



Kerongo (Suing as the Legal Representative of the Estate of Evans Kerongo Ayoti Deceased) v Kenya Power and Lighting Company (Civil Appeal E033 of 2023) [2024] KEHC 6598 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E033 OF 2023
WA OKWANY, J
MAY 23, 2024**

BETWEEN

RISPER KERUBO KERONGO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EVANS KERONGO AYOTI DECEASED) APPELLANT

AND

KENYA POWER AND LIGHTING COMPANY RESPONDENT

(Being an Appeal against the Judgment of Hon. B. M. Kimtai, Senior Principal Magistrate Keroka dated and delivered on 18th July 2023 in the original Keroka Senior Principal Magistrate's Court Civil Suit No. E213 of 2022)

JUDGMENT

1. The Appellant sued the Respondents before the trial court seeking damages under the [Law Reform Act](#) and [Fatal Accidents Act](#). Her case was that on or about the 29th March 2020, the deceased was lawfully inspecting crops in a piece of land he had leased at Kiomiti village Ikenye sub-location within Masimba Township when he was electrocuted by a live wire that was hanging from an electricity transmission line as a result of which he sustained fatal injuries. It was her case that the Defendants were liable for the said accident and the fatal injuries sustained thereof.
2. The Respondents filed a Statement of Defence dated 7th October 2022 in which they denied the contents of the Plaint in as far as the allegation of negligence was concerned. The matter proceeded to trial where the Appellant produced 5 exhibits and adopted her Statement dated 29th August 2022 as her evidence in chief. The Respondent did not call any witness in support of its case but produced the Accident Investigation Report Serial No. EPRA No. 203-2021/2022 (D.Exh1) and closed its case.



3. The trial court rendered a judgement in favour of the Appellant as follows: -

Liability at 100% in favour of the Plaintiff

- a. Damages for Pain and Suffering – Kshs. 100,000/=
- b. Damages for Loss of Expectation of Life – Kshs. 100,000/=
- c. Damages for Loss of Dependency – Kshs. 2,156,646.40
- d. Special Damages – Kshs. 132,900/=
- e. Costs of the suit
- f. Interests on the above

4. Dissatisfied with the award of the trial court, the Appellant instituted the present Appeal through a Memorandum of Appeal dated 19th July 2023 in which she listed the following grounds of appeal: -

1. That The learned Trial Magistrate erred in law and fact by misdirecting himself on what constituted net salary for purposes of dependency and in so doing, applied a multiplicand that was way below the deceased's correct net salary.
2. That The learned Trial Magistrate erred in law and fact by failing to consider adequately or at all the submissions by the Appellant's advocate on the issue of the multiplicand.
3. That The learned Trial Magistrate erred in law and fact by making an award for loss of dependency which was inordinately low considering the deceased's profession and earnings.
4. That The learned Trial Magistrate in general misdirected himself in the principles applicable for computation of the net salary for purposes of ascertaining the multiplicand.

5. The Appellant seeks orders that the Appeal be allowed and that the award by the trial court be reviewed and/or set aside under loss of dependency. She also prays for the costs of the Appeal.

6. The Appeal was canvassed by way of written submissions which I have considered. The main issue for determination is whether the trial court applied the correct principles in assessing the award under the Fatal Accidents Act – Loss of Dependency.

Analysis and Determination

7. It is a well-established principle that an appellate court will only interfere with the discretion of a trial court in assessing damages when the same was based on a misapprehension of facts, or misdirection in law or where he failed to take into account a relevant factor or applied erroneous principles. In United India Insurance Co Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd [1985] eKLR it was held that: -

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established:



first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

8. The Appellant was aggrieved by the trial magistrate’s decision to apply the deceased’s net salary in the payslip while arguing that some of the deductions should not have been factored in determining the multiplicand. She cited the decision by the Court of Appeal in Nyeri Civil Appeal No. 22 of 2014, Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja -deceased vs. Kiarie Shoe Stores Ltd (2015) where it was held that only statutory deductions such as PAYE, NHIF and NSSF ought to be considered in determining the net salary when calculating loss of dependency using the multiplicand method.

9. In Maigwa (Suing as Legal Representative of the Estate of Ezekiel Katupa) vs. British Council (Civil Appeal 178 of 2018) [2023] KECA 157 (KLR) the learned judges held thus: -

“ 17. From the cited authorities, it is evidently clear that in arriving at a multiplicand, this Court has always adopted the formula proposed by the appellant. That is to say, the multiplicand should be a deceased person’s gross income less statutory deductions...”

10. Similarly, in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR, the court cited with approval the case of Chunibhai J. Patel and Another vs. P F Hayes and Others [1957] EA 748, 749 and held as follows:-

“In the case of Chunibhai J Patel and Another v P F Hayes and Others [1957] EA 748, 749, the Court of Appeal stated the law on assessment of damages under the Fatal Accidents Act which we cite in part as follows:-

“The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase.

As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions...”

11. I find that, the trial court erred in adopting the net salary of Kshs.16,848.80/= on the payslip as the multiplicand. I have perused the deceased’s payslip (P.Exh5) and I find that he earned a gross salary of Kshs. 85,243/=. I have also considered the statutory deductions were Kshs. 17,162.10/= comprising PAYE and NHIF at Kshs. 17,147.10 and Kshs. 1500/= respectively. Consequently, I find that the correct multiplicand should be computed as follows: -

$$(85,243- 17,162.10) = \text{Kshs. } 68,080.90/=$$



12. In the final analysis I find that this Appeal has merit and I therefore allow it. Since the other awards were not challenged on appeal, I find no reason to interfere with the same. Consequently, I set aside the judgment of the trial court and in its place, I enter judgment for the Appellant as follows: -

Liability at 100% in favour of the Appellant

- i. Loss of dependency $(68,080.90 \times 12 \times 16 \times 2/3) =$ Kshs 8,714,355.20
 - ii. Loss of expectation of life - Kshs 100,000/=
 - iii. Pain and suffering – Kshs. 100,000/=
 - iv. Special damages Kshs. 132,900/=
- Total Kshs. 9,047,255.20/=

13. The Appellant was awarded costs in the trial court suit and I find no reason to interfere with the same. As for the present Appeal, having emerged successful, the Appellant is entitled to costs as it is trite that costs follow the event. I therefore award her the costs of the Appeal which I hereby assess at Kshs. 50,000/=.

14. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 23RD DAY OF MAY 2024.

W. A. OKWANY

JUDGE

In the Presence of: -

Mr. Otieno Brian for the Respondent

Mr. Nyamwaya for the Appellant

C/AA - Anita/Georgina

