



**Kenya Power & Lighting Company Limited v Kioga & another (Suing as  
Personal Representatives of the Estate of Samuel Ndenge Kioga) (Civil Appeal  
E491 of 2023) [2024] KEHC 10860 (KLR) (Civ) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10860 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E491 OF 2023**

**BK NJOROGE, J**

**SEPTEMBER 18, 2024**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT**

**AND**

**SAMUEL NDENGE KIONGA ..... 1<sup>ST</sup> RESPONDENT**

**JULISTER BOSIBORI KERUBO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF SAMUEL  
NDENGE KIOGA**

**JUDGMENT**

1. This Appeal relates to the Judgment delivered by Hon. S. N. Muchungi (SRM) on 12<sup>th</sup> May, 2023. It relates to a fatal injuries claim in respect of the deceased who was electrocuted. The Trial Court found the Appellant 100% triable. It then proceeded to award the Respondents general damages as follows; pain and suffering Kshs.100,000/-; Loss of expectation of life Kshs.200,000/-; Loss of consortium Kshs.60,000/-; Loss of dependency  $\frac{2}{3} \times 31 \text{ years} \times 12 \times 14658.85 = \text{Kshs.}3,635.382.40$ . Special damages of Kshs.150,000/- were awarded.
2. This matter was flagged for Rapid Results Initiative for the month of June 2024. This Appeal having been admitted on 6/5/2024, directions for disposal by way of written submissions were issued on 16/5/2024. Parties advocates appeared in Court on 6/6/2024 and confirmed filing their respective submissions. The matter was thereafter reserved for Judgement.



## **The Background Facts**

3. The Suit was prosecuted by the Administrators of the Estate of Samuel Ndenge Kionga. He was said to have been walking at the Bangok area of Eastleigh when he was electrocuted. He came into contact with a naked live wire dangling from some pole. Not knowing it was a live wire, he held on to it. He sustained fatal injuries and died on the spot. His dependants and his Estate therefore sought compensation. They had the Appellant as the electricity Power Supplier, liable.
4. The Appellant on the other hand while admitting to the incident, laid blame on the driver of an unknown truck. It was said that the truck hit an electric pole, which damaged the pole and left the electric wires, strung across it hanging and exposed. The driver of the truck did not stop but ran away. The Appellant blamed the driver of this runaway truck for causing the accident.
5. The trial Court found that the Appellant had a statutory duty to take all precautions and to regularly maintain its electricity transmission and distribution systems. That they generally owed the general public some duty of safety. It is this decision that triggered this Appeal.

## **Issues for Determination**

6. The Appeal challenges the trial Courts decision on both liability and quantum. The Court therefore proceeds to frame two (2) issues for determination.
  - a. Is there merit in this Appeal?
  - b. What reliefs should the Court grant?

## **Analysis**

7. This is a first Appeal. The duty of this Court as an Appellate Court has been explained in *Selle & Another –vs- Associated Motor Boat Co. Limited* [1968] E.A 123 The Court's duty is to have a fresh look at the evidence. Relook and reanalyze it. Then reach an independent decision. All this while bearing in mind that it did not see or hear any of the witnesses.

### **a. Is there Merit in this Appeal?**

8. The Appellant has filed a Memorandum of Appeal citing ten (10) grounds of appeal. They in essence challenge the trial Court's findings on liability and quantum.

## **On Liability**

9. The Respondents' case rested on the evidence of the PW. 2, the Police Officer, Dennis Etole. He produced a Police Abstract. His evidence being that the deceased was walking at Eastleigh when he was electrocuted by a naked live wire hanging from an electric pole. DW. 1, Margaret Kalya Muthoni an investigator with Sunrays General Insurance Investigators produced her accident investigation report. She confirmed the cause of the accident. It was electrocution due to the deceased coming into contact with naked live wires.
10. The Record of Appeal is missing the proceedings of 28/10/2023 to 9/3/2023 which relate to the actual hearing that took place. It is also missing a complete copy of the Judgment. Fortunately, the Lower Court File was available in this Appeal. It also contains the complete set of the typed proceedings. The Court was therefore able to follow the manner in which the trial took place.



