



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 44 OF 2015

KENYA POWER & LIGHTING CO. LTD.....APPELLANT

VERSUS

CLEMENT LIKOBEBE

SHIKONDI (*personal representative of the estate of DESMOND*

TUTU LIKOBEBE deceased).....**RESPONDENT**

(An appeal arising from the judgment and decree of the

Hon. J. Ong'ondo Principal Magistrate in Kakamega

CMCCC No. 156 of 2014 of 18th May 2015)

JUDGMENT

1. The appellant lodged herein a memorandum of appeal dated 4th June 2015, in which it was averred that the trial court had treated the evidence and submissions before it superficially hence coming to the wrong conclusions, had ignored the principles applicable in awarding quantum of damages, had awarded special damages when the same had not been. It proven, had awarded an amount of damages which was so inordinately high in the circumstances as to represent an erroneous estimate as against the respondent's claim and had failed to adequately evaluate the evidence on quantum.

2. This is a first appeal and I shall be guided by the principle stated in *Ephantus Mwangi and another vs. Duncan Mwangi* (1982-1988) 1 KAR 278, *Williamsons Diamonds Ltd vs. Brown* (1970) EA 1 and *Selle vs. Associated Motor Boat Company Limited* (1968) EA 123, that in a first appeal the court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses and making due allowance for that.

3. The factual background is that the deceased herein met his death on 7th October 2012 through electrocution. He allegedly came into contact with live electric wires which were hanging loosely close to the ground. This happened in the Khayega area of Kakamega County. The respondent accused the appellant of negligently causing or contributing to the said death by allowing the electric wires to loosely hang from the lines. The appellant countered the claim by attributing negligence to the deceased. .

4. Interlocutory judgment on liability was entered on 18th June 2014 after the respondent, who was the defendant, failed to appear. The said judgment was set aside by consent on 2nd September 2014. The appellant then filed a defence which comprised of mere denials. The trial court took evidence from the respondent on 8th December 2014. No counter evidence was presented by the appellant. Judgment was subsequently entered for liability at 100% against the appellant, and at Kshs. 1, 693, 760.00 consolidated general and special damages. Special damages amounted to Kshs. 80, 000.00, broken down into Kshs. 10, 000.00 for coffin, Kshs. 20, 000.00 for postmortem, Kshs. 10, 000.00 for transport, Kshs. 5, 000.00 for clothes, Kshs. 30, 000.00 for grant of representation and Kshs 5, 000.00 for demand letter. Out of the whole the last two it were supported by receipts. General damages were awarded under the Law Reform Act, Cap 26, Laws of Kenya and the Fatal Accidents Act, Cap 32, Laws of Kenya. Under the Law Reform Act the court awarded Kshs 20, 000.00 for pain and suffering and Kshs 125, 000.00 for loss of expectation of life. Under the Fatal Accidents Act the court awarded Kshs 1, 593, 760.00 for loss of dependency, Kshs 125, 000.00, representing loss of expectation of life, was deducted.

5. Directions were given on 13th March 2018 for disposal of the appeal by way of written submissions. The parties have complied, and have each filed their respective written submissions. I heavy perused through them and noted the arguments advanced.

6. The appellant raises issue with three matters in the judgment. Firstly, it is argued that the respondent did not lead evidence on negligence, and therefore there was no basis for the finding that the appellant was 100% liable for the death. Secondly, it is averred that the court ought not to have awarded anything under the head of the Fatal Accidents Act, for the deceased was not related to the respondent within the degrees mentioned in the Act and that the deceased died a bachelor. There are also arguments about the multiplier used by the court. Thirdly, it is argued that the court ought not have awarded special damages for items not supported by documentation. The appellant has cited several decisions to support its contentions.

7. The respondent has urged me to uphold the judgment of the lower court, on the basis that the same was made after the court considered everything that should have considered and properly applied the principles that were applicable in such cases. Several decisions were cited to support these contentions.

