



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 338 of 2010

1. STELLA KANINI JACKSON.....1ST APPELLANT

2. TITUS MUTISYA.....2ND APPELLANT

(Administrators of Estate of Jackson Ngaku Mutisya)

VERSUS

KENYA POWER & LIGHTING

COMPANY LIMITED.RESPONDENT

J U D G M E N T

1. The date Thursday 17th December, 2009, is etched indelibly in Stella Kanini Jackson's mind. It is the day her husband, Jackson Ngaku Mutisya, a docker at Kenya Ports Authority, died. Like on any usual day, he had woken up early, dressed up and went off to work. He walked the usual route from Mji Wa Jua Kali, in Tudor, where he lived with his wife and three children, Tyson Jackson, Hellenah Kalumu and Mutisya. As he passed by the SDA Church past Mji wa Salama, he moved towards the fence on the narrow path to allow a group walking in the opposite direction with Stephen Mumo Kisau to pass by. Leaning against the fence, he was suddenly thrown forward and fell down. People surrounding him were surprised. Then they saw that an electricity cable was broken and hanging from the posts onto the fence; and everyone kept their distance. Word quickly went round about the electrocution and a crowd gathered. Some women happened to pass by who knew Mutisya and his family. They ran to his house, and that is how Kanini got to know of her husband's death.

2. Kanini went back to the scene of the accident, and was able to identify her husband. He was not breathing, and so she went, escorted by neighbours, to Makupa police station. People said Mutisya had been struck by electricity power cables. On arrival at the scene the police called the Defendant, who also sent its officers to the scene. Photographs were taken and statements were recorded.

3. After disconnection of the broken electricity cable, the deceased's body was taken to Coast General Hospital, and thereafter to Pandya Hospital where a post-mortem was carried out. The body was stored at the mortuary at Pandya Hospital until the funeral on 24th December, 2009, which took place in

Kitui. According to the deceased's employer, Kenya Ports Authority paid the family relocation expenses of Kshs. 42,000/= as was shown in Exhibit 5.

4. The deceased was survived by his wife, Stella Kanini, the Plaintiff, and three children, namely, Tyson Jackson aged 17, Helleniah Kalumu aged 13, and Mutisya aged 9. Stella produced as exhibits, the birth certificates of each child. She said they were all in school although they kept being excluded from time to time for lack of fees.

5. The Plaintiff filed suit on 22nd September 2010 as administrator, with Titus Mutisya, of the estate of the deceased having been granted letters of administration. The suit is under both the Fatal Accident Act and The Law Reform Act. They seek special damages of Kshs. 55, 550/= plus interest at court's rate, and general damages under both the Law Reform Act and the Fatal Accidents Act. Although the particulars of dependency were stated to include Titus Mutisya, Stella's brother, and mother, Grace Kasii Mutisya, Stella in her evidence, named only her children as dependants, and categorically stated that Titus Mustiya was not a dependant.

The Plaintiffs relied on the doctrine of *Res ispa loquitor* to assert the defendant's negligence in allowing a line broken overhead electric cable to fall, remain unattended with electricity still flowing through it, posing danger to the deceased.

6. None of the above facts in paragraphs 1-6 were in dispute. The parties agreed on and signed a joint statement of issues for determination by court, dated and filed on 30th November, 2011. However, in their submissions the parties departed from the agreed and signed list of issues, and submitted contentious issues for determination as follows:

The Plaintiff's issues were:

1. The Defendants liability for the claim
2. The Deceased's earnings and retirement age
3. The damages payable
4. Liability for costs

The Defendant's issues were:

1. General damages under the Fatal Accidents Act
2. General damages under the Law Reform Act
3. Special damages
4. Liability

7. On the basis of the above, I find that the issues in dispute are as follows:

- 1) The Question of liability
- 2) What is the level of damages payable, namely, under the Fatal Accidents Act, the Law Reform Act and as special damages?
- 3) Who is liable for costs of the suit?

I will now seek to answer each of the above issues in light of the evidence available.

The question of liability

8. The Plaintiff pleaded and particularised the Defendant's negligence in allowing broken live overhead electric cables to remain unattended, and failing to warn the deceased of their danger, and in failing to put preventive precautionary measures in place for the safety of people.

The Defendant denied all the particulars of negligence, and sought to impute contributory negligence on the Plaintiff. In this regard the Defendant alleged that the Plaintiff:

- Ignored danger warning signs
- Stepped on live wires with wet feet
- Exposed himself to danger which was latently and patently obvious
- Exposed himself to risk of damage which he ought to have known
- Walked without due care and/or attention
- Attempted to vandalise electric cables.

In their submissions, the Defendants attributed contributory negligence to the Plaintiff as to 20%. However, the Defendant did not clearly demonstrate from the evidence how that level of contributory negligence was arrived at.

9. In its submission on liability, the Defendant put forth a suggestion that the deceased could not escape some liability because he may have been drunk and staggered into the fence which had been electrified. However, this suggestion **cannot** be used to find contributory negligence. It is trite law that the burden of proving of contributory negligence is upon a Defendant, and must be satisfied by any species of evidence sufficient to raise a *prima facie* case. No evidence of contribution was availed. From the eyewitness evidence of PW2 Stephen Mumo Kisau, the deceased and himself were walking on a narrow path in opposite directions. Kisau was in a large group with others. They were headed towards the deceased, who moved aside to let them pass by. In the process, the deceased leaned against the fence on the side of the path. That was when the deceased was electrocuted, and fell down. Kisau was not shaken in cross examination. He said there was a broken electrical cable hanging from a nearby electricity post. The cable had fallen onto the fence which the deceased touched when he stood aside to let Kisau's group pass by.

10. From the evidence availed, it is clear that there was evidence of the negligence of the Defendant in allowing their live cables to break, and come into live contact with a fence. The live cable was unprotected. On the other hand, there was no evidence of any contributory negligence on the part of the deceased, as pleaded. I, therefore, find and hold that there was negligible contributory negligence on the part of the deceased, essentially for not being alert. People walking along paths or touching fences along walkways are not expected to anticipate live electric wires endangering their safety or lives irrespective of whether or not they are drunk. I place contributory negligence on the part of the deceased at no more than only 5%.

The level of damages payable

11. Under this head, there are damages:-

- a) Under the Fatal Accidents Act (Chapter 32) Laws of Kenya
- b) Under the Law Reform Act (Chapter 26) Laws of Kenya, and
- c) Special damages.

I shall review the damages under each sub-head

a) **Fatal Accidents Act:** Where the multiplicand dependency ratio and multiplier are relevant.

The income of the deceased was disputed. The evidence was that shown in Exhibit 15(a) and (b), being the deceased's salary advice for November, and December, 2009 respectively. These were produced by PW3 David Angwenyi, the Kenya Ports Authority Human Resources Officer. The Deceased's constant salary at the time of his death was:

Basic Salary	-	Kshs. 24,460
House allowance	-	Kshs. 9,500
Constant Gross Salary	-	Kshs. 33,960

There were other non-constant allowances such as commuter allowance, paid break, overtime, and uniform detergent allowances. I will not take these into account in arriving at the gross salary as the evidence was that these are inconsistent from month to month.

12. The Plaintiff's counsel cited two cases to demonstrate the principles that the Courts apply to determine the net pay. The first case is **Radhakrishen M.Khenmaney vs Mrs. Lachaba Murlidhar [1985] EA 268** where the court cited with approval, the principles applied by the Chief Justice of Kenya in the case of **Peggy Frances Hayes** and **Others vs Chunibhai J Patel and Another Civil Case Number 173** of 1956 as follows:

“The Court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (that is, his income less tax) and the proportion of last net income which he would have made available for his dependants.”

The second case setting out the applicable principles is **Constance Kanyorota Ngugi vs Coast Bus Company Limited and Another Nairobi** HCC 3344 of 1994 (unreported) where Mulwa J stated:

“This income was based on the invoice....

He said the figure did not take into account the tax element. The figures given represented the gross income of the deceased per month. Doing the best one can do in the circumstances, I would take the deceased's income to be Kshs. 20,000/= per month, the tax would be Kshs. 6,000/=.”

13. In the present case, as already stated the constant gross income comprised basic salary and house allowance. The tax element in the November, 2009 payslip (Exhibit 15 (a) works out at 15.4%, based on a higher gross income, and in December, 2009 (Exhibit 15 b) it works out at 11.5%. The calculation used for the percentage (y) is as follows:

$$\text{tax stated in payslip} \times 100 = y \%$$

Total income

Given that the Kenyan tax regime is graduated under the Income Tax Act so that the greater the income the higher the taxation bracket, I will take the lower tax lever in December, 2009 as it more closely reflects deceased's constant gross income of Kshs. 33,960/= earlier stated. Thus the deceased's net income is:

$$\text{Gross Kshs. 33,960} - 11.5\% \text{ (tax)} = \text{Net income}$$

$$\text{Kshs. 33,960} - 3,905.00 = \text{Kshs. 30,055, Net Income}$$

14. The multiplicand/dependency ratio is also in dispute between the parties herein. The Plaintiff claims two-thirds ($\frac{2}{3}$) and the Defendant asserts it to be one half ($\frac{1}{2}$). The Defendant's position is based on the supposition that in most Kenyan households people tend to use more than half of their income on themselves. The Defendant did not provide any authority for its proposition. The Plaintiff's assertion was grounded on two authorities in which a ratio of $\frac{2}{3}$ had been used. These were **Were and 6 Others Vs Attorney General** HCC Number 752 of 1980, and **Nyokabi vs Public Trustee** [1965] EA 530, where two-thirds of the net income of a family man was accepted.

In my view, the dependency ratio will depend, on a case by case basis, on the evidence availed showing what the level of actual dependency on the deceased was by his or her family.

