



Kenya Power & Lighting Company v Kinyanjui (Suing as the Legal Representative of the Estate Victor Chege Wairimu) & another (Civil Appeal 113 & 120 of 2020 (Consolidated)) [2023] KEHC 2176 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 113 & 120 OF 2020 (CONSOLIDATED)**

**JM CHIGITI, J
MARCH 8, 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY APPELLANT

AND

**MARGARET WAIRIMU KINYANJUI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE VICTOR CHEGE WAIRIMU) 1ST RESPONDENT
FAITH WAIRIMU KAGAI 2ND RESPONDENT**

JUDGMENT

Brief Background

1. The brief background of the matter before this court is that by a plaint dated 26th May, 2014 the 1st Respondent on behalf of the Estate of Victor Chege Wairimu sued the Appellant for general and special damages.
2. This was occasioned by the fact that the late Victor Chege Wairimu while playing with friends in Ruturo Village on 22nd July, 2016 had been electrocuted by high voltage uninsulated electrical wires erected on the 2nd Respondent's property (2nd Defendant before the trial court) by the Appellant. The deceased sustained fatal injuries from the electrocution which led to his death.
3. The 1st and 2nd Defendants filed their Statements of Defence dated 26th August, 2019 and 21st August, 2019 respectively.
4. In its defence the Appellant herein contended the fact that it had erected high voltage uninsulated live electrical wires on the 2nd Respondent's property. It also denied being aware of any accident which had occurred on the said date, the particulars of negligence on its part, any fatal injuries that had been



sustained by the deceased. The Appellant contended that if there was any person who was to be blamed for the negligence it was the deceased's mother/guardian or the 2nd Defendant.

5. The 2nd Respondent herein in her defence contested the Appellant's argument that she was to be blamed for the negligence leading up to the electrocution of the deceased.
6. The trial court upon establishing each party's case settled on one issue for determination and that is whether or not the Plaintiff had proven his case on a balance of probabilities as against the defendants.
7. The Learned magistrate upon considering each party's case, the evidence tendered before her and the testimonies of the witnesses awarded the following;

“Pain and suffering Kshs.10,000/=

Loss of expectation Kshs.100,000/=

Loss dependency Kshs.1,800,000/=

Special damages Kshs. 47,800/=

Total Kshs.1,957,800/=

(Kenya Shillings One Million Nine Hundred and Fifty-Seven Eight Hundred Only) The plaintiff shall also have the costs of this suit together with the interest thereon at court rates. Orders accordingly.”

8. The Appellant is now before this Court challenging the above decision in its entirety on the following grounds;
 - a. That the Learned magistrate erred in law and fact by finding the 1st defendant/appellant 50% liable which was against weight of evidence adduced.
 - b. That the Learned magistrate erred in law and fact when she failed to find the 2nd defendant was entirely liable for the accident.
 - c. That the Learned Magistrate erred in law and in fact by making an award on General damages which were clearly excessive compared to the evidence the weight of evidence adduced before court.
 - d. That the learned magistrate erred in law and fact by failing to take into account the evidence and the submissions on liability & quantum of damages given on behalf of the 1st defendant/ appellant while rendering her judgment.
 - e. That the learned magistrate erred in law and fact by awarding Loss of dependency (multiplier and multiplicand) which was manifestly excessive and without corroboration by neither enough evidence to sufficiently prove the claim.
 - f. That the learned magistrate erred in law and fact by failing to apply proper legal principles regarding quantum and thus arriving at a bad decision.
 - g. That the learned magistrate erred in law and in fact by making an award on general damages which was manifestly excessive and inordinately high, contrary to the principle of stare decisis.



- h. That the learned trial Magistrate erred in law and fact in considering irrelevant matters in arriving at the said decision.
9. Based on those grounds, the appellant prays that: -
 - a. Judgment be reversed and case against the appellant be dismissed.
 - b. Liability and awards on General damages be re-assessed in favour of the Appellant.
 - c. Costs of the subordinate court case and of the appeal awarded to the appellant.

