REPUBLIC OF KENYA

KENYA LAW

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 52 OF 2011

(An appeal from the Judgment and decree of the Principal Magistrate, Embu in CMCC No. 179 of 2009 dated 4/4/2011)

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

VERSUS

DANIEL MWAZEA MWENDA (Suing as the legal representative/Administrator

of the estate of the late MARTIN MWANIKI KARUKU)..... RESPONDENT

J U D G M E N T

This an appeal against the judgment of Embu Principal Magistrate in CMCC No. 179 of 2009 delivered on 4/4/2011. The respondent sued the appellant in his capacity as the legal representative and administrator of the estate of the late Martin Mwaniki Karuku deceased for damages under the Law Reform Act and the Fatal Accidents Act. It was alleged in the plaint that the deceased was electrocuted and died on the spot while pruning grevillea tree in their shamba which was about three metres from a high voltage electricity line elected by the appellant. The respondent attributed negligence to the appellant for failing to cut down trees near the high voltage electricity line. The court apportioned liability at the ratio of 50:50 and awarded damages of KShs. 220,950/= plus costs and interest to the respondent.

The appellant was dissatisfied with the judgment and lodged this appeal based on the following grounds:-

1. *That the magistrate erred in finding the appellant liable in negligence whereas there was no evidence.*
2. *The magistrate erred in failing to consider the evidence of the public inquest which blamed the deceased for his own death.*
3. *The magistrate erred in failing to find that the defence of volenti non fit injuria applied in the circumstances.*
4. *The magistrate misapprehended the principles for the award of damages and adopted the multiplicand of KShs.3,500/= which was inappropriate thereby arriving at a grossly excessive award.*
5. *The magistrate erred in adopting a multiplier of 30 years which was inappropriate and arrived at an excessive award.*
6. *The judgment of the trial magistrate was against the law and the weight of the evidence.*

Both parties filed written submissions in disposal of the appeal. The appellant's counsel Mithega & Kariuki Advocates while Messrs Njeru Ithiga & Company represented the respondent.

In its submissions the appellant stated that the evidence of its witness was that the deceased died as a result of electrocution when a branch of tree which he was pruning fell on electricity wires nearby. The appellant stated that it was not in dispute that the deceased was an adult who was full aware of the danger of getting into contact with life wire. Neither the deceased nor the respondent contacted the appellant to seek the assistant in switching off the live current or use their expertise to prune the said branch. The appellant argued that an inquest was conducted which absolved the appellant from blame.

The appellant is only obligated to prune tree within three metres of the way leave upon being informed by the land owner. The deceased was cutting branches to obtain material for building for chicken. There was no evidence that there was a risk. The accident was an act of God and the appellant should not be blamed. The finding on liability was therefore erroneous.

On the issue of quantum the appellant argues that there was no evidence to support the award made and the magistrate did not explain how he came about the figures.

The appellant relied on two cases in support of their submissions of negligence. These are:-

1. ***KIEMA MUTHUKU VS KENYA CARGO HANDLING SERVICES LTD [1991] KAR***
2. ***SOUTH NYANZA SUGAR CO. LTD VS OMWANDO OMWANDO [2011] eKLR***

In support of its argument on assessment of damages, the appellant relied on two cases:-

1. ***GEORGE NDERITU NDUMIA & ANOTHER VS NYAMBURA GITONGA [2006] eKLR*** where the appeal was allowed for lack of proof of deceased's earnings among other reasons.
2. ***LUCY M. NJERI VS FREDRICK MBUTHIA & ANOTHER [2006] eKLR*** where the court declined to award damages for loss of dependency on grounds that there was no documentary evidence of deceased's income.

The respondent submitted that the court should consider the principles guiding the appellate court in interfering with the award of damages before disturbing the award in this appeal. It is not correct for the appellant to claim that the award was inordinately high, or excessive or erroneous. The magistrate considered all the relevant factors in making the award.

The respondent relied on the case of ***DENSHIRE MUTETI WAMBUA VS KENYA POWER & LIGHTING CO. Civil Appeal No. 60 of 2004*** *citing the case of* ***KEMFRO AFRICA LTD VS A.B. LOBIA & ANOTHER [1982-1988] KRA 777 KNELLER J.A.*** observed

"*The principles to be observed by an appellant court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of Appeal Eastern African to be that it must be satisfied that*

(a) *The judge in assessing the damages took into account an irrelevant factor or*

(b) *Left out of account a relevant one or (3) that short of this the amount is inordinately low or so inordinately high that it must be an erroneous estimate of the damages".*

The duty of the first appellate court was explained in the case of ***MWASOKONI VS KENYA BUS SERVICE LIMITED [1985] KLR 931*** where the court held that the appellate court has power to examine and re-evaluate the evidence on a first appeal where it becomes necessary.

The evidence of the respondent was that the deceased who was his son was cutting trees at the time he was electrocuted by life wires. He said that live wires were about three metres from where he was thereby causing his death on the spot. He was a casual worker and used to assist the respondent with maintenance and also paid school fees for his siblings. The respondent blamed the appellant for the accident because they failed to cut the trees using their skills.

