**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CIVIL APPEAL NO. 43 OF 2019**

**HADIMUSU POWER ENGINEERING LTD.....APPELLANT**

**-VERSUS-**

**CHARLES NJUGUNA WANG'ONDU.....1ST RESPONDENT**

**MARGARET WANGARE KAHURIA.....2ND RESPONDENT**

**(**Suing as the legal representatives of all the estate of the late **DOUGLAS KARUGU NJUGUNA (Deceased)**

**RURAL ELECTRIFICATION AUTHORITY.....3RD RESPONDENT**

**JUDGMENT**

1. The Appellant/Plaintiff lodged claim seeking:

**a. General damages under the Law Reform Act and the Fatal Accident Act.**

**b. Special damages as pleaded plus interest from the date of filing suit.**

**c. Costs of the suit plus interest on (a) and (b) above at court rates.**

**d. Any other or further relief this Honorable Court may deem and just to grant.**

**BACKGROUND:**

2. The Respondents claim against the Appellant can be picked up from paragraph 5, 6, and 7 of their plaint which states that;

**5) At all material times relevant to this suit the 1st Appellant had been contracted by the 2nd Appellant herein to carry out the work of connecting electricity within Laikipia County and whereby the 1st Appellant employed DOUGLAS KARUGU NJUGUNA (deceased) as a casual worker.**

**6) It was a term of the employment between the deceased and the Appellants or it was of the Appellants to take all reasonable precautions for the safety of the deceased while he was engaged upon hi authorized work with the Appellant, not to expose the deceased to any risk of damage or injury which the Appellant knew or ought to have known and to provide the deceased with safety system of work.**

**7) That on or about the 28/01/2017 while the deceased was lawfully working in the course of his duties and under the instructions of the 1st Appellant and whereby he had been instructed to carry an electricity pole and due to non-provision of safe system of work, the pole fell on him and as a result of which the deceased sustained fatal injuries occasioning the deceased's estate and the Respondents great loss and damage.**

3. Appellant/Appellant filed defence and denied claim.

4. The matter went into trial and in the judgment Appellant was held liable and the damages were awarded:

**i. General damages – Kshs.3,010,000/-**

**ii. Special damages – Kshs.141,450/-**

**Total – Kshs.3,151,450/-**

**iii. Plus costs**

5. This provoked Appellant to lodge instant appeal setting out 14 grounds:

**a. Whether Deceased was Appellant's employee.**

**b. The trial court relied on inconsistent evidence.**

**c. Whether common and contract land breached by Appellant on its obligations.**

**d. Whether Appellant was negligent.**

**e. Whether deceased was negligent.**

**f. Whether Appellant was liable solely.**

**g. Whether deceased intruded into Appellant's electrical line.**

**h. Whether user of Kshs.500/- as multiplicand was error on trial court.**

**i. Whether income of Kshs.15,000/- per month ought not to have been applied.**

**j. Whether 1st and 2nd Respondents were bound by their pleadings.**

**k. Whether the award in General and Special damages was erroneous.**

**EVIDENCE:**

6. The 1st Respondent testified that the deceased was his son. He states that the Appellants had employed his son to carry electricity posts as a casual worker at Kiamariga. The witness says the deceased with other 7 casual workers were assigned a duty to carry posts on their shoulders. The witness says the post they were carrying fell on his son and caused the fatal injuries. He reported to the police. The witness also participated in the postmortem of the deceased. His son was 32 years old and was married with two children.

7. The witness says the deceased was a casual labourer on the farms and would earn about Kshs.500/- a day. He blames the Appellants for not giving the deceased safety equipment.

8. On further examination the witness says they don't keep records for casual workers in the farms who are paid per day.

9. PW2 narrates how they were assigned worked by the Appellant to carry four posts on the eventful day. They were seven workers including the deceased herein. They were to be paid Kshs.500/- to replace the electricity posts at Raya Primary School. The witness says they were never taught how to carry the posts.

10. They carried the posts on their shoulders. He further says that when they were putting down a post, the post fell and knocked the deceased. The person who gave the work to do disappeared and that is when they took the deceased to hospital where he died shortly after arrival.