Analysis and determination

10. According to the Appellant, the 1st Respondent did not prove her case on the standard of balance of probability.
11. Within the pleadings as filed in particular, that a blunt raises concerns with their issue of the action report, which indicates that the matter the meter box was hidden. He further raises concern the Respondent did not produce a report as required under The *Energy Act*.
12. It argues that the Trial Court did not remain within the issues that were raised in the plaint by the parties.
13. The 1st Respondent believes otherwise.
14. It is this Court's duty to re-evaluate and re assess the evidence that was tendered by the parties so as to generate a finding in exercise of its discretion to allow or to disallow the appeal.
15. The first witness testified that the child died on 22nd July 2016 as a result of electrocution by an electrical wire while playing in the 2nd Respondent's premises being block number 78 in Kamiti.
16. She confirms that she went to the scene of the accident on being informed that the child had touched a meter box that was attached to the second respondent's fence. She blames Kenya Power for not monitoring the voltage of the power in the premises. She confirms that her child was 16 years old at the time of the accident and she was at home when it happened.
17. During the cross examination, she confirmed that the premises where the incident took place belonged to the 2nd defendant. Further that the Appellant came the following morning, disconnected power. The Appellant did not monitor the power connection in the said plot. The 1st Respondent also testified that the 2nd Defendant would have known that the illegal connection was dangerous.
18. The 2nd witness confirmed that the incident took place on 22nd July 2016 and that before being electrocuted the child was running through the corridor path when he accidentally touched the wire that was connected to the power.
19. One Michael who was the one had allegedly connected the power illegally fled the scene after the incident had occurred.

Defence

20. The police officer during cross-examination confirmed that the property where the incident took place belonged to the 2nd Respondent.



21. The first defence witness confirmed that the deceased, came into contact with a live wire. He further confirmed that the upper lines, connects electricity to the residence premises up to the meter box for domestic use, as was the case in the instant appeal. His only problem seems to be the illegal connection that was extended by the 2nd Respondent's agent. He further testified during chief examination that the child, came into contact with the wire connection and not cable connection. He went on to produce the report dated 1st August 2016 as evidence.
22. The witness confirms that if one came into contact with electricity, it would kill. He further confirmed that he visited the scene where a wire connected up to a nail, which would be hooked to the box meter box existed. He talked of tapping. He finally sees that the child was not to be blamed, and that the meter box was exposed. This witness confirms again that he visited the scene and even talked to neighbours of the premises where the incident took place.
23. The analysis of the evidence of this witness generates a conclusion that Kenya power was the soul, custodian and supplier of electricity in the area. It's for the generator, conclusion that there was an incident that took place is set out in the pleadings. Father confirms that there was a victim was the child in issue.
24. The evidence generates a conclusion that the child died as a result of the electrocution. The witness confirms that there was electricity supplied to the said premises. Ultimately, the witness does not blame the child for the accident. The question then is who is liable for the accident? The Appellant is a statutory body that regulates electricity in the country as a monopolist, strict liability months at all times on car in the status of a monopolist who supplies is a custodian of a dangerous service like electricity. It is my conclusion that the trial Court must not be faulted for finding the fact of the land, jointly and severally liable with their 2nd Respondent for the accident. I find that the appeal on the issue of liability cannot succeed in the circumstances.
25. In her testimony, the 2nd Respondent confirms that, it was her premises, and that she got communication that the incident had taken place and confirms that she owned the plot where she earned rent from a tenant known as Lucy.
26. She further confirmed that Michael Wangui who was Lucy Wangui's son had made some illegal power connections on the premises.
27. Lucy who is the third witness confirmed that on that date, 22nd of July 2016 she was at home and that she heard a noise from a child that had been electrocuted.
28. This witness also confirmed that in deed, an accident being of electrocution took place involving a child on the material day at the suit premises.

A. Liability:

29. The Plaintiff submits that the keeping of electricity in the suit premises constitutes a non-natural user of land on the part of the 1st Defendant a monopolist. The 1st Defendant is liable to the Plaintiff for the escape of the electricity being a dangerous thing.
30. The Defendant failed to ensure that electricity would not escape from the transformer or electric mains and in this way. The Defendant created and maintained a public nuisance which caused injuries to the Plaintiff as a result of negligence on its part.
31. It is not in dispute that there were live electricity cables in the suit premises at the date of the accident.



