Kenya Power & Lighting Company Limited v Kurgat (Civil Appeal E035 of 2022) [2024] KEHC 12220 (KLR) (9 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E035 OF 2022

HI ONG'UDI, J

OCTOBER 9, 2024

BETWEEN

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

AND

JONATHAN SERONEY KURGAT ..... RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Court at Nakuru delivered by the Honourable J.B Kalo (CM), on the 15th March, 2022 in Nakuru CMCC No. 274 of 2017)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nakuru Chief Magistrate's Civil Suit No. 274 of 2017. In the said suit, the respondent sued the appellant for payment of Kshs. 9,586,200/=, costs of the suit, interests and any other or further reliefs the court may deem fit to grant.

2. The genesis of this dispute as stated in the plaint dated 31st March, 2017 is as follows; that on the 12th March 2017, the respondent's rhodes grass which was due for harvesting for both grass and grass seed was completely destroyed by fire which was caused by the appellant's faulty electrical cable.

3. After hearing both parties the trial Magistrate delivered his judgment on 15th March,2022 ordering the appellant to pay the respondent kshs. 9,586,200/= for loss and damage he suffered plus costs of the suit and interests at court rates until payment in full.

4. The appellant being aggrieved with the entire judgment, lodged this appeal on 18th March, 2022 setting out the following grounds:

    i. That the learned honourable magistrate erred in Law and fact in failing to properly evaluate the evidence adduced in relation to the pleadings and thereby rendered Judgment that is of variance with both the pleadings and the evidence.

ii. That the learned honourable magistrate erred in law in holding the appellant liable for an incident that was not occasioned by any proved instance of negligence or breach of statutory duty of care or both.

iii. That the learned honourable magistrate erred in law and fact in effectively imposing strict liability on the appellant in respect of fire incident alleged to have arisen from electricity cable when there was no proved default of breach of any known duty of care however imposed on the appellant strictly liable merely because of the fact of fire.

iv. That the learned honourable magistrate erred in law misapprehend the nature and scope of the duty the law places on the appellant in as far as installation and maintenance of the electric Infrastructure and therefore erroneously imputed strict liability on the appellant without basis at all in law or principle.

v. That the learned magistrate erred in law in finding that the respondent had proved his case without any evidence that the appellant was aware and or ought to have been aware that there was fault on the electric cables and had time to rectify the same but failed to do so.

vi. That the court erred in law fact in awarding the Respondent colossal sum of money in damages on the basis of scanty and insufficient evidence to substantiate the award.

vii. That the learned magistrate erred in law in giving undue credit to expert opinion on the value of the gross allegedly destroyed in the report filed by the respondent when the said expert had no material to justify the computation and estimation of the value of the grass especially because the witness had not seen the grass before.

viii. That the learned magistrate erred in law in holding the respondent had proved loss of 8,586,200.00 on the basis only that the respondent has been contracted to supply such in teems and without evidence that he actually had grown the expected quantities.

ix. That the court erred in law and fact in failing to fins that the respondents alleged lease on which his contract with Kenya seeds was based was expiring the very next year and that the respondent had no basis for claiming projected income for the following four years claimed.

x. That the learned magistrate erred in law and fact in finding and holding that the respondent has proved loss in the absence of credible financial evidence payment for the portion of the alleged contract with the corporation even in the preceding year in respect of when his lease agreement had related to confirm the alleged arrangement.

xi. That the learned magistrate erred in law it awarded the respondent the sum of Kshs. 8,586,200.00 where there was no evidence that he had any contract from which he legitimately expected to earn the amount in question.

xii. That the learned magistrate erred in law in not appreciating the fact that the law imposed upon the respondent the duty to mitigate his losses and therefore the award for four (4) years was inflated and unjustified in law.

5. The appellant prayed that the appeal be allowed with costs. Additionally, that the trial court's judgment be reviewed by substituting the same with a judgment dismissing the respondent's claim or terms therein be varied.

6. The appeal was canvassed by way of written submissions.

Appellant's submissions

7. These were filed by the firm of Sheth & Wathigo advocates and are dated 13th March, 2023. Counsel submitted on the grounds of appeal.

