REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 2046 of 1985

JOHN BUNDI NYAGAH ……..…. PLAINTIFF

VERSUS

THE KENYA POWER & LIGHTING CO. LTD……..…… 1ST DEFENDANT

CHANAGH SAIMBI……...……2ND DEFENDANT

HARBHANJAN SINGH SAIMBI……...……3RD DEFENDANT

PERMINDER SINGH SAIMBI……...……4TH DEFENDANT

JASWINDER SINGH SAIMBI……5TH DEFENDANT

LAKHJIT KAUR SAIMBI W/o PYARA SINGH SAIMBI…….6TH DEFENDANT

[The 2nd, 3rd, 4th, 5th and 6th Defendants trade under the firm name and style ofMessrs Universal Furniture & Building Contractors]

JUDGMENT

This suit arises from an accident which took place on 19.07.82 at Lessos Sub-location when the plaintiff was struck by electricity and paralysed. According to the plaintiff, the accident was caused by the negligence of the 1st defendant as well as the negligence of the 2nd – 6th defendants trading as Universal Furniture & Building Contractors (hereinafter referred to as "the defendant firm"). As a result of the accident and injuries sustained by the plaintiff during the accident, the plaintiff prayed for judgment against the defendants for:-

a) Special damages together with interest thereon.

b) General damages and interest thereon at court rates.

c) Costs of and incidental to this suit.

d) Such further or other relief as this honourable court may deem fit to grant.

The defendants have denied liability for the accident .

The case first came up before ;me on 11.05.05 when the plaintiff was represented by learned counsel, Mr. A.R. Rebelo while the 1st defendant was represented by learned counsel, Mr. K.A. Fraser. There was no appearance for the defendant firm, i.e. 2nd – 6th defendants.

Plaintiff's counsel informed this court that service had been effected on Mrs. Waweru as counsel for the defendant firm on 01.04.05 but there was no appearance by the said firm for the 2nd – 6th defendants. Plaintiff's counsel proceeded to tell the court that the case was part-heard before the late Abdullah, J (as he then was); that the proceedings before Abdullah, J had been typed; that evidence for the plaintiff had closed; and that in his (plaintiff's counsel's view the case should proceed from where it had reached before Abdullah, J.

Counsel for 1st defendant informed this court that he had no further evidence to call for the 1st defendant. He said that one witness, Moses Gachie Kamau who had completed his evidence-in-chief, was cross-examined by the plaintiff and was due for cross-examination by the defendant firm had died. Counsel for 1st defendant added that another witness, Timothy Malaba retired in 1992 and the 1st defendant had been unable to trace him. finally, counsel for 1st defendant told the court that a third witness, Mr. Watts, an expatriate had left Kenya, so the 1st defendant had no further evidence to tender. Counsel for 1st defendant closed the 1st defendant's case.

Counsel for the plaintiff and 1st defendant asked to be and were allowed to file written submissions by 06.06.05. Eventually the two counsel appeared before this court and gave oral highlights of their written submissions on 14.06.05.

In his address to the court, plaintiff's counsel said the plaintiff testified on both liability and damages and that he was not cross-examined on damages and other relevant issues.

Regarding liability, plaintiff's counsel said the plaintiff was employed by the defendant form which obtained a contract to put up a building and art works at an electric power sub-station at Lessos in the Rift Valley Province. It was the plaintiff's contention that the 1st defendant controlled the power station and distributed power to various places and that the 1st defendant had a monopoly in distribution of power.

