REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 55 OF 2016

KENYA POWER AND LIGHTING CO LTD.....APPEALLANT

VERSUS

LIVINGSTON WECHULI MUKHWANA.....RESPONDENT

J U D G M E N T

1. By its Memorandum of Appeal the Appellant challenges the judgment of the lower court on two grounds that:-

> **i. "The Learned Trial Magistrate erred in law and facts by greatly misdirecting himself by treating the submissions of Appellant very superficially thereby erroneously arriving at a wrong conclusion of quantum.**
>
> **ii. The Learned Trial Magistrate erred in Law and fact in awarding general damages of Kshs.1,918,002/= (Kenya Shillings One Million Nine Hundred Eighteen Thousand Two Only) without laying a basis and which was excessive and/or inordinately high in the circumstance."**

2. In the Judgement under challenge, dated 15/4/2016, the trial court having heard the parties and considered the evidence adduced rendered itself on the question of quantum of damages, liability having been apportioned by consent, as follows:-

> **"On General damages and under the heading of pain and suffering, the deceased succumbed to the injuries on the spot. Since the deceased died on the spot there was extremely minimized pain and suffering but it cannot be ruled out that any pain was experienced. Guided by authority in HCC No. 438 of 1996 Nakuru where the Court awarded Kshs.20,000/=. At instant death, I award Kshs.30,000/= under this head.**
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> **Under loss of expectation of life, the deceased was aged 26 years at the time of accident. He, was healthy and was enjoying normal and happy life . Guided by these facts and the authority in HCC. 1368 OF 2006 eKLR where the High Court awarded Kshs.300,000/= for a 27years old; I am inclined to award Kshs.300,000/= as sufficient compensation under this head.**
>
> **Loss of dependency**
>
> **There was led evidence that the deceased left behind two children. Tabitha Mukhwana and Emanuel Mukhwana. The two children were left with the deceased's father one Livingstone Weluchi Mukhwana aged 52, they entirely depended on him for upkeep, food and schooling. It was uncontroverted that the deceased used to send between 2000 to 2500/= to the Guardian. It's evident that he was casual worker. In consideration of that and the fact that he expected a healthy life till retirement at age 55 years. I will take a multiplier of 20 years. The deceased was married but separated and had his father as guardian of the children. I take a multiplication of 2/3. I take the minimum wage applicable to casual workers of the same cadre under the Labour Institution's Act.**
>
> **9780.95 s 12 x 20 x 2/3 = 1, 564, 952.00**
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> **Special damages pleaded and proved of Kshs.33,050.00 Pext. 5(a), 3 & 5 c are also awarded.**
>
> **Total award 1,918,002 at 100% less 30%. Net General damages of Kshs. 1,342,601.4".**

3. It is that decision I have to interrogate based on the record at trial and well aware that this being a first appeal I am mandated to proceed

by way of retrial necessitating the re-appraisal and re-evaluation of the entire evidence availed at trial. In undertaking my mandate I have had the benefit of reading the rival submissions by both parties and will equally take same with account. In my reading of the submissions, the appellant apparently takes the view that the award for general damages under the heads pains and suffering and loss of expectation of life were exaggerated and too high as was the award for lost dependency owing to improper invitation and adoption of minimum wage to determine dependency when there was sufficient evidence on dependency. There was also a challenge on the choice of multiplier of 20 years with the Appellant taking the view that a period of 15 years would have been more appropriate.

4. Counsel then cited to court 4 decisions to support their contention that the trial court proceed upon error and reached an erroneous decision meriting being disturbed and set aside.

5. For the Respondent two sets of submissions were filed on 9/11/2018 and 9/01/2019. The totality of those submissions was that there was no basis to interfere with the court's decision on assessment of damages because the lower court was guided by a decision in which a judgment was delivered in 2008 and that the award was comparable to those in the decided case.

6. On lost dependency the counsel deemed the choice of multiplier of 20 years as modest and urged that there be no interference. For the multiplicand it was submitted that the court was perfectly within its right to resort to the minimum wage to come to the lost dependency having adopted a dependency ratio of 2/3. Reliance was then placed on the decision in ***Beatrice Wangui Thairu vs Hon. Ezekial Borngetony HCC No. 1638 of 1988*** but the citation of the decision nor a copy was availed to court.

Analysis and determination

7. My starting point is whether it can be justifiably and honestly said that the trial court ignored or just considered the submissions by appellant superficially. To this court there is no legal requirement that a trial court notes in its decision every submissions made by the parties in order that it be seen to have considered those submission. It is enough that it can be deciphered that regard was had to the submissions filed.

8. In this matter the Appellants submissions are to be found at pages 3 -5 of the Supplementary Record of Appeal. In the submissions some of the submissions made without reliance on any provision of the law were as follows:-

Loss of expectation of life	**Kshs.100,000.00**
Pains and suffering	**Kshs. 30,000.00**
Loss of dependency	**Kshs. 180,000.00**
Special damages	**Kshs. 33,000.00**

From those own submissions, it is clear that there cannot be a dispute that the appellant should not be heard or taken seriously to challenge the award for special damages as well as pains and suffering. The trial court did agree with its submissions wholly.

9. However, the basis upon which the Appellant sought to fault the trial court on lost dependency was the assertion that the dependency ratio should have been 1/3 and not 2/3, on the basis that the deceased died without a wife. That submission, with respect, totally ignored the unchallenged evidence that the deceased had two children and sent to his father a sum of between Kshs.2000 and 2500 per month.

10. I will deal with this question of dependency and the ratio thereof later in the second ground of appeal but the foregoing is sufficient to conclude that the submission by the appellant were properly taken into account.

