



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 754 OF 2016

KENYA POWER & LIGHTING CO. LIMITED.....APPELLANT

- V E R S U S -

LYDIA MUTUNGE MAUNDU (Suing as the administrator of

the estate of the late FRANCIS MWANZUNGA MAUNDU.....RESPONDENT

(Being an appeal from the judgement of Hon. G. A. Mmasi (Mrs), Senior Principal Magistrate, delivered on 22nd November 2016 in Nairobi in CMCC No. 2036 of 2014)

JUDGEMENT

1) Lydia Mutunga Maundu, the respondent herein, filed a compensatory suit in her capacity as the administrator of the estate of Francis Mwanzunga Maundu, deceased against Kenya Power and Lighting Company Limited, the appellant herein, for the fatal injuries sustained by the deceased. The respondent vide its plaint dated 7th April 2014, alleged that on 29th November 2009, the deceased was walking along Mukuru –kwa Njenga in Embakasi area – Nairobi, when he was electrocuted by a live wire that was lying on the ground causing the deceased severe body injuries which eventually succumbed to.

2) The appellant filed its defence dated 6th June, 2014 and denied the respondent's claim. The suit proceeded for hearing on various dates. The respondents summoned two witnesses while the appellant did not summon any witness. In the end, Hon. G. A. Mmasi (Mrs), the learned Senior Principal Magistrate entered judgement for the respondent as against the appellant in the following terms:

<i>Loss of dependency</i>	<i>ksh.910,000/=</i>
<i>Special damages</i>	<i>ksh. 21,000/=</i>
<i>Total</i>	<i>ksh.931,000/=</i>
<i>Less loss of expectation of life</i>	<i>ksh.100,000/=</i>
<i>Less pain and suffering</i>	<i><u>ksh. 20,000/=</u></i>
<i>Total</i>	<i><u>ksh.811,000/=</u></i>

3) Being aggrieved, the appellant preferred the appeal and put forward the following grounds on its memorandum of appeal:

1. The learned magistrate erred in law and in fact in failing to set aside the orders for extension of time to file suit when considering the reasons given by the plaintiff were not sufficient to warrant the extension of time.

2. The learned magistrate erred in law and in fact in entering judgment against the appellant and finding that the appellant was 100% liable when considering the evidence on record and trial, the same had not been proved.

3. The learned magistrate erred in law and in fact in finding that the respondent was electrocuted by the appellant's electrical wires while the same had not been proved on a balance of probabilities.

4. The learned magistrate erred in shifting the burden of proof to the appellant when the same was never discharged by the respondent.

5. *The learned magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before her.*

6. *The learned magistrate erred in law and in fact in adopting a multiplier of 25 years which was inordinately high taking into account the judicial authorities submitted by the appellant and the age of the deceased.*

7. *The learned magistrate erred in law and in fact in awarding a total of ksh.811,00/= in damages which was inordinately high taking into account the evidence placed before her and the judicial authorities submitted by the appellant.*

8. *The learned magistrate erred in law and in fact in awarding damages from both the fatal accidents Act and the Law Reforms Act.*

4) The aforementioned grounds may be summarised into three main grounds namely:

i. *Whether or not the trial court erred in not dismissing the suit on account of limitation under the Limitation of Actions Act.*

ii. *Whether or not the trial court erred on its apportionment of liability*

iii. *Whether or not the trial court erred on is award on quantum.*

5) When the appeal came up for hearing, learned counsels consented to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions.

6) The 1st ground of appeal is whether or not the trial court erred in not dismissing the suit on account of limitation under the Limitation of Actions Act. The appellant submits that the trial magistrate was wrong in extending the time to file the suit out of time when insufficient reasons had been provided by the respondent on why the suit was filed when statute barred. The appellant states that the respondent's claim was a claim for negligence by the appellant and ought to have been filed before the lapse of three (3) years from the date the cause of action arose, that is on the 29th November 2009, but the suit was filed five(5) years later, vide the plaint dated 7th April, 2014. The appellant cited the case of **Bosire Ogero –vs- Royal Media Services (2015) eKLR** among other cases where it was held inter alia that:

“The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same.”

