



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 11 OF 2016

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

VERSUS

ABDALLA MURAMBA MWENI & SAUMU THOYA BAYA

(suing as the legal representatives

of the estate of Asma Abdallah.....RESPONDENT

AND

CIVIL APPEAL NO. 12 OF 2016

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

VERSUS

ABDALLAH MURAMBA MWENI & SAUMU THOYA BAYA

(suing as the legal representative

of Salma Abdallah).....RESPONDENT

(Being an appeal from the Judgement delivered on 12th October, 2015 by L.N. Wasige, SRM in Kilifi SPM Civil Case No. 15 of 2014 as consolidated with Civil Case No. 16 of 2014)

JUDGEMENT

1. This judgement speaks to two appeals (HCCA. No. 11 of 2016 Kenya Power & Lighting Co. Ltd versus Abdallah Mramba Mweni & Saumu Thoya Baya (suing as the legal representatives of the estate of Asma Abdallah) and HCCA. No. 12 of 2016 Kenya Power & Lighting Co. Ltd versus Abdallah Mramba Mweni & Saumu Thoya Baya (suing as the legal representatives of the estate of Salma Abdallah)). The appeals are against a judgement delivered in respect of Kilifi SPM Civil Case No. 15 of 2014 and Kilifi SPM Civil Case No. 16 of 2014 which had been consolidated pursuant to an order issued by the trial court on 23rd February, 2015. It beats logic why the Appellant opted to file two appeals but I hasten to add that the filing of separate appeals does not in any manner prejudice any party or this court. A single judgement is therefore sufficient to take care of both appeals.

2. A brief outline of the circumstances that necessitated the claims whose decisions led to the filing of these appeals is necessary. On 5th June, 2011, PW1 Abdallah Mramba Mweni was at his place of work when he received a call from a neighbour that his children were involved in an accident. He rushed home at Kizingitini in Mtwapa area where he found his two children S A and A A had been electrocuted along with other children belonging to his neighbours. His daughter Salma Abdallah was among the children who had died. His other child A A was still alive. A A was rushed to Coast General Hospital where she succumbed to the injuries the next day.

3. PW1 and his co-plaintiff Saumu Thoya Baya who is also his wife later instituted two suits at Kilifi Senior Principal Magistrate's Court seeking damages on behalf of the estates of their deceased children. At the conclusion of the matters, which had been consolidated in the course of the trial, the trial court awarded assorted damages on various heads to the respondents (Abdallah Mramba and Saumu Thoya (suing as the legal representatives of the estates of S A and A A)).

4. The Appellant (the defendant at the trial), Kenya Power & Lighting Company being aggrieved by the judgement has appealed to this court challenging apportionment of liability and the quantum of damages awarded.

5. This is a first appeal and this court is under a duty to consider the evidence that was adduced afresh and arrive at its own independent decision. The principles guiding the hearing of an appeal by a first appellate court were expounded by the Court of Appeal at Mombasa in **Civil Appeal No. 116 of 2016, Association for the Physically Disabled of Kenya v Kenya Union of Domestic Hotels Educational Hospital and Allied Workers Union & another [2018] eKLR** as follows:

“[10] This is a first appeal, it is therefore the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial court in order for it to reach its own independent conclusion. (See Selle v. Associated Motor Boat Co. Ltd (1968) EA 123 Selle and Another v. Associated Motor Boat Company Ltd And Others, [1968] 1 EA 123 (CAZ)):

“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 Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270).”

6. There are two issues for consideration in this appeal:

- a) Whether the finding that the Appellant was 100% liable for the accident was supported by the evidence; and
- b) Whether the trial court correctly applied the applicable legal principles in determining the amount of damages awarded to the respondents.

7. In finding the Appellant 100% liable for the incident, the trial magistrate stated *inter alia*:

“I agree with the plaintiff in their submissions that no explanation whatsoever was offered by the defence as to why the electricity wires were lying on the ground. It was the defendant’s duty and obligation to ensure that the wires were safely tied up on the poles. If for some reason that could not be done immediately after the pole fell down, then it was still the defendant’s duty to ensure that electricity wires did not have live electricity in them.

It came out during cross-examination that the deceased children were alone and unattended by an adult. From what PW1 stated, it appears that the children were going to their grandmother’s farm. Considering that the children were of tender years, it would have been ideal if they would have been escorted by an adult. Be that as it may, the absence of an adult does not negate the fact that the defendant was negligent of its duty to ensure that the wires lying on the ground were not a threat to lives. It is my view that even if the children had been with an adult, the accident (electrocution) would still have occurred considering the fact that the wires were dangerously lying on the ground with live electricity inside them. It was the sole responsibility of the defendant to ensure safety of their electricity wires. The fact that the electricity wires were lying on the ground posing a danger to the area residents and passers-by connotes negligence on the part of the defendant. The defendant ought to have ensured safety of their electricity wires at all times.

It is therefore my finding that as a result of the defendant’s negligence, the deceased children got electrocuted and died. I find the defendant to be 100% liable for the death of the 2 minors.”

8. In reaching her decision, the trial magistrate was guided by the evidence on record. PW1 testified that upon arrival at the scene he saw an electricity pole that had fallen down. He also saw electricity wires on the ground. All the four children lay next to the wires. His testimony was that A was one year old and S was six years old. He blamed the Appellant for failing to raise the wires immediately after they fell. His testimony was that the wires had been on the ground for three days and a cow had even been electrocuted prior to the incident involving the children.

9. PW2 Corporal Kenneth Naivasha investigated the deaths. Among his findings was that the wires that electrocuted the children belonged to the Appellant. His investigations also revealed that the wires had been on the ground from the previous day.

10. Faulting the trial magistrate’s finding on liability, the Appellant submitted that the two minors were of tender age and their parents and guardians were expected to keep maximum watch over them. Counsel for the Appellant submitted that the children had been sent to the farm about one kilometer away and apart from the electricity wires lying on the ground there were many other dangers lurking on the roads, including motor vehicles, which require that children should not be exposed to dangers by the parents. Counsel for the Appellant faulted the trial magistrate for finding that although the children ought to have been accompanied by an adult they could nevertheless have been electrocuted. Counsel further submitted that the courts should hold the parents responsible for the death of the minors. Counsel concluded by urging this court to find that there was no fault on the part of the Appellant and dismiss the respondents’ claim. In the alternative he proposes that contributory negligence be attributed to the respondents at 80%.

11. Opposing the appeal on liability, counsel for the respondents submitted that the evidence established that the wires had been on the ground from the previous day. He submitted that the electric current had not been disconnected and this showed that the Appellant was indeed negligent. Further, that the Appellant never availed any witness to give a contrary view on how the accident occurred.

12. A review of the evidence will confirm that the electric pole supporting the wires had fallen down and the wires were lying on the ground. The evidence also established that the children were electrocuted by the live wires. Ideally, electric wires are supposed to be hanging in the air above the ground or under the ground but in this case they lay on the ground. That alone is evidence of negligence on part of the Appellant. The Appellant owes a duty of care to the citizenry to ensure that its live wires are out of reach. In the instant case the wires were not where they were supposed to be.

13. Secondly, it is also noted that the victims were children of tender age. The legal principle applicable is that children of tender years are normally not supposed to be found guilty of contributory negligence. In the case of **Bashir Ahmed Butt v Uwais Ahmed Khan (1981) KLR 349**, as cited by L.N. Mutende, J in **M M (suing thro' the next of kin C M N) v Boniface Ngaruya Kagiri & another [2018] eKLR** it was held that:

“It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness...A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child.”

14. In the circumstances the trial magistrate cannot be faulted for finding the Appellant 100% liable for the death of the minors. I therefore do not find any merit on the appeal on liability.

15. As for the appeal on the amount of damages awarded, the real bone of contention is the award for loss of dependency. On this head the estate of each deceased was awarded Kshs. 700,000.

16. In reaching her decision on the award in regard to the estate of Salma the learned trial magistrate reasoned thus:

“However the issue for my determination is whether the multiplier or global approach should be applicable in this case.

It is my finding that the global approach is more applicable herein. In my opinion, the deceased was more of a dependant of her parents. She had not reached and was not yet in a position to accord her parents any pecuniary benefit.”

17. In support of the award of Kshs. 700,000 for loss of dependency, the trial magistrate relied on the decision in **Board of Governors Friends School Kamusinga & another v M.N.S. (suing as administrator of I.K.S. (deceased)) [2015] eKLR** where the estate of the deceased child was awarded Kshs. 600,000 on the same head.

