



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 61 OF 2008**

**CHRISTINE ARARA OMOLO.....1<sup>ST</sup> PLAINTIFF**

**EVERLYN AKINYI ANDIANG..... 2<sup>ND</sup> PLAINTIFF**

***Suing as the legal Representatives of the Estate of Maureen Andiang)***

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT**

**JUDGMENT**

The Plaintiffs herein filed the plaint dated the 4<sup>th</sup> day of March, 2008 claiming general and special damages plus costs of the suit against the defendant. They have sued as the Legal guardian and sister to the late MAUREEN ANDIANG, respectively and as the legal representatives to the estate of the deceased under both the Fatal Accident and Law Reform Acts.

The defendant, Kenya Power & Lighting Company has been described as a limited liability company registered in accordance with the provisions of the Companies Act Cap 486 Laws of Kenya.

The 1<sup>st</sup> Plaintiff averred that, at all material times relevant to this case, she was/is the lawful owner and occupant of House D.25 Kimathi Estate whereas the defendant was, and continues to be, the sole supplier of Electricity to the 1<sup>st</sup> plaintiff's aforesaid house. That until her death, the deceased resided with the 1<sup>st</sup> Plaintiff in the said house.

It was the plaintiffs' case that, two to three weeks prior to the death of the deceased, certain works had been commenced around an electricity transformer which was situated behind the 1<sup>st</sup> plaintiffs house, which works included digging trenches next to the generator as a result of which works, certain live electric cables were left exposed and unattended.

The plaintiffs contended that the works were being conducted by the defendant and/or persons who had been contracted or were agents or servants working under the instructions and authorization of the defendant. That during this time that the work was going on, there were unusual noises emanating from the transformer, frequent power outages and fluctuations which affected 1<sup>st</sup> plaintiff's electrical equipment in the house and she had made several complaints and reports to the defendant both individually and through the estate association.

That on the 26<sup>th</sup> October, 2005 the deceased while preparing to take a bath, turned on the water and was fatally electrocuted and died shortly thereafter. The plaintiffs' contended that the deceased died as a result of negligence and recklessness on the part of the defendant by failing to exercise due diligence, care, knowledge, skill and caution when they permitted/caused and/or occasioned the tampering of the said transformer thereby causing untimely demise of the deceased. That the defendant breached its duty of care to the deceased. The particulars of negligence and those pursuant to the Law Reform and Fatal Accidents Acts are set out in paragraph 10 while those of special damages are set out in paragraph 11 of the plaint. They urged the court to enter judgment as prayed in the plaint.

The defendant filed a statement of defence on the 2<sup>nd</sup> day of May, 2008, in which it has denied the plaintiffs' claim save for what has been expressly admitted.

The defendant avers that it is a stranger to any works commenced and any electricity transformer situated behind the 1<sup>st</sup> plaintiff's house. Further, the defendant denies that any alleged works were being conducted by it and/or by persons contracted by or acting as its agent's or servant's working under the instructions of and authorization of the defendant.

The defendant further denied that there were any unusual noises emanating from any transformer, frequent power outages and fluctuations and has put the plaintiffs to strict proof thereof. It has denied having ever received any complaints from the plaintiffs or the alleged Estate Association. The defendant denied that the deceased was fatally electrocuted as alleged and also denied that it caused, permitted and/or

occasioned the tampering of any of its transformers. In the circumstances, the defendant denied that it failed to exercise due diligence, care, knowledge, skill and caution in its duties as alleged by the plaintiffs. The particulars of negligence are denied.

Further, in the alternative and without prejudice to the foregoing, it averred that if any works commenced and/or were undertaken around any electricity transformer situated behind the 1<sup>st</sup> plaintiff's house, which is denied, the said works were being undertaken by an independent contractor known as Cargil Enterprises.

The defendant averred that general damages sought are speculative but denied the particulars of special damages. It prayed for dismissal of the plaintiffs' case.

