



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 240 OF 2009**

**KENYA POWER & LIGHTING CO. LTD .....APPELLANT**

**VERSUS**

**UMAZ ALI SWALEH.....RESPONDENT**

**J U D G M E N T**

1. On the plain words of the Memorandum of Appeal dated 9/11/2009, the appellant challenges the finding on both liability and assessment of damages by the trial court in the judgment dated 5.11.2009. The Appellant has advanced 4 grounds of appeal as follows:-

**i. The learned Magistrate erred in awarding excessive general damages.**

**ii. The learned Magistrate erred in law in failing to correctly appreciate the fact that no negligence was proved as against the Appellant and that testimonial evidence by the Respondent reaffirmed the Appellant's case that they were not liable.**

**iii. With due respect the learned Magistrate misdirected himself on the principles applicable in determining liability and quantum on matters based on negligence and rules of evidence applicable.**

**iv. The learned Magistrate erred in law in failing to hold that on evidence adduced the Respondent had failed to establish a case on a balance of probability.**

2. However a keen appraisal of the Memorandum of Appeal reveal that the said grounds of appeal are essentially two to wit:-

- The damages assessed were excessive and exaggerated.
- The evidence adduced did not establish any liability as against the Appellant.

3. This being a first appeal, the mandate and duty of the court is to reassess and re-examine the entire evidence afresh and come to own conclusions noting that factual findings by a trial court as well as the discretionary tasks of assessing damages ought not to be interfered with freely and slightly by an appellate court [\[1\]](#).

**The Evidence at Trial**

4. The Plaintiff suit before the trial court was premised on the tort of negligence in which it was alleged and pleaded that on the material date, 2.12.2004 at about 6.30pm, the plaintiffs son, deceased, then aged 6 years, was seated outside their house when an electricity cable snapped from its pole fell onto the ground and came into contact with the deceased and causing to suffer fatal burns and instant death. Particulars of negligence were the set out as well as the particulars of damages and dependants of the deceased.

5. In answer to that plaint the defendant filed a statement of defence in which all the allegations against the defendant were denied and an alternative and without prejudice pleading put forth that the incident was purely occasioned by the negligence of the plaintiff. Two particulars of such negligence were that set forth in the following fusion:

**a. Failing to keep any proper lookout for his own safety in the circumstances.**

**b. Exposing himself to the risk of danger and damage not expected of a prudent person in the circumstances.**

6. At trial only the plaintiff tendered evidence by calling two witnesses by the deceased child's mother and a neighbor. The evidence of the two pointed to the fact that the deceased suffered electric burns but did not quite agree on how the incident occurred. PW 1 the deceased mother, said that, that evening at about 8pm he was from selling fish and was carrying a younger child as the deceased was walking in front. Suddenly, she heard a blast and a cry for the child, mama!!mama!! she saw the child lying down and a man called Ali came and knocked the child away from the electric wire using a piece of wood. The deceased was rushed to hospital and pronounced dead. After the incidence the Appellants had the wire the scene repaired.

7. On cross examination the witness conceded having been left behind as the child walked home and that she did not see the wire fall down. She also denied that the child was seated outside their house and that she was called after the incident and only met the child at the hospital and did not witness the accident. That evidence went against the pleaded fact that the deceased was seated outside their house when the electric wire fell on him. She produced a bundle of documents marked exhibit P1 A – H.

8. PW 2 gave evidence that the electric wire broke up at about 6.00pm and at about 8.00pm he saw the deceased running towards the wire, tried to warn him but the child did not heed the warning and stepped on the wire thereby getting electrocuted.

9. On cross-examination, the witness confirmed that the deceased was all alone at the time he got electrocuted and that she tried to warn him but he did not heed. In re-examination, he said that the wire broke up when the deceased and his mother were by the roadside where the mother was selling fish.

10. With that evidence the plaintiff closed its case and the defendant announced that it did not intend to call any evidence on its part. The defence case was therefore closed without any evidence. With such development, it is in accordance with the law that the pleadings advanced by the defendant stood as bare statement of facts unsubstantiated by evidence and therefore forming no basis for the court find for the defendant on such pleadings [2].

11. After the respective cases were closed, the court directed that the parties file written submissions but on the next date only the plaintiff had filed submissions which directions the plaintiff complied with but not the defendant. The trial court therefore prepared the judgment now sought to be challenged without the benefit of any input by the Appellant. In its reserved judgment, the court found as follows on the question of liability.

**“The Plaintiff’s case as narrated by PW 1 and PW 2 is that on 2/12/04 at 6.00pm an electricity line broke up at Kisauni Msikitini near PW 2’s business premises. At 8.00pm, the deceased came walking by ahead of PW 1, his mother, stepped on the live line and was electrocuted. The K.P.L.C did not repair the line until 10.00pm long after the deceased, who was then aged 8 years, had been electrocuted.**

**As the plaintiff’s case is unchallenged I am satisfied she had proved it to the required standard. I therefore find the defendant 100% liable in negligence.”**

12. From the above excerpt, it is evident that the trial court proceeded from the point that no defence was filed even after a default judgment had been set aside. However, at pages 9-10 of the Record of Appeal, there is a copy of the Defence apparently filed on the 1/3/2007 some 12 or so days after the consent was recorded in court to set aside the default judgment.

13. That notwithstanding, a perusal of the trial court record and file reveals no such document nor court filing receipt in the court file hence the trial court could have been perfectly right to comment as it did that there was no defence filed even after the default judgment was set aside. This point is however of no pertinence as, it has been observed that whether on record or not, the pleading in the absence of evidence to substantiate it afforded to the court no basis to find for the defendant.

14. For that as the first reason, the evidence of the plaintiff that the deceased met this death, pursuant to electrocution by electric wire stood unchallenged and uncontroverted.

15. The second reason is that under section 52 of the Energy Act, a licensee, in this case the Appellant, is obligated to make compensation for any loss or damage occasioned by reason of execution of its duties and mandate under the Act or by reason of any defect in any electrical supply line. I read and understand this provision to put some strict liability upon the Appellant as a licensee for purposes of supplying and maintain electric power supply lines. There was sufficient evidence that an electric wire snapped and fell to the ground and thereby causing the fatal danger ultimately visited upon the deceased.

16. Knowing the danger that a defective electric cable or line pose to any human being and property, there is a duty of care owed to all Kenyan by the Appellant to maintain and keep secured all electric transmission lines and infrastructure so that accidents are avoided. In *Joseph Kiptonui vs KPLC* [3] Hon Asike Makhandia J, as he there was, held and said:-

**“...Kenya Power & Lighting Co. Ltd owed to the plaintiff and every Kenyan a duty of care where it happen to have power lines. Further electric power is a dangerous commodity and if not properly secured can be a danger to the society”.**

17. Same sentiments were expressed by GBM Kariuki J, in *KPLC vs Joseph Khaemba Njuria* [4] to the effect that the Appellant, has a

responsibility to ensure that the power infrastructure it has installed in the country for the purposes of electrification is properly maintained to prevent accident.

18. I find the foregoing decisions to be well founded in support of my finding that the Appellant had a duty of care to ensure that its power supply infrastructure was kept in good repair and condition to avoid being a risk to the general public including the deceased minor.

19. The forth and final ground why the Appellant could not escape liability to the Respondent is that a child of tender years is ordinarily not liable to be held to be contributorily negligent<sup>[5]</sup>.

20. For the foregoing reasons, I find no merit in the Appellant's ground 1 of the Memorandum of Appeal challenging the trial court's finding on liability. That ground of the appeal is dismissed for lacking in merit.

**Was the assessed award of damages excessive?**

21. As said before, the task of assessment of damages is the realm of juridical discretion of the trial court and an appellate court ought to be slow and reluctant to slightly and freely interfere with but can only be interfered with if it be demonstrated that the court took into account irrelevant matters; failed to take into account relevant matters or just misapprehended and misapplied the principles with a consequence that the award arrived at is manifestly and exorbitantly high as to amount to an erroneous estimation of damages due<sup>[6]</sup>.

22. In this appeal, the record reveals that the trial court in coming to the decision it reached took into account decided cases cited to it by the Respondent. I have equally had a chance to consider the said submissions in line with the submissions filed by both parties in this appeal, and I have been unable to find any error as would entitle an appellate court to interfere with the exercise of discretion by the trial court.

23. The Appellant in his submissions has made proposals for damages that are not very far from those reached by the trial court. One only needs to be reminded that even on its mandate to review the evidence and come to own conclusions, including the quantum of damages, the Appellate court has no mandate to substitute its own discretion in place of that of the trial court. It is not enough to interfere merely because the appellate court would have come to a different figure on assessment<sup>[7]</sup>. The test is that there must be demonstrated error in principles applicable or an obvious and evident erroneous estimation of damages. Short of that there is no liberty to interfere.

24. In this case the Appellant has not met the threshold for this court to interfere with the findings of the trial court which I find to be well founded for which reason even this ground of appeal fails.

25. The upshot is that the appeal fails in its entirety and it is therefore dismissed with costs to the Respondent.

**Dated and delivered at Mombasa this 30th day of November 2017.**

**P.J.O. OTIENO**

**JUDGE**

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<sup>[1]</sup> **Abok James Odera t/a J.A Odera & Associates vs John Patrick Wachira [2013] eKLR quoting with approval Peter vs Sunday Post Ltd [1958] EA 424 Mwanasolloni vs Kenya Business Ltd [1985] KLR 931 and Kenya Ports Authority vs Kuston Kenya Ltd [2009] 2 EA 212.**

<sup>[2]</sup> **D.T. Dobie & Co. (K) Ltd VS Wanyonyi Wafula Chebukati [2014] eKLR; John Wainaina Kagule vs Hussein Dairies Ltd CACA No. 215 of 2010.**

<sup>[3]</sup> **[2010] eKLR**

<sup>[4]</sup> **[2005] eKLR**

<sup>[5]</sup> **CACA No. 40 of 1997; Bashir Ahmed Bhut vs Uwails Ahmed Khan**

<sup>[6]</sup> **Bhut vs Khan [1981] KLR 349. Kemfro Africa Ltd vs A.M. Lubia & Another [1982 – 1988] 1 KAR 730**

<sup>[7]</sup> **Kemfro Africa Ltd (Supra)**