



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 122 OF 2014

JAMES BARASA NYONGESA.....1ST APPELLANT

HASSAN WANJALA OMUTE.....2ND APPELLANT

=VERSUS=

KENYA POWER & LIGHTING COMPANY LTD.....RESPONDENT

(Being an appeal against the Judgment of Hon. F. Kombo, Senior Principal Magistrate,

delivered on the 11th July, 2014 in Nakuru CMCC No.756 of 2011)

JUDGMENT

INTRODUCTION

1. This appeal arise from decision in a suit filed by the appellants both legal representatives of the estate of the late **ROSE NASIKE BARASA** against the respondent seeking general and special damages under Law Reform Act and Fatal Accidents Act.

2. The trial magistrate dismiss the suit for failure by plaintiffs/Appellants to establish their case on a balance of probabilities. Being dissatisfied with lower court's decision, the appellants filed this appeal on the following grounds:-

- a) That the learned Senior Principal Magistrate erred in law and failed to appreciate very basic facts to the effect that the respondent was wholly to blame for the accident by exposing live elective cables to the deceased.
- b) That the respondent was duty bound to ensure that the live electrical cables were properly and adequately insulated to avoid injuring to an ordinary person.
- c) That the learned Senior Principal Magistrate erred in law by deciding the case in favour of the respondent when there was already overwhelming evidence against the respondent.
- d) That the learned trial Senior Principal Magistrate failed or refused to be guided by the principles of precedence and the case of **Rylands –Vs- Fletcher (1866) exc.2016 as affirmed in (1868) L.R.3 H.L.**
- e) That the learned Senior Principal Magistrate failed to apply the doctrine of strict liability against the respondent.
- f) That the learned Senior Principal Magistrate failed to observe that there existed a common law liability on the respondent.
- g) That the learned Senior Principal Magistrate misconstrued the law and misapplied the facts of the entire case against the appellants.
- h) The learned Magistrate did not fully or at all with the mandatory Provisions of Order 20 Rule 4 of the Civil Procedure Rules. He did not set out the concise statement of the case, points for determination the decisions thereon and the reasons for arriving at such decisions.
- i) The learned Magistrate failed to analyze each and all the particulars of negligence and instead went on straight to blame the

appellant for the negligence of the respondent.

APPELLANTS' SUBMISSIONS

4 The appellants restated grounds of submissions filed. They submitted that the trial magistrate failed to take into account evidence of the respondent's witness who acceded the fact that it failed to inspect electrical installations; he said that he could not recall when any inspection was done on electricity lines to the subject house.

5 Further that the trial magistrate failed to appreciate that the respondent has statutory mandate to install, supervise and inspect electrical installations

6 Appellants further submitted that the trial magistrate failed or refused to be guided by the case of **REYLANDS VS FLETCHER** as far as the doctrine of strict liability is concerned.

RESPONDENTS SUBMISSIONS

7 The respondent submitted that the appellants did not prove their case on a balance of probabilities. It submitted that no photographs were produced to prove that the power lines were hanging. It further submitted that the alleged eyewitness was not an eyewitness; that the demeanor of both plaintiff's witnesses was wanting.

8 Respondent submitted that the hanging line was tied to ICT Electrical conductor and as a result of drizzling, the hanging line became live leading to electrocution of the deceased. Respondent blamed the person who placed the hanging line.

9 The respondent urged the court to uphold the trial court's decision and award it costs.

ANALYSIS AND DETERMINATION

10 This being the first appellate court I am required to reevaluate evidence adduced in the lower court and come up with an independent decision. This I do while minded of the fact that I never got the opportunity of taking evidence first hand and observe demeanor of witnesses. I will therefore give due allowance.

11 It is not disputed that the deceased died as a result of electrocution; that it resulted from electric current in the cloth line, which the deceased touched during drizzling rain.

12 PW2 who is a brother to the deceased testified that he had gone with the deceased to visit a sick neighbor when the deceased was electrocuted while assisting the neighbor remove clothes from hanging line. He testified that the hanging line had touched the power line.

13 DW1 an employee of the respondent who investigated the incident testified that the cloth hanging line was fixed on house's fascia board where there was electrical conductor and that the electric conductor came into contact with the hanging line. He testified that the hanging line should not have been tied to ICT electric conductor. He said due to drizzle, the cloth line became live and the deceased was electrocuted.

14 DW1 refuted responsibility on part of the respondent and said the landlord is required to ensure that the wiring is in good order and nothing come into contact with electrical conductor.

15 DW1 said that at the time of installation of power in the house, there was no problem and that they inspect every 3 years. He said the incident would not have occurred if the cloth line never came into contact with the conductor. He blamed the person who fixed the cloth line.

16 On cross-examination, DW1 said respondent is required to do inspection every 3 years but he could not recall when the last inspection was done. He added that they normally demand certificate from the customer before installation but he did not have certificate in court. He also did not have photographs to show state of wires when the incident occurred. He further added that the respondent has instrument to show whether installation is correct but had nothing to show that inspection was done in the area. He indicated that rewiring had been done which require approval from the respondent wiring but he had nothing to confirm that approval was done.

17 DW1 blamed the proprietor of the house. He confirmed that approval has to come from the respondent who was to approve/certify that the installation was properly done. Further, the respondent is required to inspect wiring every 3 years. Respondent however failed to demonstrate that it discharged its mandate. He indicated that rewiring was done in the house but never availed any approval for the same as required. If Inspection was done as required, any improper installation or interference with wiring could have been noted.

18 The trial magistrate observed that plaintiff never produced photographs showing hanging electric wire lines. I note that DW1 was tasked with the duty of investigating the incident. He would been of much assistance to the court if he attached photographs showing positioning of the wires as explained in the report. None of the parties herein availed photographs.

19 PW1 a brother to the deceased testified he had accompanied his sister to visit a sick neighbour. The court found him unreliable witness for failing to tell the neighbor they were visiting. In cross-examination, he said that he lived with the deceased who was his elder sister. The length of the witness' stay with the deceased is not indicated; there is no indication as to whether he knew her sister's neighbor before the visit. My view is that by discrediting the witness for failing to state who the neighbor, the trial magistrate placed a standard of prove above balance of probabilities.

20 The respondent's witness indicated that the cloth line got electric current as a result of conduct with electric conductor. Having admitted that the respondent was required to approve installation and inspect every 3 years, this would have prevented transmission of electric current from the conductor to any object that came in contact with it in the event of rain or drizzle. He never demonstrated that the respondent discharged its mandate in ensuring safe installation. I believe the approval and subsequent inspections are intended to address any improper installation or subsequent interference.

21 My view is respondent's failure to discharge its mandate contributed to the accident to a greater extent. The respondent's witness never produced any photograph to show whether the cloth line was fixed to the electric conductor. In the absence of photographs from both sides and in view of each speaking differently on whether wire lines were hanging or it was tied to the electric conductor, I find it fair to apportion a smaller percentage of liability to the plaintiff attributed to the person who fixed the clothing line; reason being that, if indeed the respondent fixed or tied the line to electric conductor, the anomaly who have been rectified upon inspection.

22 From the forgoing, I do apportion liability at 20:80 in favour of the appellants. The appellant to shoulder 20% liability and respondent 80% liability.

23 In respect of quantum, I note that the trial magistrate assessed damages, which he would have awarded to the appellants if the suit was not dismissed. I have perused and considered the assessment and find award reasonable. I have no reason to disturb quantum.

24 FINAL ORDERS

a) Appeal is allowed

b) Liability is hereby apportioned at 20:80 in favour of plaintiff. Plaintiff to shoulder 20% and defendant 80% liability.

c) Assessment of damages upheld as hereunder:-

d) Loss of dependency: minimum wage age 8000, dependency ratio 2/3 and multiplier of years(8000 x 12 x 5 x 2/3)
.....960,000

i. Pain and suffering.....20,000

ii. Loss of expectation of life.....100,000

iii. Special damages.....18,200

GRAND TOTAL.....1,098,200

Less 20%(219,640)

NET.....878,560

e) I enter judgment for the appellants against the respondent for Kshs. Eight hundred and seventy eight thousand five hundred and sixty shillings only (878,560)

f) Costs in the trial court and the appeal to the appellants.

Judgment Dated, signed and delivered at Nakuru this 2nd day of May 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared Court Assistant

Ntabo Counsel for Appellant

Mrs. Musili Holding Brief for Juma Counsel For Respondent