The respondent called one witness PW2 who testified that he was with the deceased at the material time. The deceased climbed a tree and while cutting its branch he was electrocuted. PW2 saw smoke coming from the deceased clothes and a branch was resting on the deceased's hand and on a live wire nearby.

The appellant witness DW1 testified that he was a senior foreman with the appellant. He testified that on 1/3/2008 he was informed that someone had been electrocuted while pruning trees. He learnt that the tree was not within the wayleave. The responsibility of the appellant is confined to trees that are within the wayleave. For any trees outside the wayleave, the land owner is required to seek the assistance of the appellant in writing. In such a case, the appellant's personnel would switch off the power supply. He told the court that the appellant had already sensitized the public on the danger posed by interfering with live wires.

In her judgment the magistrate stated that the deceased was aware of the danger he exposed himself to when pruning trees next to the live wire. She further stated that the appellant was also to blame as it had a responsibility that the wayleave was not only free from branches encroaching on the wayleave. The magistrate apportioned the liability equally between the appellant and the deceased.

The appellant argued that there was no evidence to justify the apportionment of the liability for the deceased was fully to blame for the accident. It was also argued that through an inquest, the appellant had been held blameless in regard to the accident. On perusal of the respondent's evidence he blames the appellant for failure to trim the trees using its expertise. On the other hand the respondent argued that its responsibility was limited to the wayleave area.

PW1 also admitted that neither him nor the deceased had approached the appellant in pruning the said trees. For this reason the magistrate found the deceased had his share of blame. She also found that the appellant was to blame for failing to ensure that the wayleave was not only free from the the trees per se but also free from branches of the trees planted outside the wayleave which were encroaching. It is noted that the appellant did not tender any evidence that it carried regular inspections on the condition of its way leaves which is its duty. Regular inspections would ensure the safety of people living or using the area next to the wayleaves.

The finding of the magistrate was based on the evidence given by both parties. The respondent attributed the whole blame to the appellant. The magistrate was right to find that the deceased also contributed to the

accident. This was because he did not take due care and attention in working in an area which was near the live wires. Furthermore he failed to seek the help of the appellant in cutting the branches which posed great risk to his life. The appellant on the other hand, is required to pay attention to any trees whose branches encroach on the wayleave. This should be done in the cause of their normal maintenance of the wayleaves to ensure that they minimize the risk to people or to even animals approaching the wayleave area. The appellant cannot shift the blame to the respondent.

The ruling on the inquest was that the deceased being an adult was aware of the danger posed by the live wires and that the appellant had no responsibility on the accident. The burden of proof in civil cases is on the balance of probabilities as opposed to criminal cases which have a higher standard of proof. The fact that one has been acquitted of a criminal case does not absolve a person from civil liability. It is important to note that the inquest was not even a criminal trial and it is immaterial to this case.

It is my considered opinion that the magistrate's finding on liability was supported by cogent evidence. She explained in her judgment for apportionment of liability at 50:50 between the parties. I reach the conclusion that she made the correct finding on the matter.

The appellant contended that the magistrate erred in failing to consider the defence of *volenti non fit injuria*. On perusal of the submissions of the appellant in the lower court, this issue was not brought up. The claim that the magistrate erred in ignoring the defence has no basis.

On the multiplicand adopted by the court of KShs.3,500/= , I agreement with the appellant that there was no documentary proof . However, there was evidence that the deceased worked as a casual labourer. In cases where there is no proof of income, the court may adopt Regulation of Wages (General Amendment Order) Legal Notice No. 98 of 2010. The minimum wage for labourers in rural areas is KShs3,597/=. The figure adopted by the magistrate of KShs.3,500/= is close to the minimum wage. I find that the multiplicand adopted was reasonable and within the law.

The deceased died at the age of 22 years according to the evidence of his father which is held to be credible as to the age of his son. The death certificate produced by the father shows that the deceased died at the age of 22 years. The evidence of a parent and the death certificate is sufficient proof of the age of the deceased. The magistrate adopted a multiplier of 30 years. In the case of ***JAMES GICHURU KIUNJURU VS MAIYO INVESTMENTS LIMITED Nairobi HCCC No. 168 of 1999,*** the deceased died at the age of 25 years and a multiplier of 30 years was adopted. The multiplier adopted by the magistrate in this case was comparable to other decisions and it is hereby confirmed.

It is my finding that the judgment of the magistrate was based on cogent evidence in respect to liability. The award made by the magistrate was comparable to awards made in other cases with similar facts. The award was reasonable and was not inordinately high nor grossly excessive. For these reasons and in view of the principles set out in the case of ***DENSHIRE MUTETI WAMBUA (supra),*** I find no basis to interfere with the award of the learned magistrate.

The appeal is dismissed for lack of merit. The judgment of the magistrate is hereby upheld.

The appellant to meet the costs of this appeal and for the court below.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Ithiga for respondent

Mr. Nduku for Kariuki for appellant