



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 54 OF 2015

KENYA POWER & LIGHTING CO LTD.....APPELLANTS

VERSUS

EMMANUEL SHAPIL NDEGE.....1ST RESPONDENT

BOARD OF TRUSTEES NATIONAL COUNCIL OF CHURCHES (NCCK).....2ND RESPONDENT

(Being an appeal from the judgment and decree of Honourable S. M. MOKUA, Senior Principal Magistrate in Eldoret Cmcc No. 947 of 2012 delivered on 26th March, 2015)

JUDGEMENT

1. The 1st Respondent (**EMMANUEL SHAPIL NDEGE**) was awarded general damages of Kshs.3,002,000/= plus costs and interest following a claim he filed against the appellant for:

a) General damages for pain and suffering and loss of consortium, earnings and amenities arising from the electric burn wounds occasioned by the negligence of the Appellants and the 2nd Respondent.

b) Special damages and costs of future medical expenses.

2. That the 1st Respondent's suit was founded on an accident which occurred on the 15th February, 2008 wherein the 1st Respondent was electrocuted while opening a door for a friend. The house was rented to him by the **BOARD OF TRUSTEES NATIONAL COUNCIL OF CHURCHES (NCCK)** referred to as 2nd Respondent.

3. The 1st Respondent attributed severe injuries sustained to him were as a result of the negligence of the Appellant and the 2nd Respondent herein. The 1st Respondent was a tenant at the 2nd Respondent's Staff quarters and the Appellant was said to have negligently allowed live electric wires that were swaying precariously above the rented Appellant's roof which came into contact with the Appellant's T.V aerial causing the same to catch fire thereby electrocuting the appellant and occasioning him severe electric burns.

5. The trial found the Appellant liable at 70% and the 2nd Respondent liable at 30%

a) Damages for pain and suffering - Kshs. 3,000,000/=

b) Special damages - Kshs. 2,000/=

Total - Kshs, 3,002,000/=

Plus costs

The Appellant being aggrieved by the said judgment filed this Appeal on grounds that:-

(1) The trial Magistrate erred in law and fact by finding the appellant liable and apportioning liability in a manner that was not supported by evidence.

(2) The trial Magistrate failed to take into account relevant factors and as a result his decision is wrong.

(3) The trial Magistrate misapprehended the evidence on record and failed to properly and exhaustively evaluate the evidence and/or based on no evidence.

(4) The trial Magistrate shifted the burden of proof to the appellant and failed to appreciate the weight of the evidence tendered by the appellant and unjustifiably rejecting the appellant's evidence.

(5) The award of general damages which was so inordinately high as to amount to a wholly erroneous estimate based on application of wrong principles in assessment of damages thus awarding damages that were so excessive in the circumstances.

3. The Appellant prays that the Appeal be allowed and the judgment of the lower court be set aside and be substituted with a proper finding of this honourable court, the plaintiff's suit be dismissed, the apportionment of liability against the appellant be set aside and in the alternative the Honourable court makes a finding on quantum of damages payable.

4. This appeal is limited to the issue of liability and the quantum of damages awarded by the subordinate court. The parties agreed to canvass the appeal by way of written submissions.

5. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in *Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123* in the following terms:

I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this 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 (*Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270*).

6. This same position had been taken by the Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited [1958] EA 424* where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses.

An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt –vs-Thomas (1), [1947] A.C. 484*.

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, 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 is really 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 the trial and especially if that conclusion has been 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 circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

7. The appropriate standard of review established in these cases can be stated in three complementary principles:

- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

8. These three principles are well settled and are derived from various binding and persuasive authorities including *Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA)*; *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA)*; *Virani T/A Kisumu Beach Resort v Phoenix of East Africa*

9. The Respondents' case was founded on the alleged negligence of the Appellant. As such, they were by law required to establish on a balance of probabilities that:

- a. The Appellant owed the Respondent a duty of care;
- b. The Appellant breached that duty, and;
- c. The Respondent suffered injury as a result of that breach.

