



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO.8 OF 2016

KENYA POWER & LIGHTING CO.LTD.....APPELLANT

VERSUS

EDWIN MATSANZA KATAKA (Suing as the administrator and personal represented of the estate of

CATHERINE NANGEKHE WEPUKHULU).....RESPONDENT

(Being an appeal from the judgement delivered on 9th February 2016

by Hon J.K Kingori C.M in Bungoma CMCC No.70 of 2014.)

JUDGEMENT

The respondent herein; Edwin Matsanza Kataka sued Kenya Power and Lighting Co. Ltd (the appellant), seeking special damages of Kshs 110,000/- and general damages under the Law Reform Act and the Fatal Accidents Act, arising from the death of the deceased Catherine Nangekhe Wepukhulu who passed on as a result of electrocution when the appellant's electrical wire tripped and /or cut causing the house and compound of the respondent to be electrified and as the deceased was escaping from the house for safety, she was electrocuted occasioning her fatal injuries.

By a defence dated 15th April 2014, the appellant denied liability for distribution and maintenance of electrical power supply as alleged in the plaint and further averred that if at all an accident occurred, then the accident was caused by the negligence of the deceased. The appellant further denied the claim for award of damages under the Law Reform Act and the Fatal Accidents Act, contending that the respondents' suit was incompetent and did not raise any triable issues.

On 29th September, 2015, the parties entered into a consent on liability, where appellant conceded to 85%, liability and the respondent shouldered 15% liability.

Upon hearing the evidence of Edwin Matsanza Kataka, the respondent, who is also a husband to the deceased and considering submissions filed by the parties' counsel, the learned magistrate delivered a judgment in favour respondent in the following terms: -

Loss of dependency	Kshs.4,537,800/=
Loss of expectation of life	Kshs.100,000/=
Pain and suffering	Kshs.10,000/=
Special damages	<u>Kshs.110,00/=</u>
Sub Total	Kshs.4,757,800/=
Less 15%	<u>Kshs.713,670/=</u>
Total	Kshs. 4,044,130/=

The appellant aggrieved by Judgment; filed the present appeal where they raising four (4) grounds: -

1. That the trial magistrate erred both in law and fact when determining the net take home pay of the deceased and applied a higher figure hen the respondent gave a lower figure as the deceased's take-home pay.
2. That the trial magistrate erred both in law and fact by not taking into account and applying the double jeopardy /double benefit principal and not deducting from the award on quantum the sum awarded under The Law Reform Act
3. That the trial magistrate erred in law and fact and misdirected himself in applying the two third's ratio when determining the ratio of dependency as the deceased was not the sole bread winner of her estate and was survived by the respondent herein, her husband who was then, and is even now still engaged in gainful employment with a much higher salary than what the deceased earned monthly.
4. That the honorable court's award was so inordinate high as a result has constituted a miscarriage of justice.

During the hearing of the appeal, the appellant was represented by **Mr. Otsala** who was holding brief for **Mr. Obiero**, while **Mr. Onkangi** appeared for the respondent. Counsels agreed to proceed with the appeal by way of written submissions.

The appellant in their submissions faulted the trial magistrate's decision and prayed that his findings be set aside. On the 1st ground of appeal counsel submits that the net take home for the respondent was kshs. 17,430.70 after all deductions. A payslip was annexed in support of this. They contended that this amount should have been used as the deceased earning instead of kshs 22,689/= which the trial magistrate adopted as a multiplicand.

On the 2nd ground, counsel submitted that the trial magistrate erred in awarding quantum to the respondent both under the Law Reform Act as well as the Fatal Accidents Act as this amounted to double compensation. Counsel relied on **Easy Coach Bus Services & Another Vs Henry Charles Tsuma & Another (suing as the administrators and personal representative of the estate of Josephine Weyanga Tsuma-deceased) [2019] eKLR** and **Sukari Industries Limited Vs Lensa Awour & Another (2019) eKLR** in support of this proposition.

On the third ground the appellant submits that the court ought to have adopted the ratio of 1/3 or 1/2 instead of 2/3 as the respondent is employed and earning more than his deceased wife and that as an African man there is no way his wife supported him. They relied in the decision of **Beatrice Wangui Thairu Vs Hon. Ezekiel Barnetuny & Another; Nairobi HCCC no.1438 of 1990**. The appellant further submitted that the trials' court award was inordinately high resulting to miscarriage of justice and urged the court to set aside that award.

Counsel for the respondent in summary submitted that the trial magistrate's decision was sound and should therefore not be interfered with. He prayed that the appeal be dismissed with costs to them.

