



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 79 OF 2016**

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

**VERSUS**

**PAULINE MBULWA MUSTISYA (Suing as the Administrator of**

**the Estate of the late Bernard Wambua Mutisya) .....RESPONDENT**

**(Being an appeal from the Judgment delivered on 10<sup>th</sup> February, 2016 by Hon. E. K. Usui (Senior Principal Magistrate) Milimani Commercial Courts in CMCC No. 2034 of 2014).**

**JUDGMENT**

1. The Appellant, Kenya Power & Lighting Company was sued by the Respondent, Pauline Mbulwa Mutisya suing as the Administrator of the Estate of the late Bernard Wambua Mutisya for damages following the death of the deceased. The Respondent blamed the death on negligence by the Appellant, its agents and/or servants.

2. The claim was denied by the Appellant who attributed the accident as wholly caused or substantially contributed to by the negligence of the deceased. It was further pleaded that the suit was time barred.

3. After the hearing of the case, the trial magistrate held the Appellant 100% liable for the death of the deceased. Judgment was entered for the Respondent as follows:

(a) Pain & Suffering	Ksh. 50,000/=
(b) Loss of expectation of Life	Ksh.100,000/=
(c) Loss of dependency	Ksh. 633,600/=
(d) Special damages	<u>Ksh.11,000/=</u>
<b>Total</b>	<b><u>Ksh.794,600/=</u></b>

4. The Appellant was aggrieved by the said judgment and appealed to this court on the following grounds:

**1. The learned magistrate erred in law and in fact in failing to set aside the orders for extension of time to file suit when considering the reasons given by the Plaintiff were not sufficient to warrant the extension of time.**

**2. 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 proved.**

**3. 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 a balance of probabilities.**

**4. The learned magistrate erred in shifting the burden of proof to the Appellant when the same was never discharged by the Respondent.**

5. The learned magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before her.

6. The learned magistrate erred in law and in fact in adopting a multiplier of 30 years which was inordinately high taking into account the judicial authorities submitted by the Appellant and the age of the deceased.

7. The learned magistrate erred in law and in fact in awarding a total of Ksh.783,600/= in damages which was inordinately high taking into account the evidence placed before her and the judicial authorities submitted by the Appellant.

8. The learned magistrate erred in law and in fact in awarding damages from both the fatal accidents Act and the Law reforms Act.

5. The appeal was disposed of by way of written submissions. I have considered the said submissions.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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 this 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 (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

7. PW1 Pauline Mbulwa Mutisya, the mother to the deceased, testified and produced the postmortem report, the death certificate and a letter from Embakasi Police Station as exhibits.

8. The death certificate reflects that the deceased was 24 years old and the deceased died as a result of electrocution. The Autopsy Report gives the cause of death as cardiorespiratory failure due to electrocution due to high voltage exposure.

9. PW2 Regina Ndulu Maundu, a cousin to the deceased gave evidence that she witnessed police officers pulling out the body of the deceased from sewerage water at some culverts at Mukuru Kwa Njenga area. Her further evidence was that there were exposed electrical wires hanging dangerously over the scene and others lying on the ground where there is a road and some culverts. PW2 produced a photograph of the scene as an exhibit.

10. The Appellant closed its case without calling any witnesses. Thus the evidence of PW1 and PW2 remained uncontroverted by any other evidence. Both PW1 and PW2 maintained their line of evidence during cross-examination. PW1 blamed the delay in not filing the suit in time on negotiations between their advocate and the Appellant.

11. From the foregoing analysis of the evidence, I find that the order dated 18<sup>th</sup> June, 2014 which granted leave to file suit out of time was challenged during PW1’s evidence. PW1’s position having remained uncontroverted by any other evidence, there was no basis for the said orders to be set aside.

12. I am persuaded by the case of **Rosemary Wanjiru Kungu (2014) eKLR** where the court held that:

**“where the Defendant or his representative such as insurance company leads the Plaintiff advocate to believe that the claim is capable of being settled and in reliance thereof the Plaintiff or his advocate refrains from filing the suit until after the limitation has run its course, that may constitute a good ground for extending time notwithstanding the provisions of Section 27 of the Limitation of Actions Act.”**

13. The evidence of PW2 regarding on the scene is supported by the photograph produced. The photograph shows a maze of dangerously hanging exposed electrical wires from the main lines to the nearby temporary structures and on the ground. The road and the culverts can also be seen in the photographs.

14. The Appellant in paragraph 3 of its statement of Defence admitted being a duly appointed distributor of electricity and allied functions such as servicing the power lines. The Appellant had a duty to ensure the electrical wires were properly installed and maintained.

15. In the case of **Kenya Power & Lighting Co Limited v Joseph Khaemba Njoria [2005]** the court held as follows:

**“There can be no question that the power company has a responsibility to ensure that the power infrastructure it has installed in the country for the purpose of electrification is not only properly maintained to prevent accidents but also that illegal connections, when they occur are detected and removed.”**

16. Having evaluated the evidence on record, I am satisfied that the Respondent’s case was proved on a balance of probabilities. The trial magistrate correctly held that the Appellant was 100% liable for the accident.

17. As stated by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd & 2 others [2015] eKLR:**

**“The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency which must then be capitalized by multiplying by a figure representing so many years of purchase. As emphasizes above, the net income determines the multiplicand and it is only net of statutory deductions”**

18. The assessment of the Ksh.50,000/= for pain and suffering and the award of Ksh.100,000/= for loss of expectation of life is also within a similar range of awards.

19. The death certificate reflects the age of the deceased as 24 years. The multiplier of 30 years is there reasonable taking into account the age of the deceased.

20. The Multiplicand applied by the trial magistrate is supported by the payslip produced as an exhibit which reflects the net salary of the deceased as Ksh.5,280/=. The dependency ratio of 1/3 is within a similar range of awards where the deceased was unmarried and had no children.

21. The special damages awarded at Ksh.11,000/= were pleaded and proved as per the receipts produced for the postmortem Report and mortuary charges.

22. The trial magistrate did not err in awarding damages under the Law Reform and Fatal Accidents Act. As stated by the Court of Appeal in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia (1985) 1 KAR 727:**

**“.....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 and so it appears the Legislature intended that it should be considered. Section 2(5) of the Law Reform Act says this:**

**“(5) the rights conferred by this part are for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased person by the Fatal Accidents Act... To be taken into account and to be deducted are two different things. The words used in Section 4(2) of the Fatal Act are “taken into account.” The Section says what should be taken into account and not necessarily deducted. For me it is enough 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 law or otherwise for him to engage in mathematical deduction as suggested by Mr. Barasa.”**

23. I find the award of damages herein to be within range of similar awards and will not interfere with the same. I am guided by the case of **Kemfro Africa Ltd (Supra)**, where the Court of Appeal observed:-

**“....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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”**

24. The Appeal has no merits and is dismissed with costs.

**Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of March, 2019**

**B. THURANIRA JADEN**

**JUDGE**