REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 136 OF 2018

CONSOLIDATED WITH

CIVIL APPEAL NO. 143 OF 2018

KENYA POWER & LIGHING COMPANY LIMITED.....1ST APPELLANT

PETER MIYIENDA.....2ND APPELLANT

VERSUS

DENIS KABUNA NYATUNDO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Nathan S. Lutta (SPM) Dated 20th November, 2018 in the original KISII SPMCC No. 419 of 2012)

JUDGMENT

1. This is an appeal by the defendants in the lower court SPMCC No. 419 of 2012, hereinafter referred to as the 1st and 2nd appellants, against the decision of the Senior Principal Magistrate Court made on 20th November, 2018 on a negligence claim.

2. The brief facts are that the respondent herein alleged that on 28th February 2012 while plastering the walls of the 2nd appellant's building at Daraja Mbili area a fire broke out at the said building and he was electrocuted as a result of which he was severely burnt. The respondent claimed that he was a mason working for the 2nd appellant. The respondent averred that the accident was as a result of the negligence or breach or statutory duty of the appellants.

3. The 1st appellant denied the claim and averred that the claim ought to have been against the 2nd appellant who was the respondent's employer. The 1st appellant pleaded in the alternative and advanced that it was not privy to the contract between the respondent and 2nd appellant and thus did not owe the respondent a duty of care. The 1st appellant contends that the 2nd appellant was strictly liable for the alleged injuries as per the provisions of ***Occupier's Liability Act*** *('the Act')* and the 1st appellant cannot therefore assume liability. It further averred that the alleged electrical system inferred did not belong to it and neither was it being done for its benefit. It also denied the occurrence of the accident and the injuries sustained by the respondent.

4. The 2nd appellant filed its statement of defence denying the claim by the respondent. He advanced that he had no contract with the respondent, and if there was a contract between the respondent and third parties then the 2nd appellant cannot be liable. He denied the particulars of negligence alluded to in the plaint and advanced that if at all there was an accident it was occasioned by the negligence of the respondent.

5. The matter was heard and the trial court delivered its judgment. The subordinate court held that the appellant was injured through the negligence of the 1st and 2nd appellants, found the appellants 100% liable and entered judgment for the respondent in the sum of Kshs 3,300,000/- as general damages, special damages of Kshs 42,500/- together with the cost of the suit.

6. The 1st appellant submitted that it was not clear how the trial court arrived at liability of 100% and that it offered no explanation why the 1st and 2nd appellant should share the blame in equal measure. They advanced that the respondent was the employee of the 2nd appellant and thus the 1st appellant was not liable for the claim. They submitted that the respondent was a guest under the provisions of *the Act* and thus the 2nd appellant was solely liable for his injuries. It was argued that the other workers engaged in the construction were equally liable for contributory negligence.

7. The 2nd appellant submitted that there existed no employer-employee relationship between the 2nd appellant and respondent. He faulted the trial court for apportioning liability at 100%. He contends that the voltage lines were not within the premises and blamed the 1st appellant for the accident.

8. The respondent submitted that 1st appellant owed him a duty of care and relied on **section 52 of the Energy Act** *(repealed)* which provides as follows:

> *"52. Liability of licensee to make compensation for damage*
>
> *The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by the loss or damage or breaking of any electric supply line, or by reason of any defect in any electric supply line."*

9. They further cited the case of **Joseph Kiptonui Kosgei v KPLC Ltd** where the court held that Kenya Power and Lighting Company owed the plaintiff and indeed every Kenyan a duty of care whenever it happens to have power lines, the court added that electric power is a dangerous commodity which if not properly secured can be a danger to society. He urged court that the 2nd appellant owed a duty of care to anyone who comes into his premises with his permission. He supported the trial court's finding on damages.

DETERMINATION

10. This being the first appellate court, I am fully aware of my duty to revisit and reconsider the evidence adduced before the trial court and arrive at my independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses and give due allowance for that disadvantage. (See ***Selle V Associated Motor Boat Company Limited, [1968] EA 123***.)

11. The evidence on the record reveals that the respondent sustained his injuries as a result of electrocution while working at the 2nd appellant's building. The respondent testified that on the material day he heard someone scream and followed the sound. He then saw a metal bar hanging from the power line and when he touched the window to take a good look at what had transpired he was electrocuted. He sustained injuries on his left arm, right arm, chest and right leg. Dr Ezekiel Ogando (Pw2) who examined the respondent on 22nd October 2012 confirmed that the respondent had suffered severe burns on the left hand leading to amputation of 4 fingers, deep burns on the right hand, burns on the left hand, chest and right thigh. He came to the conclusion that the respondent had sustained severe injuries and multiple soft burns which led to scars. He assessed permanent disability at 45% explaining that he had lost almost the whole function of the left arm and limited function of the right arm. The evidence was conclusive that the respondent had sustained the injuries pleaded.

12. I shall now consider the issue of liability. Both the appellant's denied that they were liable for the respondent's injuries. Jared Ongiri (Dw1) testified that Pw1 was not an employee of the 2nd appellant. He testified that the 2nd appellant had contracted services of Mr. Nyabengi who in turn hired Pw1 thus the 2nd appellant was not liable for Pw1's injuries.

13. The respondent advanced that the 2nd appellant was liable under *the Act.* **Section 2 (2) of the Act** provides that;

> *"(2) The rules so enacted shall regulate the nature of the duty imposed by law inconsequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees."*

Section 3 (2) of the Act defines common duty of care. It provides that;

> *"For the purposes of this Act, "the common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."*

14. The Court of Appeal in ***Soma Properties Limited v HAYM [2015] Eklr*** while discussing the extent of occupier's ordinary duty under *section 3 of the Act* found as follows:

> ***"This provision, imposes a duty of care on an occupier and proceeds to define the standard of care necessary to fulfill that duty. The words "reasonable" and "reasonably" used in the above extract emphasize the standard of care expected of an occupier. It is a standard measured against the care to be exercised by a reasonably prudent person in all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected. The standard of reasonableness is not one of perfection. Thus an occupier will escape liability if it is established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger."***

It is thus not necessary for the respondent to establish that he was an employee of the 2nd appellant. The respondent had obtained permission from the 2nd appellant to enter into the building and carry out some work in the building. In the circumstance the 2nd appellant owed a duty of care to the respondent and was therefore liable for injuries sustained by the respondent while he was at his premises. Dw1 gave clear

testimony that the electric line was about 2 meters from the building with no barrier between the power line and the building. A reasonably prudent person would not have built its premises so close to the power lines and further carry out more extensions on the building.

15. I will now consider liability of the 1st appellant. Walter Akello Mboro (Dw2) gave evidence that the 1st appellant had issued the 2nd appellant with a letter warning him of the dangers of extending their storey building. In their letter to the 1st appellant they advised that;

> *"It has come to our notice that you are extending your story building very close to our (HT) line and his very dangerous to the building contractors, yourself and even to your future tenants.*
>
> *Despite our verbal warnings, you have never stopped the works, kindly take notice that should any accident occur you will solely be liable, responsible for the same.*
>
> *This written notice is final communication to you and we will never push anymore."*

16. Dw2 when pressed on cross examination testified that there was no evidence or proof that the letter was served to the 2nd appellant. Teresa Kemunto (Dw3) also testified that they did not receive any warning from the 1st appellant and I therefore find that the appellant issued no warning to the 2nd appellant.

17. Even assuming that such a warning existed, it is noteworthy that the 1st appellant has the monopoly to install and maintain electricity power cables. Where a consumer of power is non-compliant, the 1st appellant cannot sit back and raise their hands in surrender. The 1st appellant must employ the mechanism to enforce compliance provided by the enabling Act of parliament.

18. It is no doubt that the 1st appellant herein as a *"power company (KPLC) has a responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is properly-maintained to prevent accident"* (see ***Kenya Power and Lighting Company vs Joseph Khaemba Njoria [2005] eKLR***). The duty of the 1st appellant was also discussed by the Court of Appeal in **Joseph Wang'ethe v Ew [2019] eKLR** where it was held that;

> *"[38] We take judicial notice that the 1st appellant has the monopoly to install and maintain electricity power cables. Therefore, it was its responsibility to ensure that the wayleave was adhered to and high voltage electric power lines were not situated where it could pose any danger. The evidence was clear that there was a building that protruded on the wayleave. Although the 2nd appellant filed a defence denying any liability, the 2nd appellant who was the owner of the building protruding on the wayleave did not offer any evidence at the trial. This means that the evidence regarding the building having been built on the way leave, was not disputed. The trial Judge visited the scene and ascertained as did the 1st appellant's witness who investigated the accident that the proximity of the building to the cables contributed to the accident. In the circumstances, we come to the conclusion that the accident was caused by the negligence of both appellants: the 2nd appellant in allowing his building to extend and infringe on the way leave, and the 1st appellant in failing to take action on the infringement and ensure that the high voltage electric cables did not pose any danger."*

19. The 1st appellant has the responsibility to ensure that no buildings were constructed on the wayleave and high voltage electric power lines were not situated where it could pose any danger. It was Dw2's testimony that the distance between the electric line and the building ought to have been 15 meters. Dw2 testified that the distance between the line and the building was minimal. In ***Joseph Wang'ethe v Ew case (supra)*** the court further held that;

> *"…the trial Judge addressed the issue of contribution and apportioned liability between the two appellants at 70% as against 1st appellant and 30% as against 2nd appellant. We cannot fault this finding given that the 1st appellant had a higher responsibility of supplying and maintaining high voltage electric cables, and ensuring that the high voltage electric cables did not pose any danger. Had the 1st appellant properly carried out this responsibility, no high voltage electric cables would have been allowed to remain near the building."*

20. Since the 1st appellant had a higher responsibility of ensuring that high voltage electric cables did not pose danger to any person, I find that the trial court erred in its finding on liability. I hereby apportion liability between the two appellants at 70% as against 1st appellant and 30% as against 2nd appellant.

21. I now turn to quantum. The appellants contend that the award by the trial magistrate comprising of Kshs 1,300,000/- as general damages and Kshs 2,000,000/- for loss of earning capacity was excessive. As regards the quantum of damages, the principles upon which an appellate court would interfere with the quantum of damages awarded is well settled. In ***Butt –vs- Khan [1981]eKLR 349*** it was stated;

> *"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived on a figure which was either inordinately high or low."*

22. On the award of general damages for pain and suffering the 1st appellant before the trial court submitted that an award of Kshs 950,000/- would be sufficient for general damages. They cited the case of ***Petrocity Enterprises Ltd v Fredrick Okello Opiyo & 2 Others [2016] eKLR*** where the court upheld the trial court award of damages of Kshs. 950,000/- for a plaintiff who sustained deep burn injuries on the head, face, neck, both upper limbs and both lower limbs. The respondent cited the case of **EW (Suing As the Next Friend and Mother to BM (A Minor) v Kenya Power and Lighting Company Limited & another [2015] eKLR** where the court awarded the plaintiff Kshs

1,500,000/- for general damages for pain and suffering and loss of amenities. The plaintiff therein had sustained the following injuries;

> *"amputation of the right upper arm and skin grafting was done to cover the burnt injuries on the abdomen leaving scars. He was left with a 10 cm stump from the shoulder and 10 x 4cm scar on the right anterior abdomen. He was left with psychological trauma which is for a life time, low self esteem and will require a bionic arm to alleviate the loss of use of the arm which has a near natural arm, estimated at shs 5,000,000. His total permanent incapacity was assessed at 70% -seventy per cent."*

It is evident that the respondent suffered severe burns on the left hand leading to amputation of 4 fingers, deep burns on the right hand extending to the hand, burns on the left hand, chest and right thigh with disability assessed at 45%. Having taken into consideration the injuries sustained by the respondent. I do not find the award by the trial court of Kshs 1,300,000/- was inordinately high.

23. On the head, loss of earning capacity the trial court made an award of Kshs 2,000,000/- without any explanation for his computation. In ***Mumias Sugar Company Limited vs. Francis Wanalo [2007] eKLR*** the Court of Appeal observed that –

> *"There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability…."*

In **John Wamai and Two Other v Jane KitukuNziva and Another (2017) eKLR** the court stated as follows: -

> ***"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."***

24. The medical report by Pw2 shows that the respondent was 28 years old at the time of the accident and would have probably work for 22 more years considering the physical nature of his work. The respondent was employed as a mason and testified that he earned Kshs 500/- per day and would have earned about Kshs 10,000/- per month. The respondent having lost almost the whole function of his left arm and with limited function of the right arm, I would have awarded the respondent Kshs 2,640,000/- (10,000 x 12 x 22). However there being no cross appeal by the respondent I will not disturb the trial court's award of Kshs 2,000,000/- made on account of loss of earning capacity. I also find no reason to disturb the award on special damages.

25. In conclusion, I find no merit in this appeal and dismiss it with costs to the respondent.

Dated and Delivered at KISII this 25th day of February 2020.

A. K. NDUNG'U

JUDGE