



Kenya Power & Lighting Company v Ndungu & another (Suing as Legal Representatives of the Estate of Gideon Gachugu Ngugi - Deceased) (Civil Appeal 162 of 2020) [2024] KEHC 7712 (KLR) (Civ) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 162 OF 2020

H NAMISI, J

JUNE 28, 2024

BETWEEN

KENYA POWER & LIGHTING COMPANY APPELLANT

AND

ANNE NJOKI NDUNGU 1ST RESPONDENT

DANIEL NGUGI GACUGU 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF GIDEON
GACHUGU NGUGI - DECEASED**

(Being an Appeal against partial judgement of Hon. P. N. Gesora (Mr.) Chief Magistrate in Milimani CMCC NO. 4552 of 2018 delivered on 30th April 2020)

JUDGMENT

Introduction

1. The Appellants, being partially dissatisfied by the judgement of Hon. P. N. Gesora (Mr) Chief Magistrate dated 30th April 2020 filed a Memorandum of Appeal dated 7th May 2020 on the following grounds:
 - i. That the learned Magistrate erred in law and in fact in awarding the estate loss of dependency in the sum of Kshs 2,700,000/- which was excessive in the circumstances considering that the deceased was a child aged 8 at the time of death;
 - ii. That the learned Magistrate erred in law and in fact in applying a monthly salary of Kshs 45,000 to the estate when no income was pleaded or exhibited by the Respondents;



- iii. That the Learned Magistrate erred in law and in fact in failing to use present practice of courts to award a lump sum and/or global sum to the estate of the deceased considering the circumstances;
 - iv. That the learned Magistrate erred in law and in fact in failing to make a finding on the submissions by the Appellant in his judgment to award a lump sum and/or global sum;
 - v. That the learned magistrate erred in law and in fact in awarding the estate special damages in the sum of Kshs 55,660/- when the same was not proved and/or supported by the Respondent in the primary suit;
 - vi. That the learned Magistrate erred in law and in fact in failing to subject the award of unproved and/or unsupported special damages to contributory negligence;
 - vii. That the learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions in his judgement in regard to award of both general and special damages.
2. On 14th December 2023, directions were given to parties to dispose of the appeal by way of written submissions. Parties complied by filing their submissions dated 23rd January 2024 and 3rd May 2024, respectively.

Brief Facts

- 3. By Plaint dated 8th May 2018, the Respondents instituted proceedings in the trial court against the Appellant, seeking general damages, special damages of Kshs 166,160/-, interest thereon as well as costs of the suit following death of their son by electrocution. The deceased, an 8-year-old boy, was electrocuted as a result of a naked live conductor while he was walking around the Githurai area of Nairobi county.
- 4. The Respondents also filed a Bundle of Documents comprising of Limited Grant of Letters of Administration Ad Litem; Copy of Certificate of Death dated 8th April 2016; Copy of Abstract from Police Records; Letter from the Assistant Chief Mwiki Sub-Location dated 18th April 2016; Post Mortem Request Form and Post Mortem Report; Referral form from St. John's Hospital Ltd dated 7th June 2015; Report to Kenya Power; and copy of Demand Letter.
- 5. The Appellant entered appearance and filed a Statement of Defence denying the Respondents' claims.
- 6. On 7th November 2019, when the matter came up for hearing, parties filed a consent on liability, in favour of the Plaintiff against the Defendant in the ration 80:20. Parties also agreed to file written submissions on the issue of quantum.
- 7. The trial court entered judgement in favour of the Respondent as follows:
 - i. General Damages for pain and suffering Kshs 20,000
 - ii. Loss of expectation of Life Kshs 120,000/-
 - iii. Loss of Dependency Kshs 2,700,000/-
Kshs 2,840,000/=
 - Less 20% contribution Kshs 568,000/=
 - Kshs 2,272,000/=
 - iv. Special Damages Kshs 55,660/=



