



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 81 OF 2017**

**LUCIA ATIENO MALASRE** (*Suing as the personal representative and*

*Administrator of the estate of* **BENARD ODUOR – deceased**).....**APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD**.....**RESPONDENT**

***[Being an appeal from the Judgment in KISUMU CMCC NO. 57 OF 2013 delivered on 4<sup>th</sup> June 2017]***

**JUDGMENT**

The Appellant has moved to this court on an appeal, following the dismissal of her claim against the Respondent.

1. The Appellant, **LUCIA ATIENO MALASRE**, had sued in her capacity as the Personal Representative and the Administrator of the Estate of the late **BERNARD ODIWUOR**.
2. The learned trial magistrate held that the Respondent was not shown to have been accountable for the cable which the deceased stepped on, leading to his death through electrocution.
3. The trial court said that although the Defendant, **KENYA POWER & LIGHTING COMPANY LIMITED**, is responsible for

***“illegal or notorious connection by tortfeasers, this was not brought out in pleadings, which blame KPLC directly and the evidence which blame Dan Onyango.”***

4. Although the Appellant had led evidence that the trial court found to have shown that Dan Onyango was responsible for connecting the electric cable which led to the electrocution of Bernard, the trial court faulted the Appellant for failing to enjoin the said Dan Onyango to the suit.
5. The trial court also held that the Particulars of Negligence which were cited in the Plaint, were in such wide terms that they did not support the Appellant’s claim in negligence or in breach of contract.
6. In any event, the trial court concluded that the Appellant had not proved any negligence on the part of the Respondent.
7. In her appeal, the Appellant invited this court to determine the following 4 issues;

***“1. Was the Appellant herein seized with locus standi to file the original suit?***

***2. Whether an accident occurred on 05/11/2012 involving the Appellant (deceased)?***

***3. If the above is in the affirmative, who is culpable for the accident and to what extent?***

***4. Did the estate of the deceased suffer any loss? And if so, to what extent?”***

**8.** It is well settled that the first appellate court is obliged to re-evaluate the evidence on record and to determine whether or not the decision of the trial court should stand.

9. When undertaking the task of re-evaluation of the evidence, the appellate court always bears in mind the fact that it did not have the benefit of observing the witnesses when they were giving evidence.

10. **PW1, LUCIA ATIENO MALASRE**, testified that when she was informed about what had transpired to the deceased, she rushed to the scene. At the said scene she saw an electric wire which was in a pond of water.

11. During cross-examination **PW1** said that Dan Onyango was doing welding.

12. The said Dan Onyango was facing criminal charges before the Winam Court.

13. According to **PW1**, Dan Onyango had tapped power illegally.

14. **PW2, WILLIAM JOSEPH ANYONA**, testified that he saw the deceased on the material day. **PW2** said that the deceased was pulling a hand-cart.

15. **PW2** heard the deceased scream in pain. He saw a wire passing over the legs of deceased.

16. According to **PW2**, the deceased fell down and died instantly.

17. During cross-examination, **PW2** said that there was a person who was doing welding about 5 metres away from where the deceased had stepped on the electricity cable which was in stagnant water.

18. **PW2** said that he had heard that somebody had been charged with illegal connection of electricity. However, **PW2** was never called to testify in the criminal case.

19. Although **PW2** was at the scene when police arrived, the police did not question him.

20. After **PW2** testified, the Plaintiff closed her case.

21. When answering the Plaintiff's case, the Defendant called one witness, **FESTUS LUMARA**.

22. At the material time, **DW1** worked in Kisumu, as the Emergency Supervisor for the **KPLC**.

23. After the incident giving rise to this case, **DW1** visited the scene, where he found Dan Onyango doing welding.

24. **DW1** testified that Dan Onyango was a customer of the Defendant. He was described as a "*Domestic Customer*."

25. However, the said Dan Onyango had connected a cable to a socket at his house, and the said cable passed through a window at Dan's house.

26. The cable went to a welding machine which was 20 metres away from Dan's house.

27. **PW1** described the cable thus;

***"The cable was punctured and was passing through a pool of water, which the deceased stepped on.***

***The live part was naked and exposed to water. It was not properly insulated."***

28. I have re-assessed the evidence on record and I find that it clearly identifies **DAN ONYANGO** as the person who had a contract with the Defendant for the supply of electric power to his house.

29. Pursuant to the contract between Onyango and **KPLC**, the electric power was to be utilized for domestic consumption.

30. I understand "*Domestic Consumption*" to exclude any use for commercial purposes or industrial purposes.

31. Accordingly Onyango had no authority to tap from the electric power which the Defendant had provided him with, for use in running his welding business.

32. As it is Onyango who placed the cable at the place where the deceased was electrocuted, I find that it is he who was culpable for the fatal incident.

33. No evidence was led to show that the Defendant was aware of the presence of the cable at the said place, prior to the incident.

34. Secondly, there was no evidence adduced to show that if the Defendant had exercised due diligence, it ought to have become aware about

the cable at that location.

35. It has not been demonstrated that the Defendant was supposed to take any of the actions which the Plaintiff cited as the Particulars of Negligence and/or Breach of Duty; but that the Defendant failed to discharge any such obligation or that it discharged any such obligation negligently.

36. The Defendant supplied power to the house of Dan Onyango, and Onyango was supposed to use the said power domestically. It has not been shown that the power which the Defendant supplied to Onyango's house was either unsafe or that it posed a danger to the public.

37. As the Defendant was not aware of the unlawful connection which Onyango made, I find that the Defendant could not have been expected to put up warning notices alerting the public about the danger of the cable in issue.

38. The cable which caused the electrocution of Bernard Oduor did not lie on the ground as a result of a sag of the Electric Transmission wires installed by the Defendant.

39. The Appellant appears to suggest that even though the Defendant was not responsible for the fixing of the cable which led to Bernard's electrocution, the Defendant had a duty to have the said cable insulated. I found no evidence or law which imposed such a duty upon the Defendant.

40. In the result, I hold the considered view that the evidence adduced in court did not prove the case which the Plaintiff had particularized in the Plaintiff.

41. Contrary to the Appellant's submission that the deceased was electrocuted by an apparatus belonging to the Respondent, the evidence shows that the cable which caused the accident belonged to Dan Onyango.

42. I am in agreement with the reasoning of the learned trial magistrate, when she held that Dan Onyango ought to have been enjoined to the suit, as a Defendant.

43. Accordingly, and for all the reasons given above, I find no merit on the appeal against the finding on liability.

44. As regards the Quantum, the Appellant submitted that the deceased used to earn Kshs 1,000/= daily, as a car-wash attendant.

45. The trial court held that no evidence had been provided to prove the alleged earnings of the deceased. Therefore, the learned trial magistrate adopted the Minimum Wage in accordance with the **Regulation of Wages (General) Attachment Order LN NO. 71 of 2012**.

46. Having re-evaluated the evidence on record, I concur with the finding of the trial court because the Appellant failed to prove evidence to prove the earnings of the deceased.

47. In the result, there is no basis in law to warrant an interference with the trial court's assessment of the damages which could have been awarded if the claim had been successful.

48. In conclusion, the appeal is dismissed, with costs to the Respondent.

**DATED, SIGNED and DELIVERED at KISUMU**

**This 30<sup>th</sup> day of September 2019**

**FRED A. OCHIENG**

**JUDGE**