8. On the question of liability, I note from the record that the respondent testified, but no one testified for the appellant. He was not at the scene when the electrocution occurred but he got to the scene shortly thereafter. He noted the low hanging wires. No eyewitness was called to testify on what exactly happened. However, from the documents produced as exhibits I do see a certificate of death dated 7th October 2012, serial number 262990. Cause of death is indicated as cardiopulmonary arrest due to electrocution. Live wires are usually covered or overhead or underground, way out of reach of the common man. The testimony as given leaves a lot to desire, but it is plain that the deceased met his death upon an encounter with a live wire. It is the duty of the appellant to ensure that members of the public are not exposed to such dangers. In the absence of other evidence the trial court cannot be faulted for the conclusion it came to on liability.

9. On special damages, the appellant is unhappy that the court awarded damages for items that were not supported by any documentation. Its concern is primarily with the funeral expenses. Indeed, from the record no documents were produced to support the amounts claimed and awarded as special damages under these heads. The cardinal legal principle is that special damages must not only be specifically pleaded, they must also be specifically proved. What is pleaded in the plaint are claims for funeral expenses put at Kshs. 50, 000.00, cost of obtaining limited representation to the estate of the deceased Kshs. 30, 000.00 and cost of sending a demand notice Kshs. 5, 000.00. Out of the three items, two are supported by receipts; the demand notice and the process of obtaining representation to deceased's estate. Therefore, only these two items of special damages have been specifically proved. There are no documents in the record as specific proof that the respondent spent Kshs. 50, 000.00 on burying the remains of the deceased. However, I will not interfere with what the trial court awarded as there is ample case law to the effect that with regard to funeral expenses the court may exercise discretion and award a reasonable figure to cover that item lack of specific proof notwithstanding. It's a departure from the established rule in award of damages that has attained some notoriety to the extent of firming up to a rule on its own right.

10. Regarding the awards under the Law Reform Act and the Fatal Accidents Act, it may be stated that under the former the damages awarded are for the benefit of the estate of the deceased, while the latter is for the dependants of the deceased. Under the Law Reform Act the heads include loss of expectation of life or lost years, and pain and suffering. It was said in *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters and others* (1986) KLR 457, that under the Law Reform Act damages for the lost years are recoverable for the estate of the deceased where he dies in or as a result of the accident. See also *William Juma vs. Kenya Breweries Ltd* Nairobi High Court civil suit number 3514 of 1985 (unreported). Under the Fatal Accidents Act falls the item on loss of dependency. The trial court awarded damages under both Acts. Where that happens the amount awarded for loss of expectation of life is usually subtracted from the amount awarded for loss of dependency. See *Kemfro Africa Limited v/a Meru Express Services (1976) and another vs. Lubia and another (number 2)* (1987) KLR 30 and *South Nyanza Sugar Company Ltd vs. James Martin Matoke* civil appeal number 91 of 1997 (unreported).

11. The appellant challenges the award of damages under the Fatal Accidents Act. Firstly, on grounds that the respondent was not a dependant of the deceased within the meaning assigned to dependency under that statute, and, secondly, because the deceased died a minor and nobody was dependent on him. The said legislation is intended to enable compensation to families of persons killed in accidents. Section 2 thereof defines the persons who can benefit from the provisions of the Act in terms of compensation, and who may bring suits under the Act. The definition of 'parent' includes 'grandfather.' In that case, the respondent could properly bring an action under the Fatal Accidents Act herein with regard to the estate of his deceased grandchild. I find no fault on that account.

12. The other aspect of the appeal on this head is, however, more fundamental, whether damages could be awarded for loss of dependency in circumstances where the respondent was not dependent on the deceased. From the material before me, the deceased was a primary school going minor of about fourteen years. No evidence was adduced to suggest that the minor was in any form of gainful employment from which he derived income sufficient for the respondent to be dependent on. The fact that the minor was in primary school suggests that it was he who was dependent on the respondent.

13. In *Kassam vs. Kampala Aerated Water Co. Ltd* (1965) EA 587 and *Jane Chellagat Bor vs. Andrew Otiemo Onduu* (1990-1994) EA 47, it was stated that dependency is a question of fact, and the compensation awarded is for pecuniary loss. Dependency was defined as the relation of a person to that by which he is supported. It was observed that the extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the court will analyse the available evidence as to how much the deceased earned and how much he spent on his family. See also *Jackline Mueni Nzioka vs. Jetha Ramji Kerai* Civil application numbers 154 and 155 of 1996. (unreported)

14. I am conscious though of the decision in *William Juma vs. Kenya Breweries Ltd*, where the court stated that under English law damages were awardable to parents under the Fatal Accidents Act, where the evidence showed that the parent reasonably expected a pecuniary benefit from the child which had been lost as a result of the death of the child. The court went on to cite *Cosmas Oguttu vs. Makario Bus Trading Co. Ltd* High Court civil case number 3003 of 1984 (unreported), where the nature of the Kenyan society was taken into account, particularly the fact that parents expect financial help from their children when they grow up. It was also recognized that in local societies children often render useful services at home or in the farm, which relieves parents from other financial expenditure such as employing workers. It was noted that such services can be converted to money, and courts would award a lump sum figure to compensate parents for pecuniary loss they have suffered or that they stand to suffer. See also *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters and others*. However, the caution in *Kassam vs. Kampala Aerated Water Co. Ltd*, *Jackline Mueni Nzioka vs. Jetha Ramji Kerai* and *Jane Chellagat Bor vs. Andrew Otiemo Onduu*, that dependency is a question of fact must come into play. In *Abdullahi vs. Githiye* (1974) EA 110, the court said that a mere possibility of the pecuniary benefit by a parent from their minor child must be disregarded, for it must be established that there

was a reasonable expectation of pecuniary benefit. There must be some evidence adduced on the activities that the minor deceased engaged in with regard to assistance to the parents, his school record and his general future prospects.

15. The testimony of the respondent was lacking in essential detail. He did testify that the child was going to school and produced a school record book, however he did not testify on the sort of assistance that the child used to render during his lifetime. Neither, did he talk about the child's dreams, say as to where he desired to go to high school or university, what he intended to study at college and what he intended to do in life at the end of his educational career. It is such facts that assist the court in assessing what would be reasonable compensation for the parent. I have perused through the submissions on record in the lower court file, and I have noted that the respondent did not advert to that. Dependency is a question of fact, it's up to the party claiming damages under the Fatal Accidents Act to marshal evidence that would provide the facts sufficient to guide the court appropriately. It not enough for the party to throw in a few sketchy facts before the court, and thereafter leave it to the court to fill in the gaps. I do not think that sufficient basis was laid for the award made on loss of dependency.

16. The appellant seems to have no issue whatsoever with the awards under the Law Reform Act, and I shall therefore not say a word about it.

17. In the end I shall allow the appeal partially. I uphold the findings and holdings of the trial court on liability, on the heads under the Law Reform Act, and on special damages. However, I shall, as I hereby do, set aside the award under the Fatal Accidents Act. That means that there shall be judgment for the respondent in the sum of Kshs. 225, 000.00, broken down into Kshs. 20, 000.00 for pain and suffering, Kshs. 125, 000.00 loss of expectation of life, and Kshs. 80, 000.00 special damages. The respondent shall also have costs of the suit at the lower court. Interest on the amount of damages here above shall be charged from the date of delivery of the judgment at the lower court. Each party shall bear their own costs on the appeal.

18. Should any party be dissatisfied with the outcome of these proceedings, there shall be leave to appeal against the same at the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at KAKAMEGA this 8TH DAY OF AUGUST, 2018

W. MUSYOKA

JUDGE