



**Kenya Power & Lighting Company Ltd v JWK (Suing as father and next-friend of JKW) & another (Civil Appeal E012 of 2021) [2023] KEHC 1642 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1642 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E012 OF 2021  
LN MUGAMBI, J  
FEBRUARY 28, 2023**

**BETWEEN**

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

**AND**

**JWK (SUING AS FATHER AND NEXT-FRIEND OF JKW) .... 1<sup>ST</sup> RESPONDENT**

**BRAEX ROSE QUARRY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. In brief, this Appeal emanates from a personal injury claim that the 1<sup>st</sup> Respondent (then plaintiff) filed suing as father and next friend of JKW (a minor) who was allegedly electrocuted on his way home from school on December 6, 2015 after stepping on a three-phase electrical line that had been stacked with soil at Kwa Jungle Quarry thereby sustaining serious bodily injuries. The particulars of injuries were pleaded as follows:
  - i. Electrical burns on the top and left lateral aspect of the head
  - ii. Electrical burns (healed) on anterior and medial aspects of distal parts of both forehands round and depressed with contractures
  - iii. Electrical burns proximal aspect of all the fingers of both hands and proximal interphalangeal joints with marked ankylosis around the middle interphalangeal (IPJ) joint at very unfavourable positions
  - iv. Superficial electrical burns on the right scapula region and both buttocks
  - v. Electrical burns on the lateral aspect of left foot up to the base of four toes (2 to 4)
  - vi. Electrical burns on the right lateral malleolus of the right ankle and the base of four toes (2<sup>nd</sup> to 4<sup>th</sup>) with contractures.



- vii. The plaintiff pleaded for general damages and further averred that he suffered 30% disability and would require future medical expenses at a cost of Kshs. 300,000/-. In addition, special damages claim for Kshs. 27,000/-.
2. The suit in the lower court was in its original form filed against the Appellant only i.e. Kenya Power & Lighting Co. Ltd. It was alleged that the accident arose due Appellant's negligence and/or in breach of statutory duty of which particulars whereof were that it failed to maintain the power infrastructure to prevent access to road users, failing to regularly inspect the electric powerlines, failing to erect any warning signs of eminent danger to public road users, failing to ensure high voltage powerlines which was a danger zone was situated at sufficient distance from the road and exposing the plaintiff to risk of injury or damage which it ought to have known.
3. In its defence filed on May 25, 2018, the Appellant/1<sup>st</sup> Cross-Respondent denied that any accident occurred and traversed the particulars of negligence attributed to it. In the alternative, it pleaded that the accident if at all it occurred was due to negligence of 2<sup>nd</sup> Respondent-Braex Rose Quarry for reasons that - heaped soil under the power line, failure to remove heaped soil, failure to leave good clearance between heaped soil and Gatuonya powerline, failure to exercise due care and attention, failure to keep off and/bar children from accessing the heaped soil, failure to fence the heaped soil.
4. The Appellant by Chamber Summons filed on September 21, 2018 sought leave to issue a Third-Party Notice to the 2<sup>nd</sup> Respondent. Leave was granted on November 14, 2018 and a Third- Party Notice dated November 14, 2018 was issued and a copy of the same filed in Court on November 19, 2018. On October 7, 2020, the court entered interlocutory judgment against the 3<sup>rd</sup> Party.
5. At the trial before the lower Court, two witnesses were called for the 1<sup>st</sup> Respondent /1<sup>st</sup> Cross-Appellant. The first witness was JKW, the father and next friend of the minor. His evidence in chief was brief. He testified thus:
- “...There was a quarry, electricity wire was on the ground. He was with other children. He was seriously injured on the head, hands, legs and buttocks. He is in court. The fingers lost mobility. (Court notes the scars on the head and hands). He went to Thika Level 5 and later Kenyatta National Hospital. I have also incurred other expenses. I blame the owner of the Quarry and Kenya Power...”
6. On cross-examination, he stated:
- “...The electricity is on the side of the road. The quarry owners have brought sand up to the level of electricity wires. The quarry owner isn't a defendant herein...”
7. In re-examination, he explained:
- “... The electricity wire was just under the sand. Its KPLC's role to take care of its wire...”
8. The next witness was the Head-Teacher where the minor schooled and his evidence was on how the accident had negatively affected him in his studies.
9. The Appellant (defendant then) did not call any evidence in his defence.
10. After the full trial, the trial court thus entered judgement on both liability and quantum as follows:
- a. Liability 50:50 between the defendant and interested party in favour of plaintiff



