REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 275 OF 2014

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

-VERSUS-

MA (Suing as the legal representative of SO-Deceased).....RESPONDENT

(An appeal from the judgment delivered by Honourable A. Lorot (Mr.) (acting Senior Principal Magistrate) on 17th June, 2014 in CMCC NO. 415 OF 2012)

JUDGMENT

1. The respondent who was the plaintiff in CMCC NO. 415 OF 2012 filed a suit against the appellant vide a plaint dated 31st January, 2012. The respondent claimed that on or about the 17th of November, 2009 while the deceased who was her son was playing outside their home in Mashimoni Village, Kibera area, he was electrocuted by power cables or wires lying bare on the ground and that as a result, the minor sustained injuries which led to his death.

2. The respondent further pleaded that the appellant owed a duty of care to the minor and other persons living in the area, to cover the said wires but it breached such duty of care by negligently leaving the wires exposed on the ground. It was also pleaded that at the time of his death, the minor was two (2) years of age. Consequently, the respondent prayed for general damages under both the Fatal Accidents Act and the Law Reform Act plus costs and interest thereof.

3. The Appellant in its statement of defence largely pleaded that the respondent was to blame for the accident by failing to ensure the safety of her son.

4. During the hearing, the respondent gave evidence as the sole witness for her case whereas the appellant did not call any witnesses. The parties thereafter filed their respective submissions and the trial court ultimately rendered its judgment in favour of the respondent as follows: 100% liability on the part of the appellant, Kshs.30,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life and Kshs.1,200,000 for loss of dependency.

5. The aforesaid judgment forms the subject of this appeal. The appellant has filed a memorandum of appeal dated 8th July, 2014 premised on ten (10) grounds of appeal and which grounds relate to both quantum and liability.

6. Parties filed written submissions on the appeal. On its part, the appellant submitted that the learned trial magistrate failed to interrogate the respondent's evidence and the fact that she did not fulfil her duty of care owed to the minor and in failing to do so, acted negligently. The appellant also submitted that the respondent failed to prove dependency both on her part and on the part of her surviving children who were the deceased minor's siblings, adding that the learned trial magistrate erred in applying a multiplicand approach instead of a global approach.

7. On the issue of general damages for pain and suffering, it was the appellant's contention that the learned trial magistrate failed to take into account the fact that it was unclear whether or not the minor died instantly and ought to have awarded Kshs.10,000/= under this head. As concerns loss of expectation of life, the appellant argued that the same was manifestly high and an award of Kshs.40,000/= would have been reasonable.

8. The appellant also communicated its sentiments that in making his award, the learned trial magistrate did not consider that the beneficiary under the Fatal Accidents Act and the Law Reform Act are one and the same, hence should not have benefited twice.

9. In her submissions, the respondent reiterated her position that the appellant owed a duty of care to the minor and breached the same. The respondent as well submitted that the learned trial magistrate's award on damages was proper and made in due regard to the relevant statutory provisions.

10. While the respondent admits that the minor was already dead by the time he was rushed to hospital after the accident, the award made

under the head of pain and suffering was proper. She took a similar position in respect to the award on loss of expectation of life. On the subject of loss of dependency, the respondent's submission is that the trial magistrate correctly applied the correct approach in making his award.

11. I have considered the rival submissions to the appeal and shall begin by addressing the first limb on liability. I have also perused the record of appeal and more specifically, the proceedings together with the impugned judgment. It is clear that the appellant did not call any witnesses to give evidence in support of its case. The respondent on the other hand testified that though she did not witness the accident taking place, she was aware that the wires lay bare on the ground in her neighbourhood and was informed that her son had been electrocuted by the same.

12. In my view, much as the appellant has claimed negligence on the part of the respondent before me, no such evidence was adduced before the trial court; in fact, any documents that were filed by the appellant stand unsupported in the absence of witness accounts. In light of the circumstances, I find no reason to doubt the learned trial magistrate's conclusion that the appellant was fully liable. It owed a duty of care to the minor and by failing to cover the bare wires, it created a hazardous environment for the minor and other residents.

13. This brings me to the second limb on quantum of damages. In this respect, I draw the parties' attention to the renowned case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR* where the court wisely held the following:

> ***"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 Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

14. From the foregoing, an award can only be interfered with where there is a clear indication that either of the above conditions have been met.

15. That said, I shall first address the award on pain and suffering. I have looked at the submissions filed by the respective parties in the trial court and established that the appellant proposed the sum of Kshs.10,000/= while the respondent proposed Kshs.50,000/= under this head. In the end, the learned trial magistrate made an award of Kshs.30,000/=. In my view, given that there was no way of accurately telling whether the minor's death was instantaneous or not in view of the fact that the staff at the hospital attempted to resuscitate the said minor, the learned trial magistrate considered the proposals made by the parties herein and in turn drew guidance from the judicial authorities presented to him in making his award. As such, I find the award to be reasonable and see no reason to interfere with the same.

16. The second award is on loss of expectation of life. I can once again confirm from the record that the respondent proposed the sum of Kshs.100,000/= whereas the appellant proposed Kshs.40,000/=. In his judgment, the learned trial magistrate stated that the appellant had supported the proposal made by the respondent under this head, which position is not accurate. That notwithstanding, the appellant made reference to the case of *Joseph Kimutai Chemuren v Alfred Asunga Mureve [2009] eKLR* where the court made an award of Kshs.80,000/=.

17. It is my view that much as the learned trial magistrate misdirected himself in finding that the appellant had proposed a similar award as the respondent under this head, the said magistrate did not make a manifestly high award that would require interference. In finding so, I have taken into account the awards made in the authorities cited by the appellant before me and noted that the sum of Kshs.100,000/= or thereabout was generally awarded under this particular head.

18. Before I go any further, it is necessary for me to address the subject on whether or not the learned trial magistrate awarded double compensation to the respondent as claimed by the appellant. In so doing, I will borrow from *Section 2(5)* of the Law Reform Act, Cap. 26 which stipulates that:

> ***"The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act…"***

19. From the foregoing, there is nothing that bars a party from claiming damages under both statutes in so far as the law is applicable, as long as this is taken into account by the court. The Court of Appeal in the case of ***Hellen Waruguru Waweru v Kiarie Shoe Stores Limited (2015) eKLR*** properly addressed its mind on the issue as hereunder:

> ***"…duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise…"***

20. The judges in the above-cited case further referenced the analysis in *Kemfro Africa Ltd t/a Meru Express Services* (supra) in this way:

> ***"The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient 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 no requirement in law or otherwise for him to engage in a mathematical deduction."***

21. I have carefully perused the judgment delivered by the trial court and noted that no mention was made to the Law Reform Act or the Fatal Accidents Act. Be that as it may, there is nothing to indicate that the respondent benefited from double compensation, neither was the learned trial magistrate obligated to undertake a mathematical exercise.

22. Having determined the above, I now move to the award on loss of dependency. The impugned judgment shows that the learned trial magistrate applied the multiplicand of Kshs.5,000/= for a period of 30 years and a multiplier of two-thirds proposed by the respondent in awarding the sum of Kshs.1,200,000/= under this head.

23. Given that the minor is said to have been two (2) years of age at the time of his passing, there was no way of telling what he would have grown up to be. Also, the minor had not reached a stage where he was earning any income. In this sense, I therefore agree with the appellant that the learned trial magistrate erred in applying the proposed minimum wage of Kshs.5,000/=. In the circumstances, a global approach would have been more appropriate.

24. Furthermore, it is not clear whether the learned trial magistrate took into account the provisions of *Section 4(1)* of the Fatal Accidents Act which states that:

> ***"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased…"***

25. It is my observation that the respondent pleaded that both she (being a widow) and the minor's siblings would have depended on him in the future. It is evident that the abovementioned Section 4(1) does not cater for siblings and the learned trial magistrate ought to have taken note of the same.

26. In the case of *Joseph Kimutai Chemuren* (supra) cited by the appellant, the court on appeal upheld the award of Kshs.371,700/= as damages for loss of dependency for a five (5)-year old child. Similarly, in *Transpares Kenya Limited & another v SMM (Suing as Legal Representative for and on behalf of the Estate of EMM (Deceased) [2015] eKLR* the appellate court awarded Kshs.602,400/= for lost years to the legal representative of a five (5)-year old minor.

27. In considering economic fluctuations and the passage of time, I find an award of Kshs.400,000/= to be reasonable.

28. In the end, the appeal only succeeds in terms of the award on damages for loss of dependency. Consequently, I hereby set aside the learned trial magistrate's award of Kshs.1,200,000/= and substitute it with the sum of Kshs.400,000/=.

29. The tabulation is therefore as follows:

Liability – 100%

(a) Pain and suffering - 30,000/=

(b) Loss of expectation of life- 100,000/=

(c) Loss of dependency- 400,000/=

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Total 530,000/=

The general damages to earn interest from the date of the judgment.

Each party to bear its own costs of the appeal.

Dated, signed and delivered at NAIROBI this 3rd day of April, 2019.

L. NJUGUNA

JUDGE

In the presence of:

…… for the Appellant

…… for the Respondent