32. The Appellant connected electricity into the suit premises knowing very well that electricity has the ability of escaping and causing damage to the Deceased which ultimately happened. The escape caused the electrocution of the Deceased.
33. The Appellant failed to maintain its electrical supply lines in a good state of repair, ensure that its electrical lines were properly fixed or fastened, ensure that the electricity supply lines would not expose the Deceased to danger.
34. The Appellant failed to repair, remove or in any other way terminate the danger in the live wire thereby causing the harm. This omissions/carelessness/negligence outrightly occasioned the fatal injuries to the deceased.
35. The Appellant is the SOLE distributor and transmitter of electrical energy in Kenya under The [Energy Act](#). The Appellant has an obligation to exercise due diligence in ensuring that distribution and transmission of electrical energy is done in the prescribed manner and in safe measures. It owed the Plaintiff a duty of care in ensuring that all transmission grids and electrical supply lines were in good condition so as not to cause danger at all times.
36. The Respondent's case was based on the Tort of Negligence as set out in the principles that were developed in the case of *Stevenson Vs Donoghue*. The Appellant is under strict liability on an owner of a land for damage caused by the escape of substances to his neighbor's land. In this case, the courts held that a person who collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril and, if he does not do so, he is prima facie answerable for all the damage caused by the natural consequence of its escape. The courts further held that in considering whether a Defendant is liable to a Plaintiff for the damage which the Plaintiff may have sustained, the question in general is not whether the Defendant has acted with due care and caution but whether his acts have occasioned the damage.
37. In the case of *Joseph Kiptonui Koskei vs. KPLC Co. Ltd* [2010] eKLR, Makhandia J (as he then was) at "Page 3" held that the defendant Kenya Power Lighting Company owed the plaintiff and every Kenyan a duty of care where it happens to have power lines and further that electric power is a dangerous commodity and if not properly secured can be a danger to society.
38. Subsequently, in *Kenya Power and Lighting Company v Joseph Khaemba Njoria* [2005] eKLR GBN Kariuki J (as he then was) at "Page 2" held that the power company has the responsibility to ensure that the power infrastructure it has installed in the country for the purposes of electrification is properly maintained to prevent accidents.
39. In *Kenya Power & Lighting Limited v Stella Mgeni* [2018] eKLR at "Page 3" Honorable P. J. Otieno stated that it is the responsibility of the Kenya Power and Lighting Company as far as duty to maintain electric supply lines is a matter of statutory obligation under the [Energy Act](#) which requires KPLC as a licensee to maintain and keep maintained the electric supply lines and nothing in the Act releases the licensee of any liability to an owner or occupier of land arising out of a defect to the electric line.
40. In the case of *David M. Ndeti v Orbit Chemical Industries Limited* [2014] eKLR, the court held that the prerequisites of a strict liability claim are that the defendant made a non-natural or special use of his land. That the defendant brought onto his land something that was likely to do mischief if it escaped. The substance in question escaped and it caused damage.
41. In the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR at "Para. 12" Mulwa J held that, all electrical installations are the mandate of the Kenya Power and Lighting Company Limited which has a duty to ensure that the electrical installations are



- done by its qualified staff and in the manner specified in the Electric Power Act Cap 314 and the Rules thereunder.
42. Kenya Power and Lighting Company is the only entity mandated to install, supervise, inspect and maintain electric installations. Evidence tendered that live wires were left uncoated and hanging and were being used to hang clothes by the deceased and other persons in the plot. The duty for constant checks, inspections and maintenance of electrical installations is placed upon the appellant by statute.
 43. Its failure to do so and its employees' admission that there was a leakage from the wires that caused the electrocution, having not been challenged then leaves me to come to the same conclusion that the appellant failed to maintain, inspect and supervise electric installations into the plot leading to the deceased's death. See Section 63, and 109 of the Electric Power Act, Cap 314.
 44. In Kenya Power & Lighting Company Limited & another v Denis Kabuna Nyatundo [2020] eKLR at "Para. 9", the case of Joseph Kiptonui Kosgei v KPLC Ltd is quoted whereby it was held that Kenya Power and Lighting Company owed the plaintiff and indeed every Kenyan a duty of care whenever it happens to have power lines, the court added that electric power is a dangerous commodity which if not properly secured can be a danger to society.
 45. In Kenya Power & Lighting Co. Ltd v Umaz Ali Swaleh [2017] eKLR "Para. 18 & 21", the court was of the 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.
 46. In Joseph Wang'ethe v Ew [2019] eKLR the trial court guided by the evidence tendered was of the finding that the Kenya Power and Lighting Company has a primary duty of care with regard to all electric power installation as supplier of all electric energy in Kenya, and therefore, it had the responsibility to ensure that the power infrastructure installed for purposes of electrification is properly maintained to prevent accidents and also to take remedial measures where there is a high risk of injury or damage.
 47. In addition, the learned Judge found that the 1st appellant owed a higher duty of care to the occupiers of house No. A3225 and all other residents in the vicinity to ensure that high voltage wires were not precariously displayed next to buildings and that the 1st appellant was in breach of this duty of care.
 48. In the case of Kenya Power & Lighting Co Ltd V Flavian Mbugua (suing his mother& next friend) & another [2012] eKLR "Page 2", the appeal was lodged against the decision of the trial court for holding that the Appellant, was solely to blame for the accident that led to the Respondent's injuries, pain and suffering.
 49. The court properly observed that the appellant installed the power line and was under a legal and statutory obligation to install the same at a safe distance from the premises. He also observed that even when the 2nd Defendant applied for re-location and paid for it, the appellant deliberately failed to act until the plaintiff was injured when it then acted fast to do the re-location. The appellate court upheld the decision of the trial court and held that the act of negligence at the time the accident took place lay solely at the door of the appellant.
 50. In the Indian case of Arulmeri vs The Superintendent Engineer the facts were that on 9th October, 2012 the petitioner's husband was returning home from work when an electric overhead wire fell on him resulting to death from electrocution as indicated by the post- mortem report. It was the Petitioner's case that at the time of the accident, the deceased was aged 29 years and earned Rs. 7000 per month and she was wholly dependent on him together with their two-and-a-half-year-old child. As a result, she filed a petition seeking compensation.



51. It was the court's contention that the petitioner's husband had not committed any act, contrary to law or the provisions of the Electricity Act, as the death had occurred due to the fall of electric wire, whether it is due to unprecedented rain or Act of God, there was no need for the petitioner to go before the Civil Court and establish the cause of the death or negligence.
52. Certainly, the death had not occurred due to the negligence of the petitioner, on the contrary, indisputably, due to the fall of the electric wire, the accident had occurred. Therefore, the Court had no hesitation to hold that the officials of the Board were negligent in properly maintaining the electric wires. Even, according to them, the electric lines were mutilated.
53. From the foregoing analysis of the evidence as guided by the principles as enunciated in the above cases, I hereby find that the 1st Respondent proved her case on a balance of probabilities. It must be noted that being a statutory monopoly comes with the strict liability tag. The monopolist is and at all times under a duty to protect the consumers of this scarce service and they cannot blame its customers for accidents that are occasioned by illegal connections. This is so for the Appellant who has caused death through negligence.
54. The Appellant raised a new ground in its Supplementary Submissions filed on 14th December 2022 and is in particular concerned that the trial court found the 2nd Respondent liable with the Appellant.
55. I find no problem with that holding given that the 2nd Respondent was sued alongside the Appellant, the 2nd Respondent participated in the suit by filing a Defence and by testifying. The reliefs sought were for judgment to be entered. The court in its wisdom entered judgment against the Defendants jointly and severally.
56. To me this was the appropriate thing to do where the court was faced with such a scenario.
57. I find no justification to overturn the trial court's finding on liability.

Quantum of general damages.

58. The Appellant has concerns with the amount awarded as compensation. It feels that the sum of Kshs.2,000,000/= is excessive.
59. The court will not interfere with the amount awarded as general damages unless it is proven that the amount was inordinately high or low.
60. I am guided by the authority of Mbogo v Shah [1968] EA 93 and Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013]. I have looked at the authorities relied upon by the Respondent and the Appellant in their respective submissions.
61. The authorities referred to by the Respondent are for young children. I have compared the age of the Deceased in this appeal with the age of the children in the authorities referred to by the Respondent and I come to a conclusion that they bear similarities.
62. I am also guided by the age of the authorities and the effect of inflation on the Shilling in arriving at a conclusion that the amount awarded by the trial court is a reasonable amount and I have no reason to interfere with the same.
63. I am persuaded that the Respondent pleaded and specifically proved the special damages through the receipts that she produced for Kshs.47,800/=.
64. I uphold the trial court's finding on the special damages claim.



Order

65. The Appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT KIAMBU THIS 8TH DAY OF MARCH, 2023.

J. CHIGITI (SC)

JUDGE

In the Presence of;

For Applicant:

For 1st Respondent

For 1st Respondent

C/A

