



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 595 OF 2008

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

VERSUS

BERNARD MUTUKU KILONZO.....RESPONDENT

(From the judgment and orders of R N Kimingi Senior Resident Magistrate in Milimani CMCC No. 10051 of 2002)

J U D G M E N T

On 4th December 2002 in the Chief Magistrate Court at Nairobi, the Respondent herein commenced proceedings against the Appellant seeking special and general damages. The Respondent stated that he was on the 15th November 2000 working on the roof of a house in Komarock estate, phase five when he got electrocuted. He sustained injuries which he blamed on the negligence of the Appellant for breaching implied terms of the contract particulars which were set out in the amended plaint.

The Appellant denied responsibility and blamed it on the Respondent's own negligence and want of care in his conduct, particulars of which were set out in the amended defense. Both parties called witnesses in support of their case. On the 15th October 2008 the court delivered its judgment for the Respondent against the Appellant apportioning liability in the ratio of 50%:50% and an award of Kshs.753,000/= for pain and suffering.

That holding triggered this appeal. The Appellant filed a memorandum of appeal advancing four grounds upon which it felt the judgment of the learned magistrate was erroneous. These are:-

1. **The learned magistrate erred in failing to hold that the Respondent was solely to blame for the accident.**
2. **The learned magistrate erred in holding that the Appellant was 50% liable for the accident and injuries sustained by the Respondent.**
3. **Further or in the alternative, the learned magistrate erred in failing to hold that the Respondent was more than 50% liable for the accident.**
4. **The quantum of damages is manifestly excessive.**

Parties agreed to argue the appeal by way of submissions. The written submissions were subsequently filed and exchanged.

On the issue of liability the Appellant submitted that the particulars of negligence and breach of statutory duty as pleaded in the amended plaint, were never proved by the Respondent at the hearing in the lower court and that, therefore, the learned magistrate's decision to apportionment liability at 50%-50% was erroneous. The Appellant claims that the Respondent testified at the trial that he did not know whether the wires came into contact with him as all he knew was that he found himself in Marie Hospital, Kayole at around 8:00 p.m. The Appellant also claims that the third witness (PW3) also stated that there was wind and the electric wires hit the iron bars of the slab and as a result of which plaintiff's clothes caught fire and he fell. The Appellant further stated that there was no evidence before the trial court to ascertain the allegation that the electric power lines were sagging. In support of the position, the Appellant relied on the Court of Appeal decision in **Makube Vs Nyamuro (1983)**.

The Appellant further submitted that it was necessary for the Respondent to prove the particulars of negligence alleged. It stated that the same were not proved in the trial court. The Appellant relied on **Kaboswa Tea Estate Vs Alfred Juma Bilauni Civil Appeal No. 302 of 2000**. The Appellant maintains that the fact that the Appellant was electrocuted does not necessarily attach liability to the Appellant. The Appellant suggested that liability is apportioned at 75%:25%.

On quantum, the Appellant submitted that the Respondent did not plead any injuries to the eye or vision impairment as a particular of injury. The Appellant states that the evidence of injuries suffered does not mention anything to do with loss of the Respondent's eye vision as result of the accident. The authorities submitted by the Respondent in the lower court were therefore not applicable as they related to more severe injuries. The authorities related to more grievous harm than those suffered by the Respondent. The Appellant suggested the quantum of damages reduced to Kshs.120,000.00 subject to contribution, and the award of Kshs.753,000.00 be set aside.

The Respondent on the other hand, submitted that the particulars were proved by the Respondent testimony and that of the witnesses. The wires were sagging and were naked. He stated that the testimony of DW1 indicated that the ground clearance of the wires at the site was 18 feet which is contrary to provisions of Rule 17 (1) (b) of the Electric Power Rules. The Respondent maintained that it was the responsibility of the Appellant to maintain the said wires in accident free pose and failure to do so made the Appellant liable to 100%.

On quantum, the Respondent submitted that it is trite law that the same should never be disturbed unless it is too high or too low as to amount to an erroneous application of the relevant principle. According to the Respondent there is uncontroverted evidence that he sustained severe burns on the scalp and forehead with loss of sight in the left eye. He submitted further that he had testified that he was a manual labourer and hence the impact on the quality of life owing to the injuries was tremendous.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal all of which were apparently carefully considered by the trial court to arrive at this judgment now appealed from. I recognize my duty as the first Appellate court which will consider and independently assess the facts and law as if I was in the position of the trial court while respecting its conclusions as the court that heard the evidence.

On the issue of liability, it is common ground that the Respondent herein sustained injuries as a result of electrocution while he was at work. What is in dispute is whether the accident and the injuries sustained can be apportioned to the Appellant at 100% or the Respondent also contributed to the causing of the same. In the amended plaint dated 4th December 2002 the Respondent pleaded the following particulars of negligence and or breach of statutory duty on the part of the Appellant.

1. Failing to ensure that the electric wires were properly insulated
2. Laying electricity wires too close to residential houses.
3. Permitting the live electricity wire to sag to a height that was dangerous to people residing nearby.
4. Failing to maintain the required height to live electricity wires.
5. Permitting live wires to lean on residential houses.

6. Exposing the plaintiff to a risk of injury or damage, which the Defendant knew or ought to have known.

The Appellant claims the Respondent did not prove the particulars as required by the law. The Respondent together with PW3 who were both working together when the accident occurred testified that the electricity wires were not properly insulated and they were sagging and swinging due to the blowing wind. They also stated that the wires were erected too close to the perimeter boundary of the plot where the Respondent was working. DW1 testified in cross examination admitted that it was the duty of the Appellant to maintain the electric wires. He stated that he was in charge of the area where the accident occurred and his people were responsible for maintaining the wires.

I find that negligence can be inferred from the evidence before the court; I take judicial notice of the fact that the Defendant is the sole distributor of electricity in this country. On the whole therefore and in the light of the uncontroverted evidence of the Respondent, the Appellant owed the Respondent a duty of care to ensure that the electric line/wires did not pose any danger to the public and to him in particular. In my view the Respondent established the nexus between the injuries sustained and the failure by the Defendant to exercise that duty. There is clear evidence on record that the high voltage wires that caused the injuries were sagging at the material time, although the only Defence witness, Peter Okinyi Okello tried to deny the fact that he had not visited the accident spot on the day of accident. He however, admitted that the wires were naked and could injure a person even from as far as six feet away.

In this particular case, Plaintiff testified that he was working at a distance less than six feet (one metre) away and that although he knew that a live electric line can injure, he did not know much about electricity or electric work. Finally, there was evidence as well that the live wire at the material time was pushed or swung by wind to touch the iron pipes which in turn transmitted electricity towards the Plaintiff. There is no iota of evidence on the record that the Plaintiff in any way acted negligently to justify the trial court to come to such a conclusion.

In view of this court, while a first Appellate court should be slow to change or interfere with a conclusion of fact, nevertheless, it will not hesitate to do so, if the trial court's conclusion is so notoriously wrong and was obviously without evidence or contrary to common sense.

The conclusion that I come to is that on the issue of liability, the Defendant was and should have been found and declared 100% liable.

The trial magistrate awarded the 100% liability at Kshs.1,500,000/- before redistributing the same between Plaintiff and Defendant at the ratio of 50% to 50%. I accordingly award the damages at Kshs.1,500,000/- plus Ksh.6,000/- as special damages.

The appeal is accordingly dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 11th day of March, 2015.

D A ONYANCHA

JUDGE