18. Urging the court to set aside the awards for loss of dependency, counsel for the Appellant submitted that the awards were high considering that no evidence had been led on the school prospects of any of the minors. He also submitted that a conventional sum should be awarded on this particular head. In support of his submission he cited the decision of **Kenya Breweries Ltd v Ali Kahindi Saro, Civil Appeal No. 114 of 1990** where the Court of Appeal awarded Kshs. 100,000 for loss of dependency holding that:

“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 no evidence of pecuniary contribution.”

19. The respondents on their part urged this court not to disturb the award of the lower court stating that the authorities that had been cited by the Appellant in which Kshs. 100,000 was awarded for loss of dependency were outdated. Counsel for the respondents urged the court to follow the latest decisions and referred to the already cited case of **Board of Governors Friends School Kamusinga and another**. He also cited the case of **Daniel Mwangi Kimani & 2 others v JGM & Another (the personal representatives of the estate of NK (DCD) [2016] eKLR** where Kshs. 1,000,000 was awarded for loss of dependency in respect of the estate of a 9 year old child. It is however noted that in the said case the deceased child was already going to school and displayed bright prospects thus tilting the hand of the court in making such an award.

20. Looking at the submissions that were filed at the trial I note that the Appellant's case was supported by the decisions in the following cases:

a) Ali Kahindi Saro v Kenya Breweries Limited Mombasa HCCC No. 602 of 1987 as upheld by the Court of Appeal in **Kenya Breweries Ltd v Ali Kahindi Saro, Civil Appeal No. 144 of 1990 (CA, Mombasa)**;

b) Gerald Kawizera Baru v Mugoya Construction Co. Ltd, Mombasa HCCC No. 874 of 1991;

c) Jackson Onyango v Mkulima Transport & another, HCCC No. 73 of 1992; and

d) Jane Adongo Odhiambo v Kinyanjui Mareme Munyi & another, Mombasa HCCC No. 299 of 1995.

21. Apart from the case of **Jane Adongo Odhiambo**, where an award of Kshs. 150,000 was made, Kshs. 100,000 was awarded for loss of dependency in the other cases. In my view, all the cited cases were decided over a decade ago and they may not reflect the current trends. They are not a good guide in deciding the amount to award at the moment.

22. On the other hand the decisions cited by the respondents are current. However, they are not similar to the claim that gave rise to this appeal. In those cases the children were already in school and one can say their prospects could be gauged. In the case at hand both children

were yet to go to school.

23. The facts of this case are similar to those in the case of **Transpares Kenya Limited & another v SMM (suing as Legal Representative of the Estate of EMM (Deceased))** where P. Nyamweya, J awarded Kshs. 500,000 for loss of dependency in respect of the estate of a child who was 5 years at the time of death.

24. Even though one can say an award of Kshs. 700,000 is on the higher side, it cannot be said the same is so inordinately high to warrant interference by the court. As already demonstrated, the trial magistrate applied the correct principles in making her determination on the amount of damages to award.

25. A perusal of the awards for pain and suffering, loss of expectation of life and special damages in respect of the estate of each deceased child shows that the trial magistrate applied the correct principles. The meticulousness and aptitude of the trial magistrate in understanding the law clearly comes out when she awards Kshs. 30,000 for pain and suffering to the estate of S who died on the spot and Kshs. 60,000 on the same head to the estate of Asma who died several hours after the accident.

26. The award of Kshs. 120,000 for loss of expectation of life was quite reasonable as the range for this award is currently between Kshs. 100,000 and Kshs. 150,000. For example, in **Mombasa HCCC No. 256 of 2001 Rose Wanjiru Njeri v Water Recycling Ltd**, Kshs. 125,000 was awarded on this head.

27. As for special damages, the learned trial magistrate first awarded what was pleaded and proved and then went ahead to award Kshs. 20,000 as funeral expenses for each child. In awarding the funeral expenses she relied on the decision in the case of **Jane Katumbu Mwanzia v T.M. Mwanzui, HCCC No. 3177 of 1999** where it was stated that people don't keep receipts for funeral expenses. The award of Kshs. 20,000 as funeral expenses for each child was actually on the lower side. Funerals are expensive affairs. In short, it is very clear that the trial court was guided by principles stated in previously decided cases.

28. In summary, these appeals are without merit. The judgement of the trial court is upheld. The appeals are dismissed with costs to the respondents.

Dated, signed and delivered at Malindi this 17th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT