



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 35 OF 2017**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT**

**AND**

**MATTHEW NAMBETA WANJOHI**

**suing thro'his uncle and next friend Peter Wanjohi Keingati.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree IN Thika CMCC 305 of 2012 by Hon. C.A. Otieno (PM) on 24.02.17)**

**JUDGMENT**

1. **MATTHEW NAMBETA WANJOHI** (*hereinafter referred to as respondent*) sued **KENYA POWER & LIGHTING COMPANY LIMITED** (*hereinafter referred to as appellant*) in the lower court claiming damages for injuries allegedly suffered on 05<sup>th</sup> May, 2011 when he was electrocuted allegedly due to the negligence of the Appellant.

2. The defendant/Appellant filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

3. After the hearing, the trial court found Appellant liable at 100% and awarded the Respondent Kshs. 900,000/- general damages together with costs and interest.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and set out 4 grounds of appeal which I have summarized into two grounds to wit:

**1. The learned magistrate erred in law and in fact in holding the Appellant liable for the injuries occasioned to the Respondent**

**2. The learned magistrate erred in law and in fact in awarding exorbitant and excessive quantum of damages**

5. This appeal was argued on the basis of written submissions which both parties dutifully filed.

**Analysis and Determination**

6. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Peters v. Sunday Post Limited (1958) EA at Pg. 424**).

7. The issues in this appeal revolve around liability and quantum.

**Liability**

8. The Appellant holds the view that the accident was an Act of God/*Force Majeure*. The Respondent on the other hand submitted that the

Appellant did not plead *force majeure*.

9. I have considered the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR where the Supreme Court quoted with approval the decision in Malawi Railways Limited v Nyasulu [1998] MWSC 3 where the importance of pleadings was stated as follows:

**“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. ....”**

10. The trial court, and indeed this court, are as bound by the pleadings of the parties as the parties themselves. The court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

11. Accordingly, I find that the defence of *force majeure* cannot come to the aid of the Appellant. The trial court in my considered view rightfully found the Appellant liable and I have no reason to interfere with that finding.

### **Quantum**

12. A medical report dated 03<sup>rd</sup> April, 2012 by Dr. George Karanja shows that Respondent suffered the following injuries:

- **Amputation of right upper limb at the shoulder level**
- **Electrical burns on left hand**
- **Electrical burns on lower torso**

13. The Respondent was treated at Gatundu Hospital as an inpatient for one month. At the time of examination about a year after the incident, the Respondent had also lost function of left hand and dropped out of school. He also had ugly scars on lower abdomen, superficial scars on both iliac fossa regions and hypertrophic scars on both thighs which were the source of skin grafting. The doctor assessed permanent incapacity at 50%.

14. In the lower court, the Respondent prayed for Kshs. 12,000,000/- and cited EW (Suing as the Next Friend and Mother to BM (A Minor) v Kenya Power and Lighting Company Limited & another [2015] eKLR where plaintiff that had suffered Amputation of the right upper limb and Burns on anterior abdomen was awarded general damages for pain and suffering Kshs. 1,500,000/- and damages for diminished/loss of earning capacity Kshs. 2,628,960.

15. Respondent also cited Agnes Wanjiku Ndegwa Vs Kenya Power & Lighting Company [2014] eKLR where the court awarded Kshs 1,300,000/- for burn wounds on her neck, upper trunk posterior, left arm, right lower limb and both feet. Two doctors had assessed her permanent incapacity one at 35% and the other at 30% and Joseph Kiptonui Koskei v Kenya Power & Lighting Company Ltd [2010] eKLR where the Plaintiff was awarded Kshs. 1,200,000/- for 40% 3<sup>rd</sup> degree electrical burns covering upper limbs, trunk and back with post burns hypertrophic scars which are of both hypo and hyper-pigmentations on his right upper limb and right shoulder, a contracture on the posterior side of the right limiting movement and required surgery to release the contracture to improve the use of his right arm.

16. The principle of law on whether a court on appeal can disturb the quantum of damages was well settled in the case of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727 . At page 730 Kneller J.A. said: -

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.**

17. I have considered the record of appeal and the submission by both parties. The Appellant has not persuaded the court that trial court, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages to merit interference by this court.

### **DISPOSITION**

18. In view of the finding I have made, the appeal is found to be unmeritorious and it is dismissed with costs to the Respondent.

**DELIVERED AND SIGNED AT KIAMBU THIS 25TH DAY OF OCTOBER 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Nancy

For the Appellant - N/A

For the Respondent - Ms. Etole hb for Mboha