Issues for determination

Having perused through the record and the rival submissions filed by counsel, this court has identified the following issues for determination. First, is the question as to whether the trial court acted on wrong principles in awarding damages, and, if the above is answered in the affirmative, which sum would be sufficient compensation in the circumstances.

As the first appellate Court, the court is under the obligation to re-consider and re-evaluate the evidence on record and come up with independent conclusions as was aptly stated In **Selle -Vs- Associated Motor Boat Co. [1968] EA 123** and **Abok James Odera T/A A. J. Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**.

It is not contested that the deceased was a teacher by profession. She passed on at the age of 31 years due to electrocution. What is contested is the earnings of the deceased which ought to be used as a multiplicand, the dependency ratio to be applied and the issue of whether compensation under the Law Reform Act as well as the Fatal Accidents Act amounted to double compensation.

On the issue of whether or not the court applied wrong principles to warrant interference, this court is guided by the decision of **Kneller JA** (as he then was) in **Kemfro Africa Limited t/a Meru Express Services [1976] & another versus Lubia & another (No.2) [1987] KLR 30**, at page 35 had this to say: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilanga versus Manyoka [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co- Operative Society Ltd Versus Kalovoto [1979] EA 414, 418,419 (CA-K)

Further in **Butt versus Khan [1982-88] 1KAR**, 1 at page 4 it was stated thus: -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles; or that he must have apprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

Generally, in assessing damages under the **Fatal Accidents Act**, the factors to consider are the age of the deceased, the expectancy of the

deceased's working life, the ages and expectations of life of his dependants, net earning power and the portion of a person's net income which he would have made available to his dependants.

This Court is tasked to consider whether the learned magistrate erred by using the figure of Kshs 22,689/= as the multiplicand instead of the Kshs 17,430.70/=. I appreciate that the principle behind his finding is that courts must factor in statutory deductibles prior to arriving at the appropriate figure to use. In **Rosemary Mwasya V Steve Tito Mwasya & Another [2018] eKLR**, it was stated;

“The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as Kshs. 118,546/= x 1/3=39,512.”

The evidence on record confirms the deceased's basic pay was Kshs. 28,450 per month. The statutory deductions as contained in the payslip are; P.A.Y. E at Kshs 5,441/= and NHIF at Kshs 320/= which totals to Kshs 5,761/=. The rest do not amount to statutory deductions. The rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.

The trial magistrate did not therefore err in using Kshs.22,689/= as the earning of the deceased.

The appellant also submitted that an award under both the Fatal Accidents Act and the Law Reform Act for loss of dependency was improper as it amounted to double compensation and should have been deducted.

The Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited (2015) eKLR** stated:

“This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.

The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd v/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that: -

“An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.

The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.

The same position was reiterated, by the Court of Appeal, in **Daniel Inyangala Ambetsa vs. Moses Sigoria Shauri t/a Multibrand Marketing [2020] eKLR**, where the court said:

“In the instant case, the learned Judge interfered with the award of damages made by the trial court. She relied on the alternate proposal by the respondent regarding what the appellant should have received. She further took the view that the correct position in law was that a party claiming should not benefit under both the Fatal Accidents Act and the Law Reform Act. We do not think that that is the correct position in law.....

In the premises, the learned Judge erred in holding that the award by the trial court amounted to double compensation.”

The position is clear, nothing need be added to the above, except to state that there is no requirement to deduct one award from the other. The appellant's argument is declined.

In respect to the dependency ratio, the record reveals that the deceased was married and had four children with the respondent. The relevant birth certificates were produced as exhibit. He confirmed in his evidence that the deceased assisted him in clothing, educating and taking care of the kids. In the premises, the court is of the view that the learned trial magistrate identified the dependants and correctly applied a dependency ratio of 2/3. The court is guided by the court of appeal decision in **Silverstone Quarry Limited & another v Beatrice Mukulu Kang'uta & another (suing as Administrators of the Estate of Philip Musyoka Muthoka) [2020] eKLR** where it was held,

'... Evidence was adduced showing that the deceased was survived by a wife and five children, whom he used to support; hence the dependency ratio of 2/3 was also reasonable. In our view, the trial Judge properly directed herself and took into account relevant issues in regard to the multiplier and dependency ratio.'

Lastly on the issue of whether or not the honourable magistrate's award of Kshs.4,757,800/=was inappropriate; this court finds that the trial magistrate did not apply wrong principles of law hence the awards were within limits.

For the above reasons, the appeal is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AT BUNGOMA THIS 10TH DAY OF MARCH, 2021

S. N RIECHI

JUDGE