



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.640 OF 2016

KENYA POWER & LIGHTING COMPANY LTD.....APPELLANT

-VERSUS-

ERIC MLONGO OWINO (Suing as the legal representative of the

Estate of JOHNSTONE OWINO (Deceased).....RESPONDENT

(Being an appeal from the Judgment of Honourable Mmasi (Ms) delivered on the 23rd day of September 2016 in CMCC 1057 of 2013 at Nairobi)

JUDGMENT

1. On or about 4th April, 2010, Johnstone Owino, a boy aged 10 years was lawfully walking along a public road Within Utawala Estate , Nairobi when he came across a live naked low hanging electrical cable. He was electrocuted and died on the spot when he got contact with the live wire. Eric Mlongo Owino, the Legal representative of the estate of Johnstone Owino, deceased filed a compensatory suit against Kenya Power and Lighting Company Ltd before the Chief Magistrate's court, Nairobi.

2. Honourable Mmasi, learned senior principal Magistrate, heard the suit and eventually entered Judgment favour of the Respondent and against the Appellant in the sum of Khs. 1,050,000/=.

3. The Appellant was aggrieved, Consequently he preferred this appeal and put forward the following grounds:

i) The learned Magistrate erred in law and in fact in entering Judgment against the Appellant and finding that the Appellant was 100% liable when considering the evidence on record and trial, the same had not been approved.

ii) The learned Magistrate erred in law and in fact in finding that the Respondent was electrocuted by the Appellant's electrical wires while the same had not been proved on balance of probabilities.

iii) The learned Magistrate erred in shifting the burden of proof to the Appellant when the same was never discharged by the Respondent.

iv) The learned Magistrate erred in law and in fact in searching a conclusion that was contrary to the evidence placed before her.

v) The learned Magistrate's award of damages in particular considering the age of the

deceased was inordinately high in that it was an erroneous estimate of damages without due regard being made to the age when the deceased died and the comparable costs.

vi) The learned Magistrate erred in law and in fact in holding that the deceased could have earned a decent future when no such evidence was adduced to prove the same and awarding a sum, which was inordinately high.

vii) The learned Magistrate erred in law and in fact by failing to take into account and fully consider various authorities submitted by the Defendant before arriving at the sum of Kenya shillings One Million fifty thousand (ksh, 1,050,000/=) which award was not founded on any outlined legal principle or precedent and was inordinately high.

viii) The learned Judge erred in law and in fact by basing the award on extraneous considerations and factors.

ix) The learned Judge erred in law and in fact in awarding damages from both the fatal accidents act and the law Reforms Act.

4. When this appeal came up for hearing, learned Counsels recorded a consent order to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the Appellant put forward a total of 9 grounds of appeal, those grounds revolved around the twin issues on liability and quantum.

5. On liability, it is the submission of the Appellant that the learned Senior Principal Magistrate erred when she found the Appellant wholly to blame for the accident. The Appellant pointed out that there was no sufficient evidence to solely hold the Appellant liable. The Appellant is of the submission that the Appellant and the deceased should be held equally to blame.

6. The Respondent is of the submission that the Appellant being the only legal entity mandated by law to distribute electric power and also to erect and maintain distribution network in Kenya is wholly to blame for the accident and therefore the trial Magistrate came to the correct decision on liability.

7. I have re-evaluated the evidence presented before the trial court. It is apparent from the recorded proceedings that two witnesses testified in support of the Plaintiff's (now Respondent) case before the trial court. The Defendant's (now Appellant) closed its case without summoning witnesses to testify in support of its case.

8. Eric Mulongo Owino (PWI) told the trial court that the deceased was his son. PWI said that on 4/4/2010 at 9.00 am the deceased together with his mother left for church at Utawala Catholic Church. PW1 said, shortly someone went to his house and informed him that his son (deceased) had been electrocuted. He said he rushed to the scene and found his son hanging on an electrical wire. He produced a newspaper citing of 514/2010 showing the deceased dangling on a power line, which was loose.

9. Rodney Mulongo (PW2), a brother to the deceased told the trial court that in the night preceding 4/10/2010, it had heavily rained. PW2 said he together with the deceased and his aunt walked on foot to church in the morning of 4/4/2010. He said he saw an electricity pole which lay on the ground a few metres away.

10. PW2 further stated that he saw the deceased slip on the muddy soil and hold onto a hanging electricity wire and got electrocuted. PW2 confirmed in cross-examination that the deceased slipped and grabbed the live wire for support.

11. In her Judgment, the learned Senior Principal Magistrate stated that the deceased met his death as a result of electrocution which happened as a result of low hanging electric cable belonging to the Appellant company.

12. She further stated that the Appellant was negligent in that it left electric cable hanging low in a residential area and along the road that is used by many people.

13. I am satisfied that on liability, the learned Senior Principal Magistrate cannot be faulted. The Appellant did not tender evidence to controvert the evidence given by the PW1 and PW2.

14. It is not in dispute that there were live electric wires which loosely hanging along the footpath the deceased used to walk to church. The evidence of PW2 which is to the effect that the deceased held onto the hanging live power line to support himself after he slipped is not controverted. It is clear in my mind that the Appellant failed to maintain and keep the live wires at a safe height to avoid harming innocent people like the deceased.

15. The Appellant was therefore correctly found solely liable. The Appellant in any case failed to present any evidence that could prove that the deceased was equally to blame. I find no merit in the appeal as against liability.

16. On quantum, it is apparent from the Judgment that the learned Senior Principal Magistrate gave the following awards to the Respondent:

- i) Pain and suffering ksh 250,000/=
- ii) Loss of dependency Ksh 500,000/=
- iii) Loss of expectation of life..... Ksh. 300,000/=

17. It is the submission of the Appellant that the award of damages was inordinately high in that it was an erroneous estimate made without due regard to the deceased's age and comparable cases. The Appellant pointed out that the award of ksh. 250,000/= as damages for pain and suffering was not justified.