15. The Plaintiff's evidence was that she was not employed. At the time of the accident, she lived in *Mji wa Jua Kali* in Tudor. She said the deceased's earnings were used mostly to help out at home and with the schooling of their children namely: Tyson aged 17, Hellen aged 13 and Mutisya aged 5. Since the deceased's death, she said, the children are frequently sent home for non-payment of school fees. She herself now does casual labour carrying ballast "kokoto" for construction.

In my view, the applicable multiplicand in this case is $\frac{2}{3}$, as I find that the deceased's family lived with and almost entirely depended on the deceased for their sustenance. After his death they even had to leave Mombasa altogether.

16. The multiplier: The deceased was 36 years at the time of his death. PW3, David Angwenyi gave evidence that the retirement age in Kenya Ports Authority was at age 60, and that deceased would have retired on 1st January 2033. That retirement date is expressly stated in the payslips of the deceased. The retirement age was also stated to be based on a Gazette Notice, which was not produced. However, the Defendant argued that the deceased would have retired at age 50. They relied on Exhibit 14, the deceased's letter of Appointment dated 17th July, 1995, where at paragraph 5(a) there is the, following reference:

"5 After your confirmation you will be eligible for pension, gratuity or other allowance if you leave the services of Authority under one of the following conditions:-

a) On or after attaining the age of fifty years....."

17. I do not find Exhibit 14 to refer to the retirement age of the deceased. All it does is confirm the deceased's eligibility for "**pension, gratuity or other allowance.**" I am prepared to accept retirement age pegged at 60 years which is consistent with this Court's decision involving the Defendant in the case of **Berly Betha Malowa Were (Administrator) vs Kenya Ports Authority** High Court Civil suit Number 246 of 2009 Mombasa. In that case, Ojwang, J (as he then was) found as follows:

"Whereas no justification is given for placing the retirement age at 54 years, placing it at 60 years, quite apart from its attribution to a Government position on labour matters is, in my opinion, to be judicially recognized as fair and common place for a person of the status of the deceased...."

Thus at age 36, the deceased had 24 years working life remaining, and I so find.

18. I now come to the total amount payable under the Fatal Accidents Act, which is as follows:

Net Income \times 12 months \times 24 years \times $\frac{2}{3}$

Kshs. 30,055 \times 12 \times 24 = Kshs. 8,655,840 \times $\frac{2}{3}$ = Kshs. 5,770,570.

I have found Contributory negligence at only 5% thus:

Kshs. 5,770,570.00

Less 5% Kshs. 288,528.50

Total 5,482,041.50

Damages under the Law Reform Act

19. Under this head I consider Loss of Expectation of life, and pain and suffering.

On loss of expectation of life, the Defendant proposed Kshs. 70,000/= while the Plaintiff submitted Kshs. 200,000/=. On pain and suffering, the Defendant submitted Kshs. 10,000/= on the basis that the deceased had died on the spot. The Plaintiff however seeks Kshs. 30,000/= on the basis that the deceased suffered horribly and died after 20-25 minutes.

The evidence of PW2, who was an eye witness, was that after the electrocution, he ran to where the deceased was and saw him “**breathing and saw as if he had boils.**” The death was not instant, but took some minutes. On the basis of the above, I would award pain and suffering at Kshs. 150,000 and loss of expectation of life at Kshs. 20,000/=. I am guided by the parties’ submissions and the following authorities:

- **Elizabeth Ngina Murola vs Martin Masila Kambo** and Another HCC Number 124 of 2004
- **Beryl’s case**, earlier stated.

Special Damages

20. The Plaintiff’s pleaded for Kshs. 55,550/- as Special Damages made up on follows

Death Certificate Fee	- 50.00
Grant of Letters of Administration	- 10,000.00
Mortuary charges	- 3,500.00
Relocation expenses	- 42,000.00

Special damages have to be specifically proved. The only receipts availed by the Plaintiffs were:

Exhibit 3: Outpatient Receipt for Kshs. 2,500/- Jackson Mutisya at Coast General Hospital.

Exhibit 4: Mortuary charges Pandya Hospital Kshs. 3,500/-

Exhibit 5: Payment of Goods Allowance Kshs.42,000/=.

In evidence, Stella Kanini stated that the relocation expenses of Kshs. 42,000/- were paid by the deceased’s employer. This amount is therefore not payable as special damages.

On its part, the Defendant concedes Kshs. 13,500/= in special damages, and I shall award that amount.

21. In summary, the amounts awarded herein are as follows:

General Damages under Fatal Accidents Act: -

Loss of Dependency

Kshs. 5,482,041.50

Add General Damages Under Law Reform Act:

Loss of expectation of life
Pain and Suffering

Kshs. 150,000.00

Kshs. 20,000.00

170,000.00

Add Special Damages

13,500.00

Total

Kshs. 5,665,541.50

Less Damages under Law Reform Act

170,000.00

Total Award

5,495,541.50

The Plaintiff shall have the costs of the suit.

Dated, signed and delivered this 24TH Day of MAY, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwango

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a)

b)

c)

d).....