REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 51 of 2005

MARY MWARANIA GATEMBO

(Widow suing as a personal representative to the estate of

JAMES PETER NDWIGA – Deceased) **.....APPELLANT**

VERSUS

KENYA POWER & LIGHTINING CO. LTD .....RESPONDENT

(Being an appeal from the Judgment and Orders of the Chief Magistrate's

at Meru Hon. Mr. Karanja dated on 3rd day of June 2005)

JUDGMENT

The appellant filed before the lower court a claim for damages in respect of the injury suffered by her deceased husband at the respondent's place of work. The appellant's claim was under the Law Reform Act and the Fatal Accident Act. The appellant alleged negligence from the part of the respondent. The respondent was the employer of her deceased husband. The evidence that was led in the lower court was simple. PWI was a co-worker of the deceased. They were together on the day he was injured. They had been sent by their employer to remove electric conductor to allow their employer's customer to cut trees on his land. The deceased examined the electric pole and certified it to be in order. They then proceeded to disconnect power from the transformer. The deceased climbed a pole to remove the electric lines which pole fell down with him. PWI confirmed that when the deceased fell he was wearing his full working gear. This witness continued to state in chief:-

"It was not normal for a pole to just fall down. It fell down because it was rotten most probably from the underground. It snapped while it was 2 feet underground. He could not know that the pole was rotten underground. A pole can rot after sometime."

On cross examination, this witness said that they had checked the condition of the pole by knocking the pole with an iron and by digging underground a few metres away. Further in cross examination he said:-

"A rotten pole is normally marked "x" by our inspection team. Any defective poles is marked "X" and a report made to our office. The pole which deceased climbed was not marked "X". We confirmed that it was not rotten before the deceased climbed up. We were trained to detect a false (sic)

or defective pole."

The witness proceeded to say that the deceased was employed by the respondent from 1989 which to my calculation makes it 12 years. The appellant gave evidence to the effect that she was married to the deceased and that they were blessed with two children, Mercy Kathure was born on 27th June 1998 and Joanina Maringu born on 22nd January 1992. The appellant said that she was housewife and had never worked in her life. The respondent did not offer any evidence and therefore that was the totality of the evidence before the lower court. The lower court proceeded in its judgment to find that the appellant had failed to prove negligence on the part of the respondent. The learned magistrate in his considered judgment had this to say:-

"There is a strong indication that the deceased and his colleagues despite their training made a costly mistake when they concluded after the usual testing that the pole was in suitable condition for it to be climbed by the deceased to carry out the duty of disconnecting power. It could also be that the pole was structurally sound and what happened was an inevitable or freak accident. The defendant would not therefore be held liable for that it was not responsible for and as a result, this case ought to be dismissed."

The learned magistrate proceeded to dismiss the plaintiff case. The appellant was aggrieved by that judgment and has preferred this appeal. The appellant has brought the following ground for this court's consideration:-

1. The learned magistrate erred in law and in fact in finding that the deceased and his fellow employees were to blame for the accident.

2. *The learned magistrate erred in law and in fact in failing to find that the deceased was exposed to injury.*

3. *The learned magistrate erred in law and in fact by finding that the pole could not have been rotten, that the accident was a freak accident and that therefore the defendant could not be held liable for that which it was not responsible.*

4. *The learned magistrate failed to appreciate that the deceased and his fellow employees could only examine by banging the part of the pole above the ground.*

5. the learned magistrate failed to appreciate that the pole collapsed after disconnecting the electric cables on one side which created one sided tension an and the pole could not withhold the pull coupled with the deceased weight.

6. *The learned magistrate erred in law and in fact by not taking the plaintiff submission that the system of work of disconnecting cables while on top of the pole exposed the deceased and his fellow employees to injury.*

7. *The learned magistrate erred in law and in fact in finding that the safety gadgets of climbing irons and safety belt were sufficient safety devices for the deceased in the circumstance.*

8. *The learned magistrate erred in law and in fact in failing to apply the doctrine of res ipsa loqquitor as submitted by the plaintiff having been the plaintiff's submission that a sound pole does not just collapse under the weight it ought to support.*

9. *The learned magistrate erred in law and in fact in failing to take into consideration the plaintiff's evidence that the duty of replacing old poles lay with the maintenance department while the deceased belonged to the emergency department.*

10. *The learned magistrate erred in law and in fact in failing to take into consideration the plaintiff's evidence that the maintenance department would mark poles which were due for replacement. That the*

pole that collapsed was not marked and deceased could reasonably conclude it was safe.

11. *The learned magistrate erred in law and in fact in failing to appreciate that a pole being wooden was subject to war and tea and the duty to replace poles lay with the defendant and it is not excusable that it did not know it was rotten as same ought to he replaced before it poses any danger. That in failing to maintain stable and sound poles the defendant was negligent.*

12. *The learned magistrate erred in law and in fact by completely ignoring the authorities cited by counsel for the plaintiff.*

13. *The learned magistrate erred in law and in fact in finding that deceased earned net pay of Kshs. 7,130 per month and not Kshs. 20,600/=*

14. *The learned magistrate erred in law and in fact in finding that at age 36 years deceased would have worked for another 12 years.*

15. *The learned magistrate erred in law and in fact in assessing general damages for the pain and suffering at Kshs. 20,000*

16. *The learned magistrate erred in law and in fact by completely failing to take into consideration the plaintiff's submission.*

It should be noted that the appellant abandoned grounds number 15 and 16 and the respondent intimated that it was not opposed to ground number 14. Ground one to number 13 in around about way finds fault in the lower court's failure to find the respondent failure cause the accident. I will therefore proceed to deal with those grounds all together. At common law an employer is under a duty to take reasonable care for the safety of his employees so as not to expose them to unnecessary risk. The burden however of proving negligence always lies upon the employee. In this case, it lies upon the appellant to prove that the employer, the respondent, was negligent. That proposition is clearly set out in the book *Winfield and Jolowicz on Tort* 13th edition which state as follows:-

"*At common law, the employer's duty is a duty of care and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has been said that if he alleges a failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove, what the proper system was and in what relevant respect it was not observed. It is true that the severity of this particular burden has been somewhat reduced, but it remains clear that for a workman merely to prove the circumstances of his accident will normally be insufficient.*"

The employer on the other hand is expected to exercise due care and skills. In the case of Nicholls Austin (Leyton) LTD [1946] AC 493 It was found that a reasonable prudent employer is however expected to foresee that his employee is apt to be careless about familiar risks and take precautions appropriate to the situation. In our case, the deceased and his co worker were expected to disconnect the electric line to enable the customer cut trees. That necessitated climbing up an electric pole. PWI stated that the deceased examined the pole before climbing. He examined by knocking it with an iron and this was to confirm that the pole was not rotten. But as it can be seen, even though he did carry out those tests, the pole fell down with him. PWI in evidence stated: - "*it snapped while it was two feet underground.*" Can it in those circumstances be said that the respondent had taken all the necessary precautions to ensure that the pole did not fall down when climbed by the deceased. The respondent's argument was that the deceased had been trained to detect defective poles. In the respondent's submissions before the lower court, it was accepted that the pole was rotten. Just to quote a portion of those submissions, it was submitted as follows:-

"*At the end of his testimony, the eye witness (PWI) did not prove even one of the particulars of negligence pleaded in the plaint. The deceased tested the pole in the presence of PWI and he was satisfied it was safe to climb; mistakenly though. Nobody suspected the pole was rotten: not even the deceased who was personally tested (sic) it. The deceased had adequate support gear since, per PWI,*

and even after falling they had to loosen the fastening belt and iron climbing shoes."
(Underlining mine)

The respondent continued to argue that the negligence, if any, was that of the deceased and not the respondent. There is no doubt in my mind that the work of climbing a pole does have its own inherent danger. But the fact that PWI said the pole seemed to snap, even though they had tested it, in my view, placed the burden on the respondent to prove they exercised reasonable care. In the case of Macdonald Vs. British transport Commission [1955] 3ALL ER 789. It was held that once it was established that the defendant had provided dangerous equipment the onus shifted to them to show that they had exercised reasonable care. The respondent did not shift that onus particularly when one considers that PWI stated there was a unit within the respondent's company responsible to check and mark the defective poles. It is obvious that that unit failed, to the unfortunate consequence which led to the deceased death. It was the sole responsibility of the respondent to ensure that the deceased had a reasonable safe system of carrying out his work. The burden to prove that the system adopted by the respondent was safe lay squarely upon the respondent. The respondent ought to have adduced evidence to prove that it had provided a safe system of work. The respondent did not call any evidence. The only evidence on record was that the deceased did test the pole before climbing it. The pole being that of the respondent makes it the responsibility of the respondent to ensure that it was safe to climb. The respondent even at the trial ought to have made it possible for the court to see the pole for itself so that it could determine how it broke. In respect of the arguments raised by the respondent, I wish to rely on the case of Makala Mailu Mumende vrs. Nyali Golf & Country Club Mombasa Civil Appeal No. 16 of 1989 where Nyarangi, Judge of appeal had this to say:-

"*Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection."*

The court of Appeal in the case of Transwork Safaris (K) Limited Vs. Robin Makori Ratemo Civil Appeal No. 78 of 2005 when considering a case where a flying balloon had burst causing injury to the appellant stated:-

"*The facts speaks for themselves. Had the defendant taken all necessary steps to ensure its safety, the balloon would not have exploded. Negligence can be inferred from the facts and circumstances of the case."*

In this case too, I find that negligence can be inferred from the evidence that the pole snapped two feet from the ground. PWI in his evidence stated that the pole was most probably rotten from the underground. One would then ask the question whether the system of knocking the pole to ascertain whether it's rotten was the best method that could be used. Because of lack of evidence by the respondent we shall never know the answer to that question. All in all, I find that the respondent failed to provide safe working conditions for the deceased and was negligent in allowing him to climb a pole that was not safe. For that reason, I find that the appellant appeal on liability does succeed and in that regard, defer with the finding of the lower court. On quantum, the respondent did not oppose the appellant's ground number 14 where the learned magistrate was faulted for having found that the deceased salary was Kshs. 7,130 rather than Kshs. 20,600. for that reason, that ground succeeds. The lower court's provision of 2/3 in calculating lost years in my view was correct. Similarly, the finding on the years that the deceased would have worked cannot be faulted. The calculation therefore for dependence will be 20,600 x 12 x 12 x 2/3. The learned magistrate awarded Kshs. 70,000 for loss of expectation of life. In my view, this amount can be enhanced to Kshs. 75,000/=. There was no award for pain and suffering and I would award the appellant in that regard Kshs. 10,000/=. In the end the appeal does succeed and the judgment of the court is as follows:-

1. The order dismissing the appellant suit in CMCC Meru 92 of 2003 of 3rd June 2005 is hereby set aside and is substituted with an order finding that the appellant had proved her claim of negligence against the respondent.

2. *Judgment is entered for the appellant as follows:-*

(a) *pain and suffering Kshs. 10,000*

(b) *Loss of expectation of life Kshs. 75,000*

(c) *Lost years 20,600 x12 x 12 x2/3 = Kshs. 1,977,600*

TOTAL *Kshs. 2,062,600/=*

3. *The appellant is awarded costs of the lower court case and this appeal.*

Dated and delivered at Meru this 6th day of November 2009.

MARY KASANGO

JUDGE