



Kenya Power and Lighting Company Limited v Naziali (S/A the administrator of the Estate of Rodah Musimbi (Deceased)) (Civil Appeal 55 of 2019) [2023] KEHC 17725 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 55 OF 2019
RN NYAKUNDI, J
MAY 17, 2023**

BETWEEN

KENYA POWER AND LIGHTING COMPANY LIMITED APPELLANT

AND

BEATRICE IMALI NAZIALI RESPONDENT

**S/A THE ADMINISTRATOR OF THE ESTATE OF RODAH MUSIMBI
(DECEASED)**

((Being an Appeal from the Judgment and Decree of the Honourable Senior Resident Magistrate S. Telewa delivered on 21/12/2018 in Eldoret CMCC No 939 of 2016))

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Mose, Mose & Mose Advocates

Mwinamo Lugonzo & Co. Advocates

1. The Respondent instituted the parent suit vide a Complaint dated 25th August, 2016 claiming for General Damages under the *Fatal Accidents Act* for the benefit of the deceased's dependants and General damages under the *Law Reform Act*, special damages of Kshs 14,200, costs of the suit and interest.
2. The cause of action was that that the deceased was lawfully engaged upon her duties at Langas Estate when owing to the negligence, breach of contract and or statutory duty of care on the part of the Appellant, its servants, employees and or agents the deceased was electrocuted and died thereafter as a result of the electrocution.



2. The appellant opposed the claim and filed a defence dated 11th October 2016. The matter proceeded for hearing with the Respondent availing One witnesses and the Appellant did not avail any witness and or evidence on their part. Judgement was delivered on 21st December, 2018 in favour of the Respondent in the following terms:-
 - (a) Liability 100% in favour of the Respondent against the Appellant.
 - (b) Loss of Expectation of Life - Kshs 100,000
 - (c) Pain and Suffering - Kshs 100,000
 - (d) Damages under the *Fatal Accidents Act* - Kshs 1,500,000
 - (e) Costs and Interest.
3. The Appellant being dissatisfied with the Judgement filed the appeal vide a Memorandum of appeal dated 30th April, 2019. The grounds of appeal are as follows;

Appellant's Case

4. The appellant filed submissions on 28th July 2022. Learned counsel for the appellant submitted that there is no evidence that was presented before court that shows the omissions and commissions on the part of the Appellant leading to the suit accident. It was the duties of the Plaintiff/Respondent to give evidence and to show how the Appellant had failed to discharge its duty of care hence the particulars of negligence. The Respondent under paragraph 4 of the Plaint particularized 4 elements of negligence to wit:
 1. Making electrical connections that were dangerous and/or that exposed the deceased to danger.
 2. Exposing the deceased to risk of danger
 3. Failing to maintain electrical lines so as to avoid the deceased being electrocuted
 4. Being careless, reckless and negligent in the manner and style of making its electrical connection.
5. The appellant submitted that it is not in doubt that the deceased died while switching off a water heater, PEXH4, Death Certificate clearly shows that the deceased died of electrocution caused by a faulty water heater. The question the trial court ought to have determined is whose responsibility was that connection of water heater to the electric socket? Had the court made that determination then her finding would have been different. In failing to establish responsibility of parties, the magistrate committed an error hence erroneous determination.
6. The appellant's case is that they are responsible and only liable for faults and damage caused up to the terminal point, in this case up to the metering box as was held by Pearson J. in *Sellers v. Best* [1954] 2 All E.R. 389 at p. 394, Cited by the Honourable Judge with approval in the case of *Jeremiah Maina Kagema Vs Kenya Power & Lighting CO LTD* [2001] eKLR.



7. As to determine where or what amounts to Terminal Point, the Appellants brings to the attention of the court the relevant definitions under the ENERGY ACT, 2019 Section 2 of The Energy Act, 2019 defines supply terminals as:

“Supply terminals” means the ends of the electric supply lines upon any consumer’s premises at which the supply of electrical energy is delivered from the service line of the licensee, and is situated

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- (a) in any case where the supply of electrical energy is measured by a meter, at the point at which the conductor from the service line enters the meter, or, in respect of a conductor from the service line which does not pass through the meter, the point on such conductor nearest to the meter,
 - (b) in any other case, at the point at which the conductor from the service line enters the consumer’s main switch, or, if there is more than one main switch, that main switch on the consumer’s premises which is nearest to the source of supply; or
 - (c) in any case in which the supply of electrical energy is made to a public lamp, at the point of attachment to the distributing main of the electric supply line serving such public lamp,
8. It was evident that the power was switched off from the main switch a clear indication that the fault was not on the service line and hence the Appellant could not be held liable for such faults occasioned by the Consumer beyond the terminal point, in this case beyond the main switch as per the definition under paragraph (B) above.
9. On pain and suffering the appellant submitted that it was evident that the deceased died instantly and its body removed by the police and taken to mortuary. The Appellant at the trial submitted an award of Kshs. 10,000/= would suffice relying on *Chean Kiriti Modi and Another vs. Catherine Wanjiru Gikaru* while the Respondent prayed for Kshs 100,000/= relying on *Mombasa 16RD OF 1997 MW Alla Mwagongo Vs Kenya Post And Telcom*. The trial magistrate without reason awarded Kshs. 100,000/= a clear indication that no regard was given to the evidence that the deceased did not suffer prolonged pain and to the Appellant’s submissions and Authority therein. The Authority cited by the Plaintiff is distinguishable in terms of period the deceased endured paid before succumbing. The Respondent in that case died after battling the injuries in hospital for over 2 months.
10. On loss of dependency the appellant submitted that the trial magistrate without reason awarded Kshs. 100,000/= a clear indication that no regard was given to the evidence that the deceased did not suffer prolonged pain and to the Appellant’s submissions and Authority therein. The Authority cited by the Plaintiff is distinguishable in terms of period the deceased endured paid before succumbing. The Respondent in that case died after battling the injuries in hospital for over 2 months. Citing the case of *Nairobi Hcc No. 1525 of 2002 Mohamed A. Adi & Other vs. Wilson W. Waruta* where the court awarded Kshs. 720,000/= for a deceased minor aged 10 years the appellant submitted that the trial courts’ award was inordinately high. The jurisprudence in comparable circumstances presents awards between Kshs. 120,000 and 800,000/= for instance:



- 1) Nairobi HCC No. 1525 OF 2002 Mohamed A. Adi & Other vs. Wilson W. Waruta where the court awarded Kshs. 720,000/= for a 10-year-old.
 - 2) Oyugi Judith and Another Vs. Fredrick Odhiambo Ongong & 3 Others (2014) eKLR where an award of Kshs. 120,000/=
 - 3) Nairobi Civil Appeal No. 275 OF 2014 Kenya Power & Lighting Company Limited Vs Ma (Suing as the Legal Representative of So-deceased) where in 2019 the court awarded Kshs. 400,000/= for a 12-year-old.
 - 4) Emmanuel Wasike Wabukesa suing for BWW a Minor Deceased v Munena Ndiwa Durman C.A. Eldoret C.A. No. 10 of 2017 [2019] e KLR where the High court set aside an award of loss of dependency of Kshs. 1,260,000 and substituted it with a global award of KShs.200,000/=.
11. The appellant urged the court to dismiss the appeal with costs to the appellant.

Respondent's Case

12. The respondent filed submissions on 4th March 2022. Learned counsel submitted that the evidence of the deceased's administrator was key to determining the issue of liability in this matter. The said evidence is found at page 66 - 67 of the Record of Appeal. From the evidence of the administrator it is evident that the deceased was electrocuted after she went to put off a water heater. The result of the electrocution was due to a power upsurge which used to be on and off. The Appellant having supplied power to the Respondent it was incumbent upon them to ensure that there was no fluctuation in power and that it was well regulated to the required level and standards. The administrator reiterated that the power was not constant hence the electrocution. The Power supply was put off from the main switch as it was in excess and it was the up surging that caused the electrocution. This is a case of strict liability and the deceased was in no way to blame for the accident. It was the duty of the Defendant to regulate the amount of power supply so that it was within the limits so as not to cause the electrocution. The electricity was at high levels which in turn led to the electrocution of the deceased minor. The Appellant by allowing the upsurge of high voltage of power exposed the deceased to risk of damage and or injury. The Appellant did not call any evidence to counter the testimony of the Respondent which remained unchallenged and or uncontroverted. In the absence of any contrary evidence the trial magistrate was right and proper in finding the Appellant 100% liable for the accident.
13. The trial magistrate finding on liability was supported by the evidence of the Respondent which wholly supported the conclusion reached by the trial magistrate with regard on who is to blame for the accident. The Respondent did establish liability as against the Appellant specifically by the cogent evidence tendered.
14. The trial court's finding on quantum is not inordinately too low or so high so as to amount to a wholly erroneous estimate and the Appellate court should not therefore disturb this award. The trial magistrate followed the proper principles in making the award.
15. On loss of dependency, the respondent submitted that the deceased died aged 11 years of age and was in superb health. The deceased was in good health with a promising future. The deceased was a student in primary school. By reason of his untimely death the deceased's life was shortened and his estate has suffered loss and damage. The deceased had a promising future.



The award of Kshs 1,500,000 made by the court sufficed as just and adequate compensation to the deceased.

16. On loss of expectation of life, the respondent submitted that considering her age, the deceased had high prospects of staying longer in this world. The sum of Kshs 100,000 as awarded by the court sufficed under this head of damages. In Mombasa HCCC NO. 229 OF 1998 Jane A. Odhiambo Vs Kinyanjui M. Munui & Anor the court awarded the minor a sum of Kshs 100,000 as damages for loss of Expectation of life.
17. On pain and suffering the respondent submitted that the deceased suffered a lot of pain and suffering before her death. The court made an award of Kshs 100,000. The same was reasonable and ought not to be disturbed.
18. On special damages the respondent urged the court to take judicial notice that people do not usually keep receipts and award a reasonable amount towards funeral expenses. The court however awarded the sum of Kshs14,200 that was specifically pleaded and was proved by way of receipts. There is no reason as to why the award on special damages ought to be disturbed.
19. The respondent urged the appeal be dismissed with costs to the respondent.

Analysis and Determination

20. This being an appellate court, the following authority is to be considered when the court is making its decision; In *Selle Versus Associated Motor Boat Company Ltd* (1968) E.A 123 the court held:-

“The appellant court is not necessarily bound to accept or follow the trial court’s findings on fact if it appears either the court failed to take into account particular pertinent circumstances or if the impression based upon the demeanour or witnesses is consistent with the evidence adduced.”

The following issues arise for determination;

1. Whether the trial court erred in its findings on liability
2. Whether the damages awarded were erroneously high

Whether the trial court erred in its findings on liability

21. In order to establish negligence, he who alleges the same must prove.

Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

22. I have perused the judgement of the trial court and the learned trial magistrates’ reason for apportioning liability as against the appellant was based on non-attendance to defend the suit on their part. It is my considered view that this was a material error in law and in principle on the part of the trial court. The failure of a party to attend court to defend a matter does not automatically render the claim as proved. The court must interrogate the evidence and make a finding as to whether it establishes negligence on the part of the defendant. Otherwise, there would be a flood of claims where parties are adjudged negligent on the basis of unproved claims. The standard of proof in civil cases exists for a purpose and not for mere academic



reasons. I am guided by the Court of Appeal Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR which espouses the correct legal position that:

It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.” (emphasis mine)

23. It therefore follows that the trial magistrate erred in law in failing to analyse the evidence sufficiently to determine liability.

Whether the appellant was liable

24. The claim was for death that was allegedly caused due to the negligence of the appellant. In Regina Wangeci v Eldoret Express Co. Ltd [2008] eKLR the court held that:

In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts, which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference.”

25. It follows that the concept of a duty of care has a correlation with the concept on proximate cause as explained in *Anns vs Merton London Browngh Council* [1977] AC in which the court observed that;

Proximity simply means that the parties must be sufficiently close, so that it is reasonably foreseeable that one party's negligence would cause loss or damage to the other. Fairness means that it is fair, just and reasonable for one party to owe the duty to another.”

26. It is always a tragedy when a life is lost, more so such a young life as in this matter. However, liability is proved by way of evidence and therefore the trial court had a duty to assess the evidence of the respondent and determine whether the appellant was liable for the death of the deceased. I have considered the evidence tabled by the respondent in the trial court, especially with regard to the death of the minor as against the defence of the appellant and there was no inspection report or expert evidence by the plaintiff to determine whether the immersion heater was faulty or that it was the wiring that caused her electrocution. It is my considered view that the respondent did not prove the proximity of the death of the minor to the appellant.
27. Even at the level of an Appeals court the formulated elements of negligence must not only be seen be satisfied but also proven on a balance of probabilities. The four key elements comprise the following, (a) Duty of care (b) Breach of that duty (c) Causation in fact (d) Proximate cause & finally suffered harm. These foundational elements of a negligence claim provides the front door to recovery of damages in the law of torts. It is trite that before tort negligence



assigns responsibility to a Defendant for a plaintiff's harm it demands that the plaintiff that establishes a cause-and – effect relationship between the Acts of negligence complained off and the injury inflicted. It also follows that the evidence by the Plaintiff must demonstrate and address proximate cause of the injury, damage, or harm. Here is a question of whether in logic, fairness, policy, and practicality the Defendant ought to be held legally accountable for the Plaintiff's harm and loss. Whether there were such intervening factors to exonerate the Defendant a role matter of evidence.

28. At the close of evidence proffered by the Respondent, the facts to be proven in consonant with the element of negligence do not concur to support this action against the Appellant. The appellant's witness failed to appear in court to testify on the investigations he conducted after the incident and failed to produce the investigation report as evidence. That notwithstanding, the evidence of the respondent was not sufficient to establish the liability of the appellant. Consequently, the findings on quantum are set aside as liability on the part of the appellant was not established to the required standard.
29. In the premises, the appeal succeeds in its entirety. I hereby set aside the judgement and decree of the trial court with costs to the appellant.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 17TH DAY OF MAY 2023

In the Presence of

M/s Jemeli for Mwinamo Advocate for the Respondent

Mr. Kurgat for the Appellant

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R. NYAKUNDI

JUDGE

