REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 184 OF 2015

KENYA POWER & LIGHTING CO.....APPELLANT

-VERSUS-

WINFRED NDUNGE KATIWA & KAVATA MWANTHI MUNUVE

(Suing as administrators of the estate of the late

DOMINIC KATIWA MWANTHI-DECEASED.....RESPONDENT

[An appeal fromthe Judgment of Hon. C.A. Ocharo (Senior Principal Magistrate) delivered on 11.11.2015

in Civil Case No. 597 of 2014 before the Chief Magistrate's Court at Machakos**]**

BETWEEN

WINFRED NDUNGE KATIWA & KAVATA MWANTHI MUNUVE

(Suing as administrators of the estate of the late **DOMINIC KATIWA**

MWANTHI-DECEASED) .....PLAINTIFF

-VERSUS-

KENYA POWER & LIGHTING CO.....DEFENDANT

JUDGEMENT

1. The appellant is, in terms of the Electric Power Act, 1997, Kenya's statutory transmitter, distributor and supplier of electricity.According to the pleadings in the trial court, the deceased was 30 years old when he died as a result of electrocution and an action was brought on 7.7.2014 in the Chief Magistrates Court at Machakos through his wife and motherWinfred Ndunge Katiwa and Kavata Mwanthi Munuve, as a legal representativesagainst the appellant for damages under the Fatal Accidents Act and the Law Reform Act and special damagesdue to negligence.

2. It was pleaded that on 25.11.2011, the deceased was walking along Kalawa- KathianiRoad in Machakos County when he stepped on high voltage electric wire owned by the appellant that had been negligently allowed to loosely hang by the appellant's authorized agent and as a result the deceased sustained fatal injuries.The respondent pleaded negligence as particularized in paragraph 5 of the plaint. The respondent pleaded res ipsa loquitor. It was pleaded that the deceased at the time of his death was healthy and had four dependents being a wife, mother and two children whom he provided with food, clothing, school requirements and other basic needs. Special damages of Khs 70,000/- were pleaded.

3. The appellant denied negligence and its particulars, denied the incident and averred in the alternative that the incident was occasioned wholly or contributed to by the deceased. The appellant denied the applicability of res ipsa loquitor, denied the particulars of special damages and dependency and prayed that the suit be dismissed with costs.

4. The suit proceeded to hearing on **10.9.2015** where the Respondents testified. The Appellant closed its case without calling any witnesses.

5. Parties filed submissions and the court delivered judgement on **11.11.2015**in which Hon. C.A. Ocharo held the Appellant 80% liable for the incident and the Respondent was held 20% liable for failing to accompany the deceased and the court awarded the Respondent damages amounting to **Kshs. 1,373,600/-.**

6. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 25.11.2015 that challenged the finding on liability and quantum. Counsel prayed that the judgement of the trial court be set aside and that the court dismisses the suit against the appellant. In the alternative, counsel prayed that liability be apportioned 50:50 between the appellant and the respondent and that the quantum be varied and reduced to the extent that the court deems fit.

7. The appeal was canvassed vide written submissions. Counsel for the appellant filed submissions on 30.4 2018 and submitted on each of the 7 grounds of appeal. Learned counsel submitted that there was no eye witnessevidence of how the accident occurred or that the appellant was to blame for the accident and further the respondent did not call any independent eye witness to the accident and further that if the deceased stepped on the wires, he ought to have been more careful and therefore the deceased contributed to the accident. Reliance was placed on the case of **Kenya Power & Lighting Co Ltd v Nathan Karanja Gachoka & Another (2016) eKLR**. Counsel submitted that it was not proved on a balance of probabilities that the deceased was electrocuted by the appellant's wires, in this regard, reliance was placed on the case of **Lilian Wanjiku Wanjohi v Tornado Carriers Ltd (2016) eKLR** where the court found that there was no eye witness to the accident and it was incumbent on the appellant to prove the claim on a balance of probabilities. Counsel submitted that the trial magistrate erred in shifting the burden of proof to the appellant when the respondent did not meet their requisite standard of proof. Reliance was placed on the case of **Eastern Produce (K) Ltd v James Kipketer Ngetich (2006) eKLR.** According to counsel, the trial court made a finding that was contrary to the evidence on record as there was no eye witness account of the incident. According to counsel, the sum of Kshs 300,000/- for pain and suffering was too high and Kshs 50,000/- was sufficient as per the case of **Joseph Kahiga Gathii & Paul Mathaiya Kahiga (Suing as the Administrators of the Estate of the Late Lydia Wanjiku Kahiga and Elizabeth Murugi Kahiga Both Deceased) v World Vision Kenya & 2 others [2014] eKLR.**According to counsel, the multiplier of 30 years had no basis and the court ought to have adopted a multiplier of 15 years. It was counsel's strong contention that the trial court went into error in awarding double compensation under the fatal Accidents Act and the Law Reform Act and ought to have deducted the same. Reliance was placed on the case of **Kemfo Africa Limited t/a "Meru Express Services (1976)" & Another V Lubia & Another (1987) KLR 30**and concluded that the appeal be allowed and in the alternative thejudgement of the trial court be varied.

