REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 183 OF 2013

KENYA POWER AND LIGHTING COMPANY...............................APPELLANT

- V E R S U S –

JOSEPH NDAMBUKI KILONZO & ANOTHER....................RESPONDENTS

(Being an appeal from the judgement of Hon. Resident Magistrate Leah W. Kaberia

(Ms) delivered on 12th day of March, 2013 in CMCC No. 5382 of 2009 at Nairobi)

JUDGEMENT

1. Vitalis Kioko, now deceased, is alleged to have been electrocuted and fatally injured by live wires belonging to Kenya Power & Lighting Company Limited, the appellant herein, while playing within Mukuru Kayaba village on 9th October 2007. Joseph Ndambuki Kilonzo and Judy Ngina Nzuva, the legal representatives of the Estate of Vitalis Kioko, deceased, the respondents herein, filed a compensatory suit against the appellant before the Chief Magistrate's Court, Nairobi. Hon. Leah Kabaria, learned Resident Magistrate heard and determined the case in favour of the respondents. The appellant was found wholly liable. The respondents were awarded ksh.1,100,000 and ksh.27,100/= as general and special damages respectively plus costs. The appellant was aggrieved hence it preferred this appeal.

2. On appeal, the appellant put forward the following grounds in its memorandum:

> *1. **The learned magistrate erred in law and in fact in entering judgment against the appellant and finding that the appellant was 100% negligent when considering the evidence of the same had not been proved.***
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> *2. **The learned magistrate erred in law and in principle by adopting a wrong approach in computation of the general damages under various headings and by departing from the trends contained in the authorities cited by the appellant herein which authorities are binding upon her and therefore adopting a method which was erroneous and thus occasioning a miscarriage of justice.***
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> *3. **The learned magistrate erred in law and in fact by granting the sum of kshs.1,127,100 in damages under the Law Reform Act and Fatal Accidents Act in contravention of the practice and trends laid down by both the Superior Court and the Court of Appeal in decisions dealing with claims in respect of minor victims of fatal accidents.***

*4. **The learned magistrate erred in failing to sufficiently consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the appellant.***

*5. **The learned magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before her.***

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

4. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of five (5) grounds of appeal, the grounds revolve around two main questions touching on liability and quantum.

5. In grounds 1, 4 and 5, the appellant is basically challenging the decision to hold it wholly liable for the deceased's electrocution. It is the submission of the appellant that the respondents failed to tender credible evidence to prove the appellant's liability. The appellant submitted that the evidence of Judy Ngina (PW1) is discredited. It is argued that there was no evidence to corroborate the evidence of PW1 to confirm that the accident occurred. Secondly, it is argued that if indeed the accident occurred, then a report should have been made to the police. PW1 is said to have stated in cross-examination that the accident was reported in 2009, two years after the accident. It is also said that a letter from the area chief was obtained four (4) yeas after the incident. It is also pointed out that the post-mortem report is dated 25.6.2009, two years after the accident. The appellant further argued that the accident was never reported to it. The appellant pointed out that the totality of the evidence leads to the conclusion that the documents were obtained by the respondents in the year 2009 to fish evidence so as to sue the appellant for an accident that was not caused by the negligence of the appellant but by that of the respondents. The appellant was of the view that the suit should have been dismissed or in the alternative liability should have been apportioned between the parties.

6. The respondents on the other hand are of the view that they tendered credible evidence which were not controverted by the appellant which did not deem it fit to summon witnesses in support of its defence. The respondents also argued that there is no provision requiring the corroboration of the evidence of the respondents' witness. It is further argued that there was no requirement for one to obtain and produce a police abstract form in such cases unlike in road traffic accidents. It was pointed out that PW1 had given to the trial court evidence showing that a report was made as shown in OB29/10/07, Industrial Area Police Station.

7. I have on my part re-evaluated the case before the trial court. It is not in dispute that the respondent tendered the evidence of Judy Ngina (PW1) while the appellant failed to summon any witnesses to controvert what PW1 told the trial court. PW1 told the trial court that the late Vitalis Kioko, was playing outside his home in Mukuru Kayaba village. PW1 said he followed him and sat outside the house to keep a close watch. It is the evidence of PW1 that she saw the deceased play football which was kicked towards a house made of iron sheets. PW1 said that there were some electricity wires hanging from a bent electric pole. PW1 said that she saw the deceased enter that house and shortly she saw him fall down. She said Vitalis went near the house and bend down to pick up the ball and just fell down. PW1 said she rushed to where the deceased was to help him rise up. She said as she made her way to where the deceased lay she was hit by shock waves making her to fall down and lose conscience. She screamed when she came back to her senses. PW1 further stated that members of the public rushed to the scene to assist the deceased. He was covered with a blanket and taken to Equator where he was refered to Kenyatta National Hospital and admitted to ICU. PW1 produced the admission card as an exhibit in evidence. PW1 further stated that the deceased's skin came off and he stayed in hospital for 3 weeks after which he passed on. PW1 said that she visited the appellant's office the next day to report the incident to the appellant at Electricity House and the appellant promised to come and visit the deceased. PW1 stated that no one from Kenya Power & Lighting Co. Ltd came to visit the sick child in hospital. She said she went to book a report with the police at Industrial Area Police Station where she was given Police Occurrence Book no. 29/23/10/7. PW1 also said that she made a report with the area chief who in turn gave an introductory letter stating that he knew the deceased. The letter was produced in evidence as an