11. The deceased was bleeding from the mouth, nose and ears. PW2 says they were not given any protective gear and blames the Appellants for the accident.

12. The witness says they were shown how to uproot existing posts and they did uproot four of them and were to replace them with new ones. He further states that they did nothing wrong save that they were not trained on how to carry the posts.

13. The witness says the person, (DW2), who gave them the duty to carry the posts did not take any particulars from them and that indeed the telephone number indicated in the list of documents by the 1st Appellant doesn't belong to him.

14. PW3 is a police officer attached to Rumuruti Police Station. He says the incident was reported at their station vide OB/36/28/1/2017. He says he proceeded to the scene following day and did statements from the persons who were engaged to install the posts.

15. He says the workers were not provided with any protective gear nor were they trained. The witness states that post mortem was done and

he had signed the post mortem form. The witness says the owner of the company that was installing the posts has never come forth.

16. PW4 was also a co-worker with the deceased and with PW2. His testimony is similar to that of PW2. He says the post they were carrying knocked the deceased on the head. He says the deceased was taken to hospital and that he was bleeding from the mouth, nose and ears.

17. He says they had no helmets and that they were not trained on how to execute their duties. Likewise, he says they never provided any particulars to the person who gave them the assignment.

18. DW1 says he was also engaged by DW2 to do the uprooting of electricity post and replacing them on the material day. He says they were shown how to work. He says the deceased was not part of the team that was carrying the posts. He says the deceased joined the team on his own and he is to blame.

19. The witness says he was a casual worker for the 1st Appellant and that he had worked with them for 1 month. He says he has been trained and has tolls of work. Further, the witness says they had been instructed on how to work but they had no helmets.

20. DW2 is an employee of the 1st Appellant. He is the one who engaged the casual workers. The witness says he had explained to the workers the nature of their work and the amount of money they would be paid. He says he took particulars of the workers including their telephone numbers. He says he trained them on how to carry the exercise of removing and replacing the posts.

21. The witness says the deceased was not part of the team he engaged but says he saw him for the first time when the post fell on him. According to the witness the deceased was an intruder. After the incident the witness informed the school headmistress and later deceased was taken to hospital.

22. The witness says they are contracted by the 2nd Appellant. He had been sent to do the replacement of the electric poles by the 1st Appellant and they work independently without any consultation with the second Appellant.

23. The witness on cross – examination stated that they don't have a register for training. He further responded that he did not know whether the deceased was part of the team that carried the post that hit the deceased. The witness was at the rear end of the pole and he says he did not know how many people were ahead of him as they carried the pole.

24. DW2 is the Director of the 1st Appellant and says she is contracted by the 2nd Appellant. She says that she was informed about the incident by DW1 and that he told her the deceased was not part of his team on the site. She further states that their engagement with the 2nd Appellant was that of an independent contract. She says her company is not to blame for the incident.

25. DW3 is the Legal Officer for the 2nd Appellant. He says the safety of the workers on site lies with the 1st Appellant. The 1st Appellant and 2nd Appellant have a contract which provides for each party's obligations. The 1st Appellant is obligated by the contract to take insurance for its employees.

26. DW4 is a security officer working for the 2nd Appellant. They were informed about the incident by their county supervisor. He adopted his witness statement. He says they did investigations and confirmed that the deceased was an employee of the 1st Appellant. He also states that the safety of workers in the present case lied with the 1st Appellant.

**SUBMISSIONS:**

**27. The parties canvassed appeal via submissions but only Respondents filed same.**

**RESPONDENTS' SUBMISSIONS:**

28. It is submitted that, DW3 had confirmed in her written statement that the deceased never received any form of training on how to hand the poles. Her statement corroborated the testimonies of both PW3 and PW4. In the cross – examination, it became clear that DW3 had met with the deceased's family to try and compensate for his death. Her testimony further contradicted what DW1 had stated on the register alleging that the workers had been trained.

29. That they were responsible for the workers including hiring, training and insuring them. They were also responsible for their employees' security as per the contract they executed in 2016. The 3rd Respondent's witnesses both confirmed that the deceased was indeed employed by the Appellant herein. However, the negligence of the Appellant caused the deceased his life.