Kshs 2,37,660/=

Plus Costs and Interest

Analysis

8. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that, "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally".
9. It is not in dispute that an accident occurred on 7th June 2015 in which an 8-year-old boy was electrocuted as a result of a naked live wire conductor that had been left hanging. The incident is confirmed by the Police Abstract. The cause of death is also confirmed by the Post Mortem Report. The deceased was rushed to St. John's Hospital where he was pronounced dead. The Referral Form from St. John's Hospital indicates that the deceased was brought in dead.
10. I have considered the Memorandum of Appeal, Record of Appeal as well as submissions by the Appellant and Respondents dated 23rd January 2024 and 3rd May 2024, respectively. The issue for determination in this appeal is whether the award on quantum should be disturbed.
11. In their submissions, the Appellant has limited submissions to 2 issues; the general damages awarded by the trial court under the head of loss of dependency and the principle of global sum.
12. With regard to the issue of general damages for loss of dependency, the Appellant submitted that the trial Magistrate erred in adopting an income of Kshs 45,000/- for the deceased, who at the time of death was aged 8 years, without any evidence to substantiate the same. Further, the Appellant submitted that the multiplier approach in this particular case was irrelevant and should not have applied at all.
13. In so arguing, the Appellant relied on the cases of *Michael Rimiri M'ingetha & Anor -vs- Zipporah Mukomua M'ituri* [2020]eKLR and *Chen Wembo & 2 Others -vs- I.K.K and Anor* (suing as the legal representatives and administrators of the estate of CRK (deceased) [2017] eKLR. The Appellant submitted that the global sum of Kshs 800,000/- would suffice under the circumstances.
14. Despite lodging this appeal on the ground that the special damages of Kshs 55,660/- were not proved, the Appellant did not submit on the same.
15. On their part, in reiterating the holding in *MMG -vs- Muchemi Teresa*, HCCC No. 519 of 2013, the Respondents submitted that it is not necessary for proof of income to be availed where the deceased is a child. In the cited case the Court used a multiplicand of Kshs 45,000 for a child. Notably, therein, the court stated thus:

"He may not have become a doctor or some other high profile professional; but he appeared endowed with sufficient intelligence to at least attain a first general degree in college which



would have enabled him to secure a reasonable job that would have probably earned him a monthly salary (less statutory deductions) of about Kshs 45,000. By the time he would have secured employment, he would probably be 25 years old.”

16. The Respondents further argued that in the event that the court is inclined to consider a global sum, then the sum of Kshs 2 million would suffice in the circumstances.
17. On the issue of quantum of damages, the Court of Appeal in *Odinga Jacktone Ouma -vs- Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards.”
18. Further, in the Court of Appeal’s decision in the case of *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR, the Court held that:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that: ‘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.’ (Emphasis my own).

19. On the issue of the principle of global sum with respect to the loss of dependency, the Appellant submitted that the trial court ought to have applied this principle in awarding damages to the Respondents. They contend that it would be difficult to arrive at a multiplicand to use in the computation of general damages since no evidence was tendered to support the same. The Appellant relied on 2 cases; *Michael Rimiri M’ingetha & Another -vs- Zipporah Mukomua M’ituri* [2020] eKLR as well as *Chen Wembo & 2 Others -vs- I.K.K. & Another* (suing as legal representatives and administrators of the estate of C.R.K. (Deceased) [2017] eKLR, both in which the global approach was used.
20. On their part, the Respondents relied on the case of *Twokay Chemicals Ltd -vs- Patrick Makau Mutisya & Anor; Machakos Civil Appeal No. 132 of 2016* in which the court upheld a global award of Kshs 1,500,000/= for a minor. The Respondents submitted that since the judgment in the said case was delivered in 2019, the Court in this instance ought to take into consideration the inflationary trends and award Kshs 2,000,000/-.
21. The bone of contention is on the multiplicand used by the trial Magistrate as opposed to the global sum principle.



22. There are a number of decisions as to whether a trial court can be faulted for adopting the multiplier method in assessment of damages. In *Seremo Korir & another vs- SS (Suing as The Legal Representative of the Estate of MS, Deceased)* [2019] eKLR, the court said:

“In the lower court’s judgment, the learned trial magistrate applied the minimum wage scale of Kshs. 12,000/- as the multiplicand. The learned trial magistrate further held that the deceased was a pupil based on a letter from the deceased’s school and that the deceased was 12 years old, a fact that was not contested. It was the appellants’ submission that where the issue of the amount earned by a deceased and their profession is unsettled, courts adopt a lump sum/global sum instead of delving into estimating incomes and professions. On the other hand, the respondent submitted that the learned trial magistrate had the discretion to either adopt the multiplier method or the global assessment method.....

