



REPUBLIC OF KENYA

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

Civil Appeal 898 of 2006

FRANCIS MUCHAI KARERA.....APPELLANT

VERSUS

JANE WAHU.....1ST RESPONDENT

JULIUS WAWERU KARUMBA.....2ND RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Jane Wahu and Julius Waweru Karumba, (hereinafter referred to as the 1st and 2nd respondents). The respondents had sued Francis Muchai Karera, (hereinafter referred to as the appellant), seeking damages under the Law Reform Act, and the Fatal Accidents Act, arising from the death of Regina Njeri Karumba, (hereinafter referred to as the deceased). As per the plaint filed on 5th July, 2000 the respondents maintained that the deceased who was a tenant of the appellant was electrocuted as a result of the appellant's negligence.

2. By a defence filed on 16th August, 2000, the appellant denied that the deceased was his tenant, and claimed to be a total stranger to the allegations of negligence made against him. The appellant further contended that he was charged and convicted in a criminal Court but had appealed against that conviction. This defence of the appellant was apparently omitted from the record of appeal. However, I have had the advantage of accessing the defence from the original record of the lower Court.

3. During the hearing of the suit, three witnesses testified in support of the respondent's suit. These were; The 1st respondent Jane Wahu, Lumumba Ondiek, and Salome Muite, (all wrongly indicated in the typed proceedings as DW). Their evidence was briefly that the deceased who was living in Eastleigh, was found dead in her house, by her sister Salome Muite. She was lying down holding a TV aerial. The 1st respondent who was the deceased's daughter was contacted. Since it was suspected that the deceased was electrocuted, Kenya Power & Lighting Emergency Personnel were called.

4. Lumumba Ondiek a technician and foreman with Kenya Power & Lighting visited the scene. He noted that there was an illegal connection from a wholesale shop, within the same building where the deceased was staying, resulting in electric leakages. He formed the opinion that while the deceased was adjusting the aerial, she got in touch with the metal line which conducted electricity because of the electric leakages.

5. The 1st respondent, took photographs of the deceased's body and also photographs of the wiring from the wholesale shop. She explained that the shop belonged to the appellant. The 1st respondent had noted

during the time her mother resided in the house, that there were times when they experienced live electric current. The 1st respondent testified that a postmortem examination was later done on the body of the deceased, and it was confirmed that she had died as a result of asphyxia due to electrocution. The 1st respondent produced letters of administration which were issued by the Court appointing her and the 2nd respondent as administrators of the deceased's estate.

6 The 1st respondent testified that the deceased was working as a caretaker of a building in Eastleigh where she was earning a salary of Kshs.3,000/=. She also used to sew clothes in respect of which she could make Kshs.500/= daily. The 1st respondent testified that the deceased had 4 dependants who included her 3 brothers and herself.

7. The appellant testified in his defence. He explained that he was a tenant in the building and produced his tenancy agreement. He testified that at the time he became a tenant in the shop, there was electricity in the shop. He denied having tampered with the electricity to secure his shop, although he conceded that he had encountered incidents of burglary and theft at his shop. He learnt of the death of the deceased, proceeded to the scene where he found the three witnesses. He left the scene soon thereafter as he was not feeling well. He was therefore not present when the Kenya Power Lighting officers came to the scene. The appellant moved from the shop because he learnt that the deceased's relatives were after him. He was later charged and convicted in a criminal Court. He appealed to the High Court and was acquitted of the charge.

8. Both counsel for the appellant and the respondent each filed written submissions in the lower Court urging the Court to find in favour of his client. For the respondent it was submitted that the Kenya Power and Lighting employees confirmed that the deceased was electrocuted, and that there was an illegal connection coming from the shop belonging to the appellant.

9. It was submitted that although the appellant attributed the problems concerning electricity to the landlord, the appellant did not enjoin the landlord in the suit. It was maintained that there was sufficient evidence that the appellant was liable for the electrocution of the deceased. The Court was therefore urged to adopt a multiplier of 10 and a multiplicand of 10,000/= and therefore award a sum of Kshs.800,000/= as loss of dependency, Kshs.10,000/= for pain and suffering, and Kshs.100,000/= for loss of expectation of life.

10. For the appellant it was submitted, that the appellant having been acquitted of the criminal charge, he was absolved of any accusations that he was responsible for the deceased's death. The Court was urged to reject the evidence of Jane Wahu and the evidence of the photographs which she allegedly took. It was submitted that there having been evidence that it had rained that night, the possibility of the deceased having been struck by lightning was not ruled out.

