REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 62 OF 2010

KENYA POWER & LIGHTING COMPANY LTD…..……....APPELLANT

VERSUS

ANN WAMBUI (Suing as the administratrix in the estate

of Thomas Wahome Wambui)…….....……..1ST RESPONDENT

AAA GROWERS LTD…….....……..2ND RESPONDENT

(Being an appeal from the judgment and decree in the Nyeri Chief Magistrates' Court Civil Case No. 138 of 2008 (Hon Muketi (Mrs) delivered on 31st March, 2010)

BETWEEN

ANN WAMBUI (Suing as the administrator in the estate

of Thomas Wahome Wambui)…….....……..PLAINTIFF

VERSUS

AAA GROWERS LIMITED…….....……..1ST DEFENDANT

KENYA POWER & LIGHTING LTD…….....……2ND DEFENDANT

JUDGMENT

This appeal is against the decision by the subordinate court according to which the appellant and the 2nd respondent were decreed to pay the 1st respondent the sum of **Kshs 531,200/=** in damages in compensation of the estate of Thomas Wahome Wambui (deceased) and for the benefit of his dependants under the **Law Reform Act, Cap. 26** and the **Fatal Accidents Act, Cap 32** respectively.

According to the plaint filed in the lower court, the deceased was an employee of the 2nd respondent at all times material to the suit; he would, in the course of his employment, be assigned by his employer various tasks from time to time. On one such occasion and precisely on 2nd June, 2007, the deceased was tasked to work with a surveyor on farm that was apparently being surveyed for irrigation purposes. One of the tools the surveyor was working with was an aluminium measuring ruler which the deceased was tasked to hold at a certain position to enable the surveyor take the appropriate measurements.

It was claimed that while the deceased was carrying the measuring ruler it conducted electric current from a main electricity power line resulting into his electrocution; the deceased sustained fatal injuries from which he died on the spot. The plaintiff attributed the accident to the appellant's and the 2nd respondent's negligence.

Both the appellant and the 2nd respondent denied the 1st respondent's claim and filed their respective statements of defence to that effect; they blamed each other for the accident although the appellant also blamed the deceased for being solely responsible or having contributed to the accident.

In its judgment, the court found for the 1st respondent and held both the appellant and the 2nd respondents liable for the accident in varying degrees; the appellant was adjudged to be 60% liable while the 2nd respondent's liability for the accident was held at 40%. Liability was attributed to the appellant because of what the learned magistrate found to be sagging power cables while the 2nd respondent was blamed for exposing the deceased to unsafe working environment.

Both the appellant and the 2nd respondent were not satisfied with the with the decision of the learned magistrate and thus they appealed against it in two separate appeals which are the appeal herein and **Civil Appeal No. 67 of 2010** in which the 2nd respondent herein is the appellant.

The record shows that the two appeals were consistently mentioned in court together and when the Court issued directions as to how this appeal was to be disposed of, it directed that the order applied, with equal measure, to **Civil Appeal No. 67 of 2010**; consequently, though not formally consolidated, both appeals were heard together by way of written submissions. It is logical that since the two appeals arise from the same decision, and as noted, they were heard together, this judgment will largely be adopted as the judgment of the court in **Civil Appeal No. 67 of 2010.**

In this appeal the appellant raised seventeen grounds of appeal most of which question the finding of the appellant's liability and the apportionment of that liability between the appellant and the 2nd respondent; they are listed as follows:-

1. The learned trial magistrate erred in law and in fact in entering judgment for the 1st respondent against the weight of evidence before her.

2. The learned trial magistrate erred in law and in fact in failing to consider fully, adequately or at all the evidence placed before her.

3. The learned trial magistrate erred in law and in fact in failing to make a finding whether or not the 1st respondent had established the exact height of the electricity wires from the ground.

4. The learned trial magistrate erred in law and in fact in failing to make a finding as to the exact height of the electricity wires from the ground.

5. The learned trial magistrate erred in law and in fact in finding that the appellant left the wires to sag without first making a finding as to the exact height of the electric wires.

6. The learned trial magistrate erred in law and in fact in failing to consider the applicability of the **Electric Power (Overhead Lines) Rules.**

7. The learned trial magistrate erred in law and in fact in failing to consider the applicability of the doctrine of volenti non fit injuria to the suit.

8. The learned trial magistrate erred in law and in fact in failing to consider the 1st appellant's contention that the deceased was contributorily negligent.

9. The learned trial magistrate erred in law and in fact in holding that the appellant was 60% to blame without having due regard to the whole of the evidence, the total circumstances of the case and the law in that respect.

