



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NOS. 131 AND 132 OF 2012

BETWEEN

KENYA POWER & LIGHTING CO. LTD..... APPELLANT

AND

BEATRICE AUMA NYAPALA..... 1ST RESPONDENT

DAVID OCHIENG 2ND RESPONDENT

*(Appeal from the judgment and decree of Hon. E.M. Nyaga, SRM,
dated 9th October 2012 from original Migori SPMCC No.18 of 2011)*

JUDGMENT

1. The appeal herein arises from a suit filed in the Senior Principal Magistrate's Court at Migori by Beatrice Auma Nyapala (hereinafter referred to as the 1st Respondent) and David Ochieng (hereinafter referred to as the 2nd Respondent) against Kenya Power & Lighting Company Limited (hereinafter referred to as the Appellant).

2. In Migori SPMCC No.18 of 2011, commenced by way of a plaint dated 7th April 2011, the 1st respondent as plaintiff averred that the appellant herein, as defendant was under a duty to keep safe and maintain its electricity supply lines in a good state of repair and to ensure that the said electricity supply lines do not expose any danger to the health, life person or property of anyone; further that the appellant was under a duty to ensure that no person is injured and/or exposed to a risk or danger and/or injury arising from the generation, conversion, transmission, distribution, supply or use of electric energy.

3. The 1st Respondent also averred that the appellant was and is under a duty, as owner of an electricity supply line to make compensation to any person injured by reason of injury or breaking of any electricity supply line or by reason of any defect in any electricity supply line. The 1st Respondent also averred that through the breach of statutory duty and sheer negligence on the part of the appellant, she was injured when a loose electricity supply line fell on her and her baby whom she was carrying on her back and as a result thereof, both the 1st Respondent and her baby were seriously injured. The 1st Respondent therefore sought the following reliefs:-

a) *General damages for pain suffering and loss of amenities;*

b) *Special damages (totaling Kshs.15000/=);*

c) *Exemplary damages;*

d) *Interest on (a), (b) and (c) above at court rates;*

e) *Any other or further relief that this Honourable Court may deem fit and just to grant.*

4. In Migori SPMCC No.19 of 2011, the 2nd Respondent herein also alleging breach of statutory duty and negligence against the appellant for injuries sustained on 19th November 2010, sought the following reliefs against the appellant:-

a) *General damages for pain suffering and loss of amenities;*

b) *Special Damages (Kshs.5,000/=);*

c) *Exemplary Damages;*

d) *Interest on (a) (b) and (c) above at court rates;*

e) *Any other or further relief that this Honourable Court may deem fit and just to grant*

5. In both cases, the trial court entered judgment against the appellant as follows:-

1) PMCC NO.18 of 2011

- *Liability 75:25 in favour of plaintiff*
- *General damages – Kshs.500,000/=*
- *Special damages – Kshs.14530/=*
- *Costs and interest.*

2) PMCC No.19 of 2011

- *Liability 75:25 in favour of plaintiff*
- *General damages – Kshs.450,000/=*
- *Special damages – Kshs.5,000/=*
- *Costs and interest.*

6. Being aggrieved and/or dissatisfied with the judgment and decree of the learned trial Magistrate Hon. E.M. Nyaga, SRM, dated and delivered on the 9th day of October 2012, the appellant herein preferred Appeal Numbers 131 and 132 of 2012 (now consolidated) to this court against the quantum of damages awarded vide the said judgments and decree on the following grounds:-

1. That the learned trial magistrate erred in law and in Principle by failing to appreciate that the injuries alleged to have been sustained by the Respondent were in the nature of soft tissue injuries of lesser magnitude and did not commensurate with the amount of general damages awarded.

2. That the award of General damages to the Respondent was manifestly and inordinately excessive in the circumstances.

3. That the learned trial magistrate erred in law and in principle by ignoring the submissions and authorities filed by the appellant while adopting the amount proposed by the Respondent as the judgment of the court verbatim, thereby occasioning miscarriage of justice and a display of biasness.

7. The appellant now asks this honourable court for orders that:-

(a) The judgment and/or decree of the learned trial magistrate dated 9th day of October 2012 be set aside and/or quashed.

(b) The issue of assessment of damages payable be revisited and assess/ review/vary the same to a reasonable amount commensurate to the injuries sustained by the respondent.

(c) Costs of the appeal herein be borne by the Respondent.

