



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO.159 OF 2009**

**R K O**

**E M P W**

Suing as the Administratrix of the

Estate of the late **J O O**.....**PLAINTIFF**

**VERSUS**

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

**JUDGMENT**

**Introduction**

The plaintiffs brought the suit as the legal representatives of the estate of the deceased J O O. The deceased was an employee of the defendant company who died in the course of his duty with the defendant. He was electrocuted on the 15<sup>th</sup> November, 2006 while he was on top of an electric pole while fixing a fault.

According to the plaintiffs, the defendant switched on the power while the deceased was still working on the pole as a result of which he was electrocuted and suffered fatal injuries. They have sued the defendant for damages both under the Fatal Accidents Act and the Law Reform Act which are particularized as under:-

- a. **General damages for pain, suffering and loss of amenities.**
- b. **Special damages of Kshs.100,000/-.**
- c. **Loss of expectation of life.**
- d. **Costs of the suit.**
- e. **Interests on (a), (b) and (c) above at court rates.**

The claim is contained in a plaint dated 17<sup>th</sup> September, 2009. The plaintiffs blame the defendant for negligence as particularized in paragraph 5 of the plaint as follows:-

- i. **Switching on the power while the deceased was working on an electric pole.**
- ii. **Failing to warn the deceased before switching on the power.**
- iii. **Switching on electric power while fully aware that the deceased was still on top of electric pole.**
- iv. **Allowing the deceased to work in a dangerous environment.**
- v. **Failing to provide the deceased with protective gear to avoid his being electrocuted.**
- vi. **Failing to provide the deceased with enough supporting devices to ensure that he was safe and could not therefore fall onto the ground in the event of such an accident occurring.**
- vii. **Failing to offer enough supervision to its employees and staff while they were engaged in the course of its employment.**
- viii. **Failing to establish sufficient system of communication between its employees to ensure that the accident did not occur.**

By a defence dated 14<sup>th</sup> October, 2009, the defendant denies the plaintiff's claim. It denies that the deceased was its employee, was engaged in lawful employment by it to work on top of an electric pole, that it was negligent as a result of which the accident occurred and that it breached any statutory duty of care upon the deceased.

In the alternative and without prejudice to the foregoing the defendant denies that the accident was solely and/or substantially contributed by it and avers that the same was substantially contributed by the deceased by touching a live wire, placing himself dangerously on an electric pole, ignoring warnings and reprimands from his supervisor, walking and/or standing without the presence of mind, intentionally and experimentally causing harm to himself, not having due regard to his own safety and otherwise causing the accident.

In addition, the defendant denies that the deceased was at the time of death aged 40 years and in good health and earned a gross salary of Kshs.41,772/- per month. It also denies that any special damages should be paid to the plaintiff.

In a Reply to Defence dated 26<sup>th</sup> October, 2009, the plaintiff reiterates the claim as set out in the plaint and in addition denies that the deceased was substantially or at all to blame for the accident.

## **THE EVIDENCE**

### **The plaintiff's case**

R K O testified as PW1 in the plaintiff's case. At the time of her testimony she was a nurse at **[particulars withheld]** Hospital. She testified that she was the wife of the deceased who died in the year 2006. Before filing the suit, she obtained a Limited Grant of Letters of Administration jointly with her sister E M P W which she produced in court.

Her testimony was that the deceased was working with Kenya Power and Lighting Company (KPLC), the defendant herein. On the fateful day in the afternoon, she was informed that her husband had been involved in an accident at Kitale where he had gone to work to repair some power lines. She proceeded to Kitale and found the body lying at Mount Elgon Hospital where she was informed that he had been electrocuted. She produced into evidence the deceased's Death Certificate.

PW1 testified that the deceased was initially employed by the defendant as an artisan and produced a letter of employment and other bundles of employment letters in proof that the deceased worked for the

defendant. Her evidence was that the deceased was aged 40 years and in good health. She also produced a bundle of payslips showing what the deceased was earning. That of June, 2006 showed that his basic pay was Kshs.48,212/-, owner/occupier allowance of Kshs.23,650.00, non-designated driver's allowance of Kshs.2,500/- and other allowances which varied from time to time bringing the gross pay to Kshs.76,976/-.

