Kenya Power & Lighting Company Limited v WO (Suing through GOO as Next Friend) (Civil Appeal E002 of 2023) [2025] KEHC 10835 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E002 OF 2023

JM OMIDO, J

JULY 3, 2025

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT

AND

WO ..... RESPONDENT

SUING THROUGH GOO AS NEXT FRIEND

(Being an Appeal from the Judgement and Decree of Hon. R.M. Oanda, Senior Principal Magistrate delivered on 11th January, 2023 in Winam SPMCC No. E014 of 2020)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. R.M. Oanda, Senior Principal Magistrate/Adjudicator delivered on 11th January, 2023 in Winam SPMCC No. E014 of 2020.

2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 19th January, 2023 upon which the Appellant seeks to upset the judgement and decree of the lower court are as follows:

   i. The learned Magistrate erred in both in law and in fact by holding that the Respondent had established his case beyond the required standards.

   ii. The learned Magistrate erred in both in law and in fact by holding that the Appellant was 100% liable, or at all for the alleged electrocution and injuries contrary the evidence on record and trial, the same had not been proved.

   iii. The learned Magistrate erred in both in law and by finding that the Respondent was electrocuted by the Appellant's electrical wires while the same had not been proved on a balance of probabilities.

iv. The learned Magistrate erred in both in law and in fact by failing to reach a finding that that the Respondent had not sufficiently or at all, proved his claim and thus an award of liability at 100% could not issue and/or ensue from the fictitious claim.

v. The learned Magistrate erred in both in law and in fact when the same declined to dismiss the Respondent's suit even when it was apparent that the claim was fraudulent and fictitious.

vi. The learned Magistrate erred in both in law and in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.

vii. The learned Magistrate erred in both in law and in fact in failing to attach due weight to the Appellant's evidence and submissions and authorities attached thereto.

viii. The said award is in the circumstances so inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the Respondent.

ix. The said award is altogether disproportionate and not in line with other comparable awards made in respect of similar injuries.

x. The learned Magistrate's award lacked legal and factual basis and also amounted to an erroneous estimate of damages due in the particular case and was manifestly excessive.

xi. The learned trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered thereby arrived at a decision unsustainable in law.

3. Although the above are listed as 11 distinct grounds, a careful consideration of the same discloses only two grounds upon which the appeal is presented, to wit;

a. That the learned trial Magistrate failed to appropriately and/or adequately adduce the evidence presented before the trial court and as a result erred in holding that the Appellant was 100% liable, yet the Respondent did not prove his case to the required standard.

b. That the award in damages made by the learned trial Magistrate was inordinately and/or manifestly high.

4. In setting out the grounds of appeal, parties must always comply with the requirement of Order 42 rule 1 sub rule 2 which provides that:

(2). The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

5. The Appellant proposes that the appeal be allowed with costs and that this court sets aside the trial court's judgement and decree and substitutes the same with an order dismissing the Respondent's suit before the lower court and/or reassesses the award on quantum.

6. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

7. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

8. In Selle, Sir Clement De Lestang observed that:

> "This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

9. The matter before the trial court, based on tortious liability (negligence), was commenced by way of a plaint dated 9th October, 2020 filed by the Respondent, a minor, through the next friend Gilbert Omondi Opere. The Respondent pleaded that on or about the 22nd of September, 2020, due to the negligence and/or breach of statutory duty by the Appellant, the Respondent was electrocuted when a live electric cable fell from a nearby electric pole as a result of which the Respondent sustained injuries which included loss of consciousness, chest burns, bruises on the forearms, shoulders and knees.

10. The reliefs that the Respondent sought before the trial court were:

    a. General damages.

    b. Costs of the suit.

    c. Interest on a and b above.

11. The Appellant resisted the Respondent's claim by filing a statement of defence dated 6th January, 2021 and sought that the Respondent's suit be dismissed in its entirety.

12. This court directed that the appeal be canvassed by way of written submissions. The Appellant complied by filing its submissions. The Respondent did not file submissions.

13. Now to the evidence before the trial court, the Respondent called G.O.O. who testified and told the trial court that he was the father of the Respondent. The witness stated that on 22nd September, 2020 at about 5pm, an electric pole fell within his compound and that the Respondent who was passing by was electrocuted and sustained injuries to his chest, hands and knees.

14. The witness told the trial court that the minor was rushed to Jaramogi Oginga Odinga Teaching & Referral Hospital for treatment, where he was admitted for three days. The accident was reported at Kondele Police Station vide OB report No. 06/23/9/2020.

15. The witness produced the following documents in support of his case:The Respondent's certificate of birth.Discharge summary.OB report.A letter dated 23rd September, 2020 authored by the OCS Kondele Police Station addressed to the Appellant.Demand letter dated 29th October, 2020.Medical report dated 13th April, 2021 prepared by George Mwita.