8. When the appeal came up for directions the court directed that the same be canvassed by way of written submissions to be filed and exchanged within thirty (30) days. Both counsel complied with those directions. It was the Respondents' case that on the 19th November 2010 she was electrocuted by an electric wire and she got burns on the left shoulder upto the left leg. She had gone to weed her shamba when the incident occurred. She was taken to Bande Dispensary for treatment and she produced treatment notes from the said dispensary. Later she was treated at Ombo Hospital in Migori Town where she paid Kshs.9,000/= and was given a receipt to that effect which she produced in court.

9. She reported the incident at Muhuru police station and was issued with a P3 form which was duly filled. She then sought legal counsel and a demand notice was issued which she also produced in court.

10. A medical report by Dr. Churyai was prepared for which she paid Kshs.5000/= after being examined by the said doctor. She produced the said receipt and some photographs showing the injuries she had sustained. She blamed the appellant saying that the power lines were not properly erected because they fell on her as she worked in her shamba and she got electrocuted. She prayed for damages as compensation as well as costs.

11. Parties thereafter filed written submissions and the trial court gave its judgment. In the brief judgment, liability was agreed upon in the ratio of 75:25 in favour of the plaintiff against the defendant. The trial court awarded Kshs.500,000/= and 450,000 respectively as general damages for pain and suffering while special damages were assessed at Kshs.14,530/= and Kshs.5000/= respectively.

12. Having re-evaluated the evidence that was adduced before the trial court and further after taking into account the written submissions, it is important to state from the outset that the appellant herein is only challenging the decision on quantum. The appellant is calling upon this court to interfere with the trial court's assessment of general damages which are said to be inordinately high. The principles to be applied in deciding whether or not to interfere with the trial court's discretion to assess damages are as follows:-

(i) When the award is inordinately high or low as to represent an entirely erroneous estimate;

(ii) The trial court proceeded on wrong principles or misapprehended evidence in some material respect.

13. Appellant submits that the injuries sustained by the Respondent were minor and the same had fully recovered as at the time of hearing of the case. That the Respondent was only treated once and upon discharge she never sought further treatment. That in the circumstances, an award of Kshs.500,000/= was inordinately high as there was no basis for the same. Similar arguments were made against the award for the 2nd Respondent.

14. The Respondents on their part submit that the injuries suffered were second degree electrical burns on the left arm and scapular region and both ankle regions and that the respondent still complains of chest pains and occasional contusion. That the said injuries and their continuing effects justify awards made. The appellant has relied on the case of **Devki Steel Mills Ltd. -vs- Joseph Mutua Mulwa – Nairobi HCCA No.658 of 2002** where the plaintiff was electrocuted and sustained burns that were more severe than those of the respondent herein. However, the High Court considered an award of Kshs.250,000/= as

being manifestly excessive and unjustified and reduced the same to Kshs.150,000/=.

15. The Court of Appeal in the case of **Butler –vs- Butler – C.A. NO.49 of 1983** laid down the following principles that an appellate court should consider in reversing an award of damages by the lower court.

(a) That the court acted on wrong principles;

(b) That the court has awarded so excessive or so little damages that no reasonable court would;

(c) That the court has taken into consideration matters he ought not to have considered or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision.

16. Applying the above principles to this case and based on the evidence before the lower court, the age of the authorities cited and the fact of inflation I consider that an award of Kshs.300,000/= for general damages in respect of the 1st Respondent would be a fair estimate of the compensation due to the said Respondent.

17. With regard to the 2nd Respondent, who suffered only superficial bruises with no obvious permanent disability, I find that the award of Kshs.450,000/= for such injuries was manifestly excessive in the circumstances. The same is accordingly revised downwards to Kshs.200,000/=.

18. Accordingly and for the reasons above stated, the judgment of the trial court as regards general damages is set aside and in lieu thereof I enter judgment as follows:-

a) Appeal No.131 of 2012 - General damages in the sum of Kshs.300,000/=.

b) Appeal No.132 of 2012 – General damages in the sum of Kshs.200,000/=.

Judgment on special damages in both appeals remains undisturbed.

19. Each party in this appeal shall bear its own costs.

Dated and delivered at Kisii this 20th day of March, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. O.M. Otieno (present) for Appellant

M/s Sila Munyao & Co. (absent) for Respondents

Miss G. Nyabonyi - Court Clerk