Both were blessed with three children namely Y A then aged 16 years, L M then aged 11 years and G E A aged 3 years. She produced the original birth certificates of the second and third children and a birth notification card for the first child in proof of their said ages.

According to PW1, the deceased was the sole breadwinner of the family. After his death the defendant withdrew the medical cover which they were enjoying. She now cannot adequately cater for her heart condition from which she suffers. She also testified that her son suffers from ulcers. The death of her husband robbed the entire family emotional support in addition to economic support they enjoyed prior to his death. Her testimony was that the 1<sup>st</sup> born was a 4<sup>th</sup> year student pursuing a law degree and has since been borrowing loans to cater for school fees. The second born was a second year student at **[particulars withheld]** University while the 3<sup>rd</sup> born was in standard five. She urged the court to compensate her for the untimely death of her husband and for the pain and suffering she has undergone.

In cross-examination, she confirmed she did not witness the accident and that the deceased had worked for the defendant since 1991 during which period he had never had another accident. She stated that she had no evidence to prove that the defendant was negligent. She also stated that when she went to view the body on the material date she found it still in the work uniform which comprised a coat and boots.

**PW2**, R N S testified that on 15<sup>th</sup> November, 2006 at about 12.15 p.m. he was at Maili Tisa and the electricity power had been switched off since the previous morning. KPLC workers were repairing the same. He recalled that one of the workers was on top of an electric pole and he suddenly saw him drop on the ground and he then realized that the power must have been switched on and the worker electrocuted. According to PW2 it is the deceased's core workers who switched on the power whilst the deceased was still working atop the electric pole. He testified that the deceased died instantly.

In cross-examination, PW2 stated that he did not report the accident to the police but added that he was at the scene with KPLC workers when the accident occurred.

### **Defence Case**

**DW1**, H E O testified that he worked with KPLC in Eldoret as a supervisor. He had worked with the defendant for 36 years. He knew the deceased J W O O whom he confirmed was since deceased. He testified that on 15<sup>th</sup> November, 2006, himself together with the deceased and S R were working at Cheragany Power Station fixing some power equipment. Both the deceased and S R were on separate ladders. Samuel no longer worked with the defendant. He testified that suddenly the deceased lost consciousness and he saw him being brought down the ladder by his colleagues who lay him on the ground on his back and started administering first aid. According to DW1a colleague of the deceased one J N told him that the deceased had fainted. The deceased was still in his helmet, a blue over coat and protective boots. The same were removed from him.

DW1 testified that he did not see any indication on the deceased's hands that he had come into contact with a live wire. He asked Njoroge to take him to hospital and he was taken to Mount Elgon Hospital. After a short while Njoroge called him to tell him that they were in hospital and the deceased was being attended to by doctors. In a short while, Njoroge called him again to tell him the deceased had died. He in turn informed his seniors. He testified that he later went to the hospital where they explained to the doctors that there was no exposure to the circuit of the equipment at the substation where the deceased was working. He therefore reported the matter to the police. The body was later moved to Moi Teaching and Referral Hospital where a postmortem was conducted on it. DW1 testified that the postmortem concluded that the deceased had died of electrocution.

It was DW1's evidence that the live wire at the station where the deceased was working was 8 feet from the exact point the deceased was; and since the deceased was on a ladder he could not have come into contact with the said live wires.

In cross-examination, DW1 reiterated that the deceased died of electrocution. He stated that he was standing between 20 to 30 metres from where the deceased was at the time he fell off the ladder. He stated that power lines are switched off depending on the voltage of the power. And that where he was working there was no need to switch off the power. He added that since the deceased was working 8 feet from the wire, there was need to switch off the power. He was quick to add that he had no expertise on what he had told the court.

In re-examination, DW1 stated that the power lines are switched off or on depending on the voltage of the wires. He added that a person works closer or further from a wire depending on the voltage of the power. He stated that the defendant ensures the safety of all the workers who work on power lines.

