



Kenya Power & Lighting Co Ltd v Koech & another (Suing as the legal representatives of the Estate of the Late Peter Nyoike Kimani) (Civil Appeal E080 of 2022) [2024] KEHC 16315 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E080 OF 2022
HM NYAGA, J
DECEMBER 20, 2024**

BETWEEN

KENYA POWER & LIGHTING CO LTD APPELLANT

AND

WINNIE CHEMUTAI KOECH & MARY WACEKE KIMANI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE PETER NYOIKE KIMANI) RESPONDENT

(Being an appeal from the judgement and Decree of Hon. Rhoda Yator, Principal Magistrate, delivered on 26th May, 2022 in Molo CMCC No. 253 of 2019)

JUDGMENT

1. The appeal herein arises from the aforesaid decision of the lower court wherein the plaintiffs/ Respondents sued the defendant/Appellant seeking for:
 - a. Damages under Fatal Accident Act Cap 32 of the Laws of Kenya and Law Reform Act Cap 20 of the Laws of Kenya for the benefit of the Estate of the deceased.
 - b. Special Damages.
 - c. Costs of the suit.
 - d. Interests on (a) and (b) above from the date of filing of the suit.
2. The plaintiffs'/Respondents' claim arose as a result of a road traffic accident that occurred on 14th August, 2019, wherein one Peter Nyoike Kimani (herein the deceased) while lawfully riding motor cycle registration Number KMET 257 U along Nakuru- Eldoret was hit by a motor vehicle registration No KAV 580 E owned by the Appellant and as a result he suffered fatal injuries.



3. The defendant/Appellant filed a defence to the suit dated 11th February,2020 wherein it denied the Respondents' claim in toto and without prejudice it claimed that if there occurred any such incident on the material day, then the same was caused and/or substantially contributed to by the Deceased's negligence.
4. Subsequent to the close of pleadings and negotiation by the parties, judgment on liability was entered by consent in the ratio of 70:30% in favour of the plaintiffs/Respondents as against the defendant/Appellant. The matter proceeded on the assessment of quantum.
5. At the conclusion of the matter the trial court rendered its decision and awarded the plaintiffs/ Respondents judgment as follows:
 - a. Liability 70:30
 - b. Pain and Suffering Ksh.30,000/=
 - c. Loss of Expectation of life Ksh. 100,000/=
 - d. Loss of Dependency Ksh. 5,184,000/=
 - e. Special Damages Ksh. 87,550/=
 - Sub Total- Ksh. 5,401,550/=
 - f. Less 30% contribution Ksh.1,620,465/=
 - Total- Ksh. 3,782,085/=
6. Being aggrieved with the Judgment of the trial court on quantum, the Appellant filed this Appeal vide its Memorandum of Appeal dated 23rd June,2022 on the following grounds: -
 - a. That the Learned Magistrate erred in Law and in fact in adopting an arbitrary multiplicand which was unsupported by evidence.
 - b. That the Learned Magistrate erred in law and in fact in adopting a multiplicand that was excessive in the circumstances and against the weight of binding decisions of the superior courts.
 - c. That the Learned Magistrate erred in law and in fact in making duplicate awards of damages under the headings of loss of expectation of life and loss of dependency without discounting the former from the latter.
 - d. That the Learned Magistrate erred in law and in fact in disregarding the Appellant's evidence, submissions and judicial authorities cited.
 - e. That the Judgement and Decree is erroneously high and against the weight of evidence and law.
7. The appellants pray that the appeal be allowed, and the judgment and decree of the trial court delivered on 26th May,2022 on quantum be reversed or set aside, and that the respondents bear the costs of the appeal.
8. The appeal was canvassed through written submission.

The Appellant's Submissions

9. The appellant referred this court to the cases of Moses Maina Waweru v Esther Wanjiru Githae (Suing as the Personal Representative of the Estate of the Late David Githae Kiririo Taiti) [2022]eKLR for



the proposition that assessment of damages are within the discretion of the court, Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR on the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial & Kiruga –versus- Kiruga & Another (1988) KLR 348 for the proposition that an appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.

10. With regard to grounds 1 & 2 of the Memorandum of Appeal, the Appellant submitted that an award for bodily injuries is intended to be compensatory in nature such that the plaintiff should receive in monetary terms no more and no less than his actual loss. The Appellant argued that an injury should attract an award equivalent or near equivalent to previous court awards for similar injuries. In support of this position, the Appellant relied on the cases of H. West and Son Ltd v. Shepherd (1964) AC 326 & Lim Poh Choo Vs. Camden & Islington Ar Ea Health Authority [1979] 1 ALL E.R. 332 applied in the case of Cecilia W. Mwangi v Ruth W. Mwangi [1997] eKLR.
11. The Appellant submitted that the multiplicand adopted by the trial court of Ksh.24,000/= was unsupported by evidence and excessive under the circumstances. The Appellant argued that there was no evidence adduced before the trial court to show that the deceased was a mason earning a monthly salary of Ksh.30,000/=. According to the Appellant the pleadings, the circumstances regarding the subject accident, the police abstract and the death certificate established that the deceased was a boda boda rider. The Appellant thus urged this court to find as much and adopt basic monthly minimum wages of Ksh. 12,522.70 for a general laborer as per the Regulation of Wages (General) (Amendment) Order,2018. The Appellant submitted that the annual income would have been Ksh. 150,272.4 arrived at as follows: 12,522.70 X 12= Ksh.150,272.4
12. The Appellant therefore urged this court to set aside the trial court annual multiplicand of Ksh.24,000-28,000/= and substitute the same with Ksh. 150,272.40.
13. On grounds 3 of the Memorandum of Appeal, the Appellant submitted that the trial court's award of Ksh.100,000/= for Loss of Expectation of life was supposed to be subtracted in the award for loss of dependency. It argued that this omission by the trial court resulted into a wrong finding due to duplicate awards. To that end, reliance was placed on the Court of Appeal cases of Beatrice Nyanchama Obuya vs Hussein Dairy Limited (2010) eKLR & Richard Macharia Nderitu v Philemon Rotich Langas [2013] eKLR.
14. Citing Section 5(1) of the *Law Reform Act*, the Appellant argued that it does not mean that damages cannot be recovered under the *Law Reform Act* but when they devolve on the dependants, the same must be taken into account in reduction of the damages recoverable under the *Fatal Accidents Act*. That this especially applicable where the awards would end up with the same dependants. It submitted that in the instant case, it has not been proved or alleged that the estate has any liabilities beyond the pleaded dependants.
15. With respect to grounds 4 and 5 of the Memorandum of Appeal, the Appellant referring to Section 107 of the *Evidence Act* submitted that the burden of proof is on a party who wants the court to rely on the existence of any set of facts to make a finding in his favor to prove those facts and the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR where the court held inter alia that the standard of proof in a civil case on a balance of probabilities does not change even in the absence of rebuttal by the other side.
16. In view of the above, the Appellant submitted that the trial court failed to note that no pay slip was tendered to proof monthly earnings of Ksh. 30,000/= and/or Ksh.24,000/=: no proof of statutory deductions and tax compliance was tendered in evidence bearing in mind that the amount



of Ksh.30,000/= was tax deductible, that PW2 did not have proof that he was a director of the company that allegedly had employed the deceased and the said witness did not produce any statutory deductions such as NSSF /NHIF of the deceased. The Appellants thus submitted that the court erred by disregarding its submissions and judicial authorities on absence of proof of the same.

17. The Appellant thus urged this court to allow the Appeal.

The Respondents' submissions

18. The Respondents submitted that their pleadings, their statement and evidence adduced at the trial court confirmed that the deceased was employed at Peg Building Contractors as a mason.

19. The respondents submitted that in view of the above, the indication that the deceased was a boda boda rider in the death certificate was a non- issue.

20. The Respondents urged this court to find that the Appellant's submissions that the deceased was a boda boda operator baseless.

21. The Respondents argued that evidence of PW1 established that the deceased was involved in an accident while going to work and that their pleadings did not indicate that the deceased was carrying a pillion passenger as alleged by the Appellant. They argued that parties are bound by their pleadings and any evidence which is at variance with the pleadings must be disregarded. To this end, reliance was placed on the cases of *Philmark Systems Services Limited v Andmore Enterprises Limited* [2017] eKLR & *Jones Vs National Coal Board* (1953) 2 QB 55

22. On the issue of multiplicand, the Respondents submitted that their pleadings, their statement and evidence particularly letter of employment produced as exhibit no. 10 confirmed that the deceased was employed at Peg Building Contractors as a Mason earning Ksh. 1000/= per day and Ksh.30,000/= per month.

23. With respect to ground 3 of the Memorandum of Appeal, the respondents prayed that the awards made by the trial court under the Law Reforms Act and Fatal Accident Act be upheld for reasons that their claim was brought under the said Acts and the trial court awards under the same were sound. In buttressing their submissions, the Respondents relied on Section 2(5) of the *Law Reform Act* and the cases of *Kemfro Africa Ltd T/A Meru Express Services & Gathogo Kanini -Vs- Aziri Kamau Musika Lubia & Another (Nbi C.A No. 21 Of 1984)* cited in the case of *Pleasant View School Limited v Rose Mutheu Kithoi & another* [2017] eKLR; *Eston Mwirigi Ndege & another v Damaris Kairiari* (suing as the Legal Representative of the Estate of Felix Kibiti (Deceased) [2018] eKLR; & *Hellen Waruguru Waweru* (Suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoes Stores Limited [2015] eKLR and *Rebecca Everline Ariri vs Mary Gwaro & Another* [2018] eKLR

24. The Respondents further relied on the case of *Tridev Construction vs Charles Wekesa Kasembeli Civil Appeal No. 121 of 2002* where the court relied on the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A.M Lubia and Olive Lubia* (1982-88) L KAR 727 and submitted that the present case does not presents to this Honorable Court a scenario where the Court ought to disturb the award issued by the lower court as the trial court took into consideration the submissions and authorities of both parties in reaching its award on every limb..

25. The Respondents prayed that the appeal be dismissed with costs to them.



Analysis And Determination

26. This being the first appeal, it is this Court's duty under Section 78 of the *Civil Procedure Act* 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 follows: -

“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.”

27. In respect to quantum, an award on damages is a discretionary matter to be applied judiciously by a trial court. Being a discretionary matter, it is now well settled that an appellate court would rarely interfere and can only do so following the principles laid out in the case of *Kemfro Africa Ltd T/A Meru Express Services & Gathogo Kanini -v- Aziri Kamau Musika Lubia & Another* (NBI C.A No. 21 of 1984) where the C.A made the following guiding observations: -

“The principles to be applied by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 have been a wholly erroneous estimate of the damages.”

28. Courts while assessing damages, must ensure that damages should commensurate with injuries. The Court in *Amos Wenyere & Another v Ashford Murithi Muregi & 2 Others* [2017] eKLR the Court stated as follows: -

“It is now a settled position that an award of damages is a matter of discretion on the part of the court seized of the matter and as in all discretionary matters the same is exercised judiciously depending on circumstances of each case but the guiding factor in regard to quantum of damages is that it should not be either too low to amount to an injustice or too high to amount to unjust enrichment of the victim. Damages should as matter of law compensate the victim and restore him or her to as much as possible to the position, he/she was prior to the accident

29. With the above principles in mind, I will now proceed to deal with the Appeal.

30. I have perused the entire record of appeal and considered the submissions for both parties. The issues that stand out for determination are: -

a. Whether the trial court erred in adopting a multiplicand of Kshs. 24,000/-.



- b. Whether the trial Magistrate erred in awarding damages under the *Fatal Accidents Act* and the *Law Reform Act*.

Issue No.1- Whether the trial court erred in adopting a multiplicand of Kshs. 24,000/-.

