



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO. 147 OF 2009**

JOSEPH KIPTONUI KOSKEI .....PLAINTIFF  
-VERSUS-  
KENYA POWER & LIGHTING CO. LIMITED .....DEFENDANT

**JUDGMENT**

The plaintiff filed this suit in the High court of Kenya at Kericho. He sought as against the defendant, general and special damages and interest. The suit was informed by the fact that on or about 15<sup>th</sup> August, 2007 the plaintiff was grazing his herd of cattle at Buru farm in Kipsitet location of Kericho District when he trampled upon a loose live electricity line. As a result he suffered severe electric burns and injuries. The accident aforesaid was according to the plaintiff occasioned by breach of statutory duty on the part of the defendant towards him in that it failed to keep and maintain its electricity supply lines in a good state of repair, ensure that its electricity lines were properly fixed or fastened, ensure that its electricity supply lines would not expose the general public to a risk of danger or injury, to inspect and note any probable danger caused to the general public by the said electricity supply lines and finally failed to repair, remove or in any other way terminate the danger caused to the general public by the said electricity supply line. In the alternative, the plaintiff pleaded that the accident was caused by reason of negligence on the part of the defendant to wit; exposed him to a risk of danger or injury that it knew and or ought to have known, failed to take any or any effective measures for his safety, to provide any or any adequate warning to the plaintiff of the danger exposed to him by the electricity supply line, failed to heed and remove the danger exposed to the plaintiff by the electricity line, failed to insulate the supply line and failing to properly keep, fix and or fasten its electricity supply lines. As a result of all the foregoing the plaintiff sustained 40% electrical burns covering his upper limbs, trunk and back. As a consequence, he now suffers from right axilla and left knee contracture, multiple disfiguring hypertrophic scars, disfigurement and discomfort from permanently damaged and scarred skin, depression and cataracts. So far he had incurred Kshs. 30,000/= on treatment expenses and Kshs. 10,000/= for the medical reports. Due to the complications aforesaid, a reconstructive surgery was necessary at a total cost of Kshs. 2,088,000/=. Finally he pleaded that as a result of injuries he was unable to continue with his work as a mason and farmer from which he earned Kshs. 10,000/= monthly on the average. He therefore prayed that he be paid damages for loss of earnings and earning capacity as well as for pain, suffering and loss of amenities.

In its defence, the defendant denied that it distributes and supplies electricity, that its duty was to keep safe and maintain electricity supply lines and or compensate any person injured by reason of any defect in any electricity supply lines. The defendant further denied the occurrence of the accident and that if it occurred, it was as a result of its breach of statutory duty or negligence towards the plaintiff. The particulars of breach of statutory duty and negligence pleaded by the plaintiff were all denied. The particulars of the injuries, loss and damages suffered by the plaintiff were all similarly denied. Alternatively the defendant pleaded that if the accident occurred, then it was as a result of the sole or contributory negligence on the part of plaintiff in that he tethered his cattle on the electric poles, ignored the danger signals and warnings put up by the defendant on the dangers of touching the electric supply line, playing with electric supply lines, touching the electric supply lines barehanded heedless of the danger signals, herding cattle where the electric supply lines were situate while knowing it was patently dangerous to do so and therefore the doctrine of *volenti non fit injuria* applied. Finally, the defendant pleaded that if indeed the accident occurred it was outside its scope and control.

On 7<sup>th</sup> July, 2009 when the case was scheduled for hearing before **Ang'awa J.** in the High court of Kenya at Kericho, she secluded herself therefrom and transferred it to this court for hearing and

determination on the ground that she had an interest in the matter.

The hearing of the case commenced before me on 24<sup>th</sup> April, 2010. The plaintiff testified that on 15<sup>th</sup> August, 2007, he was herding his cattle and goats in Buru farm. As he ran to stop them from entering a maize farm, he stepped on a live electricity wire on the ground which had been covered with grass and foliage. As a result he sustained burns and electric shock. He was taken to Kericho District Hospital and admitted for 2 weeks. Thereafter he was again admitted at Kericho Nursing Home for 1½ weeks for treatment. He paid Kshs. 29,020/= for that treatment. Later he reported the incident to Kericho Police Station and was issued with P3 form. Subsequently, he was examined by **Dr. Ochieng** who prepared a medical report. He paid him Kshs. 5,000/=. Much later he saw again **Dr. Wanjeu** who also prepared a medical report. He paid him Kshs. 4,000/= for the service. He tendered in evidence Kericho District Hospital discharge summary, treatment records of Kericho Nursing home, receipt for the payment of Kshs. 29,020/= P3 form, medical reports by **Drs. Ochieng** and **Wanjeu** and receipts for payments to the said doctors respectively as exhibits 1, 2(a) and (b), 3, 4, 5, 6, 7 and 8.. The plaintiff blamed the defendant for the accident on account of the defendant's failure to warn him that an electric wire had collapsed. It had also failed to take effective measures for his safety by insulating the electricity line with something like a wire mesh. He was aged 37 years. Prior to the accident he was a casual worker at construction sites earning a monthly salary of Kshs. 10,000/=. He had not fully recovered. He needed to undergo plastic surgery at a cost of Kshs. 2,000,000/=. This figure was given to him by **Dr. Wanjeu** who is a specialist in plastic surgery. He therefore prayed for judgment in terms of the plaint.

