



**Nzoka & another (Suing as the Administrators and Beneficiaries of the Estate of the late EN) v Kenya Power and Lighting Company Limited (Civil Appeal 40 of 2021) [2021] KEHC 12532 (KLR) (29 July 2021) (Judgment)**

Neutral citation: [2021] KEHC 12532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 40 OF 2021  
MN MWANGI, J  
JULY 29, 2021**

**BETWEEN**

**SAMUEL MUSYIMI NZOKA ..... 1<sup>ST</sup> APPELLANT**

**JNN ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE ADMINISTRATORS AND BENEFICIARIES OF THE ESTATE  
OF THE LATE EN**

**AND**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... RESPONDENT**

*(An Appeal from the judgment and decree of Hon. F. Kyambia, Chief Magistrate,  
delivered on 26th March, 2021 in Mombasa CMCC No. 2122 of 2018)*

**JUDGMENT**

1. The suit against the respondent in the lower Court was that on January 7, 2018, while the minor who was three years old at the time was sleeping in the house where her parents were residing in, there were various on and off power blackouts and power surges in the entire neighborhood of the said house in Jomvu area, in Mombasa County. The appellants averred that when the power returned after one of the said power surges and blackouts, the house therein caught fire from the roof which consumed the entire house and burnt the minor therein to death.
2. The appellants further claimed that the death of the deceased, the loss and damage of their house were occasioned by reason of breach of the common law duty of care and the statutory duty of care under the Occupiers Liability Act and/or negligence of the defendant, their servants and/or agents. The appellants contended that the cause of the said fire was a defect in the electricity supply system, negligence and breach of duty of care by the respondent which facts were within its knowledge. The appellants stated that the doctrine of *Res Ipsa Loquitur* and the rule in *Reylands v Fletcher* apply.



3. The respondent filed its statement of defence dated November 14, 2018, where it denied the contents of the appellants' plaint and averred that if any fire occurred at the deceased's parents' house, then the same was not caused by the respondent but was caused or substantially contributed to, by the negligence of the appellants' landlord and of the appellants or their servant or agent. The respondent further averred that the doctrine of *volenti non fit injuria* and the Court's judgment in [Jeremiah Maina Kagema v Kenya Power & Lighting Co Ltd \[2001\] eKLR](#) are applicable herein.
4. In the lower Court, judgment was delivered on March 26, 2021, where the Court held that the appellants failed to prove on a balance of probability that the cause of the fire was attributed to the electric fault, thus the respondent could not be held liable and the appellants were not entitled to compensation. The appellants suit was therefore dismissed.
5. The appellants were dissatisfied by the decision of the Trial Magistrate and on March 30, 2021, they filed a Memorandum of Appeal raising the following grounds of appeal-
  1. That the learned Trial Magistrate erred in law and fact in holding that the plaintiff had not proved the causation and blameworthiness of the fire and or accident on a balance of probability and in requiring the corroboration of the evidence of PW1 and PW2 on causation and blameworthiness;
  2. That the learned Trial Magistrate misdirected himself in failing to focus on the evidence on record and instead based his decision on evidence allegedly not tendered and in failing to evaluate the evidence as a whole in determining the issue of liability and/or negligence or breach of duty of care;
  3. The learned Trial Magistrate's findings on negligence and/or breach of duty of care were without regard to evidence and/or proper evaluation of the evidence on record and the pleadings by the respective parties; and
  4. That the learned Trial Magistrate erred in law and fact in failing to appreciate and place sufficient weight on the evidence of DW1 that the respondent depended on members of the public in reporting on electricity faults and their causes and the failure by the respondent to place its report on its engagement and reports by members of the public on the particular accident and the history of the particular power line.
6. The appellants' prayer is for this Court to allow the appeal with costs and, set aside the order made on March 26, 2021 dismissing their suit and substitute it with an order entering judgment for the appellants against the respondent for general damages of Kshs 1,800,000/= and special damages of Kshs 488,650.00 with costs.
7. This appeal was canvassed by way of written submissions. The appellants' submissions were filed on April 6, 2022 by the law firm of Jengo Associates Advocates, whereas the respondent's submissions were filed on April 19, 2022 by the law firm of Kioko, Munyiya, Ngugi & Company Advocates.
8. Ms Julu, learned Counsel for the appellants submitted that the main issue in contention is whether the appellants proved their case on a balance of probability. She contended that the Trial Magistrate was not alive to the fact that the minor had died and that PW3's explanation was that the housemaid had left employment and they could not trace her. That he disregarded paragraph 6 of the statement of defence which acknowledged electric fault as the cause of the fire but attributed it to lack of proper parental care, electrical appliances, inexperienced domestic help and defective wiring of the house. She contended that the inference that the fire was electrical is insurmountable since the appellants' witnesses testified to the fact that the fire began at the dropline and the ceiling/roof which was on fire



and was producing sparks. She stated that in making a finding on how the fire might have started, the Trial Court did not consider all the evidence on record.

9. It was submitted by Ms Julu that DW1 during cross examination and re-examination stated that if there is an electricity fault it is the people on the ground who have to give first-hand information since without the call, he would not have known if there was a fire. DW1 further stated that he did not record statements from the people who witnessed how the fire started despite the fact that he ought to have taken them so as to determine the cause of the fire. Ms Julu contended that since PW1 and PW2 were the people on the ground, DW1 should have relied on their testimony and there was no reason as to why the Court could not rely on their evidence to hold that the case had been proved.
10. In submitting that expert evidence is not in itself conclusive, Ms Julu relied on the case of *Stephen Kanini Wang'ondru v The Ark Limited [2016] eKLR*. She contended that the Trial Court failed to consider that the appellants' house was the one that had been connected with power using a direct drop/cable line from the transformer post, hence it would be more affected by an electric problem that begins at the transformer post/wire cable as the fire would have to burn the said house first before spreading to the other houses. She submitted that it was illogical to conclude that for electricity to have been the cause of the fire, then the other houses must of necessity have been affected or burnt.
11. Ms Julu submitted that one of the core issues in determination of cases are the pleadings in place. In citing the decisions in *Ann Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR* and *Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR*, she stated that no evidence was tendered by the respondent to discharge the evidential burden to prove its averments that the fire never started on the roof, but was instead caused by lack of proper parental care, having a domestic aid who did not handle electrical appliances with care and by having electrical appliances on overnight, while having reason to know that it was dangerous; and further, by renting a house that had defective wiring and a danger to live in.
12. The appellants' Counsel relied on the case of *NM & another (suing as representative of the estate of LN (deceased) v Ndungu Isaac [2020] eKLR* and submitted that the Trial Court in requiring the that the minor and the domestic help who were in the house to testify and corroborate what PW1 and PW2 had stated raised the burden of proof to a level beyond a balance of probability. She referred to the case of *Daniel Paul Onkangi & 3 others v Kenya Power & Lighting Company Limited [2017] eKLR*, where the Kenya Power & Lighting Company Limited had stated that it did not know how the fire began while the claimant had a clear consistent story on what caused the fire and the Court therein held that the case had been proven on a balance of probability. Ms Julu submitted that from the evidence on record, the appellants had proven their case on a balance of probability
13. Ms Vanani, learned Counsel for the respondent submitted that the appellants failed to prove their case before the Trial Court on a balance of probabilities. She also submitted that the evidence of the appellants' neighbours who were the alleged eye witnesses of the cause of the fire was not enough to convince the Trial Court that the fire was caused by electric power fault or surges. She contended that their evidence was contradictory on material issues hence it lacked probative value. She stated that PW1 in his evidence stated that he was milking his cows when he saw smoke from the appellants' house, which means that the fire had already started by the time he got to the appellants' house, as smoke is a sign of fire.
14. Ms Vanani submitted that a fire started by whatever means would cause sparks on an electric power line thus without the Court being told by an expert where the fire started, it would be unsafe to conclude that it was started by an electric power fault or power surges. She urged this Court to find that the alleged eye witnesses whose evidence was self-contradictory did not establish the cause of the fire, let



