



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 262 OF 2018

KENYA POWER AND LIGHTING CO. LTD.....APPELLANT

VERSUS

HADIJA KAZUNGU NGALA.....RESPONDENT

(Being an Appeal against the entire Judgment/Order of Hon. J. M. Nang'ea (CM) on the 12th November, 2018 in Mombasa CMCC No. 428 of 2014)

JUDGMENT

1. The Appellant, **Kenya Power and Lighting Co. Ltd** was the Defendant in **Mombasa CMCC No.428 of 2014**. The Appellant was sued by the Respondent for the amount of **Kshs.3,045, 475.00** being the value of the properties, items and valuables which were destroyed or damaged by fire when a defective wiring post ignited fire, and burned down the Respondent's house at Shanzu, Mombasa.

2. The particulars were that on or about **6th March, 2008**, a defective electricity wiring post situated outside the Respondent's house at Shanzu ignited and caused fire into the connection and it spread into the Respondent's house burning it down completely, a result of which the Plaintiff's items were gutted beyond recognition. The Respondent listed the particulars of the properties gutted down by the fire and its value as hereunder:-

i) Value of the House gutted by fire Kshs. 1, 800,000.00

ii) Value of clothing material Kshs. 500,000.00

iii) Three sets of sofa Kshs. 60,000.00

iv) One wall unit Kshs. 35,000.00

v) One dining table and six table chairs Kshs. 25,000.00

vi) Two office desk Kshs. 14,000.00

vii) One bed 6 x 6ft and one mattress Kshs. 21,000.00

viii) Eight beds 5 x 6ft all valued at Kshs

120,000 + eight mattress

@Kshs. 24,000/= Kshs. 144,000.00

ix) 14 inch colour TV (make Philip) Kshs. 9,000.00

x) L. G DVD machine Kshs. 8,500.00

xi) Kenwood music system with CD

Player, remote and 2 speaker Kshs. 100,000.00

xii) Three iron box (steam) Kshs. 24,000.00

xiii) One freezer Kshs. 30,000.00

xiv) Thirteen sets of utensils Kshs. 60,000.00

xv) Two computer full set Kshs. 40,000.00

xvi) One wardrobe Kshs. 15,000.00

xvii) One tool box Kshs. 7,000.00

xviii) Two coffee tables + 4 stools Kshs. 5,000.00

xix) Several dozens of text books

Exercise books and school

Bags for 5 pupils Kshs. 80,000.00

xx) One printer Kshs.7,000.000

xxi) One bundle (Unga) maize floor Kshs. 600.00

xxii) One sack of rice 25kg Kshs. 1, 875.00

Total Kshs. 3,045,475.00

3. The Respondent stated that a report was made to the Municipal Council of Mombasa fire brigade, Bamburi Police Station Mombasa and the Appellant's company, who all visited the site. It was the Respondent's case that the Appellant had promised to correct and restore her to her status quo as soon as possible but failed to do so.

4. It was the Respondent's case that she suffered both mental and physical torture due to the sudden inconvenience and loss. And that despite the several demands sent to the Appellant, the Respondent's claims were ignored.

5. In the **Amended Plaintiff** dated **19th July, 2016** which was filed in the Trial Court, the Respondent sought as against the Appellant *payment of the sum of Kshs.3,045,475.00, general damages, and costs of the suit plus interest.*

6. The appellant filed an **Amended Statement of Defence** on **the 13th January, 2017** in which they denied that any fire broke out on or about **6th March 2008** and that the Respondent's lost any properties worth **Kshs.3,045, 475.00**.

7. The Respondent called three (4) witnesses while the Appellant called one witness.

8. It is noteworthy that the initial Plaintiff in **Mombasa CMCC No. 428 of 2014** who was **Mr. Kazungu Ngala Kasunji** who died while his suit was ongoing. But before he died, he had already testified as PW1 and he stated that he was suing KPLC as his house burnt down on **6th March 2008**.

9. PW1 testified that two (2) months prior to the house burning down, he noticed there were loose wires and he reported the same to metre readers as sent by the Appellant but no action was taken.

10. It is PW1's testimony that on **6th March 2008** at around 12.00 am, a fire started in the trees outside his house. On noticing it, he and his family tried to remove contents of the house, but they were not able to remove all as it was a big fire.

11. He stated that it was his neighbour who called the fire brigade to put off the fire but they came after the house had burnt down. The police then took his report and issued him a police abstract on **18th March, 2008** after a list of the destroyed items was made. He also reported to the Municipal Council.