That as the work progressed, it was determined that the workers were ind anger as they worked too close to the power line. That on 18.07.82 the power was turned off in order for a barrier to be created between the two buildings where the work of compacting soil was being carried out. Plaintiff's counsel contended that the barrier did not go far enough. Counsel added that it was the plaintiff's job to remove rubbish, e.g. roots, and throw it in a designated position by electricity whenhe went to he went to throw rubbish. Plaintiff's counsel drew attention to the evidence of D.W.1, Moses Gachie Kamau to the effect that power cables at the area in question created a magnetic field around them, that one did not have to touch them to be electrocuted and that in his (D.W.1's) view the plaintiff got a flash-over from circulating current near the 33 K.V. line. Plaintiff's counsel said the height of clearance was only 6 feet and that the point of the accident was just beyond the barrier. Counsel submitted that this is a case of high strict liability on the part of the 1st defendant as owner of the electric cables, that employees of the 1st defendant instructed employees of the defendant firm (2nd – 6th defendants) to dig holes and put up a fence and danger zone that this was not done and that, therefore, the defendants are jointly and severally liable.

On the issue of special damages, plaintiff's counsel said these had been agreed at Kshs.10,300/=, subject to proof of liability.

As regard general damages, plaintiff's counsel referred the court to his written submissions. He asked the court to look at the totality of the damage suffered by the plaintiff, bearing in mind that he is a young man and a labourer who lost his leg and sight thereby being rendered incapable of working for gain. In plaintiff's counsel view, Kshs. 2 million would not be too high as general damages in the current state and value of Kenya's currency. Counsel urged the court to apply the current minimum wage at Kshs.8,600/= per month in assessing the plaintiff's loss of earnings.

Reverting to the subject of duty of care, plaintiff's counsel submitted that such duty had been impossible on the 1st defendant by section 63 (1) (b), (c) and (d) of the Electric Power Act, (Cap.314 (repealed by Act 11 of 1997) and that the conduct of the 1st defendant controlled the transmission of electricity and the area where the works in question were being carried out at the material time.

On the issue of liability, plaintiff's counsel relied on Msuri Muhhidin -vs- Nazzor Bin Seif el Kassaby & Another [1960] E.A. 201 for the principal proposition that the doctrine of res ipsa loquitur applies to the case now under consideration since in plaintiff's counsel view, the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control and management of the defendants or their servants or agents so that it would not be unfair to attribute to them a prima facie responsibility for what happened to the plaintiff. Plaintiff's counsel also relied on the dictum of Lord Atkin in the celebrated and precedent-setting tort case of Donoghue (or McAlister) –vs- Stevenson [1932] All E,R. Rep.1 to the effect that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbours, i.e. persons who are so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question. Plaintiff's counsel also referred to various passages in volume 28 of Halsbury's Laws of England regarding duty and standard of care, with particular reference to electricity and urged the court to find the defendants jointly and severally liable.

With regard to quantum of damages, plaintiff's counsel referred the court to High Court Civil Suit No.1749 of 1997, Wilson Kipkosgei Maina -vs- Harun Kereda Juma t/a Wayside Service Station & 2 others in which Mulwa, J *as he then was) did , after reviewing other High Court decisions, award to the plaintiff, a graduate Engineer, Special damages of Kshs.2,564,874/15; general damages of Kshs.1,800,000/; and loss of earnings of Kshs.31,500,000/=. Plaintiff's counsel in the present case urged this court to grant to the plaintiff general damages of Kshs.5,000,000/=; special damages in the agreed sum of Kshs.10,300/=; interest on the general and special damages at court rate of 12% from the date of filing of this suit until payment in full; and costs.

On the other hand, counsel for the 1st defendant said he relied on the written submissions and authorities he had filed earlier in opposing the plaintiff's case and laid special emphasis on the statement of agreed facts. He pointed out that the work under the electric power lines was on 18.07.82 when power was switched off.

