



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
CIVIL APPEAL NO. 169 OF 2016
KENYA POWER & LIGHTING COMPANY LTD.....APPELLANT

VERSUS

E S O & M W K Suing as the Legal representatives

of the estate of P O K (deceased).....RESPONDENTS

(Being an appeal from the judgment and decree of the Chief Magistrate's

Court at Thika (Hon. M.W. Mutuku) Delivered on 4/8/2014

in Thika CM Civil Case No. 630 of 2011)

JUDGMENT

1. By a Plaint dated 27/09/2011, the Respondents herein sued the Appellant as the Legal representatives of the estate of the deceased claiming compensation for injuries they say the deceased sustained when he was cutting sisal plants that had grown so tall that they touched the electricity lines and was thereby exposed to direct current and as a result he was electrocuted whereby he sustained fatal injuries.

2. The Appellant filed a Defence denying any liability for the accident. In particular, the Appellant avers that the minor deceased exposed himself to danger by cutting a tall sisal plant situated under electric lines and caused the same to touch the electric lines thereby causing his own demise.

3. The matter proceeded to a full hearing. At the conclusion of the trial, the Honourable Trial Magistrate apportioned liability for the accident at 100% as against the appellant. On quantum, the Honourable Trial Magistrate entered judgment as follows:

a.	Pain and suffering	Kshs.	20,000/=
b.	Loss of expectation of life	Kshs.	60.000/=
c.	Lost years	Kshs.	1,118,000/=
d.	Special damages	Kshs.	27,925/=
Total		Kshs.	1,275,925/=

4. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present Appeal. In their Memorandum of Appeal, they have listed nine grounds of appeal as follows:

a) *THAT the Learned Magistrate erred in law and in fact by failing to appreciate that the suit was defended and that the Plaintiff had the burden of proving negligence and particularly the existence of the alleged hanging electricity wires which was strictly denied.*

b) THAT the Learned Magistrate misdirected herself in requiring photographic evidence to have come from the Defence and accordingly erred in holding that the absence of the same rendered the Defence witness testimony unreliable while the Defence had no such legal burden to disapprove negligence.

c) THAT the Learned Magistrate misdirected herself by failing to consider the sum total of the evidence before the Court particularly the evidence in regard to the fact that the Deceased was electrocuted when the long sisal plant in his possession came into contact with overhead electric cables.

d) THAT the Learned Magistrate erred in law and in fact by holding that the Deceased, a minor of 15 years could not bear any contributory negligence as he might not have known or appreciated the danger of the electricity wires.

e) THAT the Learned Magistrate erred in law and in fact by disregarding the evidence of the eye-witness called by the Plaintiff that both he and the Deceased sneaked into the farm with the intent of cutting down a long sisal plant to build goal posts with and had been taught about the dangers of electricity in their science classes.

f) THAT the Learned Magistrate erred in law and in fact by holding that the Plaintiffs had proved their case on a balance of probability and that the Defendant was 100% liable for the accident.

g) THAT the Learned Magistrate erred in law by applying the doctrine of strict liability against the Defendant in the face of overwhelming evidence that the Deceased was in possession of a long sisal plant and in the absence of any credible proof of the existence of hanging electricity wires.

h) THAT the Learned Magistrate erred in law and in fact by calculating and awarding damages for Lost Years under the Law Reform Act using the formula for calculating damages for Loss of Dependency under the Fatal Accident Act.

i) THAT the Learned Magistrate erred in law and in fact by failing to appreciate that no evidence was led at trial of the Deceased's academic performance or ambition to enable the Court to accurately assess the monthly earnings of the Deceased or his monthly expenditure to enable the Court assess the balance available to the Deceased's Estate.

5. The court directed the parties to canvass the appeal by way of written submissions and neither party found it necessary to orally highlight.

6. I have read and considered the respective arguments in those submissions.

7. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123** in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

8. This same position had been taken by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O’Connor stated as follows:-

*It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in **Watt –vs-Thomas (1), [1947] A.C. 484.***

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

9. The appropriate standard of review established in these cases can be stated in three complementary principles:

- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

10. These three principles are well settled and are derived from various binding and persuasive authorities including **Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000**: Tunoi, Bosire and Owuor JJA); **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another** (Civil Appeal No. 345 of 2000: O’Kubasu, Githinji and Waki JJA); **Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd** (Kisumu High Court CC No. 88 of 2002).

11. With the above principles in mind, I will now proceed to deal with the appeal.

12. The Respondents’ case was founded on the alleged negligence of the Appellant. As such, they were by law required to establish on a balance of probabilities that:

- a. The Appellant owed the deceased a duty of care;
- b. The Appellant breached that duty, and;
- c. The deceased suffered injury as a result of that breach.

13. The Respondents' case, as it emerged at the trial was that the deceased sustained fatal injuries following an electrocution incident as he was harvesting sisal due to the Appellant's negligence in maintaining their electric poles.