16. The second witness that the Respondent called was George Mwita, a Clinical Officer at Nyando Subcounty Hospital. The witness produced a medical report dated 13th April, 2021 which he prepared upon examining the Respondent. The witness stated that the minor was involved in an electrocution accident and sustained injuries to his chest, hands and knees.

17. On its part, the Appellant called Gideon Mutua, a private investigator, as its witness. The witness told the trial court that he was instructed by the Appellant's insurers to investigate the allegations by the Respondent that he had been electrocuted.

18. The witness told the trial court that the Appellant did not receive a report on the alleged electrocution of the minor. He stated that he visited Kondele Police Station where he confirmed that a report had been made but the police did not visit the scene. He further stated that he visited Migosi Police Station but no report of the electrocution had been made to the station. His visit to Jaramogi Oginga Odinga Teaching & Referral Hospital confirmed that the Respondent had been treated at the facility. His attempts to interview the Respondent's father were unsuccessful as he did not cooperate, stating that he Advocate was handling the matter.

19. In his recommendation, the witness stated that the alleged electrocution would not be substantiated as the father of the Respondent did not cooperate. He concluded that "the incident was a forgery and attempted fraud".

20. The witness produced his investigation report.

21. Upon being cross examined, the witness stated that the electrocution was reported to the police and the OB report indicated the same as an "electrification report". The hospital confirmed that the Respondent was treated at the facility, having been electrocuted, as per the discharge summary.

22. In determining liability, the learned trial Magistrate rendered himself thus:

> "The Plaintiff herein is one of the citizens of Kenya and is owed a duty of care by the Defendant herein.
>
> It is the sole responsibility of the Defendant to ensure that Kenyans are shielded from the dangers that are likely to be occasioned by electricity.
>
> The company is supposed to employ all mechanisms on earth to ensure (that) their product, that is electric power, does not cause harm and/or injury to the public.
>
> The fall of the electric fall is the worst form of negligence on the part of the Defendant.
>
> I am thus convinced that the Defendants herein were negligent which led to the fall of the electric pole and subsequent electrocution of the Plaintiff.
>
> The Plaintiff has thus proved his case on a balance of probability against the Defendant herein."

23. With that, the learned trial Magistrate went on to find that the Appellant was 100% liable in negligence. The trial court went on to assess general damages for pain, suffering and loss of amenities at Ksh.300,000/-.

24. I have perused and considered the record of appeal, the Appellant's submissions and the record of the trial court. The issues for this court to address and determine are as follows:

    a. Whether the learned trial Magistrate reached a correct finding that the Respondent proved his case against the Appellant on a balance of probabilities in holding the Appellant 100% liable.

    b. Whether the award made in favour of the Respondent under the head of general damages was excessive and/or inordinately high so as to amount to an erroneous compensatory estimate of the damages suffered by the Respondent.

c. Who should bear the costs of the present appeal?

25. I will deal with the above issues seriatim, commencing with the first one which is whether the learned trial Magistrate reached a correct finding that the Respondent proved his case against the Appellant on a balance of probabilities and in holding the Appellant 100% liable.

26. In civil cases, the standard of proof is that of a balance of probabilities. The onus to establish such proof lies on the party making the claim, in this case the Respondent, in so far as the suit before the lower court is concerned.

27. The legal burden of proof in a civil case was discussed in the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR where the court stated as follows:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act* Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the Act that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

28. What amounts to proof on a balance of probabilities was discussed by Kimaru J. (as he then was) in the case of William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLR 526 where the court held as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

29. In the same breath, the Court of Appeal in the case of Palace Investment Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR observed as follows:

> " Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.""

30. In view of the above, the burden of proof lay with the Respondent to establish his claims, on a balance of probabilities, that he was electrocuted and sustained injuries and that the Respondent was negligent and liable for the same.

31. The position that the Respondent presented through the evidence that was tendered in the trial court is that he was electrocuted and sustained injuries on 22nd September, 2020 when an electric pole with a live cable fell on him within the residential compound where he was.

32. The Respondent was taken to Jaramogi Oginga Odinga Teaching & Referral Hospital where he was admitted for three days. The matter was reported to Kondele Police Station and the police in turn reported to the Appellant.

33. The Respondent was later examined by George Mwita, a clinical officer, who assessed the Respondent's injuries in his report dated 13th April, 2021.

34. The Appellant's evidence before the trial court was that of Gideon Mutua, who told the court that he investigated the occurrence of the accident/incident and reached the conclusion that the claim by the Respondent was fraudulent. The basis upon which the witness reached that finding was that the same was not reported to the Appellant and further that the Respondent's father did not cooperate and instead told him that his Advocate was dealing with the matter. The witness however admitted that the electrocution was reported to the police and that the Respondent was treated at Jaramogi Oginga Odinga Teaching & Referral Hospital.

35. It is instructive from the OB report that was made at Kondele Police Station that the same indicated that the Respondent had been electrocuted and injured. A perusal of the discharge summary from the facility also indicates that the Respondent presented a history of having been electrocuted. The initial diagnosis indicates "electrical burn" while the final diagnosis states "resolving electrical burn". Noteworthy is the fact that the contents of the OB report and the discharge summary were not disputed or contested by the Appellant.

36. Although the Appellant's witness in his oral evidence stated that the report of the electrocution was not made to the Appellant, the witness admitted in his report that a report of the incident was indeed made to the Applicant. He stated as follows (page 2 of the report):

> " We commenced our investigations by visiting Kenya Power & Lighting Company Limited Kisumu office where we talked to their Safety Health & Environment officer one Danns Otieono who confirmed that the incident which involved a juvenile one W.O. and live power lines was reported at their offices."

37. It is further instructive from the record of the trial court that the Respondent's evidence that he was injured when an electric pole with a live wire fell, was not, other than vide a mere denial in the defence, disputed or otherwise challenged in evidence as the Appellant did not present any evidence to dispute that the post with a live cable fell within the compound where the Respondent resided.

38. The Appellant did not deny or dispute that the post with a live wire fell. As a matter of fact, the report prepared by the Appellant's witness indicated that the scene was not visited by the Appellant's officers or the police.

39. As we have seen above, the reasons that the Appellant gave to reach his conclusion that the Respondent's claim was fraudulent were that the incident was not reported to the Appellant and that the Respondent's further declined to cooperate. I have stated above that the witness, in his own report, indicated, to the contrary, that a report was made to the Appellant. Further to that, the Respondent produced a letter authored by the police to the Appellant reporting the matter. The contents of the letter were not challenged. Thus then, it is my persuasion that the Appellant received the report on the electrocution.

40. With regard to the Respondent's father declining to cooperate with the investigator and instead referring him to the Respondent's Advocates, I note that the report by the investigator was prepared on 19th June, 2021. By that date, the Respondent's suit was already pending before the lower court, having been filed on 3rd November, 2020. The Respondent had an Advocate representing him and the Respondent's father was within his rights to refer the investigator to the Advocate representing the Respondent.

41. The investigator did not present any evidence that he contacted the Respondent's Advocate on the matter and in the circumstances cannot then be heard to say that the Respondent's father did not cooperate. That alone cannot be a ground that would vitiate the Respondent's claim to be termed as fraudulent.

42. The authorities of William Kabogo Gitau (supra) and Palace Investments Limited (supra) present the jurisprudence that a party who persuades the court with the probability, however narrow, that the fact in question is more likely to have occurred than not, carries the day as he will have proved his case on a balance of probabilities.

43. In the present case, the Respondent proved through the discharge summary, OB report and medical report that he suffered injuries as a result of being electrocuted. His evidence that an electric pole with a live cable fell on him was not controverted. Without a doubt, the Appellant, as an electric power supplier, was responsible for the electricity passing through its power lines and had a duty of care to the general public, that was proportionate to the degree of risk that the power would likely cause in the event of negligence.

44. I would in the circumstances agree with the learned trial Magistrate that the falling of a post carrying a live cable was negligence on the part of the Appellant and I cannot fault him for finding the Appellant to be 100% liable.

45. The other issue for this court to determine is whether the amount assessed and awarded as compensation to the three Respondents was in error and/or inordinately high or excessive.

46. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of Price & another v Hidler [1996] KLR 95 as follows:

> " The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."

47. Further, in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of

this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.

It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

48. There is also the authority of Mbogo & Another v Shah [1969] EA 93, where it was held, inter alia, that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

49. In the present appeal, the Appellant merely stated that the award in compensation that was made in favour of the Respondent was inordinately high and/or excessive. The Appellant did not proffer and/or demonstrate to this court the ground that the exercise of the discretion by the learned trial Magistrate was clearly wrong or that he misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion. There is therefore no basis upon which I can interfere with the discretion of the trial court.

50. Being of the foregoing persuasion, I reach the result that the present appeal lacks merit. I proceed to dismiss it with costs to the Respondent, in line with Section 27 of the *Civil Procedure Act*, which I assess at Ksh.30,000/-.

51. Finally, noting that the Respondent has since reached the age of majority, I direct that the relevant application for substitution be made in due course before the trial court, for the court's consideration.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 3RD DAY OF JULY, 2025.

JOE M. OMIDO.

JUDGE

For Appellant: Ms. Odipo.

For Respondent: No Appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

Ms. Odipo: I pray for 30 days stay of execution.

Court: There shall be stay of execution for 30 days.

JOE M. OMIDO

JUDGE