



**Nguta (Suing on Behalf of the Estate of Kwekwe Ngute Choga) v Kenya
Power & Lighting Company Limited (Civil Appeal E079 of 2023)
[2024] KEHC 10928 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E079 OF 2023
JK NG'ARNG'AR, J
SEPTEMBER 23, 2024**

BETWEEN

**LEONARD CHUPHI NGUTA APPELLANT
SUING ON BEHALF OF THE ESTATE OF KWEKWE NGUTE CHOGA**

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Appellant Leonard Chuphi Nguta, the son of the late Kwekwe Ngute Choga, filed the suit on behalf of the deceased's estate against the Respondent who at all material times to the suit was in charge of installation and maintenance of electric poles and cables. That on or about 15th January 2020 at around 3.00 pm while the deceased was on her way home from the farm, she stepped in a puddle of water with high-tension electricity line. That the deceased was electrocuted and suffered 73% burn wounds. That she succumbed to the injuries on 30th January 2020 at the Mombasa Hospital. That the said accident was caused by the negligence of the Respondent's servants, employees and/or agents who failed to remove the wire that had fallen and had been lying on the ground for 3 days.
2. The Appellant averred that the deceased was 56 years old at the time of the incident, she was a housewife and a farmer, and that she left behind six dependants, a husband and 5 children. The Appellant prayed for judgment against the Respondent for special damages of Kshs. 3,082,353.00 being the fee of obtaining grant of Kshs. 5,000, funeral expenses of Kshs. 656,000 and medical bills of Kshs. 2,421,353. The Appellant also prayed for general damages, costs of the suit and interest thereon, and any other remedy the honorable court may deem fit to grant.
3. In their submissions in the trial court, the Appellant prayed that the court apportion liability at 100% against the Defendant. Under the [Law Reform Act](#), they proposed an award of Kshs. 100,000 for pain



- and suffering, and Kshs. 150,000 for loss of expectation of life. On loss of dependency, they urged the court to adopt the minimum daily wage of Kshs. 280 per day. That the deceased was aged 56 years at the time of her death and she was expected to work in her farm until her death. They proposed a multiplier of 10 years using Kshs. 7,000 per month (Kshs. 7,000 x 10 x 12 x 2/3) = Kshs. 560,000. On special damages, the Appellant prayed for Kshs. 3,082,353 which had been proved by way of invoices and receipts.
4. The Respondent denied averments in the Complaint and pleaded that the incident was caused by the negligence and/or contributory negligence of the deceased of failing to exercise safety precaution and consider safety measures in the circumstances, ignoring the danger and warning signs put up by the Respondent, interfering with electric supply wires, standing too close to electricity wires in complete disregard of the looming danger, and tampering with the Respondent's electricity wires. The Respondent prayed that the suit be dismissed with costs.
 5. The Respondent in the submissions in the trial court denied liability by relying on the case of *Hon. Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi* (2014) eKLR and Section 107 (1) of the *Evidence Act* that he who alleges must prove and that the evidence before court was not sufficient to sustain the allegation of negligence. That however, in the unlikely event that the court found them liable, they submitted on quantum under the *Law Reform Act* and proposed Kshs. 70,000 for loss of expectation of life and Kshs. 30,000 for pain and suffering. Under the *Fatal Accidents Act*, they proposed Kshs. 8,109.90 x 12 months x 10 years x 1/3 = Kshs. 324,396. On special damages, the Respondent proposed an award of Kshs. 35,000.
 6. In its judgment dated 16th March 2023, the court made an award under the *Law Reform Act* Cap 26 Laws of Kenya of Kshs. 50,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life. Under the *Fatal Accidents Act* Cap 32 Laws of Kenya, the court made an award of Kshs. 500,000 for loss of dependency. The trial court therefore entered judgment for the Appellant against the Respondent as follows: Liability – 100%; general damages – Kshs. 650,000/-; special damages – Kshs. 657,000/-; costs of the suit; and interest at court rates on general damages and costs of the suit from the date of the judgment, and interest at court rates on special damages from the date of filing the suit until payment in full.
 7. Aggrieved by the decision, the Appellant filed the appeal herein through a Memorandum of Appeal dated 28th March 2023 on grounds that the learned honourable magistrate erred and misdirected himself by proceeding on wrong principles when assessing quantum on general damages and failed to apply precedents and tenets of the applicable law, by awarding a sum in respect of general damages under the *Law Reform Act* Cap 26 Laws of Kenya which was inordinately low in the circumstances and thus occasioning a miscarriage of justice as the deceased died seventeen days after suffering severe burns, by failing to consider submissions for the Appellant's counsel on quantum under the *Law Reform Act* Cap 26 Laws of Kenya, by failing to award special damages as pleaded and proved, by failing to accept the invoice produced in court as evidence for special damages, and by making findings which were a total misdirection from the provisions of the law. The Appellant therefore prayed that the appeal be allowed with costs.
 8. The appeal was canvassed by way of written submissions. The Appellant through their submissions dated 27th February 2024 argued that an appellate court will only interfere with the judgment of the lower court if the said decision is founded on wrong legal principles. That this was the position in the case of *Municipal Council of Nakuru & Another v Daniel Mburu Gathiaya* (1993) eKLR. The Appellant submitted that the deceased suffered 73% burns on the whole body and was hospitalized for seventeen (17) days before she succumbed to her injuries. That this evidence was not challenged by the Respondent and that an award of Kshs. 50,000 was inordinately low. The Appellant relied on