18. It is argued that the learned Senior Principal Magistrate did not assign any reasons to the award. The trial Magistrate was also accused of failing to take into account comparable awards supplied to her hence she made award which was inordinately high.

19. The Appellant pointed out that the deceased died instantly hence he did not suffer from prolonged pain. The Appellant proposed that an award of ksh. 10,000/= was reasonable and within comparable awards.

20. The Respondent proposed to be awarded a sum of Ksh 100,000/= on this head and relied on the case of **Benedata Kimani Vs Changwon Cheboi & Another [2013] eKLR** in which the court stated that a nominal figure should be given if death followed immediately.

21. I have looked at the Judgment of the trial court and it is clear that the learned senior principal Magistrate did not assign any reasons to justify her decision on the award on this head. It is also apparent that the Respondent did not make any submissions on this award on appeal. However, the Appellant had proposed before the trial court that an award of ksh 10,000/= be made on this head. The case of **Ali Elmi Saney & Another Vs Mohamed Bakari & Another HCCC. NO 2225 OF 1997** (unreported) was cited where this court awarded ksh. 10,000/=

22. It is not disputed that the deceased died on the spot. On this head, this court has on various occasions awarded figures ranging between 10,000/= and ksh. 20,000/= in cases where the deceased passes on almost immediately. In this case I am of the view that a fair award should be a sum of ksh. 20,000/=. The award of ksh 250,000/= with great respect is inordinately high and amounts to an erroneous estimate.

23. The other award which was challenged on appeal is the award on loss of expectation of life. It is the

submission of the Appellant that the learned trial Magistrate did not take into account the Authorities on comparable awards hence she gave an inordinately high award of ksh. 300,000/=. This court was urged to adjust the award downwards to ksh. 100,000/=. The Appellant cited the case of **Chabhadiya Enterprises Ltd & Another Gladys Muteyo Bitali [2018] eKLR** where the High Court affirmed the trial court's award on this head of ksh. 100,000/-. The Respondent did not address this court over the award on this head in his written submissions. It is apparent that the Appellant relied on the case of **Ali Elmi Saney & Another Vs Mohamed Bakari & Another (supra)** and proposed an award of ksh. 100,000/= be made before the trial court. The Respondent did not make any proposal on this head before the trial court. Having considered the submissions, I am convinced that the award of ksh. 300,000/= given on this head is inordinately high. It is an erroneous estimate which goes against the comparable awards.

24. I am persuaded by the Appellant's submission that the award given by the trial court should be set aside. An award of Ks. 100,000/= is reasonable in this matter.

25. The award on loss of dependency of ksh. 500,000/= has also been challenged. In the trial court, the Respondent had proposed to be given an award of ksh. 21,910,000 /= tabulated as follows: **78,250 (salary p.m) x 12 x 35 x 2/2 = 21,910,000**

26. The Appellant on the other hand had proposed a global figure of ksh. 300,000/= . The learned Senior Principal Magistrate gave an award of ksh. 500,000/= after dismissing the Respondent's proposal on the basis that the court lacked pecuniary jurisdiction to make the award. However, the learned Magistrate did not also explain how she arrived at the figure she awarded.

27. On appeal the appellant argued that the trial Magistrate erred when she awarded damages both under the Law reform Act (pain & suffering) and loss of expectation of life) and damages under the fatal Accidents Act / Damages for lost years/dependency. This court was urged to take that into account. It is the argument of the Appellant that the awards under the law Reforms Act ought to be subsumed by the awards under the Fatal Accidents Act. The Appellant proposed an award of ksh. 300,000/= on this head be made.

28. The Respondent urged this court not to interfere with the award because, the figure is neither high nor low. The Respondent is of the submission that it is in line with the trend of awards for similar cases. On the issue as to whether Fatal Accidents Act should be subsumed by the awards made under the Law Reforms Act, the Respondent beseeched this court not to interfere with the same since the awards are fair, just and equitable.

29. Having considered the rival submissions over this ground, I am convinced that the learned Senior Principal Magistrate arrived at the correct decision to award a global award on this head in view of the circumstances of this case and since the victim was a minor and had no salary. A global figure is the appropriate award to make. The award made by the learned Senior Principal Magistrate is neither high nor low, hence I will not interfere with it.

30. The argument put forward by the Appellant, which is to the effect that the trial Magistrate erred by making awards under both the Law Reforms Act and the Fatal Accidents Act. With respect I do not think that is the correct position in law. Courts are entitled to make such awards save that the courts should have in mind that a party should not benefit twice where there is an award overlap. I therefore, find no merit in the argument.

31. In the end, the appeal as against liability is dismissed. However, the appeal as against quantum partially succeeds. Consequently, the following awards are set aside and substituted as follows:

i) The award of ksh.250,000/= for pain and suffering is set aside and is substituted with an award of ksh. 20,000/=.

ii) The award of ksh. 300,000/= for loss of expectation of life is set aside and is substituted with an award of ksh. 100,000/=

iii) The appeal as against the award of ksh 500,000/= for loss of dependency is dismissed.

For the avoidance of doubt the awards on appeal are as follows:

i) Pain and suffering..... Ksh 20,000/=

ii) Loss of expectation of life..... Ksh 100,000/=

iii) Loss of dependency Ksh 500,000/=

Net totalKsh 620,000/=

iv) Interest on (i)(ii) and (iii) above at court rates from the date of judgment of the trial court until the date of full payment

v) Each party to bear its own costs on appeal.

vi) The Respondent to have costs of the suit.

Dated, Signed and Delivered at Nairobi this 21st day of January, 2020.

.....

J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent