



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM; R. MWONGO, J.

CIVIL APPEAL NO. 66 OF 2018

KENYA POWER & LIGHTING COMPANY.....APPELLANT

VERSUS

SAMUEL GATHIARI CERERE.....RESPONDENT

(Being an appeal from the judgment and/or decree of Chief Magistrate, Hon K. Bidali

in Naivasha Chief Magistrate Civil Suit No. 150 of 2013,

delivered on 29th November, 2018.)

JUDGMENT

Background

1. The respondent/plaintiff in the lower court sued the appellant/defendant for Kshs 7,350,500/= in damages following a fire allegedly caused by an electrical fault in his business premises on 4th January, 2013. At the hearing, evidence was adduced by only the plaintiff, the defendant closing its case without providing a witness. The court found full liability against the defendant.

2. Damages were awarded by the trial court as follows:

Loss of merchandise	Kshs	4,771,880.00
Loss of business		Nil
Special damages		Nil

3. Dissatisfied with the judgment of the lower court, the appellant appeals to this court against both the liability and quantum of the award on the following on the following grounds:

1. The trial Magistrate erred in Law and in fact in finding the Appellant liable contrary to the evidence on record.

2. The trial Magistrate erred in law and fact in applying wrong principles and failing to take into account material facts thus arriving at an erroneous award.

3. That the learned trial Magistrate erred in law and in fact in disregarding the appellant's submissions and on all points of fact and law in as far as the award of damages is concerned.

4. The learned trial Magistrate erred in law and in fact in failing to find that the respondent failed to prove his case to the required standards.

5. That the learned trial magistrate erred in law and in fact in awarding a sum of Kshs 4,771,880/= and yet the same was not prayed for.

6. That the learned trial magistrate erred in law and in fact in failing to find that the respondent failed to produce the valuation and/or assessment report from a qualified valuer and/or assessor.

7. The trial Magistrate erred in law and in fact in failing to find that the respondent failed to link the appellant with the loss suffered if any.
8. That the learned trial magistrate erred in law and in fact in awarding Kshs 4,771,880/= as special damages plus costs and interest which are excessive and unrealistic in the circumstances and without any basis.
4. This is a first appeal. Thus, the duty of the court in is to subject the evidence in the trial court to re-appraisal, being careful to note that this court did not have the opportunity of seeing and hearing the witnesses first hand. This position was well stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123**. Once then court has reappraised the evidence, it need not follow the trial judge's findings of fact. This is especially so:

“.... if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”. See the case of **Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**.

5. I also note that it is not open to the court on first appeal to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time. These are the principles I must have in mind.

Liability

6. On liability, the appellant submits that the Respondent did not discharge his obligation to show how the appellant was in breach of its duty of care. It argues that there were contradictions in the respondent's written statement in that he said he received a call from one of his neighbours about the fire, whilst in court he stated that he was asleep in the house when he saw fire coming from the meter box. Further, the appellant argues that no expert investigation report was presented to prove the cause of the fire to establish that it was due to an electric fault. In addition, the report was not within the mandate of the appellant; neither did he call the said neighbor or any other person as a witness.

7. On the other hand, the respondent submits that all the parties' exhibits and statements were produced in the lower court by consent. As such, the appellant is barred from interrogating or questioning the same at the stage of appeal since it never challenged the same in the lower court. Further, the respondent submits that the appellant had an opportunity to call witnesses but did not do so during trial to rebut the evidence of the respondent.

8. In addition, the respondent asserts that KPLC is a monopoly power distribution company in Kenya; that it is endowed with a lot of technical abilities including engineers, valuers, technical support staff and assessors and has a duty of care to the customer; that in the lower court the appellant failed to prove that they had maintained, inspected and ensured safety of the meters, electricity lines and power to avoid loss in respondent's premises.

9. I have carefully perused the lower court record. The respondent produced all documents including valuation report, list of goods burnt and a police abstract. To all these documents, there was no objection by the appellant. Further, the appellant chose not to call any witnesses in support of its case. In such instances the law provides as follows.

10. In **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR**, Odunga, J. stated as follows on the consequences of failure by a party to call evidence:

“What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

11. There is no reason to belabour the point here. Where a party fails to adduce evidence, and has had opportunity to test and verify the same through cross examination, the court may properly rely on the evidence adduced subject to the usual rules as to relevance and probative value. Further, it is clear from the cross examination of the plaintiff/ respondent that he slept near the meter box; that he heard some noise coming from it on the material night; and that he saw sparks coming from the meter box, and that he took pictures of the same. He exhibited the pictures he took. There was no objection to the filed reports and pictures which the respondent availed as exhibits.

12. Accordingly, there is nothing to persuade me that the trial magistrate was not entitled to fully rely on the evidence adduced by the respondent, or that it was improperly relied upon. I therefore find no basis for interfering with the trial court's finding on liability.

Quantum

13. On this issue, the appellant submits that the respondent did not plead the amount of Kshs 4,771,880/= and that it was wrongly awarded by the trial magistrate. The appellant states that the Respondent tendered two written documents entitled 'goods inventory' and 'repairs of the building' amounting to Kshs 4,771,880/= and Kshs 6,000,000/= respectively but the trial magistrate did not bother to question the fact that the said inventory was actually written by the respondent and prepared after the alleged goods had been completely destroyed.

14. The appellant has also mentioned contradictions on the part of the respondent on the value of goods. I have looked at the proceedings and the judgment and I note that the respondent attributed the discrepancies in the valuation to his state of health as he was ill and unable to recollect all the details. The trial magistrate also took note and mentioned this in his judgment.

15. The issue of discrepancies in evidence was addressed by the Court of Appeal of Tanzania in **Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007**. This view was followed by the Court of Appeal of Kenya and respectfully adopted in the case of **Philip Nzaka Watu v Republic [2016] eKLR** where the court stated as follows:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

16. In my view the discrepancies in the respondents' evidence in the lower court are minor or have been explained.

17. In addition, the respondent states that he pleaded and proved his case; that the award was proper and the trial magistrate clearly outlined the basis of awarding the disputed amount in absence of any controverted evidence by the appellant or witnesses. The respondent therefore seeks dismissal of the appeal and urges court to avert the abuse of court process given that the respondent did not adduce any evidence in the lower court.

18. On perusal of the record, I note as follows on the appellants' argument that the amount awarded was not pleaded. This is incorrect. The plaint clearly particularizes the loss as follows:

Damaged building valued at	Kshs	1,300,000.00
Shop stock and merchandise worth	Kshs	6,000,000.00
Valuation and Quantity Surveyor's report	Kshs	50,000.00
Police Abstract	Kshs	<u>500.00</u>
Total	Kshs	7, 350,000.00

19. The trial magistrate found that in Exhibit 3, the Respondent had shown the value of items in the shop were valued at Kshs 4,771,880/= and that this amount had been proved on balance of probability. He also stated that the cost of repair had been indicated in the exhibit as 1,288,120/= but he did not indicate that the said amount had been proved. Neither the exhibit nor the proceedings show that the said latter amount was proved.

20. I am therefore satisfied that there is no basis, on the evidence available, for interfering with the trial court's award on quantum.

Disposition

21. The upshot of all the foregoing is that I am unable to accept the appellant's appeal and all the grounds fail. The appeal is therefore hereby dismissed with costs to the respondent.

22. Orders accordingly.

Dated and Delivered at Naivasha this 19th Day of December, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ombui for the Appellant
2. Ngunjiri holding brief for the Respondent
3. Court Clerk - Fred Kamau