



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Civil Appeal 359 of 2003

ANN MWIKALI.....APPELLANT

-VERSUS-

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

**(An appeal from the decision and judgment of the Senior Resident Magistrate's Court at Milimani;
Hon. R.E. Ougo (Mrs.) dated the 23rd day of June, 1998 in Civil Suit No. 4392 of 1994)**

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrates Court at Nairobi by Ann Mwikali, hereinafter referred to as the appellant. The appellant had sued Kenya Power and Lighting Co. Limited, hereinafter referred to as the respondent, seeking special and general damages for personal injuries suffered by her as a result of the respondent's negligence. The respondent filed a defence denying the appellant's claim. In particular the respondent denied having been negligent, or that the appellant suffered any loss or injuries. In the alternative the respondent maintained that if there was any liability on its part, then the appellant was guilty of negligence or contributory negligence.
2. During the hearing of the suit the appellant and Dr. Wokabi testified in support of the appellant's case. The appellant's evidence was that on 18th May 1993, she was passing through the road near Nairobi Hospital, when she was suddenly held, raised up and then she fell down. She explained that a wire coiled itself around her foot but came off when she was "thrown up". She was injured and became unconscious. She later found herself at Nairobi Hospital where she spent a night. Her leg was bandaged and she was later transferred to Kenyatta National Hospital where she was admitted for about a month. About 5 months later she reported the matter to the Police and recorded a statement.
3. The appellant was later examined by Dr. Wokabi who prepared a medical report showing that the appellant suffered a fracture of the tibia and fibula. Dr. Wokabi formed the opinion that the appellant fell after coming across a live electricity wire. Apart from the report prepared by Dr. Wokabi which was produced in evidence, the appellant produced an abstract from Police records, showing that she had made a report on 23rd October, 1993. The appellant also produced a P3 Form which was issued to her by the Police on 25th of October 1993 and duly signed by a medical officer on 29th October 1993.
4. On its part the respondent called 4 witnesses. These were – Meshack Aduol Muneye (Meshack) a supervisor with the respondent, Boniface Kioko (Kioko) a wireman with the respondent, Charles Ogotu Osuma (Osuma) an employee of the respondent and Benjamin Oketch Obire (Obire) a technician also working with the respondent. Their evidence was that on the 18th May 1993 Obire was the officer in charge of the emergency desk. He did not receive any complaint regarding the electricity line near

Nairobi Hospital. He produced the occurrence book where all emergency calls and complaints were recorded for that date.

5. On 29th May 1993, Meshack who was then working in the emergency office received a complaint from one Mr. Nowrojee. Osuma and some officers proceeded to the scene to investigate the report. They noted that there was a cut wire which was across the road. It was established that there was a broken conductor near the transformer adjacent to the Nairobi Hospital. Thereafter Kioko and other officers proceeded to the scene and repaired the transformer by isolating the socket that supplied the electricity to the area and then removing the fuse from the transformer. The appellant's witnesses maintained that no complaint was received on the 18th May 1993 nor was there any report of any injury.

6. Counsel for each party filed written submissions, each urging the Court to find in favour of his client. For the appellant it was contended that she was injured because of a live power line which fell due to the respondent's negligence. It was maintained that the fact that the respondent was not aware of the fallen power line between 18th May 1993 and 29th May 1993 was clear confirmation of their negligence. It was maintained that the appellant had no business in reporting the accident to the defendant, as her responsibility was to report the matter to the Police which she did. The Court was urged to find the respondent liable and award the appellant general damages of between Kshs.385,000/= and 400,000/=.

7. For the respondent it was submitted that although the appellant maintained that she was injured on the 18th May 1993, she did not produce any evidence to confirm her allegations. It was noted that the appellant failed to produce any records from the Nairobi Hospital to confirm her alleged initial treatment at that hospital.

8. With regard to the report of Dr. Wokabi, it was pointed out to the Court that the Doctor based his opinion on what the appellant told him. It was submitted that the doctor first examined the appellant on 24th November, 1994; and that the x-rays which he relied on were dated 13th September, 1993 and therefore could not relate to injuries sustained by the appellant at a latter day after the alleged incident subject of the appellant's suit. The Court was further urged to note that although the appellant claimed to have been discharged from hospital one month later after the incident, the Police abstract showed that she reported the accident on 23rd October, 1993 which was several months after the alleged accident. The Court was urged to reject the appellant's evidence and accept the respondent's evidence. With regard to the quantum of damages, the Court was urged to find a sum of Kshs.100,000/= appropriate.

