REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO.27 OF 2015

KENYA POWER AND LIGHTING CO.LTD.....APPELLANT

VERSUS

ESTHER WAMBUI NJANJA (*sued as the personal representative of*

MASTER MUTUGI KIRIMI GICHUKI (deceased)….....RESPONDENT

(An appeal from the judgement of Hon. E. H. Keago, Principal Magistrate, Baricho delivered on 8th July, 2015 in Baricho PM CC NO.5 of 2014)

JUDGMENT

1. The respondent ESTHER WAMBUI NJANJA (suing as the personal representative of Master MUTUGI KIRIMI GICHUKI [deceased] to be referred to as the respondent, had filed a suit before the Principal Magistrate's court at Baricho against the appellant Kenya Power & Lighting Company seeking damages under the Law Report Act and Fatal Accident Act.

2. The claim was based on negligence. The respondent was alleging that on 4.3.2012 the deceased was doing his duties as a farm hand and was electrocuted to death while operating a chuff cutter due to an electric fault from the main power supply provided by the appellant to the dependant to the deceased employers residence.

3. The respondent had alleged that the appellant was negligent as he had failed to switch off the power supply from the main upon the neutral cables being cut off and proceeding to supply electricity. By so doing, the respondent alleged that the appellant failed to ensure a safe and controlled power supply to the deceased and other consumers.

4. The appellant had denied the claim and filed an amended defence contending that the respondent had no locus standi to institute the suit. The appellant denied the allegations of negligence pleaded by the respondent and alleged that the deceased was negligent by voluntarily assuming and taking up a risk and willfully exposing himself to electricity by touching live wires. That the deceased was courting danger by sticking metal parts into a machine with live current, failing to take precaution and care of his own safety and exposing himself to the risk of electrocution. The appellant relied on the doctrine of volante non fit injuria in so far as it would be applicable to the facts of the case.

5. After the full trial the trial Magistrate found the appellant 100% liable and proceeded to …… the quantum of damages as follows;

1. Pain and suffering	Kshs. 50,000.00
2. Loss of expectation of life	Kshs.100,000.00
3. Loss of dependency	Kshs.750,000.00
4. special damages	Kshs.61,050.00
5. Less	Kshs.(100,000.00) for loss of expectation
Total	**Kshs.861,050.00**

6. The appellant was dissatisfied with the judgment of the trial Magistrate and lodged this appeal based on the following grounds;

1. That the Learned Magistrate erred in law by finding the appellant 100% liable in negligence regardless of the evidence tendered against such a finding whilst Kenyan law has not reached the stage of liability without fault.

2. That the Learned Magistrate erred in fact and in law by failing to take into account that the accident herein was an act of God and hence the appellant was not at fault in any way.

3. That the Learned Magistrate erred in law and in fact by holding that the delay by the Appellant's employees was inordinate while disregarding the fact that there were numerous power outages reported on the said day and that there was no report of broken power lines at the scene.

4. That the learned Magistrate erred in law and in fact by failing to discount the award of loss of expectation of life from the final award thus making a double award to the plaintiff.

5. That the Learned Magistrate misdirected himself in law and in fact by failing to be bound by the decision of the Apex Court when faced with similar facts in respect of Acts of God, contrary to the doctrine of stare decisis.

7. The appellant pleads with the court to allow the appeal and award them costs.

8. The appeal proceeded by way of written submissions. For the appellant the submissions were filed by J.K. Kibicho & Company Advocates. It was submitted on grounds 1 & 3.

Section 107 (1) of the Evidence Act provides;

> ***"whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"***

In addition, ***section 109 of the same Act*** provides;

> ***"burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"***

As regards an action in negligence it is stated in Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 as follows with respect to the what is required to be proved in an action such as was the Plaintiff's;

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must who that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established"***

In ***TEADSETTERS TYRES LTD –VS- JOHN WEKESA WEPUKHULU [2010] eKLR where Ibrahim J.*** (as he was then) in allowing an appeal quoted Charles Worth & Percy on negligence, 9th edition at).387 on the question of proof, and burden thereof where it is stated:

> "***In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred".***

9. The appellant submits that there was no iota of evidence to support the particulars of negligence pleaded in the pliant. The only reason the appellant was blamed so he submits is because the appellant was the supplier of electricity. The appellants submits that the only way he could be liable is if the plaintiff proved the particulars of negligence and if the information in the particularized acts of negligence was in possession of the defendant or there would be a reasonable expectation that the information would be in defendants possession. The appellant submits that this was not the case. The appellant submits that he could not be liable for an act which they could not have reasonably foreseen.

10.The appellant submits that they did all what was in their power and was reasonable in the circumstances and this cannot fit in the definition of or be classified as negligence.

11. On the 2nd ground, the appellant submits that what happened was an act of God attributed to heavy torrential rains accompanied by heavy winds and gales the previous night causing a tree branch to fall on an earthed metallic object. The **appellant** was electrocuted when he came into contact with an earthed metallic object. He refers this court to the black Law's dictionary defines 'act of God' as;

> ***"An overwhelming unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight"***

12. He also relies on the Kenya Supreme Court decision in Kenya Wildlife Service –VS- ***Rift Valley Agricultural Contractors Limited***

"in relying on the definition by Congress in several statutes in the United States of America propounds that:

> ***An act of God is "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight". This definition includes multiple elements (1) "natural" causation (2) a lack of foreseeability; (3) that "nature" must be the exclusive or sole cause; and (4) the effects must not have been preventable by reasonable due care of foresight of the defendant. While the concept of acts of God cannot be reduced to simply the idea of "forces of nature", acts of God are understood to be a subset of these, thereby immediately raising the question of which acts are natural and which are human"***

The appellant contends that no report of the **fallen** was made apart from the report of a power black out and no more. They could not have been expected to foresee the breakage of a powerline that would endanger lives. The appellant urges the court to attribute liability to an act of God and apportion 50% liability in the alternative.

13. The appellant abandoned ground No.4. I have considered the appeal and all the submissions. This is a first. It is well settled that a first appellate court has a duty to evaluate and re-analyse the evidence tendered before the trial court and come up with its own independent finding. This has been stated on the case of ***SELLE -VS- ASSOCIATED MOTOR BOAT CO., LTD (1968) E.A.*** The court held thus:

> ***" An appeal to this court from 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 conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily 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 inconsistence with the evidence in the case generally"***

Though the authority speaks to appeals from the High Court to the Court of Appeal. The same applies to the appeal in the High Court from subordinate court. I have a duty to consider the evidence, evaluate it and draw my own conclusion. The appellant has a legitimate expectation that the evidence will be reconsidered, evaluated and a decision made.

14. I have considered the evidence tendered before the trial Magistrate. The plaintiff (PW1) testified that the deceased ……as a result of being electrocuted. She testified that there was a problem with wiring due to the fallen trees. During cross- examination PW1 testified that the accident occurred at 1.00pm, there was no power then. There were some trees that had fallen on the power lines. The trees had fallen before the accident. She did not know whether anybody had reported about the trees.

15. The defence witness DANIEL MWANGI KARUME DW1 relied on witness statements wherein he had stated that according to the information obtained the deceased was collecting fodder near the chuff cutter when he came into contact with the metal bars of the cutter which were live. It had rained heavily the previous night and strong wind uprooted and broke several trees one of which broke the neutral conductor of the line serving the deceased's employer. The neutral conductor broke at the middle. The loadside of the broken neutral coiled itself onto the bare part of phase leading to the metal bars becoming live.

16. He stated that the defendant could not be blamed in any way whatsoever as the events were beyond capability and control.

17. In cross-examination DW1 stated the only report made was that of a power blackout. The circuit could not break because the neural wire was broken and so the circuit was not complete.

18. In finding the defendants liable the trial Magistrate stated:

> ***"I have considered the submissions by both sides on the issue of liability but I do find that indeed there was a report about the black out. The report was by the employer of the deceased. The defendant were not able to tell the cause of the black out immediately and they could not do that by visiting the scene of the report.***
>
> ***The time taken from the first report to the 2nd report of death was incidental. The defendant are too much aware of the risks of such incidents of black out, and it not possible for the first report to detail exactly what had happened. They are the experts who could tell what had caused the black out. Their failure to act in time clearly is what caused the demise of the deceased. I will therefore find the defendants liable 100%".***

19. For the plaintiff to prove an action for damages for negligence, he or she must discharge the burden to proof that the injuries sustained for which damages are claimed, were a direct result of an act of omission for which the defendant is in law responsible. It must be proved that the defendant had a duty of care but failed in his duty. See ***Husbury Law of England*** quoted above.

20. The burden of proof is on the plaintiff to prove negligence. The plaintiff is therefore expected to present before the court facts which supports his claim of negligence for the court to determine whether negligence may be reasonably inferred. Refer to the case of ***TREADSETTERS TYRES LIMITED -VS- JOHN WEKESA WEPUKHULU (2010) eKLR, Justice Ibrahim*** (as he then was);

> "***In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such either proved or admitted and after it is concluded, two questions arise, (1)***

whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred".

21. The plaintiff bears the legal as well as the evidential burden to prove that the defendant was negligent. He who alleges must proof Sections 107, 108 & 109 of the Evidence Act which I have quoted above provides that a party who would lose a case if the allegations are not proved bears the legal as well as the evidential burden of proof. This was stated by the Court of Appeal in the case of ***ANNE WAMBUI NDERITU VS. JOSEPH KIPRONO REPKOI & ANOTHER (2005) E.A. 334*** as follows;

" As a general proposition under Section 107(1) of the Evidence Act the legal burden of proof lies upon a party who invokes the aid of the laws and subsequently asserts the affirmative of the issue.

There is however the evidential burden of proving any particular fact which he desires the court to believe in its existence which is captured in section 109 and 112"

Under Section ***112 of the Evidence Act*** it is provided:

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him".

22. Tied to the issue of discharging the evidential burden is the trite principle that a party is bound by his own pleadings. The pleadings serve to furnish the defendant the statement of the claim. The functions of pleadings was described in the case of ***DARE –VS- PULHAM (1982) 148 C.L.E 658*** at 664 as follows;

"Pleadings and particulars have a number of functions they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity of what he expects to meet. They define the issues for decision in the litigation ad thereby enable the relevance and admissibility of evidence to be determined at the trial and they give the defendant an understanding of a plaintiff's claims in aid of the defendant's right to make payment in court"

23. The pleadings determines what a party embarks to prove. It can therefore be informed that where particulars of negligence are pleaded in the plaint, they form the allegations of negligence and the plaintiff must discharge the burden to prove them on a balance of probability. ***Order 2 rule 3(1) Civil Procedure Rules*** provides;

"Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits".

24.The plaintiff did not adduce evidence in court to prove the particulars of negligence at all. As submitted, the only way the defendant could have been liable for negligence is if the information particularized as acts of negligence was in possession of the defendant or there would be a reasonable expectation that this information would be in the defendant's possession. The plaintiff did not know whether any report of a broken line and impending danger as a result had been made to the defendant. The evidence before the trial court was that no report of broken power lines had been made to the appellant. The appellant could not be blamed for an act for which he was not responsible and could have reasonable foreseen. The evidence by the appellant that the only report made was that of power outages.

25.The trial Magistrate fell into error by basing liability on a matter that was not pleaded in the particulars of negligence. Delay in addressing the report of the power outages was not one of the particulars of negligence. Even the employer of deceased had only reported a power blackout. It is only after the DW1 visited the scene that he discovered the broken line and order that it be immediately switched off. The trial Magistrate appreciated that the appellant was not able to tell the cause of the black out immediately, meaning they did attend to the reports. It was therefore preposterous for the trial Magistrate failure to act in time caused the demise. The one fact is that they never came to know the cause of the black out until the incident occurred and DW1 went to the scene.

26. The appellant raised the issue that the unfortunate incident was an act of God. The issue was also raised before the trial Magistrate but no determination was given. That was an undisputed evidence that it rained heavily the material night and there were heavy winds. It is not unusual for heavy rains to be accompanied with destructive winds and wreak havoc. The trial Magistrate ought to have addressed the issue since the particulars of negligence were not proved. Acts of God are viewed as natural occurrences like rain, mudslides, thunderstorm and many others which occur unexpectedly and which cannot be avoided or prevented by exercising due care and they leave behind a trail of destruction and loss including loss of human lives. I have quoted the case of ***Kenya Wildlife Service –Vs Rift Valley Agricultural Contractors Limited*** where the Supreme Court defined an Act of God. The appellant also referred to the Black's Law dictionary definition which I have quoted above.

In determining whether an occurrence is an act of God the significant consideration must be given to the question whether the event was reasonably foreseeable. Rainy seasons are foreseeable but when they come with strong winds and storms this cannot be termed as foreseeable and is clearly an Act of God. The appellant had put measure but …….

"the wires were twisted, that how the neutral wire got broke (sic) and it coiled on the life wire and it became live, and it could not cause the circuit to break"

Page 59 from line 30 to 60 line 2. Short circuit protection is protection against excessive current or currents or current beyond the acceptable current rating of equipment and it operates instantly. As soon as an over current is detected, the device trips and breaks the circuit.

The failure of the short circuit to break again was not foreseeable as it occurred due to the way the wire got twisted and neutral wire broke.

27. The evidence is overwhelming that the event was as a result of natural events that could not have been foreseen and the resultant destruction of trees causing a branch from trees which were at a distance to fall on power line and break it could not have been prevented by reasonable care or foresight by the defendant. If the branch had not taken on the life wire and broken it due to the terrible weather which prevailed, the accident could not have occurred. The trial Magistrate errered by failing to consider the evidence and arrived at an erroneous decision of 100% liability.

28. The appellant did not challenge the award of damages. The award of damages is a matter of discretion of the trial Magistrate. Nothing was alleged on the exercise of that discretion and I therefore find no reason to interfere with the award of damages.

IN CONCLUSION

The plaintiff failed to proof that the cause of the injury on the deceased was as a result of electric fault. This is a case where the doctrine of res ipsa loquitor applies, it was based on specific particulars which were pleaded. The particulars of negligence were not proved. Thought he deceased was electrocuted by electricity supplied by the defendant, the damage on the wires were as a result of an Act of God for which the defendant cannot be held liable. The appeal has merits.

1. I allow the appeal.

2. I order that the judgement of the trial Magistrate is set aside and substituted with an order that the respondent's suit is dismissed.

3. Considering the circumstances of this case, each party will bear its own costs.

Dated at KERUGOYA this 30th day of January 2020.

L. W. GITARI

JUDGE