



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 26 of 2016

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

VERSUS

LEONARD OCHIENG MUGENYA(suing as a personal

representative/administrator of the

estate of James OkwiriOchieng).....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 258 of 2013

delivered by Hon. T.Obutu (PM) on 18th March, 2016)

JUDGMENT

1. **LEONARD OCHIENG MUGENYA(hereinafter referred to as respondent)** sued **KENYA POWER & LIGHTING COMPANY LIMITED(hereinafter referred to as appellant)** in the lower court claiming damages for fatal injuries suffered by his brother, James OkwiriOchieng, who was electrocuted on 24th March, 2010 as a result of the negligence of the appellant.

2. The defendant/appellant filed a statement of Defence and denied the claim. On 5.11.14, parties entered into consent on liability at 70:30% in favour of the respondent as against the appellant.

3. In a judgment delivered on **18th March, 2016**, the trial court awarded damages in the sum of Kshs.1, 939,954.50 after deducting the agreed contributory negligence ratio of 30%.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 18.7.17 filed the Memorandum of Appeal dated 18.4.16 which sets out 5 grounds of appeal that may be summarized into the following two major grounds that:-

1) The Learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same

2) The Learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities cited in the written submissions presented and filed by the appellants

3) The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable

4) The Learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate *vis a vis* the respondent's claim

5) The Learned trial Magistrate failed to apply himself judicially and to adequately evaluate evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

6. Appellant holds the view that there was no prove of deceased's earnings and that the trial court ought to have applied a multiplicand of Kshs. 5,218/- being the wages of an unskilled worker under the Regulation of Wages (General)(Amendment)Order, 2013. It was also submitted that the trial court did not take into account the vicissitudes of life when it applied a multiplier of 26 years and proposed a multiplier of 20 to 23 years. In addition, it was submitted that trial court failed to have deduct damages under the Law Reform Act from the damages under the Fatal Accidents Act thereby awarding the respondent double compensation. Appellant relied on the following authorities.

1. DAVID KAHURUKA GITAU & ANOTHER V NANCY ANN WATHITHI GITAU & ANOTHER [2016] ECLR

2. HANNAH WANGATURI MOCHE & ANOTHER VS. NELSON MUYA NAIROBI HCCC NO. 4533/1993

3. HELLEN WARUGURU WAWERU (SUING AS THE LEGAL REPRESENTATIVE OF PETER WAWERU MENJA (DECEASED VS. KIARIE SHOE STORES LIMITED NYERI CIVIL APPEAL 22 OF 2014

4. KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE GATHOGO KANINI .V. A.M. LUBIA AND OLIVE LUBIA (1985) 1KAR 727

Respondent's submissions

7. It was submitted for the respondent that the deceased was indeed a casual worker and that the multiplier and multiplicand applied by the trial court was justified and ought not to be interfered with. Respondent relied on the following authorities.

1. DAVID KAHURUKA GITAU & ANOTHER V NANCY ANN WATHITHI GITAU & ANOTHER [2016] ECLR

2. DAVID BORE V JOHNSON MASIKA (2014) eCLR

3. JACOB AYIGA MARUJA & ANOR V SIMEON OBAYO [2015] eCLR

4. STELLAH KANINI JACKSON & ANOTHER V KENYA POWER & LIGHTING CO. LTD (2012) eCLR

5. BENEDETTA WANJIKU V CHANGWON CHEBOI & ANOTHER (2013) eCLR

Analysis and Determination

8. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Sumaria & Another -Vs- Allied Industrial Ltd (2007) 2KLR** and **Selle & Another -Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**. It then behooves this court to summarize the evidence that was tendered before the trial court.

9. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

10. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of multiplicand, multiplier and whether the court should make awards both under the Fatal Accidents Act and Law Reform Act.

11. It is on record that deceased was a casual worker. His earnings were not proved and the learned trial magistrate ought to have applied the Regulation of Wages (General) (Amendment) Order 2013 (**Legal Notice No. 197/13**) which came into operation on the 1st May, 2013 and which shows the wages of an unskilled worker to be Kshs. 5,218/-.

12. As regards the multiplier, it is on record that the deceased died at the age of 34 years. The learned trial magistrate applied a multiplier of 26 on the ground that deceased would have worked up to the 60 years were it not for the untimely death. Deceased was in the informal sector which is not governed by the normal retirement age and I therefore find no cause to interfere with the trial court's finding on the multiplier.

13. I have considered the holding in **HELLEN WARUGURU WAWERU (SUING AS THE LEGAL REPRESENTATIVE OF PETER WAWERU MENJA (DECEASED VS. KIARIE SHOE STORES LIMITED NYERI CIVIL APPEAL 22 OF 2014** where the Court of Appeal (Waki, Nambuye and Kiage JJA) stated that:

“...this court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only

awarded under the Law Reform Act, hence the issue of duplication does not arise.

14. From the foregoing, it is apparent that I am not persuaded that the trial magistrate appropriately awarded damages both under the Fatal Accidents Act and Law Reform Act.

Disposition

In view of the finding I have, the appeal partially succeeds. I substitute the judgment of the trial court on loss of dependency with the sum of Kshs. $5218 \times \frac{2}{3} \times 26 \times 12 =$ **Kshs.1,085,344.00**. The award on pain and suffering and loss of expectation of life remain as awarded by the trial court.

The respondents will have $\frac{1}{2}$ costs of the appeal.

DATED, DELIVERED AND SIGNED THIS 19th DAY OF April 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Carolyne

Appellant - Mr. Bagada Holding Brief for Njoga

Respondent - N/A