9. In her judgment, the trial Magistrate noted that it was for the appellant to prove her allegations that she stepped on a live power line. She found that the appellant did not show in her evidence how she stepped on the live wire, but alleged that someone told her that it was a wire which had fallen. That person was not called to testify. The trial Magistrate found that the appellant had not adduced evidence to support the particulars of negligence which she attributed to the respondent. The trial Magistrate noted that there was no evidence to confirm that the appellant was indeed treated at the Nairobi Hospital on the 18th May 1993. Nor did the appellant bring any evidence from Kenyatta National Hospital to confirm that she was indeed transferred to that Hospital and admitted there.

10. The trial Magistrate further noted that the x-rays relied upon were done on 19th September 1994, which was 17 months after the accident. The trial Magistrate found the respondent's evidence, that there was no broken supply wire around Nairobi Hospital on the date of the appellant's alleged accident, credible, as it was supported by evidence. The trial Magistrate therefore concluded that the respondent was not liable as the appellant had failed to prove her case. With regard to quantum of damages the trial Magistrate found that a sum of Kshs.250,000/= would have been appropriate as general damages.

11. Being aggrieved by that judgment the appellant has lodged this appeal raising nine grounds as follows:

(i) That the appellant being dissatisfied with the whole of the Senior Resident Magistrate's decision/judgment delivered on the 23rd day of June, 1998 by Hon. R.E. Ougo (Mrs) Senior Resident

Magistrate move this Hon. Court in appeal.

- (ii) That the Honourable Senior Resident Magistrate erred in law and in fact by dismissing the plaintiff/appellant's suit.
- (iii) That the Honourable Senior Resident Magistrate erred in law and in fact by failing to appreciate the evidence given by the plaintiff and the admission by the defendant on the issue of wire broken along Nairobi Hospital on the 29/5/93.
- (iv) The learned Senior Resident Magistrate erred in law and in fact by not taking into account the omission or commission on the part of the defendant which the defendant never disputed at all.
- (v) The learned Senior Resident Magistrate erred in law and fact by failing to appreciate the fact that the defendant witnesses indeed confirmed the date of the said accident even though the contradiction was always corrected by the defence counsel.
- (vi) That the defendant witnesses who testified all confirmed the date of the accident as was alleged by the plaintiff and later changed.
- (vii) That the confusion of the date could not have been a coincidence as all the defendant's witnesses confused the date.
- (viii) That the Resident Magistrate failed to appreciate the fact that the date in question was only within the same month and the same year.
- (ix) The Senior Resident Magistrate erred in law and fact by failing to appreciate the fact that the defendant only rely on people reporting about the wire cut for them to take action or cause repair of the same if no report is made it means it can take them ages to know of the broken wire.

12. Following an agreement between the parties, written submissions were exchanged and filed, and the Court invited to determine the appeal based on those submissions. In the appellant's submissions, the 9 grounds of appeal were compressed and argued as one, namely:

“that the learned Magistrate failed miserably in law and fact by failing to appreciate the evidence given by the plaintiff and admission by the defendant as a result of which the Honourable Senior Resident Magistrate dismissed the plaintiff's suit.”

13. Counsel for the appellant submitted that the trial Magistrate came to an erroneous finding for the following reasons:

- (a) None of the defence witnesses claim or confirm that they visited the scene of the accident at the National Hospital road on the 18/5/93 to confirm that on that material date no actual power cable had fallen on the ground so as to conclusively rule out the plaintiff's claim.
- (b) The respondent witnesses in unison admitted that there was a wire broken along that very road at Nairobi Hospital on 29/5/93 which was brought to their knowledge on that date by Mr. Nowrojee Advocate. It was further admitted by the respondent's witnesses that the respondent only relied on reports about broken power lines for them to take action.

14. It was submitted that the fact that the respondent did not know if an accident was reported did not necessarily mean that the accident of 18th May 1993 did not occur. The Court was urged to find that the fact that the respondent only discovered the broken power line 11 days later was demonstrative of the extent of the respondent's gross negligence. The Court was further urged to find that the appellant had proved her case on a balance of probability, and therefore set aside the judgment of the trial Magistrate and substitute thereof a judgment in favour of the appellant. Counsel for the appellant relied on the case of ***Kenya Power and Lighting Ltd. vs. Joseph Khaemba Njoria HCCA 68 of 2002.***

15. For the respondent the Court was urged not to disturb the judgment of the lower Court for the following reasons:

- (i) There was no error in law or fact in the findings of the trial court. Based on the evidence placed before her, the magistrate arrived at the correct findings of law and fact.
- (ii) With respect to ground number three, it is not clear what the appellant's complaint is. She maintained that the accident occurred on 18th May 1993, while the defendant was able to demonstrate that any occurrence there was on 23rd May 1993. The court did in fact consider the evidence given in that regard.
- (iii) The appellant has not shown the acts of omission or commission alleged against the respondent.
- (iv) There is no record whatsoever of the allegation that the defendant's witnesses confirmed the date of the accident.
- (v) The appellant cannot rely on coincidence to prove her claim. She must establish it on a balance of probabilities. She failed to do so.

