REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. E145 OF 2024
KENYA POWER & LIGHTING COMPANY……..APPELLANT
-VERSUS-
1. SIMON MUKHAYE TABALE
2. AGNES ONGECHA MUNALA
(suing on behalf of the estate of Frida Khabai Tabale……...RESPONDENTS

JUDGMENT

1. On 16 May 2020, Fridah Khavai Tabale (whom I will henceforth refer to simply as Fridah) was playing with her friends at Bangladeshi area, Mikindani in Mombasa when she accidentally stepped on unattended naked live electricity cable owned by the appellant. Fridah, then aged nine, was electrocuted and was pronounced dead upon arrival at Mikindani Medical Centre where she had been taken for treatment.
2. The respondents, who are Fridah's parents attributed Fridah's death to the negligence of the appellant and, therefore, instituted a suit in the magistrates' court for damages. The suit was filed in Mombasa Chief Magistrates' Court as Civil Suit No. of 2020; the respondents claimed damages under the Fatal Accidents Act, cap. 32, for the benefit of her dependants and the Law Reform Act, cap. 26, for the benefit of her estate.
3. At the hearing of the suit only the respondents and their one witness testified. The appellant did not call any evidence.
4. In a judgment delivered on 7 May 2024, the Honourable Nyariki (Senior Resident Magistrate) held the appellant to have been solely responsible for

the accident. As far as the quantum of damages is concerned, the learned magistrate made an award of Kshs. 20,000/= for pain and suffering; Kshs. 2,000,000/= for loss of expectation of life and Kshs. 50,000/= under the head of special damages.

5. The appellant was dissatisfied with the judgment of the lower court and in particular, it has taken issue with the award of Kshs. 2,000,000/= under the head of loss of expectation of life. The grounds upon which this aspect of the judgment has been impugned are set forth in the memorandum of appeal dated 28 May 2024 as follows:

> *"a. **That the Honourable Learned Magistrate erred in law and in fact in awarding Kshs. 2,000,000/= under the loss of expectation of life to the Respondents.***
>
> ***b. That the quantum of damages under the loss of expectation of life is excessive and an erroneous estimate of the damages that may be awarded to the respondent with due regard to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.***
>
> ***c. That the learned Magistrate misdirected himself by failing to consider the evidence and the submissions by the Appellants while arriving at the judgment.***

d. That the Honourable Learned Magistrate erred in law and facts in relying on extraneous evidence in arriving at the decision on the general damages".

6. In a nutshell, the appeal is strictly on quantum of damages and, precisely, on the award made under the head of loss of expectation of life.
7. As far as it is relevant to the question of determination of award of damages, the evidence at the trial was that Fridah died of "*asphyxia due to complication of electrocution*". This is per the certificate of death issued on 28 July 2020 admitted in evidence in proof of Fridah's death. In the certificate, the deceased is indicated to have died at the age of 9 years.
8. The respondents' only witness was one Peter Nyongesa who testified that he was a neighbour to the respondents and that he was present when the deceased was electrocuted. The live cable on which the deceased stepped had remained unattended since 2019 and that despite reports of the danger it posed having been made to the appellant, no remedial action had been taken.
9. The deceased's mother, Agnes, testified and confirmed that the deceased died on the same day of the accident and that her daughter was aged 9 and in class four. The father of the deceased, the 1st respondent in this appeal testified that the deceased was his second born child and reiterated that the

appellant had been informed of the live cable but had not any steps to remove it.

The appellant, as noted, did not call any evidence.

10. The appellate court will not normally interfere with the assessment of general damages by the trial court because it is an exercise that squarely falls within the discretion of the trial court. In applying this principle, the House of Lords in **Davies versus Powell Duffryn Associated Collieries Ltd (1942) AC 601** where held (at page 617) that: -

> ***"In effect the court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere on the ground of excess or insufficiency."***

11. And this principle has been followed in our local jurisdiction and of the many cases where it has been applied, the oft-cited ones include **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 and Kemfro Africa Ltd T/A Meru Express Service, Gathogo Kanini versus A.M.**

Lubia & Olive Lubia (1982-1988) 1 KAR 728. In the former decision the Court of Appeal noted:

> ***"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."***

12. And in the latter case, the same Court said at page 730 that:

> ***"The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages".***

13. Turning to the question at hand, damages under the head of l**oss of expectation of life** are, more or else, an estimate of the quality of the deceased's future but for the accident that terminated his or her life. The award has been described in some circles as 'unreal' or 'arbitrary' but all the

same, it is usually made in deserving cases. **In Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-88) 1KLR 727 Kneller said of this award in the following terms:**

> ***"What has to be valued is the loss of the victims' prospective happiness which Viscount Simmonds in Benham versus Gambling (1941) AC 157 said 'might seem more suitable for discussion in an essay on Aristotelian ethics than in a judgment in a court of law' and because it is an unreal arbitrary award it usually is the current conventional sum…It was £200 in 1941 and £500 in 1968." (See page 730)."***

14. The award under this head is always conventional in the sense that it is pegged on similar awards that have been made in the past. As noted it is an award that is ordinarily made on the assumption that the deceased had the prospects of a happy life. For many years, this award has always been in the region of Kshs 100,000 to Kshs 200,000.
15. In the submissions filed in the lower court on behalf of the respondents, the learned counsel for the respondents sought for an award of Kshs. 200,000/= under this head. In support of his quest for this award, counsel cited the case of **Kenya Power & Lighting Company versus Eric Milongo Owino & Another (2016) eKLR** where the court awarded Kshs.100,000/= under this

head in the year 2020. My search of this case on the Kenya Law website revealed that it is reported as **Kenya Power & Lighting Company Limited v Eric Mlongo Owino (Suing as the Legal Representative of the Estate of Johnstone Owino (Deceased) (2020) eKLR**. The deceased was a 10-year-old boy and his estate was awarded Kshs. 100,000/= for loss of expectation of life.

16. The appellant, on the other hand, countered that a sum of Kshs. 80,000/= would be adequate compensation under this head and, in this regard, the learned counsel for the appellant cited **Chen Wembo & 2 others v I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] KEHC 4070 (KLR)** where the court awarded the estate of a minor aged 12 years Kshs. 80,000/= under this head.

17. In awarding the sum of Kshs. 2,000,000/= under the head of loss of expectation of life, the learned magistrate held as follows:

> ***"I refer to the case of HCCC Civil Appeal No. 18/ 201 7 - Cherangany Hills Ltd & Rodgers Ndaga v BWM (supra) where the court awarded Kshs 200,000. The Deceased was a nine-year old child with his whole life ahead of him. I shall award Kshs 2,000,000/-under this head."***

18. If the respondents asked for Kshs. 200,000/=, under the head of loss of expectation of life, and, as a matter of fact, a similar award was made in the

decision which the learned magistrate cited and relied upon in making his award, there was no basis whatsoever for the award of Kshs. 2,000,000/= under this head. The most the learned magistrate could possibly award is what the respondents sought.

19. Certainly, there is no comparison between Kshs.200,000/= and Kshs. 2,000,000/= except to state that if the award under the head of loss of expectation of life is a conventional award, and the current conventional rate is in the region of Kshs. 200,000/=, the amount of Kshs. 2,000,000/= awarded by the learned magistrate is, no doubt, inordinately high and, to that extent, an erroneous estimate of the damages payable under this head. It is in such a case that this Honourable Court would be entitled to tamper with the lower court's discretion in assessment of damages.

20. As much as assessment of damages has been acknowledged to be the exercise of discretion of the trial court, only reasonable compensations should be made and, for the sake of uniformity, comparable injuries should attract comparable awards. These principles have been espoused in **H West & Son Ltd and Another v Shephard - [1963] 2 All ER 625 where the House of Lords held as follows:**

> ***"My lords, the damages which are to be awarded for a tort are those which "so far as money can compensate, will give the injured party reparation for the wrongful act and for all the***

natural and direct consequences of the wrongful act" (Admiralty Comrs v Susquehanna (Owners), The Susquehanna (Per Viscount Dune-din, [1926] All ER Rep 124 at p 127, [1926] AC 655 at p 661)). The words "so far as money can compensate" point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional." (per Lord Morris of Borth-y-Gest)

21. In their submissions in the lower court, both parties were in agreement that an award under the head of loss of dependency ought to be awarded. They both relied on the case of **Chen Wembo & 2 others v I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased)** (supra) where an award of Kshs. 500,000/= was made for a minor who died at the age of 10 years. The appellant proposed the award of a similar amount to the respondents but, the latter, on the hand asked for the sum of Kshs. 700,000/= citing the loss of value of the shilling and the inflationary trends since the award was made. I would agree with the respondents that the award of Kshs. 700,000/= would be a reasonable award, in the circumstances of the deceased's case.

22. Despite the common position adopted by the parties that an award ought to be made under the head of loss of dependency, the learned magistrate did not make any award under this head. If, per adventure, the learned magistrate's award of Kshs. 2,000,000/= under the head of loss of expectation of life was intended to be a global sum, it would have been reasonable to assume that the award of loss of dependency was covered as part of the global sum and, to that end, there would have been a case for sustaining the award. But the learned magistrate left no doubt that the award was for loss of expectation of life and, thus, there is no basis for the assumption that it was a global award.

23. In the final analysis, and except for the award of pain and suffering and special damages, I am inclined to set aside the learned magistrate's judgment and substitute it with the award of damages as follows:

(a)	Loss of dependency	Kshs. 700,000/=
(b)	Loss of expectation of life	Kshs. 200,000/=
(c)	Pain and Suffering	Kshs. 20,000/=
(d)	Special damages	Kshs. 50,200/=
(e)	Total	Kshs. 970,200/=

24. The respondents will have costs of the suit and interest at court rates calculated from the date of judgment in the lower court. Parties will bear their respective costs in the appeal. Orders accordingly.

Signed, dated and delivered on 21 November 2025

Ngaah Jairus
JUDGE