



Kenya Power and Lighting Company Limited v Okumu & another (Civil Appeal E001 of 2023) [2023] KEHC 23399 (KLR) (13 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E001 OF 2023
WM MUSYOKA, J
OCTOBER 13, 2023**

BETWEEN

KENYA POWER AND LIGHTING COMPANY LIMITED APPELLANT

AND

JOHN OUMA OKUMU 1ST RESPONDENT

ZULUFA KADOGO RINGO 2ND RESPONDENT

(An appeal arising from the judgment of Hon. EC Serem, Senior Resident Magistrate, SRM, delivered on 5th December 2022, in Busia SRMCCC No. E417 of 2021)

JUDGMENT

1. The suit, at the primary court, was initiated by the respondents against the appellant, for compensation, by way of damages, arising from a fire caused by a faulty electricity pole, where they prayed for general damages, special damages, and costs. The respondents operated business on premises standing on a plot within Bumala market, when on April 28, 2021, during a downpour, a faulty electricity pole outside their premises caused a fire, which reduced their businesses premises into rubble, completely consuming everything that was inside. They attributed their loss to negligence on the part of the appellant. The appellant filed a defence, in which it denied liability. In the alternative, it attributed the incident to the sole negligence of the respondents.
2. A trial was conducted. Both respondents testified. The appellant called 1 witness, one of its officers. A judgment was delivered on December 5, 2022. Liability was assessed at 90:10 in favour of the respondents. General damages, for negligence, were awarded at Kshs. 1,500,000.00 less contribution; and Kshs. 113,000.00 special damages.
3. The appellant was aggrieved, hence the instant appeal. In the memorandum of appeal, dated December 29, 2022, it avers that the appellant was held liable without supporting evidence; the respondents did not prove their case on a balance of probability; the court failed to find that the cause of the fire was



the lightning and not negligence on the part of the appellant; the finding on liability was contrary to the evidence on record; general damages were awarded without any basis; the general damages awarded were excessive; and wrong principles were applied in the assessment of the general damages.

4. No directions were given, for disposal of the appeal by way of written submissions. Both sides, nevertheless, filed written submissions. The appellant has submitted on liability and quantum, and has cited several judicial authorities to support its case. The respondents urge that the awards by the trial court be upheld.
5. On liability, the trial court concluded that the respondents failed to prove negligence on the part of the appellant, and agreed with the appellant that the cause of the fire was lightning, as the respondents had not installed lightning arrestors. However, negligence was subsequently attributed to the appellant for connecting power to the premises before ascertaining that lightning arrestors were installed. I am persuaded that the trial court was inconsistent on its findings on liability. Having found that the respondents, who were the plaintiffs, had failed to prove liability, there was no basis, thereafter, for the trial court to turn around and attribute negligence on the appellant based on something that the its witness had said in defence. The evidential burden was on the respondents to prove the allegations made in their plaint. That burden would only shift to the appellant once the respondents establish a case on preponderance of the evidence. A finding that the respondents did not prove their case, meant that the burden of proof had not shifted, and negligence on the part of the appellant could not then be extracted from whatever the witnesses of the appellant might have said thereafter. The case for the respondents died, after they failed to prove the allegations made in their plaint, and the trial court ought not to have sought material from the appellant's case to revive and sustain the dead case for the respondents. Whatever statements were made by the appellant were in defence, not in prosecution of the respondents case. Having dismissed the respondents case, the trial court could not use defence statements to shore up the otherwise disabled case for the respondents.
6. For avoidance of doubt, this is what the trial court concluded on the evidence on liability as presented by the respondents:

“b) Liability

Notably, both parties were in agreement that the subject premises were destroyed by a fire on April 28, 2021. And everything therein was destroyed. The main issue is who is liable. The Plaintiffs case is that the fire broke out because of a faulty electricity pole. That the Defendant was negligent in failing to, among others, install an earth wire on the electric pole, failing to inform the Plaintiff of the impending danger in case of rainy conditions or bad weather and failing to ensure the safety of the Plaintiffs property by discharging their statutory duty. The Plaintiffs did not prove this fact. It was claimed that it was the Defendant's staff that came to assess the damage and that they acknowledged that it was as a result of their failure but no evidence to that effect was produced in court.”

7. The effect of these findings is that the respondents had not proved their case. The case for the respondents was founded on the particulars of negligence set out in their plaint. The conclusion by the trial court, at the end of the trial, was that the respondents did not prove those particulars of negligence, and had not established their case against the appellant.



8. The conclusions, in the analysis of the evidence of the appellant, with respect to liability, goes as follows:

“The defence on the other hand claim that the fire incident was caused by a lightning, which was an act of God and its occurrence was beyond human control. Further that the Plaintiffs were to blame for failing to install lightning arrestor(s) in the subject premises.

Thus, the Court is inclined to go by the evidence of the Defendant’s witness (DW1), that the root cause of the fire was lightening that caused a power surge and that lightning struck the subject premises because the owner did not fit the building with a lightning arrestor.”

9. The trial court is then concluding that the cause of the fire had nothing to do with what was alleged in the plaint, a faulty electricity pole. The cause was lightning, due to lack of lightning arrestors, which should have been fitted by the respondents. That suggested that the appellant had been cleared of fault.

10. However, the trial court went on to state:

“Taking this as the true position, the question then is, who is to blame? The Defendant alleges that it was the owner’s responsibility to install the arrestors and to do proper wiring. However, DW1 agreed that before connecting any premises with electricity, Defendant’s staff should ensure that proper wiring is done and that installation of lightning arrestors was one of the wiring requirements.

Thus, it is my considered view that if it is true that the subject premises did not have lightning arrestor and that the lack of it caused the fire, then the Defendant cannot run away from its responsibility. Had it checked the subject premises, it could have noted that lightning arrestor was missing and thus, advise the Plaintiffs to ensure that the same is fixed before connecting electricity to the subject premises. I say so taking into account that most of its customers are not well versed with matters electricity, unlike the defendant’s staff. Connecting electricity to premises which lack all the essentials of wiring was an oversight on the defendant’s part.

11. In the end, the appellant was held liable, in negligence, in failing to advise the respondents to install lightning arrestors, or for installing electricity before installation of such arrestors. Was there basis for this conclusion? I do not think there was. In the first place, the issue of lightning arrestors was not pleaded, not in the plaint, not in the defence statement. It came up during the oral hearing. Parties are bound by their pleadings. The issues for determination are those that emerge from the pleadings, and new issues ought not be drawn from the oral testimonies, or the witness statements, for witness statements are not pleadings. Secondly, the trial court did not have any evidence before it, to effect that installation of lightning arrestors was one of the wiring requirements. No authority was cited for this, from statute, case law or some policy document. There was no basis for pinning blame on the appellant for the failure by the respondents to install electricity arrestors.

12. The trial court attributed the requirement and responsibility to have the arrestors in place on the part of the appellant, on the basis of what DW1 had allegedly informed the court. It noted “However, DW1 agreed that before connecting any premises with electricity, Defendant’s staff should ensure that proper wiring is done and that installation of lightning arrestors was one of the wiring requirements.” I have looked that the witness statement filed in the trial record, and attributed to DW1, and noted that he did not make a statement to that effect in that witness statement. I note, though, that DW1, at re-examination, remarked that fitting lightning arrestors was part of proper wiring, but that of itself was not sufficient for the trial court to clutch on to hold the appellant liable, after it had already concluded that the respondents had failed to prove their case against the appellant.



13. The respondents did not prove the case set out in their pleadings, and the trial court ought to have dismissed their plaint. With the dismissal of that plaint, there would have been no basis to make awards for damages.
14. In the end, I hold and find that the appeal herein does have merit. I allow it, with the consequence that the final order in the judgment in Busia SRMCCC No. E417 of 2021, of December 5, 2022, finding the appellant largely to blame for the loss suffered by the respondents and awarding damages against it, is hereby substituted with an order dismissing the said suit in its entirety. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 13TH DAY OF OCTOBER 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Chumba, instructed by Kitiwa & Company, Advocates for the appellant.

Mr. Nyengeny, instructed by Calistus & Company, Advocates for the respondents.