He referred to a barrier of wooden plank 15 feet high said to have been constructed at the site and also referred to a work permit (exhibit 5) indicating safe area for the subject works and stating that all other parts were dangerous. Counsel for 1st defendant also referred to another part of the work permit (page 2) to the effect that the defendant firm (2nd – 6th defendants) made a declaration that the said defendant firm had withdrawn its workmen; that the area was no longer safe; and that the accident occurred next day, i.e. on 19.07.82, when no work permit had been granted to work in the dangerous area. While 1st defendant's counsel acknowledged that the power station was under the 1st defendant's control, he contended that the area for the subject works was under the control of the defendant firm. counsel for 1st defendant drew attention to the plaintiff's evidence to the effect that he never went within 30 metres of the electric power ;lines and he (counsel) submitted that the plaintiff knew he was not to go near the power lines and pointed out that the plaintiff said he never did, which would have made it impossible for the accident to occur. Counsel for 1st defendant said of the evidence of D.W.1, Moses Gachie Kamau given at page 21 of the typed proceedings and later during his cross-examination that such evidence was hearsay but did not say in what respect. I note that part of the evidence alluded to tends to be unfavourable to the 1st defendant's case.

Regarding the doctrine of res ipsa loquitr, 1st defendant's counsel cosntended thadt for the doctrine to apply, the accident must be shown to fall within the 1st defendant's duty of care and submitted that the 1st defendant had no control over the subject work area which in his view fell within the control of the defendant firm within the control of the defendant firm which employed the plaintiff and that paragraph 6 of the plaint acknowledges that the defendant firm entered into a contract with Ares International Ltd for the construction of a sub-station control building and related work.. Counsel said the 1st defendant co. switched off electric power when it knew there were workmen in the area and switched on the power when it knew workmen had been withdrawn and submitted that the accident was caused by the negligence of the plaintiff and his employer, the defendant firm.

On the issue of special damages,. 1st defendant's counsel acknowledged that they had been agreed at

Kshs.10,300/=, subject to liability. As regard loss of earnings which plaintiff's counsel urged this court to consider, the 1st defendant's counsel contended that there is nothing in the plaint regarding loss of earnings. He referred to **Bhogal -vs- Burbridge4 & Another** [1957] E.A. 285 to make the point made by the then Court of Appeal for Eastern Africa (Kneller, J dissenting) that loss of earnings between accident and trial should be assessed separately as special damages. Counsel for the defendant also referred to **Hahn -vs-Singh** [1985] KLR 716 to make the point made by the Kenya Court of Appeal that special damages must not only be specifically claimed but also strictly proved on the basis that they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act complained of. Finally, 1st defendant's counsel contended that using today's minimum wage for assessment of loss of earnings is unrealistic as the minimum wage has been changing.

With regard to general damages, 1st defendant's counsel referred to various passages in **Clerk & Lindsell on Torts** 18th Edition to make the broad point that the defendant firm (2nd –6th defendants) was an independent contractor with regard to the area of the subject works and that any wrongdoing on the defendant firm's part vis-a-vis the plaintiff is the responsibility of the defendant firm. Counsel for 1st defendant also referred to the following cases which principally show that assessment of damages is generally guided by the facts of each case:-

a) **Paola Cavinato -vs- Vita –Antonia di Filipo** [1957] E.a 535 ;where the then Court of Appeal for Eastern African said that general damages must be assessed on the combined effect of all injuries on the person injured and not calculated as the sum of independent assessments for each injury.

b) HCCC No. 3622 of 1995, **Kimunyu -vs- Specialised Engineering co. Ltd** where the High Court awarded a sum of Kshs.350,000/= general damages for burn injuries.

c) HCCC No.152 of 2000, **Mutie -vs- Mursau Ltd** where the High Court ad a sum of Kshs.750,000/= general damages for very serious burn injuries causing disfigurement to various parts of the body

. d) **Kemfro Africa Ltd t/a "Meru Express Services" & Another -vs- Another -vs- Lubia & Another** [1987] KLR 30 where the Court of Appeal confirmed on award of a Kshs. 150,000/= general damages for loss of an eye and made the point that before an appellate court can disturb the quatum awarded by a trial judge, it must be satisfied that either that judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or high that it must be a wholly erroneous estimate of the damge.

e) HCCC No. 4287 of 1986, **Kitavi -vs- Coastal Brothers Ltd** where the Court of Appeal raised the general damages of Kshs.250,000/= awarded by the High Court for pain, suffering and loss of amenities to Kshs.475,000/= on the basis that the amount award by the High Court was entirely inadequate and erroneous.

