



**Kenya Power & Lighting Co Ltd v Wendo (Suing as the legal administrators
of the Estate of Sheila Kageha Amusavi) & another (Civil Appeal
39 of 2019) [2023] KEHC 2367 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 39 OF 2019
FR OLEL, J
MARCH 23, 2023**

BETWEEN

KENYA POWER & LIGHTING CO LTD APPELLANT

AND

CHRISTOPHER KIPCHUMBA MULOK 1ST RESPONDENT

JACKSON KIRWA WENDO 2ND RESPONDENT

*(Being an Appeal from the judgment of Honourable M. Mutua,
RM, delivered on 5th August 2019 in Naivasha CMCC 474 of 2016)*

JUDGMENT

1. This appeal arise from the judgement of Honorable M Mutua, RM delivered on August 5, 2019, where he awarded the Respondents a total of Kshs 3,874,800/- plus cost and interest as damages arising from a fatal electrocution accident involving one Sheillah Kageha Amusavi (deceased). The Respondent's had made a claim for damages under the [Law Reform Act](#) cap 26, [Fatal Accident Act](#) Cap 32 and also sought special damages. After hearing Judgement was awarded to the Respondents for Ksh 3,874,800/-.
2. The Appellant, who was the Defendant in the primary suit being dissatisfied by the said judgment did file their Memorandum of Appeal dated August 19, 2019. The grounds of appeal were that;-
 - a. That the learned trial Magistrate erred in law and in fact by failing to appreciate the fact that the Respondents had failed to prove their case against the Appellant.
 - b. The learned trial Magistrate erred in law and in fact and mis-directed himself in finding that the Defendant was 100% liable without evidence to that effect.



- c. That the learned trial Magistrate erred in law and in fact in taking the Plaintiff, eyewitness account of events in apportioning liability, yet the said witness were not eye witnesses.
 - d. That the learned Magistrate erred in law and in fact by awarding an excessively exorbitant sum of Kshs 100,000/- for pain and suffering.
 - e. That the learned trial Magistrate erred in law and in fact in awarding an excessively exorbitant sum of Kshs 150,000/- for loss of expectation in life.
 - f. That the learned Magistrate erred in law and in fact in awarding an excessive and exorbitant sum of Kshs 3,754,800.00 /- thereby arriving at a wrong finding.
 - g. That the learned Magistrate erred in law and in fact in using an erroneous multiplicand of Kshs 44,685.00/- thereby arriving at a wrong finding.
 - h. That the trial court's decision against the weight of evidence on record and bad in law and awarded damages were given without any legal basis.
 - i. That the learned Magistrate erred in law and fact on relying on evidence that was not adduced.
 - j. That the learned Magistrate erred in law and in fact by totally ignoring the Appellant's evidence and submission.
 - k. That the learned Magistrate erred in law and in fact in determining issues that were not pleaded and not submitted upon by the plots.
 - l. That the learned trial Magistrate erred in law and in fact and used the wrong principles of law in determining the multiplier thereof arriving at a wrong finding.
 - m. That the learned trial Magistrate erred in law and in fact in failing to determine that the Plaintiff had not discharged their evidentiary burden of proving their claim under the *Fatal Accidents Act* Cap 32 and the *Law Reform Act* Cap 26 Laws of Kenya and that no sufficient evidence was put forth to corroborate the Plaintiff assertions.
 - n. That the learned Magistrate erred in law and in fact by failing to apply the proper legal principles regarding quantum and thus arrival at an erroneous decision on both liability and quantum.
3. The Appellant prayed that this appeal be allowed, the decision on liability be reversed and quantum be reassessed by this court and it be reduced. The Respondent's too did file a memorandum of cross Appeal on September 5, 2019, where they raised three(3) grounds of appeal namely;-
 - a. That the learned trial Magistrate erred in law and fact in failing to attach due weight to the Appellant's/Respondent's evidence submissions and authorities attached therein.
 - b. That the learned trial Magistrate erred in law and in fact and used the wrong principles of law in determining the multiplier therefore arrival at wrong finding of $1/3$ instead of $2/3$.
 - c. That the learned trial Magistrate erred in law and in fact by applying the wrong principles regarding the award of damages in a claim of this nature and therefore arrived at an erroneous decision in award of damages.
 4. The Respondents therefore prayed that the cross appeal be allowed and the award of the Lower Court under Fatal Accident's Act be set aside and it be reassessed afresh.



