



**Kenya Power & Lighting Company v Zebra Investments Limited (Kings Club Bondo)
(Commercial Appeal E002 of 2023) [2025] KEHC 2678 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
COMMERCIAL APPEAL E002 OF 2023**

**DK KEMEL, J
MARCH 7, 2025**

BETWEEN

KENYA POWER & LIGHTING COMPANY APPELLANT

AND

ZEBRA INVESTMENTS LIMITED (KINGS CLUB BONDO) RESPONDENT

*(Being an appeal from the judgement and decree of Hon. P.J Nandi (SPM)
in Bondo SPMCC No. E136 of 2021 delivered on 9th November 2023)*

JUDGMENT

1. The Appellant herein was sued at the trial court by the Respondent vide a plaint dated 27/10/2021 for both general and special damages arising from an accident that caused damage to an electric power line which in turn damaged the Respondent's properties and electrical appliances. The Appellant filed a defence dated 18/11/2021 and denied liability. The trial court heard the suit and vide a judgement dated 9/11/2023, the Appellant was held 100% liable and was ordered to pay special damages of Ksh 4,048, 500/= plus costs and interest.
2. Aggrieved by the said judgment, the Appellant filed its Memorandum of Appeal dated 7/12/2023 wherein it raised the following grounds of appeal:
 - i. That the trial magistrate erred in law and in fact in apportioning liability at 100% against the Appellant when no evidence was placed before the court demonstrating the chain of causation between the Appellant and the unidentified motor vehicle which allegedly knocked the electricity power line supplying the homesteads in Koyucho junction area, specifically the Respondent, hence arriving at a finding not supported by facts and law, in the absence of any evidence linking the Appellant as having caused the alleged damage to the Respondent's electrical appliances.



- ii. The learned trial magistrate erred in law and in fact when he wrongfully awarded the Respondent special damages of Ksh 4,048 500/= when the Respondent neither pleaded nor proved the same to the required standard. Thus the magistrate was in total disregard of the legal principle that special damages must not only be pleaded but also proved.
- iii. The trial magistrate erred in law and in fact when he failed to properly examine the evidence on record and note that the document produced by the Respondent as “Internal report for damages” did not qualify as proof of special damages. The said report was prepared by the Respondent’s witnesses without disclosure as to the witness’ basis of assigning values to the alleged items identified in his said report and without the benefit of any official receipts supporting the existence, purchases or values of the alleged unidentified items origin or in the alternative, justification by way of a loss assessment report or valuation report.
- iv. The trial magistrate failed to consider the Appellant’s submissions thereby grossly neglecting the apparent facts on record resulting in a decision not supported by law or fact.

The Appellant therefore prays that the appeal be allowed by setting aside the finding on liability against the appellant in the subordinate court and the award of special damages in favor of the Respondent in the sum of Ksh 4,048,500/= and in its place the Respondent’s suit in the subordinate court be dismissed. That costs of the Appeal and costs of the suit in the subordinate court be awarded to the Appellant.

3. Being a first appeal, the court relies on a number of principles as set out in *Selle & Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123 as follows:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears that he has failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”

4. It therefore behooves upon this court to relook, re-evaluate, and reanalyze the evidence at the trial court and arrive at its independent conclusion, bearing in mind that it did not see the witnesses firsthand.
5. PW1 Erick Onyango Okwacho testified that he works with the plaintiff and that he recorded his statement on 27/10/2021 which was adopted as his evidence in chief. In his statement, he stated that on the 6th of April 2019, a vehicle passing along the road knocked an electricity power line supplying electricity to the plaintiff’s premises located in Bondo sub-county at Koyucho junction along the road causing great damage to the Plaintiff’s properties.