11. With regard to the evidence of Lumumba Ondiek, it was noted that no report was produced to support the witness's evidence. It was finally submitted that the premises being old, the possibility of the wiring having been worn out was not ruled out. It was maintained that there was no connection established between the death of the deceased and the appellant. The Court was therefore urged to dismiss the respondents' suit.

12. In her judgment, the trial magistrate stated as follows:

“If one were to use the “but for test” the inference that will be drawn is that but for the defendant allowing the use of free-flow of electrical current the deceased would not have been killed. The defendant may have used the method for very valued reasons to offer security to his premises. The same however were crude and endangered the life of the other occupier in the plot. The acquittal at the appellate level notwithstanding, the defendant were liable. The standard of proof in the criminal trial is different from the civil trial. The acquittal perse, does not exonerate the defendant from his civil liabilities. The court having so stated, finds the defendant a 100% liable.”

13. The trial Magistrate proceeded to award damages as follows:

Kshs.70,000/= in respect of loss of life expectation

Kshs.5,000/= for pain and suffering

Kshs.168,000/= in respect of loss of dependency.

Kshs.70,420/= as special damages.

14. Being aggrieved by that judgment the appellant has lodged 5 grounds of appeal as follows:

(i) That the learned lower court has not followed the proper principles on burden of proof, resulting in a miscarriage of justice.

(ii) That the learned lower court has failed to consider the evidence on record in a judicious method, and its findings not supported by the evidence on record.

(iii) That the learned lower court ought to have held that the appellant was not liable for the death of deceased.

(iv) That the learned lower court ought to have decided the case in favour of the appellant, Francis Muchai Karera.

(v) That the learned lower court further ought to have held that there was no evidence linking the electrocution of the deceased with the appellant, nor the defendant's premises, so as to presume an inference of guilt on the part of the appellant.

15. Mr. Wanjohi who argued the appeal on behalf of the appellant submitted that both the appellant and the deceased were tenants in the same premises. It was submitted that the appellant having denied the allegations of negligence attributed to him, and since it was evident under the Tenancy Agreement, that it was the landlord who was under the obligation to maintain the electricals, the onus was upon the respondents to invite the landlord to either clear himself or put the blame on the appellant. It was submitted that the respondents did not discharge that onus, and therefore the tenant could not be held liable. It was further submitted that the trial Magistrate did not take into account the appellant's acquittal for the charge of criminal negligence, nor did the trial Magistrate give a reasoned judgement or apply the test of negligence.

16. In support of his submissions, Mr. Wanjohi relied on the following authorities:

- ***Haji vs Marair Freight Agencies Ltd [1984] KLR 139.***
- ***Ochieng vs Amalgamated Sawmills Ltd [2005] 1 KLR 151.***
- ***Eastern Produce (K) Ltd vs Christopher Atiado Osiro, Civil Appeal No.43 of 2001 (UR).***

17. Ms Chelagat who appeared for the respondent urged the Court to dismiss the appeal as the same was unmeritorious and an abuse of the Court process. She maintained that the issue as to whether the landlord ought to have been enjoined in the suit, was addressed in the submissions made in the lower Court, wherein it was pointed out that it was for the appellant to enjoin the landlord and seek contribution from him. She submitted that in his defence the appellant did not attribute any blame to the landlord. Ms Chelagat argued that there was sufficient evidence adduced before the trial Magistrate which showed that the appellant did interfere with the electricity. She noted that none of the particulars of negligence alleged against the appellant were rebutted. Ms Chelagat contended that even though the appellant's conviction for criminal negligence was quashed, there was overwhelming evidence against the appellant for civil liability.

18. In support of her submissions counsel relied on the following authorities:

- a. *Prof David Ndeti vs Daima Bank Ltd High Court Civil suit No.2198 of 2000.*
- b. *Zipporah Wanjiru Kamau vs James G. Wathigo & Another HCCC No.393 of 1996.*
- c. *Kenya Power & Lighting Co. Ltd vs Joseph Khaemba Njoria, Civil Appeal No.68 of 2002.*

19. I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. The main issue for consideration arising from the pleadings was whether the deceased was a tenant of the appellant and if so whether the deceased died as a result of the appellant's negligence. In his defence, the appellant specifically denied the respondent's allegation in the plaint that the deceased was his tenant or sub-tenant and put the respondents to strict proof. It was therefore upon the respondents to prove their allegation as pleaded in the plaint.