- b. General Damages Kshs. 4,000,000
  - c. Future medical expenses Kshs. 200,000
  - d. Special damages Kshs. 3,000
  - e. Interest on 2, 3 & 4 at court rates from date of judgment until payment in full.
11. The Appellant was dissatisfied with the judgment hence the appeal. In its Memorandum of Appeal dated 20<sup>th</sup> January 2021, it raised the following grounds;
- a. That the Learned Magistrate erred in law and in fact in awarding general damages in the sum of Kshs. 4,000,000/= which was excessive in the circumstances considering the injuries sustained.
  - b. That the Learned Magistrate erred in law and in fact in apportioning liability in the ratio of 50:50 percent between the defendant and 3<sup>rd</sup> party.
  - c. That the Learned Magistrate erred in law and in fact in failing to dismiss the suit against the Defendant in the lower court.
  - d. 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 hence error in determination of liability based on evidence on record.
12. The appellant prayed that the judgment on liability and general damages be set aside and the suit against the appellant be dismissed. In the alternative, apportionment of liability between the Appellant and 2<sup>nd</sup> Respondent (third party) be in the ratio of 10:90 percent respectively and award general damages in the sum of Kshs. 800,000/=. They also prayed for costs of the appeal.
13. Conversely, 1<sup>st</sup> Respondent cross-appealed the entire appeal by the Appellant. The Memorandum of Cross-Appeal dated 26<sup>th</sup> February 2021 raised the following grounds;
- i. That the Learned Magistrate erred in law and in fact in finding that the 3<sup>rd</sup> party (the 2<sup>nd</sup> cross-respondent) was duly served with process of this court primarily on grounds: -
    - a. No certificate of posting was attached to the return of service.
    - b. There was no evidence that the address affixed was truly the true address of the then 'third party.'
  - ii. That the Learned Magistrate erred in law and in fact by apportioning liability at 50:50 as against the defendant and a none existent third party.
  - iii. That the Learned Magistrate erred in law and in fact in awarding general damages so manifestly low (Kshs. 4,000,000/=) to a misapplication of the principle of assessment of damages despite the evidence and submissions.
  - iv. That the Learned Magistrate erred in law and in fact in failing to appreciate the submissions by the cross-appellant (then the plaintiff) and as such arrived at a wrong decision.
14. The 1<sup>st</sup> Respondent sought the appeal by the appellant to be dismissed and and for the cross-appeal to be allowed in the following terms; the award on general damages be enhanced to Kshs. 8,000,000/=-, the court finds the 1<sup>st</sup> cross-respondent was 100% liable for damage and costs of the appeal.
15. The 1<sup>st</sup> Respondent also filed a Supplementary Record of Cross Appeal dated December 7, 2021.



16. This court issued directions that the appeal and the cross-appeal's hearing be dispensed with by way of written submissions.

### **Appellant's Submissions**

17. The Appellant filed their submissions dated April 4, 2022 and submitted on grounds 2 & 3 of the appeal. It submitted that 1<sup>st</sup> Respondent's evidence on liability and/or cause of the accident is very clear that it is the heaping of sand from the ground up to the electricity wire that was about six metres high from the ground was what caused the accident. The position of both the electricity wires and the poles was not faulted by the 1<sup>st</sup> Respondent. It was submitted that in discharging its duties under common law and statute, it was not blamed by evidence in any way as there was no problem with the poles and wires as constructed by them including flow and/or supply of power through the lines.
18. Concerning the award of Kshs. 4,000,000 in general damages, the 1<sup>st</sup> Respondent submitted that the minor was examined by Dr. George K. Karanja who assessed degree of permanent disability at 30 percent. This court was urged to disregard document No. 3 Page C of the supplementary record of appeal because it was not part of the exhibits produced in the lower court. The decision in *Mary Wairimu Njuguna v. Kenya Power & Lightning Company Ltd (2018) eKLR* was cited and urged the court that if it would be inclined to partially hold the Appellant liable for the accident, then an award of quantum in the sum of Kshs. 800,000/= less contributory negligence was reasonable.
19. In regard to the Cross Appeal, it was submitted on behalf of the appellant that it is incompetent, lacks merit and abuse of the court process as the 1<sup>st</sup> Respondent did not seek and obtain the leave of the court to file it. The same was filed out of time as it ought to have been filed within 30 days from the date of delivery of judgment in the lower court. It was contended that the cross appeal offends the provision of Section 79G of the *Civil Procedure Act* and ought to be struck out with costs. It relied on the decision of *Kenya Bus – Rapid T/a Kenya Bus Services Management Co. Ltd v. Patrick Irungu Gichure (2018) eKLR*.
20. In regard to ground number 1 of the cross appeal (that the Learned Magistrate erred in law and in fact in apportioning liability on 50:50 as against the defendant and non-existent third party) it was submitted that the 3<sup>rd</sup> party did not contest entry of interlocutory judgment and counsel for the 1<sup>st</sup> Respondent herein had not been appointed to act for the 2<sup>nd</sup> Respondent in this appeal including the cross-appeal. It was contended that the 2<sup>nd</sup> Respondent can only contest the lower court's decision on interlocutory judgment in the lower court.