exhibit. PW1 stated that she went to the police and was given the post-mortem report dated 25.6.2009 after paying kshs.6000/=. The post-mortem report was produced as an exhibit in evidence. PW1 blamed the appellant by stating that the electric pole was bent and wires were dangerously dangling and touching on houses. PW1 said that the appellant's staff came a day after she reported to straighten the posts and to replace the wirelines. In cross examination PW1 reiterated her assertion that these wires which were dangling. She also said she made a report to the police in 2009 and to the chief on 28.11.2011 almost three (3) years after the accident. She clarified that she misplaced the letter given to her by a former chief who was there at the time of the accident and that is why she went to obtain a fresh letter from the area chief who replaced the former area chief and who had been briefed him of the incident. In re-examination PW1 stated that the area chief knew of the accident and that is why he came to the scene. The learned trial magistrate clearly stated that the respondent's witness was coherent and straight forward. She believed PW1 told the truth which evidence was not shaken under intense cross-examination. In short, the trial magistrate observed the demeanor of PW1 and believed her to have told the truth.

8. After a careful re-evaluation of PW1's evidence, I have to the conclusion that her evidence was consistent and truthful. I am convinced that she did not manufacture evidence to win the judgment before the trial court. I am convinced that the appellant is solely to blame for the accident. The appellant is said to be negligent because it left live wires dangerously dangling from electric poles which were bent. In the circumstances no negligence can be attributed to the deceased who was an innocent little boy aged 12 years. I am satisfied that the evidence presented by the respondents established liability against the appellant on a balance of probabilities. I am also satisfied that PW1 reported the incident to the police as evidenced by the unchallenged evidence of OB29/10/2007. The appellant has attempted to question the credibility of the post mortem report claiming the same was dated 25.6.2009, two years after the accident. This court notes that this is an issue which the appellant should have taken up at the trial. It is unfortunate that the appellant waited until this late stage to raise such an important issue. I will simply infer that the post-mortem was done before the burial but released to the respondents on the date stated in the post-mortem form. I see no merit in the appeal as against liability.

9. Grounds 2 and 3 relate to the appeal as against quantum. The appellant is of the view that the trial court in computing general damages departed from the practice and trends laid down by superior courts. It is argued that the award of ksh.800,000/= is inordinately high for a 12 years old hence it should be reviewed downwards. The appellant cited **Kisumu H.C.C.A no. 65 of 2009 Foam Mattresses Ltd =vs= Rose Akoth Ltd,** where this court awarded ksh.300,000/= as general damages to a deceased who was 11 years old. The appellant further complained that the award of k sh.200,000 for pain and suffering is manifestly excessive hence should be reviewed downwards.

10. The respondents on the other hand is of the view that the award is not high nor excessive hence the trial court did not breach the principles of computing awards on damages.

11. I have considered the rival submissions on quantum. I find the authorities cited by the respondents to be quite relevant. In **Nairobi H.C.C.A no. 1517 of 2002, Sanya Hassan & Another =vs= Soma Properties Ltd eKLR** this court awarded inter alia 720,000/= for lost years and ksh.1,000,000/= for pain and suffering for a 12 year old.

In **Nairobi H.C.C no. 510 of 2013 M.M.G =vs= Muchemi Teresa**

(unreported). This court awarded 150,000/= for loss of expectation of life and ksh.3,600,00/= for lost years for a deceased who died while aged 12 years.

The award of ksh.800,000/= pronounced by the trial court cannot therefore be said to be excessive for general damages.

12. It has been argued that an award of ksh.200,000/= for pain and suffering in this case is exorbitant. I have critically examined the record and it is clear that the deceased suffered 70% burns. His skin peeled off. He survived for about a month before succumbing to his injuries. I can only imagine the kind of pain the deceased suffered before death. I find the award not excessive.

13. In the end, I see no merit in the appeal against quantum.

Consequently the appeal is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

.... for the Appellant

.... for the Respondent