- alone linking the same to any fault or negligence on the part of the respondent. She stated that the Trial Magistrate was right in finding that the evidence of the said witnesses needed to have been supported by the people who were inside the house.
15. She submitted that from the evidence of PW1, the appellants' house help was in the house during that incident and her evidence would have been key in this case. She stated that the fact that the appellants chose to leave out her evidence led to presumption that her evidence would have been adverse to their case. Ms Vanani submitted that the Trial Magistrate's judgment was sound in both law and fact as they did not avail any report by a fire expert or an investigator and without the same, the Trial Court was left without any evidence to reach a finding as to the cause of the fire. She stated that in any event, the appellants were the ones with the onus to call a fire expert as a witness as in law, he who alleges must prove and as such, failure to call a fire expert left the appellants' allegations against the respondent unproved.
  16. It was submitted by Ms Vanani that DW1 visited the house where the incident occurred and it was his evidence that the house was connected to power through a cable from the pole through a conduit to the meter box, which was mounted outside on the wall. He further testified that when he visited the house, the meters, fuses/contents were intact as the same can be seen from the photograph in the report produced by DW1. The respondent's Counsel stated that the foregoing coupled with the fact that the fire only affected the appellants' house shows that the cause of the fire was not related to electricity.
  17. She relied on the case of *Mary Margaret Wejuli & another v Kenya Power & Lighting Company Limited [2019] eKLR*, where similar allegations were made against the defendant just like in the case herein and the plaintiffs therein called an Electrical Engineer who gave evidence as to the cause of the fire, but the Court still held that on a balance probability it believed the defence that the fire caused could not have been attributed to an electric fault arising from the supply of electricity by the KPLC to the suit property. Ms Vanani also relied on the case of *Jeremiah Maina Kagea v Kenya Power & Lighting Company Limited [2019] eKLR*, where the Court held that since the fire only broke out in the ceiling, then no negligence could be inferred on the defendant's part, that none of the fuses blew, and on a balance of probability, it is reasonable to conclude that it was an internal defect in the wiring system of the house that caused the fire. She submitted that the appellants herein did not call a fire expert or produce a fire investigation report hence their case was not proved.
  18. Ms Vanani submitted that the police abstract dated November 20, 2018 that was produced by the appellants shows that Samuel Musyimi Nzoka reported to the police that his house caught fire and burnt two of his rooms completely. That he did not report that the fire was caused by fire surges or power fluctuations since had it been the case, then OB No 17/7/1/18 would have indicated so as at that time, the facts of the incident were fresh in his mind. She stated that what is alleged herein is an afterthought. She submitted that the appellants knew that there was no negligence on the part of the respondent and that is why they left out any reports from the police or fire brigade and it can only be inferred that their evidence would have been adverse to their case.
  19. Ms Vanani further submitted that DW1's evidence was clear that in cases of power failure in respect of domestic supply, the members of public normally call the respondent to report, as the respondent's officers cannot detect the same from their offices like in the cases with higher power line supply. She indicated that the respondent only depends on the people on the ground to get the reports of any incidents, then the respondent goes to the ground on the strength of such reports. The respondent's Counsel contended that the fact that the respondent was informed of the fire incident did not mean that the respondent had anything to do with the fire since it is a matter of common notoriety for members of public to call the respondent in cases of fire incidents, in order for its officers to go and isolate the power lines from the affected area.



20. It was submitted by Ms Vanani that the case of Ann Wambui Ndiritu v Joseph Kiprono Ropkoi & another (supra) that was relied on by the appellants' Counsel involved a collision between a lorry and a motor cyclist making the facts therein different from those in the case herein, where there is an allegation that electric fault was the cause of fire. She urged this Court to consider the principle of law that there is no liability without fault and confirm the Trial Court's judgment on liability and dismiss the appellants' appeal with costs.

#### **ANALYSIS AND DETERMINATION.**

21. I have re-examined the Record of Appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this Court is enjoined to analyze and re-assess the evidence adduced before the lower Court afresh and reach its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. This was the position taken by the Court in the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*, where it was held as hereunder-

' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way'

22. It is trite that an appellate Court will not interfere with the finding of fact by a Trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles of fact or law in reaching his conclusion. See *Musera Vs Mwechelesi & another [2007] 2KLR 159*.

23. The issues that arise for determination in this appeal are -

1. If electric fault was the cause of the fire that burnt down the appellants' house;
2. If negligence is attributable to the respondents; and
3. Whether the appellants are entitled to compensation for the loss they suffered as a result of the fire.

If electric fault was the cause of the fire that burnt down the appellants' house

24. It is not disputed that the appellants had rented the house in question where they lived together with their children. The said house and/or household was supplied with electricity by the respondent herein. PW1 testified that he is a neighbour to the appellants and that on January 7, 2018, he woke up at 4.00 am, and saw smoke coming from the roof of the appellants' house. He stated that he went to the scene to find out what was happening and he found smoke and some sparks from the supply line which was supplying electricity to the appellants' house. He then raised an alarm and neighbours went to help them put off the fire. He further stated that since the fire was from electricity they had some difficulties in putting it out, since they were not experts. He expressed the opinion that the fire was started by electricity. PW1 stated that the drop cable was left hanging on top of the roof.
25. It was PW1's testimony that the power in the house and the meter box were intact but the wiring in the meter box was burnt. He stated that if the wiring of the said house was not properly done, the respondent would not have connected power but since the house had power, the wiring had been done



- properly. He further stated that before the fire incident, they had power surge and frequent blackouts which they reported to the respondent, but it did not respond to their call. He indicated that the transformer had been changed after the incident and they have not had any other incident.
26. In cross examination, PW1 confirmed that they did not call any electrical expert but they called the fire brigade. He also stated that at the time of the incident, the deceased was in the house with her sister and a house help. He also stated that the fire started from the roof.
27. PW2's testimony was largely similar to that of PW1. PW1 in his testimony stated that the wiring in the meter box got burnt and the meter box was therefore affected. PW2 in his evidence stated that the meter box got burnt and it was not true that the meter box was intact. In cross-examination, he stated that the meter box wires burnt. PW4, the father of the deceased was not at home when the fire occurred. He stated that after the incident occurred the defendant installed a new transformer, and since they replaced it, they have never had any problem with power. In cross-examination, he stated that when he went home in the evening, he checked the meter box and it had been affected. In re-examination he stated that the meter box got burnt and the cables also burnt.
28. DW1 an Engineer with the respondent in his examination-in-chief testified that the house in issue was connected to power through a cable from the pole, through the conduit to the meter box. He stated that about three meter numbers' cables dropped through the ceiling. That the meter box was mounted outside on the wall and it was still intact, the fuses/contents were also still intact. He further stated that they did not receive any complaint of power surge in the area and that there was no other house which was burnt by the fire.
29. DW1 testified that the cause of the fire was not electric fault since if it was, the fuses would have blown and it would have affected several houses but in this case, the fuses were intact. It was his testimony that he went to the scene because there was fire allegedly caused by electricity. He stated that the wiring of the house was done by contractors and not the respondent herein. During cross-examination he stated that if there is an electric fault, it is the people on the ground who have to give first-hand information since without their calls, the respondent cannot know whether there is a fire. DW1 produced a report in which he concluded that the cause of the fire was unknown. The report was accompanied by a photograph of a meter box which was mounted on the outer wall of the house in issue.
30. The legal burden of proof lies upon the party who invokes the aid of the law. That is the purport of Section 107(1) of the *Evidence Act* Cap 80 of the Law of Kenya which provides as hereunder: -
- ' 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'
31. The Court of Appeal in the case of *Eastern Produce (K) Limited v Christopher Astiado Osiro, Civil Appeal No 43 of 2001* stated as follows on the burden of proof-
- ' It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that 'there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.'
32. It is noteworthy that the appellants did not call an expert to tender evidence as to what caused the fire and possibly assist the Court in determining where the fire started. The appellants submitted that they did not need to call an expert since one was already called by the respondent and that he could not ascertain where the fire begun.



33. The appellants submitted that prior to the incident, there were frequent power surges and blackouts. The appellants' witnesses stated that this information was communicated to the respondent but it did not take any action until the incident happened. The respondent denied that there were any power surges and blackouts. It is my considered view that the appellants should have called the witness who actually reported to the respondent about the power surges and blackouts or a letter addressed to the respondent reporting the said issue. In this case, it was however not done. The appellants therefore failed to sufficiently prove that indeed there were frequent blackouts and power surges in their house.
34. PW1 and PW2 who are the appellants' key witnesses testified that they saw smoke which was coming from the roof of the appellants' house before they went there to find out what was happening. I concur with the Trial Magistrate's finding that smoke is a sign of a burning substance and since PW1 and PW2 got to the scene after the fire had already started, they could not conclusively confirm that the fire was caused as a result of an electric fault. It is worth noting that the appellants' witnesses stated that the deceased was in the house with her sister and their house help.
35. The deceased's sister was only seven years old which to my mind was sufficient reason for the appellants not to call her as a witness before the Trial Court to testify in a case that requires establishment of the cause of fire. The appellants' house help who was an adult at the time was however not called by the appellants to testify as to what caused the fire. I am of the considered view that since she was in the house when the fire started, she was in a better position to know what caused the fire and/or where the fire started from.
36. The appellants gave the reason as to why the house help did not record a statement with their Advocate was that she had left employment. The appellants did not demonstrate to the Trial Court the efforts they put in place in trying to locate her. They did not explain why she did not record a statement despite the fact that she was in the house when the fire started. The Trial Magistrate found that failure to call the deceased's seven year old sister and the house help only leads to an inference that their evidence would have been adverse to the appellants' case. I agree with the Trial Court's finding that the house help was the closest person to an eyewitness that the appellants had and failure to call her as a witness only attracts a negative inference in the Court's mind.
37. PW1 and PW2 stated that when they got to the scene, there were sparks from the supply line which was supplying electricity to the appellants' house. They also testified that the meter box was burnt and concluded that the fire was caused by an electric fault. DW1 on the other hand testified that from his assessment, the fire could not be as a result of an electric fault since the meter box which was mounted outside on the wall had the fuses/contents intact. In justifying that the fire was not caused by an electric fault, he stated that, the fuses in the meter box would have blown and it would have affected several houses if the fire had been caused by an electric fault. I have gone through DW1's report and I have had an opportunity to look at the photograph annexed thereto, which evidently shows that the meter box was still intact as stated by DW1.
38. It is not disputed that none of the parties herein was responsible for the wiring of the appellants' house. I note that the appellants' witnesses testified that the fire did not begin in the lower part of the house, which caught fire after the roof came crumbling down from the effects of the fire. In the case of *Jeremiah Maina Kagema vs Kenya Power & Lighting Co Ltd* [2001] eKLR. the Court held that-

' It is in the Plaintiff's evidence and also that of Simon Ngigi Mburu (DW2) that the wiring of the house was done by him (PW2) and not by the Defendants. Since the fire broke out only in the ceiling, then no negligence can be inferred on the Defendant's part. None of the



fuses blew, and on a balance of probability, it is reasonable to conclude, as I do, that it was an internal defect in the wiring system of the house that caused the fire.'

39. Notably, only the appellants' house was burnt by the fire. Therefore, considering the appellants' witnesses' testimony on one hand, while bearing in mind that they did not call an expert witness and comparing the same with the respondent's witness who is an Engineer, this Court's finding is that the respondent's testimony as to what caused the fire is more credible and more assuring, since he has the requisite expertise needed in this case. Since his conclusion in his report dated January 15, 2018 was that the cause of fire was unknown and in his testimony in Court he testified that it was not as a result of an electric fault, I concur with the Trial Magistrate that the appellants did not prove their case on a balance of probabilities.
40. It is not lost to this Court that the appellants attempted to attribute the fire to the alleged frequent power surges and blackouts prior to the incident. However, DW1 testified that there were three meter numbers' cables dropping through the ceiling in the appellants' house. The appellants failed to explain why the two other consumers who owned the other meter numbers, whose electric supply was also from the respondent were not affected by the alleged electric fault. The nature of this case required the appellants as of necessity to engage the services of a fire expert and/or an Electrical Engineer to investigate the cause of the fire. They failed to do so thereby weakening their case tremendously.
41. In light of the foregoing, this Court is satisfied that on a balance of probabilities, the respondent's assertion that the fire was not as a result of an electric fault arising from the supply of electricity by the respondent to the suit property to be true. Consequently, the respondent cannot be held liable and the appellants are not entitled to compensation.
42. This Court sympathises with the appellants for having lost their child in a fire. This Court's finding however is that the appeal herein lacks merit. The same is dismissed with costs to the respondent.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 29<sup>th</sup> day of July, 2022. Judgment delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Ms Julu for the appellant

Ms Vanani for the respondent

Mr. Oliver Musundi – Court Assistant.