10. The learned trial magistrate erred in law and in fact in failing to consider the fact that the 1st respondent had not established by evidence that she was the mother of the deceased.

11. The learned trial magistrate erred in law and in fact in awarding general damages both under the **Law Reform Act** and the **Fatal Accidents Act** which were excessive in the circumstances.

12. The learned trial magistrate erred in law and in fact in adopting 27 years as the multiplier in complete disregard to the authorities that had been supplied by the appellant.

13. The learned trial magistrate erred in law and in fact in filing to find that **section 25 (1)** of the **Workmen Compensation Act (Repealed)** was applicable to the suit.

14. The learned trial magistrate erred in law and in fact in failing to deduct **Kshs 234, 000/=** which had been paid to the 1st respondent under the **Workmen Compensation Act (repealed).**

15. The learned trial magistrate erred in law and in fact in awarding general damages both under the Law Reform Act and the Fatal Accidents Act.

16. The learned trial magistrate erred in law and in fact by awarding manifestly excessive general damages without distinguishing binding authorities tendered by the Appellant.

17. The learned trial magistrate failed to appreciate the totality of the evidence before her and in not considering the submissions on behalf of the appellant.

As noted most of these grounds revolve around the issue of liability and it is apparent that some of them are repetitive.

In order to appreciate whether the submissions filed in support of or in opposition to these grounds hold any water and, more importantly inorder to consider whether the trial court properly considered the evidence before it and came to the correct decision, it is incumbent upon this court, as the first appellate court, to reconsider and evaluate that evidence afresh and come to its own conclusions; in taking that course, this court is mindful that it is only the trial court that had the advantage of seeing and hearing the witnesses and therefore was best placed to assess such aspects of the evidence as the demeanour of witnesses and their disposition as far as they were relevant to the learned magistrate's factual findings. (See **Selle v Associated Motor Boat Co. [1968] EA 123**).

The 1st respondent **(PW1)** testified that the deceased was her son and as usual he went to work on the morning of 2nd June, 2007 but that at 9 am on the same day, she received information to the effect that the deceased had been electrocuted and died. Prior to his death, so she testified, the deceased worked with the 2nd respondent; she produced the latter's gate pass issued to the deceased in proof of the fact of the deceased's employment.

The 1st respondent also produced letters of grant *ad litem* authorising her to represent the deceased's estate in her capacity as the mother and a copy of the death certificate showing the deceased died aged 23.

She testified that a post-mortem was done to establish the deceased's death and produced a copy of the post-mortem report which was duly admitted in evidence.

It was the 1st respondent's evidence that the deceased earned Kshs 3,900/= per month. She also testified that she had been paid an amount of Kshs 234,000/= by the Labour Office, apparently under the Workmen Compensation Act, Cap 236. The payment, according to her, was made on the basis that the deceased was earning Kshs 3,900/= per month. It was also her evidence that the deceased used to assist her buy food and pay house rent though she did casual jobs herself for which she was paid Kshs 100/= daily.

When the plaintiff was informed of the accident by her daughter, she proceeded to the scene and indeed found that her son had been electrocuted; his body was on the ground but his hands were still clutching on the measuring ruler he was holding prior to his death. She testified that the electricity cables "were low" and one of the electricity poles was bent; the cable and the pole were repaired the following day, according to her.

The measuring ruler, according to her, was 4-5 metres long and that the deceased was holding it in the middle; her testimony was that the deceased's employer had not provided him with protective gloves. She also testified that the power company was to blame because the poles had "fallen"; she, however, agreed that she did not establish the distance between the alleged sagging electricity cable and the ground.

Although she admitted that her son was educated up to class eight, she denied that he was aware that electricity was dangerous and that he was aware that it was dangerous to bring the ruler into contact with the cables.

One of the persons who were at the scene of the accident when the deceased was electrocuted was **Mr Maina Mwangi (PW2);** he testified that he was a plumber and that he was then employed by the 2nd respondent. On the material date and time, he was with the deceased and one **Paul Mathu (DW1),** the surveyor. According to this witness, the deceased's task was to carry the ruler and he would take it wherever he had been instructed by Mr Mathu. At one point he was asked to move near an electricity pole and it is then that Mr Maina saw two sparks and immediately the deceased fell down in a kneeling position still holding the ruler. He said that none of them, including the deceased had been trained either by their employer or the surveyor how to go about that particular task of surveying the land. The electricity cable, according to this witness, was about 7 metres from the ground.