8. Regarding grounds 1 to 5 she submitted that the element of negligence was not proved to the standard of probability as required in law. In support of this argument he placed reliance on the case of Stratpack Industries v James Mbithi Munyao; Nairobi HCCA No. 152 of 2013 as was cited with approval in the case of EWO (Suing as next friend of a minor COW) v Chairman Board of Governors – Agoro Yombe Secondary School [2018] eKLR.

9. On grounds 6 to 12 counsel submitted that the learned trial Magistrate erred in law in finding that indeed the sum claimed by the respondent was strictly pleaded and proved. He relied on the cases of *Hahn v Singh, Civil Appeal No. 42 of 1983*[1985] KLR 716, at P. 717 and 721, British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Company of London Limited [1912] AC 673 as cited with approval in the case South Nyanza Sugar Company Ltd v Donald Ochiend Mideny [2018] eKLR`and Kiptoo v A.G [2010] EA 2010.

10. In conclusion, counsel submitted that the trial magistrate erred in law and fact by not considering the appellant's submissions and authorities, consequently arriving at the wrong decision. She urged the court to allow the appeal with costs to the appellants.

Respondents submissions

11. These were filed by the firm of Geoffrey Otieno & Company advocates and are dated 26th February, 2024. Counsel submitted on liability and quantum as raised in the appellant's submissions.

12. On liability, counsel submitted that from the uncontroverted evidence on record, PW2 and PW3 who were expert witnesses confirmed the losses which were quantified separately for grass and for the grass seed respectively taking into account that the same would have been viable for another four (4) years. Further, that the defence did not bring any witness or adduce evidence to controvert the respondent's witnesses' reports regarding the quantum of loss suffered by the respondent.

13. He submitted that the appellant did not dispute the fact that the respondent suffered loss but only challenged the amount awarded by the trial court. Further that the appellate court would only disturb an award if the same is either inordinately high or low. In support of this argument he cited the decisions in Bashir Ahmed Butt v Uwals Ahmed Khan (1982-88) KAR and Peter v Sunday Posts Limited (1958) EA 424.

14. Counsel further submitted that the respondent had pleaded special damages at paragraph 9 of the plaint and proved the same through the evidence by PW2 and PW3, which was not controverted. The court's attention was drawn to the decisions in Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau NRB CA Civil Appeal No. 87 of 2014 [2016] eKLR which was cited with approval in the Uganda Supreme Court case of Departed Asians Property Custodian Board v Issa Bukenya t/a New Mars Ware House, CA No. 26 of 1992, South Nyanza Sugar Company v Donald Ochieng Mideny [2018] eKLR and Kenya Wildlife v Rift Valley Agricultural Contractors Limited [2014] eKLR.

15. In conclusion counsel submitted that the appeal lacked merit and should be dismissed with costs to the respondent.

Analysis and determination

16. This being a first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court, and arrive at its own conclusion.

17. This principle of law was well settled in the case of Selle & another v Associated Motor Boat Company & others 1968 EA 123 where the court held as follows;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally".

18. Having considered the evidence, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find that the issue for determination is whether the instant appeal is merited.

19. It is not in dispute that the respondent's pasture was destroyed by fire and as a result he suffered loss and damage. What is in contention is whether he proved on a balance of probabilities that the appellant was to blame for the said loss and damage and whether he was entitled to the award of kshs.9,586,200/ = by the trial court.

20. During the hearing of the case, the respondent who testified as PW1 told the court that he had been informed by his neighbour that his grass was on fire and the said fire had been caused by the appellant's electricity lines which were entangled. He reported the matter at Rongai police station and the appellant rectified the transformer. In support of his case he produced photographs showing how the incident occurred. Upon cross-examination, he confirmed that electricity lines did not pass through his land and that the transformer was also not on his land.

21. PW4 a neighbour testified that while going to church he heard a sound from the electricity poles, then there were sparks and the grass started burning. The said fire spread to the respondent's farm and he showed him the two poles which had wires that had been entangled. Upon cross examination he confirmed that he was the one who had informed the respondent on the cause of the fire. He also confirmed that the pump at the borehole had switched off and that he had not reported the incident to the police or taken any photographs.

22. PW5 who is also a neighbour, did not tell the court much on how the fire started but stated that she had seen fire on the grass and they were able to put it off. She added that fire had spread to the respondent's farm and that PW4 was the one who told them that it was electricity sparks that had burnt their land. It was also her testimony that the electricity poles which were entangled were on her land but the transformer was on the opposite land. In cross examination, she stated that they had reported the matter to Rongai Police station and that the appellant had done repairs but there were sparks as the repairs were being done.

23. On its part the respondent's witness (DW1) testified that two of his colleagues had been sent to address an incident at Boito, Kabarak area, and they reported that they replaced a fuse and restored power. They had also reported that a lady had informed them that there was a fire outbreak due to the fault on the appellant's wires and grass was burnt. He testified further that no report had been made to them on the same. He however stated that loose wires coming into contact could cause sparks which could light a fire but the voltage must be sufficiently high beyond 1,100 to 33,000 volts for that to happen.

He added that if snaps/cut wire fall on the ground it was likely to burn things regardless of the voltage but there were no such incidents reported to them or addressed by their technicians.

24. In cross examination, he stated that he was not qualified to prepare fire incident reports arising from electrical faults and that he was also not an expert in investigation of matters involving fires. He confirmed that he did not visit the area of incidence and that the report on power failure was made on 13th March 2017. However, the technicians did not file any report on the repairs they had done. He admitted that there was fire caused by a 240V line on 12th March 2017. In re-examination, he challenged the photos produced by the respondent. He testified that none of the said photos showed wires touching one another and there were no sparks seen.

25. In the instant case, the onus of proving the basis for the respondent's claim lay on DW1. The Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR, in distinguishing between legal and evidential burden held inter alia;

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

26. Additionally, the Court of Appeal in the case of Karugi & Another V. Kabiya & 3 Others (1987) KLR 347 stated that:

> " The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

27. It is not disputed that there was a fire incident on the respondent's farm on the material day and that the appellant's technicians had visited the area where they replaced a fuse and restored power. This is evident from the reports produced as evidence by the respondent. The respondent produced several photographs of the scene. The appellant denied negligence on its part but failed to adduce any evidence to counter that of the respondent.

28. In Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR, the court in relying on the supreme court decision of Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR held as follows;

> "
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> " 22. The foregone analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant

throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.

On the standard of proof, the Black's Law Dictionary, (9 th Edition, 2009) at page 1535 defines 'the standard of proof' as '[t]he degree or level of proof demanded in a specific case in order for a party to succeed."

29. In view of the above, I find that the evidential burden of proof shifted to the appellant to show that indeed the fire was not caused by sparks from its entangled electrical wires and that the voltage was too low to cause fire. DW1 admitted that there were repairs done on the day of the incident but he did not produce in court any report as to what was repaired. It is therefore my finding that the trial Magistrate did not err in fact and law in finding that there was negligence on the part of the appellant.

30. The respondent also prayed for special damages of kshs. 9,586,200/=. It is trite law that the same ought to be specifically pleaded and proved. In *Mbaka Nguru & Another -v- James George Rakwar [Civil Appeal No. 133 of 1998* (UR). the Court cited with approval Lord Goddard, C.J. in Bonham Carter -v- Park [1948] 647 T.L.R. 177 and continued:

> " It will suffice to say that plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to. In the absence of any pleading as to damages claimed under this head, we are constrained to disallow the whole of that award and we set it aside wholly."

31. The respondent under paragraph 9 of the plaint dated 31st March 2017(page 6 of the record of appeal) claimed that as a result of the fire from the appellant's faulty cable, he suffered loss and damage amounting to kshs. 9,589,200/=. Being a special damage the respondent was duty bound to prove it. The evidence by PW2 and PW3 on this special damage was based on estimations and were in form of reports and not backed by any invoices or receipts. I find that this was not sufficient in proving special damage. For the said reasons I find that the trial magistrate erred in law and in fact in awarding the respondent the kshs. 9,589,200/= without sufficient proof.

    a. However, I find that the respondent is entitled to general damages having proved negligence on the part of the appellant. The award for this is normally at the court's discretion. This court finds an award of kshs 5,000,000/= to be sufficient award for general damages for the loss and damage incurred.

32. The upshot is that the appeal partially succeeds. The award of kshs.9,589,200/= is hereby set aside and substituted with an award of kshs. 5,000,000/= (five million shillings) being general damages, with costs both in the Lower court and High court.

33. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 9TH DAY OF OCTOBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE