



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 18B OF 2016**

**KENYA POWER.....APPELLANT**

**-VERSUS-**

**JACOB GIKERE MUDOGO.....RESPONDENT**

(Being an appeal from the Judgment and Decree of the Hon. Tom Mark Olando, Resident Magistrate,

delivered on 13 January 2016 in Eldoret CMCC No. 628 of 2013)

**JUDGMENT**

[1] This appeal arises from the Judgment delivered by **Hon. Olando, RM**, on **13 January 2016** in **Eldoret Chief Magistrates Court Civil Case No. 628 of 2013: Jacob Gikere Mudogo vs. Kenya Power**. The respondent had sued the appellant in that suit, claiming general and special damages plus costs and interest on account of injuries suffered by the respondent on about **26 July 2011**. The contention of the appellant before the lower court was that the appellant and its employees, servants or agents engaged his services in working on an electrical line at **Naitiri Pwani Area**; and that while he was thus engaged, he was electrocuted when the said employees, servants and agents of the appellant suddenly switched on the power supply without any warning. He consequently suffered severe burns on the chest, abdomen and both legs.

[2] It was further the contention of the respondent before the lower court that the accident was solely due to the negligence or breach of contract and/or statutory duty of care on the part of the appellant and its employees. The particulars of negligence were accordingly supplied at paragraph 5 of the respondent's Plaintiff dated **21 September 2013**.

[3] In its Defence, the appellant denied that the respondent was its employee; or that on **26 July 2011**, the respondent was lawfully assigned duties by its employees, servants or agents to work on an electric line at **Naitiri Pwani Area** as alleged by him. The appellant further denied that an accident occurred in which the respondent got burnt. Hence, it denied that the respondent suffered any loss or damage for which he deserved compensation in damages. In the alternative, the appellant had asserted that, if any accident occurred as alleged, then the respondent was solely responsible for it.

[4] The record of the lower court shows that, upon hearing the respondent and his two witnesses, the learned trial magistrate was convinced about the truthfulness of the respondent's case. He consequently entered judgment in favour of the respondent at 100% liability and **Kshs. 250,000/=** general damages. The respondent was also awarded special damages in the sum of **Kshs. 1,500/=** together with interest and costs.

[5] Being dissatisfied with the judgment of the lower court in its entirety, the appellant filed this appeal on the following grounds:

[a] That the Learned Trial Magistrate erred in law and fact in finding the defendant liable for the said accident.

[b] That the Learned Trial Magistrate erred in law and fact in finding that the plaintiff was an employee of the defendant.

[c] That the Learned Trial Magistrate erred in law and fact in finding that the defendant was to blame for the said accident.

[d] That the Learned Trial Magistrate erred in law and fact in awarding the plaintiff damages that were inordinately high in the circumstances.

[e] That the Learned Trial Magistrate erred in law and fact in not considering the evidence on record.

[f] That the Trial Magistrate erred in law and fact in not considering the defendant's submissions in his judgment.

[g] That the Learned Trial Magistrate applied wrong principles of law in the entirety of his judgment.

[6] Consequently, the appellant prayed that the appeal be allowed and that the judgment and decree of the lower court dated **13 January 2016** be set aside and a proper finding be made by this Court. It also prayed for further orders as the Court may deem fit to grant.

[7] Pursuant to the directions given herein on **11 May 2021**, the appeal was canvassed by way of written submissions. The appellant's written submissions were filed herein on **22 June 2021** by **M/s Nyachiro Nyagaka & Company Advocates. Mr. Nyachiro**, learned counsel for the appellant, proposed the following issues for determination:

[a] Whether the plaintiff was an employee of the defendant;

[b] Whether the trial court had jurisdiction to hear and determine the matter;

[c] Whether the award of damages is manifestly excessive as to warrant review by an appellate court;

[d] Who is entitled to costs?

