REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 110 OF 2013

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

VERSUS

NATHAN KARANJA GACHOKA

CHARLES NGANGA MWAURA(SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF **ANN MUTHONI (DECEASED).....RESPONDENTS**

(An Appeal from the Judgment and/or decree of the Honourable S.M. Mungai, Chief Magistrate delivered, on 19th June 2013 in Nau CMCC No. 13 of 2010)

JUDGMENT

1. This appeal arises from the judgment of the trial court delivered on the 19th June 2013 in **Nakuru CMCC No. 13 of 2010.** It is against both the trial court's findings on negligence and *quantum* of damages.

The appellant, Kenya Power & Lighting Company Limited was found wholly liable in negligence following an electrocution of the deceased on the 4th October 2009 by electric wires at her home within Nakuru Free Area while she was hanging clothes on the supplier wires fixed on the fascia board of the rental house.

2. The Respondents took out Letters of Administration *Ad litem* as the deceased's husband and uncle and sued the appellant for negligence for failing to remove fallen and exposed and defective electricity wires on the cloth hanging lines and failing to have adequate supervision and maintenance of the electricity wires and failure to certify that the electricity installation works were installed to the required standards. They also sued for damages under the **Law Reform Act and the Fatal Accidents Act** following the electrocution that was certified as the cause of death.

3. Upon trial, the trial Magistrate made findings that the supply of electricity to the subject premises were approved by the appellant which was charged with ensuring its safe maintenance, a fact that was not rebutted, and that the appellant failed in its duty to ensure that the supply lines, fittings and apparatus were safe. Upon such findings the appellant was held wholly to blame in negligence and awarded Kshs.1,500,000/= damages under the Fatal Accidents Act and Kshs.120,000/= under the Reform Act together with Kshs.48,950/= as provenecial damages.

The appellants state that the trial Magistrate erred both in law and fact in finding it wholly liable contrary to the evidence tendered and awarding damages that were inordinately high by applying a wrong multiplier and multiplicand in calculating loss of dependency and awarding the same to persons were not

dependents of the deceased. The Respondents opposed the appeal and filed written submions by their advocate B.O. Akang'o. The appellant too filed written submions through its advocates E.M. Juma & Company Advocates.

4. As the first appellate court I am mandated to consider and reevaluate the evidence tendered before the trial court and come up with my own independent findings and conclusions both on negligence and *quantum of damages as stated in the cases* ***Ephatus Mwangi vs Duncan Mwangi Wambug (1982-88) I KAR 278 and also Mwanasokoni vs*** **KBS (1982-88) I KAR 870** among y other decisions. I shall now consider the Respondentvidence before the trial court.

5. The Evidence

PW1 was Nathan Karanja Gachoka described himself as the deceased's husband married under custoy law for 10 years prior to the fatal electrocution on 4th October 2009. He was not a witness to the incident. He testified that the called by neighbours informed him the deceased was electrocuted at their rental house while hanging clothes on the lines, fixed on the fascia board of the house from one side to the other, that they found the said wires so fixed when they occupied the said house, that the postmortem conducted on the deceased body established that the death was due to electrocution.

He further testified t on 7 th October 2009 the appellant disconnected the said wires upon its findings that the electrocution due to an electrical leakage which transmitted by the iron sheet roofing the house.

6. On the matter of dependants, PW1 stated that he had four children with the deceased and named them but produced no birth certificates or clinic cards which he said were at home. It wass evidence that the deceased was doing charcoal business with a daily income of Kshs.800/= which used for the family upkeep. He also produced receipto prove funeral and related expenses of Kshs.41,800/=.

Upon cross examination, PW1 stated that they were using uncoated electrical wire to hang clothes as coat hangers that fixed to the fascia board next to the iron sheet roofing and that the wire in contact with the iron sheet roof, and that the said wires were fixed from one house to the other. He further stated that the electricity flow a problem as it used to go on and off. He further stated that he could not remember the dates of birth of his four children but that they were in school at St. Monica Academy in class 4, 3, 1 and the youngest in Nursery school respectively.

7. PW2, Eunice Waitherero a neighbour of the plaintiffs testified that she was selling charcoal with the deceased and that the wire that electrocuted the deced tied to the fascia board on one side of the post and onto the houses opposite within the plot and that she present when the deceased electrocuted, that she knew the couples four children, and that in their charcoal sales they would make Kshs.600-700 per day.

Upon cross exnation she testified that the cloth hanging lines were extending from one truss to the other across the plot, and touching the iron sheet roof, and that after the incident, the wires were changed and fixed on the post by the Defendant. stated that they did not know that the electric wires were dangerous.

8. The appellant did not call any evidence but denied the respondents claim of negligence and attributed negligence to the deceased in its statement of defence dated 5th February 2010. In particular, it blamed the deceased for interfering with electric poles and cables in that led to heed warnings on the electric poles to take reasonable care to her own safety by ignoring the presence of high powered electric wires. The appellant did not adduce any evidence to contravert the respondents evidence.