12. Further, PW1 testified that he did a valuation of the house, and a value of Kshs.1,800,000.00 was arrived at. Lastly, he added that the KPLC people came and replaced the defective power ports that were outside his house.

13. PW2 was **Khadija Kazungu Ngala**, PW1's wife. Her testimony was to the effect that PW1 had died right after he testified and that she was his representative in the suit therein. On cross examination PW2 stated that the burnt house belonged to her.

14. **PW3** was **Harrison Rai Kendo**, who was a fire-fighter officer with the Mombasa County Government. He testified that on **6th March, 2008** he was on duty when a telephone came through to his boss, wherein it was reported that a house was burning along Shanzu area. He stated that he accompanied other staff to the site where they went looking for the house, and found that it was burning. They tried to put out the fire which according to him was huge and had already burnt more than half of the house.

15. It was **PW3's** testimony that they succeeded in putting out the fire and on investigating the cause, it was found that the fire had been caused by a short circuit that involved wires that supplied electricity to the house.

16. His further evidence that the fire started from the top of the house and burnt the soft board ceiling of the house and was discovered when it had extended to other parts of the house. They then prepared a report of the incident which was produced as exhibit P3.

17. On cross examination, **PW3** stated that duty officers had visited the scene before he did and he followed them as the Senior Officer. He testified that **Mr. Charo** was the duty officer. He stated that two reports were made, one by himself and another by **Mr. Charo**. That **Mr. Charo's** report indicated that a cell phone plugged in a socket caused the fire but being an expert in fire fighting, **PW3** said that his report was the correct and he has never heard of a phone causing fire.

18. **PW4** was **Thomas Mukhwana** who was a property valuer with Value Consult Ltd, Mombasa. He stated that he was asked by one **Kazungu Ngala** to assess the damage caused by fire to a building at Shanzu Settlement Scheme. It was **PW4's** testimony that he inspected the building and assessed the damage and loss that had occasioned to the building owner. He estimated the loss at **Kshs.1,800,000.00** and prepared a report which he submitted to the client and produced the same as Exhibit P4.

19. On cross examination, **PW4** stated that he did not carry out a structural survey of the subject building and that he had no information of the value of the building before damage. He stated that he only estimated of the value of the damaged parts. It was stated that the building was of the value of similar buildings with the same materials, although he did not attach a Bill of Quantities for the required materials.

20. **DW1** was **Hilary Charo Ngala** who was a station officer at Mombasa County Fire brigade. He stated that his duties included responding to disasters as reported to the County. It was his testimony that on **6th March, 2008** when he was at work, he received information via the radio control intercom that there was a fire incident at Shanzu, Mombasa. He went on to state that the house that had caught fire belonged to **Kazungu Ngala**. He also stated that when he and the team arrived at the site, the house was still on fire but they succeeded in putting it out. He added that only a small part of the house had remained intact.

21. Further, **PW4** testified that he interviewed those present and prepared a report whose findings were that the cause of the fire was a mobile phone that was left charging in one of the sockets for too long.

22. On cross examination, **PW4** stated that he was aware that his boss **Mr. Kengo** had also prepared another report. He testified that in his opinion, the fire started from the lower floor where the phones were charging. He further testified that **Mr. Kengo's** report is more reliable as he was his senior.

23. After hearing the evidence by the parties, the Trial Court delivered its **Judgment on 12th November, 2018** in which the Respondent was awarded a total sum of **Kshs.800,000/=** plus interest and costs of the suit.

24. Being dissatisfied with the entire Judgment of **12th November, 2018**, the Appellant filed an appeal before this Court and raised the following grounds:

1. That the learned Trial Magistrate erred in law and fact by not finding that the deceased Plaintiff had no locus standi to institute the suit in the first instance.

2. That the Learned Trial Magistrate erred in law and fact by failing to find that the Plaintiff's suit was fatally defective and untenable for want of procedure as regards proof of negligence and/or for breach of contract.

3. The Learned Trial Magistrate erred in law and fact by failing to apprehend that the Plaintiff's suit failed to disclose any tenable cause of action as against the Defendant.

4. The Learned Trial Magistrate erred in law in relying on alleged expert witness evidence that did not meet the test as of the law required.

5. The Learned Trial Magistrate erred in law and fact by failing to appreciate the cardinal principal of the law that Special Damages must not only be pleaded but that they must be proved.

