



Renne & another v Kenya Power and Lighting Company Limited (Civil Suit 13 of 2020) [2024] KEHC 9717 (KLR) (1 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 13 OF 2020
SM GITHINJI, J
AUGUST 1, 2024**

BETWEEN

IVAN RENNE 1ST PLAINTIFF

FRANCIS KADENGE KENGA 2ND PLAINTIFF

AND

KENYA POWER AND LIGHTING COMPANY LIMITED DEFENDANT

JUDGMENT

1. By way of a Plaint dated 6th August 2020 the Plaintiffs moved this court seeking the following orders;
 1. A declaration that the Defendant is duty bound to maintain an independent firefighting capability to safeguard its own infrastructure and the properties of those people living close its wayleave trace.
 2. Special damages.
 3. General damages.
 4. Costs of and incidental to this suit.
 5. Interest on all the pecuniary awards.
2. The Plaintiffs' case is that they were the proprietors of an estate in fee on land known as Plot Number 9833 Casuarina Malindi where they developed a hotel operating under the name of Kenga Giama Resort. The hotel consisted of 11 rooms, reception restaurant and staff houses, gazebo, entrance shed, sign board shade, swimming pool and garden which were furnished with furniture, fittings, paintings and other decorations. It was averred that at the time of the fire the, the plaintiffs had leased the hotel to Mr. Nicola Mosca at the rate of Euro 1,800/= per month.



3. It was further averred that the Defendant was the Plaintiffs' electricity supplier and it was implied that the Defendant would supply electrical power to the Plaintiffs through a safe environment in the circumstances and remedy any defects that may be noted in the supply system without undue delay. It was stated that in breach of the terms of the contract, the Defendant retained defective installations, failed to adequately maintain the power grid and thereby caused a dangerous situation that precipitated the fire that broke out on the premises and destroyed the Plaintiffs' property causing loss and damage. It was stated that on 4th April 2018 the Defendant's personnel were notified of low hanging wires that were hanging dangerously close to the Plaintiffs' property. That the Defendant's personnel visited the premises, inspected their installations but failed to put separators or any other insulation between the loosely hanging cables. It was their statement that on 16th April 2018 at around 1.00pm a fire broke out on their power transmission system and spread out to the plaintiffs' property. The plaintiffs blamed the defendant's servants and the defendant whose particulars of negligence are set out under paragraph 14 and 15 of the plaint which led to damages amounting to Kshs. 38,041,800/= on buildings and contents amounting to Kshs. 12,000,000/=. Further, the benefit of the lease was lost thus the claim for Euro 1,800/= per month from May 2018 till the resort is rebuilt.
4. The Defendant filed a statement of defence denying the Plaintiffs' claim and stated that it was a requirement and/or express or implied term of the power supply contract that the customer's developments are not to encroach onto the power line wayleave areas. It was admitted that there was a fire outbreak on 16th April 2018 but denies any breach of contract as alleged in the plaint. It was denied that the defendant retained defective installations and that they failed to maintain power grid as alleged and that the fire outbreak was solely occasioned and/or substantially contributed to by the plaintiffs whose particulars of negligence were set out under paragraph 8 of the defence.
5. The matter was set down for hearing with two witnesses testifying for the Plaintiff and three witnesses for the Defendant.
6. Pw1 Francis Kadenge Kenga testified on his behalf and on behalf of his Co-Plaintiff, his wife. He adopted his witness statement dated 22/6/2020 and produced as PEX 1-9 a bundle of documents as per the list of document.
7. On cross examination he stated that he had applied to the Defendant requesting for power supply and the supply contract was issued in his name. He stated that opposite their land is a crocodile farm and there is a road that runs in between. He further stated that power lines follow the road behind his land's perimeter which lines were there even by the time they bought the land.
8. Pw2 Kennedy Otieno Onyangoa Superintendent Electrical Supervisor told the court that he knew Pw1 who had gone to their offices for evaluation of his burnt premises. He testified that he went alongside a Quantity Surveyor where they took measurements, assessed the costs of repairs and did a report where the costs were detailed as Kshs. 38,410,800/= and Kshs. 12,000,000/=.
9. Pw3 Harold Wadiye Kella adopted his witness statement dated 5/8/2020 as his evidence in chief.
10. On cross examination he told the court that he knew the area too well and that the first villa was a few meters from the way leave of the wires. He added that the roof that caught fire was higher than the electric wires.
11. Dw1 Kigo Kariuki a risk consultant told the court that he visited the scene on 4th and 5th June 2018 and nothing much had changed. He pointed out that there are KPLC lines in two sets, the top lines are for transmission and the lower are for distribution which are all carried by the same pole. He stated that as a result of gushy winds in June due to monsoon winds one of the high tension cables snapped from the