20. Nevertheless, no evidence was adduced by the respondents to prove that the deceased was a tenant of the appellant. In fact, contrary to the pleadings in paragraph 3 of the plaint, the 1st respondent stated in her evidence that the landlord was one Mwangi Maina, and that the appellant moved into the premises one year after the deceased. Thus it was clear that the deceased was not a tenant of the appellant.

21. With regard to the issue of negligence, the particulars of the negligence alleged against the appellant were as follows:

- (a) Carrying out illegal wiring and maintaining a high voltage during the rainy season.
- (b) Failing to provide a warning to tenants and visitors.
- (c) Allowing the premises to be used while knowing the same to be unsafe and dangerous.
- (d) Failing to let inspectors assess the safety of the wiring.
- (e) Causing the electrocution and the death of the deceased.

22. In order to succeed in establishing negligence, the respondents had to prove at least one of the particulars of negligence alleged against the appellant. The respondent's evidence was that the deceased died whilst adjusting an aerial as a result of electric current which resulted from electric leakages arising from an illegal electric connection emanating from the appellant's shop which was adjacent to the deceased's house. This was evident from the testimony of Lumumba Ondiek an employee of Kenya Power. Although the witness did not produce any report, the trial Magistrate who saw and observed the demeanour of the witness accepted the evidence of the witness that there was an illegal connection from the appellant's shop which emitted electric current of high voltage. The witness carried out tests and confirmed that there was live current in the deceased's room resulting from the illegal connection.

23. The postmortem examination report which was produced in evidence confirmed that the deceased died as a result of being electrocuted. Given the live current in the deceased's room, and the fact that the deceased apparently died holding a T.V. aerial, there was sufficient evidence that the deceased's electrocution was a result of the live current resulting from the illegal connection in the appellant's shop.

24. The question is whether the appellant was the one who carried out the illegal wiring maintaining the high voltage, or whether the same was done with his knowledge and consent by someone for whose action the appellant can be held liable. The respondent's evidence in this regard was that Lumumba Ondiek traced the electric leakage to the appellant's shop where he found two boys, and that the boys showed Ondiek a unit which they were using for security purposes. Thus it would appear that the illegal wiring and high voltage was for the purposes of securing the appellant's shop. The two boys were apparently arrested but later released when the appellant presented himself to the Police.

25. In his evidence the appellant denied having tampered with the electricity or having connected any wire to the doors or windows of his shop. He explained that there were two boys who used to work for him at the shop and that his son also used to go to the shop occasionally. Thus although there was no direct evidence, establishing that the appellant was the one who made the illegal connection, there was circumstantial evidence upon which a reasonable conclusion could be drawn that the illegal connection was either done by the appellant or done with his knowledge and consent to secure his shop.

26. It was the appellant's evidence that the landlord was the one responsible for maintaining the electricity and therefore he should be the one to explain any anomalies concerning the wiring. That was however a new line of defence which was never pleaded. Moreover, the appellant not having served any third party notice against the landlord, it is not open to him to shift the blame onto the landlord.

27. The appellant laid a lot of emphasis on his acquittal by the High Court for the offence of criminal negligence. The question is whether that acquittal absolved the appellant of any claims of negligence made against him by the respondents. In my view, the burden of proof in a criminal trial being much higher than that in a civil trial, the mere acquittal of the appellant in the criminal trial did not necessarily mean that there was no negligence on the part of the appellant. It is upon the civil Court to examine the evidence before it using the burden of proof in a civil trial which is proof on a balance of probability.

28. As aforesaid, there was evidence leading to the conclusion that the appellant carried out an illegal wiring which maintained a high voltage which caused electrocution and death of the deceased. There was therefore evidence that the appellant was negligent and that it was this negligence that caused the death of the deceased. The appellant was therefore liable to the respondents.

29. The trial Magistrate awarded the respondent damages of Kshs.70,000/= in respect of loss of life expectation; Kshs.5,000/= for pain and suffering; Kshs.168,000/= in respect of loss of dependency; and Kshs.70,420/= as special damages. The appellant has not appealed against this award. On my part, I find that the award was not based on wrong principles or misunderstanding of relevant evidence, nor was it excessive or an erroneous estimate as to justify the intervention of this Court.

30. The upshot of the above is that I find no merit in this appeal and do therefore dismiss it with costs.

Those shall be the orders of this Court.

Dated and delivered this 21st day of July, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Wanjohi for the appellant

Advocate for the respondent, absent