



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 123 OF 2014**

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

**VERSUS**

**CHARLES OBEGI OGETA (Suing as the legal representative of the estate of ESTHER NYANCHOKA OBEGI)..... RESPONDENT**

*(Appeal from the Judgment and Decree in Kisii CM Civil Case No. 517 of 2012 (Hon. J.M. Njoroge CM.)*

**JUDGMENT**

1. **KENYA POWER & LIGHTING CO. LTD** (herein, Appellant), was the defendant in a suit filed at the Chief Magistrate's Court Kisii, by the Plaintiff, **CHARLES OBEGI OGETA** (herein, Respondent), being the legal representative of Esther Nyanchoka Obegi (herein, deceased) who passed away on the 24<sup>th</sup> July 2012, after coming into contact with live electric wire at Kiongongi Shopping Centre.

2. In the suit, i.e **CMCC No. 517 of 2012**, the respondent claimed damages against the appellant pursuant to the provisions of the Law Reform Act and the Fatal Accidents Act. He pleaded in his statement of claim (plaint) dated 31<sup>st</sup> December 2012, that the fatal accident was occasioned by the appellant's negligence in failing to properly install and connect the electricity or installing the electricity with live wires dangling loosely and failing to place insulators and/or rubbers to prevent free flow of electricity to unwanted zones thereby exposing the deceased to danger by leaving live electric wire dangerously exposed after installation.

The respondent therefore prayed for judgment against the appellant for special and general damages together with costs of the suit.

3. The appellant's statement of defence dated 1<sup>st</sup> February 2013, was a denial of the allegations made against itself by the respondent and a contention that the said Kiongongi Village was a remote area which fell within the jurisdiction and mandate of the Rural Electrification Authority (REA) which was responsible for installation of electricity in rural areas under the rural electrification programme.

The appellant pleaded that the suit against itself was thus misplaced and further contended that it was not involved in the installation of electricity within the Kiongongi Shopping Centre and/or its environs.

4. The appellant also pleaded that if ever the alleged installation of electricity occurred, then it was done by persons or entity which were strangers to itself and it was therefore not culpable and/or liable to compensate the respondent out of acts, omissions or commissions of strangers not under its control either directly or otherwise or at all. It contended that if ever the deceased suffered injuries as alleged, then

these were sustained elsewhere far from the purported site of the accident and from other different cause for which it was not liable howsoever and/or whatsoever.

5. Alternatively, the appellant contended that if the accident occurred and that the deceased was ever injured, then this was due to and/or substantially contributed to by the negligence and recklessness of the deceased or a stranger who undertook the alleged installation. In that regard, the appellant invoked the doctrines of “res ipsa loquitur” and “Volenti non fit injuria”.

6. The appellant contended further that if the accident occurred, then it was due to circumstances beyond and out of its control.

The appellant thus prayed for the dismissal of the respondent’s suit against itself with costs.

7. The close of the pleadings paved way for the hearing of the suit and in that regard, the respondent, **Charles Obegi Ogeta (PW 1)**, testified and called a total of three (3) witnesses viz:- **Zachary Omwengi Obegi (PW 2)**, a son of the deceased, **C. IP David Lawendi (PW 3)**, the officer commanding Kisii Central Police Station and **DR. Adori Jared (PW 4)**, a medical doctor attached to Kisii Level Five (5) hospital.

8. However, prior to the commencement of the appellant’s case, the parties recorded a consent on liability to the extent that judgment on liability was entered against the appellant at 70% with the respondent taking 30% of the blame i.e. the ratio of 70:30.

Liability having been so agreed, the quantum of damages available to the respondent remained the sole issue for determination by the trial court.

9. In considering the point, the trial court awarded the respondent a sum of Ksh. 20,000/= for pain and suffering. A sum of Ksh. 100,000/= for loss of expectation of life and a sum of Ksh. 576,000/= for loss of dependency applying a dependency ratio of  $2/3^{rd}$ , a multiplicand of Ksh 6000/- and a multiplier of 12 years.

The respondent was also awarded special damages in the sum of Ksh. 30,000/=.

All in all, judgment was entered for the respondent in the total sum of Ksh. 726,000/= less 30% contributory negligence i.e Ksh 508,200/= together with costs and interest.

10. Being dissatisfied with the decision of the trial court, the appellant preferred this appeal on the basis of the grounds contained in the memorandum of appeal dated 29<sup>th</sup> October 2014, which essentially raise issues pertaining to the application of a multiplicand of Ksh 6000/= by the trial court, the failure by the trial court to discount the award of Ksh. 100,000/= for loss of life expectation from the total and cumulative award and the award of Ksh. 30,000/= special damages without proof thereof.

The appellant urged this court to quash and/or set aside the judgment of the trial court respecting damages and review the same.

11. The appeal was canvassed by way of written submissions and in that regard the appellant filed its submissions through **O.M Otieno & Co. Advocates**, and the respondent filed his through **S.M Sagwe & Co. Advocates**.

This court has given due consideration to the rival submissions in the light of the grounds of appeal and being a first appellate court its duty was to revisit the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Selle & Another Vs. Associated Motor Boat Co. Ltd & Others (1968) EA 123**).

Herein, the witnesses availed testified in favour of the plaintiff/respondent. The appellant did not avail any witness.

12. The respondent was the successful litigant although he accepted to shoulder a 30% blame for the accident which led to the death of his wife. He testified that the deceased was aged about 47 years at the time of her death and was a farmer by occupation. He also said that they were blessed with seven (7) children and that he incurred over Ksh. 10,000/= for her funeral. He did not however, support that claim with tangible documentary evidence. He only produced one receipt (P.Ex 5) for Ksh. 995/= which was incurred in obtaining a limited grant of representation to file this suit.