6. The Learned Trial Magistrate erred in law by partially allowing the Plaintiff's claim without the benefit of any supporting evidence.

7. The Learned Trial Magistrate erred in law by disregarding the cardinal jurisprudential principle of our adversarial nature of litigation and thus tendered a manifestly unfair decision.

8. The Learned Trial Magistrate erred in law by disregarding the Defendant's defence and the attendant final submissions and thus arrived at the wrong decision.

9. The Learned Trial Magistrate erred in law by rendering a decision that does not meet the test as set down under the law for judgments in defended suits.

10. The Learned Trial Magistrate erred in law by allowing the Plaintiff's suit against the Defendant with costs.

25. The Appellant prayed that the Appeal be allowed with costs and that the court be pleased to set aside the trial court's judgment upon re-evaluating the evidence that was adduced thereof and reaching its own findings.

26. On **30th November, 2020**, directions were given that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed its submissions on the **19th January, 2021** while the Respondent filed hers on the **20th January, 2021**. The parties opted to rely on their written submissions in their entirety.

The Appellant's Written Submissions

27. The Appellant in their submissions discussed three issues being *whether the deceased Plaintiff had locus standi to institute the suit; whether the Respondent proved the Appellant's negligence in the incident and whether the Respondent was entitled to the special damages awarded by the Trial Magistrate.*

28. On whether the deceased Plaintiff had locus standi to institute the suit, it has been submitted that **Kazungu Ngala Kasunji** was not the owner of the property and had no right to institute the suit before the trial court because both him and **PW2, Khadija Kazungu Ngala** could not agree on who was the owner of the property.

29. The Appellant submitted that the issue on ownership of the house was an important point and the witnesses ought to have made it clear. The Appellant was not satisfied by the trial court's conclusion that the PW1 and PW2 were spouses and that they clarified on who was the owner of the house. It has been stated that the mere fact that PW1 and PW2 were spouses did not mean that they owned the property jointly.

30. It is the Appellant's contention that without any title or ownership document, the trial court ought not to have made assumptions as to the owner of the property which challenged the locus standi and jurisdiction as was alluded to by the Trial Magistrate.

31. On whether the Respondent proved negligence against the Appellant, it has been submitted that the Respondent and/or the deceased did not disclose the cause of action against the Appellant. It was stated that the suit is neither anchored on tortious liability for negligence and/or breach of contract, it was merely a claim for special damages without establishing any nexus to the Appellant.

32. According to the Appellant, a mere occurrence of an accident caused by a fire outbreak does not amount to negligence. There should be evidence, which was not availed in the case herein before the trial court. Reliance has been placed on the case of **Statpack Industries –vs- James Mbithi Munyao [2005] eKLR**, where Justice Visram stated that proof of an injury is not enough, the same must be as a result of negligence for one to be compensated.

33. It has been submitted that the negligence of a Defendant must not only be pleaded but must also be proved. It has been added that even if negligence was pleaded, the issue of causation or the nexus between the outbreak of the fire and the Appellant ought to have been strictly proved. That the report relied on was not signed nor did it have a seal as required by the law, a fact that PW4 agreed to during cross examination.

34. The Appellant has also submitted that PW1's evidence that the electrical wire that belonged to the Appellant started the fire, was not enough, as the defect was never reported to the Appellant's office. Further, that PW1 and PW2 did not state that the Appellant did or omitted to do anything and as a result the fire occurred.

35. It is the submission of the Appellant that the Respondent in her pleadings did not aver that the fire was caused due to the negligence of the Appellant and that no such particulars of the negligence were enumerated. The deceased never reported the default of the wires to the Appellant but instead to meter readers, which evidence the Appellant submits they did not rebut.

36. On whether the Respondent was entitled to the special damages awarded by the trial Magistrate, the Appellant has submitted that it is a well-known principle of law that special damages need not only be pleaded but must also be strongly proved and that the proof must be in documentary evidence.

37. The Appellant submits that the special damages in this case were pleaded but were not strictly proved. It has been stated that on re-examination PW1 disowned the originality of the bundle of receipts he produced as evidence before the court. Further, that the valuation report as produced by PW4 was not reliable as it was indicated by the trial court that it only offered guidance and no proof on the special damages.

38. Further submissions is that the amounts of **Kshs.500,000.00** as assessed by the trial court as being special damages were not based on any document but was an amount that was picked from the air and that the award of **Kshs.300,000.00** was unprecedented after the PW1 disowned receipts as were produced by him. It has added that special damages are not proved on a balance of probabilities and are not awarded on speculation as was done by the trial court.