31. PW1 was Mary Waleke Kimani, the deceased's mother. She testified that on 14th August, 2019, the deceased was involved in an accident and he died on the spot. She said the deceased was 25 years old at the time of death and of good health. She also said that the deceased worked as a Mason at Peg Building Contractors and used to earn Ksh. 1000/= per day and Ksh. 30,000/= per month. She stated that the deceased's salary catered for his wife, child and herself as her mother. On cross examination, she stated that she did not have any document to prove the deceased used to earn Ksh. 1000/= per day.
32. PW2 was Peter Gaitho Mungai. He testified that he was a constructor and owned a company known as Peg Building Constructions which was duly registered in 1982. He produced the deceased's employment letter showing that he used to pay him Ksh. 1000/= per day.
33. On cross examination, he confirmed he had not produced the certificate of registration of his company and reiterated that the deceased was a mason. He said he used to pay the deceased in cash. He also said that the company had tax returns and confirmed that the deceased did not have an identification card as employee of the company.
34. The Appellant did not call any witnesses in support of the case against it. It, however, through its counsel had opportunity to cross-examine the 2nd Plaintiff and the plaintiffs' witness.
35. The Appellant has urged this court to find that there was no proof that the deceased used to earn Ksh. 1000/= per month as no pay slips, Mpesa /bank statements or payment vouchers were produced. The Appellant also submitted that there was no proof the deceased was a mason and urged this court to find that he was a boda boda rider based on the information contained in his death certificate and to adopt basic monthly minimum wages for general laborers. I have considered the Appellant's and respondents' submissions in this regard.
36. In civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of *Kirugi & Ano.-Vs-Kabiya & 3 Others* [1987] KLR 347 wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.
37. The burden of proof in civil cases on the balance of probability was defined in the case of *Kanyungu Njogu vs Daniel Kimani Maingi* [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
38. It is my opinion that the plaintiffs proved on a balance of probability that the deceased was a mason earning Ksh. 1000/= per month. The employment letter produced as an exhibit settled this fact. The Appellant did not cross examine on this issue so as to give the Respondents a chance to explain who gave the information that the deceased was a boda boda rider to the person who prepared the certificate of death. Additionally, PW1 being the deceased's mother was reasonably expected to know more about the profession of her child. Equally, PW2 satisfactorily explained that he used to pay the deceased in cash and as such the issue of lack documentary evidence raised by the Appellant is misplaced. There was also no indication on the part of PW2 that the deceased's earning was tax deductible.



39. It is factual that parties in areas such as construction industry, negotiate daily rates, depending on various parameters. In that case, a daily wage of Kshs 1,000/-, in my view would not be exaggerated. Based on PW2's evidence, the deceased worked 6 days in a week. The trial magistrate adopted a multiplicand of ksh. 24,000/= which in my view was correct and I see no reason to interfere with her decision on this aspect.

Issue No.2 - Whether the trial Magistrate erred in awarding damages under the Fatal Accidents Act and the Law Reform Act

40. On whether the damages awarded under the Law Reform Act should be subtracted from the award made under the Fatal Accidents Act on account of double enrichment, I hold the view that the Appellant's submissions on this issue cannot stand for two reasons. First and foremost, the Appellant through its own submissions made proposal for awards under both the loss of expectation of life and loss of dependency before the lower court. It proposed a sum of Kshs 100,000/- for loss of expectation of life and Kshs 2,504,540/- for loss of dependency. There is nowhere in its submission to show it invited the court to discount the former from the latter. Therefore, the Appellant cannot raise new issues at the stage of appeal.
41. Secondly, guided by the law and practice where a claimant gets awards for loss of life both under the Law Reform Act and the Fatal Accidents Act was explained by the Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited [2015] eKLR as follows:

“This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.

The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

- “6 An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.
7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.



8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”
42. I note in this regard that the evidence by PW1 was that the deceased used to support her, his wife and child, and as such there were other beneficiaries of his estate who will benefit from the award of loss of expectation of life, other than the dependants getting compensation under the *Fatal Accidents Act*. From the foregoing, it is my finding that the trial court herein was entitled to make awards under both the *Law Reform Act* and the *Fatal Accidents Act*.
43. In the upshot, the Appeal herein is devoid of merit and I hereby dismiss the same with costs to the Respondents.
44. It is so ordered.

SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 20TH DAY OF DECEMBER, 2024.

H. M. NYAGA

JUDGE.

In the presence of;

