



**Kenya Power & Lighting Company v DBO (Suing as the next friend and father to DM - Deceased)  
(Civil Appeal E028 of 2023) [2024] KEHC 15436 (KLR) (3 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15436 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E028 OF 2023  
TA ODERA, J  
DECEMBER 3, 2024**

**BETWEEN**

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

**AND**

**DBO (SUING AS THE NEXT FRIEND AND FATHER TO DM -  
DECEASED) ..... RESPONDENT**

*(Being an appeal from the Judgment delivered by Hon. D.O Mac'  
Andere (SRM) on 28th February, 2023 in Kisii CMCC No. 728 of 2018)*

**JUDGMENT**

**Introduction**

1. Being aggrieved by the Judgment of the lower court dated 28.2.23, the Appellant filed the Appeal herein which was based on grounds of that;
  - a. The learned magistrate erred in law in making a finding of excessive damages against the defendant.
  - b. The learned trial magistrate erred in law and fact in holding that the defendant was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same
  - c. The learned magistrate erred in law and fact by failing to appreciate the impeccable defense of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant General Damages of Kshs 1,610,000/= without concrete documentary evidence.
  - d. The learned trial magistrate erred in law and fact by awarding the deceased minor the global award of Kshs 1,500,000/= for loss of Dependency in contravention to the Applicable law for a minor aged 9 years without taking into account the vagaries of life.



- e. The learned magistrate erred in law and fact in failing to appreciate the impeccable defense of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs 1,610,000/=
  - f. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding / conclusion, in particular relating to damages.
  - g. The learned magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.
  - h. The learned magistrate erred in law and fact in entering judgement in favor of the plaintiffs against the defendant in spite of the plaintiff's miserable failure to establish their case more especially on quantum.
  - i. The learned magistrate erred in law and fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances.
2. Based on the above grounds the appellant sought from this court the following orders
- a. That the appeal to be allowed with costs.
  - b. That the judgement of the subordinate court and consequential orders therefrom be set aside with costs to the appellants both in the lower court and on Appeal

### **Background of the Suit**

3. Vide a plaint amended on 6<sup>th</sup> December 2018, Respondent approached the trial court seeking a judgment against the Appellant's for:
  - a. General damages, under the Fatal Accident Act and under the Law Reform Act.
  - b. Special damages
  - c. Costs of the suit.
  - d. Interest on a, b, and c.
4. The Respondent's pleaded that on 4<sup>th</sup> January, 2013 while the deceased, (a child on whose behalf he had filed the
5. suit) was lawfully walking along a footpath leading to his home was electrocuted by an electricity cable belonging to the Respondent. As a result of the electrocution, the child suffered fatal high voltage burn. The Plaintiff placed blame on the Respondent whom he accused being negligent.
6. The Appellant filed a statement of defense on 28<sup>th</sup> March, 2019 denying the Respondents claim.
7. The trial court upon hearing the parties the trial court delivered a judgment wherein held as follows;

“Liability

The plaintiff contended that the deceased died as a result of electrocution.

He produced a copy of the abstract -P.EXH. 1 -and a copy of the postmortem



Report -P.EXH. 2- which confirmed that indeed the deceased died as a result of electrocution. A photograph -P.EXH. 4 -of the deceased lying dead beside the live wires was also adduced. Though the defendant filed their defense they did not controvert these assertions through viva voce evidence. The documents produced by the plaintiff were equally not challenged in court. The evidence adduced in court by the plaintiff therefore remains unchallenged.

In light of this I find that the plaintiff has proved on balance of probability that the defendant was negligent for the said accident and I hold them 100% liable for the same.

#### Quantum

The plaintiff has brought this suit as a personal representative of the deceased Denis Omariba his son on his behalf and on behalf of the dependent under the [Fatal Accident Act](#) and the [Law Reform Act](#). He produced the grant ad-litem -P.EXH. 5-as proof that he is the father to the deceased and he was granted the permission to file the suit vide court order issued on. The deceased in this case died aged 9 years and the plaintiff submitted that there were guidelines that were set by court when dealing with assessment of damages for minors whereby he cited the case of *Sheikh M. Hassan v Kamau Transporters* [1982-88] 1 KAR 946 which set these guidelines interalia that: -

- a. The sum to be awarded is never conventional one but compensation for pecuniary loss.
- b. It must be assessed and with moderation.
- c. Deduct the victims using expenses during the lost years for they would not form part of the estate.
- d. A young child's present or future earnings in most cases would be nil.
- e. An adolescent would usually be real, accessible and small.
- f. Calculate the annual gross loss.
- g. Apply the multiplier (estimates) number of lost working years accepted as reasonable in each case.
- h. Deduct the victim's probable living expenses of a reasonable satisfying enjoyable life.

The plaintiff further submitted that an award of Kshs 2,700,000/= would be sufficient compensation. The amount is divided into Kshs 800,000/= for pain and suffering, Kshs 400,000/= for loss of expectation of life and Kshs 1,500,000 for lost years under the [Law Reform Act](#). He relied on the case of

*Emmanuel Wasike Wabukesa (Suing for BWW Minor DCD) v Muneria Ndiwa Burman* where the Court of Appeal awarded a sum of Kshs 200,000/= for pain and suffering and loss of amenities, Kshs 80,000/= for loss of expectation of life and Kshs 500,000/= for lost years in respect to a child aged 1 1/2 years. The plaintiff submitted that in the instant suit the deceased died aged 9 and was teenage and going to school. That the record showed he performed well and he could have a career in future and earn a living as a professional.

The defendant on their part submitted that a sum of Kshs 350,000/= would be sufficient compensation as a conventional lump sum figure. They relied on the case of *H. Young & Co.*



*Ltd & another v James Gichana Orangi Kisii* (HCCA No 207 of 2009) where court awarded a conventional sum of Kshs 300,000/= in respect of a minor aged 11 years.

#### Compensation Under Law Reform Act

##### Pain and suffering

The plaintiff told court during cross examination that the deceased died on the spot. In such instances a conventional figure of Kshs 10,000/= is normally awarded. See the case of *James Gakinya Karienyé & another (Suing as the Legal representative of the Estate of David Kelvin Gakinya (Deceased) v Perminus Kariuki Githinji* [2015] eKLR. I therefore award Kshs 10,000/= for pain and suffering.

##### Loss of expectation of life

The deceased died aged 9 years and he was a pupil. He definitely had a bright future ahead of him. In *Azan Enterprises Ltd v Zubura Syongit Robert (Legal representative of the Estate of Abibakar Abdalla Mwangi (Deceased))* HCCA No 76 of 2019 Nyakundi J. upheld the trial court award of Kshs 100,000/= under this head for the loss of a minor aged 6 years who was a pupil. I find an award of Kshs 100,000/= would be sufficient in this instant suit as well.

#### Compensation Under Fatal Accident Act

##### Loss of dependency

In cases for loss of dependency in respect of the estate of a deceased minor the global award is the best approach in determining the amount of damages to award as opposed to the multiplier method see the case of *Kenya Breweries Ltd v Saro* [1991] KLR 408. In *Daniel Mwangi Kimani & 2 others v JGM & another* [2016] eKLR where court made an award of Kshs 1,000,000/= for loss of dependency in respect of the estate of a 9 years old child. Factoring inflation I find an award of Kshs 1,500,000/= would be sufficient for loss of dependency.

The upshot is judgement is hereby entered for the plaintiff against the defendant in the following terms: -

1. Pain and suffering Kshs 10,000/=.
  2. Loss of expectation of life Kshs 100,000/=.
  3. Loss of dependency Kshs 1,500,000/=.
- Total sum is Kshs 1,610,000/=.
4. Cost of the suit is awarded to the plaintiff.”

8. It is against this holding that the Appellant has approached this court in the manner hereinabove highlighted.

9. This court directed that the Appeal be disposed of by way of written submissions. Both parties filed their submissions which I have considered in my determination herein below.

#### Issues of Determination

10. Having analyzed the grounds of Appeal, reviewed the written submissions of the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the issues for determination are;



- a. Whether he erred in finding the Appellant liable for the fatal injuries sustained by the deceased minor.
- b. Whether award on general damages for a minor aged nine years was excessive.

### **Analysis and Determination**

#### **Whether the erred in finding the Respondent had established on a balance of probability that the Appellant was liable for the fatal injuries sustained by the deceased minor**

11. The *Evidence Act* under Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows regarding who bears the burden of prove:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

12. In order to establish whether the respondent did discharge his duty under section 107 of the *evidence act* as outlined hereinabove, this court as the first appellate court has the duty to re-examine and re-evaluate in facts and evidence as tendered in the lower court to arrive at its own conclusion that must necessarily be similar to the lower court. As an Appellant court is not bound to accept a finding of fact by the lower court. In *Selle v Associated Motor Boat Co.* [1968] EA 123 the court observed as follows;

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. During the hearing of the plaintiff case on 6<sup>th</sup> December, 2021 the Respondent testified adopted his witness statement dated 6<sup>th</sup> December, 2018 as his evidence in chief wherein he stated that the deceased was his son aged nine years old and that he was electrocuted on 4<sup>th</sup> January, 2013 at around 2.00pm and he sustained fatal injuries. He further told the court that he was in a meeting two kilometers away when he received a call from unknown person informing him that that his son had passed on and asked him to visit the scene. That he rushed to the scene near at Mosochi and found his son lying dead with electric wires coiled around him. At around 5pm on the same day, an officer of Kenya Power visited the scene and disconnected the power and the police officers who had already arrived at the scene recorded statements. They then moved the deceased body to the mortuary. Post mortem was conducted and it was established that the cause of death was electrocution. Further that the area assistant chief had reported in January 2013 to Kenya Power about the fallen cables but it took long for Kenya Power to resolve the same and he blamed the company for that negligence. The plaintiff further testified a child of tender years could not discern the danger of electric cables. The plaintiff did produce the among other documents to support a police abstract, post mortem report, photograph of the body of the deceased, copy of death certificate and copy of demand notice and response thereof. During cross examination he told court that the deceased died on the spot and that he did witness the incident.



14. From the testimony of the plaintiff and the documentary evidence especially the police abstract and the post mortem report, it was clear that the deceased minor died out of electrocution. The testimony by the Respondent that when he arrived at the scene he found electric wires around his body. There was no contestation to his averment that the area assistant chief had reported to Respondent regarding the killer electric wires days before the incident happened. The Kenya Power and Company has a duty of care to ensure that their electric installations are safe and do not expose any person to danger of electrocution. It has emerged that the wires were naked and that the appellant did not repair and or maintain the same.
15. I therefore find that the trial court made a correct finding that the Appellant was 100% liable for death of the minor.

**Whether award on general damages for a deceased minor aged nine years was excessive.**

16. The appellant urged this court to set aside and/or review the said Kshs 1,500,000 for loss of dependency. The learned counsel for the appellant submitted that trial court should have awarded a global figure since the deceased was a minor hence the guardian could not have depended on such a deceased child as there was no guarantee that the minor would become such a person as would be relied upon by the guardian, taking into account the vagaries of life. The learned counsel for the Appellant proposes a lump sum award of Kshs 350,000.
17. A review of the submissions of the learned counsel for the appellant it is outright that the impugned award was the one for loss of dependency which the court awarded at 1,500,000. I note that appellant has not raised any issue with awards made under the Loss of expectation of life being Kshs 100,000 and for pain and suffering of Kshs 10,000.
18. It is not unusual that there is controversy over whether a court should award damages for loss of dependency where the fatal injuries were caused on a minor. There are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income for the deceased, whereas the other school advocates for a global award.
19. In *Beatrice Wangui Thaini v Hon Ezekiel Bargetuny and another* NRB HCC 1638 of 1998(UR) Ringera J (as he then was) stated:

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

20. In awarding loss of dependency, the trial magistrate stated:

“In cases for loss of dependency in respect of the estate of a deceased minor the global award is the best approach in determining the amount of damages to award as opposed to the multiplier method see the case of *Kenya Breweries Ltd v Saro* [1991] KLR 408. In *Daniel*



*Mwangi Kimani & 2 others v JGM & another* [2016] eKLR where court made an award of Kshs 1,000,000/= for loss of dependency in respect of the estate of a 9 years old child. Factoring inflation I find an award of Kshs 1,500,000/= would be sufficient for loss of dependency.

21. An award for loss of dependency is an award under the *Fatal Accidents Act*. In *Ephantus Mwangi and another v Duncan Mwangi Wambugu* [1982] 1 KAR 278, Hancox J.A. (as he was then) stated:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings he did.”

22. In this case the trial Court awarded a global figure of Kshs 1, 500,000/= for loss of dependency, on account that the deceased was a child. In my view, that global award was not erroneous and neither was it excessive. I am fortified by the decision in *Emmanuel Wasike Wabukesha suing for BWW a Minor Deceased v Munena Ndiwa Durman* C.A. Eldoret C.A. No 10 of 2017 [2019] eKLR where the High Court set aside an award of loss of dependency which had been made by the trial court using a multiplier where the deceased was an infant and where an award of Kshs 1, 260,000 was substituted with a global award of Kshs 200,000. The Court of Appeal cited several of the past decisions where it made awards on loss of dependency using global sums i.e. *Kenya Breweries Ltd v Saro* [1991] eKLR where the Court of Appeal awarded Kshs 100,000 for loss of dependency to a parent of a child and stated that:

“damages are clearly payable to a parent of a deceased child irrespective of the age of a child and irrespective of whether there is no evidence of pecuniary contribution.”

23. The Respondent pleaded that the deceased was aged 9 years, brilliant and supportive of her family. His untimely death robbed the family of a great source of hope and health and the Respondent claims both under the *Law Reform Act* and *Fatal Accidents Act*.
24. In *Daniel Mwangi Kememi & 2 others v JGM & another* [2016] eKLR the court (Gikonyo J) awarded Kshs 1,000,000/= for loss of dependency where the deceased child was aged Nine (9) years, a bright student who was always in position one to three in their class and expressed her desire to be a doctor upon completion of her education but all her dreams were shattered by the untimely deaths.
25. In my humble view, therefore, an award of Kshs 1.500,000 for loss of dependency was reasonable in the circumstances taking into account the inflation rate, the age of deceased and recent awards for similar cases I find no reason to upset it. I uphold the said decision of the magistrate on quantum.

## Conclusion

26. From the forgoing therefore I find that the appeal on liability and quantum is unmerited and I proceed to dismiss it with costs to the Respondent.
27. It is so ordered

**T.A ODERA**

**JUDGE**

**3.12.24**

Delivered Virtually Via Teams Platform in the presence of:



Anyona for the Respondent

N/A for Appellant

Court Assistant – Oigo.