9. Consequences of such failure to adduce evidence been discussed in numerous decision among them **Janet Kaphiphe O & Another vs Marie Stopes International Kenya – HCCC No. 68 of 2007, H.C.A. No. 792 of 2007 James Kihara Wanjohi vs China Road & Bridge Corporation Ltd (2015) e HCA No. 57 of 2010 Phyllis Wairimu Chacharia vs Kim Tea Factory (2016) e KLR.** The general thread running through is thread is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein remain as mere statements. This is buttressed by the provisions of **Section 107** and **108 of the Evidence Act** t places the burden of proof on the person

who pleads and asserts.

10. Analysis of Evidence

I have evaluated the Respondents evidence and cross examination. There is no dispute that the deceased electrocuted. It has not been shown by the apellant that it was not the one who had a duty to install supervise and maintain its electrical installations in various premises including the deceased's premises. No evidence adduced that the deceased interfered with the electrical installations. However, evidence adduced by PW2 t indeed the electrical wires were exposed and were touching on the iron roof of the rental houses and that the deceased placed the clothing hanging lines on the electrical wires that were fixed from the fascia board of the rented house. PW1 also confirmed the same facts but added that when they occupied the house they found the electricres so fixed including the cloth hanging lines.

11. PW1 testified that after the incident the appellants officials disconnected the electric wires and told him that there was an electric leakage which transmitted by the iron sheet roofing to the house.

This piece of evidence too not challenged nor was it proved. It is true that no evidence lead to show indeed installed the electric wires the way they were nor it said t the appellant had so installed them.

12. It is trite that all electrical installations are the mandate of the Kenya Power and lighting Company limited who has a duty to ensure that the electrical installations are done by its qualified staff and in the manner specified in the **Electric Power Act Cap 314** and the Rules e thereunder. Kenya Power and Lighting Company is the only entity mandated to install, supervise, inspect and maintain electric installations. Evidence tendered that live wires were left uncoated ad hanging and were being used to hang clothes by the deceased and other persons in the plot. The duty for constant checks, inspections and maintenance of electrical installations is placed upon the appellant by statute Its failure to do so and its employees admission that there was a leakage from the wires that caused the electrocution,having not been challenged then leaves me to come to the same conclusion that the appellant failed to maintain, inspect and supervise electric installations into the plot leading to the deceased's death. See **Section 63, and 109 of the Electric Power Act, Cap 314**.

13. However evidence on record show that the deceased contributed to the unfortunate accident that caused her death. It matters not installed the electric wires in the plot if not the Appellants agents. They were haphazardly done and it is evident that KPLC had failed to inspect the said installations as it would have found it defective and a danger to human life in the manner they were so done. It its duty and mandate to inspect and disconnect or remove the said installations found improperly installed if it took its work seriously. It did its work of inspection and maintenance at the same time the plainti admitted that they hanged clothes from the uncoated electric wires hanged across their houses. The deceased, PW1 and PW2 ought to have known that uncoated electric wires were dangerous. They did not take any action to ensure that the same were fixed for their own security and safety. No mention of having reported to Kenya Power Lighting Company was made. Ignorance is no defence in law and common sense too must be employed more so in obvious and naked danger to life, in this case, hanging clothes on live electric wires that were naked and obviously haphazardly installed.

14. I am persuaded that the respondents were by their evidence able to prove the necessary causation and the link between the appellants negligence and the fatal injury to the deceased. That evidence, in my view sufficient to link the two and therefore sufficient to hold both liable at dirent proportions. See **Statpack Industries vs James Mbithi Munyao (2005) e** as stated in the **Timsales Ltd vs Stephen Gachie (2005) eKLR** , an accident be caused by many factors and a link must therefore be established. The appellant failed to prove its assertions in its statement of defence, and they therefore remain as such.

15. I am of the considered view that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its c too upon a balance of probability whether the evidence in unchallenged or not.

In **Kanyungu Njogu vs Daniel Kimani Maingi (2000) e KLR** it was held that:

> ***" when a court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that probability was more probable than the other"***

16. The deceased is said to have been a mother of four children. She was expected to take care of her own safety and more so that the danger of interfering with electric power cables forceable. One does not have to be a scientist or an electrician to know and be aware that uncoated electric cables cause danger once interfered with. The deced ignored obvious danger and led to safeguard her own ety.

In the case **Grace Kanini Muthini vs KBS and Another Nyeri H.C. Miscl Appl. No. 270 of 2000** the Court of Appeal was faced with two probabilities as to between the parties may have caused an accident. The plaintiff was said to have contributed to the accident by failing to take care of his own safety and permitted the accident to occur. The plaintiff however required to prove her case on a balance of probability that she did not contribute to the accident. The Judge rendered that:

> ***" ----- I can only decide the case on a balance of probability if there is evidence to enable me say that it was more probable than that the second defendant wholly or partly contributed to the accident."***

And the court finding no such evidence, the plaintiff suit was dismissed.