11. According to the Appellant's Investigator, the incidence was caused by a garbage truck. This truck hit an electric pole. It caused a live wire (cable) to fall on the deceased's head. The deceased attempts to brush the wire off led to his electrocution. He died instantly. The garbage truck is said to have been driven off.
12. The trial Court found the Appellant liable at 100%. The Appellant submits that the Court erred in not holding the runaway garbage truck liable or at the very least, contributory negligent.
13. The Court was referred to the decision in LWK (A Minor suing through father and next friend SKD) –VS- Kingu Stanley and Another [2019] eKLR. The proposition being advanced is that the Court may either hold the absent runaway garbage truck contributory negligent, say 50%. Alternatively, the Court may hold the garbage truck wholly liable. Since the owner of the runaway garbage truck is not a party to the Suit, this Court is urged to proceed to dismiss this suit, thus exonerating the Appellant from any blame.
14. The Court notes that the owner of the garbage truck is not impleaded in this Suit either as a Defendant or as a Third Party.
15. The Respondents pleaded the case based on breach of a Statutory duty of care owed to the deceased by the Appellant as the Defendant. The particulars of negligence or breach pleaded are among others failing to ensure that the power cables were properly fastened. Failure to inspect or note any loose power cables and allowing power cables to remain unattended with electricity flowing through them. The Appellant denied it owed such a duty of care. It also pleaded contributory negligence against the deceased for among others engaging in child's play with the live cables, intentionally touching electric cables and walking carelessly and recklessly.
16. The trial Court found that the Appellant owed to the deceased a duty of care, to ensure that the electric cables, poles and transmission lines did not pose a danger or risk of injury to the public. The investigation report produced by the Appellant's own investigator shows the live cables belonged to the Appellant. It is common knowledge that electricity poses a real risk of danger to the public. This Court does not hesitate to find that the Appellant owed the deceased a duty of care. The Court follows the decision in Kenya Power and Lighting Co v Agnes Nduku Ndava [2019] eKLR.
17. The question to be asked is what of the runaway garbage truck? Was it the cause or did it substantially contribute to the accident? Unfortunately, there is no evidence of an eye witness. The Police officers who arrived at the scene did not find the garbage truck. The Court cannot from the evidence presented tell whether the incidence of the garbage truck hitting the pole and the deceased touching the wire happened simultaneously. Even the Investigator who testified as the Appellant's witness was not an eye witness.
18. The trial Court that heard and saw the witnesses, noted this challenge of lack of eye witness testimony. It further went on to state that if the garbage truck was liable, the Appellant would have taken out Third Party proceedings against the owner. This would be pursuant to order 1 Rule 15 of the Civil Procedure Rules.
19. To this Court, the issue starts with whether the garbage truck was liable for the accident or could be held contributory negligent. If the garbage truck hit the pole which caused the wire to become loose and fall on the deceased, liability would lie. More so if the chain of events is almost instantaneous. What if the garbage truck hit the pole and the wires got cut, and hours later they remained unattended, unsecured and posed risk to the passersby? What if they deceased involuntarily touched one of the hanging cables which was live? Leaving exposed live wires unattended, unrepaired for a period of time leaves the Appellant bearing the blame.



20. The evidence before the trial Court was sufficient to find that the deceased found a naked live cable as he was walking. The Appellant does not disapprove that. The evidence of the garbage truck on the scene, the time when it hit the pole was not clearly presented. This Court does not fault the trial Court for failing to apportion any liability to the unknown garbage truck. This court follows Vyas Industries –vs- Diocese of Meru [1976-1985]E.A 596; [1982] KLR 114. An Appellate court will not interfere with apportionment of liability unless the trial Court came to a manifestly wrong decision or based apportionment on wrong principles.
21. In this particular case the Respondents were able to prove a case of breach of statutory duty. The Court follows the standard of evaluation of evidence set out in William Kabogo Gitau –vs- George Thuo & 2 others [2010] 1 KLR 526.

### **On Quantum**

22. The Appellant submits that the award of loss of dependency was excessive. This is opposed by the Respondents in their submissions.
23. In the Further submissions filed by the Respondents, they raised the issue of further evidence. They argue that since the Appellant did not file any submissions on quantum before the Trial court, to file submissions on appeal amounts to adducing fresh evidence. The Court has perused the Record of Appeal and noted that the Appellant did file written submissions dated 10/3/2023 with several authorities attached.
24. In any event this Court is not convinced by the Respondents’ argument that submissions would be in the same class as evidence. Certainly, no authority was placed before this Court to persuade it otherwise. We say no more, suffice to say there was no objection to the Defendant’s submissions already placed in the Record of Appeal. This objection therefore cannot hold.
25. The award for pain and suffering at Kshs.100,000/- and for loss of expectation of life at Kshs.200,000/ are within the range of comparable awards. There are no submissions challenging the same. The same remain undisturbed.
26. This also applies to the award for loss of Consortium at Kshs.60,000/- which the Court finds reasonable. The deceased’s wife is entitled to an award for the loss of the company of her husband. A sum of Kshs.60,000/ as compensation for this ensuing void, cannot be said to be excessive.
27. On loss of dependency the Court applied a ratio of 2/3 as the deceased was a family man and hence had dependants.
28. The Court applied a multiplier of 31years on the basis that the deceased was a conductor in the informal sector where there is no retirement age. The deceased died at the age of 27 years.
29. The Appellant proposes a multiplier of 15 years. It submits that with the fragility of life, frequent pandemics like Corona Virus, Swine Flu, increased poverty, terminal and lifestyle diseases like cancer, hypertension and HIV/AIDS, the life expectancy of an average Kenyan has dropped to 40 years. The Court was referred to the decisions of Rose Munyasa & another –vs- Daphton Kirombo & Another [2014] eKLR and Roger Dainty –vs- Mwinyi Omar Haji & another [2004] eKLR and lastly Jane Wangui Kamau and 2 others –vs- Alice Atandi & another [2004] eKLR. In these cases, the multiplier applied was 20 years; 10 years and 13 years respectively.
30. In this Appeal, the Respondent did not refer this Court to any decision to support the multiplier of 31 years. The Court has perused the submissions before the trial Court. The Respondent had relied upon Easy Coach Bus Services & another –vs- Henry Charles Tsuma & another (Suing as the administrators