7) The respondent submits that she obtained leave to file the suit out of time vide orders granted on 1st August 2014. The respondent told the trial court when seeking for leave to file the suit out of time that the reasons were contributed by the mistake of her advocates, which was well explained and the trial court exercised its discretion to grant extension of time. The respondent cited the case of **Kenya Industrial Estates Limited –vs- Samuel San and Another (2008) eKLR** among other cases where it was held inter alia that:

“..... lengthy delays resulting from mistakes of advocates should not always lead to dismissal of applications for extension of time.”

8) A re-evaluation of this ground of appeal by this court is that the action was founded on tort, as per Section 4(2) of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the action in tort may not be brought after the end of 3 years from the date on which the cause of action arose. In the said act, Section 27 gives power to the court with which it can extend time to file an action that it statute barred. It is clear from the record that the trial court exercised its discretion and granted extension of time to the respondent to file is claim out of time. For these reasons therefore, this ground of appeal is found to be without merit.

9) The 2nd ground of appeal is whether or not the trial court erred on its apportionment of liability. The appellant submits that the trial magistrate was wrong in entering judgment against the appellant at 100% liability. The appellant states that the deceased should be held 50% liable since he failed to take precautions while walking on the road and stepped on the electrical cables which were clearly visible. The appellant cited the case of **Kenya Power & Lighting Company Limited –vs- Nathan Karanja & Gachoka & Another (2016) eKLR** where it was held inter alia that:

“..... the deceased contributed to the occurrence of the accident that claimed her own life. Ignorance and more so by an adult of obvious circumstances as in this appeal is not an excuse in law. I find the appellant to have been 50% to blame and 50% blame goes to the deceased.”

10) The respondent submits that the trial magistrate cannot be faulted for arriving at the 100% award. The appellant did not lead any evidence to discount the respondent's claim. The respondent cited the case of **Kenya Power & Lighting Company Ltd –vs- Joseph Khaemba Njoria (2005) eKLR** where it was stated inter alia that:

“...The power company has a responsibility to ensure the power infrastructure it has installed in the country for the purpose of electrification is not only properly maintained to prevent accidents but also that illegal connections, when they occur are detected and removed.”

11) I am convinced that the trial court finding on liability was well founded. The deceased was in his normal course of the day events walking when he stepped on cables and got exposed to live electric shock. The post mortem report PEXh 2 by Dr. Peter M. Ndegwa stated that the cause of death was cardiorespiratory failure due to high voltage exposure. The death certificate PEXh 1 indicated the cause of death to

be electrocution. The deceased could not have expected such an occurrence when walking to prompt him take caution or extra care. I find no merit in this ground of appeal and it cannot be disturbed.

12) The 3rd ground of appeal is whether or not the trial court erred in awarding damages. The appellant submits that an award of ksh.811,000/= in damages was inordinately high hence it ought to be re-assessed. The appellant proposes in the alternative that if the suit is not dismissed, then damages should be awarded as follows: monthly salary of 9,100, multiplier of 14 years and dependency ratio of 1/3 calculated as $9,100 \times 12 \times 14 \times \frac{1}{3} = 509,600/=$.

13) The respondent submits that the damages awarded were not inordinately high but very reasonable in the circumstances of this case. This court has looked at the award on damages and it is trite law that to interfere with this award, this court must be persuaded that the trial magistrate acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. The deceased was earning 9,100 monthly as seen in the letter of employment from Vimit Converters Ltd, PExh 10. The deceased died at the age of 31 as per the death certificate, with the mother, the respondent herein as his dependant thus a 1/3 dependency. The trial court awarded a multiplier of 25 years, giving the deceased a working age of 56 years if he was to live and work and continue providing for his dependants. I find the award given by the trial court to be well founded and not excessive. Therefore this ground of appeal cannot succeed.

14) In the end, I find no merit in the appeal. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 4th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents