REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Appellate Side)

(Coram: Odunga, J)

CIVIL APPEAL NO 94 OF 2017

MBATHA MUITHYA &

ROSE KAVENDI DAUDI

(Suing as the Legal Representatives of the Estate of

DOMINIC MUTETI MBATHA (deceased).....APPELLANTS

VERSUS

KENYA POWER & LIGHTING CO. LIMITED.....RESPONDENT

(An appeal from the Judgment and Order of the Hon. Kahuya I.M, Senior Resident Magistrate in Chief Magistrate's Court, Machakos Civil Case No. 637 of 2015 delivered on 12th June 2017) 2017).

BETWEEN

MBATHA MUITHYA &

ROSE KAVENDI DAUDI

(Suing as the Legal Representatives of the Estate of

DOMINIC MUTETI MBATHA (deceased).....PLAINTIFFS

VERSUS

KENYA POWER & LIGHTING CO. LIMITED.....DEFENDANT

JUDGEMENT

1. This is an appeal from the judgement of the **Hon. Kahuya I.M, Senior Resident Magistrate**, delivered on 12th June 2017 in Machakos Chief Magistrate's Court, in Civil Case No. 637 of 2015. The Plaintiffs in that suit, who is the Appellants herein, had instituted proceedings against the Respondent herein seeking both General and Special Damages on behalf of the Estate of **Dominic Muteti Mbatha** (deceased).

2. The cause of action, according to the plaint arose from on 18th October, 2014 while the deceased was working as a casual worker in a construction site where he was earning Kshs 1,500/- per day. It was pleaded that on that day, the deceased was electrocuted by a live electric wire where he fell from the third floor and sustained fatal injuries. According to the plaint the accident was solely caused by the Respondent's negligence as the electric poles fell and live wires hand precariously which touched the deceased making him fall and be electrocuted.

3. According to the plaint, at the time of his death, the deceased was aged 37 years enjoying good health and enjoyed a happy, healthy and vigorous life earning Kshs 1,500/= per day working 6 days a week. Due to his death, it was contended that his expectations of a healthy happy life were abruptly shortened and his dependants suffered damage which they claimed from the Respondent. It was pleaded that the

deceased had a wife and four sons, three of whom were minors.

4. It was also pleaded that the Plaintiffs suffered loss of special damages in the sum of Kshs 441,604/=.

5. PW1, **Mbathe Muithya**, relied on his statement in examination in chief. In the said statement, PW1 stated that on 18th October, 2014, he was called by **Rose Kavendi**, his daughter in law who informed him that the deceased, his son had been admitted at Kenyatta National Hospital. When he visited the deceased, he found him with severe burn injuries and he was informed that the deceased had been electrocuted by electric wires at a construction site in Kitengela. After a number of visits, he was informed on 22nd January, 2015 that the deceased passed away. According to him, they depended on the deceased for their upkeep since the parents were elderly.

6. In cross- examination, PW1 stated that he used to raise the deceased's children and that he wholly depended on the deceased as the deceased's wife was a casual labourer. In re-examination, PW1 stated that the deceased used to give him about Kshs 1,000/- weekly though at times the amount would be less. He however, had no proof of the same.

7. PW2, **Rose Daudi**, the deceased's wife, also adopted her witness statement as examination in chief. In the said statement she stated that testified that on 18th October, 2014, she was informed that her husband the deceased was hospitalised at Kitengela Medical Hospital. When he arrived there, she was informed that the deceased had been transferred to Kenyatta National Hospital. She later learnt that the accident occurred at the construction site where the deceased was working. When he went to Kenyatta National Hospital on 20th October, 2014, she found him with severe burn injuries with back injuries and she was informed by the doctor that he had been electrocuted by live electric wires and that he fell from a height hence the back injuries. Since the deceased could not feed himself, PW2 visited him daily in order to feed him. However, on 22nd January, 2015 when PW2 visited the deceased, she was informed that the deceased had succumbed that morning and his body had been transferred to the mortuary. She then called PW1 and relayed the information.

8. According to PW2, at the time of the accident they used to stay in Kitengela with their two children, **Mutisya Muteti** and **Dennis Mbatha** but after the deceased's death they went to live with the deceased's parents in Makueni. It was her evidence that she incurred expenses in form of medical and transport expenses.