The Respondent's Submissions

39. In her submissions, the Respondent has summarized the case as was before the trial court, the evidence and all that occurred before court.

She has however emphasized that a valid valuation report was filed on the 13th July, 2019 after the parties herein entered into a consent.

40. The Respondent has urged this court not to interfere with the award of **Kshs.800,000/=** as the same can only be done in the clearest of circumstances that the trial court acted on a wrong principle of law. Reliance has been placed in the cases of **Joseph Njogu Kamunge –vs- Charles Muriuki Gachari [2016]eKLR** and **Daniel Paul Onkangi & 3 Others –vs- Kenya Power & Lighting Company Limited [2017]eKLR**.

41. This court has been urged to uphold the decision delivered on 12th November, 2018 and dismiss the Appeal herein with costs.

Analysis and determination

42. This being the first Appeal, this Court has a duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to observe their demeanour. (See the case of **Peters –vs- Sunday Post Ltd [1958]EA 424**).

43. I have carefully considered the pleadings, the evidence and Judgment of the trial court and submissions filed herein. I find the issues for determination are as follows: -

- i) Whether the original deceased Plaintiff (Kazunu Ngala Kasunji) had locus standi to institute the suit in the first instance;*
- ii) Whether there was sufficient proof of negligence against the Appellant;*
- iii) Whether the Respondent was entitled to the award of Special damages as awarded by the trial court*

i) Whether the original deceased Plaintiff (Kazunu Ngala

Kasunji) had locus standi to institute the suit in the first instance

44. The issue on *locus standi* has been raised by the Appellant, contending that the issue of ownership was not settled as to who owned the house between the **Hadija Kazungi Ngala** and the late **Kazungu Ngala Kasunji** who testified as PW1. The Appellant stated that the trial court erred when it dismissed their preliminary objection on *locus standi* as a mere technicality.

45. The Appellant referred the court to PW1's testimony on cross-examination where he stated that the house belonged to him, and later on stated that he only built the house, but it belonged to his wife. The wife, who is the Respondent herein later testified as PW2 and when she was cross examined, she stated that the burnt house belonged to her. The Appellant further added that no ownership documents of the house were adduced to support this claim.

46. In the case of **Law Society of Kenya –vs- Commissioner of Lands & 2 Others [2001]eKLR**, Ombija J(as he then was), stated the following on *locus standi*: -

“... Locus-standi signified a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law. That was the holding in BV Narayana Reddy –vs- State of Kamataka Air (1985) Kan 99, 106 (The Constitution of India, ARD 226). I adopt the same as a correct proposition of the law and I so hold....

...the test of locus-standi is embodied in HC Misc Application No 58 of 1997 – Hon Raila Odinga vs Hon Justice Abdul Majid Cockar and Republic—vs- GBM Kariuki Misc Cr Appl. No 6 of 1994 which are authorities for the proposition that for a party to have locus standi in a matter he ought to show that his own interest particularly has been prejudiced or about to be prejudiced. If the interest in issue is a public one, then the litigant must show that the matter complained of has injured him over and above injury, loss or prejudice suffered by the rest of the public in order to have a

right to appear in court and to be heard on that matter....”

47. It can be said that *locus standi* is the right to appear and be heard before a court of law and when raised as a **Preliminary Objection** and the same is determined it is capable of disposing of the matter without the suit being fully heard.

48. In the case herein, the Appellant's contention is that the deceased Plaintiff (**Kazungu Ngala Kasunji**) had no right to bring the suit herein as he claimed not to own the property. The owner of the property is said to be the Respondent, the late Plaintiff's wife.

49. In applying the test of *locus standi* as shown in the case of **Law Society of Kenya –vs- Commissioner of Lands & 2 Others (supra)**, I find that the deceased Plaintiff (**Kazungu Ngala Kasunji**) had interest in the house, as clearly indicated during his cross examination that he built it and thereafter lived in it with his family which included the Respondent herein, who was his spouse.

50. The argument that the deceased Plaintiff (**Kazungu Ngala Kasunji**) lacked *locus standi* is farfetched as the deceased and the Respondent were spouses and under **Article 22** of the **Constitution of Kenya**, the deceased was within his rights to institute the suit herein.

