



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO.15 OF 2020

(Consolidated with Kakamega HCCA No. 18 of 2020)

(Appeals arising from the judgment and decree in Kakamega CMCCC No. 191 of 2017,

by Hon. JN Maragia, Senior Resident Magistrate, of 12th February 2020)

KENYA POWER AND LIGHTING COMPANY LIMITED.....APPELLANT

VERSUS

ABEDNEGO SHIKHUYU INEA.....1ST RESPONDENT

ANDREW GUNYAMA.....2ND RESPONDENT

JUDGMENT

1. There are two appeals herein consolidated into one. The order consolidating the them was made on 15th June 2021. The appeal in HCCA No. 15 of 2020 came first in time, and I shall treat it as the lead file, so that reference to the appellant and the respondents would correspond to the parties as named in that matter.
2. The suit in the primary court, that is to say Kakamega CMCCC No. 191 of 2017, was brought by the 1st respondent against the appellant and the 2nd respondent, seeking damages following the electrocution of a child of the 1st respondent, who I shall refer hereto as the deceased, on the 4th October 2016, when he came into contact with live wire, on his way home from school, which were allegedly lying on the ground after a tree that was cut by the 2nd respondent fell on them. The 2nd respondent filed a defence, wherein he denied liability, and attributed the accident to the negligence of the 4-year-old deceased minor and the 1st respondent. The appellant on its part denied liability and attributed negligence on the deceased minor and the 2nd respondent.
3. The primary court heard three witnesses from the 1st respondent and one from the side of the 2nd respondent. The appellant did not present any witness. In the end, the trial court found the appellant and the 2nd respondent equally liable in negligence for the death of the deceased, and awarded damages to the 1st respondent, as follows: loss of dependency Kshs. 1, 000, 000.00, damages for pain and suffering Kshs. 20, 000.00 and special damages Kshs. 21, 075.00, totaling Kshs. 1, 041, 075.00. Liability was apportioned between the two defendants, so that the appellant bore 60%, while the 2nd respondent bore 40%.
4. The appellant herein was aggrieved by that outcome, and filed the appeal in Kakamega HCCA No. 15 of 2020, listing fifteen grounds, which really turn on two issues, liability and quantum of damages. The appeal in Kakamega HCCA No. 18 of 2020 is by the 2nd respondent, listing seven grounds, which also turn on liability and quantum of damages.
5. Directions on the disposal of the appeal were given in Kakamega HCCA No. 15 of 2020, on 2nd February 2021. The 1st respondent has filed a set of written submissions, one in Kakamega HCCA No. 15 of 2020 and the other in Kakamega HCCA No. 18 of 2020. In both he supports the judgment of the primary court. I have seen written submissions filed in Kakamega HCCA No. 18 of 2020 by the 2nd respondent, as appellant in that appeal. He submits that the deceased minor should have been found liable to the extent of 30%, he is not clear on how the balance of the liability was to be shared, save that he submits that he did not own the land and the trees, and neither was he a customer of the appellant. The appellant did not file written submissions.
6. On issue of liability, the first issue the 2nd respondent raises is that the primary court ought to have ascertained and apportioned liability on the part of the minor deceased person, for failing to take precautions for his own safety. It is trite that, with respect to negligence, minors of

tender years especially, are considered not to have reached the stage of mental development where they could be held responsible for acts of negligence. There is ample case law on that principle. In *Butt vs. Khan (1981) KLR 349 (Madan, Wambuzi & Law JJA)*, it was said that *it would need a great deal of persuasion before imputing contributory negligence to the child aged eight years having regard to her tender age; while in Tayab vs. Kinanu (1983) KLR 114 (Law, Potter & Hancox JJA), it was said that the practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission. See also MM (suing thro' the next of kin CMN) vs. Boniface Ngaruya Kagiri & another [2018] eKLR (Mutende J) and EWO (suing as the next friend of a minor COW) vs. Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR (Aburili J). The issue of apportioning liability, by way of contributory negligence, to a 4-year old is out of question. The trial court did not err at all in failing to do so.*

7. The second issue on liability relates to whether the 2nd respondent was the owner of the land where the trees in question were cut, and whether he had control of the property and the trees. He asserts that there was no proof that he owned the land, and, therefore, the trees in question. I have perused through the trial court record and I do note that he has been consistent in taking that position. From the case mounted by the 1st respondent no material was placed on record on the ownership of the land in question. As it is, there is nothing before me which connects that land and the trees to the 2nd respondent. The trial court ought not have attributed liability on the 2nd respondent in the absence of such evidence.