The witness also testified that **Paul Mathu** was the surveyor and that they had been working with him for two days. Before the accident happened, the deceased hit the electricity pole apparently after he had been instructed by Paul Mathu to move near it. He said that the ruler was about 4 metres above the deceased's head since he held it upright and it was slightly above his hip. It is apparently then that he touched one of the cables resulting into sparks of fire and the electrocution of the deceased. The cable according to the witness was 'bent' and that the appellant repaired it the following day.

The 2nd respondent's production manager **John Kimani (PW3)** testified that he knew the deceased and that on 2nd June, 2007, at about 9 am it was reported to him that the deceased had been electrocuted. He went to the scene and found the deceased dead.

According to this witness the cable was 'less than 6 metres' and that he had made a report of this fault to a Mr Kariuki.

One of the witnesses who testified on behalf of the 2nd respondent was **Paul Mathu (DW1)**; he testified that he worked for Irrico International Ltd which is a company involved in irrigation projects; its specific tasks included survey and design. This company was contracted for its services by the 2nd respondent and on 2nd June, 2007, the witness was undertaking survey work on the 2nd respondent's farm for irrigation purposes. The deceased person was assigned to him by the company to help him carry the surveying staff or the measuring ruler to help him take the readings. According to him, he briefed the deceased how to

handle the staff and specifically told him that while walking he should hold it horizontally and that when he got to a place where readings were to be taken he was to hold the staff vertically.

The witness was about 50 metres from where the accident happened; he testified that there was a slope and he was standing on the upper side of the slope while the deceased was on its lower side. The deceased was to move, apparently under the instructions of this witness, but as he moved he heard something fall with a thud. When he looked up, he was told by **John Kimani (PW3)** that the deceased had been electrocuted.

The deceased was apparently standing in between two electricity poles when the accident happened; apparently, while there, the deceased held the staff in an upright position. According to this witness, the full length of the staff was 5metres. The cause of the accident, according to this witness, was as a result of "negligence, an unfortunate situation and an act of God." It was his evidence that the deceased was negligent because if he was holding the staff horizontally, the accident would not have occurred.

At his cross examination the witness admitted that he was the one directing the deceased's movements and he had not noticed the electricity cables above him when he asked him to move. He too admitted that for the measurements to be taken the measuring staff had to be upright or vertical. He also confirmed that the staff the deceased was holding was made up of aluminium.

The witness also admitted that for the deceased to have been electrocuted, he must have been holding the staff vertically and that there were at least 4 metres of the staff that must have been held vertically since the deceased was holding the 1metre point.

Mark Karimi Kiambati (DW2) testified that he was the 2nd respondent's general manager. On the material day he received information that the deceased had been electrocuted. According to him, the 2nd respondent was introducing an irrigation scheme and that Irrico International, a company that **Paul Mathu (DW1)** worked for, had been contracted to do the survey work. He testified that he assigned Mathu two people to work with him and that one of them was the deceased.

He went to the scene and found the deceased electrocuted and that his body was under the cable. According to him the company provided protective clothing and that the deceased had been provided with gumboots.

The witness testified that the electricity poles were bent and the cables sagged; he said that he had made several reports of this faulty line to the appellant. He blamed the appellant and the deceased for the accident. He said that the cables were 12 to 15 feet from the ground but that he was not aware of their minimum standard height from the ground.

John Wanjala Muthoka (DW3) testified on behalf of the appellant; he said that he was in the employment of the appellant for 27 years and that he was in charge of operation and maintenance.

When he got information that the deceased had been electrocuted, he went to the scene where he found the deceased's lifeless body on the ground.

It was his testimony that the cables were more than 19 feet from the ground; he produced records to show the state of the line and explained that area where the accident occurred was between pole 9B and 10B and that the line in issue was a high voltage line. According to him, the deceased may have touched the live wire with the meassuring ruler or that staff must have been close enough to the cable as to conduct electricity. He said that every cable has some sort of a sag except that it must not be less than 17 feet from the ground.

This particular cable was 19 feet from the ground after the sag into consideration.

The witness testified that the cables were usually maintained after every six months. He denied that there was any work on that line on 3rd June, 2007, a day after the accident.

From the evidence proffered, it is not in doubt that the deceased died as a result of electrocution; if there was any doubt then the post-mortem report dispelled such doubt because according to the opinion of the doctor who conducted the post-mortem, the decease "died as a result of electrocution secondary to cardiopulmonary arrest". The main question which the trial court faced and which this court has to interrogate is who amongst the deceased, the appellant and the 2nd respondent was liable for the accident. Was any of these persons solely responsible for the accident or did they all contribute to it? If the latter is the case, to what extent did each of them contribute to the accident?

The other equally important question is whether the 1st respondent was entitled to any damages and if so, the extent of the damages payable.

Before delving into these questions, there is another question which the appellant raised and which I think can immediately be disposed of; this question relates to the whether the 1st respondent was the deceased's mother and whether she had the capacity to sue. Although the appellant made it an issue, at least in one of the grounds of its appeal, I am of the humble view that this should not have been an issue as the 1st respondent produced a grant of letters of administration appointing her to be the personal representative of the deceased to file suit on his behalf and on behalf of his estate. She testified that she was the deceased's mother and no doubt she obtained the limited grant in that capacity. Without any evidence to the contrary, there was no reason to doubt the 1st respondent's capacity to sue and her evidence that she was the deceased's mother.

Coming back to the question of liability, it is common ground that the deceased was the 2nd respondent's employee at the time material to the suit; it is also not in dispute that the 2nd respondent had assigned him a specific task on the material day and that he was fatally injured in the course of performing this task or, to be more accurate, in the course of his employment.

Going by the evidence of the 1st respondent, the deceased was a person of limited education his highest level being class eight. This testimony coupled with that of the deceased's workmate, **Maina Mwangi (PW2)** and that of **Mark Karimi Kiambati (DW2) who was** the 2nd respondent's general manager revealed that the deceased was not a professional in any field and he would be assigned mainly menial tasks. I suppose it is for this reason that when the 2nd respondent sought to have its land surveyed for irrigation, the deceased was readily made available for no other reason except to carry surveyor's measuring ruler and move it around as directed by the surveyor himself.

Although **Paul Mathu (DW1)** and **Mark Karimi Kiambati (DW2),** testified that the deceased together with **Maina Mwangi (PW2)** had been briefed on the task ahead of them on the material day, the latter denied it and testified that he almost got hold of the measuring ruler too when it was not safe to do so.

My assessment of the evidence of these three people leads me to conclude that it is improbable that the deceased was given instructions or any sufficient instructions on the handling the measuring staff as to avoid the accident. I say so because, first, **Paul Mathu (DW1)** testified that the accident happened on the second day of his working with the deceased but it was not clear from his evidence when the instructions were given and whether there were any specific instructions regarding his measuring staff and electricity cables. All he said in respect of the instructions was as follows:-

> ***"I assigned him the staff and showed him how to handle it. That when walking he hold (sic) it horizontally as it is a length of 5 metres. That when he got to a part where he was to read he is (sic) to hold it vertically. He was fully aware of where to hold the staff."***

There is no reference in the purported instructions to electricity or to the dangers associated with it if the staff came into contact with or near electric cables; all that the deceased was told was to carry the staff horizontally but raise it vertically wherever measurements were to be read. **Paul Mathu (DW1)** himself testified that he was not aware of the electricity cables at the scene of the survey and this could probably have been the reason he did not mention anything about the dangers associated with his working tools as far as electric power was concerned.

One other thing to note was that irrespective of whether the deceased was given any instructions, he was under the directions of **Paul Mathu (DW1)** of where to go and when to raise the staff or hold it vertically; he was apparently complying with such instructions when he was struck.

It is apparent from the evidence of **Paul Mathu (DW1)** and **Maina Mwangi (PW2)** that the deceased could not move or hold the staff as he pleased; his movements and positioning of the staff were directed by **Paul Mathu (DW1).** In order to position the deceased properly and hence the measuring staff, the surveyor was busy looking at his own other instrument that apparently guided him on where the measurements would appropriately be taken. This explains why he only heard something fall "with a thud" without knowing that it was his helper who had fallen. In his own evidence, he was told by **Maina Mwangi (PW2)** who was further away from the deceased than the surveyor, that he saw two sparks and that the deceased had been electrocuted.

It is quite apparent that since the surveyor was taking the measurements or directing where the staff could properly be positioned for him to take the measurements, it was inevitable that the staff had to be vertical and this is the position it was in when it either came into contact with or was brought close to one of the electricity cables.

Paul Mathu (DW1) himself testified that he was not aware that there were cables nearby and that he only became aware of their existence after the deceased had been electrocuted.

What is patently clear is first, that the staff was intended to be vertical and it was not by accident that it was in that position when the deceased was struck; second, when the surveyor was directing the deceased to position the staff at what in his opinion would have been the appropriate place for him to take the measurements, he did not know that he was asking the deceased to move the staff towards the electricity cable. Consider his evidence verbatim:-

> ***"I was standing on the upper part, he was on the lower floor. The accident occurred a few metres from where he was standing when I started recording he was to move as he was moving I heard a sound like sack falling down, a thud, I looked up one of the guys who was with us, on and of, he said that he had been electrocuted."***

One can safely conclude that it does not matter that the deceased may have been instructed on how to hold the staff on particular occasions; in this particular occasion he was under the instructions of the surveyor to hold it vertically and move. Without knowing, the deceased followed these instructions to his fatal end.

I cannot see how negligence can be attributed to the deceased in these circumstances; the deceased was simply following the directions of the surveyor when he met his death. There is no evidence that he was aware of the characteristics of the staff and in particular, that it was a good conductor of electricity and hence he risked his life if he brought it in contact with or close to a power cable.

Having excluded the deceased from blame, the issue of negligence has to be decided between the other two players- the appellant, on one hand and the 2nd respondent, on the other.

According to the 2nd respondent's witnesses, the electricity cables had sagged and at least one of the poles which they hung was bent. Although **Mark Karimi Kiambati (DW2)** the 2nd respondent's general manager, alleged that the line was faulty and that he had made several reports to the appellant he did not support this allegation with any proof; in any event he conceded during cross-examination that the appellant company checked its lines and routinely maintained them. He alleged that the cables were 12 to 15 feet from the ground but again he never produced any evidence to show that this was the case. He also admitted that since he was not an engineer he could not tell the minimum height below which the cables could not be allowed to sag or hung.

On the other hand, the appellant's witness produced documentary proof to show that the electricity line was properly maintained; in particular he produced documentary evidence to show that the line had been

inspected and maintained on 15th May, 2007, a little over two weeks before the accident, and according to that report there was no sag and that none of the conductors was in a poor state and neither the conductors or the poles required any sort of repair. The lines, according to the witness were maintained at the interval of six months. The conductors according to the witness were 19 feet from the ground.

He testified that the deceased lifted the staff and either touched the live cable or he brought it near the cable bringing it within the electricity field considering that this was a high voltage line; such line, according to him, could electrocute without even touching it. The witness admitted that every cable has some sag but it cannot be lower than 17 feet from the ground. This particular line had such a sag but the minimum length from the ground to the sag level was 19 feet.

I cannot find anything on record to doubt the appellant's evidence as far as the distance between the cables and the ground is concerned. More importantly, its evidence in this respect was not controverted and as noted the 2nd respondent did not prove that the cables were either lower than required level or the posts were bent or had fallen at the time the accident occurred.

The evidence that the deceased touched the live cable with a raised staff is more plausible. The surveyor himself testified that had the deceased not held the staff in upright position the accident would not have occurred. It must be noted that it was also the evidence of the surveyor that the staff was 5 metres long which is equivalent to approximately 16.7 feet. If it was raised by a mere two feet from the ground it would certainly touch a cable hanging at 19 feet above the ground.

If the deceased touched the cable or brought the measuring staff within its proximity as to cause the fatality, it cannot be said that the appellant was to blame particularly since it was proved that those cables were maintained at their appropriate and legal level. The inevitable conclusion that I must reach is that the 2nd respondent was solely responsible for the deceased's predicament and was therefore wholly to blame for the accident. It follows that the appellant's appeal succeeds.

The maxim volenti non fit injuria was pleaded by both the appellant and the 2nd respondent and it is necessary that I address it here. It is true that where one relies on the breach of a duty of care owed by the defendant to him, it is a good defence that that the claimant consented to that breach of duty, or knowing of it, voluntarily incurred the whole risk entailed by it. In such a case the defence of assumption of risk, traditionally expressed in the maxim volenti non fit injuria applies. ***See Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/4, at paragraph 69***.

It has, however, been held that the question is not whether the injured party consented to run the risk of being hurt, but whether he consented to run that risk at his own expense so that he should bear the loss in the event of an injury; the consent that is relevant is not consent to the risk of injury but the consent to the lack of reasonable care that may produce that ***risk (see Kelly v Farrans Ltd [1954] NI 41 at 45 per Lord Macdermott,*** cited at paragraph 69 of Halsbury's Laws of England (supra).

My assessment of the evidence at the trial is that the deceased did not consent not care or take any reasonable care on the risks involved in the assignment he was given; he was not even aware of such risks. It has been held that inorder to establish a defence of *volenti non-fit injuria* the claimant must be shown not only to have perceived the existence of danger but must also have appreciated it fully and voluntarily accepted the risk. (***See the cases of Thomas v Quartermaine (1887) 18 QBD 685, CA; Letang v Ottawa Electric Rly Co [1926] AC 725, PC and Williams v Birmingham Battery and Metal Co [1899] 2 QB 338, CA)***

Further, the question whether the claimant's acceptance of the risk was voluntary is generally one of fact, and the answer to it may be inferred from his conduct in the circumstances. The inference of acceptance is more readily to be drawn in cases where it is proved that the claimant knew of the danger and comprehended it (**See Thomas v Quartermaine (1887) 18 QBD 685 at 696, CA, per Bowen LJ)**, for instance where the danger was apparent or proper warning was given of it and where there is nothing to show that the claimant was obliged to incur it **(See Sylvester v Chapman Ltd (1935) 79 Sol Jo 777,** where it was held that the plaintiff unnecessarily put his hand near the bars of a leopard's cage).