30. There is no doubt that the Appellant employed the deceased as a casual worker for purposes of installing an overhead power line at Raya Primary School. In this we wish to rely on the celebrated case of ***Makala Mailu Mumend v Nyali Golf & Country Club [1989] eKLR.***

> **"Such being the circumstances, it is essential that employees of security workmen take reasonable care to protect such employees from risks which can reasonably be foreseen. After all, the keen demand for security personnel means there is a role for them to play."**
>
> **"….It is an implied term of employment that an employer will make the conditions of employment to his employee**

**absolutely safe and will not expose his employees to any danger to avoid any negligence, but will not be responsible of the employee's own negligence in execution of such employment."**

31. On the upshot, the deceased was the employee of the Appellant.

32. Indeed, the Appellant failed to take adequate safety precautions to shield the deceased from any possible dangers which were likely to arise from the work he was engaged in. the Appellant thus exposed him to dangers it ought to have known were possible. Consequently, the fatal injuries sustained by the deceased resulted from 100% the negligence of the Appellant and thus a finding to this effect was not an error by the learned trial Magistrate.

33. It submitted that, the trial court considered the evidence adduced by the 1st and 2nd Respondents and subsequently awarded the most appropriate damages in the case. In exercising its discretion, the court awarded Kshs.150,000/- as damages for pain and suffering; Kshs.100,000/- as loss of expectation of life; Kshs.2.760,000/- as damages for loss of dependency. Additionally, the court granted Kshs.141,450/- as special damages guided by the adduced receipts.

34. Indeed, during the hearing of the trial case, PW2 and PW3 expressly stated that they were usually paid a minimum of Kshs.500/- per day as casual labourers. From a casual look, the amount would equal to Kshs.15,000/- per month.

35. It is therefore not correct that the Honorable court erred in using Kshs.500/- as the amount the deceased earned a day. Subsequently, the use of Kshs.15,000/- to compute the quantum of general damages for dependency was not an error.

36. Various decided authorities have determined issues on quantum of general damages for dependency. As a departure point, the Court of Appeal in Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR clearly enunciated that production of certificates was not the only way to prove the profession of a person.

37. PW3 on the daily wages payable to the deceased was thus enough. Indeed, the said amount was never contended during the trial of this matter.

38. It is also trite law that a Court of Appeal will not normally interfere with a finding on fact determined by the trial court unless the same is not founded on evidence or where the trial court errs by using the wrong principles. See **Easy Coach Bus Services & Another v Henry Charles Tsuma & Another (Suing as the administrators and the personal representatives of the estate of Josephine Wenyanga Tsuma Deceased [2019] eKLR.**

39. The learned trial court did not err in law or fact when it used a multiplier of 23 years and a dependency ratio of 2/3rds. Indeed, the same was just and fair given that the deceased died at the prime age of 32 years leaving behind a young wife and his two young daughters aged 4 years and 4 months respectively.

40. In addition, to the general damages awarded under loss of dependency, the Honorable trial court awarded general damages under both the Law Reform Act and the Fatal Accidents Act.

41. It is trite law that special damages must not only be pleaded but also be strictly proved. There is no question that in the instant case, the 1st and 2nd Respondents proved beyond any iota of doubt the expenses which they had incurred by adducing receipts pertaining to the sendoff they gave their deceased son and husband respectively in addition to other subsequent expenses.

42. To this end, the special damages awarded was the actual loss which the family incurred and it was thus fair for the Respondents to be put back to the position they held before they were forced to incur the expenses.

43. It is worth noting that the Appellant never objected the documents and receipts adduced by the 1st and 2nd Respondents herein during the trial of this matter. Furthermore, the special damages as awarded by the court were never contrived by the court or the 1st and 2nd Respondents.

44. Rather, every shilling of the Kshs.141,450/- awarded was proved to the last cent.

45. The law clearly states that the burden of proof lies with whoever desires the court to adjudge any legal right or liability in their favour.

