



**Mwagafwa v Kenya Power & Lighting Company Ltd (Civil Appeal
E052 of 2022) [2023] KEHC 23281 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E052 OF 2022
GMA DULU, J
OCTOBER 6, 2023**

BETWEEN

EPHRAHIM MUGHADI MWAGAFWA APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LTD RESPONDENT

*(From the judgment delivered by Hon. D. Wangeci (PM) at Wundanyi
Law Court on 3rd October 2022 in Civil Case No. E002 of 2021)*

JUDGMENT

1. In a judgment delivered on 3rd October 2022, the Magistrate's court at Wundanyi dismissed the suit of the appellant, who was the plaintiff with costs, on the grounds that the plaintiff did not discharge the burden of proving the case on the balance of probabilities.
2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the following grounds:
 1. That learned Magistrate erred in law and in fact by delivering a judgment in total disregard of provisions of the law relating to liability of the respondent.
 2. That the learned trial Magistrate erred in law and in fact and misdirected herself by failing to consider at all the submissions made before her by the plaintiff and reached an erroneous conclusion thereby occasioning a miscarriage of justice.
 3. The learned trial Magistrate erred in law and facts by failing to appreciate and consider the evidence before her and finding that the plaintiff had not proved liability against the defendant.
 4. The learned trial Magistrate erred in law and in fact in holding that the accident was not attributed to an electrical fault on the part of the defendant.



5. The learned trial Magistrate erred in both law and in fact in deciding the case against the weight of the evidence and in further dismissing the appellant's suit in the court below for want of sufficient evidence.
6. The learned trial Magistrate erred in law and in fact in failing to hold that the defendant was wholly liable for the loss that was suffered by the plaintiff.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by S. M. Righa & Company Advocates for the appellant as well as the submissions filed by Mogaka Omwenga & Mabeya for the respondent. Both sides relied on decided court cases.
4. This being a first appeal, I have a duty to re-evaluate and reconsider all the evidence on record and come to my own conclusions and inferences – see *Selle v Associated Boat Company Ltd* (1968) EA 123.
5. This being an appeal on the finding of the trial Magistrate on proof of liability, I have to bear in mind the requirements of Section 107 of the *Evidence Act* (Cap.80), that the burden was on the plaintiff (now appellant) to prove his claim of negligence against the respondent. This being a civil case, the standard of proof was on the balance of probabilities.
6. At the trial, the appellant called two witnesses PW1 Robert Ochieng an insurance loss adjuster, who assessed the value of the fire damage. He stated that the suspected cause of fire was electric cable. He was cross-examined.
7. PW2 was Ephraim Mughadi Mwagafwa, the appellant and owner of the damaged house, who stated that an electric meter belonging to the respondent was installed in his premises and electricity supplied by the respondent. He described how the fire incident occurred, and was cross-examined at length. He said that he used a private electrician to do the house wiring.
8. The respondent called DW1 Kingai Muruga an Assistant Engineer working for the respondent. It was his evidence that he visited the subject premises, and filed a report that the meter box, cut out breaker were intact, thus power supply and customer network was intact. However, he was stood down for testifying to things that were not in his report.
9. DW2 was Elisha Mwakom a technician/driver working for the respondent, who stated that he visited the scene with the engineer (DW1).
10. DW3 was Ambrose Mwakesi Mwamachi an employee of the respondent, who in cross-examination stated that the respondent is the monopoly supplier of metered electricity. He stated that he was a driver.
11. I have to point out that DW1 was recalled and cross-examined at length. He stated that he did not establish the cause of the fire, though there must have been a cause. He maintained that the fire was not attributed to the respondent.
12. In determining the issue of proof of negligence or liability, the trial Magistrate cited a number of cases including *Mary Ayo Wanyama & 2 Others v Nairobi City Council* – Civil Appeal No. 252 of 1998.
13. The trial Magistrate considered that because the cut out breaker was intact, as well as the meter box, then no liability can attach on the respondent, who is a monopoly power supplier.
14. In my view, the trial Magistrate erred in her determination or interpretation of the facts and evidence. Firstly, the burden on the appellant was to establish on the balance of probabilities that the fire was more likely than not caused by an electric fault. In my view the appellant did so because it was not



- disputed that the respondent was the monopoly supplier of electric power, and the loss adjusted specifically referred to electric cable as cause of the fire.
15. Secondly, once proof on balance of probabilities was done by the appellant, as happened in this case, the evidential burden shifted to the respondent to show that as a monopoly power supplier, they were not to blame. In this regard, I rely on the case of *Jeremiah Maina Kangema v KPLC Ltd* (2001) eKLR, and *Seasons Restaurants & Hotels Ltd v KPLC Ltd* (2017) eKLR. Thus by DW1 merely evading the issue of cause of the fire by stating that he did not find out the cause of the fire did not exonerate the respondent from liability under Section 12 of the *Electric Lines Act*.
 16. In my view, even assuming that the meter box and cut out point were intact, as that is not the point where the power supply stops, and electricity power could still cause damage beyond that point due to power fluctuations, which the appellant was not in control of, the respondent's failure to address this probability of power fluctuations which is in the public domain, did not remove liability from them.
 17. Thirdly, the appellants witness DW1 being an expert in his own right, could not claim that his employer was not negligent by merely saying that he did not try to establish the cause of fire, as there is no denial that electricity was supplied right into the house for use solely by the respondent. In so doing, this witness showed that his employer the respondent, as monopoly metered power supplier in Kenya, took this matter casually, and being the sole power supplier could not escape liability in negligence.
 18. I will thus allow the appeal, set aside the finding by the trial court on liability and dismissing the case, and instead enter judgment for the appellant against the respondent.
 19. With regard to quantum of damages, the trial Magistrate assessed the quantum of monetary awards and I will go by same.
 20. Consequently and for the above reasons I allow the appeal and order as follows:-
 - i. I set aside the dismissal of the case orders of the trial court, and instead, enter judgment in favour of the appellant against the respondent.
 - ii. I award the appellant the amount of Kshs. 1,941,742/= as damages for the fire.
 - iii. I also award the appellant Kshs. 162,000/= as special damages for the loss adjuster's report.
 - iv. I award the appellant the costs of the trial court's proceedings, as well as costs of this appeal, and interest at court rates until payment in full.

Right of appeal 30 days.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF OCTOBER 2023 AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Ms. Wachira – for appellant (holding brief)

Mr. Abaja – for respondent

