



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 20 OF 2014**

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

**V E R S U S –**

**JAMES KHANG'ANG'A IJOMBI.....1<sup>ST</sup> RESPONDENT**

**JAMES KINUTHIA t/a DOUBLE K. AGENCY.....2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgement and decree of Hon. Ole Keiwa in Milimani*

*Chief Magistrates Court at Nairobi Civil Case No. 5348 of 2011*

*delivered on 18/12/13)*

**JUDGEMENT**

1. James Khang'ang'a Ijombi, the 1<sup>st</sup> respondent herein filed a compensatory suit against James Kinuthia t/a Double K. Agency, and Kenya Power and Lighting Co. Ltd, the 2<sup>nd</sup> respondent and the appellant respectively, vide the plaint dated 4<sup>th</sup> November 2011. In the aforesaid plaint, the 1<sup>st</sup> respondent sought for special and general damages with costs for the injuries he sustained while working for the 2<sup>nd</sup> respondent in a contract awarded by the appellant to the 2<sup>nd</sup> respondent. When served with the summons to enter appearance plus the plaint, the appellant entered appearance and filed a defence to contest the 1<sup>st</sup> respondent's claim. It would appear, the 2<sup>nd</sup> respondent failed to enter appearance nor file a defence thus prompting the 1<sup>st</sup> respondent to successfully apply for entry of judgement in default of appearance and defence against the 2<sup>nd</sup> respondent. The suit was eventually heard and determined by Hon. Ole Keiwa, Learned Principal Magistrate in favour of the 1<sup>st</sup> respondent. The appellant being dissatisfied filed this appeal to upset the decision. He put forward the following grounds of appeal:

- 1. THAT, the trial magistrate erred in law and in fact in finding that the appellant was vicariously liable for the accident the subject matter of the suit.***
- 2. THAT, the trial magistrate erred in law and in fact in finding that the appellant vicariously liable without any factual or legal basis.***
- 3. THAT, the trial magistrate erred in law and in fact in finding that the appellant liable without establishing any nexus between the appellant and the 2<sup>nd</sup> respondent.***

4. **THAT, the trial magistrate erred in law and in fact in awarding kshs.365,000/= as damages.**

6. **THAT, the trial magistrate completely erred in granting judgment of aforesaid when the plaintiff had completely failed to prove his claim.**

6. **THAT, the trial magistrate erred in law in failing to appreciate that the burden of proof rests on the plaintiff throughout.**

7. **THAT, the trial magistrate misdirected himself and arrived at a wrong decision.**

2. Two witnesses testified in support of the 1<sup>st</sup> respondent's case before the trial court. The 1<sup>st</sup> respondent stated before the trial court that he was assigned work by the 2<sup>nd</sup> respondent and in the process of performing the assignment he fell down from an electric pole and sustained serious injuries. He blamed the 2<sup>nd</sup> respondent for failing to warn him of the dangers the work posed and beseeched the trial court to hold the appellant vicariously liable for his injuries. In the end the trial magistrate opined that since the appellant and the 2<sup>nd</sup> respondent did not tender evidence to controvert the 1<sup>st</sup> respondent's evidence on how the accident occurred the duo were liable. The learned principal magistrate held that the 2<sup>nd</sup> respondent did not provide a safe working environment. The appellant raised a question touching on misjoinder of parties but the learned principal magistrate dismissed it claiming that the 1<sup>st</sup> respondent was negligent in prosecuting the suit having failed to amend the plaint to put the correct name of the appellant. He however declined to strike out the suit claiming the point raised by the appellant was a technicality. On damages, the learned principal magistrate awarded the 1<sup>st</sup> respondent ksh.360,000 as general damages and ksh.5,000/= as special damages.

3. Having set out in brief the case that was before the trial court, let me now consider the merits or otherwise of the appeal. I have re-evaluated the case that was before the trial court. I have further considered both the oral and written submissions. The first ground which was ably addressed by the parties is the question as to whether or not the appellant was vicariously liable for the actions of the 2<sup>nd</sup> respondent. It is the submission of the appellant that there was no evidence linking the appellant to the accident the 1<sup>st</sup> respondent was involved therefore the appellant could not possibly be held vicariously liable. The 1<sup>st</sup> respondent is of the view that he tendered evidence showing that the relationship between the appellant and the 2<sup>nd</sup> respondent as that of an agent/contractor to connect electricity to customers which work was supervised by the appellant. The key tests in establishing whether or not vicarious liability exists were restated in **Clerk & Lindsel on Torts 20<sup>th</sup> Edition 92010) paragraphs 6-13 to 6-16** as follows *inter alia*:

i. **There must exist an essential core of mutual obligations to be ready to work and to pay for that work between the parties.**

ii. **The employee must be under the direct control or supervision of the employer.**

iii. **The existence of the relationship will not be affected by the fact that the employer is not allowed by law to do the work for himself, but is compelled to employ an agent of a particular class to do it for him, provided that the employer has power to control and dismiss the agent.**

4. In **Katerega and Another vs Uganda Electricity Board (1995- 1998) 1 E.A P. 10 – 19** it was held *inter alia* that

**The party alleging vicarious liability against the Uganda Electricity Board was held to bear the burden of proof for the following important elements of vicarious liability:-**

i. **That the alleged tortfeasor was an electric technician.**

ii. **That such technician was employed as such by the respondent; and**

***iii. That at the material time he had instructions from the board to act to connect electricity.***

5. I have already pointed out that the learned principal magistrate stated that the appellant and its co-defendant did not tender evidence to controvert the plaintiff's assertion that he had a contractual relationship with the 1<sup>st</sup> defendant (1<sup>st</sup> respondent) over a contract given to the 1<sup>st</sup> defendant (Appellant). In my humble view and applying the above stated principles, the learned principal magistrate erred. It was incumbent upon the plaintiff (1<sup>st</sup> respondent) to prove that such a relationship existed notwithstanding the fact that the action is not defended. In the case before the trial court, the 1<sup>st</sup> respondent failed to tender sufficient evidence to discharge the burden of proof.

6. The second main ground argued is to the effect that the trial magistrate entered a default judgment against the respondent without proof of service. I have re-examined the record and it is clear that the court appears to have declined to allow the request for judgment in default against the 2<sup>nd</sup> respondent. With respect, I agree with the submissions of the appellant that there was no credible evidence of service upon the 2<sup>nd</sup> respondent therefore the entry of judgement against the 2<sup>nd</sup> respondent was not justified.

7. On the basis of the above grounds, I am convinced that the Appeal should be allowed. Consequently this appeal is allowed. The judgement of the trial court is set aside.

8. In the circumstances of this case, I am of the view that the trial was not properly conducted, hence a fair order which I issue is that the case be heard afresh before another magistrate of competent jurisdiction other than Hon. Ole Keiwa and on priority basis.

9. Costs of this appeal is awarded to the appellant.

Dated, Signed and Delivered in open court this 16<sup>th</sup> day of September, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent