



JNM (Suing as the legal representative of the estate of PMN (Deceased) v Kenya Power & Lighting Company Limited; School Committee Gitwebe Public Primary School (Third party) (Civil Appeal E011 of 2021) [2022] KEHC 14297 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 14297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E011 OF 2021**

JN NJAGI, J

JUNE 30, 2022

BETWEEN

JNM (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PMN (DECEASED) APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

AND

SCHOOL COMMITTEE GITWEBE PUBLIC PRIMARY SCHOOL THIRD PARTY

(Being an appeal from the judgment and decree of Hon. W. C. Waswa, RM, Nyamira CM's Court Civil Suit No. 41 of 2020 delivered on 11/1/2021)

JUDGMENT

1. The appellant herein who was the plaintiff at the lower court had sued the respondent in his capacity as the legal representative of the estate of the deceased herein wherein he sought general and special damages after the deceased who was a pupil at the Gitwebe Public Primary school (herein the third party) was electrocuted at the school premises. The appellant blamed the respondent for the mishap. The respondent took out third party proceedings against the school and blamed it for the accident. The third party did not enter appearance in the case.

After a full hearing the trial magistrate dismissed the case against the respondent and instead found the third party to have been wholly liable for the accident. The court entered judgment for the appellant against the third party and proceeded to award damages under the *Fatal Accidents Act* and under the *Law Reform Act*. The appellant was dissatisfied with the finding of the trial court on liability and filed the instant appeal.



2. The grounds of appeal are that:
 1. The learned trial magistrate erred in law and in fact in holding that the third party was 100% liable for the death of the minor child as opposed to the whole evidence tendered by the plaintiff and PW2.
 2. The learned trial magistrate erred in law and in fact in relying on hearsay evidence tendered by the defence.
 3. The learned trial magistrate erred in law and in fact by contradicting his judgement by stating that the evidence tendered by the defence was hearsay but proceeded to conclude that the third party was to blame as opposed to the defendant.
 4. That the learned magistrate misdirected himself in concluding that the third party herein had constructed a tank above the live wires without seeking the authority of the defendant whereas there was no evidence tendered to show whether it was the defendant who had first constructed their line of live wires above the school tank.

Submissions

3. The appeal proceeded by way of written submissions. The advocates for the appellant, Ombati & Ombati Co Advocates, submitted that the case for the appellant on how the minor met his death was supported by the evidence of an eye-witness PW2 who stated that the minor was electrocuted by an electric wire that was lying on the ground. However, that the trial court relied on the evidence of a technician from the respondent company DWI whose evidence was that he conducted investigations on the matter and found that the minor climbed a ladder that was leaning against the school water tank and as a result came into contact with overhead live electric cable lines thereby causing his electrocution. The advocates submitted that there was no basis for this finding as the trial court made a finding that DWI did not witness the accident and did not disclose the source of his information that the minor was electrocuted after climbing the ladder. That the evidence of DWI was hearsay and the trial court was wrong in relying on such evidence as opposed to the evidence of PW2 who witnessed the accident. That having found that the evidence of DWI was hearsay it was not tenable for the trial court to rely on the same evidence.
4. It was submitted that it was the duty of the respondent to ensure that all electricity cables and wires are well maintained and for them to provide a safe environment to the users and members of the public. That the respondent failed to uphold this responsibility which led to the death of the minor. That the trial court was wrong in blaming the third party instead of the respondent.
5. The advocates for the respondent, Meritad Law Africa, on their part submitted that the witness for the respondent DWI stated in his evidence that he did not see any wires on the ground that could have led to the electrocution of the deceased. That the electrocution occurred as stated by DWI that the minor climbed a ladder and touched the live overhead cables. That PW 1 confirmed that the water tank had a ladder. That the construction of the tank by the third party within the school premises and under the live electric wires was done without authority from the respondent. That in the premises the trial court did not err in finding the third party entirely liable for the accident.
6. It was submitted that the trial court did not rely on hearsay evidence in the case. That the appeal is unmerited.



Analysis and determination

7. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify — see *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA123.
8. The appeal is based on the ground that the trial court was wrong in its decision that it is the third party who was to blame for the accident instead of the respondent. The issues for determination are: -

Whether the respondent is the one who was to blame for the accident.

9. Whether the trial court erred in holding that the third party was 100% liable for the accident.
10. The standard of proof in civil cases is on a balance of probabilities. In *Monarch Insurance Company Ltd v Warucia Mwangi* [2020] eKLR it was held as follows:
 14. The duty of the plaintiff is to prove his claim against the defendant on a balance of probabilities. What amounts to proof on a balance of probabilities was discussed by Kimaru, J in *Willian Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 where the Court stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. 'In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that is probable than not that the allegations that he made occurred."
11. Section 107 of the *Evidence Act* provides that -
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
12. The appellant pleaded in his plaint as follows:

"On or about the 30th day of October 2019 at around 13:30 pm the plaintiff was playing in a group with his friends at the school grounds of Gitwebe Primary School...when he stepped into live electric wires which were carelessly lying along the ground of a footpath and as a result of which he was electrocuted."
13. The appellant filed a witness statement dated the May 18, 2020 in which he stated as follows:

"I know of my own knowledge that my late son was electrocuted while playing at the school grounds on October 30, 2019 and died on the spot.... I do blame Kenya Power and Lighting Co Ltd for leaving live wires dangling on the ground which pupils use for playing and endangering their lives."
14. The appellant later filed a further statement dated November 25, 2020 in which she stated that:

"On this particular date I received a call from the headteacher of Gitwebe Primary School that my son had stepped into live electricity wires which were carelessly lying along their playing ground. ...I blame the defendant for the death of my son as the said live wires have



been lying on the ground for more than a month despite several reports to remove the same but to no avail."

15. The eye-witness for the appellant PW2 stated in his evidence that he resides next to Gitwebe Primary School. That on the material day and time he was next to the school gate where he had a vivid view of school pupils playing on the school ground. That within no time he saw pupils shouting for help. He saw one of them on the ground fighting to remove live electric wires on which he had unknowingly stepped on. He rushed there and found the deceased entangled with live electric wires and was trying to entangle himself from them. That he assisted him and took him to Nyamira County Hospital where he died.
16. The witness for the respondent DWI testified that he investigated the matter and found that the deceased was electrocuted after he climbed a ladder that was leaning against the school water tank and came into contact with overhead electric cables.
17. I have considered the evidence that was adduced before the trial court. There was no eye-witness that the deceased was electrocuted after he climbed a ladder that was leaning against the school water tank and came into contact with overhead electric cables. The witness for the respondent who made *these allegations, DWI, did not witness the accident and did not disclose the source of his information to that end. The trial court found as much. These allegations were therefore unfounded and were based on hearsay or on speculation.
18. Though the respondent did not produce an eye witness to the accident, the burden of proof was on the appellant to adduce evidence showing that the respondent was liable for the accident. The appellant gave two different versions of how the accident took place. In the first place he pleaded that the deceased was electrocuted when he stepped into live electric cables that carelessly strewn on the ground of a footpath. In his initial statement he stated that the deceased was electrocuted after he came into contact with live electric wires that were left by the respondent dangling dangerously onto the school playing ground. In his second statement he stated that his son was electrocuted after he stepped onto live electric wires which were lying carelessly in the school ground. His witness PW2 stated in his evidence that the deceased was electrocuted when he stepped onto some invisible live electric wires that were lying in the school playing ground. If then the respondent was liable for the accident, the question is what he was guilty of among all the above versions. Was it leaving loose hanging electric wires, or leaving live electric wires on a footpath or leaving invisible live electric wires on the school playing ground? There was no evidence that the respondent had left any electric wires dangling from their power line. If the deceased was electrocuted on a footpath or at the school playing ground, there was no evidence that it is the respondent who had left live electric wires at the stated places. There was no evidence that the respondent had done any electric installations on the school playing field. How then would they have left live electric wires there? Even though there was no doubt that the cause of death was electrocution, it is clear to me that the appellant and his witness did not tell the truth on how the minor met his death. There was no evidence that the cause of death was attributable to the negligence of the respondent. The trial court was correct in its finding that the respondent was not liable for the accident.
19. The third party was brought into the suit by the defendant wherein the defendant was claiming for indemnity and or contribution from the third party in case judgment was entered for the plaintiff against the defendant. The third party notice was issued pursuant to Order 1 Rule15(1) of the *Civil Procedure Code* that provides that:

“Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —



- a. that he is entitled to contribution or indemnity; or
- b. that he is entitled to any relief or remedy relating to connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
- c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them.

He shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *ex parte* supported by affidavit."

20. Going by the claim that was before the court and considering the fact that the respondent was found not liable for the accident it was, in my view, not tenable for the trial court to enter judgment against the third party as the obligation for the third party was only to indemnify the respondent in case judgment was entered against the respondent. In *Sammy Ngigi Mwaura v John Mbugua Kagai & Another* (2006) eKLR where the High Court had dismissed the case on grounds as similar to this case, the Court of Appeal held that:

"In our view, it should be noted that the three sub paragraphs (a), (b) and (c) of Order I Rule 14 (1) are each in the alternative and that the only alternative chosen to be relied upon by the defendant/ respondent in his Third Party Notice was a claim for "indemnity or contribution to any judgment that may be entered in favour of the plaintiff in respect of the plaintiffs' claims as is set out in the plaint."

If, as was the position in this case, there was no judgment entered in favour of the plaintiff against the defendant for the very good reason that there was no evidence of any negligence by the defendant or his employee, there could not be any amount in respect of which the defendant could be indemnified by the Third Party or to which the Third Party could contribute however negligent the Third Party or its employee, driver of the lorry may have been.

21. In *City Hoppa Limited v Harrison Kamau Karabi & 2 Others* (2021) eKLR where the trial court had entered judgment against the third party despite a finding that the defendants were not liable for the accident the High Court dismissed the case against the third party and held that there was nothing for the third party to indemnify the defendant on. In the instant case I am of the view that no judgment could be entered against the third party after the respondent was found not liable for the accident. The trial court therefore erred in entering liability against the third party at 100%. There was no evidence adduced against the third party that it was liable for the accident.
22. The upshot is that there is no merit in the appeal against the respondent. The same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JUNE

J. N. NJAGI

JUDGE



In the Presence of:

Mr. Ombati for the appellant

Mr. Kangogo for the Respondent

Court Assistant

30 days Right of Appeal