### **1st Respondent's Submissions**

21. The 1<sup>st</sup> Respondent filed his submissions dated July 18, 2022 and submitted that it was misleading to submit that the doctrine of laches caught up with their cross-appeal and thus it should be dismissed. He cited Order 42 Rule 32 of the Civil Procedure Rules which provides for cross-appeals and argued that it does not provide for procedure or timelines. He also referred to the decision of the High Court in *Hcca No. 1 Of 2018 Busia, Bulsho Trading Co. Ltd V. Rosemary Likholo Mutakha & Another* to buttress this submission.
22. On the whether the award of Kshs. 4,000,000/= was excessive, he submitted that the same is far much below what should have been awarded considering the nature of injuries to the minor, his age and the inability to hold things with his hands. In the cross appeal, it was submitted that the award be enhanced to Kshs. 8,000,000/= as the child has suffered for close to 10 years already, has missed out on young life and he is always in and out of hospital for treatment. He relied on the decision in *HCCC No. 28 Of 2019 Meru, AMK (suing as the mother and next friend to JMK) Vs Kenya Power & Lighting CO. Ltd.*



23. Concerning Third party, it was submitted that the appellant herein did not serve the appeal to the third party because the said Third Party does not exist and never existed before the lower court too.
24. In the cross-appeal, it annexed objector proceedings by Brexrose Ltd in CMCC No. 663 of 2017 Thika, the same suit where their appeal emanates from which essentially demonstrates that the Appellant sued the non-existent entity as the 3<sup>rd</sup> Party and in essence misled the lower court to arrive at a finding that the Third Party was 50% liable. They cited the decision in Linus Nganga Kiongo & 3 Others V Town Council Of Kikuyu (2012) eKLR. They noted that despite serving the appellant with their Record of Cross-Appeal together with the objector proceedings, they have not submitted on the same showing that their claim against the 3<sup>rd</sup> party was fictitious and they have similarly not served their Memorandum of Appeal to the so-called third party whom they intend to surcharge the award hereto once given.

### **Analysis And Determination**

25. Having read the memorandum of appeal, the memorandum of cross-appeal and their respective records of appeal together with rival submissions, I am of the view that the following are the issues for determination in this Appeal:
  - a. Whether the cross-appeal was filed out of time;
  - b. Whether the supplementary record of cross-appeal should be considered in this appeal;
  - c. Whether the appeal on liability is merited;
  - d. Whether the appeal on quantum is merited;
  - e. Whether the cross-appeal is merited;
  - f. Who should pay costs of this appeal?
26. The Appellant has told this court that the cross-appeal was filed out of time and that the 1<sup>st</sup> respondent ought to have sought leave of this court before filing the said cross-appeal. In response, the 1<sup>st</sup> Respondent said that they filed their cross-appeal 16 days after they were served with the Memorandum of Appeal by the Appellant.
27. Order 42 Rule 32 of the Civil Procedure Rules which refers to a cross-appeal reads:

‘The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.’

This provision does not provide for the timelines within which a cross-appeal should be filed and courts in this country have interpreted the said provision differently.
28. In the case of Kenya Power & Lighting Co. Ltd v Peter Langi Mwasi [2018] eKLR, which was cited by the 1<sup>st</sup> Respondent herein, Justice Njoki Mwangi held that cross-appeal is legal although the applicable



procedure is not provided for. While referring to Order 42 Rule 32 of the Civil Procedure Rules she quipped:

“... The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time...”

29. I have noted from the pleadings filed in court the Appellant filed their Memorandum of Appeal on January 20, 2021 while the 1<sup>st</sup> Respondent filed their Memorandum of Cross-Appeal on March 1, 2021. The 1<sup>st</sup> Respondent claimed that they were served with the appellant’s memorandum of appeal on 12<sup>th</sup> February. They submitted that they filed their cross-appeal 16 days from date of service which was reasonable time.
30. Having considered the submissions, I concur with the finding of Justice Njoki Njuguna about cross-appeals, I am persuaded that the 1<sup>st</sup> Respondent filed the cross-appeal within reasonable time after being served with the Memorandum of Appeal by the Appellant.
31. In regard to the supplementary Record of Cross-appeal dated 2<sup>nd</sup> December 2021 the Appellant faulted and argued that it was not part of what was produced and relied upon during trial in the lower court, particularly document no.3, page C of the supplementary record of appeal labelled “photos of the minor current condition” and contains three pictures.
32. Section 78 of the *Civil Procedure Act* provides for powers of appellate courts and provides as follows;
  - (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power: -
    - a) To determine a case finally;
    - b) To remand a case;
    - c) To frame issues and refer them for trial;
    - d) To take additional evidence or to require the evidence to be taken;
    - e) To Order a new trial.
  - (2) Subject as aforesaid, the appellate Court shall have the same Powers and shall perform as nearly as may be the same duties as are charged conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.
33. In Civil Appeal Number 60 & 62 of 2017- Otieno Ragot & Co. Advocates Vs. National Bank (2020) eKLR the Court of Appeal held as follows:

“...For a party to adduce additional evidence on appeal, leave ought to be granted by the said court...In the present appeal, the respondent did not seek leave to adduce additional evidence...No additional evidence could be introduced before the learned judge unless they formed part of the record between taxing master as correctly submitted by the appellant...”
34. Additional evidence is thus only allowed in appeal when a party makes an application to court and the court sanctions it. The 1<sup>st</sup> Respondent herein has explained that they are attaching the photographs



since in the lower court, the minor appeared physically but as for now, only photos can aid this court to see the extent of damage the appellant's electrical line did to the minor. The 1<sup>st</sup> Respondent did not make an application to this court discretion to allow it adduce additional evidence. That unilateral decision by Counsel for the Respondent without leave is unacceptable and potentially prejudicial to the appellant, the photos in page C of the Supplementary Record of Cross-Appeal are rejected and ordered expunged from the record.

35. In respect to liability, the Appellant argued that the 1<sup>st</sup> Respondent did not prove his case to the required standard. It submitted that in his evidence, the 1<sup>st</sup> Respondent blamed the 3<sup>rd</sup> party. On the contrary, the 1<sup>st</sup> respondent asked this court to find that the appellant is 100% liable as the third party enjoined in the trial court has filed objector proceedings after their property was attached by the auctioneer. The 1<sup>st</sup> Respondent submitted that the Appellant enjoined a fictitious party as the 2<sup>nd</sup> Respondent in the lower court and it did not even serve the 2<sup>nd</sup> Respondent with the memorandum of appeal yet they want them bear responsibility for the award.
36. The Court of Appeal in *Gideon Ndungu Nguribu & another v Michael Njagi Karimi* [2017] eKLR quoted Lord Reid in *Stapley vs Gypsum Mines Ltd (2)* [1953] A.C. 663 at p. 681 discussed the difficulty that courts sometimes face in determining who is to blame for the accident.

“...To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”

37. Bearing the above in mind, I agree with the trial court that the level of interference with the power line by the Third Party was so patent for the Appellant which has powers over management of the powerline not to have noticed it. KPLC had a duty to ensure the safety of the powerline was not compromised by actions of a 3<sup>rd</sup> Party in such a blatant manner. Failure to act with due dispatch on its part contributed to the happening of this accident. I would thus uphold the finding that it was jointly liable.
38. In apportionment of liability, I am guided by the case of *Khambi and Another vs. Mahithi and Another* [1968] EA 70, where it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

39. The trial court in its judgement noted that the 1<sup>st</sup> Respondent's witness PW1 blamed the owner of the quarry (3<sup>rd</sup> party) for depositing a huge heap of soil at the edge of the road bordering his unfenced



quarry which raised the ground and covered the electricity lines. The trial court said that the appellant had a responsibility to ensure that businesses/people/companies do not interfere with power lines and they failed to put a stop to the 3<sup>rd</sup> party's reckless activities. That is how the trial court arrived at apportioning liability at 50:50 as between the appellant herein and the 2<sup>nd</sup> Respondent.

40. From the assessment of the evidence of the 1<sup>st</sup> Respondent, it is apparent that heaping the soil on the power line was the major reason why the accident occurred. Mounding the soil was an act of commission by 3<sup>rd</sup> Party that interfered with safety standards that the Appellant had put in place. The only blame that goes to the Appellant was in its failure to act on the interference in good time to stop the 3<sup>rd</sup> Party from endangering the safety of the residents of that locality. The 3<sup>rd</sup> Party was the principal tortfeasor while the Appellant's contribution was much less. It had put safety standards but looked the other way as those standards were being infringed by the acts of 2<sup>nd</sup> Respondent. All in all the evidence showed that the 2<sup>nd</sup> Respondent's acts negligence predominantly led to the electrocution of the minor. I thus find that 50:50 apportionment by trial court was erroneous as there was the dominant tortfeasor while the Appellant was the subsidiary torfeasor. I set aside the apportionment of liability and substitute it to be on 20:80 basis in favour of Appellant as against the 2<sup>nd</sup> Respondent in the circumstances of this case.
41. On the issue that raised by the Respondent that Appellant introduced a wrong or false Third Party, the position of this Court is that evidence has clearly pointed to the existence of a Third Party who was majorly responsible for the accident. Whether faceless or not, there was another party beside the Appellant who was involved. This was not contested by the 1<sup>st</sup> Respondent during the trial. The Appellant cannot therefore shoulder the burden of such a person unless it be proved there was vicarious liability. To hold the Appellant liable for negligence of another would be unfair. My finding is that the Appellant can only be held liable for its share of blame that is attributable to it.
42. The trial court assessed general damages at Kshs. 4,000,000/= as adequate compensation for the injuries sustained by the 1<sup>st</sup> respondent. The trial court stated that it considered the nature of injuries, submissions filed by the parties and the age of the authorities. The 1<sup>st</sup> Respondent cited the decision in AMK (Suing as the mother and next of friend of JMK-Minor) v. Kenya Power and Lighting Company Limited where the court awarded the plaintiff Kshs. 22,056,160/=. In the said decision, the minor's degree of injury was assessed as grievous harm with 100% disability as both upper limbs were amputated. The Appellant on the other hand relied on the decision in Mary Wairimu Njuguna v. Kenya Power and Lighting Company Ltd in Civil Appeal No. 117 of 2016 where the Court of Appeal upheld assessment on general damages on appeal in the sum of Kshs. 500,000/=, a reduction from the award by the lower court in the sum of Kshs. 800,000/=.
43. As the first appellate court, I am aware that the trial court had the advantage of seeing the witnesses in court. The accident happened when the minor was 10 years old and it affected their ability to live his life as normal including his studies as attested by the headmaster who testified before the trial court. However, looking at the nature of the injuries, authorities presented and considering that he suffered 30% permanent disability; going by comparable awards, the quantum at Kshs. 4,000,000/ was high in the circumstances. I reduce the award to Kshs. 3,000,000 million in general damages as fair and adequate compensation.
44. The upshot of the foregoing is as follows;
  - a. The memorandum of appeal dated January 20, 2021 partially succeeds with the liability being apportioned at 20:80 as against the Appellant and 2<sup>nd</sup> Respondent respectively.



- b. The award of general damages is set aside and substituted with an award for Kshs. 3,000,000- to be apportioned on the basis of the finding on liability above.
- c. The cross-memorandum of appeal dated February 26, 2021 is dismissed in its entirety.
- d. Each party will bear its costs of the appeal.

**JUDGMENT READ, SIGNED and DELIVERED VIRTUALLY at Busia High Court this 28<sup>th</sup> day of February, 2023.**

**L.N. MUGAMBI**

**JUDGE**

**In presence of:-**

Appellant –

1<sup>st</sup> Respondent -

2<sup>nd</sup> Respondent-

Advocate for the Appellant=

Advocate for the 1<sup>st</sup> Respondent –

Advocate for 2<sup>nd</sup> Respondent-

Court Assistant – Annette

The Judgment is to be transmitted digitally by the Deputy Registrar to the Counsels on record through their respective email addresses.

**L.N. MUGAMBI**

**JUDGE**