pole and crushed in the low voltage lines of transmission which ignited sparks on the makuti roof. He stated that a building should not be less than 7 feet from the way leave and when he took measurements of the building it was 8 feet. He produced the report dated 10/7/2018 as DEX1. He further told the court that he had obtained the approved drawings for the structures erected by the plaintiffs.

12. On cross examination, he stated that the building plans according to the plaintiffs' documents, were approved on 17/9/1993 which time the lines were not in existence. He stated that KPLC should not supply power to premises which have breached their provisions. He further stated that the loss was for Kshs. 30, 406, 748/=.
13. Dw2 Henry Odhiambo an engineer with KPLC adopted his witness statement dated 29th June 2021 as his evidence in chief. He stated that fire incidents do occur and produced a report showing various maintenances they had taken in different areas. He testified that when the fire was reported they shut down the line for the area.
14. On cross examination he stated that the crushing of their conductors caused the fire. He admitted that the line was put in the year 1995. He further stated that if one encroaches on the way leave they give a notice for removal. It was his testimony that they inspect buildings before they supply power and also check on encroachment and where there is encroachment they don't supply power. He as well stated that Kenya Power & Lighting co was to blame for the fire.
15. Dw3 Harrison Macharia Mwangi an Electrical Engineer, adopted his witness statement dated 28/6/2021 as his evidence and produced as exhibits documents.
16. On cross examination he stated that the fire was caused by conductors which had crushed and sparks fell on the makuti roof. He stated that a breach of way leave should be reported by their personnel and he was not aware of a report of such breach. He stated that their personnel visit the premises monthly for meter readings and would have noted any breach of way leave.

Analysis and Determination

17. The parties filed written submissions. I have considered pleadings by the parties, evidence adduced and the extensive submissions as well as the authorities relied upon. It is not in dispute that a fire occurred on the Plaintiffs' premises on 16th April 2018 causing damage thus the instant suit. With that, the issues arising for determination are;
 1. Whether the fires were attributable to negligence on the part of the Defendant.
 2. Whether the Defendant bore a statutory duty to compensate the Plaintiff.
 3. What if any, is the quantum of damages.
18. From the evidence of both the Plaintiffs and the Defendant's witnesses, it is not in dispute that the fire was caused by crushing of conductors igniting sparks that lit the makuti roof thus spreading to adjacent buildings. What however is in dispute is as to whether, the plaintiff complied with the Defendant's provisions as regards proximity to way leaves. The Defendant averred that the Plaintiffs did not comply and that the premises were on the way leave of the power line. At the site visit, Dw1 told the court that the approximate distance of way leave and a building should be a minimum of 7 feet. When the distance was measured it came to about 7.6 feet away from the way leave. This was the evidence of a risk consultant which is taken as expert evidence having stated his qualifications and experience before the court. The other issue that emerged is that the lines were installed in the year 1995 and there had been complaints about the sagging lines. Dw2 and Dw3 in their testimony stated that there had been maintenance in Malindi area. The evidence on record establishes beyond shadow of doubt that



the fire was caused by the Defendant's power line. There is no reliable evidence by the defence that the defendant premises were on the way leave. This is for reason that the Defendant's own witnesses admitted that the Defendant would not have supplied electricity to the plaintiffs' premises if they had not complied with the regulations of the Defendant in respect of proximity to way leave. In addition, Dw3 admitted that the Defendant's personnel would visit the premises on monthly basis for meter readings and therefore if there had been a breach of the way leave the plaintiffs would have been informed. In a nutshell, I find that the Plaintiffs have proved the Defendant's negligence due to the defendant's failure to maintain their power conductor's safety, causing their crushing and production of sparks that fell on the Makuti leading to the fire outbreak.

19. Negligence is defined in the Black's Law Dictionary, 10th Edition as:

“The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation..... The elements necessary to recover damages for negligence are (1) the existence of a duty on part of the defendant to protect the plaintiff from the injury complained of, and (2) an injury to the plaintiff from the defendant's failure.”