- and personal representatives of the Estate of Josephine Wanyaga Tsuma) [2019] eKLR. A multiplier of 27 years was awarded to a 33 years old deceased. In SMM –vs- Kassam Hauliers Ltd [2020] eKLR a multiplier of 29 years for a 31 year old deceased was adopted.
31. This Court has a duty to determine whether the multiplier applied is fair and reasonable. In doing so, the Court warns itself that the trial Court exercised its discretion on the basis of the evidence it heard. This Court cannot interfere with this discretion simply because it would have arrived at different figures, if it had tried the case. See Savanna Saw Mills Ltd –vs- George Mwale Mudomo [2005] eKLR.
  32. The circumstances in which the Court will interfere with an assessment of damages by the trial court are well known. If the trial Court applied the wrong principles by taking into consideration some irrelevant factor or failing to consider a relevant factor. Also, if it misapprehends the evidence and arrives at a figure so inordinately high or low as to represent an entirely wrong estimate. See Catholic Diocese of Kisumu –vs- Sophia Achieng Tete Civil Appeal NO. 284 of 2001 [2004]2 KLR 55.
  33. This Court considers the following decision Sidi Kazungu Gohu & another (Legal Representatives of the Estate of George Yongo Katana (Deceased) v Fatuma Abdi Mohamed & another [2021] eKLR a multiplier of 24 years was applied to a 34-year-old deceased. In Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) v Dubai Superhardware[2021] eKLR a 21 year old was awarded a multiplier of 30 years.
  34. The Court notes that a multiplier of 31 years brings the deceased lost years a few years shy of the retirement age of 60 years. The Court sees no reason to interfere. The figure awarded is within the range of comparable multipliers.
  35. On the multiplicand, we note that the evidence produced by PW. 4 shows that the deceased was a Matatu conductor. This was also confirmed by DW. 2 the Police officer. The Public Service Vehicle Conductor’s badge was produced. The Investigation Report by Sunrays General Insurance Investigators Ltd produced on behalf of the Appellant stated that the deceased was a Conductor. The Court will not fault the trial Court for holding that the deceased was a PSV Conductor.
  36. There was no proof of earnings by way of a pay slip. The Court takes judicial notice that in the informal Sector, such documentary evidence in the Matatu industry, relating to wages are rarely if ever kept. The trial Court adopted the minimum wages of a turn boy at Kshs.14,658.85. This is pursuant to the Regulation of Wages (General) (Amendment) Order 2018. The Court will not interfere with the award.
  37. The evidence of PW. 1 and even DW. 1 shows that he deceased was married. The 1<sup>st</sup> Respondent was the deceased’s wife. The evidence of PW. 1 and the letter from the Chief indicates that she had two (2) children. The trial Court correctly adopted the ratio of  $\frac{2}{3}$ .

**(b) What reliefs should be granted?**

38. The Court proceeds to uphold the decision of the trial Court.
39. The special damages awarded are Ksh.150/- as were proved at the trial. There is no cross Appeal. This amount remains undisturbed.
40. The Appellant submits that the Court made double compensation under the Law Report Act and under the *Fatal Accidents Act*. This argument has been rejected by the Courts in the decision of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR.
41. As we wind up, we note that the trial Court had a discretion to adopt the multiplier approach or the global assessment approach to the assessment of damages for loss of dependency. In this particular case,



the age and nature of employment of the deceased were known. The trial Court followed the basic minimum wage of a conductor as at that time. The decision in Kenya Power & Lighting Company Ltd –vs- EKO & Another [2018] eKLR supports this position.

42. The Appellant therefore does not succeed in this Appeal. The Court has considered that costs are awarded at the discretion of the Court. There would be no good reason to deny the Respondents the costs of this Appeal.

**Determination**

43. The Appeal is dismissed with costs to the Respondents.

44. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

.....

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of:

.....for the Appellant.

.....for the Respondent.