The plaintiffs filed a reply to defence on the 15<sup>th</sup> day of May, 2008 in which they have joined issue with the defendant's defence filed on the 2<sup>nd</sup> day of May, 2008 and reiterates the contents of the plaint

At the hearing, the 1<sup>st</sup> plaintiff testified on her own behalf and that of the 2<sup>nd</sup> plaintiff and called one witness in support of their case. The defendant did not call any witness.

The 1<sup>st</sup> plaintiff adopted her witness statement dated the 10<sup>th</sup> December, 2012 and a further statement dated the 12<sup>th</sup> February, 2014 as her evidence in chief. In addition, she produced the list of documents filed on 10<sup>th</sup> December, 2012 and a supplementary list filed on the 12<sup>th</sup> February, 2014 which were all marked as exhibits.

It was her evidence that 2 - 3 weeks prior to the 26<sup>th</sup> October, 2005 when the deceased was electrocuted, there were some works going on in their area near the transformer behind her house. That though the employees working on the transformer had no uniforms, she saw the defendant's and Siemen's vehicles parked in the neighborhood on several occasions, which made her to believe the workers were employees of KPLC. She stated that members of the estate's association requested for works to be discontinued but the defendant refused.

That on the 25<sup>th</sup> October, 2005, there was no power in her house yet the other houses in the estate had power and the problem persisted until the following day. On the same day, there was loud noise from the transformer and when they tried to reach the defendant's employees, they could not be reached on phone.

On 26<sup>th</sup> October, 2005 in the early morning the deceased went to take a bath and soon thereafter, they heard screams and a loud bhang from the bathroom. They rushed to the bathroom to see what was going on and on breaking the door, they saw the deceased lying on the floor and there was steam coming from the water point. She screamt and went to look for a neighbor who is a nurse and on coming back to the house with her, she confirmed that the deceased had died. They reported to the police who went to the house as well as the KPLC employees. Police officers took photographs and carried out investigations following which, the body was taken to the mortuary.

Jonathan Daniel Onura testified as PW2 and adopted his witness statement dated the 12<sup>th</sup> February, 2014. He reiterated most of the evidence given by PW1 and confirmed that about 3 weeks prior to the incident the defendant was carrying out works within Kimathi Estate and he could see KPLC vehicles every once in a while. The works were going on behind their house where the transformer was situated. That the works affected the lights which could flicker on various occasions thereafter yet before the said works started, they hardly had issues to do with electricity.

That a week before the incident, the transformer started to emit some sounds which in turn affected the flow of electricity. He even noticed some cables had been exposed as the area was open. That on the 25<sup>th</sup> October, 2005, their house had no power and things felt strange. He felt an electric current passing on the fridge when he touched it and he immediately informed PW1 who is his mother. That on the following day there was still no power in the house and when the deceased went to the bathroom to take a shower, she was electrocuted. He reported the matter to the police who went to the scene to investigate the incident. The defendant also sent its employees to analyze the incident.

At the conclusion of the hearing, parties filed written submissions which the court has duly considered together with the evidence on record and the pleadings.

In my view, the two issues for determination are;

1. Liability
2. Quantum

On liability, it is clear that the plaintiffs' cause of action is based on negligence. The plaintiffs contend that there was failure on the part of defendant to observe its duty of care that it owed to the plaintiffs and the deceased when it failed to properly maintain an electrical infrastructure (transformer) and for undertaking electrical works behind the 1<sup>st</sup> plaintiffs house without paying due regard to her safety and that of her family, as a result of which, her daughter suffered fatal injuries due to electrocution.

It is the plaintiffs' contention that as the custodian of the electrical infrastructures, the defendant failed to take the necessary action and precaution to avoid causing harm to the deceased as a result of which she lost her life.

The plaintiffs submitted that the defendant owed them and the deceased a duty of care which it breached. It relied on the case of *Joseph Kiptonui Koskei Vs. Kenya Power & Lighting Co. Limited [2010] eKLR* on the duty of care. They urged the court to rely on the letter dated 12<sup>th</sup> January, 2006 by the defendant to the plaintiffs advocates and also to the witness statements taken by Proximate Adjusters Limited

under the instructions of the defendant, which were marked as exhibits 6 – 8.

