REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 376 OF 2018

KENYA POWER & LIGHTING COMPANY LTD.....APPELLANT

VERSUS

DAVID JOHN MWANGANGI..... RESPONDENT

JUDGMENT

1. This appeal challenges the judgment of *Hon. A.M. Obura (SPM)* dated 3rd November 2017 delivered in Milimani CMCC No. 2540 of 2012 in which the respondent, then the plaintiff, was awarded special damages in the sum of KShs.1,290,000 for loss of his motor vehicle registration number KAP 499 A (the suit vehicle) which was burnt to a shell in South B area of Nairobi by a fire allegedly caused by explosion of the appellant's transformer. The respondent was also awarded costs of the suit and interest.

2. According to the respondent, the vehicle was burnt while it was undergoing minor repairs in a garage located near the pole on which the transformer was installed. In his plaint dated 16th May 2012, the respondent alleged that the transformer's explosion and resultant fire was solely caused by the appellant's negligence and that he was entitled to damages in the sum of KShs.1,400,000 being the pre-accident value of the vehicle. He also prayed for costs of the suit and interest.

3. In its defence filed on 19th December 2013, the appellant denied liability as alleged in the plaint *in toto* and put the respondent to strict proof thereof.

4. After a full trial, the learned trial magistrate rendered the impugned decision and being aggrieved by the decision, the appellant proffered this appeal relying on eight grounds of appeal in which he principally complained that the learned trial magistrate erred in law and fact by: finding it 100% liable for the accident; failing to apportion liability on the respondent; failing to take into account its submissions on liability; taking into account irrelevant factors in awarding damages and by awarding the respondent special damages in the sum of KShs.1,290,000.

5. By consent of the parties, the appeal was prosecuted by way of written submissions. The firm of *Michuki & Michuki Advocates* filed submissions dated 16th June 2020 on behalf of the appellant while the firm of *Kivuva Omunga & Company Advocates* filed theirs dated 24th July 2020 on behalf of the respondent.

6. This is a first appeal to the High Court and as such, it is an appeal on both facts and the law. Being the first appellate court, I am duty bound to exhaustively re-examine and re-consider the evidence presented before the trial court to arrive at my own independent conclusions but bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses and give due allowance to that disadvantage. See: ***Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123*** ; ***Sumaria & Another V Allied Industrial Limited, [2007] 2 KLR 1***.

7. I have carefully considered the grounds of appeal, the evidence on record as well as the parties' rival written submissions and all the authorities cited. Having done so, I find that the key issue arising for my determination is whether the learned trial magistrate erred in her finding on both liability and quantum.

8. At the outset, I wish to point out that though an appellate court is mandated to interfere with findings of fact made by the trial court, it should be slow to do so mainly because as stated earlier, an appellate court does not have the advantage of seeing or hearing the witnesses who testified before the trial court and consequently, it is ill equipped to determine their credibility having not had an opportunity of observing their demeanour. See: ***Peters V Sunday Post Limited, [1958] EA 424***.

9. It is however trite that an appellate court should interfere with findings of fact made by the trial court if it is satisfied that the same were based on a misapprehension of the evidence or misapplication of the law or that they were not supported by the evidence adduced before the trial court. See: ***Jabane V Olienja, [1986] KLR 661; Makube V Nyamoro, [1983] KLR 403.***

10. In order to determine whether or not the trial court erred in arriving on its finding on liability, it is important to revisit albeit in summary,

the evidence tendered before the trial court.

11. The respondent testified in support of his case as PW1 and called two additional witnesses. He adopted his witness statement as his evidence in chief. In the statement, he stated that he took the suit vehicle to a garage in South B for minor body repairs and paintwork. The garage was adjacent to the appellant's transformer which was mounted on post number 3809; that the transformer exploded erupting into a fire that spread to the garage and completely burnt his vehicle. In support of his case, he produced documentary evidence in the form of various documents including photographs of the burnt vehicle which were marked as *pexhibit 1-13*.

12. According to the evidence of PW2, *Mr. Boniface Ochola*, he was employed as a security guard in the said garage and on 24th May 2009, he was on duty at around 7pm when he saw the transformer explode. The explosion caused a fire which spread to the garage and burnt down three vehicles including the vehicle owned by the respondent. He notified his employer about the incident who in turn informed PW1.

13. In his evidence under cross-examination, PW1 testified that he had bought the vehicle as salvage for KShs.160,000 but had extensively repaired it until it attained roadworthy condition. He maintained that its pre-accident value was KShs.1,400,000. He produced a copy of its logbook to substantiate his claim of ownership of the vehicle. Further in re-examination, he testified that the transformer was faulty and that is why it exploded on its own.

14. Both PW1 and PW2 recalled that they witnessed the appellant's employees replacing the transformer and the burnt cables after the accident.

15. PW3 was an expert witness. He was the motor assessor who assessed damage to the suit vehicle after the accident. He visited the garage and saw that the vehicle had been burnt beyond repair. In his opinion, it was a total loss. He assessed its salvage value as KShs.45,000. He recalled having assessed the vehicle earlier in December 2008 and had valued it at KShs.1.39 million but after factoring depreciation, he assessed its pre-accident value as KShs.1,200,000.

It is however noteworthy that in his assessment report which he produced as *pexhibit 14*, PW3 gave a different assessment by indicating that the vehicle's pre-accident value was KShs.1,290,000 and not KShs.1,200,000 as stated in his oral evidence. He did not explain the discrepancy in his report and in his oral testimony regarding the vehicle's pre-accident value.