11. Even the choice of the multiplier can be seen to have had regard of the submissions filed because while the Appellant urged a period of 15 years, the Respondent had proposed a period of 30 years. What must be made clear is that written or oral submissions are the opinion of the counsel on the law as applied to the evidence. Submissions themselves, unless the circumstances of the case dictate and it be agreed between the parties that an issue be determined on the basis of agreed facts as applied to law, cannot be a substitute for the evidence.[1] I find no substance or merit in the first ground of appeal and hold that it must fail.

12. On the assessment of the damages in the sum of Kshs.1, 918,002, I must point out that, it is a general and omnibus ground that should have been framed better. It is omnibus and too general because, the ground of appeal gives the erroneous impression that that is the sum the Appellant was obligated to pay when it was not. The second erroneous impression created is that the sum was wholly contested when the truth is that sum was an aggregate of four separate components, two of which, I have pointed out were not disputed by the Appellant even in own submissions at trial. I take the view that parties and counsel must be reminded that candid and diligent frame of pleadings are the hallmarks of fair and just determination of legal disputes.

13. For appeal purposes, counsel and all litigants are reminded that the law under Order 42 Rule 1(2) leaves no doubt on the duty of an appellant in crafting its Memorandum of Appeal. The rule provides:-

> **(2) "The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.**

14. Ground 2 of the Memorandum of Appeal cannot, therefore, pass the test and requirement of the law that the grounds be set forth in a

concise and distinctive manner. I will however ignore that transgression on the law and determine that ground on the merits based on the material I have on record. I will thus determine the ground into two:-

- Was the award and assessment of loss of expectation of life justiciable or reasonable?

- Was the assessment of loss of dependency reasonable or justifiable?

Loss of expectation of life

16. The award under this head is at the discretion of the court even though the court is obligated to note that comparable loss need to attract comparable damages and that the level of awards should be kept modest so as not to hurt the economy[2] . Submissions were offered to the trial court and decided cases cited to court in which sums ranging between Kshs.120,000/= and 300,000/= were awarded in comparable cases. In fact the Respondent having considered those decisions ended his submissions on the point by stating that '*Kshs.250,000.00 shall suffice to compensate the deceased's estate'*.

17. While I do not intend to slightly and readily interfere with the trial court's discretion in assessment of damages, I do note that the litigation belong to the parties and a court of law need not impose on a party what it has not asked for. This I say well aware that in the judgment appealed against the trial court in his conclusion and making of the award did say that he was guided by the decision in ***Jonnes Eshapaya Olumaiyi vs Minial Lalji Koyedia [2008] eKLR***. In being so guided he opted to say nothing about the other two cases cited where the award was less than the figure he wanted. He equally enhanced the Respondents prayer in the submissions without offering any explanation. On that account alone I would take the view that if a party makes a specific prayer or request it is not open for the court to give him another and above his prayer. I would therefore interfere with that award and in place of Kshs.300,000/= I substitute an award of Kshs.250,000/=

Lost dependency

18. While the multiplier formula is a useful and definite formula to determine awards under this heading, it is not the only mode of assessment[3]. A court of law may as well settle on a lump sum provided it can pass as adequate compensation. Whenever the thresholds are well proved in evidence then it becomes a very useful formula. However, where there is evidence, like in this case, there was evidence that the deceased would send a definite sum to his father for the upkeep of the said father and the deceased children, the law is that dependency is a matter of fact and evidence[4] hence, a court of law need not venture into the expedition of ascertaining the extent of dependency otherwise called the dependency ratio.

19. In this case the dependency sum was in clear evidence and there was no need to invite the minimum wage and pluck from nowhere a ratio of 2/3. And the reason is glaring on the face of judgment of the trial court.

19. Having adopted a minimum wage of 9,780.95 and a ratio of 2/3, it meant that the dependency was assessed at Kshs.6,520.62. That figure was nowhere in the evidence of the Respondent and in awarding the same based on calculations offered there was a clear error of both principle and appreciation of the evidence and the award cannot stand but must be set aside.

20. I do set aside the award and substitute in its place an award calculated as follows:-

2500 x 20 x 12 = **600,000/=**

21. In coming to this determination I have come to the conclusion and opinion that the choice of a multiplier was reasonable and that there having been cogent evidence on the dependency exercised upon the deceased there was no basis to adopt minimum wage and unsubstantiated dependency ratio.

21. In the end, I do allow the appeal partly and in place of the damages awarded at trial, I substitute an award as follows:-

Lost dependency **Kshs.600,000.00**

Loss of expectation of life **Kshs. 250,000.00**

Pains and suffering **Kshs. 30,000.00**

Special damages **Kshs. 33,000.00**

Total **Kshs.913,050.00**

Less 30% **Kshs.273,915.00**

Net due **Kshs.639,135.00**

22. As the appeal has succeeded only partly, I award to the Appellant a half of the costs of the appeal.

23. On the sum awarded, general damages shall attract interest at court rates from the date of judgment of the lower court while special damage will attract interest from the date of filling the suit

Dated and delivered at Mombasa on this 8th day of April 2019.

P.J.O. OTIENO

JUDGE

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[1] Daniel Toroitich Arap Moi vs Mwangi S. Muriithi [2014] eKLR

[2] Jabane vs Olenja [1986] KLR 661

[3] In **Hussein Ahmed Hanshi another v Peter Gichuru Njoroge & 2 others [2016] eKLR**, this court held and said:-

"…the multiplier formula is a helpful and important formula but not the only formula available. In *Mwanzia vs Ngalali Mutua & Kenya Bus Services* Ringera J Said:-

"It is plain that is useful and practical where facts such as the age of the deceased, the amount of annual dependency and the expected length of dependency are known or are knowable without undue speculation"

[4] James Mukolo Elisha vs Thomas Martin Kibisu [2014] eKLR