## **SUBMISSIONS**

Those of the plaintiff are dated 1<sup>st</sup> October, 2014 and were filed on 2<sup>nd</sup> October, 2014 by Mwinamo Lugonzo Advocates. On liability it is submitted that the plaintiff was able to demonstrate that the accident leading to the death of the deceased was occasioned by the negligence of the defendant and/or servants/employees who switched on the power when the deceased was still working on wires as a result of which he was electrocuted. It was submitted that the deceased was not warned that the power would be switched on and it was therefore willful on their part to so negligently switch on the power. In addition, it was submitted that the deceased was not provided with sufficient protective gear which would have enabled him to work in a safe environment thus avoid electrocution. As a result, he died of shock. The court was referred to the case of **Nakuru High Court Civil Appeal No. 38 of 1995, Sokoro Saw Mills Ltd. Vs Benard Muthambi Njega** where it was held that the place of employment should be safe as to the exercise of reasonable skill and care would permit. It was urged that liability be entered at 100%.

On quantum, it was submitted that PW1 had demonstrated that she and her three children were the dependants of the deceased and damages were urged under the following heads:-

### **(i) Loss of dependency**

It was submitted that as per the pay slip of October, 2006 the deceased was earning a gross salary of Kshs.94,857.76/- and a dependency ratio of 2/3 and a multiplier of 20 years would suffice. In this regard the court was referred to the cases of **John Mwangi –Vs- Patrick Kariuki&Ano.Nakuru HCCC No. 99 of 1994** and **Mrs. Miriam Sei& 2 Others –Vs- John Njenga Kahuo&Ano.Kakamega HCCC No. 12 of 1985.**

### **(ii) Damages for loss of expectation of life**

An award of Kshs.200,000/- was thought as reasonable. And in this regard, the court was referred to the case of **Mwala Katana Mwangongo –Vs- KPTC** in which the deceased died at 26 years and damages of Kshs.150,000/- were awarded under this head. The same amount was awarded in the case of **Kiptaman Lockorir –Vs- Kadenga Kenga& Another, Mombasa HCCC No.478 of 1994.**

### **(iii) Damages for pain and suffering**

Under this head a sum of Kshs.100,000/- was claimed.

### **(iv) Funeral expenses and special damages**

Under this head it was submitted that receipts for funeral expenses are hardly reserved and it was thought that a sum of Kshs.100,000/- would suffice.

The defendant's submissions were dated 1<sup>st</sup> October, 2014 and filed on 2<sup>nd</sup> October, 2014 by Kibichy & Company Advocates. On liability, it was submitted that the plaintiff did not discharge the burden of proof as required by Sections 107 and 108 of Evidence Act particularly in that it was not demonstrated how negligent the defendant was in causing the accident that caused the fatal injuries on the deceased. It was also submitted that no witness was called to corroborate the plaintiff's evidence particularly that it was the defendant who caused the accident.

On quantum, it was submitted that the plaintiff did not demonstrate how she had arrived at the figure of Kshs.100,000/- which she submitted she was entitled to as funeral expenses; and being special in nature the funeral expenses ought to be specifically pleaded and proved which was not done.

For damages for loss of expectation of life, it was submitted that the court will ordinarily give a lump sum figure and a figure of Kshs.50,000/- was thought as reasonable.

For pain and suffering, it was submitted that a sum of Kshs.10,000/- was sufficient as the deceased died instantly.

For damages under the Fatal Accidents Act, learned counsel for the defendant submitted that dependency is a question of fact and in the instant case the plaintiff had not proved with any documentation that the deceased had three children as pleaded in the plaint by producing of their birth certificates. Had that been proved, it was submitted that taking into account that the deceased died aged 40 years his minimum wage was estimated at Kshs.41,722/-. It would have been expected he would have worked for another ten years until he attained the age of 50 years. As he was married, the dependency ratio should be a 1/3. Hence, the tabulation is given as;

$$10 \times \frac{1}{3} \times 12 \times 41,722/- = 1,668,880/-.$$

The defence relied on the case of Nyeri Court of Appeal Civil Appeal No.345 of Ann Wambui Ndiritu Kiriamburi –Vs- Joseph Kiprono Kipkoi & Another.

### **EVALUATION OF EVIDENCE**

Having considered the respective submissions, I shall consider the case under two heads:-

#### **(a) Liability**

It is my view that the plaintiff discharged the burden of proving on a balance of probability that the defendant at all the material time was to blame for the accident that fatally injured the deceased on the following grounds:-

**One**, although PW1 was not at the scene, PW2 was an eye witness on how the deceased suddenly fell off the electric pole and died. According to PW2 when the deceased fell off he rushed to the scene and confirmed that he had already died. That cast doubt on DW1's evidence that the deceased fainted and first aid was administered at the scene.