20. Negligence is a specific tort that comes from the common law jurisprudence. In a claim of negligence, the Plaintiff ought to establish that the Defendant owed him a duty of care, that there was a breach of the duty of care and as a result of that breach, the Plaintiff suffered damages. The principles involved in a claim of negligence were established in the case of *Donoghue Vs Stevenson* (1932) UKHL 100, where it was held: -

“The law takes no cognisance of, carelessness in the abstract. It concerns itself with carelessness only where there is duty of care and where failure in that duty has caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty.”

21. For a claim to succeed in an action for negligence, the damages alleged must be recognized by law. In the case of *Anastassios Thomos Vs Occidental Insurance Company Limited* (2017), the High Court held that: -

“When it comes to remoteness of damages, the court ought to determine whether there was sufficient cause or proximate connection between the defendant's negligence and the damages suffered by the Plaintiff that is recognisable as a matter of policy that the Defendant should pay the damages.”

22. In the case of *Cotecna Inspection S.A Vs Hems Group Trading Company Limited* (2007) eKLR, the Court of Appeal held that: -

“My analysis and evaluation of the evidence, a summary of which is given above, must only be confined to the question as to whether or not that breach of duty was the cause of the losses the respondent suffered and if so, whether the assessment of damages was properly carried out by the trial court. But first, the law. What are the principles to be applied when considering the nexus between the acts of the offending party and the loss suffered by the offended party. I do agree with both learned counsels that there must be a link between the



action complained of and the loss incurred. That to me, goes without saying and is a matter of common sense. It underlines the doctrine of remoteness of damages.”

23. The Plaintiff must show that the damages suffered are as a result of the Defendant’s negligence. Without proof of causation, negligence cannot be actionable and/or sustainable. This was addressed by Visram J (as he as then) in the case of *Elijah Ole Kool Vs George Ikonya Thuo* (2001) eKLR, where he stated: -

“When will an act or omission be said to be the cause of the Plaintiff’s injuries” a defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff’s injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions.”

24. The Plaintiffs’ claim for negligence is founded on the defendant’s failure to maintain a safe system and neglecting to repair power lines. As aforesaid, it is not in dispute that the crushing of the defendant’s power lines caused the fire. The Defendant being the monopolistic supplier of electricity in the country has a duty to ensure that the supply is well maintained and in safe condition. This duty was as expounded in the case of *Kenya Power and Lighting Company Limited Vs James Muli Kyalo and Another* (2020) eKLR, the Court while discussing Kenya Power and Lighting Company’s duties stated:-

“The appellant’s responsibility, as far as the duty to maintain electric supply lines is concerned, is a matter of statutory obligation under the *Energy Act*, 2006. Section 51 required the appellant as licensee, or any person authorized by it, from time to time as it becomes necessary, to enter land on which electric supply lines are laid, for the purpose of inspecting or repairing lines, or removing lines where such electric supply lines are no longer required.”

25. As earlier pointed out, it has already been established that the power lines were near the Plaintiffs’ premises thus the proximity between the action complained against and the damage suffered. Thus, the Defendant bore a duty of care to the Plaintiffs which was breached, this court finds the Defendant wholly liable for the fire outbreak that led to the loss and damage.

26. As to whether the Defendant has a statutory duty to compensate the Plaintiffs, Section 52 of the *Energy Act* No. 12 of 2006 provides as follows: -

“The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity trespass or other wrongful proceeding in the execution of this Act, or by loss or damage or breaking of any electric supply line or by reason of any defect in any electric supply line.”

27. It is clear that Section 52 of the *Energy Act* No. 12 of 2006 applies where it is proved that the damage or loss suffered was caused by the exercise or use of any power conferred by the Act or by breaking of any electric supply line. Once these are proved, then it becomes a case of strict liability. I agree with the



decision in *Kenya Power & Lighting Company Vs Umaz Ali Swaleh (2017) eKLR, Civil Appeal No. 240 of 2009*, where the Court held that: -

“..... under Section 52 of the *Energy Act*, a licensee, in this case the Appellant is obligated to make compensation for any loss or damage occasioned by reason of execution of its duties and mandate under the Act or by reason of any defect in any electrical supply line. I read and understand this provision to put some strict liability upon the Appellant as a licensee for purposes of supplying and maintaining electric power supply lines. There was sufficient evidence that an electric wire snapped and fell to the ground and thereby causing the fatal danger ultimately visited upon the deceased. Knowing the danger that a defective electric cable or line pose to any human being and property, there is a duty of care owed to Kenyans by the Appellant to maintain and keep secured all electric transmission lines and infrastructure so that accidents are avoided. In *Joseph Kiptonui vs. KPLC*, Hon. Asike Makhandia, as he then was, held and said:

“..... Kenya Power & Lighting Co. owed to the plaintiff and every Kenyan a duty of care where it happens to have power lines. Further electric power is a dangerous commodity and if not properly secured can be a danger to society.”

Same sentiments were expressed by GBM Kariuki J, in *KPLC vs. Joseph Khaembe Njuria* to the effect that the Appellant, has a responsibility to ensure that the power infrastructure it has installed in the country for the purpose of electrification is properly maintained to prevent accidents. I find the foregoing decisions to be well founded in support of my finding that the Appellant had a duty of care to ensure that its power supply infrastructure was kept in good repair and condition to avoid being a risk to the general public including the deceased minor.”

28. The Defendant is the sole distributor and supplier of electric power in Kenya and is therefore strictly liable. I agree with the sentiments of Mabeya J who in the case of *AMK (suing as the mother and friend of JMK-Minor) Vs Kenya Power & Lighting Company Limited (2020) eKLR*, held that:-

“The defendant is the sole installer, distributor and supplier of electric energy in Kenya. It has a statutory duty of supervising, inspecting and maintaining its electric installations under Section 52 of the *Energy Act*. This calls for a higher degree of vigilance on its part in order to avert accidents.”

29. It is my conclusive finding that strict liability attaches to the Defendant and it bears a statutory duty to compensate the Plaintiff in this case.
30. The damages sought by the Plaintiff are in their very nature Special Damages. It is trite law that Special Damages must be specifically pleaded and proved. See *National Social Security Fund Board of Trustees Vs. Sifa International Limited (2016) eKLR*.

The Plaintiffs sought the following damages;

- a. Repairs and replacements at Kshs. 50,041,800
 - b. Valuation report Kshs. 75,000
 - c. Loss of business at Euro 1,800 per month from May 2018 till the resort is rebuilt.
31. In support of the damages that amount to repairs and replacements, the Plaintiffs produced a valuation report prepared in June 2018. To challenge the sums pleaded, the Defendant produced a report dated



10th July 2018 with the adjusted claim being Kshs. 30,406,748. I have considered both valuation reports and in the absence of an independent valuation report, I think it would be fair to find a common ground in terms of loss and damage. In the circumstance therefore, I invoke common sense and work out the damages as follows; Kshs. 50, 041,800+Ksh. 30,406,748x1/2 =Kshs. 40,224,274/=.

32. Special damages for preparation of the valuation report are equally awarded at the rate of Kshs. 75,000 as a receipt for the same was produced.
33. Regarding loss of business, I have considered the duly executed lease dated 17th May 2017 and the terms attendant. I do note that the lease was for a period of 5 years commencing on 15th September 2017 to terminate on 14th September 2022. The agreed amount for the lease is Euro 1,800. The Plaintiffs pleaded for this amount from May 2018 till the resort is rebuilt. I shall however grant the said monthly sum only for the remainder of the lease period as there is no certainty that the lease would have been renewed. The sum is therefore awarded as follows; Euro 1,800/=x 52 months= Euro 93,600/=.
34. In the upshot, I make the following orders: -
 - i. A Declaration be and is hereby issued declaring that the Defendant breached its statutory duties under the provisions of the Energy Act which breach has caused loss and damage to the Plaintiffs and the Defendant is therefore under a duty to compensate the Plaintiff.
 - ii. The Defendant shall compensate the Plaintiff damages in the sum of Kshs. 40,299,274/=.
 - iii. The plaintiff is awarded the sum of Euro. 93,600/= being the award for loss of business.
 - iv. The Plaintiff shall have costs of the suit and interest on (iii) and (iv) at court rates until payment in full.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 1ST DAY OF AUGUST, 2024.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Ole Kina for the Plaintiff

Mr Abanja for the Defendant

Mr Abanja; - I pray for 30 days stay of execution.

Court; - Stay is granted as sought.

1/8/2024