17. In the present case, there is sufficient evidence to conclude that the deceased contributed to the causation of the accident that claimed her own life. Ignorance and more so by an adult of obvious circumstances as in this appeal is not excuse in law.

To t extent, I shall set de the trial courts judgment on the ie of liability and substitute with a finding that both the appellant and the deced contributed to the cauion ohecident

I find the appellant to have been 50% to blame and 50% blame goes to the deceased.

18. Quantof damages

In the matter of *quantum* of damages under the Fatal Accidents Act, the appellant faults the trial Magistrate for awarding what it terms as inordinately high award to the respondents it is stated were not dependant of the deceased.

Section 4 of the Act describes a dependent as the wife, husband, child and parents of the deceased. It is urged by the appellant that the respondents did not prove any marriage between the plaintiff PW1 and the deceased nor the children stated as children of the couple as no birth certificates were produced as evidence. I have seen the appellants submissions before the trial court on the issue. The issue of dependency was not questioned at all. Thepellant made proposal in terms of dependancy ratio at 2/3 and a multiplier of 12 years against an income 3000/=.

19. Having not raised any question as to whether the first respondent and the children were dependants of the deceased before the trial court, it cannot be taken on appeal. It is too late to bring it up.

The first respondent testified that he was the husband of the deceased and father to the named four children. He also stated that the couple had been married for ten years under customary law and further that the children were all in school PW2 too testified that she knew the first respondent and the deceased as a couple and also knew the children as their children. It is my view that it would be a traversity of justice and grave denial of dependants rights if the courts would always insist on production of birth certificates to prove t a party parent to children when, either by ignorance of otherwise, the said birth certificates were not obtained. The same goes for production of school records to confirm t a child was indeed a school going child when incident occurs. This is not to say that such documents are not important. They are important, and the public must always endeavour to obtain them as soon as the

children are born or as soon as an even occurs to ease the work of Judicial officers in that respect.

I am satisfied that the first respondent and the four children were dependanthe deceased.

20. The deceased 28 years old at date of her death. This not disputed as evidenced by a Death certificate issued on the 16 th October 2009. The trial Magistrate considered all relevant facts and adopted multiplier of 25 years against a multiplicand of 2/3 and an income of Kshs.7,500/= per month. That gave sum of Kshs.1,500,000/= as loss oependency.

The appellant urged the court to adopt an income of Kshs.3,000/= on the basis that in her evidence PW2 stated that there was scarcity of charcoal and therefore the sum adopted by the court of Kshs.7,500/= per month not justifiable, and a multiplier of 10 years.

With respect to the appellant the multiplier of ten years suggested is too low and without any basis. It was not stated that the deceased was unhealthy or worked in high risk environment. She could have worked gainfully to reach the age of sixty years and above. That is thirtytwo years period. Due to imponderables of life, I find a multiplier of twentyfive years reasonable. No reasons have been advanced by the appellant for its assertion that the trial court led to take into account any relevant tor or left out any in adopting the d multiplier. No sucrrelevant factor was demonstrated by the apellant.

21. Likewise, I find no reasons or at all to persuade the court to vary the income of shs.7,500/=adopted by the trial Magistrate.

In **Kemfro Africa Ltd t/a Meru Express & Another vs A.M Lubia (1982-88) I KAR 727** the court held that assessment of damages is at the discretion of the trial Magistrate and an appellate court will be slow to interfere with such discretion unless it is demonstrated t in asseng the damages, the court acted on wrong principles or led to take into account a relevant tor or considered an irrelevant tor and in the results arrived wrong decision.

The appellant has not demonstrated any of the above factors. It is not enough just to state a fact. Some material ought to be placed before the court for consideration. None produced. I find no reason to interfere with the trial court's decision to adopt the income of Kshs. 7500= per month. I have no reason to vary or set aside the award by the trial Magistrate.

22. Consequently and for the above reasons the appeal succeeds partially. I shall set aside the trial court's judgment and substitute it with a judgment that:

> 1. The appellant shall bear 50% contributory negligence while the deceased shalla bear 50% of the same.
>
> 2. The assessment of damages under the Fatal Accidents Act, commonly known as loss of dependency is upheld but shall be subjected to a contributory negligence of 50%. leaving a sum of Kshs750,000/=.
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> 3. Kshs 120,000= awarded under the Law Reform Act shall be deducted from the award on loss of dependency leaving a sum of Kshs.630,000/=.
>
> 4. Special damages of Kshs.48950/= is confirmed, and is also subjected to contributory negligence of 50%, thus Kshs. 24,475/=.
>
> 5. Net award to the first Respondent for himself and the deceased's children shall therefore Kshs. 654,475/=.
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> 6. The appellant shall pay costs the appeal.

Dated, signed and delivered in co this 17th day of November 2016.

JANET MULWA

JUDGE