REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NARIOBI

CIVIL APPEAL NO. 366 OF 2017

KENYA POWER LIMITED.....APPELLANT

VERSUS

FRANCIS NDUNGU GITAU (*Legal*

***Representative of the Estate of* JNN).....RESPONDENT**

(Being an appeal from the judgment of the Hon. E.K Usui Senior Resident Magistrate delivered on 14th June, 2017 in CMCC No. 7129 of 2013 at Nairobi)

JUDGMENT

The appellant was the defendant in the lower court where the respondent filed a suit for damages following the death of one JN said to be aged 9 years at the time as a result of electrocution. It was the respondent's case that the appellant was to blame for the death of the boy due to negligence and or breach of statutory duty on its part or that of its agent or servant.

The appellant denied the respondents claim in its statement of defence and blamed the deceased for being negligent in exposing himself to the risk of damage of which he knew or ought to have known thereby failing to take care of any or adequate precautions for his own safety. It was also pleaded that the incident was wholly caused or substantially contributed to by the negligence of the guardian of the minor in that he failed to take care of him and exposed him to the risk of damage or injury which he knew or ought to have known.

After a full trial the lower court found in favour of the respondent holding the appellant wholly to blame for the said incident. The lower court then awarded Kshs. 700,000/- loss of dependency, Kshs. 50,000/= pain and suffering, Kshs. 150,000/= loss of expectation of life. The plaintiff was also awarded costs and interest. The appellant was aggrieved by the said judgment and lodged this appeal. The appeal is both against liability and quantum going by the Memorandum of Appeal dated 14th and filed on 20th July, 2017.

Both parties have filed submissions in the argument of this appeal. As the first appellate court it is my duty to evaluate the evidence adduced before the lower court with a view to arriving at independent conclusions. – **See Selle & another vs. Associated Motor Boat Company Limited & Others (1968) E.A 123, Abdul Hamed Saif vs. Ali Mohamed Sholan (1955) 22 EACA 279** and **Peters Vs Sunday Post Limited (1958) EA 424.**

In so doing, I must bear in mind the fact that, the trial court had the advantage of seeing and hearing the witnesses which I do not have. There is no dispute that the deceased died as a result of electrocution. The death certificate appearing at page 17 of the record of appeal alongside the evidence of the respondent confirm this aspect. This was also confirmed by P.W. 2, one Edward Njenga.

The deceased was said to be running after a puppy when he encountered an overhead naked conductor which touched his neck. On trying to remove it he was electrocuted and died. This court notes that at the age of 9 years the deceased could not have been very tall, indicating that the said wire must have been dangling quite low from the post.

In deciding the issue of liability the court referred to several cases which included **KP &L Co. Limited Vs. Joseph Khaemba Njoria (2005) e KLR and donoghe vs. Stevenson (1932) AC 558.**

Part of the judgment states as follows,

> **"….the court took judicial notice that the defendant is the sole distributor of electricity in this country and that no doubt electricity wires belong to it. That it owed all Kenyans duty of care where it happens to have its power lines. The court also held that KPLC is aware that electric power is a dangerous commodity and if it is not properly secured it can be a danger to society and should take such measures to ensure safety of its people……**

By failing to properly secure the live wires that were fixed /placed in a populated area, the defendant failed to discharge its said duties. The defendant has not produced any evidence to demonstrate that either the plaintiff or the deceased were to blame. Liability is fully established against it."

Although the defendant pleaded negligence on the part of the deceased and the guardian no evidence was offered to counter the evidence that was presented by the plaintiff. I am unable to assign any contributory negligence either on the part of the deceased or his guardian. Pleadings cannot take part of evidence. Further, even in the absence of any other explanation, the doctrine of *res impsa luquitor* applies.

My assessment of the evidence presented before the lower court justified the conclusions made in finding the appellant liable in this case. On quantum, the trial court referred to some authorities before making the awards complained of. Although the court said the deceased was aged 12 years, the evidence is that he was 9 years old at the time of his death.

The principles applied, and in particular the citation of the case of **Oshivji Kuvenji & Another Vs. James Mohamed Ogenjge (2012) eKLR** was in point. The judgment in the above case was delivered in March, 2009 in the lower court at Eldoret. An appeal followed and judgment thereof delivered in November, 2012. An award of Kshs. 320,000/= was made under the Fatal Accidents Act.

The judgement in respect of this appeal was delivered in June, 2017 which is about 5 years thereafter. The appellate court may interfere with quantum of damages awarded by the trial court if it is satisfied that wrong principles were applied, or that irrelevant factors were taken into consideration leaving out some relevant ones, or that the trial court misapprehended the evidence and so arrived at an award which was so inordinately high or low as to represent an erroneous estimate – see **Kemfro Africa Limited T/A Meru Express Services & Another vs. A M Lubia & Another (1985) e KLR.** Having gone through the record, I am not persuaded that the award made by the lower court was inordinately too high to attract interference by this court.

There is another aspect raised by the appellant with regard to the award of damages both under the Fatal Accidents Act and the Law Reform Act. It has been stated severally that in making an award under Fatal Accidents Act, damages under the Law Reform Act should be taken into account, which some courts have found it means the same thing as **"deducted**" from the award under the Fatal Accidents Act.

The argument is that, if awards are made under both Acts then the estate of the deceased would benefit twice. I prescribe to the position that **"taken into account**" does not mean the same thing as **"deducted".** What this would mean is that the court should keep an open mind such that, in making an award under the Fatal Accidents Act, there is also a claim under the Law Reform Act. This was not done in the instant case and for that reason, I am inclined to interfere with the award under the fatal accidents act by reducing the award of Kshs. 150,000/= by Kshs. 50,000/= leaving a balance of Ksh. 100,000/=.The final award therefore shall be Kshs. 861,000/=.

Accordingly this appeal is dismissed except for the adjustment of the award under loss of expectation of life which has been reduced by Kshs 50,000/=. There shall be judgment therefore, for the respondent against the appellant in the total sum of Kshs. 861,000/= plus costs and interest, applicable to the judgment of the lower court. In this appeal each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 26th Day of September, 2019.

A. MBOGHOLI MSAGHA

JUDGE