



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

Civil Appeal 490 of 2004

ELIJAH KUNG’U MUKORA.....APPELLANT/APPLICANT

VERSUS

TOBIAS ODONGO NYAMWANDA.....RESPONDENT

(An appeal from the judgment of the Honourable Senior Principal Magistrate, C.W. Meoli (Mrs) delivered on 6th July, 2004 in Chief Magistrate’s Court Civil Case No. 5730 of 2003, Milimani).

J U D G M E N T

1. This appeal arises from a suit which was filed by Tobias Odongo Nyamwanda, hereinafter referred to as the respondent. He had brought the suit as the administrator of the estate of Elizabeth Atieno Odongo hereinafter referred to as the deceased. The deceased, a child aged 8 years suffered fatal injuries as a result of being electrocuted after she touched the fence surrounding the residence of Elijah Kungu’u Mukora, hereinafter referred to as the appellant. The respondent who is the father to the deceased, sued the appellant and Kenya Power & Lighting Co. Limited (hereinafter referred to as the 2nd defendant), for damages under the Law Reform Act, Cap. 26, and the Fatal Accident Act, Cap. 32 Laws of Kenya. The respondent claimed that the accident was caused by the negligence of the appellant and the 2nd defendant.
2. The appellant and the 2nd defendant each filed defences in which they denied the respondent’s claim and the particulars of negligence attributed to them. In the alternative the 2nd defendant claimed that the accident was caused or substantially contributed to by the negligence of the deceased. The 2nd defendant further claimed that the accident was caused or substantially contributed to by the negligence of the appellant and/or its servants or agents.
3. Hearing of the trial initially commenced in the High Court. The suit was later transferred to the Chief Magistrate

Court at Nairobi, the parties having agreed to have the suit heard *de novo* in that Court. During the trial two witnesses testified in support of the respondent's suit. These were: Roseline Achieng Odongo who was the mother to the deceased and the respondent.

4. Briefly the evidence of the respondent was as follows: The appellant was a neighbour to the respondent. The appellant had a fence made of wire surrounding his home. On the 13th June, 1997, the deceased's mother was in her house when her daughter Margaret and another child came crying, saying that the deceased was being held by a wire. The deceased's mother ran to where the deceased was, and noted that she was being held by an electric wire. The mother tried to draw near to the deceased, but was unable to do so because of the electric current. The deceased mother then used a piece of wood to hit the deceased and she fell off the electric wire. The respondent arrived just as the deceased was freed from the electric fence. The deceased appeared unconscious so she was taken to a local clinic from where they were referred to the general hospital, where the deceased was admitted. The deceased however died 10 minutes later.
5. Following the incident, the appellant was charged at the Principal Magistrate's Court at Garissa with three offences. These were the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, negligently causing death contrary to section 244, and unlawful alteration in installation contrary to Electricity Power Act Cap. 214. He was tried and acquitted of the charges. The respondent however insisted that the appellant was negligent as he had an electrified barbed wire fence surrounding his home without any warning. The respondent also blamed the 2nd defendant for having allowed the appellant to electrify the barbed wire. As a result of the deceased's death the respondent incurred a sum of Kshs.108,030/= in funeral expenses. The respondent produced receipts for some of the expenses.
6. No evidence was adduced on behalf of the appellant or the 2nd defendant, an application for adjournment having been made and rejected. Submissions were filed on behalf of respondent in which the Court was urged to find both the appellant and 2nd defendant liable to the respondent, as the appellant's fence was electrified and the electrification could only have been done by the 2nd defendant upon application by the appellant.
7. It was further submitted that the acquittal of the appellant in the criminal case, was not inconsistent with the finding of liability against the appellant or the 2nd defendant. This is because the standard of proof in civil cases which is on a balance of probabilities is much lower than that in criminal cases. The Court was also urged to note that the deceased being a young child could not be held contributorily negligent.

The Court was therefore urged to find in favour of the respondent and award him general damages as follows:

Loss of expectation of life	Kshs.150,000/=
Pain and suffering	Kshs.25,000/=
Lost years	Kshs.200,000/=
Funeral expenses	<u>Kshs.106,030/=</u>
TOTAL	<u>Kshs. 481,030/=</u>

8. For the appellant it was submitted that that the respondent had failed to prove any negligence against the appellant; and that there was no evidence as to who had supplied power to the fence on that particular day. It was maintained that the respondent did not call any expert evidence to explain where the electric current in the fence originated from. It was pointed out that the evidence of Paul Maungu Mayabe, an officer of the 2nd defendant, who testified that the appellant had electrified his fence, was totally discredited in the criminal case, such that it could not be relied upon. It was submitted that no expert evidence was brought to support the allegation that the deceased's cause of death was electrocution.
9. For the 2nd respondent, it was submitted that the appellant did not adduce any evidence, to controvert the

respondent's evidence, that the appellant had tampered with the consumer unit for the power to his house. The 2nd defendant further maintained that the respondent did not establish any negligence against it. The 2nd defendant pointed out that the respondent did not give any advance evidence against it in the criminal case.

10. On quantum it was submitted on behalf of the 2nd respondent that the following awards would be appropriate:

(a)	Pain and suffering	Kshs.10,000/=
(b)	Loss of expectation of life	Kshs.100,000/=
(c)	Lost years	<u>Kshs.1,200,000/=</u>
	TOTAL	<u>Kshs.1,310,000/=</u>

11. In her judgment the trial Magistrate found that the appellant's fence was electrified, and that the appellant was responsible for the electrification. She did not find any evidence that the 2nd defendant allowed the appellant to electrify his fence or that the 2nd defendant was aware of the electrification. She therefore found no negligence proved against the 2nd defendant but found the appellant fully liable to the respondent. The trial Magistrate awarded general damages as follows:

Loss of expectation of life, Kshs.70,000/=
Pain and suffering Kshs.10,000/=
Lost years Kshs.110,000/=
And Kshs.60,000/= as special damages

12. Being aggrieved by that judgment the appellant has lodged this appeal raising 5 grounds as follows:

- (i) That the learned Magistrate erred in law and in fact in failing to appreciate that the respondent had not established any liability or at all against the appellant.
- (ii) That the learned Magistrate erred in law and in fact in relying heavily on the evidence of PW3, PW4 and PW5 in Criminal Case No. 482 of 1997 Garissa to establish liability on the part of the appellant despite the fact that those witnesses did not testify before her.
- (iii) That the learned Magistrate erred in law and in fact in finding, without any expert evidence whatsoever, that the appellant had electrified his fence.
- (iv) That the learned Magistrate erred in law and in fact in finding, without any expert evidence whatsoever, that the deceased had died of electrocution.
- (v) That the learned Magistrate erred in fact and in law in awarding a global sum in special damages yet special damages must be strictly proved in order to be awarded.

13. Following an agreement between the parties, written submission were exchanged and filed, and the Court was invited to determine this appeal based on those submissions.

14. For the appellant it was submitted that there was no proof that the appellant had supplied electric power to his barbed wire fence, as no expert evidence was adduced in that regard. It was further submitted that the trial Magistrate erred in relying on evidence adduced in the criminal case to establish negligence. This was because the appellant was acquitted during the criminal trial, and also none of the witnesses testified before the trial Court. It was maintained that the failure of the appellant to testify could not be the basis for establishing liability against the appellant, as the respondent was under a duty to prove negligence, on the part of the appellant. It was submitted that there was no evidence to establish the cause of death of the deceased as no post-mortem report was produced. Finally it was submitted that the special damages were not specifically proved therefore none ought to have been awarded.

15. For the respondent it was submitted that there was evidence that the appellant's fence was electrified and that the deceased was electrocuted. It was submitted that it was demonstrated in the criminal case that the electricity to the wire fence was supplied by the appellant's aerial which was connected to the barbed wire. It was submitted that although the appellant was acquitted in the criminal Court, the trial Court had to make its own evaluation of the evidence before it and arrive at its own conclusion. It was observed that the refusal of the adjournment was not a ground of appeal. It was maintained that the certificate of death produced in evidence showed that the deceased died due to electrocution. Finally it was submitted that the award of Kshs.60,000/= as special damages was based on the documentary receipts which were produced in evidence.
16. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also given due consideration to the submissions made before me and the authorities cited. The respondent's wife explained how she found the deceased stuck on the appellant's barbed wire fence, and how she felt the electric current when she tried to remove the deceased from the barbed wire fence, forcing her to use a piece of wood. It is evident that the deceased died as a result of the injuries she received after coming into contact with the barbed wire fence which had electric current.
17. The respondent produced a death certificate which confirmed that the deceased died as a result of being electrocuted. Although no post-mortem report was produced before the trial Magistrate, it is clear from the proceedings of the criminal Court, that a post-mortem report was produced in that Court by Dr. Samuel Odera Ywaya, which confirmed that the deceased died from electrocution. The evidence before the trial Magistrate was therefore sufficient to establish on a balance of probability that the deceased died as a result of being electrocuted, and that the electrocution occurred at the appellant's barbed wire fence. The main issue was whether the appellant was negligent. It was not disputed that the barbed wire fence where the electric current emanated was the fence to the appellant's house. Although the fence and the house were apparently examined by the 2nd defendant's officers none was called to testify.
18. From the proceedings which were produced before the trial Magistrate, it was apparent that evidence was adduced in the criminal Court by one Paul Maungu Mayabe, an officer of the 2nd defendant that a T.V. aerial which was connected to the barbed wire fence was the one which conducted electric current to the barbed wire fence. The criminal proceedings having been produced in evidence, the trial Court was entitled to take note of the evidence which was adduced in that Court. The appellant, who was the occupier of the house, the fenced compound and the T.V. aerial, must be held responsible for the contact between the T.V. aerial and the barbed wire fence. Indeed, the appellant was under a duty to warn the public of any danger that was on his premises including the fence.
19. I concur with the submissions that the acquittal of the appellant in the criminal Court did not necessarily absolve him of civil liability, as the standard of proof is much lower in a civil Court. The respondent having established that the deceased died as a result of an electric current which was on the appellant's fence and that the electric current on the fence emanated from a T.V. aerial connected to the appellant's house, the respondent established causation between the death of the deceased and the appellant. The appellant having opted to call no evidence, I find that the trial Magistrate was right in finding the appellant fully liable.
20. I have considered the award of damages which were made by the trial Magistrate. The appellant has not taken any issue with the award in respect of general damages but was aggrieved by the award in respect of special damages contending that the same was not strictly proved. I have examined the exhibits which were adduced in the lower Court and I do see that the following receipts were produced:

Hire of transport for transporting body from Garissa to Sondu Kshs.65,000/=

Embalment and storage charges for mortuary Kshs.2,500/=
Coffin Kshs.32,000/=
Transporting body from Chiromo to City Mortuary Kshs.3,000/=
Taxi from Chiromo to town Kshs.2,000/=.

It is obvious that the respondent proved special damages which were much more than the sum of Kshs.60,000/= which was awarded by the trial Magistrate. In the circumstances, I find no justification for interfering with the award of Kshs.60,000/=.

21. The upshot of the above is that I find no merit in this appeal and accordingly dismiss with costs. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 4th day of December, 2009.

H.M. OKWENGU

JUDGE

In the presence of:

Ms. Materi holding brief Muturi for the appellant

Advocate for the respondent, absent

Eric, court clerk