Cross-examined, he stated that the accident occurred in a farm belonging to a neighbour, **William Koech**. He had given him permission to graze his cattle in the farm. He never warned him about the faulty electricity line. The live wire belonged to the defendant. As a result of the accident he lost consciousness. He was taken to hospital by his wife and neighbours. Before then he had been a casual worker earning Kshs. 10,000/= monthly but had nothing to show. He denied that he was a mere herdsman. The defendant ought to have fixed the wire immediately. With that the plaintiff closed his case.

The defendant elected not to tender any evidence in its defence. Accordingly it closed its case without as much as any scintilla of evidence in support of its averments in the statement of defence.

Thereafter parties agreed to file and exchange written submissions. This was subsequently done and I have carefully read and considered them alongside cited authorities.

The issues for determination in this suit are two fold, liability and possibly quantum.

On the first issue, it should be noted that the plaintiff's evidence was not at all challenged or countered by any other evidence. It was his uncontroverted testimony that he was on the material day attending to his cattle and goats in the farm of a neighbour who had given him permission to graze therein when his goats strayed into a maize plantation. On running after them he stepped on a loose live electricity supply wire. He did not see it as the same was covered by thick foliage. As far as he was concerned the live wire belonged to the defendant. In any event on previous occasion he had seen a metal plate nailed to one of the electricity poles bearing inscriptions "**KPLC**" which is the defendant's acronym. Further this court is entitled to take judicial notice of the fact that the defendant is the sole distributor of electricity in this country. Accordingly the electricity lines no doubt belonged to it. On the whole therefore and in the light of the uncontroverted evidence of the plaintiff, I am satisfied that the live wire that occasioned the plaintiff injuries if at all, belonged to the defendant contrary to the submissions of the defendant.

Did the defendant owe the plaintiff a duty care? In the well known and celebrated case on the issue, **Donoghue –vs- Stevenson (1932) AC 580**, it was stated that every person must take reasonable care to avoid acts or omissions which can reasonably be foreseen as likely to injure a neighbour. The definition of a neighbour was given as persons who are so closely and directly affected by one's act that one ought reasonably to have them in contemplation as being so affected when one directing his mind to the acts of omissions which are called in question. In this case, I have no doubt at all in my mind that the defendant owed the plaintiff and indeed every Kenyan where it happen to have their power lines a duty of care. No doubt it is aware that electric power is a dangerous commodity and if it is not properly secured can be a danger to society. Cases abound where innocent people have been electrocuted or houses burnt and even household electrical items damaged due to power outages as well as live wires being exposed or damaged life electricity wires not being repaired etc. That being the case, it behoves the defendant knowing how dangerous unprotected electrical power lines can be to take such measures as to ensure the safety of populace. In this case there is no doubt at all that the live wire that the plaintiff came in contact with had collapsed. It was lying on the ground covered in grass and foliage. The defendant knew or ought to have

known that a collapsed live electric wire was bound to cause injury to a person(s), or anything which came in contact with it either deliberately or accidentally and taken remedial measures. The defendant took no such measures for reasons which are not clear. Though they claim that there was no evidence that the live wire belonged to them and that it was possible that the live wire may have been an extension introduced by **William Koech**, the farm owner, those were mere suppositions and speculations not backed by any solid or credible evidence. It is the evidence of the plaintiff that he blames the accident on the defendant because there was no warning that a live electric wire had collapsed. The defendant did not take effective measures to ensure his safety and finally that it failed to insulate the live wire with something like a wire mesh. This evidence supported some of the particulars of negligence or breach of statutory duty attributed to the defendant by the plaintiff in the plaint. It cannot therefore be true as submitted by the defendant that the plaintiff had nothing by way of evidence to establish breaches of statutory duty as against it. The same reasoning would apply with regard to common law negligence. The plaintiff in my view amply demonstrated that as a direct consequence of the defendant's action or inaction with regard to the collapsed live electric wire, negligence emanated as a result of which he was injured. In any case, in the case of **Kenya Power & Lighting Company Ltd –vs- Joseph Khaemba Njoria (2005) eKLR**, the court held: *“.....There can be no question that the power company (KPLC) has a responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is ..... properly maintained to prevent accidents .... The deceased could not be blamed for not seeing the wire. It would not be reasonable to expect that as people walk along in towns, they should anticipate live electric wires that might protrude from the ground or from walls and endanger their lives.....”*. I am aware though that this is a decision of a court with coordinate jurisdiction as mine and is therefore not binding on me. However I agree with the sentiments expressed therein. If the live electric wires are broken and hidden under grass with no warning at all from the defendant as was the case here, the defendant knew and or ought to have known that it was dangerous to have such wires in that state and taken remedial measures. It requires no great imagination on the part of any rational being to appreciate the great danger of having loose and broken live electric wires carelessly lying underneath grass foliage. The defendant in the circumstances owed a duty of care to the plaintiff to take all the necessary and reasonable steps which would have avoided the risk, as the plaintiff pointed out his evidence by providing danger signs or having the broken wire repaired and or insulated in wire mesh. Everything considered, I think that the principles enunciated in the case of **Donoghue (Supra)** were established by evidence in this case contrary to the submissions by the defendant. The plaintiff showed that the defendant owed him a duty of care, that the said duty of care was breached and that the plaintiff suffered as a result of the breach. The injury too could be attributed to the negligence of the defendant towards the plaintiff on the same account. Again contrary to the submissions of the defendant, the plaintiff established the nexus between his injuries and the failure by the defendant to exercise that duty of care. It is obvious from the foregoing that the answer to the first issue is that on the evidence, I find that the defendant was entirely to blame for the accident. There is no evidence from the defendant that would have forced me to consider the plaintiff's culpability either wholly or contributory.

On quantum, I have no doubt at all that the plaintiff sustained serious injuries if the reports by the two doctors and photographs of the plaintiff tendered in evidence are anything to go by. The plaintiff sustained 40% 3<sup>rd</sup> degree electrical burns covering his upper limbs, trunk and back. **Dr. Ochieng** noted that his right upper limb and right shoulder had post burns hypertrophic scars which are of both hypo and hyper-pigmentations. He also noted a contracture on the posterior side of the right shoulder with limitation to movement. Surgery will be required to release the contracture to improve the use of his right arm. For **Dr. Kimani Wanjeu** who is a consultant plastic and reconstructive surgeon, he opined that the three important determinants for burn severity qualifies the plaintiff's burns as major and he has been maimed and his life will never be the same again. He had already developed complications as a result of the injuries and might develop in the future Marjolin's (skin cancer) that may lead to his early or premature death. He recommended though that reconstructive surgery and use of pressure garments and sunscreen lotions will make him comfortable and reduce chances of developing the skin cancer. The reconstructive surgery would cost Kshs. 2,088,000/=. Relying on the case of **John Machoka –vs- Kenya Power & Lighting Company Ltd, NKR HCCC No. 52 of 2003**, counsel for the plaintiff urged me to award Kshs. 1,200,000/= as general damages. On its part and using the same authority, the defendant urged me to award the defendant Kshs. 400,000/= as general damages on the grounds that the plaintiff's injuries herein were less severe compared to those suffered by the plaintiff in the authority cited.

Once again I hasten to add that the authority cited is from a court of coordinate jurisdiction as mine

and therefore not binding. I will however use it as persuasive authority. I have no doubt at all in my mind that the injuries sustained by the plaintiff were extremely serious than those suffered by the plaintiff in the case cited contrary to the submissions of the defendant. Taking into consideration the incidence of inflation, since the award of Kshs. 800,000/= was made in that authority, and that it is 6 years since the same was made, I think an award of Kshs. 1,200,000/= as prayed for the plaintiff will be appropriate.

As for the claim for loss of earnings, no credible evidence was led in this regard. There was nothing tendered in evidence to show that he was a qualified mason and or that he earned a monthly income of Kshs. 10,000/=. In any case being a casual worker, it is a far cry to claim monthly earnings of Kshs. 10,000/=. He had nothing to show that he had been previously employed as a casual worker. A note to that effect from one of his previous employees would have done the trick. In my view, I do not think that the plaintiff was in any gainful employment, temporary, casual or otherwise. He was simply a man of his own means taking care of his livestock which he can still do despite his incapacitation. I will therefore disregard this aspect of the claim.

The plaintiff also claims Kshs. 2,088,000/= in future medical expenses. This has been necessitated by the complications arising from his injuries that require reconstructive surgery. This is as per **Dr. Kimani Wanjeu's** recommendation as well as his costing. Of course costs of future medical expenses are awardable. See **James Gituku Ndolo –vs- Daniel Ngang Kany (2006) eKLR**. The defendant did not call any evidence to counter that claim nor did it address it in its written submissions. That being the case I would allow it.

The plaintiff proved special damages to the tune of Kshs. 29,000/= in treatment expenses and a total sum of Kshs. 9,000/= being the charges of the medical reports. Consequently special damages in the sum of Kshs. 38,000/= that were proved by evidence are awarded.

In summary, I enter judgment in favour of the plaintiff as against the defendant on full liability. As for damages, I make the following awards:-

- General damages for pain, suffering and loss of amenities	Kshs. 1,200,000.00/=
- Future medical expenses	Kshs. 2,088,000.00/=
- Special damages	Kshs. 38,000.00/=
<b>Total</b>	<b><u>Kshs. 3,326,000.00/=</u></b>

In addition the plaintiff shall have costs and interest at court rates.

**Judgment dated, signed and delivered** at Kisii this 16<sup>th</sup> September, 2010.

**ASIKE-MAKHANDIA**  
**JUDGE**