



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 68 of 2002

**(Appeal from the judgement of the Chief Magistrate at Kakamega, Muga Apondi Esq.,
as he then was, in CMCC No.750 of 1999 delivered on June24, 2002)**

**KENYA POWER & LIGHTING CO.
LTD.APPELLANT**

V E R S U S

**JOSEPH KHAEMBA
NJORIARESPONDENT**

J U D G E M E N T

This is a judgement from the decision of the Chief Magistrate at Kakamega, Muga Apondi Esq., as he then was, made in Kakamega Chief Magistrate Court Civil Suit No. 750 of 1999 from which, Kenya Power and Lighting Co. Ltd. (referred to hereinafter as “*the Power Company*”) appealed.

The Chief Magistrate had in his decision given judgement in favour of Joseph Khaemba Njoria and awarded him Shs.5000/= as funeral expenses and Shs.50,000/= as general damages for Pain and suffering and a further sum of Shs.50,000/= towards loss of expectation of life. He also gave costs of the suit to the said plaintiff.

The claim giving rise to these awards had been instituted in the court by Joseph Khaemba Njoria (the Plaintiff) against the Power Company and one Lucas Shivia. The latter neither entered appearance nor filed defence.

In brief, the Plaintiff’s son, John Anyanda Khaemba, was electrocuted by a live wire on 12th March 1999 at Bushiri market in North Butso Location as he walked to school at 6.00 a.m. in the morning. The electric wire had been connected to a temporary structure belonging to the 2nd Defendant who carried on the business of charging batteries. It was contended by the Plaintiff that the Power Company was negligent in not detecting the dangerous electric connection to the 2nd Plaintiff’s temporary structures and that both the Power Company and the 2nd Defendant were negligent.

The Plaintiff sued on 25/10/99 as the personal representative of the estate of his said son in respect of which estate he had obtained on 22-6-1999 a Grant of Letters of Administration. The action was under the Law Reform Act and the Fatal Accidents Act for the benefit of the estate of the deceased and for his dependants respectively.

The Plaintiff's evidence was brief. He did not witness the electrocution of his son but when he went to the scene upon being informed of the tragic incident he found his son lying on the electric wire. He also observed that it emanated from the Power Company's electric pole and was connected to the shop of the 2nd Defendant and that the latter carried on the business of charging batteries there. He blamed both the Power Company and the 2nd Defendant. He called one witness at the hearing, namely Gedion Sabeyi Mangala who was walking about 4 metres behind his son just before the latter got electrocuted. He saw the boy falling and flashed his torch. He called out to him three times but the boy did not respond. The body of the boy fell to the ground when power was disconnected by an officer from the Power Company.

The Power Company denied liability and contended that the power connection by the 2nd Defendant to his premises was illegal and that there was no meter to the connection.

The evidence adduced at the trial showed that the Power Company had not supplied power to the said premises. The power connection was illegal. It had been on for sometime. It was in a public place where business of battery charging was being carried on. The Power Company had not known about it until that tragic incident.

In these circumstances does tortious liability attach to the Power Company? There is already judgement against the second Defendant. The learned trial magistrate held in his judgement that ***"this court has reached the conclusion that both the Defendants were negligent and that is what caused the accident. Both of them had a duty of care to the neighbourhood by ensuring safe use of electricity. It is in view of the above that I find the Plaintiff has proved his case on a balance of probabilities. Both of them are liable accordingly."***

There can be no question that the Power Company has a responsibility to ensure that the power infrastructure it has installed in the country for the purpose of electrification is not only properly maintained to prevent accidents but also that illegal connections, when they occur, are detected and removed. Where as here an illegal connection is made openly and is visible to the public generally or is notorious, it cannot be a defence for the Power Company to say that the connection was illegal. It has a duty to the public to ensure that the installation it has made is not abused by unauthorized persons or illegal connections made that endanger the lives of the public.

It is my finding that the Power Company failed in its duty to the plaintiff to detect what appears to have been a notorious illegal connection that was visible to the public. The wires were on the electrified walls and on the temporary structure. 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. The deceased was electrocuted at Bushiri market, a public place.

In these circumstances, the learned trial magistrate was right in the conclusion that he reached.

As regards damages, the figure of Shs.5000/= towards funeral expenses was modest considering that a sum of Shs.20,000/= had been pleaded and although no receipts were produced and notwithstanding that special damages must be proved. Where as here the specials relate to funeral, a modicum figure in absence of receipts can be awarded if it is shown that it was incurred notwithstanding that receipts to prove the precise amount are unavailable. I see no basis for disturbing the other awards of damages which in the circumstances of this case are not excessive nor were they awarded on wrong legal principles. In the result, I dismiss the appeal with costs.

Dated at Kakamega this 25th day of February, 2005.

G. B. M. KARIUKI

J U D G E