16. It was submitted that in order for the appellant to succeed in her action, she had to prove that she was injured by a negligent act or omission for which the respondent was responsible. It was contended that the appellant ought to have proved that there was a broken power supply line which she stepped on, thereby causing her injuries. And that the accident occurred on the date and manner she alleged. It was contended that the real cause of the appellant's accident was not established and there was insufficient evidence to confirm the appellant's injuries as having occurred as alleged on the material day. It was maintained that there was no negligence proved on the part of the respondent.

17. It was further submitted that the report of 18th May 1993 made by Mr. Nowrojee did not relate to the same power line which allegedly caused the accident. It was maintained that a breakage of a major supply line such as the one reported on 18th May 1993 would have affected so many consumers in the locality that it was not possible for such a line to remain unrepaired for 11 days. Relying on the case of ***Kiema Mutuku vs. Kenya Cargo Handling Services Ltd.*** [1981] 2KLR 258 it was submitted that there was no liability without fault in the legal system in Kenya and the appellant had therefore to prove some negligence against the respondent in order for his claim in negligence to succeed.

18. Counsel for the respondent further relied on ***Timsales Ltd. vs. Stephen Gachie*** [2005] eKLR where Musinga J. held:

“A court of law will not just award damages to a litigant because it is sympathetic to him due to an injury which he may have received in his place of work and in the course of duty if he was under an obligation to prove negligence and/or breach of statutory duty and he failed to do so.”

It was submitted that there was no evidence before the trial Magistrate upon which any culpable act of negligence on the part of the respondent could be found. Counsel for the respondent distinguished the case of ***Kenya Power & Lighting Ltd vs. Joseph Khaemba Njoria*** (supra), contending that unlike the present case, the plaintiff in that case proved negligence against the defendant. The Court was urged that the report of Dr. Wokabi was not useful as it was based on what the appellant told the doctor, and the doctor did not examine the appellant immediately after the accident, and relied on x-rays taken long after the accident.

19. I have carefully reconsidered and evaluated the evidence which was adduced before the trial Magistrate. The appellant's action being an action for damages arising out of the respondent's alleged negligence, it was imperative that the appellant establish that the respondent was under a duty of care to the appellant and that the respondent was in breach of that duty. The appellant had also to establish that the loss or injury suffered by him arose from the respondent's breach.

20. In this case the appellant alleged that she was injured as a result of stepping on a live wire due to the negligence of the respondent. The appellant particularized the negligence of the respondent in paragraph 3 of his plaint as follows:

- (a) Failing to check the powerline poles regularly so as to replace the rotten ones with strong ones.
- (b) Failing to act so as to rectify the fallen powerline and to avert the accident.
- (c) Failing to provide due attention and care to the public and in particular the plaintiff.
- (d) Failing to insulate live powerline thereby exposing the plaintiff and or the public to danger.
- (e) Failing to act prudently in the circumstance although it was within its knowledge and or means or knowledge that the powerline had fallen and was exposing the public to risk.

However, there was no evidence adduced by the appellant to show that any power line poles were rotten, or required replacement, or had fallen down. The appellant's evidence was that she was walking beside the grass when her legs were held and she was suddenly "taken round and round and then she was thrown down." The appellant did not appear to know what it was that held her or caused her to be taken "round and round and then thrown down." This is evident because the appellant explained that "I sent someone and they saw it was a wire that had fallen down." This person was not called to testify and therefore the appellant's evidence that it was a live wire which she stepped on was based on hearsay. There was therefore no evidence to support the allegation that there was a power line or power pole which had fallen. There was an attempt to connect the appellant's alleged accident with the emergency report which was received by the respondent on 29th May, 1993. However, I find that the emergency report concerned a problem which was noticed 11 days after the appellant's alleged accident.

21. I concur with the respondent that it was unlikely that such a problem could have gone undetected for 11 days. Further the appellant did not produce any records from either Nairobi Hospital or Kenyatta National Hospital to confirm that she was treated or admitted at these hospitals as a result of being electrocuted on 18th May, 1993. These were documents which were easily available. The absence of these documents cast great aspersion on the truth of the appellant's evidence. The appellant totally failed to establish any negligence on the part of the respondent, nor did she establish that she suffered injury as a result of that negligence. In the circumstances I cannot fault the trial Magistrate for dismissing the appellant's suit nor do I find any substance in this appeal. It is accordingly dismissed with costs.

Dated and delivered this 18th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant, absent

Miss Mikanga for the respondent