Kenya Power & Lighting Company Limited v M'mwirabua & another (Sued as the Administrators of the Estate of Eunice Makena – Deceased) (Civil Appeal 108 of 2021) [2023] KEHC 23648 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23648 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL 108 OF 2021

LW GITARI, J

OCTOBER 17, 2023

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED .... APPELLANT

AND

IBRAHIM MBORI M'MWIRABUA .... 1ST RESPONDENT

ANGELICA CIOMITHEA M'MWIRABUA .... 2ND RESPONDENT

SUED AS THE ADMINISTRATORS OF THE ESTATE OF EUNICE MAKENA – DECEASED

(Being an Appeal from the Judgment and Decree of the Honourable C.K Obara , SPM in Maua CMCC No.149 of 2016 dated 12/7/2021)

JUDGMENT

Background

1. Eunice Makena (hereinafter referred to as the "deceased") was tiling her land parcel situated within Mutuari market municipality on or about 27th March, 2015 when she encountered over-hanging power lines owned and managed by the Appellant that electrocuted her occasioning her death. Subsequently, the Respondents instituted a suit against the Appellant vided a Plaint dated 4th November, 2016 in Maua CMCC No. 149 of 2016. They claimed general damages, special damages of Kshs. 61,170/= and costs of the suit as well as interest. The Respondents blamed the Appellant for the accident that occurred on 27th March, 2015 and alleged various particulars of negligence against it.

2. The Appellant denied the allegations contained in the Plaint and put the plaintiff into strict proof thereof. It claimed that if there occurred any such incident on the material day, then the same was solely caused and/or substantially triggered by the deceased's own negligence.

3. After full trial, the learned magistrate entered judgment in favour of the Respondents against the Appellant as follows:

   i. Liability 25:75%

   ii. Pain and Suffering .... Kshs. 50,000/=

   iii. Loss of expectation of life .... Kshs. 100,000/=

   iv. Loss of dependency .... Kshs. 2,720,000/=

   v. Special damages .... Kshs. 970/=

   Sub Total Kshs. 2,870,970/=

   Less: 25% Liability Kshs. 717,742/=

   Total Kshs. 2,153,227/=

4. Being dissatisfied with the judgment and decree of the trial court, the Appellant instituted this appeal vide the Memorandum of Appeal dated 10th August, 2021. The appeal is on quantum of damages only as the issue of liability was settled by consent of the parties at the rate of 75:25 in favour of the Respondents.

5. The grounds of appeal as contained in the Memorandum of Appeal are as follows:

   i. The learned Magistrate erred in law and in fact in raising the multiplicand to Kshs. 10,000/= even after finding that the applicable multiplicand was Kshs. 7,240.95 based on the minimum monthly income for a general labourer as provided in the Regulation of Wages (General Amendment Order, 2018 thereby misapplying the principles of assessment of damages for loss of dependency thereby arriving at a wholly erroneous figure thereof.

   ii. The learned magistrate erred in law and in fact in adopting a multiplier of 34 years in the case of a 26 year old deceased which is too high thereby arriving at a wholly erroneous estimate.

   iii. The learned magistrate erred in law and in fact in adopting a multiplier of 34 years failing to take into account the vicissitudes of life.

   iv. The learned magistrate erred in law and in fact in making an award of Kshs. 50,000/= on account of pain and suffering even after arriving at a conclusion that a minimal award of Kshs. 10,000/= would be appropriate in the absence of evidence that was tendered to show that the deceased underwent a prolonged period of pain.

   v. The judgment and decree of the learned trial magistrate was against the weight of the law and evidence.

6. The respondent opposed the appeal and filed written submission dated 29/3/2023 urging the court of uphold the decision of the trial court. The appeal was disposed off by way of written submissions.

Appellant's Submissions

7. In their submissions, the Appellant opted to argue grounds of appeal nos. 1 and 4 and abandoned grounds nos. 2 and 3.

8. The Appellant faulted the trial court for not strictly applying the gazette minimum wage of Kshs. 7,240.95/= as the multiplicand and instead increasing it to Kshs. 10,000/=. Relying on the case of Eston Mwirigi v. Patrick Gitonga Mbaya [2018] eKLR, the Appellant submitted that the trial court

ought to have applied and left the "amendment" of the same to the Government policy makers who are charged with that task and who actually review the same periodically on the dictates of the prevailing economic situation. The Appellant thus urged this Court to apply the minimum wage of Kshs. 7,240.95/= as the multiplicand in place of Kshs. 10,000/= which it termed as speculative.

9. Under the head of pain and suffering, it was the Appellant's submission that the award of KShs. 50,000/= under this head was a hefty award considering that the deceased did not undergo a prolonged period of pain.