10. The Respondents' case, at the trial was that the he sustained severe burn injuries following an electrocution incident as he was opening a steel door due to the Appellant's negligence in

- a. Causing or permitting live electric power lines to hang precariously and or dangerously above the buildings and in particular above the plaintiff's rental premises,
- b. Neglecting to ensure that the said live wires were removed from the same site so as not to pose a danger to the residents living along the power lines especially the plaintiff,
- c. Failing to re-allocate the electric posts or power line to a safer distance and ensuring that the lines or power lines were properly installed, erecting high voltage lines passing near buildings contrary to way leave guidelines,
- d. Failing to adhere to formulated policies and management of power supply security, allowing installation of a power line above a building or dwelling house,
- e. Permitting live wires to be exposed, permitting members of the public to construct buildings under the high voltage wires and lastly colluding with the 2nd defendant to demolish the building after the tragic accident.

11. The second defendant was faulted negligently for the following:-

- a. Constructing rental premises along high voltage transmission electric lines without due regards to the tenant.
- b. Erecting the building contrary to way leave guidelines and/or failing to consult the 1st defendant.
- c. Colluding with the 1st defendant to construct the building and installing the electricity contrary to the laid down rules of housing and Kenya Power & Lighting Company Limited.
- d. Negligently causing to lease rental premises to the public which it knew to be dangerous and risk to them and more particular to the plaintiff tenant.
- e. Failing to alert or inform the 1st defendant on the culpable danger posed by high voltage wires on the premises.
- f. Maliciously demolishing the building or the house after the occurrence of tragic accident as a cover up of any liability arising therefrom.

13. It was the plaintiff's testimony that at the time of the accident he had leased a premise at Eldoret West Estate for rental belonging to the 2nd defendant. He further stated that he was electrocuted while opening the door. As a result of the accident, he sustained burns on the neck, chest, abdomen, arms and legs including the toes.

14. **Barnabas Kipchirchir** an employee of Kenya Power visited the scene of the accident and realized that a tenant of **NCCK** while in the process of adjusting his T.V antennae got into contact with the electric line electrocuting him. He stated that the wires were 40 feet above the ground and blamed the Respondent for putting his aerial high and blamed the 2nd Respondent for building below the power line.

17. On appeal, the Appellant maintains that the Respondent had not proved the elements of negligence that is the duty, breach, causation and damages. The appellant further submitted that the 2nd Respondent was liable for the burn accident due to the safety violations which they were responsible for enforcing.

18. The Appellant also argues that the 2nd respondent being landlord herein owed the 1st respondent a duty of care which it failed to exercise by ensuring that the 1st respondent is not harmed in any way.

They referred to the case of *Donoghue vs. Stevenson (1932) AC 580* where it was stated that every person must take reasonable care to avoid acts or omissions which can reasonably be foreseen as likely to injure a neighbor.

19. That the magistrate erred in apportioning liability of 30% as against the defendant having made bold declaration on the status of its

liability. The 2nd Respondent was responsible for the injuries on the 1st Respondent as it knew of the dangerous condition and failed to repair the same or give adequate of its presence to its tenants.

20. They further submitted that the 1st respondent failed to take proper care of his safety and this failure contributed overwhelmingly in his injuries as it was not mandatory for him to lease out the premises which he observed were close to the electric line. They relied in the case of ***Froom vs Butcher (1976) 1QB 286, Butterfied vs Forrester and Fitzgerald vs Lane (1989) 1AC 328***

21. The primary argument of the Appellant on quantum was that the award was inordinately high. The Appellant referred to the Court of ***Appeal of East Africa in Butt vs Khan (1978) Eklr*** and the common law compensatory principle that the purpose of an award of damages is to compensate the injured party for loss rather than punish the wrong doer.

22. The Respondent in opposing the appeal submitted that the appellant contravened the safety regulations stipulated under the electricity power Act. The Appellant permitted the live electric power lines to hang dangerously above the building where the 1st respondent rented.

23. The 2nd respondent on the other hand was faulted for constructing the rental premises below the high voltage lines of without due regard to the 1st respondent and in erecting the building contrary to way leave guidelines without consulting the appellant.

24. On quantum, it was submitted that the 1st respondent was admitted for a period of 10 months. Upon being examined by **Dr. Aluda** his prognosis and opinion was that the scars and skin pigmentation will remain a permanent feature on his body and more so the scars as well.

25. On second examination by **Dr. Lodhia**, his prognosis and opinion was that the respondent sustained severe electric burns on burns on his body leaving a permanent damage to the affected parts. He awarded him **70% permanent disability** and that the elbow joints may be reduced by surgical intervention by plastic corrective surgery.

26. **Dr. Gaya** on the other hand opined that there is permanent disability of the elbow joints and left wrist joint whose function may only be partially restored through extensive corrective surgery. He awarded **65% permanent disability**.

27. Coming now to the important issue of “causation”, it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone’s negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone’s negligence. An injury per se is not sufficient to hold someone liable.

28. The Appellant’s alternate propositions are that either the accident occurred to the Respondent without the negligence of the Appellant or that the Respondent himself was responsible for the accident by courting danger knowing the dangers associated with electric lines yet leasing the house.

29. It is trite that all electrical installations are the mandate of the Kenya Power and lighting Company limited who has a duty to ensure that the electrical installations are done by its qualified staff and in the manner specified in the **Electric Power Act Cap 314** and the Rules e thereunder. Kenya Power and Lighting Company is the only entity mandated to install, supervise, inspect and maintain electric installations.

30. The duty for constant checks, inspections and maintenance of electrical installations is placed upon the appellant by statute Its failure to do so and its employees admission that there was a leakage from the wires that caused the electrocution, having not been challenged then leaves the same conclusion that the appellant failed to maintain, inspect and supervise electric installations into the plot leading to the respondent’s electrocution. See **Section 63, and 109 of the Electric Power Act, Cap 314**.

31. The respondents were by their evidence able to prove the necessary causation and the link between the appellant’s negligence and the fatal injury to the deceased. That evidence, is sufficient to link the two and therefore sufficient to hold both liable at different proportions. See **Statpack Industries vs James Mbithi Munyao (2005) eKLR** as stated in the **Timsales Ltd vs Stephen Gachie (2005) eKLR**, an accident be caused by many factors and a link must therefore be established. The appellant failed to prove its assertions in its statement of defence, and they therefore remain as such.

32. That the uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its too upon a balance of probability whether the evidence in unchallenged or not.

33. In **Kanyungu Njogu vs Daniel Kimani Maingi (2000) e KLR** it was held that:

“... when a court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that probability was more probable than the other”

34. In the case **Grace Kanini Muthini vs KBS and Another Nyeri H.C. Misc Appl. No. 270 of 2000** the Court of Appeal was faced with two probabilities as to between the parties who may have caused an accident. The plaintiff was said to have contributed to the accident by failing to take care of his own safety and permitted the accident to occur. The plaintiff however required to prove her case on a balance of probability that she did not contribute to the accident. The Judge rendered that:

“ ---- I can only decide the case on a balance of probability if there is evidence to enable me say that it was more probable than that the second defendant wholly or partly contributed to the accident.”

35. As for the damages, I have considered the medical reports by the various doctors and the prognosis, as well as the past judicial decisions on related injuries, and I find that the trial magistrate paid due consideration to all the relevant factors and the same is not inordinately high. I therefore decline to interfere with the damages awarded. Consequently and for the above reasons the appeal lacks merit and is dismissed with costs.

Delivered and Dated this 10th day of January 2019 at Eldoret

H. A. OMONDI

JUDGE