- the decision in *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* (2017) eKLR and *Cromwell Mzame v Zablon Mwanyumba Lalu & Another, Civil Appeal No. E001 of 2020* where Kshs. 100,000 was awarded for pain and suffering.
9. According to the Appellant on loss of expectation of life under the *Law Reform Act*, the deceased was healthy prior to the accident, she enjoyed a vigorous life and was injured while tilling her farm. That in the case of *Cromwell Mzame v Zablon Mwanyumba Lalu & Another, Civil Appeal No. E001 of 2020*, the court awarded Kshs. 200,000 for loss of expectation of life while considering the issue of inflation. That in the case of *Agnes Mutinda Ndolo & Another v Mboya Wambua & Another*, HCCC No. 949 of 2002, the court found that an award of Kshs. 150,000 was fair for loss of expectation of life. On special damages, the Appellant testified that he had spent Kshs. 2,421,353.00 on hospital bills, he produced invoices and the evidence was not challenged. That in the case of *Jacob Ayiga Maruja & Another v Simeon Obayo* (2000) eKLR, the court stated that even oral evidence can be adequate to prove special damages. The Appellant also relied on the decision in *Haji Asuman Mutekanga v Equator Growers (U) Limited*, Civil Appeal No. 7 of 1995. The Appellant therefore prayed that the appeal be allowed.
 10. The Respondent filed submissions dated 26th March 2024 and contended that the Appellant's Record of Appeal did not have a copy of the decree appealed from and that neither was there evidence that it was applied for. That failure to include the decree in the record is fatal and failed to comply with Section 79G of the *Civil Procedure Act* as read with Order 42 Rule 1 (2) and Rule 13 (4) of the *Civil Procedure Rules* which provide that a copy of the decree is a primary document and therefore it is a mandatory document that must form part of the record. The Appellant was also guided by the case of *Milligan Heritage Ltd & Another v Anthony M. Mwaura* (2014) eKLR.
 11. On general damages for pain and suffering, the Respondent submitted that the trial court gave an award of Kshs. 50,000/- which was reasonable as it is within the conventional award. The Respondent relied on the decision in *Sukari Industries Limited v Clyde Machimbo Juma* (2016) eKLR where it was held that the sums have ranged from Kshs. 10,000 to Kshs. 100,000 over the last 20 years. On loss of dependency and expectation of life, the Respondent stated that the trial court's approach of a global sum was most appropriate as no evidence was tendered to show that the deceased was engaged in any income generating activity and the amount she used to earn was never pleaded. The Respondent was guided by the decision in *Frankline Kimathi Baariu & Another v Philip Akungu Mitu Mborothi (suing as the administrator and personal representative of the Anthony Mwiti Gakungu Deceased)* (2020) eKLR.
 12. On special damages, the Respondent argued that special damages must be specifically pleaded and proved. That the Appellant pleaded special damages amounting to Kshs. 3,082,353.00 but the trial court awarded Kshs. 657,500 which were fully proved. That no receipts were produced for the medical expenses but invoices. That PW1 stated in evidence that part of his salary went to servicing the hospital bill but he did not tender any evidence in support of his allegations. The Respondent was guided by the decision in *Alex Koech & Another v Nelson M. Mulama (suing as the legal representative of the estate of Kevin Kinyanjui, Deceased)* (2018) eKLR. The Respondent prayed that the appeal be dismissed with costs to them.
 13. This court as the first appellate court is required to reconsider, reanalyze and reevaluate evidence afresh and come up with its own conclusion as it was held in the case of *PIL Kenya Limited v Oppong* (2009) KLR 442 as follows: -

“...It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial



court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that..."

14. I have considered the record of appeal, the grounds of appeal and submissions by the parties. The issues for determination are whether failure to include the decree in the record of appeal is fatal and whether the award of quantum was in accordance with the law and as pleaded and proved.

15. On the first issue, the Respondent in their submissions argued that the record of appeal did not have a copy of the decree appealed from, that neither was there evidence that it was applied for and that failure to include the decree in the record is fatal. Section 2 of the [Civil Procedure Act](#) provides: -

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include –

- a. any adjudication from which an appeal lies as an appeal from an order; or
- b. any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

16. The issue of failure to include a decree in the record of appeal was also discussed in [Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata](#) (2017) eKLR where the Court of Appeal held: -

“According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities...”

17. From the above holding, I find that the omission of the decree in the record of appeal is not fatal as a certified copy of the judgment was adequate.

18. On the second issue of quantum, the Appellant submitted that the award of general damages was inordinately low in the circumstances. Under the head of pain and suffering, the Appellant proposed Kshs. 100,000. However, the Respondent maintained the position that the award of Kshs. 50,000 was reasonable as it was within the conventional award.

