representative of the estate of the deceased. He further testified that the deceased was on top of a pole installing electrical cables when the passing motor vehicle dragged the cables and the deceased fell off the pole and sustained fatal injuries .

5. John Kiplagat Kuto (DW1) a technician with KPLC gave evidence that the deceased was on top of the pole fixing the wires when the passing motor vehicle pulled the wires and the deceased fell down.

6. In his judgment, the trial magistrate apportioned liability on 50:50 basis between the Appellant and the 2nd Respondent. Judgment was entered as follows;

a. Pain and suffering Ksh.10,000/=

b. Loss of expectation of life Ksh.60,000/=

c. Loss of dependency Ksh.361,200/=

d. Special damages Ksh. 6,250/=

TOTAL **Ksh.437,450/=**

7. The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:

"1. The Learned magistrate erred in law and fact in finding the appellant and the 2nd respondent herein liable in the proportion of 50% on liability.

2. The Learned magistrate erred in law and fact in his construction of the evidence on record in finding the appellant liable at all inspite of clear and uncontroverted evidence to the effect that the appellant had taken all reasonable and necessary precautions with a view to ensuring the safety of its workers including the deceased.

3. The Learned Magistrate erred in law and fact in relying on hearsay evidence in his finding that the 1st respondent had proved his case against the appellant.

4. The Learned magistrate erred in law and fact in awarding damages for loss of Expectation of Life, Pain and Suffering inspite of clear evidence that Grant of Letters of Administration was obtained after suit had been filed and in the circumstances such claims for and on behalf of the estate of the deceased were incompetent *ab initio*.

5. The Learned magistrate erred in law and fact in applying a multiplier of 25 years in assessing damages for loss of dependency while there was clear evidence that the Plaintiff was the older brother of the deceased while the other dependent was the mother of the deceased and could not in the circumstances reasonably be expected to depend on the deceased for all the working life of the deceased.

6. The Learned magistrate erred in law and fact in applying the sum of Ksh.3,612/= as the earnings of the deceased in assessing loss of Dependency inspite of clear evidence that this sum represented the gross earnings of the deceased.

7. The Learned magistrate erred in law and fact in failing to discount the capital sum arrived at for loss of dependency so as to allow for lump sum payment.

8. The Learned magistrate erred in law and fact in awarding general damages which were so manifestly excessive as to be a totally erroneous assessment of compensation due if at all to the Plaintiff.

9. The Learned magistrate erred in law and fact in awarding the 1st respondent the costs of the suit in the subordinate court as against the appellant.

10. The Learned magistrate erred in law and fact in holding that the 1st respondent's claim for Loss of Dependency was competent despite clear evidence that the 1st respondent had failed to comply with mandatory provisions of law in regard to supplying full particulars of the dependents together with the statement of claim.

11. The Learned magistrate erred in law and fact in awarding the 1st respondent special damages of Ksh.6,250/= notwithstanding the fact that the 1st respondent had not tendered evidence in proof of the same."

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

9. From the evidence of PW1, it is clear that he was not at the scene of the accident. His evidence on how the accident happened is hearsay. However, the evidence of DW1 admits that the deceased fell off the pole when the passing motor vehicle pulled the wires. The evidence of DW1 further reflects that the deceased had tied a safety belt but had no helmet as none had been provided. The death certificate produced as an exhibit shows that the cause of death was due to haemothorax due to multiple fractured ribs and tear of lungs consistent with falling from a height. The helmet would therefore have been of no assistance in the circumstances of the accident herein. The deceased and his colleagues were working in the presence of a supervisor. There is no evidence of any negligence on the part of the deceased. There is also no evidence of any warning signs to other road users. In the circumstances of this case, I do not fault the apportionment of liability by the trial magistrate on a 50:50 basis between the Appellant and the 2nd Respondent.

10. The grant of letters of administration was obtained on 28th April, 1998. The suit was filed on 31st August, 1995. Clearly the grant of letters of administration was obtained long after the suit was filed. The 1st Respondent was therefore not entitled to any award under the Law Reform Act. As stated by the Court of Appeal in the case of **Trouistik Union International & another v Jane Mbeyu & another, CA No.145of 1990:**

"It is not in dispute that the two respondents who invoked the aid of the Court to agitate the cause of action which survived the deceased, were not persons to "whom a grant of letters of administration have been made under the Act" ie the Law of Succession Act. They did not even pretend to be such. The only capacity in which they sought to enforce the deceased's chose in action, was as dependants. As the professed widows and dependants of the deceased, it was within their legal competence to claim damages for loss dependency under the Fatal Accidents Act. ....We conclude, therefore, that the damages awarded in favour of the

respondents in the sum of Ksh.50,000/= under the Law Reform Act was wrong and ought to be set aside with costs."

11. The death certificate produced shows that the deceased died at 29 years. The trial magistrate used a multiplier of 25 years which gave the deceased a working life of up to 54 years. Taking into account the compulsory retirement age of sixty years in the civil service, the multiplier adopted by the trial magistrate is reasonable and leaves room for vicissitudes of life and lump sum payment.

12. The evidence of PW1 was that the deceased was single but used to support his mother and sibling. The dependency ratio of 1/3 is reasonable. As stated by Court of Appeal in case of **Hassan v Nathan Mwangi Transporters & 5 others [1986] KLR**:

"The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expense of his/her education is lost, never to be redeemed. All the benefits that would accrue to the parents, and where it applies, to younger brothers and sisters of the deceased as the deceased natured physically and materially are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms."

13. The pay slip produced reflected a gross pay of Ksh.3,612.17 However, there were statutory deductions which were not taken into account by the trial magistrate. The trial magistrate used a multiplier of 25 years and multiplicand of Ksh.3,612/=. This worked out as follows; 3612x12x25x1/3 =361,200/=. If the statutory deductions had been taken into account the net pay comes to a round figure of 3,000/=. That works out as follows; 3000x12x25x1/3 =300,000/=.

14. On special damages, the same were not proved. No documents were produced in support thereof. The same were not specifically proved.

15. Costs ordinarily follow the event unless the court for good reason orders otherwise. The trial magistrate was correct in making an order for the payment of costs by the Defendants who are the Appellant and the 2nd Respondent herein (subject to apportionment of liability).

16. with the foregoing, total award to the 1st Respondent ought to read as follows:

a. Pain and Suffering Nil

b. Loss of expectation of life Nil

c. Loss of dependency Ksh.300,000/=

d. Special damages Nil

17. With the foregoing, the judgment of the trial magistrate is set aside and substituted with one for the sum of Ksh.300,000/=. The appeal has been partially successful. Each party to bear their own costs of the appeal. The appellant and the 2nd Respondent to bear the costs in the Lower Court on a 50:50 basis.

Dated, signed and delivered at Nairobi this 29th day of Jan., 2018

B. THURANIRA JADEN

JUDGE