REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 20 OF 2015

KENYA POWER LIMITED..APPELLANT

AND

JAMES MATATA, JOSEPHAT SAIDI INYOSI & MJOMBA DOUGLAS

KIBURI (suing as the legal representatives of the Estate of

NYANGE MASAGA (Deceased)...................................RESPONDENT

(Being an appeal from the Judgment of Honourable Orenge Learned Principal Magistrate

in Civil Case No 4 of 2013 at Wundanyi, delivered on 9th September 2015)

IN

REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATE'S COURT

AT WUNDANYI

CIVIL SUIT NO 4 OF 2013

JAMES MATATA, JOSEPHAT SAIDI INYOSI &

MJOMBA DOUGLAS KIBURI (suing as the legal

representatives of the Estate of

NYANGE MASAGA (Deceased)....................................PLAINTIFF

VERSUS

KENYA POWER LIMITED...DEFENDANT

JUDGMENT

INTRODUCTION

1. By an undated Plaint that was filed on 3rd July 2013, the Appellant, its agents and/or servants were said to have dug up holes for erecting power pool in Zare area, Mwatate District, Bura but left them exposed. It was also stated that on or about 5th April 2011, Nyange Masaga (hereinafter referred to as "the deceased") was lawfully walking home when he fell into one of the holes as a result of which he sustained fatal injuries.

2. In his judgment delivered on 8th September 2015, Hon K.I. Orenge, Senior Resident Magistrate at Wundanyi Law Courts entered judgment in favour of the Respondents against the Appellant in the following terms:-

a. **Loss of Dependency**

2/3 x 7,000 x 12 x 15	**Kshs 840,000/=**
b. **Loss of Expectation of life**	**Kshs 80,000/=**
c. **Pain & Suffering**	**Kshs 100,000/=**
d. **Special Damages**	**Kshs 25,500/=**
	Kshs 1,045,500/=

Plus costs of the suit and interest thereon.

3. The said Learned Trial Magistrate directed that all the beneficiaries were to share the decretal sum equally. He found the Appellant to have been wholly liable for the misfortune that befell the deceased.

4. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed its Memorandum of Appeal dated 21st September 2015 on 30th September 2015. The grounds of appeal were as follows:-

a. **THAT the learned Principal Magistrate misdirected himself in law by assessing damages that were manifestly excessive and incomparable to the current judicial awards in analogous circumstances.**

b. **THAT the learned Trial Magistrate erred in law in failing to appreciate the applicable principles in assessment of damages under the Fatal Accidents Act and the Law Reform Act.**

5. The Appellant's Record of Appeal was dated 10th March 2016 and filed on 14th March 2016. Its Written Submissions were dated 22nd July 2016 and filed on 2nd August 2016 while those of the Respondents were dated 19thJuly 2016 and filed on 21st July 2016.

6. When the matter came before the court on 5th September 2016, the parties' advocates requested for a Judgment date herein having relied entirely on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is under a duty to re-evaluateand assess the evidenceand make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

8. This was aptly stated in the cases of**Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case,the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

9. Having the aforesaid holding in mind and having looked at the Appellant's grounds of appeal and the parties' respective Written Submissions, it was clear to the court that the said grounds both related to the question as to whether or not the Learned Trial Magistrate was justified in awarding the Respondent the said sum of Kshs 1, 045, 550/= as aforesaid.