51. I therefore agree with the finding of the trial court that the issue on ownership of the house was not enough to dispose of the case at a preliminary stage.

ii) Whether there was sufficient proof of negligence against the Appellant

52. It was further the Appellant's case that the case herein did not disclose a cause of action as against them as a mere fire outbreak does not in itself connote negligence. It was stated that PW1's evidence on the fire outbreak was scant and further that the Respondent herein did not testify on the cause of the fire and that the case never alluded to what the Appellant did or omitted to do that caused the fire. The Appellant added that the mere mention that there were two loose wires was not sufficient as the deceased and his family were duty bound to report any default to the Appellant, which was never done.

53. The Court of Appeal in the case of **Eastern Produce (K) Limited –vs- Christopher Astiado Osiro, Civil Appeal No.43 of 2001** held that: -

“...It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence...”

54. In this case, I find that negligence has been sufficiently proved against the Appellant as **PW1** stated that the fire was ignited by two electrical wires that brought power to the house, a claim that was corroborated by **PW3**, a fire fighter from Mombasa County who stated that the cause of the fire was a short circuit that involved wires that supplied electricity to the house.

55. On whether the Respondent was required to report the default to the

Appellant, and not the meter readers, I concur with the finding of the trial court that no one from the Appellant's office testified to contradict the deceased's evidence and inform the court of the requirement to report any default to their offices. The court was convinced that by the Plaintiff telling the meter readers, it was enough proof that the Plaintiff reported the default as required. The trial court therefore had no option but to rely on the uncontroverted evidence of the Plaintiff.

56. The court, further finds that it is unnecessary as alluded by the Appellant that the word “negligence” should be specifically used in the Plaintiff for there to be a finding on negligence. The mere fact that the Applicant has explained to the court what was done or omitted is enough for a court to make a finding on negligence. In the case herein, the claim was on defective wires that were hanging that emanated from the Appellant.

57. This court has looked at the trial court's Judgment and finds that it considered all the pleadings and supporting evidence as were filed before it, and concluded correctly that the Appellant was negligent and liable to the deceased and Respondent herein.

iii) Whether the Respondent was entitled to the award of Special damages as awarded by the trial court

58. The Appellant has stated that the trial court erred when it awarded the Respondent the sum of **Kshs.800,000/=** as special damages being that the value of the damaged house having been assessed at **Kshs.500,000/=** and **Kshs.300,000/=** being an award for the loss of items therein. To the Appellant, the Respondent pleaded an amount of **Kshs.3,045,475/=** but the same was not strictly proved as required in law.

59. It is the Appellant's contention that **PW4**, a valuer who testified for the Respondent estimated the loss at **Kshs.1,800,000/=** and prepared a report to that effect. On placing reliance on the report, the trial court noted that it was based on the cost of constructing a house and not on the damages incurred as at **6th March, 2008** when the fire occurred. The Appellant stated that the trial court found the report to be unreliable but only offered guidance, thus was not sufficient to prove special damages. Further, that when the deceased testified he disowned receipts of the particularised loss of items in **Amended Plaintiff**.

60. According to the Appellant the amounts of **Kshs.500,000/=** and **Kshs.300,000/=** being an award for the damaged house and loss of items was picked from the air and therefore the trial court had no basis to award the same. It is the Appellant's case that the special damages were awarded on speculation.

61. On the issue of whether or not the appellant's case was properly pleaded and proved, I am guided by the decision of the court of Appeal in the case of **John Richard Okuku Oloo –vs- South Nyanza Sugar Co Ltd [2013]eKLR**, wherein it observed: -

“...We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited –vs- Murunga & Others, Nairobi CA No.192 of 1992 (ur) appears in the Jivanji case:-

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors

Limited and another v Chebon civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:

“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ’s judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

62. It is evident from the case of **John Richard Okuku Oloo (supra)** that the fact that special damages cannot be assessed with certitude cannot allay the offender of the necessity of paying damages for the negligence that has been **occasioned**.

63. In this case, as correctly held by the trial court, in the midst of all the uncertainty as to the proof required for special damages to be awarded, the trial court took cognisance of the uncontroverted fact that the house was damaged and goods therein destroyed a decision that is in line with the finding of the case of **John Richard Okuku Oloo (supra)**.

64. In view of the above, the trial court was entitled to award special damages to the Respondent, thus I see no reason why I should tamper with the award of **Kshs.800,000/=**.

Disposition

65. In view of the above, the Appellant’s Appeal is hereby dismissed with costs to the Respondent.

66. It is so ordered

DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF AUGUST, 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS 2ND DAY OF SEPTEMBER, 2021.

J. N. ONYIEGO

JUDGE