



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 910 of 2007**

**PAUL OWINO OBWANDA.....APPELLANT**

**VERSUS**

**STEEL MAKERS LTD.....RESPONDENT**

*(An appeal against the judgment delivered by Hon. E.C Cheronu (Mr) at the Chief Magistrate's Court Nairobi, in Civil Suit No.5770 of 2005 on 14<sup>th</sup> August, 2006)*

**J U D G M E N T**

1. This appeal arises from a suit which was filed in the Magistrate's Court at Nairobi by Paul Owino Obwanda (hereinafter referred to as the appellant). He had sued his employer Steel Makers Ltd (hereinafter referred to as the respondent). The appellant claimed that he was employed by the respondent as a general worker, and that his duties included taking measurements for raising damping ground within the respondent's premises in Kitengela.
2. The appellant stated that on the 4<sup>th</sup> January, 2005 during the cause of his duty he was instructed to assist in holding a measuring metal chain at a constructions site to raise the damping ground. During that process the metal chain suddenly came into contact with an unattended live electric wire causing the appellant to suffer severe electric burns.
3. The appellant held the respondent responsible for his injuries contending that the accident was caused by breach of contract of employment and statutory duty on the part of the respondent, its servants or agents. The appellant therefore claimed general and special damages from the respondent.
4. The respondent filed a defence in which it denied having employed the appellant, or that an accident occurred on the date and place alleged or that the appellant sustained any injuries. The respondent further denied all allegation of negligence and or breach of statutory duty, attributed to it or its servants or agents. The respondent further relied on the defence of *volenti non fit injuria*. In the alternative the respondent contended that if the accident occurred, then it was solely caused or substantially contributed to by the appellant's own negligence.
5. During the trial in the lower court, the appellant explained that between April, 2003 and June, 2005 he was working for the respondent as a general worker. On the 4<sup>th</sup> January, 2005, he was assigned to assist the surveyor. He was working with 3 other people. The surveyor directed the appellant to be a chain man. This entailed the appellant standing about 100 metres away from the surveyor, holding the metal for the surveyor to be able to take the measurement. The surveyor was directing the appellant to push the metal either upwards or downwards. The surveyor adjusted the metal, then told the appellant to raise the metal. The metal touched an

electric wire and the appellant suffered an electric shock and fell down. The appellant was taken to the AthiRiverMedicalCenter where he was treated and discharged. He continued with treatment for about 3 months.

6. The appellant produced a report from the clinic. The appellant also produced a Notice of Accident Causing Injury Form which was partly filled but not signed by the employer. The appellant also produced medical reports prepared by Dr. Kiama and another one by Dr. R. P. Shah. The appellant blamed the respondent for the accident contending that he was not provided with protective clothing, nor was he given proper instructions or training.
7. The respondent testified through its Administrative Assistant Magusa Henry Musyoka. The witness testified that the appellant was on the material day engaged by the respondent company as a casual. The company was in the process of constructing a perimeter wall, and the appellant was assisting the surveyor one Mr. Manjibhai. He explained that the appellant's work entailed using a rod to raise the damping level. The instrument was about 4 feet long. The appellant was required to raise and lower it as instructed by the surveyor, who was standing about 100 metres away. As the appellant was raising the rod, it reached a level above an electric power cable. Sparks started coming out of the cable and the appellant fell down. The appellant was given first aid and then taken to the hospital. The witness blamed the appellant for the accident contending that he was in a position to know the environment in which he was working. The witness further maintained that the appellant was provided with gloves on 30<sup>th</sup> November, 2004 and that it was his responsibility to come for replacement once the gloves were worn out. The witness further contended that the respondent had no access to the electric cable and that it was the Kenya Power & Lighting Company which was concerned with the cables.
8. Counsel for each party filed written submissions urging the trial court to find in favour of his client. Counsel for the appellant urged the court to award them general damages of Kshs.650,000/=.
9. For the respondent it was argued that the accident was caused solely or substantially by the negligence of the appellant. The court was therefore urged either to dismiss the appellant's case or find him 70% to blame. On damages, counsel for the respondent submitted that a sum of Kshs.50,000/= was adequate compensation for the injuries suffered.
10. In his judgment the trial magistrate found that live electric wires were laid down by the Kenya Power & Lighting Company. He noted that the law makes it incumbent for the owner of an electric line to be liable and to compensate either the owner or occupier of the land or agent or servants of the owner or occupier of the land, for any damage on injury caused by the breaking of any electric power lines or by means of any defect in the power line. The trial magistrate therefore found that the appellant's claim lied elsewhere.
11. The trial magistrate further noted that the instructions and directions of the surveyor to the appellant to raise the damping level rod upwards or downwards did not remove from the appellant the use of his common sense, and that the appellant was obliged to see the direction of the metal rod as he was moving it, and take notice of the electric cables, and take evasive action for his own safety. The trial magistrate found that the appellant knew or ought to have known that exposed electric cables were dangerous and should therefore have taken action for his own safety. The trial magistrate therefore found that no liability could attach to the respondent and dismissed the appellant's claim. On damages the trial magistrate found that an award of Kshs.120,000/= would have been adequate for the injuries suffered by the appellant.
12. Being aggrieved by that judgment, the appellant has lodged this appeal raising 7 grounds as follows:
  - (i) The honourable magistrate erred in facts and law by finding that the claim by the appellant did not lie against the respondent.
  - (ii) The Hon. magistrate erred in fact and law by arriving at a judgment based on unpleaded issue.
  - (iii) The Hon. Magistrate erred in fact and law by failing to find that the respondent was entirely

negligent that led to the injury of the appellant.

- (iv) The Hon. Magistrate erred in fact and law by failing to consider and fully analyze the evidence on record before arriving at the judgment.
- (v) The Hon. Magistrate erred in fact and law by failing to find that the appellant was not provided with protective clothing and that there was no adequate supervision by the respondent.
- (vi) The Hon. Magistrate erred in fact and law by failing to find that the respondent exposed the appellant to danger by instructing the appellant to carry his duties under overhead live electric cable.
- (vii) The Hon. Magistrate erred in fact and in law by proposing to have awarded to the appellant the general damages which would have been too low, unreasonable and unjustified in view of the nature of injuries sustained by the appellant.

13. Following an agreement between the parties, written submissions were duly exchanged and filed and this court is invited to determine the appeal based on those submissions. For the appellant it was submitted that the trial magistrate erred in basing his judgment on a matter which was not pleaded. It was noted that no negligence was pleaded by the respondent against the Kenya Power & Lighting Company, nor was any effort made to have Kenya Power & Lighting Company Ltd joined as a party. It was further submitted that the trial magistrate wrongly relied on Section 12 of the Electric lines Act (Cap 315) which had been repealed by the Electric Power Act of 1997, and also erred in applying the provisions of the Way Leaves Act Cap 292 which had no relevance to the suit. It was argued that under Section 45(3) of the Electric Power Act of 1997, the respondent was presumed to have been compensated for laying of the overhead cables and therefore the respondent should not have constructed on the land.

14. It was further submitted that the trial magistrate failed to consider the evidence that the appellant was acting under the instructions of the supervisor i.e. the surveyor who should have seen the height of the damping level. It was submitted that the evidence showed that the respondent failed to take reasonable precaution when it instructed its worker to work below an electric power cable using a steel rod. It was further pointed out that the trial magistrate failed to consider that the appellant was a casual labourer with no knowledge of handling surveying equipments and therefore required instructions and reasonable adequate supervision. It was maintained that the trial magistrate failed to consider and appreciate the evidence given by the appellant regarding proof of negligence against the respondent and also shifting the basic duty of care to the appellant, and failing to note that the respondent had exposed the appellant to risk of injury by assigning him to work near the electric cables.

15. On the issue of damages, it was submitted that the sum of Kshs.120,000/= assessed by the trial magistrate was inordinately low and was an erroneous estimate of damages considering the injuries suffered by the appellant.

16. For the respondent the court was urged to uphold the decision of the trial magistrate. It was submitted that it was the appellant's duty to prove his case to the required standard, and that the appellant had failed to discharge that burden. It was noted that the respondent demonstrated to the trial court that the proximate cause of the appellant's injuries was electrocution, as a result of contact between the appellant and overlaid cables belonging to Kenya Power & Lighting Company Limited. It was argued that the respondent had no control or access to the overlaid cables. It was pointed out that the respondent did not enjoin Kenya Power & Lighting Company Ltd as a 3<sup>rd</sup> party. Therefore, they were not under any duty to prove negligence or any wrong doing on the part of Kenya Power & Lighting Company Ltd. The court was further urged to reject the submission that respondent was a trespasser on the land where the electric cables stood, or that the land belonged to the Kenya Power & Lighting Company Ltd. It was maintained that that was a new ground which was not raised in the memorandum

of appeal.

17. It was further contended that the appellant testified that surveyor was far from where the appellant was standing. It was accordingly maintained that the appellant having seen the electric cables ought to have alerted the surveyor but failed to do so. It was submitted that the appellant did not require any skill or supervision, to move the rod up and down according to the surveyor's instructions. It was pointed out that the respondent pleaded negligence against the appellant, and therefore the trial magistrate did not shift the duty of care. It was further submitted that the respondent's evidence that the appellant was provided with gloves was not controverted. Finally, it was submitted that the sum of Kshs.120,000/= assessed by the trial magistrate was reasonable for the injuries suffered by the appellant.
18. I have carefully reconsidered and evaluated all the evidence that was adduced before the trial magistrate. I have also considered the submissions made before the trial court and before me, as well as the authorities cited. Although in its defence the respondent denied having employed the appellant, or the occurrence of the accident, the respondent's witness admitted in his evidence that the appellant was on the material day engaged by the respondent, and that an accident happened when the appellant was using a rod to raise the damping level so as to enable the surveyor carry out his work.
19. It was further undisputed from the evidence, that the accident occurred when the appellant who was standing about 100 metres away from the surveyor, was directed by the surveyor to push the rod upwards and the rod touched an overhead electric wire, which caused the appellant to suffer an electric shock. The question is who was to blame for this accident? In his plaint, the appellant contended that the respondent was to blame as they were in breach of statutory duty and or negligence in:
  - (a) In failing to take adequate precaution for the safety of the appellant
  - (b) In exposing the appellant to risk of damages of injury of which they knew or ought to have known.
  - (c) Failing to provide or maintain adequate or suitable plant, tackle or appliances, to enable the appellant to carry on with his duties.
  - (d) Failing to provide protective equipment such as gloves, or insulated gloves to avoid direct contact with the electricity.
  - (e) Failing to provide or maintain a safe and proper system of work.
  - (f) Failing to put off electricity before asking the appellant to work at the ground.
  - (g) Leaving the electric wires exposed at the premises.
  - (h) Instructing the appellant to work at the place that was risky to work at.
20. I find that the relationship between the respondent and the appellant was that of an employer and employee. As stated in the case of *Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47*, the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution. In this case, the appellant who was a general worker was acting under the instructions of the surveyor. The appellant lifted the metal rod up and down as directed by the surveyor. It is apparent that the appellant was not warned of the danger of the overhead electric cables and therefore lifted the metal rod such that it came into contact with the electric cable.
21. In his judgment, the trial magistrate found that the electric cables were laid by the Kenya Power & Lighting Company Ltd and therefore the respondent cannot be held liable for any injury arising therefrom. The trial

magistrate further found that the appellant knew or ought to have known that the exposed electric cables are dangerous and should therefore have taken steps for his own safety. I find that the trial magistrate misconstrued the evidence before him. No witness testified that the electric cables were exposed. The appellant only claimed that the wire was loose.

22. The evidence before the trial magistrate was clearly that the appellant was electrocuted because of electric current being conducted from the overhead electric cables to the appellant through the metal rod which the appellant was holding and which had come into contact with the electric cables. There was no evidence at all that the electric cables were defective in any way, or that the Kenya Power & Lighting Company were in any way negligent in laying the overhead electric cables. The evidence was clear that the accident happened because of the appellant lifting the rod to the height where the cables were laid.
23. I find that this accident happened because of the risk which the appellant was exposed to in lifting the metal rod. The appellant was acting under the instructions of the surveyor who was an employee or agent of the respondent. The surveyor failed to ensure that there was a safe and proper system of work ensuring that the lifted metal would not come into contact with the overhead electric cables whose presence the surveyor and the respondent were no doubt aware of.
24. It was contended that the appellant ought to have used his common sense to take evasive action for his own safety having seen the electric cables. That finding was based on an assumption that the appellant understood that the metal rod was a good conductor of electricity and should therefore not come into contact with the electric cable. The appellant was simply a general worker/labourer. He could not have been expected to know such technical details. I find that the respondent must take full responsibility for this accident as its surveyor was negligent in directing the appellant to lift the metal rod without taking care of the danger posed by the overhead electric cables.
25. Although the respondent was not responsible for maintaining the electric cables, the respondent needed to liaise with the Kenya Power and Lighting Company Ltd to enable them work under the electric cables as the danger of contact with the electric cables was not unforeseen, particularly when lifting the metal rod upwards. Accordingly, I find that the trial magistrate was wrong in finding the respondent not liable.
26. As regards damages, it is an established principle that an appellate court will not disturb the award of damages unless it is inordinately high or low as to present an entirely erroneous estimate based on some wrong principle, or on a misapprehension of the evidence. (*Shaban vs the City Council of Nairobi Court of Appeal Civil Appeal No.52 of 1994*). In this case the trial magistrate assessed the general damages at Kshs.120,000/=. The appellant's injuries were electric burns on the arms, feet, chest, forearm, right hand and left hand. The appellant recovered fully from the injuries except for scars. The appellant has not demonstrated that the award was so inordinately low or erroneous as to justify the intervention of this court.
27. For the above reasons, I do allow this appeal and set aside the judgment of the trial magistrate and substitute thereof a judgment in favour of the appellant. I confirm the award of general damages at Kshs.120,000/=. I further award the appellant costs of the suit in the lower court and costs of this appeal. Those shall be the orders of this court.

**Dated and delivered this 15<sup>th</sup> day of April, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Momanyi for the appellant

Advocate for the respondent absent

Eric - Court clerk