Most importantly, as far as this appeal is concerned, where the relationship of employer and employee exists the defence of **volenti non fit injuria** may be theoretically available, for instance where the employment is necessarily dangerous the employee must take such risks as the employer cannot reasonably eliminate,(for instance in **Withers v Perry Chain Co Ltd [1961] 3 All ER 676, [1961] 1 WLR 1314, CA**, where the plaintiff was susceptible, to her and her employer's knowledge, to dermatitis, and her employer found work for her which entailed a slight risk of the disease, and the employer was held not liable for her contracting it) but it is unlikely to succeed if the employee was acting under the compulsion of his duty to his employer; in such circumstances acceptance of the risk will rarely be inferred **(see Bowater v Rowley Regis Corpn [1944] KB 476, [1944] 1 All ER 465, CA).** The rationale is that owing to his contract of employment an employee is not generally in a position to choose freely between acceptance and rejection of the risk, and so the defence does not apply in an action against his employer. Without belabouring the point the defence of volenti non fit injuria was not available to either the appellant or the 2nd respondent.

My humble opinion is that as the deceased's employer, the 2nd respondent owed the deceased a duty of care which it failed to exercise as circumstances demanded; I say this because the deceased was not a professional of the particular skill he was engaged in, albeit on ad hoc terms; he would not therefore have been expected to meet the standard of an ordinary skilled man exercising and professing to have the special skill in question. By tasking him to undertake tasks which ordinarily would have been exercised by a professional without considering the dangers associated with such tasks, the 2nd respondent exposed the deceased to danger of injury to which he succumbed.

The only other question that this court is left to grapple with is the extent of damages payable to 1st respondent; having found that it was not to blame for the accident, the appellant may be less interested in the answer to this question but I have to consider it here for two reasons; first, if an appeal was to be preferred against this decision, the second appellate court would be interested to know how much this court would have awarded against the appellant in the event it is held to be culpable; secondly, this judgment applies to **Civil Appeal No. 67 of 2010** in which the 2nd respondent is the appellant and to the extent that it is a party to this appeal where it has been held to be solely responsible for the accident for exposing the deceased to a risky working environment, it is necessary that the question of compensation is discussed and determined in this appeal.

In considering this question I am aware of the general principle that assessment of damages is an exercise that is well within the discretion of the trial judge or magistrate and the appellate court will only interfere where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms:-

> ***"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."***

The extent of damages has to be considered under Fatal Accidents Act for the benefit of the deceased's dependants and the Law Reform Act for the benefit of his estate.

The deceased was employed and according to her mother he was earning the sum of Kshs 3,900/= per month prior to his demise. This figure should not be disputed at least from the 2nd respondent's perspective because when it made its report to the District Labour Office of the deceased's death on the basis that he died while in the course of his employment, this is the figure it gave as the deceased's monthly salary. Being the deceased's employer and having presented this figure to the Labour Office as the deceased's monthly earnings, the second respondent could not turn around and dispute the same figure in the proceedings in the subordinate court. **Section 14** of the **Workmen's Compensation Act, Cap. 236 (Repealed)** under which the report to Labour Office was made provides as follows:-

14. (1) Notice of an accident, causing injury to a workman, of such a nature as would entitle him to compensation under this Act shall be given in the prescribed form to the labour officer of the area or, where there is no such officer, to the District Commissioner of the district by the employer of such workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured.

(2) When the death of a workman from any cause whatever is brought to the notice, or comes to the knowledge, of his employer, the employer shall, as soon as practicable after the occurrence of the death, give notice thereof in the prescribed form to the labour officer of the area or, where there is no such officer, to the District Commissioner of the district, in which the workman was employed; and such notice shall state the circumstances of the death of the workman if they are known to the employer.

3. Any employer who, without reasonable cause, fails to comply with the provisions of subsection (1) or subsection

4. shall be guilty of an offence and liable to a fine not exceeding one thousand shillings.

5. Nothing in this section shall prevent any person from making a claim for compensation under this Act.

6. The provisions of section 219 of the Criminal Procedure Code shall not apply in respect of any offence against this section.