8. The third issue relates to liability on the part of the appellant. As stated above, the appellant did not file written submissions, and that would then mean that it has not presented its case on appeal. I would have dismissed its case, save for the fact that its appeal is consolidated with that of the 2nd respondent. There is ample case law placing responsibility on the appellant with respect to how it handles live electric cables. It was stated, in *Kenya Power (previously sued as Kenya Power & Lighting Company Ltd v Fredrick Muhavi Amusinda (suing as a personal representative of the estate of Anzavula Amusinda- DCD) [2016] eKLR (C. Kariuki J)*, that the appellant had a statutory duty to maintain its cables and to ensure that they are not a danger to the people around them. In *Kenya Power & Lighting Co. Ltd vs. Joseph Khaemba Njoria [2005] eKLR (GBM Kariuki J)*, it was said that the appellant has a responsibility to ensure that the power infrastructure it has installed in the country for the purpose of electrification is only properly maintained to prevent accidents, and that it would not be reasonable to expect that, as people walk along in towns, they should anticipate live electric wires that might protrude from the ground or from walls and endanger their lives. In *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR (J. Mulwa J)*, it was stated that all electrical installations are the mandate of the appellant, which is the only entity mandated to install, supervise, inspect and maintain electric installations. It was asserted that the duty for constant checks, inspections and maintenance of electrical installations is placed upon the appellant by statute, and that its failure to do so attracted liability for any deaths caused.

9. The appellant did not adduce any evidence at the trial court, and, therefore, it did not establish that the electricity cables in question did not belong to it. It led no evidence that would have led the trial court to attribute liability to any other person or entity. The trial court, therefore, did not err in finding it liable for the death of the deceased herein. As I have found, and held here above, that there was no proof that the land on which the trees that were cut from belonged to the 2nd respondent, and, therefore, no liability could be attributed to him, it follows that the appellant should bear liability at 100%. The infrastructure belonged to it, and the fact that live wires were lying on the ground, when they came into contact with the deceased, was sufficient proof of negligence.

10. In the matter of quantum of damages, the primary court is faulted for awarding an inordinately high award, given that the deceased was a nursery school child, who had no dependants. The appellant has an issue with the loss of expectation of life award of Kshs. 1, 000, 000.00, and it has proposed Kshs. 400, 000.00. There are two schools of thought on calculation of loss of dependency, one favours taking into account the number of years and anticipated income of the deceased, while the other advocates a global award. See *Beatrice Wangui Thaini vs. Hon. Ezekiel Bargetuny & another Nrb HCC 1638 of 1998 (UR) (Ringera J)*, *Emmanuel Wasike Wabukesa vs. Munema Ndiwa Burman [2019] eKLR (Githinji, Okwengu & Mohammaed JJA)*, *Kenya Breweries Ltd vs. Saro [1991] eKLR (Gachuki, Masime JJA & Omollo AG JA)*, *Kwamboka Grace vs. Mary Kemuma Mose [2017] eKLR (JR Karanja J)*, *Daniel Mwangi Kememi & 2 others vs. JGM & another [2016] eKLR (Gikonyo J)*, among others. The principle appears to be that where a child is of tender years, and it is impossible to prospect into how his future would have turned out, a global award would be the way to go.

11. In view of the above, it is my conclusion and finding that the trial court arrived at the correct decision, in making a global award, given that the deceased was of very tender years. I am persuaded that the award made by the trial court was neither high, nor low, and I shall not interfere with it.

12. In the end, the two appeals are disposed of as follows:

- (a) That no liability attached on the 2nd respondent, for there was no proof that he owned the land and the trees on the land;**
- (b) That liability attached fully on the appellant for it was responsible for the infrastructure and its maintenance;**
- (c) That quantum of damages shall remain as awarded by the trial court; and**
- (d) That 1st respondent shall have the costs of the appeal.**

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2021

W MUSYOKA

JUDGE