14. Kevin Ndung'u Wachira testified as PW2. He was the only eye witness in this case. His testimony was that he had accompanied the deceased to go and pick sisal posts in the bush. As the Deceased picked the posts he was electrocuted as the wires had been concealed in the bush and were sagging low. He testified that if they had seen the wires they would not have proceeded to cut the posts.

15. On the Appellant's side, Michael Muiruri Kanjere a technician for Kenya Power appeared as the witness. He testified that he was told that a boy had been electrocuted at Kiandutu Area and he proceeded to the scene. He stated that the electric wires are normally 45 feet from the ground and they were neither defective nor hanging dangerously. He further stated that Kenya Power normally clears vegetation 15 feet on both sides of the cables and that if one wishes to clear vegetation around the cables, one should call Kenya Power personnel to clear at no cost. He testified that nobody called Kenya Power to inform them that the Deceased was going to cut down the posts. In his view, the Deceased was responsible for the accident. Lastly he testified that they had inspected the wires for sagging.

16. In disposing off the issue of liability, the Learned Trial Magistrate found thus:-

Due to lack of photographic evidence, the defence witness testimony about the distance between the sisal plant and the wires is unreliable, as he was also not at the scene at the time of the accident. The defence has also not brought forth evidence to show that the land owner in proceeding to cut the sisal plant with the deceased defaulted KPLC by-law and regulation, as they neither fined him or enjoined him in the suit and conclusion can only be drawn that KPLC knew that it was solely to blame.

It is worthy to note that the deceased in this case was a minor, who might not necessarily have known or appreciated the danger of the electricity wires. The said wires were the sole property of KPLC, and they owed a duty of care to the public.

In upshot, I find that the Plaintiffs have proved their case against the defendant on a balance of probability. I enter judgment in favour of the plaintiffs and find the defendant 100% liable for the accident.

17. On appeal, the Appellant has taken the position that PW1 was not at the scene of the accident therefore his testimony that the wires were sagging 10 metres from the ground without photographic evidence should be held as not proved just as the Learned Trial Magistrate held in regard to the defence witness testimony.

18. The Appellant also argues that PW1 confirmed that the deceased was 15 years therefore, bright enough to understand the reasonable concept and the cautionary risks and dangers within his environment. That the deceased had covered the dangers of electricity in school.

19. The primary argument of the Appellant is that the Respondent did not prove its case as it is required by law to do: the Respondent had alleged negligence but it had produced no evidence to demonstrate so. It relied on section 107 of the Evidence Act as well as ***Statpack Industries v James Mbithi Munyao [2005] eKLR***. In the latter case, Visram J. (as he then was) stated:

Coming now to the important issue of "causation", it is trite law that the burden of proof of any fact

or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable.

20. The Appellant's alternate theories are that either the accident occurred to the Respondent without the negligence of the Appellant *ala Statpack Case* or that the Respondent himself was responsible for the accident by courting danger: knowing the dangers associated with electric lines yet harvesting sisal plants growing under electric lines. The second theory sounds in the doctrine of *volenti non fit injuria*. The Appellant buttresses its arguments on the second theory by the fact that PW2 testified that they had not sought anybody's permission or assistance to harvest the sisal.

21. It is not clear whether in this last line of attack the Appellant is alluding to the limited duty to a trespasser – but the doctrine would be inapplicable here anyway since the suit is not between the Respondent and the owner of the property. Even if it were, it is now well established that a land owner has a limited duty to prevent wanton injury to a trespasser. That duty would be implicated here.

22. On my part, after re-evaluating the evidence on record as I am required to do, I have come to the conclusion that there were sufficient grounds for the Learned Trial Magistrate to reach the conclusion that the Appellant is 100% liable for the Deceased's accident.

23. First, PW2 was categorical in his testimony that they did not see the electric wires as they were concealed in the bush and were sagging low. He only saw the sagging lines after the accident had happened. This evidence remained unchallenged on cross-examination and the Learned Trial Magistrate who heard and saw the witnesses was entitled to rely on that evidence.

24. Conversely, the Learned Trial Magistrate was entitled to disbelieve DW1 when he claimed that he did not see any sagging lines. DW1, did, on the other hand, testify that he saw sisal plants within 15 feet of the electric cables which is contrary to the Appellant's own stated policy.

25. Lastly, it is telling that although DW1 testified that they had inspected the wires for sagging and actually saw the sisal plants, he did not produce the inspection report in Court. A safe presumption can then be made that the report contained adverse findings against the Appellant.

26. It is therefore my finding and holding that the Learned Trial Magistrate was correct in finding that the Appellant was fully to blame for the deceased's accident.

27. I will now turn to the quantum.

28. First, the Appellant complain that the Respondents did not adduce any evidence to support their allegation of the deceased's academic potential or ambition and that, therefore, the Learned Trial Magistrate erred in using the multiplier approach. Reliance was placed on the case of *Mwanzia vs Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* as quoted in *Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003 (2007) eKLR*.

29. In regard to pain and suffering, the Appellant proposed an award of Ksh. 10,000/=. *They cited Abdi Kadir Mohammed & another vs John Wakaba Mwangi (2009) eKLR*.