[8] **Mr. Nyachiro** submitted that, although the respondent took the position that he was employed by the defendant at the time of the alleged accident, he did not furnish any such proof. He pointed out that in cross-examination, the respondent conceded that he had nothing to show that he was the appellant's employee. **Mr. Nyachiro** also urged the Court to note that in his evidence in chief, the respondent stated that he was then employed in some home when **Kenya Power** people called him to go and dig holes for them. Thus, counsel relied on **Sections 107 and 108 of the Evidence Act, Chapter 80 of the Laws of Kenya** and the case of **Eastern Produce Limited vs. John Lumumba Mukosero** [2008] eKLR in urging the Court to find that the respondent failed to discharge the burden of proving his case; and therefore that the trial court should have found that the respondent was not an employee of the appellant.

[9] On jurisdiction, it was the submission of **Mr. Nyachiro** that, given the finding of the trial court that the respondent was an employee of the appellant at the material time, the suit ought to have been referred to the Employment and Labour Relations Court, which is the court clothed with jurisdiction to entertain such disputes. Counsel relied on **Phoenix of E.A. Assurance Company Limited vs. S.M. Thiga T/A Newspaper Service** [2010] eKLR and **Republic vs. Karisa Chengo & 2 Others** [2015] eKLR to support his argument that without jurisdiction the decision of the lower court is null and void.

[10] On whether the award of damages is manifestly excessive, **Mr. Nyachiro** took the view that, since the respondent did not suffer permanent disability; and given that his injuries had healed, the sum awarded by the trial court was excessive. He relied on **Eastern Produce(K) Ltd (Savani Estate) vs. Gilbert Muhunzi Makotsi** [2013] eKLR for the proposition that an appellate court will not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate. He underscored his argument that given the nature of the respondent's injuries, the award by the lower court was unwarranted; and therefore ought to be set aside.

[11] Lastly, **Mr. Nyachiro** urged the Court to award the costs of this appeal to the appellant. He referred the Court to **Section 27 of the Civil Procedure Act, Narok County Government vs. Livingstone Kunini Ntutu & 2 Others** [2018] eKLR, and **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others** [2014] eKLR and prayed that the Court's discretion in this regard be exercised in the appellant's favour. Hence, counsel prayed that:

[a] This appeal be allowed;

[b] The judgment and decree of the trial court be substituted with an order dismissing the respondent's suit with costs.

[c] The judgment and decree of the trial court be set aside and be substituted with a proper finding by the Court;

[d] The Court be pleased to make any other or further order as may be just and expedient in the circumstances;

[e] Costs of the appeal be awarded to the appellant.

[12] On behalf of the respondent, **Mr. Mwinamo** relied on his written submissions dated **17 May 2021**. He reiterated the respondent's stance that he had been engaged to dig holes for the appellant when the accident occurred. Counsel therefore submitted that, having engaged the respondent as an employee, the appellant was under duty to provide him with protective apparel and ensure his safety as he engaged in the assigned work. The case of **Sokoro Saw Mills Ltd vs. Benard Muthambi Njenga**, Nakuru HCCA No. 38 of 1995, was cited in support of the submission that it is the duty of the employer to provide its employee with as safe a place of work as the circumstances would permit. **Mr. Mwinamo** also pointed out that whereas the respondent testified and called witnesses in support of his case, the appellant did not tender any rebuttal evidence. In his view, therefore, the finding of the lower court fixing liability at 100% is proper and ought not to be disturbed.

[13] On quantum, **Mr. Mwinamo** submitted that the injuries suffered by the respondent were confirmed by the treatment chits and **Dr. S.I. Aluda's** medical report. In his view, the general damage award of **Kshs. 250,000/=** was commensurate with the respondent's injuries. He relied on **Nairobi HCCA No. 34 of 1996: Bonface N. Ndole vs. Pauline Katunge** in which the plaintiff suffered severe burns over the face, neck, trunk, arms and abdomen and was awarded **Kshs. 600,000/=**. **Mr. Mwinamo** also relied on **Nairobi HCCA No. 954 of 2000: Nzilani Ndari vs. Bonface Musyoka Ndo & Another** in which general damages were assessed at **Kshs. 500,000/=** for external burns on the right arm, forearm, trunk and both legs. He, consequently, urged the Court to uphold the lower court's award both on general and special damages.

[14] This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was presented before the lower court and make its own conclusions thereon. (see Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123). As pointed out hereinabove, the respondent adduced evidence before the lower court in support of his case. He testified on **31 July 2014** as **PW1** and told the lower court that he was employed at a certain home in **Makunga** when Kenya Power people called him on **26 July 2011** to go and dig holes for them and thereafter fix the electricity wires. He was to be paid after performing the task. He further testified that while he was going about the assigned task, he got electrocuted and suffered burns on his right hand, left leg and right leg. He was rushed to **Lugulu Hospital** where he was treated. He later saw **Dr. Aluda** for medical examination and report, for which he paid **Kshs. 1,500/=**. The respondent blamed the appellant for his injuries and asked for an award in general and special damages.

[15] **Dr. Aluda** testified as **PW2** and he confirmed to the lower court that he examined the respondent on **6 September 2013** in respect of injuries sustained on **26 July 2011**. **PW2** confirmed that the injuries, which were basically soft tissue injuries, had healed as at the time of examination. He also testified that he relied on the treatment notes that had been made at **Lugulu Hospital** where the respondent had been admitted for treatment. He produced the medical report he prepared as an exhibit before the lower court. He added that he charged the respondent **Kshs. 1,500/=** for his services which was duly paid. The receipt was also produced and marked **Exhibit 3**.

[16] **PW3** was **Peter Wanyama** of **Lugulu Mission Hospital**. His evidence was that the respondent was admitted at their facility from **26 July 2011** to **15 August 2011** for treatment, having suffered severe burns on the chest, both legs and abdomen. He produced the Discharge Summary as the Plaintiff's Exhibit before the lower court.

[17] In the light of the foregoing, the issues for determination, as rightly pointed out by learned counsel, are confined to the question of **jurisdiction, liability** and **quantum**. Starting with jurisdiction, it is needless to say that where a court proceeds without jurisdiction, its efforts and the ensuing decision would be in vain. In Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (supra), the Court of Appeal made this clear thus:

**“In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae...”**

[18] The same position had been taken in Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd. (1989):

**“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”**

[19] **Mr. Nyachiro's** argument on jurisdiction was that, given the finding of the trial court that the respondent was an employee of the appellant at the material time, the suit ought to have been referred to the Employment and Labour Relations Court, which is the court clothed with jurisdiction to entertain such disputes. Thus, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Supreme Court held that:

**"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

[20] Indeed, in Republic vs. Karisa Chengo & 2 Others (supra), the Supreme Court of Kenya was explicit that:

**“...pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *sui generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”**

[21] Thus, in the light of the provisions of **Articles 162(2) and 165(5)** of the **Constitution**, **Section 12** of the **Employment and Labour Relations Act** stipulates that:

**"The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends**

jurisdiction to the Court relating to employment and labour relations...”

[22] As to whether a claim for compensation in tort for work-related injuries falls within the purview of **Section 12** aforesaid, opinion has been varied. For instance, in the persuasive case of **Julius Osey Nyende & 2 Others vs. Antoine Refrigeration Eng. Co. Ltd** [2017] eKLR, **Hon. Ngugi J.** took the view that:

**“...Having pleaded the employment relationship as an important element in their claim, a finding of that relationship would have to be one of the central issues in the case. In the circumstances, it is disingenuous for them to claim at this stage that their suit sounded in tort simpliciter...it is my finding that the intended appeal is one from a suit for injuries sustained in the course of employment. Such injuries are “employment and labour relations” matters that belong to the ELRC. I have found no reason to depart from the reasoning in the John Mackenzie Mbuvi Case cited above which, in turn, followed the reasoning by my brother Mabeya J. in the Francis Mutunga Musau Case...”**

[23] The learned Judge however acknowledged the need for a clear pronouncement from the Court of Appeal on the matter. He observed that:

**I will pause here long enough to agree with the Applicants, in line with the Court of Appeal’s reasoning in the Kenya Cargo Case that a claim for personal injuries arising in the course of employment may sound in either tort or contracts or both. A Plaintiff can carefully place her bets in either and one can imagine a Plaintiff keenly drawing her pleadings so that it sounds only in one or the other cause of action. However, in most cases, and for good reasons, Plaintiffs present a mixed case – sounding in both torts and contracts. In these cases, because the underlying claim is predicated on the employment relationship, it would follow that the contract action would be predominant...I once again readily admit that this is a question that has caused me much anxiety. It seems plain that parties are still facing much uncertainty on this question as there has been no authoritative enunciation yet of the correct legal position by the Court of Appeal. Suffice it to say that I have not been persuaded by the present application that jurisdiction lies with the High Court...”**

[24] Where, as in this case, the cause of action bestrides two different regimes, thereby attracting what **Hon. Ngugi J.** referred to as the **“incidental concurrent jurisdiction”** of both the High Court and either of the courts of equal status, the determining factor of jurisdiction would be the **“dominant issue”** test; going by the decision of the Court of Appeal in **Co-operative Bank of Kenya Ltd vs. Patrick Kangethe Njuguna & 5 Others** [2017] eKLR. From the pleadings and the evidence presented before the lower court, the claim was basically in tort for compensation for injuries sustained by a casual labourer. It is therefore my finding that that the lower court had the jurisdiction to entertain it and to grant the relief it granted; and that this Court has the requisite jurisdiction to handle the appeal.

[25] As to whether the issue of liability was proved to the requisite standard, the record of the lower court shows that no evidence was presented by the appellant in spite of being granted several opportunities to avail its witnesses. It is therefore plain that the evidence presented in support of the respondent’s case was entirely un rebutted; and therefore the learned trial magistrate can hardly be faulted for having accepted that evidence as true. It is also the case that all the allegations of negligence made against the respondent by the appellant in its defence remain mere allegations; the same having not been backed up by evidence. In **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others** Nairobi (Milimani) HCCC No. 1243 of 2001, the position was taken, which I endorse, that:

**“...where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”**

[26] In the premises, I am satisfied that the respondent made a good case on liability before the lower court and therefore duly established a connection between his injuries and the breach of duty of care on the part of the appellant. (see **Statpack Industries vs. James Mbithi Munyao** [2005] eKLR).

[27] On quantum, the uncontroverted evidence of the respondent, which was augmented by the evidence of **Dr. Aluda (PW2)** and **PW3**, was that he sustained severe electricity burns on the chest, abdomen and on both legs. By the time he was examined by **Dr. Aluda** on **6 September 2013**, the injuries had healed save for occasional pains which were expected to subside with the use of analgesics. **Dr. Aluda** formed the opinion that the respondent had suffered 27% burns; and therefore that the burns were very severe. As the appellant offered no contrary expert evidence, **Dr. Aluda’s** opinion and prognosis was uncontroverted.

[28] Needless to say that assessment of damages is at the discretion of the trial court and that an appellate court can only interfere if it is shown that the court acted on wrong principles, or that it awarded so excessive or so little damages that no reasonable court would allow it; or that the court took into consideration matters that it ought not to have taken into consideration or failed to consider matters that it ought to have considered, and as a result arrived at the wrong decision. In **Butt vs. Khan** [1981] KLR 349 it was held that:

**"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."**

[29] In his judgment, the learned trial magistrate mentioned that he had perused and considered the authorities that counsel for the respondent brought to his attention. He also noted that counsel for the defendant/appellant did not submit on quantum. Granted the awards made in the two authorities cited by the respondent, there is no valid ground for complaint; bearing in mind the nature and extent of the respondent’s injuries. Indeed, in **H. West and Son Ltd v. Shepherd** (1964) AC.326 it was acknowledged that:

**“...money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to**

**secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional..”**

**[30]** As counsel for the appellant did not draw the Court’s attention to any such comparable authorities as would lead the Court to the conclusion that the lower court’s award is manifestly excessive and therefore erroneous, I find no justifiable cause for disturbing the award given. As the special damage component of **Kshs. 1,500/=** was likewise proved, the conclusion that I come to in this appeal is that it lacks merit and it is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2021**

**OLGA SEWE**

**JUDGE**