



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.3 OF 2018

SUKARI INDUSTRIES LIMITED.....APPELLANT

VERSUS

SILVESTER MORACHO (suing as the legal Representative of the estate

of **CLEOPHAS N. NYANAMI – Deceased**) **1ST RESPONDENT**

KENYA POWER & LIGHTING CO. LTD.....2ND RESPONDENT

(Appeal from the judgment and decree of the Principal Magistrate in Ndhwa SPMCC No.24 of 2014 delivered on 24.01.2018 – Hon. Mary A. Ochieng, SRM)

JUDGMENT

1. **SILVESTER MORACHO**, as the administrator of the estate of the late **CLEOPHAS NYANAMI** (deceased) filed a claim for damages against **SUKARI INDUSTRIES COMPANY LIMITED** (first defendant) and **KENYA POWER & LIGHTING COMPANY LIMITED** (second defendant) arising from an accident involving the deceased, who was at the material time allegedly employed by the second defendant, and a motor vehicle Registration No. KTCB 809-ZD 7436 Tractor/Trailer belonging to the first defendant and driven at the time by its employee, servant and/or agent.

2. In the plaint dated 12th March 2015, it was pleaded that on or about the 30th December 2013, at about 5.12 p.m., the deceased was in the course of his employment connecting power lines on electricity poles along Pala-Riat road near Ototo Secondary School when the first defendant's tractor was so negligently driven, managed and/or controlled such that it came into contact with and dragged the power lines and cables thereby causing Fatal electrocution of the deceased by high voltage power sparks.

3. The plaintiff attribute the mishap to the negligence of the first and second defendants towards the deceased. He therefore prayed for damages against both of them under the Fatal Accidents and Law Reform Act. He also prayed for special damages together with costs of the suit and interest.

4. Both defendants, in their respective statements of defence denied the allegations made against each one of them by the plaintiff and contended that, if the accident indeed occurred, then it was caused by the sole and/or contributory negligence of the deceased. However, each of the two defendants further accused each other of negligence along with the deceased in causing the accident.

5. At the hearing of the suit, the plaintiff (PW1) testified that he was merely informed of the death of the deceased who was his brother and who was fatally electrocuted while in the course of his employment near Ototo Secondary school.

The plaintiff did not witness the accident but he blamed the second defendant for the accident, in that it failed to erect warning signs of the ongoing works and to switch off power while the deceased undertook his task. The plaintiff also blamed the driver of the tractor for driving at a high speed and failing to heed warnings given to him by bystanders at the scene. He indicated that he incurred medical, legal and other expenses amounting to Kshs.32,800/= due to the accident and stated that the deceased's formal education ended at Makiro Primary School where he sat for his KCPE examinations in the year 2007.

6. The plaintiff further stated that after school, the deceased was employed as a casual labourer at a daily wage of Kshs.600/= or Kshs.14,000/= per month. He died at the age of 21 years while taking care of his orphaned siblings.

KEVIN OCHIENG (PW2), worked with the deceased as contractors with the second defendant. He testified that they were together on the material date of the accident and while he was on the ground, the deceased was on top of a pole tying a wire when the first defendant's

tractor carrying sugar cane passed by and dragged the wire causing the pole and the deceased to fall down.

7. The witness (PW2) blamed the tractor's driver for the accident but not the second defendant. He stated that the first defendant's driver ignored the life savers signs on the road and failed to stop even after the accident.

Both the first and second defendants did not lead any evidence in support of their respective defences and allegations of negligence against the deceased and against each other.

8. After considering the evidence and the pleadings before it, the trial court concluded that both defendants were liable for the accident but, whereas the first defendant's liability was placed as high as 90%, the second defendant's liability was lowly placed at 10%.

The plaintiff was accordingly awarded a sum of Kshs.10,000/= for pain and suffering, a sum of Kshs.100,000/= for loss of expectation of life under the **Law Reform Act** and a sum of Kshs.739, 418/40 cts for loss of dependency under the **Fatal Accidents Act**.

The plaintiff was also awarded Kshs.13, 000/= as special damages. In total, the entire award came to Kshs.862, 418/40 cts.

9. Being aggrieved by the judgment of the trial court, the first defendant (first appellant) filed the present appeal on the basis of the grounds in the memorandum of appeal dated 19th February 2018, in which the second defendant is treated as the second respondent after the plaintiff (first respondent).

It is noteworthy that the second defendant (second respondent) did not file any appeal against the judgment of the trial court. It however, participated in the hearing of the appeal and urged this court to decide the appeal on its merit.

10. The hearing proceeded by way of written submissions and in that regard, the appellant filed its submissions dated 24th April 2019, through the firm of **L.G. MENEZES & CO. ADVOCATES**, while the first respondent, filed his submissions dated 26th April 2019, through the firm of **G.S. OKOTH & CO. ADVOCATES**.

The second respondent, filed its submissions dated 25th April 2019, through the firm of **MOSE, MOSE & MILLIMO ADVOCATES**.

11. The duty of this court was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

In that regard, the evidence availed to the trial court was considered hereinabove.

On the question of liability, the occurrence of the accident and the deceased's employment with the second respondent were factors which were not substantially disputed.

With regard to culpability, the deceased did not shoulder any responsibility as he was lawfully and properly undertaking his authorized task of connecting power lines on an electricity pole when it was brought down together with him when the appellant's vehicle passing along the road ensnared the wire hanging loosely from the pole and dragged it along with the vehicle.