**Two**, it is the defendant's witness who introduced the issue of a postmortem that was conducted on the body of the deceased person. According to DW1 he maintained both in examination in chief and on cross-examination that the postmortem done at the Moi Teaching and Referral Hospital concluded that the deceased died of electrocution. This vindicated the plaintiffs' case.

**Three**, in an apparent contradiction of his evidence DW1 in cross-examination indicated that the power line had not been switched off at the time the deceased was working. His explanation was that since the deceased was 8 feet from the live wire he could not have come into contact with it. That in my view is a far-fetched assertion because the deceased could not have been working on anything else other than a wire. This fact is vindicated by his evidence in chief because he testified that the deceased together with a Mr. S R were working on power equipment. Earlier in evidence in chief he testified that the power was

off. Hence, he changed the story in a desperate move to save the defendant, whereas it is common sense that the major component electrical power equipment are wires, and so the deceased could not have been fatally injured by anything else other than the power wires.

**Four**, DW1 was unable to substantiate his assertion that there was no need to switch off the power when the deceased was working on wires. He purported to wear the gown of an expert in the field of electricity in how power lines work and also how the voltage of power is measured yet he was only a supervisor whose qualifications were not given and did not exhibit any knowledge of what he purported to say in that field. For that reason, his evidence that the deceased could not have been electrocuted did not rebut the plaintiff's case that the deceased died of electrocution.

**Five**, the defence did not call any of the workers who were working with the deceased at the time he met his death who probably would have shed light on the circumstances leading to the death of the deceased. This left DW1's evidence so bear and weak as to controvert the plaintiff's case.

**Six**, the death certificate produced as P .Exhibit 2 in respect of the deceased made a conclusion of the cause of death as *'postmortem findings are suggestive of electrocution.'* This settles the case that the deceased died of electrocution.

In view of the foregoing, I have no doubt in my mind that in whatever manner that the deceased was electrocuted the defendant was negligent in either not switching off live wires or in switching on the power as the deceased worked. In Common Law, an employer owes a duty of care to his employee. See **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 15 at paragraph 560:-**

**"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to an unnecessary risk."**

But the duty of care must be within specific confines of the law. It must be reasonable and foreseeable in circumstances and situations in question. **See KreativeRoses Ltd –Vs- OlpherKerubo Sumo (2014) @ KLR, HC at Nakuru Civil Appeal No.151 of 2008 in which Omondi, J. while referring to Halsbury's Laws of England stated:-**

**"The Court of appeal quoting Halsbury's Laws of England in the case of Mwanyale Said T/A Jomvu Total Service Station stated as follows:-**

**"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of relation of employer and employee to compensate him for any injury which he may sustain in the work upon which he is engaged. The employer is not liable to the employee for damages suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety, exercise of due care and skill suffices."**

In the case of **Segwick Kenya Insurance Brokers –Vs- Price Water House Coopers Kenya, High Court Civil appeal No.720 of 2006 (Nairobi)** the learned Lesiit, J. cited the case of **Caparo Industries Ltd PLC –Vs- Dickman & Others (1990) 1 All ER, 658**, where the House of Lords held thus:-

**"The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty of care. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered is the kind of damage which the defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care existed."**

In view of the above cited case law, the accident herein was foreseeable as a matter of common sense in that live wires automatically would cause electrocution if a person comes into contact with them. As such, the defendant was expected to be extremely careful so as to ensure that the deceased does not come into contact with them and so provide to him a safe working environment. It failed in this test reasons wherefore I find it 100% liable.

**(b) Quantum of damages**

**(i) Damages for loss of dependency.**

PW1 produced the birth certificates of the three children born by the deceased namely L M O, Yvonne T A, and G E A. She was also able to demonstrate that she was the mother of the children as in the birth certificates of the children the deceased is indicated as the father and PW1 as the mother. She also produced into evidence Grant of Letters of Administration Intestate which showed that she was the legal representative of the estate of the deceased and so had the locus standi to bring the suit on her behalf and on behalf of the estate of the deceased. On the age of the deceased, the same is clearly shown as forty (40) years on his death certificate that was produced in court.

As to the deceased's earnings five payslips were produced as exhibits 4(a) to (e), being for the months of May, June, July, August and September, 2006. The latest being of September, 2006 gave the basic pay as Kshs.48,212/-. Together with allowances the gross pay was Kshs.88,091.08/-. The total deductions were Kshs.61,181.08/- leaving the net pay to Kshs.26,910/-. Incidentally, the net pay varied from time to time as follows:- Kshs.31,580/-, Kshs.30,600/-, Kshs.22,880/- and Kshs.13,860/- for the months of May, June, July and August, 2006 respectively depending on the amount of deductions. However, the basic pay remained constant at Kshs.48,212/-. It is prudent to tabulate the deceased's earnings based on the basic pay which is constant and also given that deductions do not ordinarily go to the benefit of the dependants.

As for the dependency ratio, the deceased had a wife and three children. And would be expected that 2/3 of his earnings was used to support the family. Hence a ratio of 2/3 is most prudent to use.

As for the multiplier applicable, the deceased died at 40 years. He would currently be aged 49. At present the retirement age for public officers is sixty (60) years. The deceased would have worked for another 20 years. Given unforeseeable misfortunes which accompany somebody's life it is only fair to tabulate the damages with a multiplier of twelve (12) years.

A good comparable case is that **KitampanLockorir –Vs- KadengaKenga and Another HCCC 478 of 1994 Mombasa** in which the deceased died at forty five (45) years and a multiplier of ten (10) was used. In **John Mwangi –Vs- Patrick Kariuki&Another HCCC No.99 of 1994 Nakuru Rimita J**, applied a dependency ratio of 2/3 and a multiplier of 12 in a case where the deceased had died aged 26 years.

**(ii) Damages for loss of expectation of life**

The courts will ordinarily give a global sum under this head. It is without much emphasis that the deceased's life was suddenly cut short thus frustrating the legitimate expectation of his family that fully relied on him. In that regard I will award a sum of Kshs.150,000/- under this head.

**(c) Damages for pain and suffering**

The evidence on record is clear that the deceased died instantly on electrocution. In that regard, I think he must have suffered some shock that brought him down from the electric pole. I shall therefore award a conservative sum of Kshs.20,000/.

**(d) Funeral expenses and special damages**

A sum of Kshs.100,000/- was pleaded for special damages but no documents whatsoever were produced in proof thereof. It is trite law that special damages must be specifically pleaded and specifically proved.

The plaintiff did not pass this test and I will therefore not award any damages under this head.

As for funeral expenses, the same have been awarded as a matter of course, the rationale being that a dead must be buried and expenses must be incurred in burial preparations. The genesis of the award for funeral expenses is bone from Section 6 of the Fatal Accidents Act which provides as follows:-

**“Funeral expenses may be awarded by way of damages in certain cases. In an action brought by virtue of the provisions of this Act, the court may award, in addition to any damages awarded under the provisions of Sub-section (1) of Section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought”.**

Although the above provision implies that funeral expenses being an incurred expenditure ought to be treated as special damages the tradition of the courts is to award them as a matter of course for the reason I have given. I will accordingly award a global sum of Kshs.30,000.00/- under this head.

### **Conclusion**

It is my view that the plaintiffs have proved their case on a balance of probability and I enter judgment for them against the defendant as follows:-

a. Loss of dependency

Kshs.48,212.00 x 2/3 x12 x12      Kshs.4,628,352.00

b. Loss of expectation of life      Kshs. 150,000.00

c. Pain and suffering      Kshs. 20,00.00

d. Funeral Expenses      Kshs. 30,000.00

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**Total      Kshs.4,828,352.00**  
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e. Costs of the suit and interest thereon

**DATED and SIGNED** this 22<sup>nd</sup> day of June 2015.

**G. W. NGENYE – MACHARIA**

**JUDGE**

**DELIVERED** at **ELDOROT** this 6<sup>th</sup> day of July, 2015.

**By: G. K. KIMONDO**

**JUDGE**

**In the presence of:-**

1. Mr. Mwinamo for the plaintiffs.
2. No appearance for the defendant.