Brief Facts

5. The Respondent's did file a plaint on May 27, 2016 in their capacity as the legal administrators of the estate of Sheillah Kageha Amusavi (deceased) claim damages arising from a tort of negligence where the deceased was electrocuted while hanging clothes on the clothes line at her residence at sanctuary estate within Naivasha town. They sought damages under Fetal Accident Act, Law reform Act, Special damages and costs of the suit.
6. The Appellant who was the defendant in the primary suit, did file their statement of defence on June 14, 2016 denying any wrong doing on their part. The suit came up for hearing on April 1, 2019 when the 1st Respondent in the appeal testified and adopted his witness statement. He further produced as exhibits all the documents listed in the list of documents dated May 26, 2016. The Appellant did not offer any evidence and opted to close their case. The trial magistrate after considering the parties submission delivered judgment on August 5, 2019 whereby he found the appellant to be 100% liable and awarded the Respondents a total of Ksh 3,874,800/-. It is this judgement/award that has given rise to this appeal.

Appellants Submissions

7. The Appellant faulted the trial magistrate on finding them 100% liable yet the Respondent's had not fully discharged their burden of proof in line with Section 107 and 109 of the Evidence Act. The appellant submitted that there was no eye witness who saw the deceased hanging cloth outside her house and being electrocuted after touching the hanging lines which had come into contact with the iron sheet. Apart from there being no eye witness, this incident was never reported to the appellant's office and/or to the police for investigations.
8. They submitted that the deceased could have been electrocuted elsewhere and/or inside her house while tempering with electricity/electronics. Merely because the deceased died as a result of electrocution does not automatically translate to negligence of the appellant. They relied on the case of Uchumi Supermarket Ltd versus Torgol Investment Limited (2016)eKLR.
9. The Appellant also submitted that the award of Ksh 100,000/- for pain and suffering was excessive and based on speculation as the magistrate alleged "that the deceased must have died a terrible death with a lot of pain and suffering". It was their contention that a person who is unconscious is not capable of experiencing pain and suffering during that period before she passed on. They proposed a sum of Ksh 10,000/- and relied on the citation of Mercy Muriuki and another versus Samuel Mwingi Nduati and another (suing as the legal administrator of the estate of the later Robert Mwangi) (2019)eKLR.
10. Similarly under the heading of loss of expectation of life the appellant stated that the award of Ksh 150,000/- for loss of expectation of life was excessive as the deceased was not the only bread winner in the family. The appellant submitted that the appropriate amount should have been Ksh 100,000/-.
11. For loss of dependency the appellant faulted the trial magistrate for using Ksh 44,685/- as the deceased monthly earning yet there was no proof of the same. Exhibit 7, the payslip dated December 31, 2015 was never filed or produced in evidence and in any event it purported to be salary payment of December 2015, one month after the deceased had died. In addition the Respondent had testified that the deceased earned Ksh 10,000/- and thus the magistrate could not assume a higher multiplicand.
12. Given the lack of tangible evidence on the deceased earning, the appellant submitted that the trial magistrate should have applied a minimum wage approach for one who resides outside a city or municipality as at November 27, 2015. The appellant guide was the Regulation of wages (general)



(amendment) in 2015 which indicates the minimum wage of a general labourer/worker is (Ksh 5,844/-). The trial magistrate thus ought to have used this as a multiplicand. Since the deceased was 35 years and multiplier of 15 years would suffice given the many vestiges of life and dependency ratio of $\frac{1}{3}$ on the ground that the deceased was survived by her husband and thus was not a single mother at time of death. The appellant proposed that the calculation should be $5844 \times 12 \times 15 \times \frac{1}{3} = 350,640/-$.

13. The appellant final submissions was that the trial magistrate ignored their submission and it was not acknowledged anywhere in the trial court judgement. In contrast, the trial magistrate heavily relied on the Respondent submissions which was a misdirection. They prayed that this appeal be allowed with costs to the appellant.

Respondents Submissions

14. The Respondent filed their submissions on June 15, 2022 and submitted that the deceased died when she came into contact with live electricity, which had come into contact with the iron sheet of the house where they were residing in. This matter was reported to the police who investigated the matter and also post mortem conducted confirming cause of death to be electrocution. It was not a contested fact that there was a live wire which was loose and got into contact with iron sheets and the hanging line when the deceased went out to hang her clothes, she was electrocuted and she died on her way to hospital.
15. The Respondents submitted that their evidence was not controverted and the appellant never called any witness to rebut their evidence and thus the liability of 100% as found by the trial court was correct. They also relied on the case of John Wainaina Kagwe versus Hussein Dairy Ltd (2013)eKLR, where it was held that failure by the defendant to call evidence in their defence was fatal and the statement of defence as filed was mere bones with no flesh in support. The same was also posited in Kenya Power & Lighting Co Ltd versus Sophie Ngele Malemba and another (2019)eKLR.
16. On the issue of pain and suffering and loss of expectation of life the Respondents submitted that the magistrate discretion cannot be faulted. There is no evidence that the trial magistrate applied a wrong principle or ignored a pertinent issue and therefore arrived at a wrong conclusion. It was a fact that the deceased died a painful death and the death was not instant and what was awarded was within normal range usually awarded by court.
17. On the cross appeal the Respondent faulted the trial magistrate for using the wrong multiplicand of $\frac{1}{3}$ instead of $\frac{2}{3}$. The deceased had a family and children under her care and therefore there was no justification for the court to use a dependency ratio of $\frac{1}{3}$ especially in light of Section 4 of the Fatal Accident Act which provide that 'every action is brought for the benefit of the wife husband, parents and child of person where death was so caused'. They relied on Abdimana Abdulwahab and another versus Janet Njeri Wambui and another (suing as the legal representative for and on behalf of the estate of Jane Wambui Kirugu (deceased)) 2021 eKLR where the court supported and adopted a dependency ration of $\frac{2}{3}$ in computing damaged for dependency under Fatal Accident Act. They prayed that the award based on the deceased last payslip thus should have been $(44,685 \times 20 \times 12 \times \frac{2}{3} = 7,149,600/-)$.
18. The Respondent prayed that the appeal be dismissed and the cross appeal be allowed with costs.

Analysis and Determination

19. In determining this appeal I have considered in detail, the entire record of appeal, submissions filed by the parties both before the trial court and in this appeal and will consider the whole appeal and fresh scrutiny and arrive at its own conclusion



20. As held in *Selle and another versus Associated Moto boat Co Ltd and another* 1968 EA 123 that,

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”.

21. In *Coghlan versus Cumberland* (1898) 1 Ch 704 the court of appeal (of England) stated as follows;

“Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

A. Grounds 1,2 and 3 the Respondent did not prove liability against the Appellant and therefore he trial court was wrong to assess liability at 100% as against the appellant

22. The 1st Respondent did testify and provided documents to prove that indeed the deceased was his wife and she died on November 27, 2015 as a result of an electrocution incident which occurred while she was hanging clothes outside her house at Sanctuary Estate. It was the 1st Respondent testimony that was an electricity wire which was hanging loosely and it touched the iron sheet on top of their house. The deceased was hanging clothes on a wire used to hang clothes and which was attached to the roof of the house. When she touched the hanging line, she was instantly electrocuted, fell down and lost consciousness. He was informed by one of his sons, who was at the scene and called an ambulance from Finlays. She was rushed to hospital but died before reaching the hospital. No evidence was called to rebut the 1st Respondent’s evidence.

23. Under provision of Section 107(1) of the *Evidence Act* Cap 80 Laws of Kenya “Whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exists”

24. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Section 109 and 112 of the same *Act* and which provides that;

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to these proceedings, the burden of proving or disproving that fact is upon him.



25. These two propositions were dealt with in *Ann Wambui Nderitu versus Joseph Kiprono Ropkor and Another* (2015) 1 EA 334 in which the court of appeal held that;

“As a general proposition under Section 107(1) of the *Evidence Act*, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires that court to believe in its existence which is captured in Section 109 and 112 of the *Act*”

26. In *Mbuthia Macharia versus Anna Mutua and another* 2017 eKLR the court stated that;

“the legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes the evidential burden therefore while both the legal and evidential burden initially rest upon the appellant the evidential burden may shift in the course of trial depending on the evidence adduced. As the weight of evidence given by either sides during trial varies so will the evidential burden shift to the party who would fail without further evidence being adduced. In this case, the incident of both the legal and evidential burden was with the appellant.”