Of particular interest to this appeal is **subsection (2)** of **the section 14 under** which the employer has the obligation to give notice of the death of an employee in a prescribed form. Such form was filled and presented by the 2nd respondent to the District Labour Office on 5th June, 2007 and amongst the details which it included in the form was the deceased's monthly earnings which were specified as Kshs 3,900/=.

Based on the information given, the Labour Office compensated the 1st respondent the sum of **Kshs 234, 000/=** which is equivalent to the deceased's sixty months earnings; the calculation of this compensation is provided by **section 6** of the Act which states:-

Compensation in Fatal Cases.

6. ***Where death results from the injury -***

(a) if the workman leaves any dependants wholly dependent on his earnings, the amount of compensation shall be a sum equal to sixty months earnings or thirty-five thousand shillings whichever is the greater; but where in respect of the same accident compensation has been paid under the provisions of section 7 or section 8 there shall be deducted from the sum payable under this paragraph, any sums so paid as compensation;

(b) if the workman does not leave any dependants wholly dependent on his earnings, but leaves any dependants in part so dependent, the amount of compensation shall be such sum, not exceeding in any case the amount payable under paragraph (a), as may be determined by the court to be reasonable and proportionate to the injury to such dependants;

(c) if the workman leaves no dependants, the reasonable expenses of the burial of the deceased workman, not exceeding the sum of two thousand shillings, shall be paid by the employer.

The question as to how much the deceased was earning before his life was fatally terminated was thus well settled.

Apart from the notice by the deceased's employer of his death, the other information submitted to the Labour Office was a certificate of dependency which showed that the 1st respondent was the deceased's

mother and the degree of her dependency on her deceased son was assessed at 100%. In fact, considering the provisions of section **6(a)** the amount awarded was calculated on the basis that the 1st respondent was wholly dependent on the deceased's earnings.

Coming back to the evidence at the trial, the 1st respondent testified that the deceased used to support her in buying food and paying her rent. Taking this evidence into account, the learned magistrate assessed the dependency ration to be a third of the deceased's monthly earnings. In my humble view, the learned magistrate was correct and I cannot find any evidence to suggest that she ought to have awarded anything less than this; if anything, going by the District Labour Office's assessment of the 1st respondent's dependency, the 1st respondent might have made had a case for a higher award under this head but since she did not take up the issue I would leave it at that and only hold that in the circumstances of this case, the adoption of a third of the deceased's salary as the amount the deceased spent on his mother was a reasonable estimation.

On the question of the multiplier, the deceased was aged 23; this was clear from his mother's testimony and also from the death certificate submitted and duly admitted in evidence in support of her case. The 2nd respondent itself presented this age as the age of the deceased when it notified the Labour Office of his death and thus the deceased's age ought not to have been an issue.

Based on this age, the learned magistrate adopted a multiplier of 27 years noting that this the number of years the deceased would have worked.

There was no suggestion that the deceased was not leading a healthy and a happy life and so he could probably have lived and worked for the next 27 years as suggested by the learned magistrate; however, the learned magistrate did not taken into consideration the preponderances and the vicissitudes of life associated with the nature of the deceased's job and life generally. In my humble view, if this fact had been taken into account, a multiplier of 25 years would have been adopted as the most reasonable multiplier.

The award under the **Fatal Accidents Act** for **loss of dependency** would thus be **Kshs (3,900 x 12 x 1/3 x 25) = Kshs 390,000/=**

Coming back to the computation of damages under the Law Reform Act, one has to consider several heads one of which is the loss of expectation of life; under this head a conventional sum of Kshs 100,000/= is usually awarded. At the age of 23, the learned magistrate's award of this sum is reasonable and consistent with the awards made under this head for a person of the deceased's age. I also note that this is the sum proposed by the 2nd respondent in its submissions filed in the magistrate's court on the question of quantum under this head. The 2nd respondent relied on the decisions in **Mombasa High Court Civil Case No. 539 of 1994 Muitha Mwalili versus Ulayan Edward & Lucy Mary Linck and High Court Civil Case No. 56 of 2000, Nelson Namu Elija versus James Nganga Mbau & Another** where awards of Kshs 100,000/= and 70,000/= were made respectively. I would not disturb the award of Kshs 100,000/= made by the learned magistrate under this head.

On **pain and suffering** the court awarded the sum of Kshs 10,000/= which is also the sum proposed by the 2nd respondent relying on the decision of **Nakuru High Court Civil Case No. 80 of 1998, Joseph Wanjira Njogu versus Mary Wangari Kungu**.