12. In the process, the deceased suffered fatal injuries. The postmortem report indicated that he suffered intracerebral bleeding which was the actual cause of death and not electrocution as erroneously pleaded by the first respondent and reiterated by himself in evidence. In any event, he (first respondent) did not witness the accident and could not therefore tell how it occurred.

13. The fact that the deceased was not electrocuted to death vindicated the second respondent from any allegations of negligence made against itself particularly the implication that it exposed the deceased to dangerous risk. The eye witness (PW2) clearly indicated that the second respondent did not shoulder any blame in the occurrence of the accident. He confirmed that indeed the second respondent erected life savers signs on the road to warn all and sundry of the work in progress. This fact was never substantially disproved by the first respondent or even the appellant.

14. All these factors indicate that the blame of 10% placed upon the second respondent by the trial court was incompatible with the evidence and clearly erroneous.

What clearly and credibly emerged from the evidence was that the appellant's driver was fully responsible for the accident as he drove his vehicle without due care and attention such that it ensnared an electric wire/cable and dragged it along thereby causing a pole on which the deceased was atop to fall down with him and occasion him fatal bodily injury.

15. The appellant's driver also failed to heed to the warning signs placed on the road or shouts by the deceased's colleague (PW2) to stop the vehicle due to the ongoing works ahead.

Indeed, the appellants 100% liability was established in evidence and was actually not disputed and this explains only this appeal is mainly on the quantum of damages.

In that regard, guidance was given by the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE –VS- L.M. LUBIA & ANOTHER [1983 – 88] 1 KAR 777**, where it was held that:-

“the principles to be observed by an appellate court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that:

It must be satisfied that either 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.”

16. Herein, the appellant does not contest the awards made by the trial court with respect to pain and suffering, loss of expectation of life and special damages. The contest was essentially the award made for loss of dependency under the Fatal Accidents Act.

In that regard, the appellant contended that the award was inordinately high as there was no evidence of dependency and the multiplicand of Kshs.5, 436/90 cts was based on the **2017 Regulations of Wages Order** yet the accident occurred in 2013. The appellant therefore suggest a reduction of the multiplicand to Kshs.5, 218/= instead of Kshs.5, 436/90 cts as well as that of the multiplier from 34 years to 30 years. The dependency ratio of $\frac{1}{3}$ was acceptable to the appellant.

17. Therefore, the appellant proposed that the award for loss of dependency made by the trial court in the sum of Kshs.739,418/40 cts be reduced to Kshs.626,160/= i.e. Kshs.5218 x 12 months x 30 years x $\frac{1}{3}$ dependency ratio.

On his part, the first respondent defended the contested award and indicated that at the trial the proposal to apply a multiplicand of Kshs.5, 436/90 cts was actually made by the appellant along with a proposal of 25 years as the multiplier and a dependency ratio of $\frac{1}{3}$. The first respondent therefore contends that this appeal is unmerited.

18. The second respondent on its part left it to this court to decide whether the impugned award was inordinately high. It however, invited the court to look at the minimum wage or income adopted by the trial court in view of the proposal made by both the appellant and itself (second respondent) but noted that at the material time of the accident, the minimum wage for the County of Homa Bay was Kshs.3000/=.

19. In his submissions before the trial court, the first respondent (plaintiff) made a proposal of Kshs.3, 360,000/= for loss of dependency under the Fatal Accidents Act.

This figure was made up as follows: - Kshs.12, 000 x 12 x 35 years x $\frac{2}{3}$ dependency ratio.

The appellant (first defendant) proposed a sum of Kshs.543, 690/= under the head based on the following formulae:-

Kshs.5, 436/90 cts x 12 x 25 years x $\frac{1}{3}$ dependency ratio.

The proposal by the second respondent (second defendant) was a sum of Kshs.400, 000/= as follows: - Kshs.5000 x 12 x 20 years x $\frac{1}{3}$ dependency ratio.

20. The trial court indeed agreed with the appellant’s proposal of Kshs.5, 436/90 cts as the multiplicand based on the **Regulation of Wages Order 2017**, it is therefore ironic that the appellant would want the figure reduced to Kshs.5,218/= at this juncture, yet there is no proper basis for that suggestion which smacks of an afterthought.

It was established in evidence that the deceased died at a young age of 21 years. He was unmarried and had no children, but being in gainful employment and in keeping with African traditions he was expected to provide for his siblings particularly the younger ones given that they were orphans.

21. Although, documentary proof of the deceased’s earnings was lacking, there was no dispute that he was in gainful employment and that is why the minimum earning stipulated in the **Regulation of Wages Order, 2017**, was adopted as the multiplicand in assessing damages for loss of dependency. The figure of Kshs.5, 436/90 cts was thus quite proper and reasonable as a multiplicand and so, was the multiplier of 34 years and $\frac{1}{3}$ dependency ratio adopted by the trial court.

22. In sum, this appeal is lacking in merit. It is therefore dismissed with costs to both respondents. However, the trial court’s finding on liability is hereby altered to accord with the finding of this court in that regard. Judgment on liability is thus entered against the appellant (first defendant) in favour of the first respondent (plaintiff) at 100%. This means that the second respondent (second defendant) is not liable to the first respondent (plaintiff) in damages or otherwise. The first respondent’s case against the second respondent was unmerited and is hereby dismissed with costs to the second respondent.

It is accordingly ordered.

J.R. KARANJAH

JUDGE

09.05.2019

[Delivered and signed this 9th day of May, 2019]