**ISSUES, ANALYSIS & DETERMINATION:**

46. Under the provisions of ***Section 78 of the Civil Procedure Act*** first appellate court may reassess, re-evaluate and re-examine evidence adduced before the subordinate court and make its own findings and arrive at an independent conclusion. The sentiment was also reiterated in ***Garton Limited v Nancy Njeri Nyoike [2016] Eklr.***

47. The parties produced documents in support of their case chief among them being the postmortem report (P-Exhibit 1) and the contract between the 1st and 2nd Appellant.

48. Evidence adduced by the Respondent and not negated by the Appellants indicates that indeed an accident did occur on the eventful day. The deceased died as a result of the incident which was caused by an electricity pole that they were carrying fell on him. This fact is not in contention. Documentary evidence also supports this fact. I therefore agree with trial court finding that the deceased died as a result of the accident in question.

49. From the pleadings and from the testimonies of the witnesses, it is apparent that the deceased was part of the team that was contracted by the 1st Appellant to carry out the works of replacing electricity poles at Raya School.

50. From the testimony on record and particularly the testimony of PW2, PW4 and DW5, the deceased was assigned duties on the eventful day by DW2 who was the supervisor of the 1st Appellant. It is also on record that DW5, a security officer with the 2nd Appellant, conducted investigations and made a finding that the deceased was employed by the 1st Appellant on the eventful day (see D-Exhibit 2). I agree with trial court finding therefore that the deceased was an employee of the 1st Appellant.

51. It is settled law that employers have an obligation to ensure safety of its employees. This obligation is also captured in the contract between the 1st Appellant and the 2nd Appellant.

52. In apportioning liability between the 1st and 2nd Appellant, the trial court was guided by the case of ***Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & Another [2013] eKLR*** which held:

> **"The Respondent has alleged the 1st Appellant should be liable for the acts of the 2nd Appellant who was its servant. The 1st Appellant has on the other hand argued that the 2nd Appellant was an independent contractor and not its servant, and that it is therefore not liable for any wrongs committed by the 2nd Appellant. The general rules as to when one is a servant or independent contractor for purposes of apportioning liability in tort is stated as follows in Bowstead and Reynolds on Agency, Nineteenth Edition, edited by Peter Watts and F.M.B. Reynolds at paragraph 1 – 030;**
>
> **The dichotomy of servant (or employee) and independent contract stems from the law of tort: a person is more readily liable for the torts of his servants than for those of his independent contractors. The difference turns on the degree of control exercised.**
>
> **A servant has been defined as a 'person employed by another to do work to him on terms that he, the servant, is to be under the control and directions of his employer in respect of the manner in which his work is to be done.'**
>
> **An independent contractor has been defined as 'one who undertakes to produce a give result, but so that in that the actual execution of the work he is not under the orders or control of the person for whom he does it, and may use his discretion in things not specified beforehand."**

53. From the evidence of PW2 and PW4 it is evident that they were not provided with any safety gear despite the apparent danger and risk of the nature of work they were undertaking. The allegation by the Appellant that the workers had been trained is not supported by any evidence.

54. The 1st Appellant failed to meet its part of the obligations both in common law and as provided for in the contract between the 1st and 2nd Appellant. There were insufficient measures deployed by the 1st Appellant to ensure safety of its employees. The 2nd Appellant had no control of the activities of the 1st Appellant.

55. On balance of probabilities, the trial court found it safe to conclude that the accident in contention was caused by the negligence on the part of the 1st Appellant which this court agrees with. The occurrence of that accident cannot be attributed elsewhere.

**A. ON LIABILITY:**

56. From the evidence on record, the Appellant picked casual workers from a trading centre and entrusted them with the duty of dealing with works associated to electricity supply. Due to the nature of the work that the deceased was engaged in, it was expected that minimum safety gear and training would have been availed to him.

57. For a minute, I am persuaded to conclude that if the Appellant had proved the deceased with a helmet, the head injuries that caused his death would have been minimal and non-fatal thus no error on trial court finding as much.

58. There is no evidence on record to indicate that the deceased was negligent. The particulars of negligence on the part of the deceased as pleaded by the Appellant have not been proved.

59. In the circumstances, I hereby uphold the trial court finding on liability in favour of the Respondent at 100% as against the 1st Appellant.

**B. ON QUANTUM:**

60. This being a fatal accident, the trial court categorized quantum in sub heads relying on the case of *Radhakrshen **M. Khemaney v Mrs. Lachaba Murlindear [1985] EA 268*** which held;

> **"In considering the award of damages under the Fatal Accidents Act, the court should ascertain the age, expectation of working life, wages and expectations of the deceased and what proportion of his net income the deceased would have made available for his dependents from which the annual value of dependency would be calculated, the annual sum should then be capitalized b multiplying it by the sum representing so many years, purchase, having regard to the expectation of earning of the deceased and the expectation of life and dependency of the widow and children."**

61. The above precedent set out, the fundamental principles in dealing with a claim of the nature at hand. Namely;

**a. Pain and Suffering:**

62. From the medical documents produced as exhibits the deceased died on the same day of the accident. From testimony on record, the deceased was pronounced dead on arrival at Ndaragwa Hospital.

63. The deceased was bleeding from the mouth, nose and ears. He had difficulties in breathing as he was rushed to hospital. Evidently, he was in some excruciating pain. The trial court awarded for pain and suffering an award of Kshs. 150,000/- as being reasonable. I find same on the higher side and reduce same to ksh 100,000. See High Court at **Kitui Civil Appeal 34 of 2016 Bidii Muimi vs Patricia Mutemi** where in similar circumstances same award for pain and suffering was made.

**b. Loss of expectation of life:**

64. The deceased was aged 32 years old at the time of his death. Trial court awarded a sum of Kshs. 100,000/- to compensate his estate on this component, which in trial court view, was said to be reasonable in the circumstances of the case. In the case of ***Hellen Waweru vs Kiarie shoe Co Ltd. (2015) eKLR*** similar amount was awarded under same heading. Thus this court upholds the same amount of Kshs.100,000/- as loss of expectancy of life.

**c. Loss of dependency:**

65. The deceased was aged 32 years old. This is generally the stage in life is where an individual has settled down in life and focused his energies on raising his family. It is expected that one is highly productive at this stage if he/she is focused.

66. The deceased was survived by two children (one born on 09/03/2012 and the other 01/09/2016) and widow. (see P-Exhibit 7a and b). The minors will grow up without their father as a result of the accident. PW1 states that the deceased used to earn an income of Kshs.300/ per day. Indeed, this is the moment they were to be paid on the material day of the incident.

67. From the evidence on record, trial court made a finding that the claim on dependence from the parents of the deceased as unsupported and which it dismissed.

58. However it took an average of Kshs.500/- per day it is reasonable to arrive at an average of Kshs.15,000/- per month as the deceased's income and apply it as multiplicand in this case. However, the court does not indicate where ksh 500 came from to apply same. It ought to have applied ksh 300/ which was proposed by the pw1 as was said to be what deceased was earning.

69. Considering the age of the deceased and life expectancy in this republic, this court agrees with trial court that a multiplier of 23 years was a reasonable parameter in the circumstances. The deceased would, in my view, be productive in the labour market up to age of 55.

70. After considering the testimony on record especially that he was 32 years old and was married with two children I agree with trial court in applying a dependency ration of 2/3rds. The calculation will therefore give the following sum as loss of dependency;

9,000 x 12 x 23 x 2/3 =Kshs.1656,000/-.

**d. Special Damages:**

71. Receipts were produced to support the expense on the burial of the deceased. Which the Respondent proved a sum of Kshs. 141,450/- (see the respondents' list of documents) and rightfully awarded. These documents were not contested during the hearing.

72. The end result is that the appeal fails on attack on finding on liability but succeeds to the extent that awards are adjusted as here under;

**1. Damages**

**i. Pain and suffering Kshs.100,000/-**

**ii. Loss of expectation of life Kshs.100,000/-**

**iii. Loss of dependency Kshs.1,656,000/-**

**iv. Special damages Kshs.141,450/-**

**v. Total Kshs.1,997,450/-**

**2. Parties bear their own costs**

**DATED, SIGNED AND *DELIVERED* AT NYAHURURU THIS 7TH DAY OF OCTOBER, 2021**

**……..**

**CHARLES KARIUKI**

**JUDGE**