27. The appellant opted not to call any witness to rebut the 1st Respondent’s evidence and cannot be heard to say that the 1st Respondent’s case was not sufficiently proved. The evidential burden shifted on the appellants and it is obvious their case would fail if no further evidence was adduced. In this instance there was no evidence adduced to rebut the Respondent evidence and the post mortem report (exhibit 3) dated 2/12/2018 confirmed the cause of death as cardiorespiratory arrest secondary to electrocution incompatible with life.

28. Reliance is also placed on *John Wainaina Kagwa versus Hussein Fairy ltd* (2013)eKLR where the court held that;

“the Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. What even the Respondent gathered in cross examination of the appellant and his witness could not be said to have built up its defence. As it were therefore, the Respondent’s defence was mere bones without flesh in support thereof, it did not therefore prove any averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident.”

29. This court thus cannot fault in any manner the trial court finding on that the appellant was 100% liable in absence of their evidence to rebut negligence attributed to them.

B. The trial magistrate awarded exorbitant damages

30. The appellant submitted that the award of Ksh 100,000/- from pain and suffering was exorbitant and it was based on assumptions that did not form part of the evidence and it would therefore have been appropriate to review it down wards to Ksh 10,000/-. Further on loss of expectations of life the appellant submitted that the award of Ksh 150,000/- was excessive as the deceased was not the only bread winner in her family and was survived by her husband conventionally an award of Ksh 100,000/- would have been appropriate.



31. On the issue of loss of dependency the appellant submitted that the trial court erred in law in awarding the Respondents a sum of Ksh 3,574,800/- basing it on the deceased payslip of Ksh 44685/- which was not produced in evidence. To the appellant P-exhibit 7 payslip for December 31, 2015 was never filed or produced as evidence and in any event it purported to be a payslip for the month of December 2015 after the deceased had died.
32. In addition the appellant submitted that the Respondent testified that the deceased used to earn Ksh 10,000/- monthly and therefore the trial court was not at liberty to assume a higher multiplicand. Finally they submitted that the court should have used as a guide The Regulation of wages (general) (amendment) order 2015 which indicted that minimum wages of a general worker as Ksh 5,844/- for persons working outside a city or municipality.
33. The issues raised as regards damages awarded are conjoined together with the Respondent's cross appeal where they faulted the trial court for using a multiple of $\frac{1}{3}$ instead of $\frac{2}{3}$. That pursuant to provision of Section 4 of the *Fatal Accident Act*, the suit was filed for the benefit of the husband and children of the deceased and that women also support their families the same way men do and as such there was no justification to use a multiple of $\frac{1}{3}$.
34. The deceased died aged 35 years as per the death certificate. She had 25years left before reaching the conventional retirement age. The trial magistrate used a multiplicand of 20 years owing to life uncertainties. The appellants in their submissions agreed with the trial magistrate reasoning on this issue but submitted that he should have applied 15 years as the multiplier. There is no basis upon which the multiplier should be reduced further from 20 years to 15 years the same proposition is unmerited.
35. The court of Appeal in *Catholic Diocese of Kisumu versus Sophia Achieng* Civil appeal no 284 of 202 (2004) 2KLR 55 sets out circumstances under which an appellate court can interfere with an award of damages in the following terms.

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded different figure. If it had tried the case first instance, the appellate court can justifiably interfere with. Quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at figure so inordinately high or low as to represent and entirely erroneous estimate.”

36. The same court in *Shiekh Mustag Hassan versus Nathan Mwangi Kamau Transporters and 5 others* (1986) KLR 457 held that;

“The appellant court is only entitled to increase and award of damages by the high court if it is so inordinately low that it represents and entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge proceeded on a wrong principle or misapprehended the evidence in some material respect.....A member of an appellate court would naturally and reasonably says to himself” what figure would I have made and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”



37. With respect to pain and suffering and loss of expectations of life the appellant have not shown which irrelevant factors the court considered or which evidence the court misapprehended so as to say he arrived at an erroneous figure. This court is not justified in substituting the figure awarded for its own unless the error wrong principle or misapprehension is identified. For pain and suffering it is clear from the evidence adduced that the deceased did not die instantly and died on the way to hospital.
38. In *Mary Muriuki and another versus Samuel Mwangi Nduati and another. (suing in as the lead administrator of the estate of the late Mwangi)* 2019 eKLR it was observed that;
- “the generally accepted principles therefore is that very nominal damages will be awarded on these two heads if the death followed immediately after the accident. The conventioned award for loss of expectation of life is Ksh 100,000/- while for pains and suffering the ward ranges Ksh 10,000/- to Ksh 100,000/- with higher damages being awarded if the pain and suffering was prolonged before death”.
39. This was also confirmed in *West Kenya Sugar Co. Limited versus Phillip Sumba Julanya (suing as legal administration and personal representative of the estate of James Julaya sumba)* (2019)eKLR when it was observed that;
- “The principle is that damages for pain and suffering are recoverable if the deceased suffered part and suffering as a result of his injuries in the period before his death. In addition, a plaintiff whose expectations of life has been diminished by reason on injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”
40. The deceased did not die immediately after the accident and the awards given under these two heading are not exorbitant and are in line with comparative awards issued by courts. There is therefore no basis to interfere with the same
41. For loss of dependency the appellant submitted that P-exhibit 7 payslips for December 31, 2015 was not produced. That submission does not hold true as the said payslip was admitted into evidence without any challenge from the appellant counsel who was present during trial. This court has had a look at the said payslip fact (found in the trial court file) and finds as a fact that;
- a. It’s a payslip from Finlays Horticulture Co Ltd and the deceased was a permanent worker thereat.
 - b. The deceased basic monthly pay is Ksh 7,500 and monthly house allowance is Ksh 2,500/-
 - c. In December 2015, she was paid (her family was paid) Ksh 45,932 as service gratuity less Ksh 7,593 as absent hours and less Ksh 2,500 as house allowance.
 - d. Her final dues at Finlays Horticulture was Ksh 44,685.00(net pay).
42. It is clear that the trial magistrate fell into error to compute the deceased pay at Ksh 44,685. This is an error which must be corrected and the deceased monthly salary is reduced to Ksh 10,000/- which was also confirmed by the 1st Respondent when he testified.



43. As regards the issue of depend Nancy in *Albert Kubai Mbogori versus Violet Japtum Rabadi* (2017)eKLR it was stated that;

“The degree of dependency on the deceased income is a matter of fact” in *Bone versus Onduu* (1982 – 1988) KAR 290 the court expressed itself that

“ The extent to which the family is being supported must depend on the circumstances of each case to ascertain it, the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule in such a situation”.

44. The 1st Respondent did plead that he is the husband of the deceased and she left behind three children (all minors) as named in the plaint while testifying in chief he stated that the deceased would take care of the family, while he was a farmer thus not the main bread winner. In cross examination he confirmed that his wife earned Ksh 10,000/- and maintained the family while he did not work. It is thus clear in this particular appeal that the depending ration is higher and ought to have been assessed at $\frac{2}{3}$ / instead of $\frac{1}{3}$.

45. Reliance is also placed on *Abdimana Abdulwahab and another versus Janet Njeri Wambui and another (suing as the legal representation for and on behalf of the estate of Jane Wambua Kirugu (deceased))* 2021 eKLR where Justice F. Gokonyo held that “Argument by the appellant seems to suggest that a lower ratio of dependency should be adopted because the deceased was a woman. Truth be told, women are empowered and single mothers or unmarried women with full parental responsibility support their children single handily to the full extent a pair of married couple would. The dependency ration of the fraction of income which is spent on the dependency by unmarried or single mothers. In the absence of evidence that the child or children are also supported by their father pursuant to parental responsibility.....should be equal to that of a married man who is taken to maintain his family household at the ration of $\frac{2}{3}$ of his income Gender does not matter or justify any differentiation between a female and male bread winner and provider. Both occupy the same eminent position and traction of a family bread winner or provider and there is no lawful or any justification that an unmarried women’s support of her family should be at lower ration of her income compared to that of the male counterpart. The evidence herein supports and I do adopt dependency ration of $\frac{2}{3}$ in the computation of the applicable damages for dependency under fetal accident Act.”

46. The compensation made by the trial court is thus set aside and it is calculated at $10,000 \times 12 \times 20 \times \frac{2}{3} = 1,600,000/-$

Conclusion

47. This appeal and cross appeal partially succeeding the judgment and decree of Honorable M Mutua (RM) delivered in Naivasha CMCC 474 of 2016 is partially set aside with regard to computation of loss of dependency. The sum is reduced from 3,574,000/- to Ksh 1,600,000/-. The other awards remain as awarded.

48. Each party will bear their own cost in this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF MARCH 2023.

FRNCIS RAYOLA

JUDGE



Parties absent

