



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL APEAL NO. 40 OF 2010**

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

**Versus**

**IRENE CHEMUTAI..... RESPONDENT**

*(Appeal from the Judgement and Decree of Hon. T.Okello (PM) dated 27<sup>th</sup> October 2010 Bomet SRMCC No.106 OF 2009)*

**JUDGMENT.**

1. The appeal herein arises out of the judgment in the Principal Magistrate's Court Bomet Civil Case NO. 106/09 where the Respondent was awarded a total sum of Kshs.690,940/=against the appellant.
2. The appellant set out the following as its grounds of appeal:
  1. *The learned Trial Magistrate erred in Law and in fact in failing to appreciate that the Respondent was bereft of the requisite Locus-Standi to originate the suit in the subordinate Court insofar as the letters of Administration adlitem issued by Bomet Resident Magistrates Court were invalid and illegal thus incapable of forming the basis of any claim in Court.*
  2. *The learned Trial magistrate erred in fact and in Law in finding that the Respondent had proved her case on a balance of Probability, notwithstanding the glaring discrepancy and variance between the evidence tendered by the Respondent and her witnesses vis-a-vis the Respondent's Pleadings on record.*
  3. *The learned Trial Magistrate erred both in Law and in fact in holding the Appellant liable and fixing liability at 100%, or at all, as against the Appellant whereas no evidence of negligence or breach of statutory duty of care was proved as against the Appellant at all to warrant such finding.*
  4. *The learned Trial Magistrate erred in Law and in fact by failing to appreciate that there was no proof tendered before the Court to confirm that the alleged electrical connection belonged to the Appellant and thus it was erroneous to attribute any liability upon the Appellant without fault.*
  5. *The learned Trial Magistrate erred in Law and in fact by proceedings to assess damages in the sum of Kshs.690,940/=, or at all, in favour of the Respondent, which quantum was excessive in the circumstances and not supported by the law or evidence.*
  6. *The learned Trial Magistrate erred in law and in fact in disregarding and/or failing to take into*

*account the Appellant's written submissions which had articulated weighty and relevant issues of Law and facts thereby arriving at erroneous decision both in Law and in principle.*

*7. The learned Trial Magistrate erred in principle and Law as laid out in precedents on the mode of assessment of damages payable in respect of a minor victim of a fatal accident under the Law Reform and fatal accident and failing to take into account the award under the respective heading thus reaching erroneous decision.*

*8. The learned Trial Magistrate erred in Law by disregarding the holding in the decisions cited by the Appellant in written submissions which were binding on him.*

*9. The learned Trial Magistrate erred in Law and in fact by failing to dismiss the Appellant's suit with costs.*

3. The Respondent who was the plaintiff in the subordinate court filed a plaint dated 29<sup>th</sup> May, 2009 on the same date. The appellant who was the Defendant filed a defence dated 1<sup>st</sup> July 2009 on the same date. A reply to the defence was filed on 20<sup>th</sup> July 2009. Later, on 25<sup>th</sup> March 2010 the parties by consent agreed to amend of their pleadings. The amended plaint and defence were filed on 25<sup>th</sup> March, 2010 & 9<sup>th</sup> April 2010 respectively.

4. In her amended plaint the Respondent blamed the Appellant for permitting the exposure of electrically charged cables to her deceased daughter. Further that the Appellant did not give any or any adequate & effective warning to the members of the public of the presence of electrically charged loose cables. She set out the Appellant's particulars of negligence at Paragraph 4 of the amended plaint.

5. She brought the suit as the personal representative and administrator of the the estate of her daughter **DAISY CHERONO**.

6. The appellant in its amended defence denied all the Respondent's claims and instead placed blame on the parents of the deceased. The particulars of negligence by the Respondent are outlined in Paragraph 14 of the amended defence. It denied being liable to the Respondent as stated in the amended plaint or at all.

## **7. A BRIEF SUMMARY OF THE EVIDENCE.**

The Respondent testified and called three witnesses. She was one of the tenants in the premises of **WILLIAM KIPRUTO KOSKEI (PW2)**. This premises did no have electricity. A neighboring premises had electricity installed. On the 5<sup>th</sup> March 2008 the deceased who was the plaintiff's daughter was playing within PW2's compound when she was electrocuted as she passed through a fence with barbed wire, which separated PW2's compound from the neighbour's.

8. The police and Kenya Power & Lighting Company officers responded to the call by PW2. The deceased was a pupil at Bomet Primary School in Standard 4. The plaintiff produced a copy of a demand letter Pexhibit 7 and a reply to it Pexhibit 8; Letter from the Applicant's Insurance Brokers Pexhibit 9; Death Certificate Pexhibit 2; Post Mortem Report Pexhibit 3; Receipt for Shs.1500/= for Post Mortem PEXhibit 4; Burial Permit Pexhibit 5; Chiefs Letter Pexhibit 6. She & her witnesses stated that they spent money on funeral expenses.

9. The Appellant called one witness (DW1) an employee of Kenya Power & Lighting Company based at Sotik under which Bomet falls. His evidence was a denial of any report of electrocution either from the police or any one else. He however confirmed that the Kenya Power & Lighting Company head office had a report of this incident.

10. The learned Trial Magistrate analysed the above evidence and came to the conclusion that the Appellant was liable at 100% and went on to assess damages.

11. When this appeal came for hearing the counsels for both parties filed written submissions by consent, in disposing of the appeal.

### **The Appellant's Submissions.**

12. M/s O.M. Otieno for the Appellant submitted that the Magistrate's Court had no Jurisdiction to issue Limited grant of Letters of Administration Ad litem, hence the invalidity of the letters of administration ad litem produced by the Respondent. He relied on the case of **Grace Obuya Okumu – Vs- Philip Onyango Ogundo Kisii H.C.C No. 34 of 2009** and **Stephen Murimi Kibuchi – Vs- A.M. Sunkai HCCC No.1301 of 1998.**

13. He further submitted that the evidence of the Respondents' four witnesses was too weak to support any Judgment in her favour. In other words negligence was not proved at all against the Appellant. On this he cited the case of **Japhet Nkubitu & Another -Vs- Regina Thirindi Court of Appeal C.A. NO.150 of 1997.**

14. He also submitted that the pleadings & the evidence by the witnesses was at variance. He stated that the pleadings were that the deceased stepped on loose live electrical cables belonging to the defendant whereas the evidence was that she was electrocuted by the barbed wire fence surrounding the compound. He referred to **Abdul Shakoor Sheikh -Vs- Abdul Majed Sheikh & Another Civil Appeal No.161 of 1991.**

15. That the learned Trial Magistrate had over relied on the Respondent's submissions while ignoring the Appellant's hence arriving at an erroneous decision in the manner of assessing the damages for a minor claimant. His main submission is that in instances of minor children a lump sum of general damages is awarded as opposed to sums being given under various heads.

16. He cited the cases of:-

- *Saro -Vs- KBL (1990) KLR 395;*
- *H. Young & Co. E.A Ltd & Another -Vs- James Gichara Orangi Kisii HCCA No.207 of 2009.*
- *Ogotu -Vs- Makairo 3Bs Trading Co. Ltd (1985) KLR 1.*

### **The Respondent's Submissions.**

17. M/s Kipkorir Tele & Kitur for the Respondent submitted that the issue of Locus Standi was not in the pleadings & proceedings before the subordinate court. It could not be raised in this appeal and on this he cited the case of **Kenya Bus Services Ltd – Vs- Kawira (2003) 2 E. A 519 (CAK) .** He referred to **Section 47, 48, 49, 54 of the Law of Succession** & submitted that the Magistrates court once gazetted can exercise the powers of the High Court. He also cited *Section 4(1) of the Fatal Accidents Act* arguing that the plaintiff being the mother of the deceased had a right to file the suit. He cited the case of **Romano Carl Thintz - Vs- Mwang'ombe Mwakimai (1982 – 88) 1 KLR 482** and referred to the judgement of Nyarangi J.A (as he then was).

18. He also submitted that the pleadings and the evidence adduced were not at variance. On this he cited the case of **Odd Jobs -Vs- Maibia 1970 E.A 476.** It was his view that the most important thing was for the party to be clear on what his/her is claim is. He submitted that the amended plaint complied with **Order 2 Rule 3(1) Civil Procedure Rules (CPR).**

19. Further he submitted that the evidence adduced showed that the loose electrically charged cables belonged to the Appellant which had a duty to maintain the same. The evidence also confirmed that the deceased was electrocuted. He referred to *Section 117 of the Energy Act 12 of 2006.* He referred to the incident report at Page 67 of the Record of Appeal.

20. For the assessment of damages he submitted that the learned Trial Magistrate applied the correct principles. He cited cases where the courts had awarded damages based on various heads for example:

- *Sheikh Mushtaq Hassan -Vs- Kamau Transporters (1986) KLR 457.*

- *Hassan & Another -Vs- Soma Property (2004) eKLR.*

- *James Mugo Manyara – Vs- James G. Wambugu (2006) eKLR.*

21. He finally submitted that all issues raised by the Appellant were of a technical nature. It has not been shown that the Appellant suffered any prejudice or there was a miscarriage of justice by failure to observe the technical requirements pointed out by the Appellant. He prayed that the appeal be dismissed with costs.

22. This is a first appeal, and this court is called upon to re-evaluate the evidence on record and arrive at its own conclusion. See ***Selle & Another -Vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123***

23. I have carefully evaluated the pleadings, evidence on record, grounds of appeal plus the submissions by both parties. I find the issues falling for determination to be as follows:

i. *Whether the Respondent had Locus-standi to file the suit in the subordinate court.*

ii. *Whether liability against the Appellant was proved.*

iii. *If issue no (ii) is answered in the positive then whether the damages awarded should be interfered with by this Court.*

**Issued No. (i): Whether the Respondent had Locus-standi to file the suit in the subordinate Court.**

The Respondent filed the claim in the Lower Court as a legal representative of the deceased who was her daughter. She produced in Court a Limited grant ad Litem (Pexhibit 1) as the document that gave her the authority to file the suit. He said grant has been challenged by the Appellant in their submissions both in the subordinate Court and in the High Court. The said issue was also pleaded in Paragraph 3 of the amended defence but not raised during the proceedings.

24. The judgment is silent on this issue as it was not canvassed in the proceedings. Counsels have presented authorities that have dealt with the issue.

The two High Court cases which the Appellant has relied on are only persuasive for this Court. The said authorities addressed the issue of Limited grant ad Colligenda which is the subject of *Rule 36 (3) P & A Rules*. Limited grant ad colligenda & Limited grant ad litem are issued for totally different purposes. Limited grant ad litem is solely for the purpose of enabling one to file and/or defend a suit.

25. M/S O.M. Otieno argue that a Magistrate's Court cannot issue such a grant. M/s Kipkorir Tele for the Respondent thinks otherwise. ***Section 47 (1) of the Law of Succession Act provides***

**“Jurisdiction of High Court**

*The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:*

*Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”*

***Section 48 of the said Act provides***

**“ Jurisdiction of magistrates**

*(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:*

*Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate’s Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”*

**Section 49 further provides**

**“ Territorial jurisdiction of magistrates**

*The Resident Magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by section 48:*

***Provided that—***

*(i) the magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other resident magistrate where it appears that the greater part of the estate is situated within the area of that other magistrate or that there is other good reason for the transfer;*

*(ii) if the deceased had his last known place of residence outside Kenya, the High Court shall determine which magistrate shall have jurisdiction under this section;*

*(iii) every Resident Magistrate shall have jurisdiction, in cases of apparent urgency, to make a temporary grant of representation limited to collection of assets situated within his area and payments of debts, regardless of the last known place of residence of the deceased.”*

26. It must be appreciated that not all Magistrate's deal with Succession Causes. It is only those who have been gazetted by the Hon. Chief Justice who can handle such matters. The limited grant ad litem produced herein as Pexhibit 1 was issued by the *Senior Resident Magistrate Bomet* on 27<sup>th</sup> June 2008 and not the *Principal Magistrate Migori* as submitted by M/S O.M. Otieno for the Appellant.

27. From the records, this Judicial Officer Mr. T. Okello was gazetted by the Hon. The Chief Justice on 9<sup>th</sup> March 2007 vide *Gazette Notice No.1909* to deal with Succession matters with effect from 15<sup>th</sup> March 2007. Having been so gazetted would he issue a limited grant ad litem? It is not lost to me that he could only deal with estates whose value does not exceed Shs.100,000/= . What then was the value of the estate of the deceased herein? It was valueless until a suit had been filed, heard and determined. In the case of **Kenya Bus Services Ltd -Vs- Kawira (2003) 2 E.A. 519 CAK** the court of Appeal in similar circumstances held thus: *“The issue of the validity of the grant of the letters of administration was not before the Superior Court and with respect cannot be raised in this court. The Respondent pleaded that she was suing as the administrator of the estate of the late Josephat Kinengeni M'Daka. By the date of filing the suit, she had been granted letters of administration in respect of the estate of Josphat Kinengeni M'Daka. As the Appellant did not prove that the grant of letters of administration was obtained subsequent to the filing of the suit of the claim for damages under the Law Reform Act was competent (sic). Moreover the Magistrate who made the grant could not have known the amount of damages to be awarded to the Respondent & the subsequent award of some Kshs. 2 million said to be outside the Magistrate's Jurisdiction could not, by itself invalidate the grant”*.

28. It cannot:- be argued that the claim exceeded the value of the estate that the Magistrate's court can deal and so the said grant is a nullity. At the time of issuance of the Limited grant ad litem there was no

value attached to the deceased's estate.

29. **Rule 14 Probate and Administration Rules** which provides for the grant for special powers administration is Limited to filing suit, does not oust the Jurisdiction of the Magistrates Court in issuing such grant. This is in consideration of the provisions of **Section 48(1)** which only prohibits the said Court from entertaining an Application under **Section 76 of the Act**. Otherwise the said Court can entertain any application subject to Jurisdiction. I therefore find that the Limited grant ad Litem (PEXB1) was properly issued, and the plaintiff had the Locus Standi to file the suit.