That most of the plaintiff’s electrical appliances got burnt thereby causing loss of business to the plaintiff. That the Defendant had been informed by members of the public about the live electricity line that had been loosely hanging from one of the poles but that they failed to fix it. He thus prayed for general damages, special damages, costs, and interest. He produced the demand letter as exhibit 1, receipt dated 14/5/2018 as exhibit 2, receipt dated 5/8/2019 as exhibit 3, invoice No. 16 dated 3/14/2017 as exhibit 4, invoice No. 44 dated 8/10/2017 as exhibit 5, copy of invoice No. 12 dated 10/5/2017 as exhibit 6, invoice No. 13 dated 10/10/2015 as exhibit 7, invoice No.. 14 dated 5/6/2013 as exhibit 8, invoice No. 45 dated 5/6/2013 as exhibit 9, internal report on damages dated 6/7/2017 as exhibit 10

On cross examination, he stated that he worked with the plaintiff as a manager. That he has not filed any authority but he is allowed to act and speak on behalf of the plaintiff. That he never identified the



particulars of the motor vehicle that knocked the electricity power line nearing the cable itself. That he discovered that the electricity lines were not in good state after the incident. That he reported the incident to Kenya Power on 6/4/2019. That he was not sure about the other people who were affected by the power surge. That he did not produce any report made by the members of the public. That he visited the scene but he had no photographic evidence to show the hanging lines. That the power surge happened on 6/4/2019. That the special damages produced is for 10,000/= but there is no receipt for the same. That the receipts produced are for the cost of buying the said items. That the appliances affected have not been specified in paragraph 4 of the plaint. That an invoice is not a receipt. He stated further that he has not filed any assessment report in view of the demands or valuation report. That there was loss of business owing to the power surge but he did not file any report showing the items that they had lost. That they did not file any business permit of license to show the existence of the business.

That without the assistance of the report, the court cannot tell how much he used to repair the appliances. That he did not plead the particulars of the loss of business. That the special damages are as per the internal report.

On re-examination, he stated that in paragraph 4 of the plaint he pleaded loss of business.

That marked the close of the plaintiff's case.

6. DW1 Thomas Kiptoo Sambu stated that he is a distribution engineer at Ugenya branch. That his duties are general operations, installations and power emergencies among others. That he recorded his statement dated 5/5/2023 which was adopted as his evidence-in-chief. He stated that they did not record any information in regard to the power surge in this case. That when a report is made, they have an emergency crew which responds to such emergencies. That once a report is made, an incidence number is issued. That if there is poor earthing on the side of the customer, the power surge may be due to poor wiring and installation. He prayed that the case be dismissed as there was no other customer affected.

On cross- examination, he stated that no power surge was reported on 6/4/2019. That he was not aware of the demand letter dated 29/1/2021. That he is aware of the documents filed on 3/5/2023 and 4/4/2023. That he did not go to the scene because there was no power surge. They did not make any application to go to the scene to verify the plaintiff's allegations. An officer was sent to the scene and confirmed burnt items.

On re-examination, he stated that when an incident is reported, they rush to the scene and an incident report form is made. The incident was not reported to them.

That marked the end of the defense case.

7. The appeal was canvassed by way of written submissions. The Appellant submitted that the trial magistrate erred in finding that the Appellant was 100% liable for the Respondent's damage. In expounding on this, he stated that the Respondent failed to establish a nexus between the unidentified motor vehicle that knocked an electricity pole causing a power surge. In the Respondent's evidence, causation was not established as by law required to prove the offense of negligence. The Appellant submitted that it was the Respondent's testimony that the power line at Koyucho area serves 31 homesteads yet none of them reported a power surge. He submitted that the Respondent confirmed on cross examination that he did not file a loss assessment or valuation report after the alleged power surge because no valuation or assessment of damage was done on the affected electronics.

On this, the Appellant relied on sections 107, 108 and 109 of the *Evidence Act* as well as the cases of Caparo Industries PLC vs. Dickman(1990)1 ALL ER568 and East Produce(K) Ltd vs. Christopher Atiado Osiro(2006) EKL.R.