10. The Appellant thus urged this court to allow this appeal and review the awards downwards.

Respondents' Submissions

11. In response to the Appellant's contention that the trial magistrate erred in adopting a multiplicand of Kshs. 10,000/=, it is the Respondents' submission that the trial court's decision was well founded in law. That it is not disputed that the deceased was a farmer although there is no documentary evidence to support the same. Relying on the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR, the Respondent submitted that in the absence of clear documentary proof of income, a court ought not to merely disregard the claim as thought the claimant or deceased had no livelihood at all. That doing so would lead to injustice of great proportions. It is the Respondents' submission that in such cases, the court correctly ought to revert to the applicable Regulation of Wages Order or to a global figure in appropriate cases such when dealing with a minor. Reliance here was place in the case of David Kimani Githinji & Grace Mbaile (suing as the administrator of the estate of Catherine Njeri Kimani - deceased) v. Mutai Hardware Stores Limited. It was thus the Respondents' submission that the minimum wage for a general worker under the Regulation of Wages (General) Amendment Order, 2018 is Kshs. 7,240.95/=. That the trial magistrate used their discretion and used a multiplicand of Kshs. 10,000/= in consideration of the harsh economic situations.

12. On whether the award of Kshs. 50,000/= under the head of pain and suffering was justified, it was the Respondent's submission that since the deceased died on the same day of the accident, the trial magistrate was correct in awarding Kshs. 50,000/= for pain and suffering and never erred or misdirected himself. He relied on the case of Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000/ = for pain and suffering. The Respondent thus urged this court to agree with the trial court's finding and uphold the same.

Issues for Determination

13. I have considered grounds of appeal no.s 1 and 4 as argued by the Appellant, the record of appeal as well as the submissions by the parties. the main issues that arise for determination by this Court are:

    i. Whether the trial court erred in law and fact in adopting a multiplicand of Kshs. 10,000/=;

    ii. Whether the award of Kshs. 50,000/= under the head of pain and suffering was justified.

Analysis

14. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it, and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing

and hearing the witnesses to access their demeanour. In Kiilu & Another vs. Republic [2005] 1KLR 174 the Court of Appeal stated as follows in this regard:

> "1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

See also Selle-v- Associated Motor Boat Company (1968) EA (2) & Kiruga –v- Kiruga & Another (1988) KLR 345

15. Guided by the above authority, I now turn to the evidence that was adduced before the trial court.

16. The Respondents, as the legal representatives of the estate of Eunice Makena (deceased) sought for an award of damages under the *Fatal Accidents Act* and the *Law Reform Act* following an accident that occurred on or about 27th March, 2015. The deceased was lawfully tilling her parcel of land situate within Mutuati market municipality when she was electrocuted by hanging power lines owned by the Appellant thus occasioning her instant death.

17. PW1 was Ibrahim Mbori and he testified as the only witness in support of the Respondents' case. He adopted his statement dated 4th November, 2016 as his evidence in chief and stated that that the deceased was his wife and together they had two (2) children. That the deceased was a farmer growing beans and maize and used to get about Kshs. 20,000/= per month.

18. The Appellant did not call any witnesses in support of the case against them.

19. In the end, the learned trial magistrate entered judgment in favour of the Respondent as against the Appellant as follows:

    i. Liability 25:75

    ii. Pain and suffering .... Kshs. 50,000/=

    iii. Loss of expectation of life .... Kshs. 100,000/=

    iv. Loss of dependency .... Kshs. 2,720,000/=

    v. Special damages .... Kshs. 970/=

    Sub total .... Kshs. 2,870,970/=

    Less 25% liability .... Kshs. 2,153,227/=

20. As mentioned above, the Appellant is now challenging the award made under the heads of Pain and suffering, and loss of dependency. Under the head of loss of dependency, the Appellant is challenging the multiplicand adopted by the trial court.

21. The assessment of damages was a discretionary relief. As such, an appellate court will ordinarily not interfere with the finding of a trial court on an award of damages unless it is shown that the trial court proceeded on wrong principles, or misapprehended the evidence in some material respect, and

so arrived at a figure which was either inordinately low or high (See: Butt v. Khan [1981] KLR 349). In exercise of its judicial discretion in assessment of judgment, courts consider the facts of each case and the prevailing social economic conditions in our society.

22. In Ugenya Bus Services v Gachoki [1982] eKLR the Court of Appeal held as follows:

> "General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is very heavy task. When I ponderingly struggle to seek a reasonable award I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.
>
> I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs 20,000 for the loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly."

23. In this case, the trial court reverted to the minimum wage in determining the multiplicand noting that there was no proof of actual income of the deceased. It correctly noted that that the minimum monthly income for a general labourer as provided for in the Regulation of Wages (General) Amendment Order, 2018 is Kshs. 7,240.95/=. The learned magistrate however adopted a multiplicand of Kshs. 10,000/=having considered the prevailing harsh economic situation. In my view, the multiplicand adopted by the learned magistrate was without basis where the trial court adopt the minimum wage as the multiplicand, he had no option but to adopt the lawful and gazetted minimum wages without amendment. The approach adopted by the trial magistrate was erroneous as what he used as multiplicand was not the gazette minimum. An erroneous decision automatically invites the appellate court to disturb the award. See Butt-v-Khan (supra). In Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased), (supra) the Court of Appeal held that where income is not proved the claim ought not to be disregarded. The best approach by the court is to adopt the minimum wage or a global award.

In Eston Mwirigi Ndege-v- Patrick Gitonga Mbaya (2018) eKLR Justice Mabeya, where the deceased was involved in farming on family land and her earnings could not be ascertained and the trial court applied the minimum age, the Judge stated-

> "In this court's opinion the process of assessment of damages should not be based on assumptions and speculation. It should be based on concrete evidence that is predictable. There is no rule of law that where the profession and or earning of a deceased person is unknown the minimum wage should be applied. It becomes speculative in that different professions will attract different hazards. The multiplicand cannot be the same. It is therefore in my view safe to adopt the approach of global/lump sum award in the case of Moses Mairua Muchiri (supra) and Mary Khayesi Awalo (supra)."

In the two cases, the courts adopted a global sum instead of estimating or assuming the income.

On the other hand the trial magistrate relied on Tobias Odoyo Oburu-v- Jane Kerubo Miruka & Another suing as legal representative of John Onywoki Saganyi (deceased) & Another (2018) eKLR, Majanja J where he held that;

> "there was no evidence of actual income, hence the trial magistrate ought to have reverted to the minimum wage to determine the multiplicand."

From the foregoing, it can be seen that the approach by the courts where there is no proof of income is to adopt a lump sum approach. The courts have also opted to work with the set minimum wages. In such circumstances, whichever approach the court adopts the process of assessment of damages should not be based on guess work, assumptions and speculation. The process must be predictable and based on sound evidence. If the multiplicand cannot be ascertained with any precision, the approach of global award of a conventional figure can be adopted. The approach will depend on the circumstances of the each particular case.

In this case the learned trial magistrate adopted the approach of minimum wage. The choice of multiplier and multiplicand is a matter of the courts discretion which discretion has to be exercised judiciously and with reason, I will not interfere with that approach. I will however interfere with the award of Kshs.10,000/- as it was not the minimum wage and apply the minimum monthly for a general labourer as provided for a general labour regulation of wages (General) Amendment Order 2018 which is Kshs.7,240.95.

Thus, the trial court's finding on the deceased's income multiplicand should be interfered with.

24. Under the head of pain and suffering, the learned magistrate relying on the case of Hider Atheena Musili & Another v. China Wu Yi Limited & Another [2017] eKLR correctly noted that usually, the award made under the head of pain and suffering rangers from Kshs. 10,000/= to Kshs. 100,000/=. The learned magistrate subsequent awarded the sum of Kshs. 50,000/= after noting that although the deceased died almost immediately after the accident, she underwent some pain although not prolonged. The Appellant submitted that the deceased did not undergo a prolonged period of pain to warrant such a heft award of Kshs. 50,000/= in general damages for pain and suffering. I have perused the post mortem report which indicates that the cause of death of the deceased was severe electrocution. The deceased must have suffered so much pain before passing on.

General damages for pain and suffering where the accidental is fatal, the assessment depends on the period the deceased underwent the pain. If death is sudden the damages will be minimal and where deceased suffers prolonged pain before the death, the damages will be higher. In the case of Hider Athena Musali & Another –v- China Wu Yi Limited & Another, (2017) eKLR Justice P. Nyamweya (as she then was) stated as follows:-

> " 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 range from kshs,10,000/- to Kshs.100,000/- with higher damages being awarded if the pain and suffering was prolonged before death. In the present case PW1 & 2 testified that the deceased died at the scene of the accident and I find that the award of Kshs.10,000/- for pain and suffering is reasonable."

In this case the trial magistrate found that the deceased died almost immediately as testified by PW1 and as shown on death certificate. There is no doubt that she underwent some pain though not prolonged.

From the evidence adduced by PW1- the deceased died instantly. There is no doubt that she suffered some amount of pain. I am persuaded by the above decision of Justice Nyamwea (as she then was) that nominal damage should be awarded where death is sudden. In the circumstances I find that the award of Ksh.50,000/- was excessive and presents a wrong award. I therefore have reason to set aside the award.

Conclusion

25. For the reasons stated, I find that the appeal has merits. I order the award of damages for loss of dependency and for pain and suffering are set aside. They are substituted as follows:-

1. Pain and suffering - Ksh.10,000/- less 25% = 2,500/-

2. Loss of dependency -Ksh.7,240.95x12x34x2/3

   =Ksh.1,969,538.40

   Less 25% = 492, 384.60

   Total under this head is Ksh.1,477,153.80

3. Loss of expectation of life = Kshs.100,000/-

4. Special damages- 970.00 Under 3&4 the total is Ksh.100,970.00

   Less 25% = 25,242.50

   Total = Ksh.84727.50

5. The total award after removing 25& is Ksh.1,560,381.30

6. I award the costs of the appeal to the appellant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 17TH DAY OF OCTOBER 2023.

L.W. GITARI

JUDGE