9. PW2 testified that the deceased was casual labourer and was the sole breadwinner since she was not employed. The deceased was also supporting his elderly parents. It was her evidence that their eldest son, **Kyalo Muteti**, was working for the family upkeep while the second son, **Mwendwa Muteti**, was forced to drop out of primary school due to lack of fees. The family was yet to settle the deceased's hospital bills. She exhibited the medical documents, burial permit, death certificate and grant.

10. It was her evidence that the deceased used to earn between Kshs 1,000/= and Kshs 1,500/= per day for 6 days a week. She explained in her oral evidence that she was a casual labourer.

11. In cross-examination, PW2 stated that it was the deceased's colleague who informed her of the accident. She therefore did not know the details of the accident. However, she visited the scene, she found the electric wires lying carelessly on the construction wall. It was her evidence that it was the construction wall that trespassed onto the pathway of the high voltage electric wires and it was the deceased's employers who were to blame for constructing at the wrong place. She testified that the balance owed to Kenyatta National Hospital was Kshs 342,364/- though the hospital had not demanded for the same. Her legal claim, she stated was Kshs 28,000/= since there was a possibility that the other debts might be waived though she was yet to be given a waiver. She admitted that she neither produced receipts for Kshs 63,470/- nor a letter proving the deceased's employment.

12. PW3, **PC Karanja**, was on 18th October, 2014 on duty when he received a report from **Samuel Wambugu** that some masons had been electrocuted at a construction site. Upon rushing there he found 4 masons had been electrocuted and one had died. They sought treatment for the injured while the deceased was taken to Kitengela General Hospital Mortuary. The deceased was however transferred to Kenyatta National Hospital. He proceeded to produce photos of the scene which were taken by his colleagues. It was his evidence that the photos showed electricity post with lines crossing above the building while the post was bent.

13. According to him, he visited the scene after the incident. In cross-examination he admitted that the photo did not show that the electricity pole was bent and that the electric lines were straight. According to him the building was under construction while the electricity posts were already in existence. In his view, the building was erected close to the power lines. From his interview, he stated that he was informed by witnesses on the ground that the electricity lines hit one of the masons leading to the chain of accidents.

14. In re-examination he stated that to the best of his knowledge the building had not yet been demolished and that the Respondent would have asked for it to be demolished had it been encroaching.

15. The Respondent did not adduce any evidence in support of its case.

16. In her judgement, the learned trial magistrate found that none of the witnesses testified as to how the accident occurred and that PW3's evidence was merely an opinion and not expert evidence. The Court found that from the evidence, it was the deceased's employers who were statutorily responsible for the welfare of their employees and ought to have been joined in the suit as defendants in order to explain the actions they had taken in safeguarding the deceased. The court found that from the pleadings, the deceased fell on his own from the construction site and touched the defendant's high voltage wire leading to his electrocution and death, an implication the deceased's death was caused by his own negligent act or that of his employer. The court found that had the defendant's wires fallen off by themselves onto the deceased, that would have been evidence of negligence on the part of the defendant. Based on the evidence, the learned trial magistrate found that the Respondent was not liable for the accident and dismissed the suit with costs.

17. In this appeal, the appellant relies on the following grounds:

1) THAT the learned Magistrate erred in law and fact in making findings not proved or pleaded by the Respondent/Defendant in the subordinate court.

2) THAT the learned Magistrate erred in law in considering extraneous matters.

3) THAT the learned Magistrate as a result erred in law and in fact in ignoring the Appellants'/Plaintiffs' evidence on record.

4) THAT the learned Magistrate erred in law in failing to provide a concise statement of the case, points for determination in her Judgment contrary to order 21 rule 4.

5) THAT the learned Magistrate erred in law in failing to make findings on issues framed with reasons on each separate issue contrary to order 21 rule 5.

6) THAT the learned Magistrate erred in making a finding that the Plaintiffs' /Appellants herein did not prove their case.

7) THAT the learned Magistrate erred in law by ignoring points of law raised by the Appellants in their submissions.

8) THAT the learned Magistrate erred in law and fact by omitting in her Judgment the fact that the Respondent/Defendant had adjourned the suit to explore settlement on 29th August 2016.

9) THAT the learned Magistrate erred in law and fact by making a contradictory finding.

10) THAT the learned magistrate erred in law and in fact in entirely arriving at the decision as she did totally ignoring the Appellants' arguments and uncontested facts pleaded.

11) THAT the learned Magistrate erred in law and in fact in arriving at her ruling and order.