8. The Appellant also submitted that the court erred in awarding special damages of ksh 4 048 500/= to the Respondent. He stated further that it is trite that special damages must not only be specifically pleaded but the same must be proved. He went further that from the reading of paragraph 7 and 11 of the plaint (page 3- 6 of the Record of Appeal), the Respondent/Plaintiff pleaded special damages of ksh 10,000/-(ten thousand only) however no receipt was produced in evidence to prove this amount. That the subsequent amount of ksh 4, 048 500/= was not pleaded and was only mentioned for the 1st time during PW1's oral testimony. This he submitted is tantamount to trial by ambush as the Plaintiff/ Respondent was introducing new evidence while on the stand, deviating from his own pleadings. The trial court was further not guided on how this figure was arrived at and as such this award was not justified at all. On this he relied on the Court of Appeal case of Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others (2014)eKLR where the court held that :

“It is now a very trite principle of the law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded. In fact, that the parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation”

9. The Appellant submitted further that the court did not consider his submissions thus arriving at an erroneous figure as special damages. He stated that the Respondents witness confirmed that they did not file a loss assessment or valuation report post the alleged power surge because no such evaluation was done on the electronics. That the witness further agreed that the loss assessment report would be ideal to quantify the damage incurred, if any, as well as placement costs at current market value taking into consideration the aspects of wear and tear due to overtime use.

That the witness did not specifically identify the electronics that were allegedly burnt or distinguish those that were not in his pleadings before the court. That he only made a general comment that most of the Plaintiff's electronic appliances got burnt. That he did not produce receipts to show that he produced new electronics after the alleged power surge. That PEX4 to 9 on his list of documents are invoices and not receipts confirming actual payment. He placed reliance on the holding of Ngugi J in Christine Mwigina Akonya vs. Samuel Kairu Chege[2017]Eklr where he stated that:

“I have carefully perused these documents. As is readily obvious, many of them are proforma invoices and not receipts as our caselaw requires. I am therefore unable to award the amounts represented by those invoices as special damages. The receipts presented only amount to Ksh 67, 627.00. This is the only amount proved by evidence and it is the only amount I will award...”

In conclusion, the Appellant submitted that the award of Kshs 4,048 500/= awarded as special damages to the Respondent was unjustified and unsupported in law and the rules of evidence, thus not merited. Ultimately he prayed that the appeal be allowed and the trial courts finding on liability and the award of the special damages of Kshs 4,048 500/= be set aside; in its place that the Respondents suit at the subordinate court be dismissed with costs of both the subordinate court and the appeal be awarded to the Appellant.

10. The Respondent on the other hand, submitted that the trial court considered the suit conclusively and arrived at a just decision thus the same should be upheld.



11. I have considered the pleadings, evidence, authorities and the rival submissions of the parties. I find the issue for determination is whether the Respondent's suit was proved on a balance of probabilities.
12. It is noted that the bone of contention is whether the 100% liability and the special damages of Kshs 4,048 500/= was justified against the Appellant. It is trite law from the provisions of section 107 of the Evidence Act that whoever alleges must prove. In this case, it was incumbent upon the Respondent to adduce evidence showing that indeed there was a power surge and that the same was reported and that an assessment was done on the damage incurred which report ought to have been filed in court and probably the maker called to produce the same for purposes of cross-examination. From the record however, there is no evidence that a power surge happened as no one from the 31 households allegedly connected to the said power line came as a witness to confirm that indeed the surge occurred and that damage was occasioned as a result. Further, the Respondent's witness confirmed that they did not file a loss assessment or valuation report post the alleged power surge because no such evaluation was done on the electronic appliances. The witness further agreed that the loss assessment report would be ideal to quantify the damage incurred, if any, as well as placement of costs at current market value taking into consideration the aspects of wear and tear due to overtime use. The witness did not specifically identify the electronic appliances that were allegedly burnt or distinguish those that were not in his pleadings before the court. In a nutshell, I do not find the necessary nexus between the acts or omissions of the Appellant and the alleged damage incurred by the Respondent, which means that the Appellant should not have been held 100% liable for the alleged damage. The Respondent's witness stated that an unknown vehicle had damaged an electric pole thereby causing damage thereby striking a chain of reactions leading to a power surge that destroyed the Respondent's electrical appliances. The identity of the motorist who caused the accident was not established and that the scene was not visited and further no report and assessment/valuation was made by the Appellant's relevant department was made. It was necessary for the Respondent to have first made a report of the incident and see to it that the scene was documented by the Appellant's relevant department and then file the claim if no reprieve came from the Appellant. This was not done. Further, the liability on the part of the Appellant should not be a strict one so that even acts of third parties/criminals are attributed to them. It is instructive that the accident report was not booked with the police for investigation so as to get the identity of the tortfeasor and thereafter establish the issue of liability between the Appellant, Respondent and the tortfeasor. I find the issue of negligence was so central in the matrix of the suit and that the Respondent had no option but to discharge the burden of proof before the question of liability could be established. Indeed, the requirements of the tort of negligence entailed the existence of duty of care, breach of that duty, causal connection between the breach and the damage and foreseeability of the particular damage caused. Hence, the Respondent was under a duty to establish these ingredients in order for the court to apportion liability. In *Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 it was held that there is as yet no liability without fault in the legal system in Kenya and that a Plaintiff must prove negligence against the defendant where the claim is based on negligence. Even though the Respondent claimed that the Appellant had been informed by members of public about the existence of wires hanging loosely on the road, the Respondent did not call any of the members of public to back up its case and further failed to avail even photographs of the alleged loosely hanging wires or an incident report prior to the alleged accident. Again, none of the Respondent's neighbours came forward to claim that their properties had been affected by a power surge following the accident caused by an unknown motorist. The Respondent called a witness who purported to be an expert but did not avail proper evidence regarding the issue of the alleged power surge that only targeted the Respondent's premises and not the rest of the residents of Koyucho junction. I find the entirety of the Respondent's evidence before the trial court did not meet the threshold of proof of negligence against the Appellant.



Hence, the finding on liability by the learned trial magistrate was erroneous and must be interfered with.

13. As regards the award of special damages of Kshs 4, 048, 500/ by the trial court, i find nowhere in the plaint where the amount Kshs 4, 048 500/= has been pleaded as special damages. The Plaint indicates that that other particulars of special damages to be provided at the hearing. This was obviously against the cardinal rule that special damages must be specifically pleaded and proved. The introduction of the claim during the hearing amounted to an ambush against the Appellant. This was unwarranted and further that the same must be a gimmick by the Respondent to avoid paying court fees since they already had the report of the claim when they filed the suit. Further, the Respondent ought to have sought for leave to amend its plaint and introduce the extra special damages claim. I therefore do not understand on what basis the trial court awarded the same. In the case of Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others (2014) eKLR it was held that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or which is at variance with the averments in the pleadings must be disregarded. It was therefore quite erroneous for the learned trial magistrate to have accepted the claim yet the Respondent did not even file the loss assessment report. I find the claim was unsupported by credible evidence and ought to have been rejected. The appeal on liability as well as on the special damages must succeed.
14. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed. The judgement by the trial court on liability as well as the award on special damages of Kshs 4,048, 500/ is set aside and substituted with an order dismissing the Respondent's suit with costs to the Appellant. The costs of this appeal are awarded to the Appellant.

Orders accordingly

DATED SIGNED AND DELIVERED AT SIAYA THIS 7TH DAY OF MARCH, 2025.

D.KEMEI

JUDGE

In the presence of:

Ms. Monica Atieno..... for Appellant

Oreda..... for Respondent

Ogendo..... Court Assistant