f) **Dick -vs- Koinange** [1973] E.A. 355 where the then Court of Appeal for Eastern Africa raised the sum of Kshs.70,000/= awarded by the High Court for injuries, pain and suffering to Kshs.130,000/=.

g) Kigaragari –vs- Aya [1985] KLR 273 where the Court of Appeal confirmed the sum of Kshs.250,000/= awarded by the High Court as general damages for personal injuries.

h) HCCC No. 4287 of 1986, **Kuria -vs- Kenya Posts & Telecommunications & Another** where the High Court awarded in 1990 a sum of Kshs.500,000/= general damages for pain, suffering and loss of amenities (amputation of left leg below the kne). Arising from the above authorities, 1st defendant's counsel submitted that, in the event of a finding in favour of liability, jgeneral damages should not exceed Kshs.700,000/=.

As recorded earlier, the defendant firm, i.e. 2nd –6th defednats, did not attend court when this matter came up before me although plaintiff's counsel said counsel for the defendant firm had been duly served. It is also to be noted that the defendant firm filed defence to the plaintif's plaint and denied liability for the accident, which they attributed to the plaintiff's own negligence.

In reply, plaintiff's counsel submitted that there is no evidence that the defendant firm had a separate area under its control. In this connection, plaintiff's counsel drew attention to a request to construct a barrier and for 1st defendant to put up danger signs vis-à-vis defence exhibit 3 to the effect that the putting up of a fence and danger signs were done after the accident. On the issue of loss of earnings, plaintiff's counsel contended that it is not possible to state loss of earnings with precision. With regard to general damages, plaintiff's counsel submitted that these are assessed at the time of writing judgment and that the court gives current value taking into account inflation and cost of living, etc., hence the reference in plaintiff's counsel's submissions to current minimum wage.

I have given due consideration to the rival arguments of the parties plus such evidence as was tendered before Abdullah, J as well as the authorities cited before me.

There is only one eye-witness account of the accident under inquiry. That eyewitness account is the evidence of the plaintiff who started testifying on 18.10.90 – some eight years after the accident which had rendered him unconscious for a week. The essence of the plaintiff's evidence is as under. He was employed by the defendant firm (2nd – 6th defendants) in 1980 as a labourer and remained in that employment until 1982 when the accident occurred. His wages were Kshs.1,200/= per month inclusive of overtime and he was housed by his employer. In July, 1982 the plaintiff's employers were engaged by "the power people "(1st defendant) in a contract to build houses and roads for a power station at Lessos and he worked there. he was aged 20 years at the time.

On 18.07.82 the plaintiff was mixing cement and sand. Next date, I,e, 19.07.82, he was picking up grass, twigs and dirt or rubbish from murram, brought to the work site by his employers lorries, and dumping the rubbish (foreign matter) in an area specified by one of his bosses he called Sindi, pointing to Joswinder Singh Saimbi (5th defendant) in court. The plaintiff carried the rubbish in his hands and dumped it in the area designated by his boss. The dumping place was near a fence. After making many trips of throwing rubbish as a foresaid, the plaintiff fell down and became unconscious. The work of dumping rubbish started at 7.00 a.m. and the accident occurred at around 10.00 a.m. The plaintiff regained consciousness after a week and realized he was in Kapsabet Hospital and had burns on his face, back and left leg. He said he remained in hospital for 7 months but it would appear from his out-patient card (exhibit 1 (a)] that he was admitted on 19.07.82 and discharged on 06.12.82. Be that as it may, during the plaintiff's hospitalization his left foot was amputated – in September, 1982. In March, 1983 he was fitted with an artificial foot at Kabete, for which he paid.