8. Learned counsel for the respondent vide submissions dated 29.8.2018 submitted that the evidence of Pw1 as corroborated by the exhibits proved that the deceased died as a result of electrocution and that the appellant did not call any evidence to rebut the respondent's evidence and agreed with the findings of the trial court on quantum placing reliance on the case of **Damaris Wanjiru Mugoro v Joseph Kamau Njoroge & Another (2011) eKLR**. Counsel submitted that there was no obligation to deduct the sum under the head of loss of expectation of life as the same was now bad law. Reliance was placed on the case of **Hellen Waruguri Waweru(suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR**

9. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

10. The evidence in the trial court was as follows. P**w1, Winfred Ndunge Katiwa** testified that the deceased was her husband with whom they had two children. She testified that her husband was electrocuted by electric wires that had been cut from a power line that had fallen following heavy down pour. She testified that the deceased was taken to Kalawa Health care Centre for 1st aid then transferred to Machakos Level 5 Hospital where he was admitted for five days and later passed on. She tendered in court the limited grant of letters of administration, a letter from the Chief dated 19.4.2013 and the deceased's death certificate. She told the court that the deceased died on 29.11.2011. On cross examination, she told the court that she did not witness the accident and on reexamination, she testified that the deceased informed her that the wires were inside the water and that this was stated by her husband while still undergoing treatment in hospital.

11. Pw2 was **Kavata Mwanthe Munuve** who testified that the deceased was her son who died after stepping on electric wires. He testified that the deceased had a wife and two school going children. She testified that she reported the matter to the police who carried out an inquest andshe tendered a copy of the same that was marked as Pexh 7. She testified on cross examination that she did not witness the accident.

12. The respondent closed their case and the appellant closed their case without calling any witnesses. From the evidence on record the accident that happened on the material day was confirmed vide the evidence of Pw1 and Pw2 and the cause may be inferred from the evidence of Pw1 and Pw2 as corroborated by the documentary evidence that was neither challenged nor controverted. I am alive to the fact that there was no direct eye witness to the incident, however there is circumstantial evidence that linked the injuries with electrocution; the same is independent and I place reliance on the case of **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another[2015] eKLR, where the court observed** that:

> The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore proved negligence on the part of the 2nd respondent."

13. Having considered the pleadings and the evidence on record, the following issues are to be determined.

a. Whether the accident was caused by the negligence of the appellant.

b. Whether the Appellant is liable for damage and loss the Respondent claims to have suffered and at what percentage.

c. Whether the court may interfere with the finding of quantum of the trial court.

14. The answer to any of the above issue depends on the amount of evidence adduced by a party having the legal burden to do so. See s**ections 107**, **108** and **109** of the **Evidence Act, Chapter 80 of the Laws of Kenya** that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author ***WVH Rodgers*, Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132**as well as case law stated that the elements of negligence remains this:

(a) there is a duty of care owed by an appellant -

(i) the appellant would foresee the reasonable possibility of his conduct injuring another and causing him loss **;Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd or Wagon Mound (No. 1) (1961) 1 All ER 404** and

(ii) the appellant would take reasonable steps to guard against such occurrence; and

(b) the appellant failed to take such steps.

In assessing whether the appellant took reasonable steps, the court will consider:

(a) The degree or extent of the risk created by the actor's conduct;

(b) The gravity of the possible consequences if the risk of harm materializes;

(c) The utility of the actor's conduct; and

(d) The burden of eliminating the risk of harm. See**Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The "Wagon Mound" (No 2)) [1967] 1 AC 617**

15. It is undisputed that the appellant owed a duty of care and this was observed in the case of **Kenya Power & Lighting Company Ltd. v Joseph Khaemba Njoria [2005] eKLR** where the court held:-

"...there can be no question that the Power Company [KPLC] has a responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is ...properly maintained to prevent accidents ...the deceased could not be blamed for not seeing the wire. It would not be reasonable to expect that as people walk along in towns, they should anticipate live electricity wires that might protrude from the ground."

16. On foreseeability of the injury, it is commonplace that protruding electricity wires once in contact with water and the human body do cause electrocution. On the aspect of steps taken to eliminate harm, there is no evidence from the appellant that steps were taken to eliminate any harm that would result in instances of electrocution. In this regard I find that the appellant was negligent and in addition the appellant not having testified left the respondents evidence as unchallenged. It was the responsibility of the appellant to ensure that its electric wires and cables are properly secured so as to prevent incidents of electrocution.

17. The appellant has assailed the trial court for relying on the evidence of the witnesses who did not witness the accident. It can be imputed that they consider the same as hearsay evidence. Under section 33a of *The Evidence Act*, a dying declaration is a statement made by a person who believes he is about to die in reference to the manner in which he or she sustained the injuries from which he or she is dying, or other immediate cause of his or her death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them. Dying declarations however, must always be received with caution, because the test of cross examination may be wanting and particulars of violence may have occurred circumstances of confusion and surprise. Although corroboration of such statements is not necessary as a matter of law, judicial practice requires that corroboration must always be sought for (see *R. v. Eligu S/o Odel and Epangu S/o Ewunya (1943) 10 EACA 90*; *Pius Jasunga v. R. (1954) 21 EACA 331* and *Mande v. R. [1965] EA 193*). Dying declarations are an exception to the hearsay rule. It follows that the evidence that the deceased gave to Pw1 as an account of the accident is admissible to prove what happened and the same is corroborated by the medical evidence that the deceased died as a result of electrocution.

18. It also follows that the appellant is negligent for the death of the deceased as proven by the evidence of Pw1 and Pw2 and post mortem report that was not controverted by the appellant. However, I shall maintain the 20% contribution that was given by the trial court. In as much as the appellant has a duty of care to the public regarding the installation of its electric wires and cables it is also expected that members of public should exercise great care and caution as they walk about. The respondent being an adult was no exception. The respondent herein was an adult and was thus expected as a reasonable man in the street to keep a proper lookout for anything unusual as he walked along the Kathiani-Kalawa road on the material date. It is claimed that the deceased had waded into a flooded section of the road. As an adult he was expected to exercise caution but not to just go through the flooded road without caring as to what lurked therein. The contributory negligence of 20% attributed to the respondent and arrived at by the trial court was quite reasonable in my view. The appellant should shoulder the 80% liability. It is noted that the appellant opted not to tender evidence in defence and as such the respondent's evidence remained uncontroverted.

19. On aspect of damages to be awarded the general rule regarding measure of damages applicable both to contract and tort has its origin in what Lord Blackburn said in: ***Livingstone v Rawyard's Coal Co. (1880) 5 AC 259.*** He defined measure of damages as:

"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have

been in *if**he had not sustained the wrong for which he is now getting his compensation or reparation.”***

20. In cases of pecuniary loss, it is easy enough to apply this rule in the case of expenses which have actually been incurred up to the date of the trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages. In the case of loss of expectation of life, loss of dependency assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of the trial. The Law Reform Act introduced death as a cause of Action for loss of expectation of life and awarded damages as solitum for bereavement. The Fatal Accidents Act introduced a cause of action for the benefit of the members of the family of the deceased for the loss suffered as a result of the death of the deceased which had to be brought by and in the name of the executor or administrator of the deceased or by’ and in the names of all or any of the members of the family.

21. In **Benham v Gambling (1941) 1 ALL ER 7** Viscount Simon L.C, enunciated the following considerations which should guide the court in assessing damages for loss of expectation of life especially in case of a child:-

> **a. Before damages are awarded in respect of the shortened life of a given individual, it is necessary for the court to be satisfied that the circumstances of the individual life were calculated to lead on balance, to a positive measure of happiness of which the victim has been deprived by the defendant’s negligence. If the character or habits of the individual were calculated to lead him a future of unhappiness or despondency that would be a circumstance justifying a small award.**
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> **b. In assessing damages for this purpose the question is not whether the deceased had the capacity or ability to appreciate that his future life on earth would bring happiness. The test is not subjective, and the right sum to award depends on an objective estimate of the kind of future on earth the victim might have enjoyed, whether he bad justly estimated that future or not. No regard must be to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.**
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> **c. The main reason why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child’s future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood and having in some degree attained an established character and firmer hopes, his or her future becomes more definite and the good fortune that may probably attend him at any rate becomes less incalculable.**
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> **d. Stripped of technicalities, the compensation is not being given to the person who was injured at all, as the person who was injured is dead. The truth is that in rutting a money value on the prospective balance of happiness in years that the deceased might have lived the judge is attempting to equate incommensurables. Damages which would be proper for a disabling injury may be much greater than for deprivation of life. These considerations lead to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, a very moderate figure should be chosen.**

22. In the instant case, the respondents claim for damages for loss and damageswas set out in their plaint as follows:

> **“5. …the deceased was aged 30years .. he was healthy and was fully depended by the following dependants.**
>
> 4 dependants were listedand the respondents particularized Kshs 70,000 as the special damages.

23. In the prayer, the plaint asked for: **“(12) (1) General damages as under the Law Reform Act and Loss of expectation of life and future earnings underthe Fatal Accidents Act and.”**

24. In the present case it is necessary to consider what kind of life the deceased would have enjoyed had be not been killed. There is no evidence to that effect. According to Pw1, the deceased was a farmer who used to sell farm produce but no receipts were furnished.

25. The law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. In***Phillips vThe London South Western Point Way Company (1879 -80) 5. Q.B.D. 78***, James L. J. said on page 85:-

> “The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which generally speaking is considered to be within their exclusive province, that is to say the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less. Still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice, be subject to the supervision of a Court of first instance and f necessary of a Court of Appeal in this way that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for consideration by another jury.”

26. In ***Owen vs Sykes (1936) I.KB.192***the Court of Appeal of England felt that although if they had tried the case in the first instance they would have probably awarded a smaller sum as damages yet they would not review the finding of the trial Judge as to amount of damages as they were not satisfied that the trial Judge acted upon a wrong principle of law, or that amount awarded as damages was so high as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. The Court of Appeal followed the case of- ***Flint vs Lovell (1935) I.KB.354***.

27. It is known that the deceased had a wife and 2 children, and this evidence is uncontroverted by the appellant. The amount for loss of expectation was fair. Save for the receipts of Kshs 47,000/- in proof of special damages, the other receipts are illegible to enable the court

make an assessment. It is not known how the figure of Kshs 300,000/- for pain and suffering was arrived at asthe rate that is awarded considering the deceased did not die on the spot is Kshs 50,000/- as per the case of **Joseph Kahiga Gathii & Paul Mathaiya Kahiga (Suing as the Administrators of the Estate of the Late Lydia Wanjiku Kahiga and Elizabeth Murugi Kahiga Both Deceased) v World Vision Kenya & 2 others [2014] eKLR,** and I hereby award the same. The deceased is reported to have died five days after the incident and so he must have experienced excruciating pain before breathing his last. The amount for loss of expectation of life was unchallenged, however the appellant submitted that the same ought to have been offset. In view of the finding in **Hellen Waruguri Waweru(suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR,** I reject the suggestion and proceed to award the conventional sum ofKshs 100,000/- for loss of expectation of life as awarded by the trial court.

28. The amount awarded for loss of dependency shall be varied in the sense that I shall use the multiplier of 20 instead of 30 that was used by the trial court, the dependency ratio remains 2/3 and the wages for an unskilled laborer in the agricultural sector will be Kshs 6415.55/- according to the **Regulation of Wages (Agricultural Industry) (Amendment) Order, 2017**.

The multiplier of 20 years is reasonable in that the retirement age in Kenya currently stands at 60 years. Vicissitudes or vagaries of life must be factored as well. There were no records of income and so the regulation of wages come in handy since the deceased is reported to have been the bread winner for his family and his mother. A dependency ratio of 2/3 is appropriate. The proved special damages comes to Kshs 47,000/

29. The calculation for loss of dependency would be 6415.55x2/3x20x12= Kshs 1,026,488.00**.**

30. The appeal partially succeeds. The judgement by the trial court is set aside and substituted with judgement against the appellant as follows:

Liability between Appellant and Respondent: 80%to 20%

Pain and Suffering under LRA	Kshs. 50,000/-
Loss of expectation of life	Kshs. 100,000/-
Lossof dependency	Kshs. 1,026,488/-
Special damages	Kshs. 47,000/-
Sub Total	**Kshs. 1,223,488/-**
Less 20% contribution	**244,697.60/-**
Total	**Kshs 978,790.40/**

31. The general damages will attract interest at court rates from date of judgement while special damages shall be from date of filing suit. The appellant is awarded half costs of the appeal while the respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at Machakos this 6th day of May, 2020.

D.K.Kemei

Judge