18. In their submissions the Appellants urged the court to examine the record of the photos and testimony of witnesses in this regard and particularly the evidence of PW3 that had the building been encroaching, the Respondent would have brought it down. However, to his knowledge the building had not been demolished, evidence which was never shaken by any defence witness.

19. On the failure by the Respondent to adduce any evidence, the Appellant relied on **Kenya Power & Lighting Co. Ltd vs. Umaz Ali Swaleh [2017] eKLR Civil Appeal 240 of 2009.**

20. The finding by the learned trial magistrate that it was pleaded that the deceased fell on his own from the construction site and touched the Defendant's high voltage line was similarly challenged as not being correct and the court was invited to the evidence of PW3 that he interviewed witnesses and that it is the Power line that hit the deceased. It was submitted that the deceased did not die immediately and that PW2 in his written statement describes what the deceased told him on his hospital bed. According to the Appellant, nothing prevented the Defendant from calling witnesses to show encroachment.

21. It was submitted that whereas under sections 51 and 53 of the ***Energy Act*** the Defendant is empowered to inspect and where necessary demolish for purposes of Electrical Supply, any property impeding this process, to date after occurrence of the incident which took two lives, there has been no action by the Defendant despite the wide powers under the said Act to do so. It was contended that under section 52 of the Act, the Defendant is not exonerated from liability to make compensation for damage by reason of any defect in any electric supply line and therefore strict liability is placed by statute on the Defendant.

22. It was submitted that under Section 56 of the said Act, the law places an obligation on the Defendant to keep in good state of repair suitable and sufficient electric supply lines for the purpose of enabling supply to be given in the area of supply specified in that behalf in the licence. It was further submitted that whereas under thereof, it is criminal to hinder or obstruct supply of electricity, there is no record of a criminal complaint by the Defendant.

23. The Appellant invited the court to take note of the fact that several times the matter was adjourned to explore settlement, yet this was ignored by the trial court. According to the Appellants, in light of the overwhelming evidence adduced, adjournments and strict liability imposed by the law on the Respondent/Defendant, the judgment was contradictory *ipso facto* and *per incurium*.

24. It was submitted that as per the supplementary documents filed pursuant to leave of court, the suit subject of the present appeal is a cause of action that affected two parties. According to the Appellant, Kajiado Civil suit 23 of 2017 between **James Mulili Kyalo and Agnes Mwongeli vs. Kenya Power Limited,** was partly settled and the only point of departure was the amount of quantum and liability percentage which the respondent herein appealed in Kajiado High Court Civil suit (Sic) No. 34 of 2018. This Court was therefore urged to be guided by the decision in that suit.

25. On behalf of the Respondent it was submitted that from the evidence, it was clear that the deceased fell from the building he was constructing hence it was his fall that caused his electrocution. The Respondent therefore submitted that this raised a clear imputation of negligence on the part of the deceased. In support of its submissions the Respondent relied on section 3 of the ***Occupation Safety and Health Act***, Cap 514 Laws of Kenya and section 6(1) hereof as interpreted by the Court of Appeal in **Purity Wambui Murithi vs. Highlands Mineral Water Co. Ltd [2015] eKLR**. The Respondent further relied on ***Clerk & Lindsell on Torts***, 18th Edn. Para 11-04 at page 600. According to the Respondent, since the deceased was fatally injured while working at a construction site, yet his employer was not joined in

the case, since there was no contractual relationship between the deceased and the Respondent, it was misguided to claim damages from the Respondent who was not obligated to protect the deceased.

26. The Respondent relied on ***Halsbury's Laws of England***, 4th Edition at paragraph 662 at page 476, sections 107-109 of the ***Evidence Act***, Cap 80, Laws of Kenya and the case of **Henderson vs. Henry E Jenkins and Sons [1970] AC 232 at 301.**

27. It was therefore submitted that the appellants ought to have demonstrated that the deceased's employer was not to blame and that he had taken adequate measures to ensure the safety of his employees and that despite his adequate measures the Respondent's negligence led to the deceased's death. Having failed to do so, the appellants failed in proving that the respondent was to blame. According to the Respondent, it would have been prudent for the appellants to call an eye witness to prove that the accident happened suddenly and there was nothing either the deceased or his employer would have done to prevent it.

28. It was therefore submitted that the appellants failed to prove their case on a balance of probabilities and their case failed in its entirety.

Determination

29. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

30. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

31. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

32. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

33. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

34. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

35. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

'That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.'"

36. Therefore, as a general rule, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent. In this case, the pleadings were that on 18th October, 2014 while the deceased was working as a casual worker in a construction site, he was, due to the negligence of the Respondent in allowing its electric poles and live wires to precariously hang, caused the deceased to be fatally electrocuted by a live electric wire.

37. PW1's evidence was that the information was relayed to him by PW2. He however visited the scene and had photographs taken to prove that the wires hanged precariously. PW2, was similarly informed of the incident after it took place and therefore was not aware of the details of the incident/accident. She however testified that when she visited the scene she found the wires hanging precariously on the construction wall that trespassed onto the pathway of the high voltage electricity lines. She conceded that the deceased's employers were to blame for constructing at the wrong place. Asked about the photos, she admitted that none of the defendant's wires were loose. On his part PW3 also received the information after the incident. In cross-examination, he admitted that the wires were straight and that the construction was being undertaken when the wires were already in place.

38. What is clear from the evidence is that none of the witnesses were present when the accident occurred. Their evidence as to how the accident occurred was however contradictory. While at one point they alleged that the wires were hanging precariously, in cross-examination, they admitted that there was nothing wrong with the wires and in fact shifted the blame onto the deceased's employers.

39. From the evidence of PW3, it was clear that his information was obtained from the witnesses who were on the ground. Had these witnesses been called to testify, they would have shed light as to how the accident occurred. In the absence of their testimony, the evidence by the witnesses who testified was merely hearsay and could not be the basis of finding the Respondent liable. This must be so since as was held in **Mary Wambui Kabugu vs. Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995**:

"The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to the negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the Appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed."

40. In **Treadsetters Tyres Ltd vs John Wekesa Wepukhulu (2010) eKLR**, **Ibrahim, J** (as he then was) cited ***Charlesworth & Percy on Negligence***, 9th Edition at pg 387 inn which it is stated that:

"In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

41. Similarly, in **Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute (2016) eKLR, Nyamweya, J** quoted ***Halsbury's***

Laws of England, 4th Edition at paragraph 662 at page 476 where it is stated that:

> **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."**

42. In the case of **Henderson vs. Henry E Jenkins and Sons [1970] AC 232 at 301** it was held that:

> **"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgement at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a *prima facie* inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In this situation there is said to be an evidential burden of proof resting on the defendants."**

43. In **Simpson vs. Peat (1952) 1 ALL ER 447** it was held that errors of judgement do not amount to careless driving and that the mere fact that an accident occurs does not follow that a particular person has driven dangerously or without care and attention. That was the same position in **Rambhai Shivabhai Patel & Another vs. Brigadier-General Arthur Corrie Lewin [1943] 10 EACA 36** where it was held that the mere occurrence of an accident is not in itself evidence of negligence and that there must be reasonable evidence of negligence.

44. As stated hereinabove in ordinary cases a case such as the present one would fail for failure by the Appellant to prove that the accident was caused by the negligence of the Respondent. In that case there would be no evidence as to whether it was the deceased who was liable or the driver.

45. The Appellant seemed to have taken the view that since there were indications of negotiations, the trial court ought to have taken that into account in making its finding on liability. With due respect that submission is incorrect. In most cases negotiations are conducted on without prejudice basis and the mere fact that parties decide to explore an out of court settlement does not amount to admission of liability. It may well be that the defendant was attempting to convince the plaintiff to withdraw the suit. This court is not aware of the nature of the negotiations and it would have been improper for the trial court to conclude that since there were negotiations which seemed to have hit a dead end, the Respondent must be deemed to have been liable.

46. The Appellants have cited the findings in Kajiado CMCC No. 23 of 2017 which according to them arose from the same incident and in which judgement on liability was entered against the Respondent herein. As right appreciated by the Appellant that decision is not binding on this court and in any case it was disclosed that the decision is subject of an appeal.

47. According to the Appellant the case against the Respondent was one of strict liability based on section 52 of the ***Energy Act***. In principle I agree with the holding in **Kenya Power & Lighting Co. Ltd vs. Umaz Ali Swaleh** (supra) that:

> **"…under section 52 of the Energy Act, a licensee, in this case the Appellant, is obligated to make compensation for any loss or damage occasioned by reason of execution of its duties and mandate under the Act or by reason of any defect in any electrical supply line. I read and understand this provision to put some strict liability upon the Appellant as a licensee for purposes of supplying and maintain electric power supply lines. There was sufficient evidence that an electric wire snapped and fell to the ground and thereby pausing the fatal danger ultimately visited upon the deceased. Knowing the danger that a defective electric cable or line pose to any human being and property, there is a duty of care owed to all Kenyan by the Appellant to maintain and keep secured all electric transmission lines and infrastructure so that accidents are avoided. In Joseph Kiptonui vs KPLC Hon Asike Makhandia J, as he there was, held and said:-**
>
> **"…Kenya Power & Lighting Co. Ltd owed to the plaintiff and every Kenyan a duty of care where it happen to have power lines. Further electric power is a dangerous commodity and if not properly secured can be a danger to the society".**
>
> **Same sentiments were expressed by GBM Kariuki J, in KPLC vs Joseph Khaemba Njuria to the effect that the Appellant, has a responsibility to ensure that the power infrastructure it has installed in the country for the purposes of electrification is properly maintained to prevent accident. I find the foregoing decisions to be well founded in support of my finding that the Appellant had a duty of care to ensure that its power supply infrastructure was kept in good repair and condition to avoid being a risk to the general public including the deceased minor."**

48. Section 52 aforesaid provides as hereunder:

> ***The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by the loss or damage or breaking of any electric supply line, or by reason of any defect in any electric supply line.***

49. That section, in my view only kicks in where it is proved that the damage or loss was caused by the exercise or use of any power or authority conferred by the Act or by any irregularity, trespass or other wrongful proceeding in the execution of the Act, or by the loss or

damage or breaking of any electric supply line, or by reason of any defect in any electric supply line. In this case since reliance was placed on defect in the electric supply line, it was necessary for the Appellants to prove that that was in fact the cause of the accident/incident. Once that was proved, it would then be a case of strict liability. The would have been easily proved by calling an eye witness to the accident. In the absence of that, section 52 could not be invoked in order to find the Respondent liable.

50. I however agree that the learned trial magistrate misconstrued paragraph 4 of the plaint to imply that the deceased fell onto the wires. A proper reading and understanding of that paragraph does not lead to that conclusion. To my mind, what that paragraph states is that the deceased was electrocuted and fell from the 3rd floor and sustained fatal injuries. That is a different thing from saying that the deceased fell on the wires.

51. Regarding the complaint that the learned trial magistrate erred in law in failing to provide a concise statement of the case, points for determination in her Judgment contrary to Order 21 rule 4 of the ***Civil Procedure Rules***, in **Shah vs. Aguto [1970] EA 263**, the East African Court of Appeal expressed itself as follows:

> **"In his judgement the Judge of the High Court was most critical of the Resident Magistrate's decision and held that the Court must consider and make findings not only upon the genuineness of the books and whether they were kept in the course of the business but also the relative credibility of the parties and must ponder on the balancing of probabilities remembering at all times where the burden of proof lies. According to the Judge this was not done. With respect, the Judge was not being altogether fair to the Senior Resident Magistrate. A Resident Magistrate is usually an extremely busy man and trials before him are of a summary nature, and the law does not require him to deliver that full and detailed judgement which the Judge appears to have considered necessary. Order 20 rule 4 sets out what a judgement should contain and it appears that the Resident Magistrate sufficiently complied with requirements of this rule. The law presumes that a judge or magistrate knows the law and is always mindful of the principles of the law applying to particular case and in particular as to where the onus of proof lies. A judge or magistrate is under no duty to set out in detail all the various principles of law which he is applying except, of course, where there is any particular question of law to be decided or where there is a dispute between the parties as to what is the law in any particular matter. It is, of course, a different matter if it appears from his judgement that the Judge or magistrate has misdirected himself on any particular question of law and it is, of course, also different when a judge or magistrate has to sum up or explain the law to the assessors."**

52. It was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

> **"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."**

53. I have on my part considered the judgement of the learned trial magistrate and I find that it substantially complied with the law and ought not to be disturbed on that ground.

54. Accordingly, this appeal fails and is dismissed but with no order as to costs as the Respondent did not comply with this court's directions to furnish the court with soft copies.

55. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 4th day of February, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Kubai for Mr Mulei for the Respondent

Mr Munyao for Wambugu for the Appelant

CA Geoffrey