



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 46 OF 2014

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

PETER OWUOR OMOLLO suing as the

administrator of the estate of

LINDA OTIENO AWITI (Deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.T. Obutu, PM dated 15th April 2014 in the Chief Magistrates Court at Kisumu in Civil Case No. 239 of 2012)

JUDGMENT

1. The respondent's case before the trial court was that on 23rd April 2012, the deceased was at home at Nyawita Estate, Kisumu City, hanging clothes when she was electrocuted after touching a live wire. She died due to the injuries sustained and her dependants filed suit seeking damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and the ***Fatal Accident Act (Chapter 32 of the Laws of Kenya)*** claiming damages for injuries caused by the appellant's negligence.
2. In its statement of defence, the appellant denied that it was negligent. It averred in the alternative that the accident was solely or substantially caused by the deceased's own negligence.
3. After hearing the matter, the trial Magistrate apportioned liability at 80% against the appellant. He awarded the respondent Kshs. 345,600/= as general damages for loss of dependency under the ***Fatal Accidents Act***. The appellant appealed on the issue of liability while the respondent cross appealed on the issue of liability and quantum.
4. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see ***Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123***). *In order to test the evidence, it is necessary to outline the evidence as it was presented before the subordinate court.*
5. The deceased's husband, Peter Owuor Omollo (PW1) testified that on 23rd April 2014 he was in his house in Nyawita Estate. It had rained and the electricity pole situated outside his home had tilted. The deceased was washing clothes outside when he heard her scream. He came out and found her lying down having touched the live wire while hanging clothes. When cross-examined, PW1 stated the wire got cut at

night and was on the grass. He denied the suggestion that he used to tap electricity as his house was connected and he used to pay for electricity as part of his rent to the landlord. In re-examination, he told the Court that the appellant came and changed the pole and transformer after the incident.

6. Festus Kanaka Lumara (DW 1), an employee of the appellant, testified that he visited the scene at Nyawita on 23rd April 2014 and found the houses there without power. He was informed that the deceased was airing her clothes when she was electrocuted. He also confirmed there was an electricity pole nearby. He stated that he could not establish how the accident happened but he blamed a neighbour for stealing electricity and using a live clothing wire. In cross-examination, he stated that the hanging wire was charged. Moses Rotich (DW 2) testified that he went to the scene two months after the accident. His position was that power had not been legally connected hence KPLC was not to blame as he did not see any meter connected to the house.

7. The thrust of the appellant's case set out in the Memorandum of Appeal dated 30th April 2014 is that the learned trial Magistrate failed to appreciate its case and misapprehended the evidence, law and submissions in holding it liable. Mr Nyamweya, counsel for the appellant, submitted that the electric wire that collapsed was visible matter which could be seen by anyone hence the appellant could not be blamed for the accident as the deceased had the responsibility to take care of her own safety.

8. In the further amended memorandum of cross-appeal amended on 15th July 2014, the respondent contended that the trial magistrate erred in apportioning liability when the appellant was wholly liable. Counsel for the respondent, Ms Kyamazima, submitted that it was the duty of the appellant to ensure that its poles and wires remain in place by properly maintaining them and that the deceased could hardly be blamed if the appellant failed to do so.

9. There was no dispute about the fact that the deceased was electrocuted by touching a live electric wire. There is uncontroverted evidence that after it had rained, one of the electric poles close to the deceased's residence was tilting and the electricity wire cut. The main issue then is who is to blame for the incident. In the particulars of negligence and breach of duty pleaded in the plaint, the appellant contended as follows;

(i) Failing to keep live wire at a height sufficiently safe to eliminate danger to the innocent public.

(ii) Failing to keep live wires insulated to avoid accidents [of] the type that befell the Deceased.

(iii) Failing to maintain electricity poles and specifically failing to ensure that the poles are properly erected so that the electric transmission wires do not sag or lie on the ground as would be a danger to the public and more specifically the deceased herein.

(iv) Failing to place up a warning to the public of the fact that a live wire was lying on the ground and thereby causing the Deceased to come into contact [and as a] result suffer the injuries

(v) Generally breaching its monopolized and statutory duty to distribute electricity consumers safely and without posing danger to the public.

10. The appellant is a supplier of electricity. It operates transmission lines which if not properly maintained are liable to cause members of the public grave injury or loss through electrocution. It therefore owes the public a duty of care to ensure that its infrastructure is safe and does not pose unusual risks to members of the public. The deceased was going about her usual household chores when she was electrocuted by a live wire from a tilting pole. The uncontroverted evidence is that she was hanging her clothes on the clothes line which had come into contact with the live wire from the tilting electricity pole after it had rained.

11. I also find and hold that the appellant had a duty to ensure that its power lines were in repair particularly after it had rained. The duty of the appellant has been explained in many cases (**see also Kenya Power and Lighting Company v Joseph Khaemba Njoria [2005]eKLR and Joseph Kiptonui**

Koskei v Kenya Power and Lighting Company Ltd [2010]eKLR). In Kenya Power & Lighting Company Ltd v Joseph Khaemba Njoria [2005]eKLR, the court held:

There can be no question that the power company (KPLC) has a responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is properly maintained to prevent accidents The deceased could not be blamed for not seeing the wire. It would not be reasonable to expect that as people walk along in towns, they should anticipate live electric wires that might protrude from the ground or from walls and endanger their lives.....

12. The appellant owed a duty of care to the deceased to take all the necessary and reasonable steps which would have avoided the risk such as ensuring that the electricity poles were repaired so soon after the rains. Further, it was the burden of the appellant to prove that there was an illegal connection but I find that this fact was not proved on the balance of probabilities. In fact, PW 1 confirmed that after the incident, the appellant came to repair the pole and replace the transformer. This is clearly inconsistent with the allegation that the respondent was relying on an illegal connection. I also hold that there is no way the respondent would have known that her clothes line was live with electricity to avoid it and consequently the trial magistrate was wrong to ascribe any contributory negligence to her. I therefore find the appellant fully liable.

13. I now turn to the issue of quantum. The respondent case was grounded on the **Fatal Accident's Act**, as he did not obtain letters of administration he could not mount a claim under the **Law Reform Act**. In the plaint, the respondent pleaded that the deceased was 23 years old and was a business lady earning Kshs. 15,000.00 a month. She had two children aged 4 and 1 year. PW 1 testified that she used to sell mandazis and would make about Kshs. 500/- per day which she used to take care of household. In assessing damages the learned magistrate used a multiplier of 27 years, multiplicand of Kshs. 4000 and a dependency ratio of 1/3.

14. The respondent's contention was that the trial court did not consider that the deceased was wholly supporting two children when it awarded dependency ratio of 1/3 adopted. The appellant's view was that the amount awarded was reasonable and that there was no reason to interfere with the assessment of damages by the trial court. The general principle upon which this court, as an appellate court, will interfere with an award of damages was stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

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

15. Assessment of the dependency ratio is a question of fact. The trial magistrate did not explain how he reached the conclusion that a ratio of one third was appropriate in the circumstances. A mother who had two very children would likely use a substantial part of her income for her children rather than herself. I therefore find a dependency ratio of 2/3 suitable in this matter. The learned magistrate misapprehended this part of the evidence which resulted in an inordinately low award. I therefore find the respondent was entitled to $Kshs. 4,000 \times 12 \times 27 \times 2/3 = Kshs. 864,000/-$ as damages for loss of dependency under the **Fatal Accidents Act**.

16. The appeal is therefore dismissed while the cross appeal is allowed. Accordingly, the judgment in the subordinate court is set aside and substituted with a judgment for the respondent against the appellant for the sum of **Kshs. 864,000/-**. Interest thereon shall run from the date of judgment in the subordinate court. I award the respondent costs of the appeal and the cross appeal.

17. Finally when the court makes an award under the **Fatal Accidents Act**, it must, in accordance with **section 4(1)** apportion the amount awarded to each dependant and where children are involved approve a scheme of investment for the sums due to the children. I therefore direct that the respondent to file the

necessary application for consideration before the subordinate court in due course before the decretal sum is released to him or his advocates.

DATED and DELIVERED at KISUMU this 30th day of November 2016.

D.S. MAJANJA

JUDGE

Mr Nyamweya instructed by L. G. Menezes Advocates for the appellant.

Ms Kyamazima instructed by S.O. Madialo and Company Advocates for the respondent.