13. The respondent did not indicate whether or not the deceased earned any income from her farming occupation and whether the income if any was used to supplement household expenses.

What may be deduced from the respondent's evidence was that the deceased undertook most likely than not, subsistence farming from which she was able to assist her family maintain a meaningful livelihood.

14. However, it is a matter of common knowledge that a home without a matriarch to keep the family afloat and enable it to live a normal family life would invariably suffer immense loss which may not necessarily be computed in monetary terms but ought to be given legal recognition or acknowledgement. Suffice to say that the respondent and his children with the deceased depended on the deceased for the upkeep of the family. Her demise was a great loss to them and ought to be compensated.

15. In the book **"Kemp & Kemp – The Quantum of Damages" Vol 1**, it is aptly stated that curtailment of the life span of a deceased person gives rise to compensation for a non-pecuniary injury. Such an award is based on the presupposition that a person has a legal right that his life shall not be abridged by the negligence of another. His normal expectancy of life is a thing of temporal value so that its impairment is something for which damages should be given.

16. Basically, the term "damages" refer to a type of money remedy which consists of a sum assessed in the course of a trial and that ordered to be given as a payment by or on behalf of the defendant for loss suffered by the plaintiff at the hands of the defendant. It is a pecuniary compensation obtainable by success in a suit for an actionable wrong. (see, **Case book on measures of damages for bodily injuries** by Richard Kuloba, Judge – Emeritus, High Court of Kenya).

17. Herein, the respondent was the key witness at the trial. His evidence was mainly in support of his claim for the loss incurred by the estate of the deceased and her dependants.

The other witnesses i.e PW 2, PW 3 and PW 4, testified on the issue of liability which was in any event, compromised by the parties and did not fall for determination by the trial court.

18. Under the Law Reform Act, compensation is normally for loss of expectation of life and perhaps for pain and suffering undergone by the deceased prior to death. These are solely for the benefit of the estate of the deceased. The trial court awarded Ksh. 100,000/= for loss of expectation of life. The amount is to this court adequate and reasonable such that it does not call for interference at this stage.

However, with regard to the award of Ksh. 20,000/= for pain and suffering, this court is of the view that the amount was undeserving as the deceased was electrocuted and died instantly on the spot.

This court must now and hereby overrule the award of Ksh. 20,000/= but sustains that of Ksh. 100,000/= while being very much alive to what was stated by the Court of Appeal in the case of **Kenfro Africa Ltd t/a Meru Express Service & Another Vs. A.M Lubia & Another (1982 – 1988) 1 KAR 727**, regarding the principles to be observed by an appellate court in deciding whether or not to interfere with the quantum of damages awarded by a trial court.

19. In that case, it was stated that:-

***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the***

*judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage ....”(see also, Arrow Car Ltd Vs. Bimomo & 2 Others (2004) 2 KLR 101).*

20. Under the Fatal Accidents Act, damages are awarded for loss of dependency for the benefit of the dependants of the deceased. These are separate and distinct from damages under the Law Reform Act such that the two sets of damages can be awarded to the same beneficiaries without there being a danger of double compensation. In some instances, the ultimate beneficiaries may not be the same persons but different persons. The appellant did not adduce evidence to show that damages awarded under both sets would solely go to the respondent.

21. The trial court awarded a sum of Ksh. 576,000/= for loss of dependency made out of Ksh. 6,000/= x 12 x 12 x 2/3 = Ksh. 576,000/=.

The trial court thus applied the multiplier approach to arrive at that award of Ksh. 576,000/=. However, the view of this court is that the evidence availed by the respondent did not provide a proper basis for applying a sum of Ksh. 6,000/= as the multiplicand although the multiplier of 12 years was reasonable given that the deceased died at the age of 47 years.

22. As there was no tangible evidence to show that the deceased made or earned a monthly income of Ksh. 6,000/= from her farming occupation, the multiplier approach ought not have been applied by the trial court to assess loss of dependency. Instead the trial court ought to have applied the global sum approach based on the number of dependants left behind by the deceased.

In applying the global sum approach, this court would award a sum of Ksh. 300,000/= for loss of dependency.

23. With regard to special damages, the Court of Appeal in the case of Virani t/a Kisumu Beach Resort Vs. Phoenix E.A Assurance Co. Ltd (2004) 2 KLR 269, stated that:-

*“A claim for special damages should not only be pleaded but strictly proved. What amount to strict proof depends on circumstances, that is to say, the character of the acts producing damage, and the circumstances under which these acts are done.”*

Herein, the amount specifically proved by necessary documentary evidence was the sum of Ksh. 1,045/= for the death certificate and the limited grant of representation. The claimed amount of Ksh. 20,000/= for funeral expenses was not proved. The respondent was therefore entitled to only Ksh. 1,045/= as special damages.

24. In sum, this appeal is allowed to the extent that the judgment of the trial court on assessment of damages is hereby set aside and substituted for judgment in favour of the respondent against the appellant for the total sum of Ksh. 401,045/= made of Ksh. 100,000/= under the Law Reform Act, Ksh. 300,000/= under the Fatal Accidents Act and Ksh. 1,045/= being proven special damages, all these, less 30% contributory negligence together with costs and interest.

Each party to bear own costs of appeal.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**[Delivered and signed this 25<sup>th</sup> day of May 2016].**