REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 114 OF 2012

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

VERSUS

MATHEW KABAGE WANYIRI…….……..…….....….....
…….....RESPONDENT

(An appeal from the Judgment of Hon. E. Makori, S. P. M. delivered on 25th September 2012 in Nyeri C.M.C.C. No. 70 of 2011).

JUDGMENT

The Respondents' suit in the lower court is enumerated in the plaint dated 5th April 2011 in which the Respondent sued the Appellant herein for recovery of general and special damages arising from personal injuries sustained by the Respondent during and in the course of his duties as an employee of the Appellant. The Respondent blamed the appellant for the said injuries and particularized particulars of breach of duty of care in the plaint.

In its defence, the Appellant denied liability and sought for the dismissal of the Respondents' case and also blamed the Respondent for the accident.

The Respondents' testimony was that on the material day, they were selecting electricity poles which were heaped on top of each other reaching a height of 2 metres, and in the process, they rolled and injured him seriously. The injuries sustained are a fracture of the shaft of the left femur and neck of the right femur. In the doctors opinion, the recovered with a shortening of right lower limp and loss of function at the hip, a permanent disability of about 20%. The doctor also opined that the metal implants will require to be removed, at a cost of Ksh. 50,000/= and chances of the Respondent developing osteoarthritis in future.

The appellants witness stated that the Respondent and others were sitting on the poles at the material time and while others escaped, he was trapped. On cross-examination he confirmed *that the poles are usually not held by anything, that he was the team leader and he did not secure the team.*

After evaluating the evidence, the learned magistrate, apportioned liability at **60%** as against the Appellant and **40%** against the Respondent. In their submissions, the Appellants had proposed **50%-50%** apportionment while the Respondent urged the court to find the Appellant **100%** liable.

On quantum of damages the Appellants proposed general damages of **Ksh. 350,000/=** while the Respondent urged the court to award **Ksh. 2,000,000/=.** After considering both submissions, authorities and the injuries, the learned Magistrate awarded general damages of **Ksh. 1,200,000/=** and special

damages of **Ksh. 3,000/=**, less **40 %** liability leaving a balance of **Ksh. 721,800/=.** This appeal challenges both the findings on **liability** and **damages.**

The Respondents also filed a cross-appeal and urged this court to dismiss this appeal, and set aside the findings on liability stated above and find the Appellant 100% liable. I note that the cross-appeal only relates to findings on liability but does not challenge the award of damages.

Appellants counsel in heir sub-missions urged this court to find that the Respondent was equally to blame and find him **50%** liable as proposed in the lower court. Counsel also submitted that the award of **Ksh. 1,200,000/=** is hefty and urged this court to reduce it to **Ksh. 350,000/=.**

Counsel for the Respondent submitted that there is no evidence to place the blame on the Respondent and urged the court to find the Appellant 100% liable while on damages he submitted that the award by the lower court is not exaggerated.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.(See ***Stanley Maore -vs- Geoffrey Mwenda*).**

On liability, I find useful guidance in the English House of Lords decision in the case of *Wilson and Clyde Coal Co. Ltd* whereby it was held that:-

> *"All employers have a duty to take reasonable care to ensure the safety of their employees, and, in particular, in the provision of a safe place of work, safe tools and equipment, and a safe system of work."*

In *Boniface Muthama Kavita vs Carton Manufacturers Ltd* **Onyancha J** observed as follows:-

> *"The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to an unreasonable risk."*

The *locus classicus* in cases of this nature is to be found in the statement of **Sir Percy Winfield**, quoted in *Clerk & Lindsell on Torts* where it is stated:-

> *"Tortuous liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redress-able by an action for un-liquidated damages."*

It is also important to bear in mind the meaning of negligence. Negligence is defined in *Charleswoth & Percy on Negligence* as:-

> *"Three meanings of negligence. In current forensic speech, negligence had three meanings, They are: (a state of mind, in which it is opposed to intention; (2) careless conduct; and (3) the breach of a duty to take care that is imposed by either common law or statute. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings."*