The plaintiffs also urged the court to consider that though the defendant filed a defence, it did not call any witnesses in support of its case or produce any documents to substantiate the allegations raised in its defence. Reliance was made to the case of *Stephen Gachau Githaiga & Another vs. The A.G.(2015) eKLR* on failure by a party to call a witness to support its case.

The plaintiffs also urged the court to take note that the defendant did not deny that it owned the transformer or the electric cables that had been placed in the area, yet, it stated that it was a stranger to the work that was going on in the area. The court was asked to consider the contents of the letter dated 7<sup>th</sup> December, 2005 by the defendant in which it admitted that there was work going on at Bahati and Baba Dogo Estates. The plaintiffs further submitted that the deceased did not plead *volenti non fit injuria* and no evidence was tendered to show that the deceased was to blame for the accident or that she and/or the plaintiffs interfered with the transformer in any way.

The defendant on its part submitted that the plaintiffs did not prove the case against it, in that, they did not demonstrate how negligent the defendant was in causing the accident that caused the fatal injuries that led to the death of the deceased.

It further submitted that there was no evidence that the alleged works were being conducted by the defendant and/or persons contracted or acting as their agents. That the plaintiffs did not show that there were unusual noises emanating from the transformer, frequent power outages and fluctuations.

The court has considered the submissions by both parties on the issue of liability. As earlier stated, the cause of action is based on negligence. In its defence, the defendant has admitted that it is a supplier of electricity. The plaintiffs in their evidence have stated that the defendant was the supplier of electricity to their house. This was not denied by the defendant at all.

The plaintiffs stated that there was work going on near the power transformer which is behind the 1<sup>st</sup> plaintiff's house number D 25. This was also confirmed by the statement of Shadrack Obuya Mukanda which was produced as exhibit 6 and which was given to proximate Adjusters Limited who were instructed by the defendant to carry out investigations on the accident. In his statement aforesaid, Shadrack Obuya Mukanda who is a resident of House number C12 in Kimathi Estate and the chairman of security committee stated that after a few minutes following the incident, police officers went to the scene followed by the KPLC employees. They all proceeded to the transformer behind the 1<sup>st</sup> Plaintiffs house and they noted the following;

1. There was a trench measuring about 4 meters which was freshly done.
2. There was cable laid in the trench.
3. There was a puncture on the cable.
4. There was black polythene paper that was wrapped at the punctured spot of the cable.

That upon removing the wrapping slightly, he saw a puncture that was as long as 4 inches and the wires at that point were exposed.

Though the said Shadrack Obuya did not testify, his statement was produced as an exhibit and there was no objection on the part of the defendant. The contents of his statement corroborates the evidence of PW1 and PW2 and especially that of PW2 who stated in his statement that the works were being carried out near the transformer. PW2 in his evidence also stated that he noted some cables were exposed and that the transformer was emitting sounds.

Though the defendant has denied knowledge of any works that were going on in Kimathi Estate behind the 1<sup>st</sup> plaintiffs house, the court has taken notice of exhibit 21, a letter dated 12<sup>th</sup> January, 2006 from the defendant to Rachier & Amollo Advocates. The subject of that letter is the fatal accident of 26<sup>th</sup> October, 2006 involving late Maureen Adhiang. Part of that letter read as follows;

“Following the meeting in your offices, we have further acted as hereunder:-

- 1. Our officers visited the site on the 14<sup>th</sup> December, 2005 and were accompanied by your client one Mr. Shade Mukandah.**
- 2. A faulty cable in the substation in the estate was confirmed as replaced thereby assuring no danger from our equipment**
- 3. We explained to your client the process of preliminary works for re-routing of cables to enable other civil works to proceed. Supervision of this would be organized by one of our offices.**
- 4. We re-emphasized that we will Endeavour to comply with all proper and necessary safety measures and procedures in accordance with statutes governing our operations.**
- 5. As previously indicated, certain works are on-going in the areas which concern construction of a sub-station at Bahati and allied works at Baba dogo which works are referred to as “Bahati-Baba Dogo.” These are being carried out by independent contractors including Siemens Limited and Cargill Enterprises.**

This letter was produced as an exhibit and there was no objection from the defence counsel.

The other letter which is of interest to this court is the one dated the 7<sup>th</sup> December, 2006 which was marked as exhibit 23. It is yet another letter from the defendant to Rachier and Amollo Advocates who filed the plaint on half of the plaintiff. The letter is on the same subject as the one marked as exhibit 21. In the letter, the defendant admitted that they have a contract for construction of certain works at Bahati and Baba Dogo which are stalling. That their contractor had informed them that the plaintiffs had denied them access to certain areas that are necessary for further progress on the works aforesaid and are hostile to their teams.

It is without doubt that these two letters confirm that there was electrical work going on in Kimathi estate. In the letter dated 12<sup>th</sup> January, 2006, the defendant even admitted that a faulty cable in the sub-station in the estate was confirmed as replaced thereby assuring no danger from their equipment.

The chairman of the committee (PW2) confirmed that the cables near the transformer which was behind the 1<sup>st</sup> plaintiff's house were exposed and one had a puncture.

Among the documents produced by the plaintiffs are the post mortem report marked as exhibit 5 and the certificate of death marked as exhibit 2. Both documents confirm the cause of the deceased death as consistent with electrocution due to high voltage. The defendant does not deny owning the transformer and the exposed and faulty cables. The defendant did not attribute any negligence to either of the plaintiffs or to the deceased. To the contrary, it attributes blame to an independent contractor namely Cargill enterprises Limited whom it has blamed for exposing all the underground cables within the 1<sup>st</sup> plaintiff's plot situated within Kimathi estate. It has also blamed the contractor for negligently and/or recklessly puncturing concentric cable thereby causing power leakage thus endangering the safety of the members of the public. They have also blamed them for carelessly attempting to conceal the damage to the concentric cable by covering the same with a polythene paper thereby endangering the safety of the members of the public. It has also blamed the contractor's servants and/or agents for failing to exercise any due care, skill and or caution in the conduct of its duties

The contents of the third party notice indeed confirms the allegations by the plaintiffs with regard to the work that was ongoing in Kimathi estate, and exposed the negligence on the part of the defendant or its agents.

It is curious to note that the defendant did not call any witness in support of its case to prove the allegations of the work having been in the hands of an independent contractor. It filed a third party notice on the 27<sup>th</sup> February, 2009 to enjoin Cargill Enterprises Limited to the suit. The record shows that when the application came up for hearing on the 20<sup>th</sup> January, 2012, the defendant was granted leave to serve the same by way of registered post. Thereafter, there is no indication as to what could have happened. There is no way the court could tell whether it was served or not. What is clear from the record is that the third party did not enter appearance and the defendant did not take up that issue further even at the hearing. In the circumstances, the court cannot attribute any negligence to the third party.

The defendant did not call any witnesses and in the circumstances, its averments remain allegations which have not been proven. This was espoused by the court in the case of Stephen Gachau (supra) when it stated;

***“Where a party does not appear and defend the suit and/or substantiate on its pleadings, they remain mere allegations and therefore, the balance of probability should tilt in favour of the party who has appeared and substantiated on his or her pleadings”***

I cannot agree more.

I find that the plaintiffs have proved their case on a balance of probability. Judgment on liability is entered in their favour at 100%.

On quantum of damages, the plaintiffs submitted that at the time of her death, the deceased was 16 years old and in form two at Huruma Secondary School. That it was expected that she would have secured a good job and worked up to the retirement age of 60 years. They relied on the chief's letter to show that she left behind some dependants and urged the court to consider that it is normal in Africa setting for the children to help their parents, old siblings and the deceased was not exceptional. They asked the court to apply the minimum wages principle in its calculation with a set retirement age of 60 years citing the case of Daniel Kuria Ng'ang'a vs Nairobi City Council (2013) eKLR and arrive at loss of dependency as follows;

$$13,000 \times \frac{2}{3} \times 12 \times 44 = 4,576,000/=$$

On loss of expectation of life, the court was asked to award Kshs. 400,000/- relying on the case of Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another (2013)eKLR where a sum of Kshs. 100,000/- was awarded.