16. The appellant closed its case without calling any witness.

17. In her judgment, the learned trial magistrate accepted the evidence offered by the respondent and his witness and found as a fact that the fire which consumed the suit vehicle emanated from an explosion of the appellant's transformer and that the explosion occurred because the transformer was faulty. She thus found the appellant 100% liable for the accident.

18. Upon my independent appraisal of the evidence and the written submissions filed by the parties, both at the lower court and in this court, I agree with the finding of the learned trial magistrate that the evidence of PW1 and PW2 proved as a fact that the fire which burnt down the suit vehicle was caused by an explosion of the appellant's transformer mounted on a pole adjacent to the garage in which the vehicle was kept for repairs. PW2 was an eye witness to the accident. His evidence was consistent and remained unshaken during cross-examination.

19. Though the appellant denied the respondent's claim that the transformer exploded because it was faulty asserting that it was regularly checked and kept in good condition, it failed to adduce any evidence during the trial to prove that assertion. It did not also tender any evidence to disprove the respondent's claim that the fire was caused by the transformer's explosion.

20. The appellant's claim that the fire came from a pile of burning boxes below the transformer which spread to the transformer causing the explosion was contained in its written submissions before the trial court which it adopted on appeal. These claims cannot aid the appellant since submissions are not evidence and can never take the place of evidence. This legal position was reiterated by the Court of Appeal in ***Daniel Toroitich arap Moi V Mwangi Stephen Muriithi & Another [2014] eKLR*** where the court expressed itself as follows:

> ***"…Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed,there are many cases decided without hearing submissions but based only on evidence presented."***

21. Having installed a transformer for transmission of electricity in a busy area which according to the evidence on record accommodated, *inter alia*, several garages, the appellant owed the business community operating in that area, their customers and members of the public at large a duty of care to ensure that the transformer did not endanger their safety and that of their properties by ensuring that it was regularly serviced and was always in top notch condition.

22. In the absence of evidence that the transformer was regularly serviced and maintained, I cannot fault the trial magistrate's finding that the explosion and consequent fire occurred because the transformer was faulty. As the appellant did not adduce evidence to prove that the respondent or the garage owner contributed in any way to the explosion, I find no reason to interfere with the trial court's finding that the appellant was 100% liable for the accident.

23. On quantum, I agree with the appellant's submissions that a claim based on material damage is a special damage claim which must not only be specifically pleaded but must also be strictly proved. See: ***Sande V KCC Ltd, [1992] KLR 314***. The respondent pleaded that the suit vehicle was valued at KShs.1,400,000 prior to the accident but he only produced proof in the form of a motor vehicle assessment report indicating its pre-accident value as KShs.1,290,000. This is the amount that was awarded by the learned trial magistrate.

24. In its submissions, the appellant faulted this award claiming that the respondent did not offer any evidence to support his claim for special

damages except a receipt for KShs.160,000; that the trial court should have awarded the respondent KShs.160,000 and not KShs.1,290,000 as he did not produce invoices or other receipts to prove that he had actually repaired the vehicle to a value of KShs.1,400,000. For this proposition, the appellant relied on the persuasive authority of ***Garissa Maize Millers Ltd V Attorney General & 3 Others, [2016] eKLR*** which in my view is distinguishable from the present case as the facts in both cases are completely different.

25. In the ***Garissa Maize Millers Ltd*** case, the plaintiff had claimed financial loss in terms of millions of shillings owing to alleged destruction of materials for packaging maize flour, loss of profit, destruction of office equipment and furniture as well as factory premises and motor vehicles through burning by military officers but did not produce any documentary or oral evidence to prove the alleged loss. In his judgment, *Hon. Dulu, J* dismissed the suit noting that pleading special damages was not equivalent to proving the same. He proceeded to state as follows:

> ***"Proof of special damages does not necessarily need to be on documents, but there has to be cogent evidence to establish that the loss quantified in terms of money has been established, and that the loss was visited upon the plaintiff by the defendant. …"***

26. In this case, the respondent proved by way of documentary evidence that the subject vehicle was his property and that it was burnt beyond repair by a fire that was caused by the appellant's negligence in failing to maintain its transformer in good working condition. He also produced evidence from an expert who had assessed the vehicle in December 2008 and soon after the accident and assessed its pre-accident value at KShs.1,290,000 according to the assessment report and KShs.1,200,000 according to his oral testimony.

27. Though I cannot entirely fault the learned trial magistrate for choosing to go with the value shown in the assessment report, I think that prudence would have required her to be guided by the latest valuation given by the assessor in his testimony on 26th June 2017 on the premise that he must have had a reason to deviate from his earlier assessment made several years earlier in his report dated 31st May 2009. It is also my finding that the learned trial magistrate erred in not deducting the salvage value of the vehicle assessed at KShs.45,000 from the amount awarded since the respondent would no doubt benefit from the salvage in the event that it was disposed of either as spare parts or as a whole.

28. In view of the foregoing, I find that the learned trial magistrate erred in awarding the respondent KShs.1,290,000. The award is set aside and is substituted with an award of KShs.1,200,000 less KShs.45,000 which translates to KShs.1,155,000. The amount will attract interest at court rates from date of judgment of the trial court until payment in full.

29. Costs follow the event and are at the discretion of the court. The order that best commends itself to me on costs is that the respondent is awarded costs of the suit in the lower court but each party shall bear its/his own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH 2021.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Ms Karwitha: Court Assistant