10. The Appellant listed the following the questions for determination by this court as follows:-

> a. **Whether the award for loss of dependency was proper in light of the express provisions of the Fatal Accidents Act;**
>
> b. **Whether the award of pain and suffering was excessive hence an erroneous estimate;**
>
> c. **Whether the Respondents were entitled to recompense for lost years in lieu of an award for loss of dependence.**

11. The said issues were therefore dealt with under the distinct heads shown hereinbelow.

I. **FATAL ACCIDENT'S ACT CAP 32 (LAWS OF KENYA)**

12. In his evidence, James Matata (hereinafter referred to as "PW 1") stated that the deceased, who was a farmer and earned Kshs 10,000/=, was his brother and that he supported the entire family which included him, his brothers, Josphat Said Inyosi, Mjomba Douglas Kimburi and their sister Jostina Mshai Mghendi who were, at the time of the trial, aged fourty eight (48) years, sixty six (66) years, forty seven years (47) and nineteen (19) years respectively. He adduced in evidence a letter from the Chief dated 3rd October 2012 which showed that himself, his two (2) brothers and sister were the deceased's dependants.

13. There was no proof of the deceased's income. However, the Learned Trial Magistrate applied the minimum wage of Kshs 7,000/= as the multiplicand. It was apparent that both the Appellant and the Respondents did not object to this figure. The said Learned Trial Magistrate adopted 2/3of the dependency ratioand a multiplier of fifteen (15) years in calculating the damages under the Fatal Accidents Act.

14. The Respondents urged this court not to interfere with the same. They relied on the case of **HCCC No 1168 of 1999 James Gichuru Kinjuru & Another vs Mainyo Investment Limited** (unreported) where the court therein adopted a dependency ratio of 2/3 as the deceased therein, though single, supported his parents.

15. On its part, the Appellant was categorical that the Learned Trial Magistrate ought not to have awarded damages under this head as the beneficiaries did not fall under the definition of dependants as provides for under Section (4) (1) of the Fatal Accidents Act which provides as follows:-

> **"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child**(emphasis court) **of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so**

recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

16. It pointed out the beneficiaries of the deceased had been indicated in the Plaint as follows:-

a. **James Matata** **Brother**

b. **Josphat Saidi Inyosi** **Brother**

c. **Mjomba Douglas Kiburi** **Brother**

d. **Jostina Mshai Mghendi** **Sister**

17. It was therefore its submission that the Respondents claim under the Fatal Accidents Act had to fail. It referred the court to the case of **Multiple Hauliers Co Limited vs David Lusa [2012] eKLR** where the court therein had been confronted with similar set of facts and circumstances and came to a similar conclusion.

18. The only dependants for whose benefit a claim under Section 4(1) of the Fatal Accidents Act can be brought are a wife, husband, parent or child, a position that Asike- Makhandia J (as he then was) articulated very well in the case of **Multiple Hauliers Co Limited vs David Lusa** (Supra) and which this court entirely agreed with.

19. This court could not therefore have agreed more with the Appellant on its submissions that the Respondents and their sister were not and could not be regarded as the deceased’s dependants within the meaning of the Fatal Accident Act.

20. Hence, this court wholly concurred with the Appellant’s submissions that the Learned Trial Magistrate erred in law in awarding the Respondents the damages for loss of dependency under the Fatal Act as there was clearly no legal basis for him to have done so.

21. This court found that the Learned Trial Magistrate misdirected himself on the principles of the law and there was need to disturb this award for damages of Loss of dependency under the Fatal Accidents Act being Kshs 2/3 x 7,000 x 12 x 15 totalling to Kshs 840,000/=. The same is hereby overturned as there was no legal basis to have awarded the same.

II. **LAW REFORM ACT CAP 26 (LAWS OF KENYA)**

22. The Respondents were issued with Letters of Administration *Ad Litem* on 22nd February 2012. This gave them the *locus standi* to seek damages for pain and suffering, loss of expectation of life and lost years, which were benefitsto the deceased’s estate under the Law Reform Act. The same were dealt with under distinct heads.

A. **LOST YEARS**

23. The Respondents did not submit on this issue. On its part, the Appellant submitted that an award for lost years was a recompense available to the deceased’s estate in lieu of the award for loss of dependency under the Fatal Accidents Act. It further submitted that an award for loss of dependency payable under the Fatal Accidents Act could not, however, be substituted for an award for lost years under the Law Reform Act in this case in view of the provisions of Section 2 of the Fatal Accidents.

24. It averred that this court’s hands were tied by the pleadings which only sought an award of loss of

dependency and that in any event, an award for lost years was for the benefit of their parents. It placed reliance on the case of **Betty Ngatia (Administrator of the Estate of Gladys Waithira Ngatia) vs Samuel Kinuthia Thuita [1999] eKLR** in which the case of **Sheikh Mushtaq Hassan vs Nathan Mwangi Transporters & Another (1982-1988) 1 K.A.R** had been cited.

25. It was its contention that if this court was inclined to award damages for lost years, then it ought to adopt a multiplicand of Kshs 7,000/= and a dependency ratio of 1/3 as the income the deceased would use on his dependants, noting that he was unmarried and had no children.

26. It urged this court to adopt a multiplier of 6 years and relied on the cases of **James Wambura Nyika & Another vs Mumias Sugar Company & Another [2011] eKLR**, **Silas Njiru Catholic Diocese of Meru vs Andrew Kiruja [2010] eKLR** and **Joyce Kavuli (suing as next of kin of Timothy Kitoo Mathendu) vs Eastern Express Bus Service & Another [1998] eKLR**where the different courts adopted a multiplier of 5 years, 5 years and 6 years for deceased person who were aged 49, 50 and 48 years respectively.

27. Its proposed computation for an award for lost years was therefore as follows:-

1/3 x 7,000 x 6x 12 Kshs 168,000/=

28. It was difficult for this court to envision how the deceased supported PW 1 when he himself had said that he was a business man and the two (2) other brothers who were persons of age. The Respondents may have, however, considered themselves to have been the deceased's dependants by virtue of Section 29 (b) of the Law of Succession Cap 160 (Laws of Kenya) which deems brothers and sisters as dependants of a deceased person.Indeed in the African culture, well to do siblings are expected to support their less economically endowed family members.

29. Unfortunately, the Respondents claim was not under the Law of Successionwhere they could claim support from the deceased. On the other hand, the Fatal Accidents Act envisages that a child in the African setting, whether married or not, is more often than expected to support his parents.

30. In the case of**Kenya Breweries Ltd vs Saro (1981) KLR 408,** the Court of Appeal sitting in Mombasa stated as follows:-

> **"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 variable asset which the parents are proud of and are entitled to keep intact."**

31. Kneller, JA (as he then was) in **Hassan –Vs- Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 457** made similar observation when he stated as that:-

> **"The fact of the matter is, however, that today parents and children in most Kenyan families do expect their children when adults to help their parents if they need it and, in my view, that should be encouraged and not fulminated against as a system of genontocracy** (sic)**at its worst."**

32. The Respondents assertion that the deceased supported their parents was not a fact that was presented before the Trial Court. Indeed, they could not introduce new facts in their submissions at this appellate stage. In any event, the aforesaid letter from the Chief showed that the deceased's parents were all dead. There was also no evidence that the deceased supported his sister.

33. This court was therefore not inclined to award the Respondents' claim for lost years for the aforesaid reasons and further because they had not sought the same in their pleadings. Although this was not an issue in contention, this court only decided to deal with the same as it had been raised by the Appellant herein.

B. **PAIN AND SUFFERING**

34. In his evidence, PW 1 stated that he found the deceased dead at about 9.00 am. Lawrence Mwazighe (hereinafter referred to as "PW 2") testified that he found the deceased dead at about 7.00 am. Number 69049 PC Lewis Gitonga (hereinafter referred to as "PW 3) stated that the victim died after falling in a trench that was dug by the Appellant herein.

35. Dr Patrick Mwigeni (hereinafter referred to as "PW 4") said that the deceased died of cardio respiratory arrest secondary to spinal cord injury. According to the Postmortem report that PW 4 adduced in evidence, the approximate time of the deceased's death was 9.00pm.

