



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO.15 OF 2018

JOSEPH KIPNGENO KORIR.....APPELLANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

(Being an appeal from the Judgment of Hon. P. Achieng (P.M) in Bomet PMCC No.56 of 2017 delivered on 9/7/2018)

JUDGMENT

1. The Appellant filed Bomet PMCC No.56 of 2017 against the Respondent seeking special damages of kshs.150,000/- for negligence on account of the Appellant's cow that was electrocuted by an electric post belonging to the Respondent.
2. The parties entered into a consent judgment on liability and apportioned liability at 80:20 in favour of the Applicant against the Respondent and the case proceeded to formal proof.
3. The trial court entered judgment in the sum of kshs.150,000/- less 20% liability plus costs of the suit.
4. The Appellant has appealed to this court on the grounds that no general damages were awarded.
5. The sole issue for determination is whether the magistrate ought to have granted the Appellant general damages.
6. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

33. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses”.

7. In the current case, I find that the Appellant filed a plaint dated 5/6/2017 seeking general damages and costs of the suit and interest against the Respondent. The plaintiff also sought special damages of kshs.150,000/-.
8. The trial court said that no particulars of loss were given save loss of the cow. The trial court also said the Appellant raised a new head of

damages in the submissions by stating that the cow was three months pregnant and seeking kshs.900,000/- in general damages.

9. I find that the purpose of fixing the matter for formal proof was in order to ascertain the general damages payable to the Appellant otherwise there was no point in calling evidence.

10. There was need for the court to assess general damages for loss of the cow. The cow is described as milk cow and in paragraph 4 of the plaint, it is stated that:

“The Plaintiff’s cow was 3 months pregnant by the time it was electrocuted and it used to provide the plaintiff with milk and other related cow products including manure.”

11. I therefore find that the trial court was duty bound to assess general damages payable to the Appellant in respect of the loss of the cow.

12. I accordingly find that the appeal has merit and I allow it in the following terms;

i) That the judgment for Special damages of kshs.150,000/- still stands.

ii) That the matter is referred back to the trial court for assessment of General damages and for a determination on costs of the suit.

iii) That the matter be heard by any other magistrate other than the one who dismissed the claim for general damages.

iv) That the costs of the appeal to abide the cause

Delivered, signed and dated at Bomet this 6th day of August 2020.

A. N. ONGERI

JUDGE