19. In the case of [Hyder Nthenya Musili & Another v China Wu Yi Limited & Another](#) (2017) eKLR, the court held that: -

“As regards damages awarded under the [Law Reform Act](#), the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to



Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

20. The evidence on record shows that the deceased was electrocuted on 15th January 2020 where she suffered 73% burns on her body and was hospitalized for 15 days before she succumbed to the injuries on 30th January 2020. It is clear the deceased underwent prolonged pain and suffering and since the conventional award for pain and suffering ranges between Kshs. 10,000/= to Kshs. 100,000/=: this court finds that the trial court’s award of Kshs. 50,000 was sufficient.
21. Under the head of loss of expectation of life, the Appellant relied on decisions that awarded Kshs. 150,000 and Kshs. 200,000. However, the Respondent urged the court to uphold the decision of the trial court where Kshs. 100,000 had been awarded. In *Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR (Deceased))* (2020) eKLR, the court held that on loss of expectation of life, the award of Kshs. 100,000/= under this head is conventional and well merited and in accordance with the applicable principles of law. The court herein therefore appreciates that an award of Kshs. 100,000 was modest on the reasoning that the deceased was healthy and enjoyed a vigorous life which was cut short by the accident.
22. The Appellant has not challenged the award on loss of dependency. This court will therefore not interfere with the award under this head.
23. Under special damages, the Appellant pleaded Kshs. 3,082,353.00 for special damages being the fee of obtaining grant of Kshs. 5,000, funeral expenses of Kshs. 656,000 and medical bills of Kshs. 2,421,353. The trial court in its judgment awarded the Appellant Kshs. 657,500 which according to the court was strictly proved. The Appellant in their submissions argued that the evidence was not challenged and invoices were produced.
24. In *Kenya Power & Lighting Company Ltd v James Muli Kyalo & Another* (2020) eKLR, Mwita, J. held that: -

“It is trite law that a claim for special damages must not only be pleaded, it must also be strictly proved. This is because a claim for special damages represents what the party may have actually lost in the form of the amount used and he would want to be put back to the position he was had he not been forced to incur the expense, hence the need to strictly prove these claims.”
25. Upon perusal of the Record of Appeal, this court notes that the Appellant furnished the court with a copy of invoice of Kshs. 2,421,353 for the medical bills, and copies of receipts of Kshs. 637,500 for funeral expenses and Kshs. 20,000 as filing fees at Kituo cha Sheria. The court awarded the amount in receipts of Kshs. 657,500 but the medical bills of Kshs. 2,421,353 in the invoice. The Appellant gave reasons that he guaranteed payment of the treatment costs at the Mombasa Hospital where he worked and the same was to be deducted from his salary. The Respondent opposed this position on the basis that no employment letter or undertaking was tendered in evidence to support the Appellant’s allegation that his salary serviced the hospital bill.
26. The issue of invoice was addressed in the case of *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* (2015) eKLR cited with authority the case of *Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority* (2009) eKLR 720 which held that: -

“What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word” paid” on the invoice and that



would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt.”

27. It is not in dispute that the deceased succumbed while undergoing treatment at the Mombasa Hospital. The evidence on record shows as much. It is also not in dispute that medical expenses were incurred while the deceased was undergoing treatment and that the deceased was admitted in the Intensive Care Unit and underwent surgery. The Appellant through a letter dated 17th January 2020 reached out to the Respondent for assistance for the escalating bill. The invoice shows Leonard Chuphi Nguta’s scheme, as staff at Mombasa Hospital and the payer, and that the deceased was admitted under him. The letter dated 17th January 2020, the invoice and other documents on the Appellant’s list of documents were tendered in court as evidence by PW1, Leonard Chuphi Nguta, and the said documents were not disputed by the Respondent in cross examination. Further, the word ‘paid’ was not endorsed on the invoice but this court is convinced by the Appellant’s explanation that deductions made on his salary went towards clearance of the hospital bill and this issue was addressed by PW1 in his cross examination. This court therefore finds that in addition to the Kshs. 657,500 awarded, the Appellant is also entitled to the Kshs. 2,421,353 that went towards the medical bills.
28. Accordingly, for the reasons set out above, the Appellant’s appeal partially succeeds. The trial court judgment delivered on 16th March 2023 is set aside and awards are made in the following terms: -
1. The award of Kshs. 50,000 for pain and suffering is affirmed.
 2. The award of Kshs. 100,000 for loss of expectation of life is affirmed.
 3. The award of Kshs. 657,500 for special damages is set aside and substituted with an award of Kshs. 3,078,853
29. Judgment is therefore entered in the sum of Kshs. 3,228,853 for the Appellant against the Respondent. The orders on interest and costs made by the trial court shall remain in force. Each party shall bear their own costs of the appeal which has partially succeeded.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD SEPTEMBER 2024

J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

No appearance Advocate for the Appellant

Mutuku Advocate for the Respondent (holding brief)

Court Assistant – Mr. Samuel Shitemi

Further order;

30 days’ stay granted.