36. The Respondents argued that the deceased did not die immediately as he suffered a cardio-respiratory arrest before he died and that the sum of Kshs 80,000/= was adequate compensation. They placed reliance on the case of **Premier Dairy Limited vs Amarjit Singh Sagoo & Another [2013] eKLR** where the court therein awarded a sum of Kshs 75,000/= for pain and suffering.

37. On its part, the Appellant submitted that the Learned Trial Magistrate erred in awarding the Respondents a sum of Kshs 80,000/= for pain and suffering and asked this court to review the same downwards to Kshs 20,000/=.

38. It referred the court to the cases of **Beatrice Nyanchama Obuya vs Hussein Dairy Limited [2010] eKLR** where the court therein awarded a sum of Kshs 20,000/= where the cause of death was cardio-respiratory arrest and **Charles Masoso Barasa & Another vs Chepkoech Rotich & Another [2014] eKLR** where the court awarded a sum of Kshs 15,000/= for pain and suffering where the deceased therein died a few hours after being involved in a road traffic accident.

39. It was clear that none of the witnesses were present when the deceased person herein died and therefore no one knew how much he suffered before he passed away. This court would definitely have awarded a lower figure than the one that was awarded by the Learned Trial Magistrate under this head.

40. Notably, a court exercises its discretion in awarding damages for pain and suffering. However, an appellate court cannot review the amount downwards merely because it could have awarded a lower figure if it was the trial court. It can only interfere with such an award if the same is inordinately high or inordinately low so as to come up with a wholly erroneous estimate.

41. This is a principle that is well settled in law. In this regard, the Respondents referred this court to the case of **Butt vs Khan (1977) 1 KAR** in which it was held as follows:-

> **"An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**

42. Accordingly, bearing in mind the holding of the Court of Appeal of 2013 in the case of **Premier Dairy Limited vs Amarjit Singh Sagoo & Another**(Supra)where it upheld an award of Kshs 75,000/= in respect of a deceased who died on the spot, this court was of the view that a sum of Kshs 80,000/= that was awarded by the Learned Trial Magistrate was therefore not inordinately high to warrant it to disturb the said award.

43. In this respect, this court was not persuaded by the Appellant's submissions that it should review the award for pain and suffering to Kshs 20,000/=.

C. **LOSS OF EXPECTATION OF LIFE**

44. The Respondents contended that a sum of Kshs 100,000/= for loss of expectation of life that was awarded by the Learned Trial Magistrate was fair. The Appellant did not submit on this issue which led

this court to conclude that it was not disputing the said figure. This court did not therefore disturb the figure that was awarded.

III. **SPECIAL DAMAGES**

45. The Appellant did not appeal against the award of special damages in the sum of Kshs 25,500/=. This court will also not therefore disturb the same as these were expenses that were proven by the Respondents herein as having been incurred for funeral expenses.

DISPOSITION

46. Accordingly, having considered the evidence, the Written Submissions and the case law that was relied upon by the parties herein, this court came to the conclusion that the Learned Trial Magistrate ought to have awarded the damages for pain and suffering, loss of expectation of life and special damages only.

47. In this respect, this court hereby varies the judgement of the Learned Trial Magistrate by deducting the sum of Kshs 840,000/= being damages for Loss of Dependency under the Fatal Accidents Act and instead enters judgement in favour of the Respondents against the Appellant for the sum of Kshs 205,500/= made up as follows:-

a. **Loss of Expectation of life** **Kshs 100,000/=**

b. **Pain & Suffering** **Kshs 80,000/=**

c. **Special Damages** **Kshs 25,500/=**

Kshs 205,500/=

48. Bearing in mind the economic circumstances of the Respondents vis- a-vis those of the Appellant, which is a government monopoly, each party will bear its own costs.

49. It is so ordered.

DATED and **DELIVERED** at **VOI** this **25th** day of **October** 2016

J. KAMAU

JUDGE