In this case, I am in agreement with the submissions of the respondent that courts have the discretion to apply either the ‘global sum’, ‘separate heads’, or ‘mixed’ approaches in awarding damages and that it is not cast in stone that just because the deceased was a minor, then courts can only apply the global/lump sum approach”

23. Similar position was taken in the cases of *Charles Ouma Otieno & another vs. Benard Odhiambo Ogecha (suing as Brother and Legal Representative and Administrator of the Estate of the Late Oscar Onyango Ogecha (Deceased)* [2014] eKLR, *Chen Wembo & 2 others vs. IKK & another (supra)* and *Oshivji Kuvenji & Another vs. James Mohammed Ongenge* [2012] eKLR.
24. In the case of *Chitabhadhiya Enterprises & Another Vs. Gladys Butali, Kakamega HCCA No. 10 of 2017* the Learned Judge stated as follows after analysing the two methods:

“...A review of past High Court Judgments in Kenya indicated that there is no uniform method of assessing damages for estates of minors for loss of dependency. Some High Court Judges hold the view that both approaches are proper as exemplified by the following holding of Joel Ngugi J in *Kenya Power & Lighting Company Limited Vs E.K.O & Another, Kiambu HCCA No. 169 of 2016 (2018) eKLR* where he said that:“...It thus emerges that superior court are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was in my view therefore upon the discretion of the learned trial magistrate to use the multiplier method in this case. This court cannot review that decision merely because it would have used the global assessment method advocated by other High Court decisions. The learned trial magistrate did not proceed on wrong principles for merely choosing to use the multiplier method and then choosing the minimum wage as the multiplicand...”

25. From the above cases, it is clear, therefore, that the choice of whether to adopt a multiplier or global approach is an issue of discretion of the trial court, to be determined on a case-by-case basis. There is no fixed and definitive method that must be applied and the trial Magistrate cannot be faulted for choosing one way over the other.
26. This notwithstanding, looking at this instant case, the deceased was aged 8 years old at the time of death. However, there was no evidence led as to his future prospects and ambitions other than the Respondents’ averments that the deceased was a bright student. There is no basis, therefore, for the trial court to hold that the deceased would have earned Kshs 45,000 as monthly wages, though the court adopted a multiplier of 15 years taking into account the vagaries and vicissitudes of life.



27. Based on the foregoing, the award made by the trial court ought to be set aside and substituted with an award based on the global sum method.
28. In assessing the appropriate damages herein, I have reviewed cases in which the global sum approach was used. In *Charles Makanzie Wambua vs. Nthoki Munyao & Prudence Munyao* (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased) [2020] eKLR, the Court of Appeal upheld a global award of Kshs 1,320,000.00 for loss of dependency. Similarly, in *Twokay Chemicals Limited vs. Patrick Makau Mutisya & another* [2019] eKLR, the appellate court upheld a global sum of Kshs. 1,500,000.00 for loss of dependency for a minor aged sixteen (16) years. In *Zachary Abusa Magoma vs. Julius Asiago Ogentoto & Jane Kerubo Asiago* [2020] eKLR, the court awarded a global sum of Kshs. 1,500,000.00 for loss of dependency. In *Francis Odhiambo Nyunja & 2 Others -vs- Josephine Malala Owinyi* (suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, a global award of Kshs 1,500,000 was held to be sufficient for loss of dependency of a 17-year-old.
29. Based on these cases and bearing in mind the age of the cases as well as the fact that the deceased herein was aged 8 years, I am of the view that a global sum of Kshs 2,000,000 would be sufficient compensation in the circumstances.
30. On whether the Respondents were entitled to an award of special damages of Kshs 55,660/-, the law is clear that special damages must not only be specifically pleaded but that they must be strictly proved. The Respondents pleaded for special damages amounting to Kshs 166,160/-. However, the Respondents produced receipts at pages 62 –64 of the Record of Appeal showing the following expenses:
 - i. Post Mortem Examination - Kshs 15,000/=
 - ii. Flowers - Kshs 2,500/=
 - iii. Purchase of Coffin and Hiring hearse - Kshs 16,000/=
 - iv. Mortuary Fees - Kshs 11,000/=
 - v. Court fees for Letters of Administration Intestate - Kshs 11,600/=

Kshs 55,660/=
31. The trial Magistrate rightfully noted that these are amounts that were expended and therefore are not subject to contribution. I, therefore, see no reason to interfere with the award of special damages.

Disposition

32. The upshot of the foregoing is that the Appeal succeeds. The judgement of the lower court is set aside and judgement is hereby entered as follows:

General Damages for pain and suffering Kshs 20,000

Loss of expectation of Life Kshs 120,000/-

Loss of Dependency Kshs 2,000,000/-

Kshs 2,140,000/=

Less 20% contribution Kshs 428,000/=

Kshs 2,568,000/=



Special Damages Kshs 55,660/=

Kshs 2,623,660/=

Plus Costs and Interest

33. The costs of this Appeal of Kshs 40,000/- is awarded to the Appellant.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF JUNE 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

....MODI the Appellant

....N/Athe Respondent