On pain and suffering, a sum of Kshs. 150,000/= was suggested relying on the case of KPLC Limited vs. James Matate & 2 others (2016) eKLR where a total of kshs. 100,000/= was awarded.

On special damages, the plaintiffs asked the court to award the sum of Kshs. 78,800/- claimed in the plaint.

On the part of the defendant, it was submitted that the claim of kshs. 4,576,000/= for loss of dependency is untenable as dependency is a question of fact and the plaintiffs have not proved the same by way of documents. on loss of expectation of life, the defendant suggested a figure of Kshs. 50,000/= and Kshs. 10,000/= for pain and suffering.

On special damages, the defendant submitted that the plaintiffs did not demonstrate how they arrived at the figure of kshs. 78,800/-.

The court has considered the submissions by the respective parties on quantum under the various heads. On the loss of expectation of life, the

birth certificate shows that the deceased died at the age of 16 years. In my view, Kshs. 200,000/= is reasonable under that head.

On pain and suffering, there is no evidence on how long it took before the deceased died. When the plaintiffs opened the door to the bathroom, they found the deceased lying on the floor. The nurse who is /was a neighbor pronounced her dead when she went to the scene. I find a sum of kshs. 30,000/= reasonable in the circumstances of this case.

On special damages, it is trite law that the same have to be pleaded and proved. No receipts were produced in court to prove the specials. In the circumstances, no award is made under this sub head.

On loss of dependency, the court notes that there was no evidence adduced by the plaintiffs to prove that the deceased was a form 2 student at Huruma High School. No progress report was produced to show how she was performing in class. In the absence of these, it is very difficult for this court to appreciate the fact that she was a student and what she could have become in future. As submitted by the defendant, damages as assessed by the plaintiffs in their submissions are speculative. In the absence of evidence as above, the court can at best apply global sum formula in arriving at a reasonable compensation.

In the case of ***Twokay Chemicals Limited vs. Patrick Makau Mutisya & Jonathan Kioko Mumama Civil Appeal Number 132/2016***, Justice Odunga upheld the decision of the trial court in which, the learned magistrate had made an award of Kshs. 1,500,000/= for a girl who was 16 years old.

In upholding the decision, the judge was guided by the case of DMM (suing as the Administrator and legal Representative of the estate of ***LKM vs. Stephen Johana Njue & Another (2016) eKLR*** in which the judge opined that a sum of between Kshs. 1,000,000/= - 1,500,000/= for a 16 year old in school is reasonable compensation.

Similarly, in the case of ***Kenya Breweries Limited vs. Saro (1991) KLR 408***, the court of appeal stated as follows;

***“We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are not ascertained. That, we think, is a question of common sense rather than law.”***

In Kiambu Civil Appeal No. 100/2016, ***Henry Kuria Muniu & Another vs. Silas Lenene Tonkei & another (suing as legal representatives of the estate of Sheila Nekison (Deceased)*** the court made an award of Kshs. 1,019,280/=for loss of dependency in respect of the estate of a seven year old child.

Lastly, in the case of ***Wandere George T/A Odindiko Investments vs. Harrison Shida Thoya & Bendera S. Saya (suing as the legal Representatives and/or Administrators of the Estate of Linet. Thoya Baya – deceased (Civil Appeal Number 32/2016)***, the court upheld the decision of the trial court in which the learned magistrate had awarded kshs. 1,200,000/= for loss of dependency to the estate of a 16 year old who was in form one.

Being guided by those authorities, I am of a considered view that an award of kshs. 1,500,000/= is reasonable in the case herein. I do award the same.

In the end, judgment is entered for the plaintiffs against the defendant as follows;

- Liability – 100%
- Loss of expectation of life – Kshs. 200,000/=
- Pain and suffering - Kshs. 30,000/=
- Loss of dependency – Kshs. 1,500,000/=
- Special damages – Nil
- Total Kshs. 1,730,000/=

The plaintiffs are also awarded the costs of the suit.

Dated, Signed and Delivered at **Nairobi** this 5<sup>TH</sup> Day of **DECEMBER, 2019**.

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Applicant

..... For the Respondent