



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 185 OF 2015

KENYA POWER & LIGHTING COAPPELLANT

VERSUS

AGNES NDUKU NDAVA (Suing as legal representative of the estate of

PRECIOUS MWENDE MUTISO-DECEASED.....RESPONDENT

[An appeal from the Judgment of Hon. M.K. Mwangi (Ag. Senior Principal Magistrate) delivered on 30.10.2015 in Civil Case No. 366 of 2014 before the Chief Magistrate's Court at Machakos]

BETWEEN

AGNES NDUKU NDAVA (Suing as legal representative of the estate of

PRECIOUS MWENDE MUTISO -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 11 years old when she died as a result of electrocution and an action was brought in the Chief Magistrates Court at Machakos through her mother Precious Mwende Mutiso, as a legal representative against the appellant for damages under the Fatal Accidents Act and the Law Reform Act and special damages due to negligence.
2. It was pleaded that on 20.4.2012, the deceased was walking along Katheka-Kai Village in Machakos County when she was electrocuted by power lines owned by the appellant that had been negligently left loose by the appellant's authorized agent and as a result the deceased was electrocuted and she sustained fatal injuries. The respondent pleaded res ipsa loquitor. 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 and her guardian by failing to take precautions for the safety of the deceased. The appellant denied the applicability of res ipsa loquitor, denied receipt of a demand letter and denied the capacity of the respondent to bring the suit under the Law Reform Act and the Fatal Accidents Act and prayed that the suit be dismissed with costs.
3. The suit proceeded for hearing on 26th February, 2015 where the Respondent testified. The Appellant closed its case without calling any witnesses.
4. Parties filed submissions and the trial court delivered judgement on 30th October, 2015 in which Hon. M.K. Mwangi held the Appellant 90% liable for the incident and the Respondent was held 10% liable for failing to accompany the deceased and the court awarded the Respondent damages amounting to **Kshs. 1,204,552/-**.
5. 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. 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 the issue of liability be varied and the quantum be varied and reduced to the extent that the court deems fit.
6. The appeal was canvassed vide written submissions. Counsel for the appellant filed submissions on 4th March, 2019 and submitted on

each of the 7 grounds of appeal. Learned counsel submitted that there was no evidence 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 the respondent's evidence was to the effect that the wires were hanging on the farm for a long period yet the respondent did not bring this to the attention of the appellant and was thus partly liable for the incident. 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 and 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 her requisite standard of proof. Reliance was placed on the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another (2014) eKLR**. According to counsel, the trial court made a finding that was contrary to the evidence on record for there was no eye witness account of the incident, there were no photographs of the scene and no police officer was called to testify on the incident. According to counsel, the sum of Kshs 200,000/- for pain and suffering was too high and Kshs 20,000/- was sufficient as per the case of **T.O.A. v George Onyango Ogam & Another HCCC 115 of 2004**. According to counsel, the sum of Kshs 900,000/- for lost years too high and Kshs 400,000/- as a global sum was sufficient as per the case of **P.I. V Zena Roses Ltd & Another (2015) eKLR** where a global sum of Kshs 300,000/- was awarded in 2015. 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 **Paul Ouma v Sarah Akinyi & Monica Achieng Were (suing as the legal representative in the estate of Paul Otieno Were (deceased) (2018) eKLR** and concluded that the appeal be allowed and in the alternative the quantum of the trial court of Kshs 1,204,552.00 be varied with a sum of Kshs 494,052.00. Learned counsel for the respondent vide submissions dated 17th June, 2019 submitted that the evidence of Pw1 as corroborated by the exhibits proved that the deceased died as a result of electrocution and that the minor aged 14 years was incapable of appreciating the risks of exposed power lines 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 **Delina General Enterprises Ltd v Monica Kilonzo Nzuki, Machakos HCCA 83B of 2015**.

7. 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 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**.

8. The evidence in the trial court was as follows. Pw1, Agnes Nduku Ndava told court that the deceased was her daughter whom she had sent to the shop on 24.4.2012 and she heard screams and on rushing to the scene she saw her on fire and she took her to Machakos Level 5 hospital then to Kenyatta National Hospital where she was admitted for 3 days and died. It was her testimony that she took her to Kenyatta Mortuary and she presented in court the discharge summary, the treatment notes and the certificate of death as well as the post mortem report, the burial permit, the receipts in respect of the burial as well as the demand letter. She told the court that she blamed the appellant for the accident as there were wires on the road. On cross examination, she testified that the wires were on the road for a long time and that the road was one used when by children going to school.

9. The respondent closed her 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 the cause may be inferred from the evidence of Pw1 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.”

10. 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 that the Respondent claims to have suffered and at what percentage.***
- c) ***Whether the court may interfere with the finding of quantum awarded by the trial court.***

11. The answer to any of the above issue will depend and depends on the amount of evidence adduced by a party having the legal burden to do so. See sections 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.**

12. 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.”

13. On foreseeability of the injury, it is commonplace that protruding electricity wires once in contact with 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 I am unable to agree with the trial court that the deceased was contributorily negligent because it was her testimony that the route was used by the deceased when going to school.

14. It also follows that the appellant is wholly negligent for the death of the deceased as proven by the post mortem report that was not controverted by the appellant.

15. 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.”

16. 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 any authorized person and in the names of all or any of the members of the family.

17. 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.

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 had 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.

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 same degree attained an established character and firmer hopes, his or her future becomes more definite and which good fortune may probably attend him at any rate becomes less incalculable.

d) Stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth is that in putting 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.

18. In the instant case, the respondents claim for damages for loss and damages was set out in her plaint as follows:

“5. ...the deceased was aged 11 years old at the time of her death. She was in good health and survived by....mother.

The dependant has suffered much loss and damage by the death of the deceased” and particularized Kshs 94,052 as the special damages.

19. In the prayer, the plaintiff asked for: **“(8) (a) General damages as under the Fatal Accidents Act and the Law Reform Act.”**

20. In the present case it is necessary to consider what kind of life the deceased would have enjoyed had she not been killed. There is no evidence that the deceased would have had an unhappy life. According to her mother, she was school-going. On the other hand her mother was a housewife. It is not known how far she would have reached in her education. It is not known whether she had brothers and sisters in school. The conclusion which can be reached here is that the deceased could have enjoyed average happiness, subject to the normal risks and uncertainties. It is not known how the figure of Kshs 900,000/- was arrived at for lost years, the Kshs 200,000/- for pain and suffering and the Kshs 10,000/- for loss of expectancy of life.

21. 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 v The 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 if 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.”

22. 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**.

23. In **Kenya Wildlife Services v Geoffrey Gichuru Mwaura (2018) eKLR**, an amount of Kshs 700,000/- was awarded on appeal for a 13 years old boy for loss of dependency under the Fatal Accidents Act and in this case because the minor is aged 11 years, the amount awarded by the trial court was a little high. The award for deceased minors should always be a lump sum as nobody knows what those minors would have become later in life. Being guided by the above authority I find a global award of Kshs 800,000/ would be reasonable in the circumstances.

24. The amount of Kshs 200,000/- for pain and suffering is rather high and because the deceased died whilst undergoing treatment she must have felt excruciating pain before breathing her last. Courts have been awarding sums ranging from Kshs 10,000/ to 50,000/. I will substitute the award by the trial court with the sum of Kshs 50,000/ to cater for pain and suffering. The trial magistrate awarded Kshs. 10,000/- for loss of expectation of life and I feel the amount is rather too low. The conventional awards under this head is Kshs 100,000./ I will not give an award herein as the same will still be discounted so as to prevent double compensation as the other head of damages will be covered under loss of dependency under the Fatal Accidents Act. In the circumstances I award a global sum of Kshs 800,000/- .

25. Funeral expenses are in the nature of special damages. The respondent prayed for a total amount of Kshs. 94,052/- and the trial magistrate awarded the said amount. I shall not interfere with the same as the total of the receipts produced came to the said sum.

26. In the result the appeal partially succeeds. The trial court’s judgement is set aside and substituted with the following:

Liability against the Appellant.....	100%
Pain and Suffering under LRA	Kshs 50,000/-
Loss of expectation of life.....	Kshs. 0/-
Loss of dependency.....	Kshs. 800,000/-
Special damages	<u>Kshs. 94,052/-</u>
Total.....	<u>Kshs. 944,052/-</u>

Each party to bear their cost of the appeal while the Respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at **Machakos** this **20th** day of **November,2019**.

D. K. Kemei

Judge