



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KISII

CORAM: A.K. NDUNG'U J.

CIVIL APPEAL NO. 131 OF 2018

CONSOLIDATED WITH

CIVIL APPEAL NO. 144 OF 2018

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

PETER MIYIENDA.....2ND APPELLANT

VERSUS

DORICAH MOKEIRA NYATUNDO

(Suing as the legal representative of the estate of

CHARLES NYAKANG'O NYATUNDO).....RESPONDENT

(Being an appeal from the judgment and decree of Hon. Nathan S. Lutta (SPM) dated 20th day of November 2018 in CMCC No.153 of 2014 Kisii)

JUDGEMENT

INTRODUCTION

1. Being dissatisfied with the trial court's judgment in CMCC No. 153 of 2014, the appellants filed separate appeals which were consolidated for efficient disposal of the matter.
2. The impugned decision arose from a suit filed by the respondent in her capacity as administratrix of the estate of her son the late Charles Nyakang'o Nyatundo ("the deceased"). She claimed that the deceased was working for the 2nd appellant as a mason and that on 28th February 2012, during the term of the contract of employment, fire broke out at the 2nd appellant's building. The deceased was electrocuted and sustained severe burns on his body which he succumbed to. The respondent claimed that at the time he died, the deceased was on duty plastering the walls of the 2nd appellant's building situated at Central Kitutu/Daraja Mbili/2177. The respondent particularized what she claimed was negligence and breach of statutory duty by the appellants, their employees, servants or agents and sought compensation for loss under the Fatal Accidents Act and the Law Reform act
3. The 1st appellant accepted that it was involved in the installation, distribution and connection of electricity and general maintenance of power lines but denied that it was liable for the accident. In its statement of defence, the 1st appellant maintained that it was not privy to the contract between the 2nd appellant and the deceased. It contended that the 2nd appellant was strictly liable for the injuries sustained by the deceased according to the provisions of the Occupiers' Liability Act and asserted that his and the deceased's negligent conduct had occasioned the accident.
4. For his part, the 2nd appellant denied the respondent's assertions. He denied the existence of a contract of employment between himself and the deceased in his statement of defence and averred that if there had been any accident as said, the deceased had occasioned it and he could not be held liable for the acts of the deceased.

EVIDENCE

5. By consent the parties adopted the evidence of Dennis Kabuna Nyatundo in CMCC No. 419 of 2012. Dennis recalled that on the day his brother the late Charles Nyatundo died, they were doing some plaster work at Mwenzangu building which belonged to the 2nd appellant. He heard a scream and rushed to the source. He saw a metal bar hanging from a power line. When he touched the window to get a better look, he was hit by an electric shock. He realized that his brother was the one that screamed after being electrocuted. He told the court that the deceased was attempting to pull an iron bar into the building through the window when it touched the power line.

6. Dennis testified that they had been working on the building for about a week and knew that the power line existed before the commencement of the construction. He stated that he was not putting on gloves or a helmet which had not been provided and would not have prevented the accident in any case. He also testified that he and his brother were paid their daily wages by the 2nd appellant.

7. The respondent, Doricah Mokeira Nyatundo, received the information about the accident involving her son the deceased and headed to Kisii Referral Hospital, where the deceased succumbed to his injuries. She testified that the deceased was being paid Kshs. 450/= for each day of work and was in good health when he died. She told the court that she had to sell 2 cows to meet the funeral expenses and produced a bundle of receipts in support of her claim for Kshs. 71,500/= for funeral expenses and Kshs. 20,000/= for legal expenses.

8. Jared Ongiri, the 2nd appellant's brother in law, testified that on 28th December 2012 he was at the building supervising the renovation of the 2nd appellant's building when the accident occurred. He stated that they were installing windows and plastering walls on the 3rd floor of the building which had already been constructed. He testified that he had witnessed an agreement between the 2nd appellant and one Ogoti Nyabengi who had been put in charge of the renovation. Ogoti Nyabengi was required to hire and pay employees whereas the 2nd appellant was required to provide building materials. According to the agreement, he had witnessed, Nyabengi was also required to ensure the safety of the employees by providing helmets and other equipment used by the employees during the construction. He stated that he reported to the 2nd appellant at the end of each day and that the 2nd appellant used to visit the site every week.

9. Jared denied that the 2nd appellant had been instructed to stop the construction because the work was being carried out on a way leave. He testified that the electric post was located about 2 meters away from the building and admitted that they had not erected a barrier between the power line and the building.

10. The 2nd appellant's wife, Teresa Kemunto, confirmed that two floors of the building had already been completed when the accident occurred. She also denied receiving any warning from the 2nd appellant.

11. The 1st appellant's witness, Walter Akello Mboro, told the court that when they realized that there was an extension touching on a high voltage power line hanging too close to the 2nd appellant's building; they warned the 2nd appellant about the dangers but the construction proceeded without heeding to their warning. As a result some workers were electrocuted as they did the work.

PARTIES' SUBMISSIONS

12. The 1st appellant's counsel accused the trial court of glossing over the fundamental issues raised by the parties and failing to critically analyze the evidence before arriving at its decision that the 1st respondent is 100 % liable. The 1st appellant's counsel highlighted various paragraphs in the judgment which were, in his opinion, a show of the trial court's failure to grasp the evidence of the witnesses. He was particularly aggrieved by the trial court's finding that the only evidence on record was that of the respondent, yet the parties had agreed to include the evidence of Dennis Kabuna Nyatundo in CMCC No. 419 of 2012 in the matter. Counsel contended that if the trial court had taken into account the evidence of that witness, he would have found that the deceased was substantially to blame for the accident. He also argued that the 1st appellant had put forth a formidable defence contrary to the trial court's finding that the respondent's case was unchallenged.

13. The court was also asked to take judicial notice that the government is attempting to curb illegal development on way leave, riparian land and other restricted areas in the County and also take note that the 1st appellant is not involved in the process of issuing approvals for constructions. It is contended that the 2nd appellant is wholly to blame for the loss suffered by the victims as stipulated under the Occupiers' Liability Act. That a notice issued to the 2nd appellant was not heeded. Further that he could also be found culpable under the Employment Act and Factories Act which require that an employer should not expose his servants to known dangers. Liability is also imputed on the victims whom, the 1st appellant contended, knowingly courted danger by working close to the power lines and bringing a metal rod in contact with the lines.

14. The 1st appellant was also dissatisfied with the trial court's decision on quantum and relied on its submissions before the trial court on the issue.

15. For the 2nd appellant it was argued that since the respondent did not plead a claim under occupier's liability, she was bound to prove an employer/employee relationship between the deceased and the appellant which she failed to do. It is the 2nd appellant's contention that he was not aware of the deceased's presence in his premises and he cannot be held vicariously liable for his actions. It was also argued that the 2nd respondent did not contract the agents of the 1st appellant to install power lines close to the building or connect the electric wires to the building so he had no obligation to ensure the accident occasioned by the 1st appellant did not occur. He also blames the deceased for failing to take precaution to prevent the accident and urges the court to set aside the trial court's finding that he was liable for the accident.

16. In rebuttal, counsel for the respondent argued that the 1st appellant has a duty to ensure that the power lines it installs all over the country do not pose unnecessary risk to people. He relied on **Section 52 of the repealed Energy Act** which imposed that duty on the 1st appellant thus;

“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 kind which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power authority confirmed by this Act, or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by loss or damage or breaking any electric supply line, or by reason of any defect in any electricity supply line.”

17. It was submitted that from the evidence it was not clear which between the power lines and the buildings came first. Counsel argued that the 1st appellant had claimed that it had issued a notice warning the 2nd appellant that he was building an extension touching on a high voltage line but there was no proof of service of the notice.

18. Regarding the 2nd appellant, counsel submitted that his argument that he had hired a contractor to do the construction was weak in light of evidence that the deceased’s wage was paid by the 2nd appellant. The respondent also pointed out that the contract between the 2nd appellant and his said contractor was conspicuously missing from the record, therefore the assertions by the 2nd appellant were merely denials of no consequence. Moreover, the Occupier’s Liability Act placed a duty of care on the 2nd appellant as the owner of the premises and he could not purport to hid behind the question of whether the deceased was his employee or not.

19. The respondent’s counsel rejected any imputation of liability on the part of the deceased and submitted that the metal rod which came into contact with the power lines was integral in the performance of the duties that the deceased had been tasked to perform by the 1st respondent. He urged the court to uphold the trial court’s decision on liability and quantum and dismiss the appeal.

ANALYSIS AND DETERMINATION

20. Having reevaluated the evidence afresh and analyzed the parties’ submissions, I found that the determination of this appeal revolves around the issue of quantum and liability.

21. The cause and circumstances leading up to the death of the deceased are not in dispute. The respondent sufficiently established that on 28th February 2012, the deceased, Charles Nyatundo, was working at the 2nd appellant’s building located on his land known as Central Kitutu/Daraja Mbili/2177.

22. Dennis Kabuna narrated that he and the deceased were doing some plaster work and in the course of their work, the deceased got electrocuted when the metal bar he was attempting to pass through the window came into contact with electric power lines. He was himself gravely injured when he touched the window which was electrically charged.

23. The main issue between the parties was who among them was liable for the accident. The trial court was convinced that both appellants were 100% liable for the accident. I have considered the evidence on record and the submissions of the parties on the liability and I form the following opinion of the matter.

24. The 1st appellant herein vigorously denied any liability for the accident. In its defence, the 1st appellant pleaded that the 2nd appellant was to blame for the accident as the accident had occurred at his place therefore he was strictly liable as provided by the Occupiers’ Liability Act. The 1st appellant also accused the deceased of exposing himself to danger by bringing a metal rod in contact with high voltage wires.

25. The 1st appellant’s witness, Walter Akello, testified that they had warned the respondent of the dangers of the works they were carrying out close to the high voltage wire. He produced a notice dated 15th January 2012, warning the 2nd appellant that he was infringing on a way leave. The 1st appellant’s witness admitted that there was no proof that the notice had been served upon the 2nd appellant. The 2nd appellants’ witnesses, Jared and Teresa Kemunto both denied that they had received such a notice from the 2nd appellant. The 1st appellant also insinuated that the 2nd appellant had obtained dubious approvals to undertake the construction but there was no proof of this allegation.

26. I concur with the sentiments of the court in ***Kenya Power and Lighting Company Ltd vs Joseph Khaemba Njoria [2015] eKLR***, that;

“There can be no question that the power company (KPLC) has the responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is properly maintained to prevent accidents”.

27. Similarly, the court in ***Joseph Kiptonui Koskei v Kenya Power & Lighting Co. Limited Civil Case No. 147 of 2009 [2010]eKLR*** held;

“In this case, I have no doubt at all in my mind that the defendant owed the plaintiff and indeed every Kenyan where it happen to have their power lines a duty of care. No doubt it is aware that electric power is a dangerous commodity and if it is not properly secured can be a danger to society. Cases abound where innocent people have been electrocuted or houses burnt and even household electrical items damaged due to power outages as well as live wires being exposed or damaged life electricity wires not being repaired etc. That being the case, it behoves the defendant knowing how dangerous unprotected electrical power lines can be to take such measures as to ensure the safety of populace.”

28. In my view the 1st appellant did not take sufficient precaution to ensure that its power lines it is charged with maintaining did not cause harm. The 1st appellant’s witness testified that the distance between the line and the building was less than what was ordinarily required. The 1st appellant was aware of this but did not prove that they had warned the 2nd appellant of the risks the high voltage power lines posed to the workers undertaking the construction. I therefore find that the 1st appellant was liable for the accident.

29. As for the 2nd appellant, there was no doubt that when he died, the deceased was working for him in his premises. The 2nd appellant's witness Jared, tried to shift blame to a contractor who allegedly hired the workers on the site. I accept the invitation to draw an adverse inference from the failure of the 2nd appellant to testify or produce the purported agreement between by the contractor and the 2nd appellant. I find that the respondent proved a master/servant relationship between the 2nd appellant and the deceased. Since the deceased was died in the course of his duty, the appellant was vicariously liable for his actions.

30. Further, the Employment Act defines an employee as a person who is employed for wages and includes casual workers as employees. In **section 3 of the Occupational Safety and Health Act** which repealed the Factories Act, an employer is required to ensure the health and safety of persons at work.

31. The Court of Appeal in **Purity Wambui Murithii v Highlands Mineral Water Co. Ltd, [2015] eKLR** found that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety.

32. Dennis Kabuna who was working with the deceased at the site told the court that the power lines were existing before the commencement of the construction. From the evidence given, it was also demonstrated that the power lines were hanging close to where the work was going on and a protective barrier had not been erected between the building and the power lines to ensure that the working environment was safe. The 2nd appellant did not inform contact the 1st appellant to remove or disconnect the power lines before the construction began. He ought to have known the dangers posed by the power lines and should have taken reasonable precaution to ensure that the deceased and his co-workers were safe on the premises.

33. Contrary to the 2nd appellant's contention that occupier's liability had not been pleaded, the 1st appellant raised the issue in its defence. The Occupiers' Liability Act provides that an occupier of premises owes a duty to visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them. It is reasonable to expect that the 2nd appellant would have foreseen the hazards the workers who were on his premises with his permission were exposed to as they were working on an elevated level close to the power lines.

34. I agree with the court in **Gohil Soap Factory Ltd v Dickson Odima Yim Civil Appeal 88 of 1998 [2005] eKLR** that where an occupier allows a person entry into his premises for a mutually contemplated purpose, there is an implied warranty that the premises are safe for the person to allow him to perform his duties.

35. That said, the deceased also had a duty to ensure his own safety by avoiding the electric power lines. Dennis Kaduna testified that they had been working at the site for about a week and he was expected to be careful around the electric power lines. I therefore set aside the trial court's finding on liability and apportion liability to the estate of the deceased at 20% and find that the 1st appellant and 2nd appellant were equally liable for the accident. I apportion liability at 50% for the 1st appellant and 30% for the 2nd appellant noting that the appellant had a higher responsibility of ensuring that high voltage electric cables did not pose danger to any person.

36. The 1st appellant also contended that trial court's assessment of general damages as excessive. The trial court computed the damages to be awarded to the respondent as follows;

Pain and suffering – Kshs. 20,000/=

Dependency [9,000 x 12 x 33x 1/3] = Kshs. 1,186,812

less loss of expectation of life [1,186,812 – 100,000] - 1,086,812

Total [Kshs. 1,106,812]

37. An appellate court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see **Butt v Khan [1981] KLR 349**).

38. The fact that the deceased died at the young age of 22 years was supported by the oral evidence of his mother, the respondent and backed by a copy of the certificate of death which was produced as evidence of the court. Before the trial court, the 1st appellant proposed a multiplicand of Kshs. 9,000/=. They submitted that a dependency ratio of 1/3 would be reasonable and urged the court to use a multiplier of 26 years. The trial court found that the deceased would have worked to the age of 55 years and adopted a multiplier of 33 years.

39. In support of its proposition, the 1st appellant relied on the case of **David Kajogi M'mugaa v Francis Muthomi [2012]eKLR** where the court adopted a multiplier of 25 years for the deceased who died aged 23 years. The respondent proposed a multiplier of 38 years based on the conventional retirement age of 60 years. The case of **Benedeta Wanjiku Kimani (Suing as the administratrix of Samwel Njenga Ngunjiri (Deceased) vs Changwon Cheboi & Anor HCCC No. 373 of 2008** where the court applied a multiplier of 16 years for the deceased who died at the age of 44 years.

40. Taking the conventional retirement age as 60 years, I find that the multiplier adopted by the trial court was reasonable and took into account the vagaries of life.

41. In the case of **Kuria & Anor (suing as the legal representatives of the estate of Joan Wambui Ngigi) v Thomas Ondili Oduol & Anor Civil Appeal No. 47 of 2016 [2019]eKLR** the court applied a multiplier of 30 years for the deceased who was a business lady and had died

aged 29 years old.

42. In *Yh Wholesalers Ltd & another v Joseph Kimani Kamau & another Civil Appeal No. 454 of 2015 [2017] eKLR* the court found that a multiplier of 30 years would be sufficient where the deceased had died aged 22 years.

43. I however note that the trial court did not include damages under the head of pain and suffering and gave no reason for why it had deducted damages under the head of loss of expectation of life. I uphold the award of Kshs. 101,500/= for special damages which was not contested.

44. The award of damages shall now be computed as follows;

Pain and suffering – Kshs. 20,000/=

Dependency $[9,000 \times 12 \times 33 \times \frac{1}{3}] =$ Kshs. 1,188,000

Loss of expectation of life Kshs. 100,000

Total Kshs. 1,308,000

Special damages - Kshs. 101,500/=

45. The appeal is also allowed on liability which is apportioned to the estate of the Charles Nyakang'o Nyatundo at 20%; 50% for the 1st appellant and 30% for the 2nd appellant.

46. Each party shall bear his costs of this appeal.

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

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A. K. NDUNG'U

JUDGE