**30. Issue No (ii): Whether Liability against the Applicant was proved.**

The fact that the deceased was electrocuted has not been displaced. The evidence by PW1 – PW4, Death Certificate (Pexhibit B2), Post Mortem Report (Pexhibit 3) Chief's Letter (Pexhibit 6) all confirm this.

31. Though DW1 denied that Kenya Power & Lighting Company Office Bomet was aware of the report of the electrocution, he confirmed that their head office (Nairobi) was aware of it. The communication contained in the letters produced as Pexhibit 8 & 9 further confirms that the Appellant was fully aware of this matter.

32. It has been confirmed through the evidence that the compound where PW1 & the deceased lived did not have any electricity but their neighbour did. It is the fenced wire that caused the accident. **The amended plaint states that the deceased was playing “within the vicinity of her parents compound”**. This means anywhere on the compound and could even be next to the fence, as per the evidence.

33. The Defence at Paragraph 14 raised very serious particulars of negligence but unfortunately none was proved. There is no way the Kenya Power & Lighting Company Headquarters could get such a serious report and fail to send officers on the ground to establish the true position. If such officers were ever sent, what were their findings? The Court would have expected such findings to be filed in the light of the particulars of negligence that were pleaded by the Defendant. No such evidence came from the defendant.

34. The learned Trial Magistrate looked for this evidence as I have done, and he found none. He stated this in his judgment at paragraph 20 line 12-14 of the (Record of Appeal)”. “ *I have considered the particulars of negligence stated at paragraph 14 of the amended defence but I would state that none was attributed to the deceased or the plaintiff herein or did the evidence by the Defendant”*.

35. The Appellant did not show that it was not the one that had supplied electricity to the neighbouring plot to PW2. Since its the one that had supplied the electricity it had the duty to ensure that the said power is properly maintained and the electrified fences are properly kept with posters warning members of the public on the dangers of getting in touch with the fence.

36. There was no evidence to show that such safety measures were undertaken: Since there is no iota of evidence pointing at contributory negligence by the plaintiff and/or deceased I concur with the finding of the learned Trial Magistrate that the Applicant was wholly liable.

**Issue No (iii): If issue No (ii) is answered in the positive then whether the damages awarded, should be interfered with by this Court.**

37. M/s O.M Otieno have submitted that the Respondent only sought damages under the Law Reform Act and did not seek any damages under the Fatal Accidents Act, and she should be bound by her pleadings. He went at length to explain that the Court should have awarded one lump sum and not sums under various heads.

38. The issue of failure to specifically make a pleading under the Fatal Accidents Act was not responded to by the Respondent. I however note from the record that this specific issue was never raised in the subordinate court in the pleadings, proceedings and/ or submissions. It is being raised before this court for

the first time. I will, rely on the earlier case of *Kenya Bus services Ltd -Vs- Kawira (Supra)* and not address the issue here.

39. No general damages are awarded under the Law Reform Act as pleaded by the Respondent. They are awarded under the Fatal Accidents Act as “Loss of dependency” which was not pleaded. Be it as it may the Respondent pleaded general damages though under the wrong provision of the Law. Can the Court deny her this because of this omission? I don't think so.

40. The learned Trial Magistrate in assessing quantum used a multiplier of **Shs.6,743/=** and a multiplicand of **10 years**. He proceeded to assess loss of dependency which had not been pleaded. The approach by the Courts in the cases of deceased persons who were minors at the time of death is two fold:

*i. To award a lumpsum as general damages.*

*ii. To make awards under specific heads as the learned Trial Magistrate did in this case.*

41. The second option would, in my view apply where the evidence is very clear and specifics are stated in the said evidence.

42. However in cases where there are no specifics to assist the court in determining the multiplier and multiplicand to apply the 1<sup>st</sup> option would be more appropriate. It's not clear how the learned Trial Magistrate arrived at the figures he used.

43. In the circumstances, having confirmed the finding on liability, I hereby set aside the award on quantum and substitute it with **a lumpsum of Shs.400,000/=** plus special damages of **Shs.41,500/=**. Judgment is entered for **Shs.441,500/=** plus costs and interest.

(b) Half costs of the Appeal to the Respondent.

**Dated, signed and delivered in open court this 22<sup>nd</sup> day of July 2015.**

**H.I ONG'UDI**

**JUDGE.**

**In the presence of:**

Hillary – Court Assistant.

Mr. Mutai for O.M. Otieno for appellant.

Mr. Langat for Respondent – present.