



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 20 OF 2017

RICHARD MURIUKI WAHEIRE.....APPELLANT

VERSUS

KENYA POWER & LIGHTING.....RESPONDENT

(Being an appeal from judgment and decree in the Principal Magistrates Court

Civil Case No. 48 of 2014 delivered on 25 May 2017)

JUDGMENT

The appellant's suit against the respondent for both general and special damages was dismissed by the magistrates' court on 25 May 2017. According to the averments in the plaint, the appellant's house was connected to electricity supplied by the respondent. As a matter of fact, he held an electricity account number 0 6 8 4 6 7 with the respondent.

The plaintiff defaulted in payment of his electricity bills as a result of which his power was disconnected in February 2011.

It was his case that he eventually settled the bill and got the power reconnected; however, the reconnection was so negligently done that his house was burnt down on 7 June 2011 as a result of an electric fault. He lost property worth Kshs. 1,205, 938/= which he pleaded and claimed as special damages.

The respondent denied the claim and in that regard filed a statement of defence. In particular, the respondent denied that the appellant property was even connected to its electricity grid and that the Account Number 0680467 either did not exist or, if it existed, it was not under the appellant's name.

It also denied having disconnected or reconnected power to the appellant's house. It denied, further, that the appellant's house was burnt as alleged or at all.

In the alternative, the defendant contended that if any fire occurred, it was solely caused or substantially contributed to by the appellant himself. The respondent denied that the appellant suffered any loss or damage.

After hearing the evidence, the learned trial magistrate dismissed the appellant's suit mainly on the ground that the appellant had not proved negligence on the part of the respondent. It is against this decision that the appellant has now appealed. In the memorandum of appeal dated 23 June 2017, the appellant has raised five grounds which he has framed as follows:

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- 1. The learned magistrate erred in law and in fact in ignoring the appellant's evidence and entirely blamed him for not calling an expert to testify.***
- 2. Although the appellant adduced abundant evidence that pointed to the negligence and carelessness of the respondent, the magistrate said that he was left to speculate as to what caused the fire.***
- 3. The learned magistrate erred in law and in fact in exonerate (sic) the respondent from blame, although the fire could have been caused by lack of the fuse/cut-out or the power surge that could have occurred after the respondent's workers restored the power after the day-long maintenance exercise.***

4. The learned magistrate erred in making a finding that the quantum of damages was proved but proceeded to dismiss his claim.

5. The learned magistrate ought to have concluded that since there was nobody at home the whole day and bearing in mind that the respondents workers spent the whole day in the area servicing the electricity the most likely source of fire could have been lack of a regulating gadget in the appellant metre box.”

As is required of the appellate court, it is necessary that the evidence at the trial be evaluated afresh at the end of which this Honourable Court may come to its own factual conclusions independent of those reached by the trial court. However, it has to be borne in mind that the trial court had the advantage, which this court does not have, of seeing and hearing the witnesses. **(See *Selle Vs. Associated Motor Boat Co.* [1968] EA 123 and *Kiruga Vs. Kiruga & Another* [1988] KLR 348).**

Charles Gaitui Ndei (PW1) testified that he prepared a bill for the construction of the appellant’s house in May, 2014; the total cost for the construction of the house was estimated at Kshs. 660,980/=.

The appellant himself testified that electricity to his house was disconnected in January, 2012. According to him, the disconnection was effected by removal of a fuse from the electricity meter.

Power was later restored when he apparently settled the outstanding bill. For two or three days after the reconnection, all was well. But lights went off after that; he thought there was a blackout but noticed that his neighbours had power. When he checked the fuse at his meter, he observed that there was a loose cable hanging. He alerted the respondent whose officers responded and came to replace the fuse. After some days there was no power in his house. He once again noticed that there was a hanging loose cable.

The defendant never replaced the fuse. Sometimes in 2011, at around 11 apparently in the morning, while he was away, a neighbour called and told him that there was fire in the metre box. By 8 PM when he returned home, his house had been burnt down. He reported the matter to the respondent but it denied liability.

On the question of damages, the appellant testified in response to a question put to him during cross-examination that the amount he prayed for in his claim was the cost of construction of a new house.

Bobu Sukwi, the defendant’s employee, testified that he investigated a fire incident at the appellant’s home. He confirmed that indeed some maintenance had been undertaken on the line distributing electricity to the appellant, among other consumers in that particular area. During the maintenance works, power had been switched off but it was reconnected at 5.30 AM. The fire was reported at 6.30 AM. The service line to the appellant’s house had been burnt. The transformer fuse had also been burnt. He explained that the service line was burnt by the fire from the house and that it was also the same fire that caused the fuse to blow.

Kelly Muchoki (DW2) a loss adjuster from General Adjusters Limited testified that the loss that the appellant suffered was at Kshs. 436,270/=; however, he denied that the loss was attributed to the defendant.

This is all there was to the evidence that was presented before the trial court.

The primary question is whether the evidence was sufficient to sustain the appellant’s claim of negligence against the respondent. In interrogating this question it is necessary to consider, albeit in summary, what negligence, as an independent tort, entails and ultimately evaluate the evidence from that perspective.

Negligence as a tort is a breach of legal duty to take care which results in damage to the claimant. Thus its ingredients are:

- (1) Legal duty on the part of a defendant to exercise care towards a claimant in such conduct of the defendant as falls within the scope of the defendant’s duty.**
- (2) Breach of that duty, that is, a failure to come up to the standard required by law; and**
- (3) Consequential damage to the claimant which can be attributed to a defendant’s conduct.**

(See *Winfield & Jolowicz on Tort, Eighteenth Edition, By W.V.H Rogers at p.150.*)

As a provider of electricity services to the public in general and to the respondent, in particular, there is no dispute that the respondent bears a legal duty of care towards the consumers of its services, including the appellant and bore such legal duty at the time material to the appellant’s suit.

What is in dispute is whether the respondent breached that duty, and if so, whether the appellant suffered any damage for which the respondent would thereby be liable.

The appellant’s evidence that his house was burnt as a result of an electric fault is traced to a ‘neighbour’. According to the appellant, the neighbour informed him that there was fire in the meter box. If this is true, the neighbour would have been the only eye witness to testify on not only how the fire started but also the possibility that since it was coming from the meter box, it could have been caused by an electric fault.

But this so-called neighbour did not testify and so the statement attributed to him was nothing more than hearsay which, needless to say, is not admissible in evidence. What this meant, in effect, is that there was no evidence of the cause of the fire that burnt down the appellant's house.

Even then, it is not always the case that only an eyewitness account is necessary to establish the cause of a fire; it is not in doubt that such evidence is crucial and depending on the circumstances of any particular case, it may be the only evidence available on the cause of fire. It will not necessarily be dismissed only because it is an eyewitness' account of what transpired. Depending on its weight and taking all the circumstances into consideration, the court will be well in order to rely on such evidence as to the cause of a fire.

In the appellant's case, there was no such evidence and neither was the cause of fire established by any investigation whose report was to the effect that the fire was as a result of an electric fault. I agree with the learned magistrate that in the absence of an eyewitness' account or an investigation report on the cause of the fire, it would have been speculative to lay it at the doorstep of the respondent.

Having found that negligence was not proved to the required standard, it follows that there is no basis for a claim in damages against the respondent. But even if a claim for damages was well founded, they were not proved. The evidence that was presented in support for the claim for damages was a bill of quantities for construction of a new house and not an assessment report of the damage, or evidence of the loss that the appellant had incurred as a result of the fire; in his own words this is what appellant said on this claim:

“The amount I have prayed for is costs for new construction. The one who assessed costs had not seen previous house that got burnt.”

It is trite that special damages must be proved apart from being pleaded. In *Maritim & Another –v- Anjere (1990-1994) EA 312 at 316*, the Court of Appeal emphasised this point and noted as follows:

“In this regard, we can only refer to this court's decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

In short, the court could not award the appellant what he had not incurred; what was pleaded as special damages were, largely, speculative.

In the ultimate, the appellant did not prove his case on a balance of probabilities; it follows, therefore, that this appeal has no merits and it is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED ON 4TH JUNE 2021

NGAAH JAIRUS

JUDGE