It is important to recall the holding in the old English case of *Blyth vs The Company of Proprietors of the Birmingham Waterworks* where it was held *inter alia:-*

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do....."*

In *Halsbury's Laws of England* it is stated as follows:-

> *" The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a casual connection must be established."*

Thus, it is essential that a plaintiff proves that the employer was negligent or guilty of an omission as a result of which the injury arose. The defense witness admitted in cross-examination that the poles were not help by anything. To me, this is an act of negligence. It is prudent to hold that a reasonable man in the circumstances could have foreseen the danger. The employees were not provided with any safety gadgets. Again, this is a serious omission. The defence witness described himself as the team leader but admitted in cross-examination that he never secured the employees. There is no evidence that the employees were taken through any drills or training on safety precautions, yet they were deployed to work in accident prone areas. In this regard in find that the Appellant cannot escape liability, the only question is, to what extent. Counsel for the Appellant proposes 50%, presupposing that both parties were equally to blame.

With regard to the position of employees injured in cases of this nature, I find useful guidance in the case of *Stat Pack Industries vs James Mbithi Munyao* where it was stated that:-

> *"an employer's duty at common law is to take all reasonable steps to ensure the employee's safety* ***but he cannot baby sit an employee****. He is not expected to watch over the employee constantly."*

Nyarangi JA in *Makala Mailu Mumende vs Nyali Golf Country Club* put is more succinctly when he said:-

> *"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."*

Turning to the evidence on record and applying the above authorities and the law, I find that the Appellant owed the Respondent a duty of care, and as stated above that it was admitted in cross-examination that the poles were not held by anything, and that the team leader admitted that he did not secure the team. No evidence was tendered to show that any safety or protective gadgets were provided to the employees. I find that the appellant was in breach of his duty of care to his employees and in particular to the Respondent. The relationship between the Appellant and the Respondent as employer and employee creates a duty of care and breach of this duty is actionable in court.

I equally find wisdom in the word of Nyarangi J cited above that *"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous."* Thus, the Respondent must share some degree of blame for exposing himself to the risk. The law balances several factors in its attempt to do justice to those who seek redress from the courts. The court must weigh the facts and circumstances of this case and determine which party wholly or substantially contributed to the accident. I this regard, the learned magistrate concluded that the Appellant was **60 %** to blame and the Respondent 40 % to blame.

In *Selle & Another vs Associated Motor Boat Co Ltd & Another* the Court of Appeal had this to say:-

> *" A Court on Appeal will not normally interfere with the findings of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."*

I find nothing to show that the learned Magistrate based his findings on liability on no evidence or on a

misapprehension of the evidence. I find no reason to disturb it.

I now turn to the question of damages awarded by the lower court and as I do so I find tremendous wisdom in a passage from a decision by the Supreme Court of India in *K. Suresh vs New India Assurance Co. Ltd & Another* where **Dipak Misra J** state:-

> *"Despite many pronouncements in the field, it still remains a challenging situation warranting sensitive as well as dispassionate exercise how to determine the incalculable sum in calculable terms of money in cases of personal injuries. In assessment neither sentiments nor emotions have any role. It has been stated in Davis vs Powell Duffryn Associate Collieries Ltd that:-*
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> > *"My Lords, the damages which are to be awarded for a tort are those which 'so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act' The words 'so far as money can compensate' point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. <u>But money cannot renew a physical frame that has been battered and shattered.</u> All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."*

The following passage from *Clerk and Lindsell on Torts* is highly illuminating on the subject:-

> *"In all but a few exceptional cases the victim of personal injury suffers two distinct kinds of damage which may be classed respectively as pecuniary and non-pecuniary. By pecuniary damage is meant that which is susceptible of direct translation into money terms and includes such matters as loss of earnings, actual and prospective, and out-of-pocket expenses, while non-pecuniary damage includes such immeasurable elements as pain and suffering and loss of amenity or enjoyment of life. In respect of the former, it is submitted, the court should and usually does seek to achieve **<u>restitutio in intergrum</u>** in the sense described above, while for the latter it seeks to award 'fair compensation.' This distinction between pecuniary and non-pecuniary damage by no means corresponds to the traditional pleading distinction between 'special' and 'general' damages, for while the former is necessarily concerned solely with pecuniary losses-notably accrued loss of earnings and out-of-pocket expenses-the latter comprises not only non-pecuniary losses but also prospective loss of earnings and other future pecuniary damage."*

The conception of *'just compensation'* is fundamentally concretized on certain well established principles and accepted legal parameters as well as principles of equity and good conscience. In *Yadav Kumar vs Divisional Manager, National Insurance Company Limited and Another,* while dealing with the facet of *"just compensation"* the court stated thus:-

> *" It goes without saying that in matters of determination of compensation both the tribunal and the court are statutorily charged with a responsibility of fixing a "just compensation". It is obviously true that determination of just compensation cannot be equated to a bonanza. At the same time the concept of "just compensation" obviously suggests application of fair and equitable principles and a reasonable approach on the part of the tribunals and the courts. This reasonableness on the part of the tribunal and the court must be on a large peripheral field."*

In *Mrs. Hellen C. Rebello and Others vs Maharashtra State Road Transport Corp & Another* while dealing with the concept of *"just compensation"*, it was ruled that *"just"* as its nomenclature, denotes

equitability, fairness and reasonableness having a large peripheral field. The largeness is, of course, not arbitrary, it is restricted by conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, unequitable, not just. The field of wider discretion of the tribunal has to be within the said limitation. It is required to make an award determining the amount of compensation which in turn appears to be *"just and reasonable,"* for compensation for loss of limbs or life can hardly be weighed in golden scales.

It is noteworthy to state that an adjudicating authority, while determining quantum of compensation has to keep in view the sufferings of the injured person which could include his inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have earned. Hence, while computing compensation the approach of the tribunal or a court has to be broad based. Needless to say, it would involve some guesswork as there cannot be any mathematical exactitude or a precise formula to determine the quantum compensation. In determining compensation the fundamental criterion of *"just compensation"* should be inhered.

The law on circumstances under which an appellate court would interfere with an award of damages has been reiterated in numerous authorities and in various jurisdictions throughout the world and the general principle is the same. The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd V. Ogboli* had this to say:-

> *"It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- **(a)** where the trial Court acted under a mistake of law; or **(b)** where the trial Court acted in disregard of principles; or **(c)** where the trial Court took into account irrelevant matters or failed to take into account relevant matters: or **(d)** where the trial Court acted under a misapprehension of facts; or **(e)** where injustice would result if the Appellate Court does not interfere; or **(f)** where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*

Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. Therefore, as was held in the above cited case, and indeed in numerous authorities in this country, an appellate court will only interfere with the award on general damages on the above cited grounds.

In *Kivati -vs- Coastal Bottlers Ltd* the Court of Appeal had the following to say:-

> *"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."*

In *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates* stated as follows:-

> *"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."*

The Court of appeal proceeded to observe that this is the general principle to be found in *Rook v Rairrie*. This principle was adopted with approval by the Court of Appeal in *Butt v Khan* where it was held per **Law, JA**:-

> *"... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."*

I find nothing in the judgment the lower court to suggest or even in the arguments advanced by the appellants counsel to suggest that the manner of assessing damages as enumerated in the above cited decisions was not followed. The learned magistrate had the benefit of listening to the witness. I find no reason to fault the said finding.

I find wisdom in the words of **Holroyd Pearce, L.J.** who said:- *"since the question is one of actual material loss, some arithmetical calculations are necessarily involved in the assessment of the injury."* He was however, of the view that arithmetical calculations do not provide a substitute for common sense."

Accordingly, I find no justifiable basis to warrant this court to interfere with the said award. Having so found, I found no merits in the grounds of appeal. The appeal against findings on liability and award of damages fails. **The upshot is that I hereby dismiss this appeal with costs to the Respondents. The cross-Appeal also fails.**

Orders accordingly

Dated at Nyeri this 30th day of March 2016

JOHN M. MATIVO

JUDGE