REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL 190 Of 2010

KENYA POWER & LIGHTING CO. LTD..APPELLANT

VERSUS

BENARD KILONZO (*suing as the administrator of the Estate of the late* MAURICE MUTINDA KILONZO...........RESPONDENT

Coram:

Mwera, J.

Mrs. Kariuki for Ms. Ngugi Appellant

Mrs. Omondi for Respondent

Court Clerk Furaha

JUDGMENT

The un-paginated record of appeal was filed on 8th April, 2011. The appeal is against part of the lower court judgment dated 18th August, 2010. It followed trial of claim for damages brought by respondent/plaintiff who sued the appellant as the administrator of the estate of the late Maurice Mutinda Kilonzo. In the plaint it was pleaded that on 7th August, 2006 when the deceased was walking along a path at a place called Noor village in Changamwe he stepped on a live electricity wire laid out by the appellant and he was electrocuted, dying on the spot. So the claim was brought under the Fatal Accidents and Law Reform Acts for damages and loss that resulted. The appellant was found 100% liable for acts of negligence that led to the death of Maurice.

The learned magistrate then awarded a sum of Shs. 600,000/= taking a multiplier of 30 for the deceased who was aged 21 years at the time of the accident. Other reliefs were also granted but the appeal is confined to the award of Shs. 600,000/= in respect of lost years. In the four grounds of appeal it was contended that that sum was manifestly excessive particularly that the learned trial magistrate adopted a multiplicand of Shs. 5,000/= per month for the deceased who was unemployed (casual labourer?). All that ended in an inordinately high award that amounted to a wholly erroneous estimate.

In submission, the appellant posited that the deceased's father told the learned trial magistrate that his son had just finished fourth form and in the process of looking for employment. The deceased did not have a family. So the learned trial magistrate ought to have adopted a conventional sum of Shs. 4,000/= income on a multiplier of 20 because there was no evidence that the deceased earned any income. That the

appellant proposed a multiplier of 20 citing the case of **Nelson Namu Elijah vs. James Nganga Mbau & Others HCCC 56/2000** where a deceased died at age 21 but the court applied a multiplier of 15. Then reference was made to the cases the respondent cited where a multiplier of 30 had been adopted. It considered multiplier of 30 adopted here as being on the higher side.

The respondent retorted that the sum of Shs. 600,000/= represented lost years – not dependency, which falls under the Law Reform Act to benefit the estate of the deceased who was not in gainful employment. So the lost years award was warranted under the Law Reform Act. That the case of **Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & Others (1982-88) 1KAR 946** supported this principle – an award for lost years where the deceased was even a child from whom parents expected support in future when he grew up. Accordingly, the award herein was fair using a multiplier of 30 for one who died at age 21.

As regards the multiplicand of Shs. 5,000/=, the court heard that in May, 2011 the Ministry of Labour announced the lowest labour wage of 8,364/= per month. And so Shs. 5,000/= adopted by the learned trial magistrate could not be impeached. It ought to be noted however that the judgment under review here was delivered earlier - on 18th August, 2010.

Now how did the learned trial magistrate adopt the figure of Shs. 5,000/= per month, based on a multiplier of 30 to arrive at the award of Shs. 600,000/= for lost years?

It is clear from the record that the deceased had just finished school and was looking for employment. He used to assist his father (respondent) both on the farm in their rural home and at Mombasa. Other witnesses had told the court how an electric wire snapped and fell in a pond on the path where the deceased was walking. When he stepped on it, he was electrocuted. The appellant did not call evidence and both sides filed submissions.

The respondent urged the learned trial magistrate to make award:

"For damages under the Fatal Accidents Act – the deceased was aged 21 and had average income which we put at Kshs. 5,000/= per month, minimum wage. Considering the deceased age we adopt a multiplier of 30 years and shall assume the financial assistance was $^{2}/_{3}$ of his salary."

As for the appellant, it was submitted on loss of dependency:

"The deceased was 21 years old. Evidence was led that he had just completed form four and was looking for a job. It was said that he used to assist his father in the farm and at home. There was no evidence that he had a family of his own at the time of his death. We submit that a conventional figure of Kshs. 4,000/= being the minimum salary for a casual labourer be adopted as the multiplicand and a multiplier of 20 years."

So both sides were making proposals for the multiplier and multiplicand under the Fatal Accidents Act – loss of dependency. Regarding the appellant, the source of a conventional sum of Shs. 4,000/= for casual labourers or that being a minimum wage was not disclosed as per long practice and usage or the law.

And then the learned trial magistrate delivered himself on this very aspect:

"As for loss of dependence the deceased died aged 21 years after completing form four and used to support his father. Since earnings were not stated I take the minimum wage of Shs. 5,000/= as a multiplier (sic). He would have continued earning and supporting him for another 30 years."

Accordingly, the sum of Shs. 600,000/= was computed in the usual money when dealing with **loss of dependency**.

The respondent submitted here that the disputed sum represented **lost years** not loss of dependency. This court does not see how lost years came in when all the way the parties had submitted on loss of

dependency before the learned trial magistrate who also made the award on that account. Again, the learned trial magistrate did not appear to state the source of Shs. 5,000/= as minimum wage. Probably, it was so in 2006 when the death occurred. This court has not researched through the Ministry of Labour gazette supplements and notices in this regard. And the respondent did not append the source of information that by May, 2011 the minimum wage was Shs. 8,364/=. But be all that as it may. In this court's own view, it is inclined to accept that the deceased's contribution to the farm and other activities of his father, that could and should be computed to sum figure. It was suggested to the lower court that this figure be Shs. 5,000/= and Shs. 4,000/= respectively. He adopted the former. And while the respondent proposed 30 as the multiplier, the appellant had 20 in mind. The learned trial magistrate again took the respondent's figure. In the circumstances of this case and with the multiplicand, multiplier beset with uncertainties on either side, it is prudent to consider that it would have been fairer for the learned trial magistrate not to accept wholly a set from one party and discard the other, without good reason, even as he had the discretion in the matter.

Accordingly, this court grants that the multiplicand be put at Shs. 4,500/= while the multiplier of 25 is adopted. So loss of dependency – not lost years, based on the ratio of $^{1}/_{3}$ as the appellant proposed and the learned trial magistrate applied, works out at Sh. 450,000/= (Four Hundred Fifty Thousand shillings).

(4,500 x 12 x $^{1}/_{3}$ x 25)

In sum, this appeal is allowed by substituting the loss of dependency of Shs. 600,000/= with one of Shs. 450,000/=. The rest of the finding/award remains. Costs of $^{2}/_{3}$ herein go to the appellant.

Judgment accordingly.

Delivered on 29th June, 2012.

J. W. MWERA

<u>JUDGE</u>