



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO.155 OF 2017**

**KENYA POWER & LIGHTING CO. LTD .....APPELLANT**

**VERSUS**

**RASSUL NZEMBE MWADZAYA.....RESPONDENT**

*(Being an Appeal from the Judgment/Decree of Honourable F. Kyambia (SPM) in Mombasa CMCC No.2257 of 2012, delivered on 7<sup>th</sup> July 2017)*

**JUDGMENT**

1. The Respondent instituted a suit against the Appellant claiming general damages, special damages, costs and interest in **Mombasa CMCC No.2257/2012** on **8<sup>th</sup> October 2012**.

2. The Respondent averred that on or about **15<sup>th</sup> June, 2007**, the Appellant negligently allowed an upsurge in power supply line into the Plaintiff's house hence igniting a fire, which completely burned down the Plaintiff's house together with all contents and abutments thus occasioning him loss and damage.

3. After the case was heard, the Learned Magistrate entered Judgment on liability in favour of the Respondent against the Appellant at **100%** bases and awarded damages as follows:-

**a) Special damages - Kshs.5,161,367.50/=**

4. The Appellant, on being dissatisfied with the above decision, lodged the instant **Appeal** and set out **3 grounds** namely:-

**a) That the Learned Magistrate erred in law and in fact in finding that the Respondent had proved his case on a balance of probability whereas no iota of negligence was proved as against the Appellant hence arriving at the wrong decision.**

**b) That the Learned Magistrate erred in law and in fact in finding that the Respondent had proved his whereas the exact cause of the fire could not be established.**

**c) That the Learned Magistrate erred in law and in fact in entering Judgment in favour of the Respondent as against the Appellant for Kshs.5,161,367.50/=**

5. The **Appeal** was dispensed with via written submissions. The Appellants' submissions were filed on **26<sup>th</sup> February 2019**, while the Respondent's submissions were filed on **7<sup>th</sup> March 2019**.

**Submissions by the Parties**

6. On the issue of liability, **Mr. Kobole** Learned Counsel for the Appellant submitted that in **PW6's** evidence, it was stated that the cause of fire had not been established. Further, the same was confirmed via cross examination, where **PW6** confirmed that he could not tell the real cause of the fire, where the fire began, and that the meter box was missing so he never examined it. Therefore, there was no evidence tendered to demonstrate that the fire was caused as a result of an upsurge in power supply in the Respondent's premises. Therefore breach of the Respondent's duty of case was not proved. For authority, Counsel cited the case of **Anastassios Thomos...Vs...Occidental Insurance Company Limited [2017]eKLR**, where it was observed:-

***“Before a claim can succeed in an action for negligence, the damages alleged must be damages which the law recognizes and which is not too remote. When it comes to remoteness of damages, the court ought to determine whether there was a sufficient cause or proximate connection between the Defendant's negligence and the damages suffered by the Plaintiff that is***

*recognizable as a matter of policy that the Defendant should pay for the damages....”*

7. **Ms. Ngugi**, Learned Counsel for the Respondent submitted that once a contract of supply of electricity was established, the Appellant owed the Respondent a duty of care. Further, Counsel submitted that PW6 in his opinion observed that the possible cause of fire was that the cut out that would protect the installation from external faults had been fitted with twisted wire instead of correct rated High Rapture Capacity Fuse.

8. Counsel also submitted that the Appellant did not file any witness statement or documents in support of its defence and no witness was called to testify in regard to the occurrence of the fire incident, meaning that the allegations in the Appellant’s defence remained just mere allegations and answers gathered on cross-examination cannot build the Appellant’s case.

#### **Determination**

9. In determination of the **Appeal**, the court considered the submissions of the parties in this **Appeal** in line with the **Grounds of Appeal**, the proceedings, **Judgment** of the trial court, cited case and statute law. The court finds that the issues for determination are as follows:-

*i. Whether the Respondent proved negligence against the Appellant.*

*ii. Whether the award on quantum of damages by the trial court was justified.*

10. This being a first Appellate Court, it was held in the case of **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 demeanor of a witness is inconsistent with the evidence in the case generally”.*

*i) Whether the Respondent proved negligence against the Appellant*

11. The occurrence of the fire accident and the fact that the relationship between the Appellant and the Respondent was contractual in nature, was not in dispute. As regards the first issue of whether the Respondent proved negligence on the part of the Appellant, it is noteworthy that **PW6** who is an electrician and a **Technical Manager** of **Kites Technical Limited**, produced his report dated **31<sup>st</sup> July, 2009**, wherein he concluded that it was possible that the fault emanated from the mains backward into the final sub circuit. He explained that this is because all circuit breakers seemed to have tripped simultaneously at the consumer unit and the cut out which should protect the installation from external faults had been fitted with twisted strand of wire instead of a correct rated HRC fuse. Consequently, **PW6** concluded that the cause of the fire is more inclined to have been an electrical fault from the mains supply other than any other probable cause.

12. It is noteworthy that the Appellant in its amended **Statement of Defence** filed on **15<sup>th</sup> October 2012** denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of **Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schulter, Civil Appeal No.23 of 1997**, where the Court of Appeal stated:-

*“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.*

13. Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. In the case of **John Wainaina Kagwe..Vs..Hussein Dairy Ltd[2013]eKLR**, the Court of Appeal held as follows:-

*“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent’s defence was a mere bone with no fresh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....”*

14. Further, the Appellant alleges that the testimony of **PW6** was of no probative value as the same was challenged through cross-examination and it was established that there was no basis of arriving at the said finding since **PW6** confirmed that the meter box was missing. Consequently, the source of the fire could not be established. The Court of Appeal in the case of **Dhalay...Vs... Republic (1995-1998)EA 29**, expressed:-

***“Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty to reject it” [emphasis added]”.***

15. Having found that the Respondent’s case remained uncontroverted, and that there was no any other evidence in conflict with the evidence by **PW6**, this Court notes that there were no cogent grounds advanced by the Appellant that would persuade this court to reject the evidence by **PW6**. Consequently, this Court finds that the trial court did not fall into error when it found that the fire was as a result of an electric fault and the Appellant was the one to blame.

***ii) Whether the award on quantum of damages by the trial court was justified.***

16. On the second issue of whether the award on quantum of damages by the trial court was justified, this Court notes that **PW5** who is a quantity Surveyor vide Report dated **7<sup>th</sup> August, 2009** gave an assessment report at **Kshs.5.161,367/=**. There is no other evidence that is in conflict and/or challenges the conclusion arrived at by **PW5**. Consequently, this Court upholds the finding by the trial court on the issue of special damages. See the Court of Appeal case of **Dhalay...Vs...Republic (1995-1998) (supra)**.

17. For the above reasons, the entire Appeal is found unmerited and the trial court’s Judgment delivered on the **7<sup>th</sup> July, 2017** upheld.

18. Accordingly, the **Appeal** is dismissed with costs to the Respondent..

It is so ordered.

**DATED, SIGNED, and DELIVERED at MOMBASA on this 7<sup>th</sup> day of October, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all Judgments and Rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**