It is curious to note that even after the 2nd respondent proposed an award of this sum under this head in the lower court, and which the latter awarded as proposed, it has sought to challenge the same award on the basis that the deceased died instantly.

It is true that where death is instant, there is no basis for the award of pain and suffering; however, the 2nd respondent proposed to pay this amount as due to the 1st respondent under this head. It cannot, in my view turn around against its own proposed award at the appellate stage. For this only, I will not interfere with the award of the sum of Kshs 10,000/= under the head of pains and suffering.

Ordinarily the final award due to the 1st respondent would have been as follows:

1. Damages for loss of dependency……..Kshs 390,000.00

2. Damages for loss of expectation of life…..Kshs 100,000.00

3. Damages for pain and suffering……..Kshs 10,000.00

Total **Kshs 500,000.00**

It was admitted, however, at hearing that the 1st respondent had received the sum of Kshs 234,000/= under the Workmen's Compensation Act. **Section 25(1)** of the **repealed Act** acknowledged that despite the compensation provided for under that Act, an injured party was free to institute civil proceedings in court to recover damages. Where such damages were recovered after any compensation had been made under the Act, then it was incumbent upon the court awarding damages to take into account the amount awarded under the Act. The relevant provisions of that Act provided as follows:-

> ***Proceedings Independently of This Act.***
>
> ***25. (1) Where the injury was caused by the personal negligence or wilful act of the employer or of some other person for whose act or default the employer is responsible, nothing in this Act shall prevent proceedings to recover damages being instituted against the employer in a civil court independently of this Act:***
>
> ***Provided that -***
>
> ***i. if damages are awarded after compensation has been paid, the amount of damages awarded in such proceedings shall take into account the compensation paid in respect of the same injury under this Act;***
>
> ***ii. a judgment against the employer in such proceedings shall be a bar to proceedings under this Act in respect of the same injury at the suit of any person by whom or on whose behalf the proceedings against the employer were taken.***
>
> ***(2) If, in proceedings independently of this Act or on appeal, it is determined that the employer is not liable under such proceedings, the court in which such proceedings are taken or the appellate tribunal may proceed to determine whether compensation under this Act is liable to be paid to the plaintiff, and may assess the amount of compensation so payable, but may deduct from such compensation any extra costs which in the opinion of the court or appellate tribunal have been incurred by the employer by reason of the proceedings having been taken independently of this Act.***

The award in the civil proceedings was made after the repeal of the **Workmen's Compensation Act** and the question is whether the court ought to have considered the provisions of **section 25(1)(i)** of the Repealed Act and reduced the amount awarded by Kshs 234,000/=which is the sum awarded under the repealed Act.

In my humble view, when the 1st respondent received the compensation under the repealed Act, she thereby assumed the obligation or liability that came along with such an award; that obligation was that in the event any award for damages was made in court, then the amount the court awarded would take into consideration the award made under the repealed Act.

It follows that despite the fact that the award in court was made after the repeal of the law under which the 1st respondent recovered her initial compensation, that compensation ought to be taken into account and in this respect I would agree with the learned counsel for the appellant that **section 23 (c) and (d)** of

the **Interpretation and General provisions Act, Cap. 2** would be applicable. That law provides as follows:-

> ***Provisions respecting amended written law, and effect of repealing written law***
>
> ***23***
>
> ***(1) …***
>
> ***(2)…***
>
> ***(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—***
>
> ***(a) revive anything not in force or existing at the time at which the repeal takes effect; or***
>
> ***(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or***
>
> ***(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or***
>
> ***(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or***
>
> ***(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.***

I should add that **section 23 (3) (c)** would also be applicable in the sense that much as the repeal of the previous law could not affect the compensation made under the repealed Act it could not also affect the taking into account of the amount of compensation in determining the award of damages subsequently made in court. In my humble opinion, any other interpretation that would tending to award general damages in court without due consideration to the award already made under the repealed Act would be not only be absurd but would also amount to double compensation for the same claim.

It must be remembered that the award of damages for tortious acts should, so far as any monetary award can do so, restore the claimant to the position in which he would have stood but for the defendant's wrong doing; they are not meant to enrich the claimant unjustly.

For the reasons I have given I would deduct the sum of Kshs 234,000/= from the sum of Kshs 500,000/= and award the 1st respondent the difference. Accordingly, I would allow the appellant's appeal and substitute the award of Kshs 531,000/= with the award of Kshs 266,000/= as against the 2nd respondent only plus costs and interest from the date of the judgment in the lower court. The appellant shall have the costs of the appeal.

Dated, signed and delivered in open court this 3rd day of June, 2016

Ngaah Jairus

JUDGE