REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 164 OF 2013

KENYA POWER AND LIGHTING COMPANY LTD.....1ST APPELLANT

JAMES MACHARIA.....2ND APPELLANT

VERSUS

JOHN MUCHIRI NDUNGU.....1ST RESPONDENT

MUBEA CONTRACTORS.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. Mr. Nditika Principal Magistrate delivered on 25th February, 2012 in CMCC No. 12772 of 2003 at Nairobi)

J U D G M E N T

1. John Muchiri Ndungu, the 1st Respondent herein, filed an action for compensation against **Mubea Contractors, Kenya Power and Lighting Co. Ltd** and **James Macharia** being the 1st Appellant, 2nd Appellants respectively, before the Chief Magistrate's Court for the injuries he sustained while working for the 2nd Appellant.

2. The 1st Respondent averred that he was hit by a high voltage electric wire which the 1st Appellant and the 2nd Respondent had negligently left sagging.

3. The suit was heard by Hon. Nditika, learned Principal Magistrate who eventually entered judgment in favour of the 1st Respondent in the sum of Ksh.2,880,000/- This being general damages and loss of future earnings.

4. The Appellants felt aggrieved by the aforesaid decision hence they each preferred an appeal to challenge the decision. The appeals were consolidated for ease of determination.

5. In its memorandum of appeal Kenya Power & Lighting Co. Ltd, the 1st Appellant put forward a total of eight grounds of appeal: -

i) The learned magistrate erred in law and fact in finding in favour of the 1st Respondent when the evidence adduced in court did not prove the 1st Respondent's case to the required standards.

ii) The learned magistrate erred in law and in fact in finding in favour of the 1st Respondent when the evidence adduced by the 1st Respondent was tested on cross-examination and found to be having too many glaring inconsistencies to sustain a favourable judgment in his favour.

iii) The learned magistrate erred in law and fact in finding that the Defendants were wholly liable for the alleged accident and ignored and/or failed to consider the evidence adduced by the defendants.

iv) The learned magistrate erred in law and fact in awarding the 1st Respondent a manifestly high sum of Ksh.2,000,00/- as general damages which could not be justified by the evidence adduced in court and in the existing judicial precedent.

v) The learned magistrate erred in law and fact in awarding the 1st Respondent a manifestly high sum of Ksh.880,000/- as damages for loss of earning capacity when the same was neither pleaded nor evidenced led in court in support thereof.

vi) The learned magistrate completely erred in law and fact in awarding damages the 1st Respondent for loss of earning capacity

which was neither pleaded nor proved in court when it is trite law that a claim for loss of earning capacity is a special damage claim and must be specifically pleaded and strictly proved in court.

vii) The learned magistrate completely erred in law and fact in awarding damages for loss of earning capacity which in the circumstances of this case he had no jurisdiction to award.

viii) The learned magistrate completely misunderstood and misapprehended the case by the 1st Respondent and the defense filed by the Respondents in court.

6. James Macharia, the 2nd Appellant on his part put forward the following grounds of appeal: -

i) The learned magistrate completely misapprehended the law and thereby reached a very wrong conclusion in all the aspects of the 1st Respondent's case and particularly: -

a) The 1st Respondent did not prove liability as against the appellant whom he admitted was unknown to him.

b) The learning magistrate relied on the provisions of a non-existent law, The Electric Power Act, to find the Appellants liable when he ought not have done so.

ii) The award of special damages for loss of earnings based on spurious assertions and is manifestly excessive nothing that the 1st Defendant testified that he was only a casual employee.

iii) The award of general damages of Ksh.2,000,000/- is excessive and incomprehensible and the learned magistrate erred in allowing the same as against the Appellant jointly and/or severally with the 2nd and 3rd Respondents.

iv) The learned magistrate misapprehended and applied the law wrongly because it statutory duty existed, the same did not impose such duty of care to trespassers or to persons the Appellants did not have control over.

v) The 1st Respondent did not prove his case on a balance of probabilities, both on liability and quantum of damages and the learned magistrate would easily have held so if he was keen and unbiased.

vi) ***The 1st Respondent's case was made up with his witnesses contradicting each other and the earned magistrate should have dismissed the case.***

7. When the appeals came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

8. I have re-evaluated the case that was before the trial court and also considered the rival written submissions.

9. Though the Appellants put forward several grounds of appeal, those grounds revolve around the questions touching on liability and quantum.

10. On liability, the Appellants have argued various grounds to show that the 1st Respondent did not establish his claim on liability to the required standard in civil cases.

11. It is the submission of the 1st Appellant that the learned Principal Magistrate misunderstood the 1st Appellants' case and defence. The 1st Appellant argued that the Learned Principal Magistrate failed to construe and apply Sections 59 and 60 of the Electric Power Act, 1997 (now repealed) to absolve it from liability since the responsibility to fence off a construction site to protect members of the public from accidents or injuries lies with the owner or licensee.

12. In response to the 1st Appellant's submissions, the 1st Respondent stated that the 1st Appellant did not call for evidence to rely on the Provisions of Sections 59 and 60 of the Electric Power Act, 1997. The 1st Respondent argued that the repealed statute is strictly in respect of the undertakings of work that deal with the streets which was not the case in this dispute. It was pointed out that the 2nd Appellant was putting up a building hence the defence of the 1st Appellant cannot stand.

13. I have carefully considered the rival submissions made by the 1st Appellant and the 1st Respondent. It is not in dispute that the 1st Appellants defense is premised on Sections 59(1) and 60 of the Electric Power Act, 1997 (repealed). Section 59(1) of the aforesaid Act, places an obligation on the owner, operator or licensee carrying out any construction work in a street or part of a street to provide fences or guards to protect members of the public from any danger arising from such works. Section 60 of the same Act insulates the 1st Appellant from liability that arise as a result of accidents or injuries from such constructions.

14. A careful consideration of the evidence tendered by the 1st Respondent will show that the 1st Respondent with other works were on a construction site of the 2nd Appellant at Huruma Ngei II Estate off Juja Road preparing the site and to set the machines ready for construction of the slab the next day.

15. It is apparent from the evidence of the 1st Respondent that on the fateful day the 1st Respondent together with another colleague were on

4th floor when an electric wire belonging to the 1st Appellant sagging near the building touched the building thus electrocuting the 1st Respondent.

16. With respect, I am not persuaded that the provisions of Sections 59 (1) and 60 of the Electric Power Act, 1997 applies in this case.

17. The accident occurred on the 4th floor of a building. The site was not along a street as envisaged under Sections 59 and 60 of the aforesaid Act.

18. I am satisfied that the learned Principal Magistrate came to the correct decision. I, therefore, find that the 1st Appellant was properly found to be labile for leaving its electric wires hanging too loosely and dangerously sagging next to a building under construction.

19. On the issue of liability, the 2nd Appellant argued that he had contracted an independent contractor by the name Matthew Kimani Kamau, to carry out construction work, therefore he never employed the 1st Respondent.

20. It was his submission that the 1st Respondent should have pursued Matthew Kimani Kamau. The 1st Respondent urged this court to reject the 2nd Appellant's arguments. It was pointed out that the 2nd Appellant failed to summon the alleged Matthew Kimani Kamau as a witness to prove his claim that he was an independent contractor he had hired.

21. With respect, I agree with the submissions of the 1st Respondent that the 2nd Appellant failed to summon the alleged independent contractor as a witness and neither did he enjoin him as a third party.

22. The learned Principal Magistrate, therefore, properly found him to be liable. It is not in dispute that the 2nd Appellant is the owner of the building where electric wires dangerously and loosely sagged. It was his responsibility to ensure that the 1st Appellant was informed to adjust or made aware of the sagging electric wires from the building under construction. Having failed to do so, he consequently becomes liable.

23. On quantum, the 1st Appellant is of the submission that the award of Ksh.2,000,000/- as general damages is inordinately high and not in line with comparable cases. It was pointed out that the trial court relied on the case of **Naomi Wangui Roman Vs Alice Wanjiru & another, HCCC No. 23 of 1996** in which the Plaintiff was awarded Ksh.1,350,000/- for injuries which were more serious than those suffered by the 1st Respondent.

24. The 1st Appellant urged this court to adjust the award of Ksh.2,000,000/- downwards to Ksh.500,000/-. The 2nd Appellant also argued that the award of Ksh.2,000,000/- was excessive and without justification.

25. The 1st Respondent urged this court not to disturb the award arguing that the trial magistrate took into account the age of the case and comparable awards.

26. It is not in dispute that as a result of the accident, the 1st Respondent's left arm was amputated. I have also looked at the decision of the trial Principal Magistrate and it is clear that he heavily relied on the case of ***Naomi Wangui Vs Alice Wanjiru & another*** *(supra).* He also noted that the 1st Respondent cannot work as his hand was amputated.

27. On appeal, the Appellants introduced new authorities, which the learned Principal Magistrate had no benefit to consider.

28. It is, therefore, unfair to take into consideration such authorities to upset the decision of the trial magistrate who had no benefit to take into account in his judgment. I prefer instead to re-examine and consider the cases cited before the trial court in determining the award.

29. The available authorities which were cited before the trial court show that this court has in the past made awards ranging between Ksh.500,000/- to Ksh.1,500,000/- for such injuries. With respect, I agree with the Appellants that the award of Ksh.2,000,000/- for general damage is high and excessive in the circumstances.

30. Consequently, I am entitled to interfere with the award. The same is adjusted downwards from Kshs.2,000,000/- to Ksh.1,500,000/-.

31. The other award, which was seriously contested was the award on loss of future earnings. The 1st Appellant pointed out that the trial magistrate erred when he made an award for loss of earning capacity, a prayer which was not made by the 1st Respondent in his plaint.

32. The 1st Appellant further pointed out that the prayer for loss of future earnings sought in the amended plaint is in the nature of a special damage and therefore, it must be specifically pleaded and strictly proved. The 2nd Appellant did not address this court over this award.

33. The 1st Respondent is of the submission that he sought to be awarded for loss of earning capacity and that he submitted evidence to prove that. The 1st Respondent also argued that he tendered evidence showing that his remaining hand was rendered useless hence he could no longer make an earning for himself and family.

34. This court was implored to find in favour of the 1st Respondent under this heading because the 1st Respondent successfully pleaded and proved the claim.

35. Having considered the competing arguments, it is clear from the pleadings that the 1st Respondent in his amended plaint dated 7th June, 2010, that he sought for ***inter alia*** loss of future earnings.

36. It is also apparent from the judgment of the trial court that the 1st Respondent was awarded Ksh.880,000/- for loss of earning capacity. With respect, such an award was not prayed for in the plaint.

37. The 1st Appellant is, therefore, right to challenge such an award. It was never pleaded in the plaint but it was stated in the final submissions.

38. The learned Principal Magistrate, therefore, fell into error. The difference between ***'loss of earning capacity'*** and ***'loss of future earnings'*** was given in **Butler Vs Butler [1984] KLR 225** where the court held ***inter alia*** as follows: -

> ***"1. A person's lost of earning capacity occurs where as a result of injury, his chances in the future of getting any work in the labour market or work, as well as paid as before the accident was lessened by his injury.***
>
> ***2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages."***

39. It is clear that loss of future earnings is a special damage claim, which must be specifically pleased and strictly proved.

40. In this case, the 1st Respondent pleaded for loss of future earnings but he was instead given loss of earning capacity. The question which should be answered is whether the 1st Respondent specifically pleaded strictly proved his claim for loss of future earnings?

41. The answer to the above question is in the negative. Being akin to special damage, the 1 st Respondents should have given the particulars of loss of future earnings but he just prayed for it to be given at the tail end of the amended plaint.

42. In his evidence expressed in the written statement the 1st Respondent namely stated that he was working and earning at the time of the accident a sum of Ksh.350/- per day. This averment cannot be said to have been strictly proved.

43. In the end, I agree with the submissions of the 1st Appellant that the plea for loss of future earnings was not specifically pleased nor strictly proved.

44. In the end, this appeal partially succeeds. Consequently, I make the following orders: -

> ***i) The appeal against the order on liability is dismissed.***
>
> ***ii) The appeal as against the award of Ksh.2,000,000/- as general damages is allowed. Therefore, the award is set aside and is substituted with an award of Ksh.1,500,000/-.***
>
> ***iii) The appeal as against the award of Ksh.880,000/- as loss of earning capacity is set aside.***
>
> ***iv) In the circumstances of this appeal a fair to order on costs is to direct that each party meets its own costs.***
>
> ***v) The 1st Respondent to have costs of the suit based on the award on appeal.***

Dated, signed and delivered at Nairobi this 21st day of September, 2018.

.....

J K SERGON

JUDGE

In the presence of`

..... *for the Appellants*

..... *for the Respondent***.**