30. On compensation for loss of expectation of life the Appellants proposed an award of Ksh. 50,000/= as has been the High Court trend.

31. On compensation for lost years/dependency the appellant proposed a global figure of Kshs. 300,000/= since no evidence was tendered in regard to the deceased school performance. Reliance was placed on *E.A. Growers Ltd vs. Charles Nganga Ngugi (2015) eKLR as cited in Picket vs. British Rail Engineering Ltd, M'rarama M'nthieri vs Luke Kiumbe Murith (2015) eKLR as cited in Kwanzia vs Ngalali Mutua & Another and P I vs Zena Roses Ltd & Another (supra)*.

32. On their part, the Respondents relied on **Butt v Khan (1977) 11 KAR** to point out the principles upon which an Appellate court will disturb an award of damages.

33. The Respondents argue that the Learned Trial Magistrate only awarded compensation under the Law Reform Act thus cannot be said to have erred for failing to deduct the same from the damages awarded in Fatal Accidents Act while there was no such award. They cited **Silas Mugendi Nguru v Nairobi Women's Hospital (2014) eKLR**.

34. The Appellant fault the Learned Trial Magistrate for using the multiplier approach. The Appellant insists that using a multiplicand of Kshs. 10,000/- and 30 years was unreasonable. Instead, they insist that a multiplier approach in this case occasioned a miscarriage of justice and that the Court should have used a global figure instead.

35. The Respondents urge me to leave the award by the Learned Trial Magistrate undisturbed for he neither applied the wrong principle of law; took into consideration some irrelevant factors or left out relevant ones. Finally, they argue that the Appellants have not demonstrated that the award is so inordinately high that it must be a wholly erroneous estimate of the damages.

36. The Respondents insist that the choice of the multiplier, multiplicand and ratio in this case was reasonable and should not be disturbed even this Court felt that it would have come to a different conclusion on the matter.

37. It bears repeating two general principles that the parties do not seem to disagree on. The first one, is the general test that an Appellate Court uses in re-evaluating an award of damages by a Lower Court. As the Respondents have correctly submitted, an Appellate Court will not interfere with an award of damages simply because it would have come up with a different assessment if it were hearing the case in the first instance. Instead, the Court must be satisfied that the Lower Court proceeded on wrong principles; considered irrelevant factors; ignored relevant factors or came up with a figure so inordinately low or manifestly excessive as to be a wrong estimation of the awardable compensation under comparative analysis of like cases.

38. Second, it is now well established in Kenya that parents can and do recover for loss of dependency from the estates of their children – including their minor children. This was well-stated in the **Kenya Breweries Limited Vs. Saro [1991] Mombasa Civil Appeal No. 441 Of 1990 (eKLR)** in the following words:

*We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have “homes” for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a “home” while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase “being mindful of other people’s welfare”. If any legal authority is required in support of our views we would quote this court’s decision in **Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others [1985 – 1986] 4KCA 217**, wherein the late Nyarangi, delivered himself as follows-*

“In general, in Kenya children are expected to provide and to provide for their parents when the

children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu community is well nigh total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religions of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is "outrageous and pernicious" is not well-founded and must be rejected.

...In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution.

39. So, there is no longer a question in Kenya whether the parents of a minor child can recover for loss of dependency under the Fatal Accidents Act.

40. The only question that seems to divide Courts is whether the multiplier method is an appropriate one to use when the Deceased is a minor who had not yet started working for gain. Many Courts – including the **Kenya Breweries Case**; and the two cases cited to me by the Appellants have eschewed the multiplier method on account of the imprecision of finding the salary amount to use. Justice Gikonyo had particularly strong words to use in the **Daniel Mwangi Kimemi Case** in discouraging Courts from using the multiplier method in such cases. These Courts insist that to come to a fair assessment of damages in such cases, it is fairer to use a global figure pegged to the specific circumstances of the case.

41. On the other hand, many other Courts – including the High Court – have persisted in using the multiplier method even when dealing with a minor. Examples include **Transpares Kenya Ltd & Another v SMM [2015] eKLR**.

42. It thus emerges that the Superior Courts are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It is was, in my view, therefore, upon the discretion of the Learned Trial Magistrate to use the Multiplier method in this case. This Court cannot review that decision merely because it would have used the "global assessment method" advocated by other High Court decisions. The Learned Trial Magistrate did *not* proceed on wrong principles merely for choosing to use the multiplier method and then choosing the minimum wage as the multiplicand.

43. Moreover, the Appellant does not really find any fault in the multiplicand chosen (Kshs. 10,000/-) – which is below the minimum wage or the ration of one-third – which is typical for children of this age given that that it is to be expected that the children will likely have their own lives and families and would not necessarily spend most of their resources on their parents in their adult age. I would, therefore, not disturb the quantum awarded as well.

44. **The upshot, then, is that the appeal is wholly without merit and it is dismissed with costs.**

45. Orders accordingly.

Dated and delivered at Kiambu this 9th day of February, 2018.

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JOEL NGUGI

JUDGE