It was the plaintiff's further evidence that after the accident his eye-sight was adversely affected, he underwent eye operation and has had to use spectacles but even with the aid of spectacles he could hardly see the judge who was hearing his evidence at a distance of only 5 feet away. The plaintiff said he was advised he would need a further operation of his eyes. He suffered a back injury ;and feels a burning sensation in the back, especially during the hot season or when in sunlight or when he bathes with hot water. He feels pain in the left leg, particularly in the thigh. He feels weak. Prior to the accident the plaiantiff used to work from 7.00 a.m. to 6.00 p.m. with a break at lunch time. He also used to work on Saturdays and Sundays and got paid over-time. He has not worked since leaving hospital.

The plaintiff said he had worked at the Lessos project for one year and was familiar with the area where he was working. He said the electricity place was "a bit far" from where he was working and that the place where he was working was not dangerous.He said he could not read, did not know whether electric power lines are dangerous and that it was only after the accident that he learnt from those who visited him in hospital ;that he had been burnt by electricity and that electricity is dangerous. He said he had worked at the subject sight and nobody, not even his employers, had told him that electricity is dangerous. The plaintiff also testified that on 19.07.82 he was the only one working on dumping rubbish from the murram, that he was about 30 metres away from the power lines and about 15 metres from where he was

dumping rubbish. He said his fellow workers were not constructing a wooden fence the day before the accident.

The plaintiff was subjected to intense cross-examination on a variety of issues, some requiring accurate recollection of the events of the fateful day some 8 years previously. The issues included whether he walked under the electric wires or not to which he replied that the accident had taken place a number of years previously and he could not recall walking under the overhead wires or going near them. He also said he could not recall climbing over the heaps of soil under the wires in order to take a shortcut to the place where he was dumping rubbish. He added that he was directed to dump the rubbish he was collecting from the murram near the poles of the power lines before the accident. He said on 18.07.82 nobody went to tell him of the dangers of the power line. The plaintiff was emphatic that there was no barrier put up between the power lines and the compacted soil terraces on 18.07.08 and that it was put up while he was in hospital, i.e. after the accident. When it was suggested to the plaintiff that where he was dumping rubbish was at the highest level of the terraces and that that was why he came into contact with live wires, he answered that the accident had taken place some 8 years earlier and that while the suggestion may be true, the place where he was dumping the rubbish was the place he had been directed by his employer to dump the rubbish in question.

The only other witness to testify in this case was D.W.1, Moses Gachie Kamau who started testifying on 28.09.92. His evidence may be summarized as under. He was at the time of testifying an Engineer with the 1st defendant company. In 1982 he was a Senior Technician based at Eldorect and was in charge of Eldoret, Lessos, Nandi, Kitale and Kabarnet. His duties were to take care of sub-stations and that one Timothy Malaba was then the officer in charge of Lessos sub-station and worked under him. D.W.1 was made to identify Timothy Malaba in court before he (D.W.1) continued with his evidence.

D.W.1 told the late Abdullah, J that the (D.W.1) was at Lessos on 18.07.82 when Timothy Malaba switched off power and also when he switched it back on; that he (D.W.1) saw employees of a person he called Lindi (5th defendant) working on a wooden barrier between electricity power lines and new control room under construction.According to D.W.1 the barrier was completed at about 5.00 p.m. that day but soil compacting was not completed that day. D.W.1 added that before power was restored that day, Timothy Malaba called the 5th defendant and his office foreman near the point of work to confirm to them that it was no longer safe to work on the job again because the period to work on this job had already been cancelled and the 1st defendant was going to energise the line. D.W.1 said he saw about 5 men around the 5th defendant and that Timothy Malaba addressed those assembled as follows:

“Tomorrow morning you have to dig some holes and erect posts so that Malaba would put barbed wires between posts as well as most danger plates on warning devises.”

According to D.W.1, timothy malaba also warned that no one may go beyond the point where the holes were dug; that thereafter all people cleared from the point of ;work as it was getting late; that after the line was energized he (D.W. 1) returned to Eldoret; and that he learnt of the accident which took place next day, i.e. on 19.07.82 at about 10.00 a.m., at around 11.00 a.m. on the day of the said accident.

During cross-examination D.W.1, inter alia, said that electricity is invisible and one cannot see or smell it. That in the absence of warning, the only time one becomes aware of electricity is when one gets a shock. That the 1st defendant has two types of warning, one of which is a till with crosslines and the word “HATARI” in red and that the latter is to warn illiterate people of live electricity in the vicinity. That it is true that electric power carried through cables creates a magnetic field, which is caused by electricity escaping through the cable and that the diameter of the area of the magnetic field of electricity is about 3 feet, so the radius is 1½ feet. That if one comes into contact with the area of magnetic field, one gets a shock or a flash-over. That in a 33 K.V. line, as the one at the subject site, the optimum voltage is 33,000 volts and when there is a power surge, the voltage could enhance to 34,000 volts. D.W.1 described a power surge as a spasmodic acceleration of electricity through the cable. He said electricity cable is not like a water pipe which is not porous and through which water does not normally leak. In the case of a cable, unlike a water pipe, you have leakage and the magnetic field is electricity which leaks circumelectrically through the cable. That when there is a power surge, the area of magnetic field

increases by 1 foot in the entire diameter or 6 inches in the radius. D.W.1 said that in the present case there were 2 cables running parallel side by side and 4 inches apart; that the cables do not generally run straight but curve or sag because of their weight; and that this means the minimum height of the cables from the ground level within the sub-station would be 9 feet. D.W1 conceded that electricity which escapes from the cable generally goes down towards the earth as does lightning, i.e. it discharges to the earth.

It was also D.W.1's evidence in cross-examination that Acres International were consultants and overseer "or behalf KPL" (1st defendant) to oversee and supervise safely within Lessos sub-station, i.e. Acres International Ltd were in charge of the sub-station for the purpose of building the new sub-station and covering the safety precautions. My understanding of this aspect of D.W.1's evidence is that Messrs Acres International Ltd were actually the 1st defendant's agents for purposes of building the new sub-station at Lessos and covering safety precautions there and not agents of the defendant firm as counsels for 1st defendant through his written submissions seemed to infer from the contents of paragraph 6 of the plaint, which in my view is ambiguously framed on this point. In answer to another question in cross-examination, D.W.1 said:

"I would say that the contractors were under control and direction of Acres International. <u>The area under construction was not fenced off."</u>

D.W.1 also agreed that the clearance between K.V. lines and ground level was reduced to 2 metres, i.e. slightly over 6 feet, because the filling was going on and that a man 6 feet tall would be in imminent danger of being in contact with the power lines because of reduced clearance; that the clearance where **<u>the accident occurred was 6 feet; and that the barrier did not extend to the point of the accident..</u>**

Answering further questions in cross-examination, D.W.1 also said that from the evidence the victim (plaintiff) came closer to the 33 K.V. line; that a person carrying a metal object, e.g. a metal karai, a metal buckle, a panga or crowbar, would increase chamber of being electrocuted.

Apart from what D.W.1 said he heard Timothy Malaba tell the 5th defendant and about 5 other men around him at the subject work site on 18.07.82, most of what he (D.W.1) said in his evidence related to the general practice if the 1st defendant in matters of safety precautions at work sites such as Lessos sub-station. Whether or not the general practices of the 1st defendant were actually applied at the material time at the work station in question are questions of fact to be deduced from the evidence on record. D.W.1 also gave opinion evidence on various technical issues regarding electricity. Since D,.W.1 said he was Engineer, he qualified as an expert and his expert opinion on technical matters in question is the evidence Act (Cap. 80) and the court can take guidance from such opinion in evaluating the evidence on record.

I wish to make the general observation that in some instances both the plaintiff and D.W.1 gave hazy answers relating to certain matters of detail asked of them. There are discrepancies in their evidence in some respects. Bearing in mind that both witnesses were testifying on events of at least 8 years previously, such discrepancies as may exist are understandable.

The following emerges from the totality of the evidence on record. The plaintiff was illiterate. He was a mere labourer and never knew what arrangements had been entered into betweens the 1st defendant and the defendant firm regarding the work at the subject site and safety precautions against danger from electricity. No requisite danger signs had been put by the 1st defendant company or its agents at the subject site whens the accident occurred. The evidence of D.W.1 shows clearly that the 1st defendant did not divest itself completely of control regarding matters relating to safety at the subject work site. Otherwise how would one explain the statement ascribed by D.W.1 to timothy Malaba on 18.07.82 that the 5th defendant and his men should on 19.07.82 dig some holes and erect barriers so that timothy Malaba would put up danger signs there? The plaintiff testified that he was not warned of the danger of going near the power lines and that he never knew that electricity was dangerous until after the accident. That may sound foolish to the learned but the fact of the matter is that the plaintiff's eye-witness evidence was not controverted by contrary first hand evidence. The only other witness who testified in this case,

i.e. D.W.1, was not at the scene when the accident took place.

D.W.1 was not the officer in direct charge of the work site. He relied principally on records as to what safety precautions his employer, the 1st defendant normally insisted should be taken. He did not identify the plaintiff as having been among the people Timothy Malaba is reported to have addressed at the site in the evening of 18.07.82 regarding the danger of going into areas designated as dangerous.

I accept that the 1st defendant co. switched off power on 18.07.82 when it was notified by the defendant from of the works near the power lines that day and that the 1st defendant co. restored power at the end of that day. The evidence on record, which I accept, however, shows that the barrier did not extend to the point of the accident.

D.W.1's evidence that timothy Malaba instructed the 5th defendant and his men on 18.07.82 that they should next day dig holes for .purposes of danger signs being put up shows that no requisite danger signs had been put up by close of business on 18.07.82. T he plaintiff testified that indeed no danger signs had been put up when the accident occurred. I am persuaded that no requisite danger signs had been put up by the 1st defendant co. or its agents by the time of the accident. I accept the plaintiff's evidence that he was working for the defendant firm at the material time and that his employer never instructed him on the dangers of going near the power lines. The defendant firm exposed the plaintiff danger unknown to him. this was a very serious responsibility lapse on the defendant firm's part.

Section 63 (1) (b), (c) and (d) of the Electric Power Act, Cap. 314 which was in operation at the material time is clear on the duty of care imposed by law on the likes of the defendants.

I find the 1st defendant 40% liable for the accident and the defendant firm 60% liable for the same accident.

As regards quantum of damages, I note that prayer (a) for special damages was settled between the plaintiff and 1st defendant at kshs.10,300/=. I hereby grant the said prayer against the 1st defendant and the defendant firm jointly and severally, apportioned as above. The award carries interest at court rate from the date of this judgment until payment in full.

On the issue of loss of earnings there is no specific plea therefore. It does not also appear to have featured in the negotiations between the plaintiff and the 1st defendant for special damages. The plaintiff did not produce a letter of appointment showing the terms of his employment with the defendant firm. The only evidence on the matter is the plaintiff's testimony that his wages were Kshs.1,200/= per month inclusive of overtime.It is common knowledge that overtime payments are not regular but sporadic depending on availability of excess or urgent work. The plaintiff's mode of earning would not be a suitable item for consideration under the head of special damages and I shall consider it alongside the plaintiff's claim for general damages in the same way that Kneller, J in his dissenting judgment in Bhogal's case (supra) held that a court is entitled to do.

Having considered all the circumstances of this case and the trends in assessment of damages shown in the authorities cited before me, I grant prayer (b) and award against the defendants jointly and severally a sum of Kshs,1,200,000/=, apportioned as indicated hereinabove. The award carries interest at court rate from the date of this judgment until payment in full.

I also grant prayer (c) for costs of and incidental to the suit against the defendants jointly and severally, also apportioned as hereinabove.

Orders accordingly.

Delivered at Nairobi this 5th day of August, 2005.

B.P. KUBO

JUDGE