



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 132 OF 2017**

**RURAL ELECTRIFICATION AUTHORITY.....APPELLANT**

**-VERSUS-**

**PETER KIGEN.....1<sup>ST</sup> RESPONDENT**

**KENYA POWER AND LIGHTING COMPANY.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. C. Obulutsa,**

**Chief Magistrate, delivered on 22 September 2017 in Eldoret CMCC No. 150 of 2015)**

**JUDGMENT**

[1] This appeal was filed on **24 October 2017** by **Rural Electrification Authority**, (hereinafter "the Appellant"). It arises from the Judgment and Decree passed by the Chief Magistrate's Court in **Eldoret Chief Magistrates Civil Case No. 150 of 2015: Peter Kigen vs. Rural Electrification Authority and Kenya Power and Lighting Company Limited**, delivered on **22 September 2017**. **Peter Kigen**, the 1<sup>st</sup> Respondent herein, had sued the Appellant and the 2<sup>nd</sup> Respondent jointly and severally for General and Special Damages, interest and costs, contending that it was due to their negligence that one of his heifers fell and died in a trench that had been dug by the Appellant and left uncovered for far too long.

[2] It was the contention of the 1<sup>st</sup> Respondent before the lower court that were it not for the negligence of the Appellant and the 2<sup>nd</sup> Respondent, the accident would not have occurred. Hence particulars of negligence were pleaded at paragraph 8 of the 1<sup>st</sup> Respondent's Plaint dated **25 February 2015**. Having heard the evidence that was adduced before the court by either side, the Learned Trial Magistrate found for the 1<sup>st</sup> Respondent on liability and quantum against the Appellant and entered Judgment in his favour in the sum of **Kshs. 294,000/=** plus costs and interest. Being dissatisfied with that decision, the Appellant preferred this appeal contending that:

[a] The Learned Trial Magistrate erred in law and in fact in totally disregarding the evidence tendered by the Appellant;

[b] The Learned Trial Magistrate erred in law and in fact in holding that the 1<sup>st</sup> Respondent had proven his case on a balance of probabilities, when the contrary was the case;

[c] The Learned Trial Magistrate erred in law and in fact in failing to consider the submissions tendered by the Appellant;

[d] The Learned Trial Magistrate erred in law and in fact in awarding the 1<sup>st</sup> Respondent damages that are excessively high in the circumstances, and which were not proved in any way by the 1<sup>st</sup> Respondent;

[e] The Learned Trial Magistrate erred in law and in fact in awarding Judgment of **Kshs. 294,000/=** in favour of the 1<sup>st</sup> Respondent;

[f] The Learned Magistrate erred in law and in fact in arriving at a decision that was against the weight of evidence on record and weight of law and as a result, he arrived at an erroneous decision;

[g] The Learned Magistrate erred in law and fact by failing to appreciate the significance of the documentary evidence tendered in

support of the Appellant's case and as a result, he arrived at an erroneous decision;

**[h]** The Learned Magistrate erred in law and fact by failing to take into account relevant factors and as a result, his decision is wrong;

**[i]** The Learned Magistrate erred in law and fact by taking into account irrelevant and extraneous factors, hence he reached an erroneous verdict;

**[j]** The Learned Magistrate misapprehended the evidence on record, the consequence of which was a decision which lacks any basis in law and fact;

**[k]** The Learned Magistrate misdirected himself by arriving at conclusions which are unsupported by evidence and/or based on no evidence;

**[l]** The Learned Magistrate erred in law and in fact by shifting the burden of proof to the Appellant;

**[m]** The Learned Magistrate erred in law and in fact by failing to properly and exhaustively evaluate the evidence on record; hence he arrived at wrong inferences and conclusions;

**[n]** The Learned Magistrate erred in law and in fact by exercising his discretion arbitrarily and in disregard of the applicable legal principles and as a result he erred by entering judgment in favour of the 1<sup>st</sup> Respondent;

**[o]** The decision of the Learned Magistrate is plainly wrong;

**[p]** The Learned Magistrate erred in law and in principle in failing to find and hold that the 1<sup>st</sup> Respondent had not established a case on a balance of probabilities against the Appellant;

**[q]** The Learned Magistrate erred in law and in fact in finding the Appellant wholly liable;

**[r]** The Learned Magistrate erred in law and in fact in finding that the 1<sup>st</sup> Respondent is entitled to damages in total disregard of the evidence on record.

**[3]** In the premises, the Appellant prayed that the Judgment dated **22 September 2017** be set aside, and that in lieu thereof an order be issued dismissing the 1<sup>st</sup> Respondent's suit. It was also prayed that the costs of the appeal be awarded to the Appellant along with any other finding and order that the Court may deem just and fit to grant in the circumstances.

**[4]** The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **30 October 2018**. Thus, the 1<sup>st</sup> Respondent filed written submissions on **10 December 2018**; while the Appellant's Counsel filed his written submissions herein on **25 February 2019**, whereby he consolidated the 18 Grounds of Appeal into four main grounds; namely liability, burden of proof, admission of documentary evidence and quantum. On liability, it was the submission of the Appellant that there was total failure by the trial court to analyze the issue of liability. Reference was made to the cases of **Oluoch Eric Gogo vs. Universal Corporation Limited [2015] eKLR** and **Statpack Industries vs. James Mbithi Munyao [2005] eKLR** to emphasize the need for a re-evaluation of the evidence adduced before the lower court to ensure that justice is done in the matter.

**[5]** On quantum, it was the submission of Counsel for the Plaintiff that since the award was in the nature of special damages, it was imperative that the same be specifically pleaded and proved. Counsel cited **Eastern Produce (K) Limited (Savani Estate) vs. Gilbert Muhunzi Makotsi [2013] eKLR**; **Kemfro Africa Limited t/a Meru Express Services, Gathongo Kanini vs. A.M. Lubia and Olive Lubia [1985] eKLR** as well as **Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku [2006] eKLR** to underscore his argument that the evidence adduced by the 1<sup>st</sup> Respondent was not anything to go by, as it failed to prove the claim. It was therefore the submission of the Appellant that there was no basis for the award.

**[6]** On his part, Counsel for the 1<sup>st</sup> Respondent was of the view that sufficient evidence was adduced before the lower court to prove the case against the Appellant to the requisite standard. He pointed out that the 1<sup>st</sup> Respondent's evidence was corroborated by the evidence of the area Chief and the Veterinary Officer; and therefore that negligence on the part of the Appellant was sufficiently established. In his view, therefore, the Learned Trial Magistrate was right in holding the Appellant 100% liable. Similarly, it was the submission of the 1<sup>st</sup> Respondent that sufficient basis was laid for the award made by the lower court. On the authority of **Butt vs. Khan [1982-88] 1 KAR 1**, it was submitted that no sufficient cause has been shown for this Court to interfere with that award.

**[7]** This being a first appeal, the principle propounded in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, applies, namely:

**"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

[8] Accordingly, I have carefully perused and considered the record of the lower court and note that the 1<sup>st</sup> Respondent testified on **28 September 2016**, adopting his witness statement dated **25 February 2015**. His evidence, basically, was that on the **6 October 2013**, while his cattle were grazing within **Kapchemutwa Forest**, one of them accidentally fell into a trench that had been dug and left open by the Appellant; and that the heifer, which was 7 months pregnant, died as a result. He blamed the Appellant for digging the holes and leaving them uncovered and unfenced.

[9] The 1<sup>st</sup> Respondent called, as his witness, **Dr. Stephen (PW2)**, a Veterinary Officer based at **Iten**. He produced a report that he prepared at the instance of the 1<sup>st</sup> Respondent; and it was marked **the Plaintiff's Exhibit No. 4** before the lower court. That report shows that the estimated economic loss to the Plaintiff following the accidental death of the heifer was **Kshs. 294,000/=** taking into account its approximate live weight, loss of milk production and loss of possible calves.

[10] The 1<sup>st</sup> Respondent's last witness before the lower court was Senior Chief **Fred Lagat (PW3)**. He confirmed that a report was made to him by the 1<sup>st</sup> Respondent to the effect that his cow had fallen into one of the holes dug by the Appellant; and that he gave him a referral letter to take to the Veterinary Office. He identified the letter before the lower court and it was produced and marked **the Plaintiff's Exhibit No. 3**.

[11] On behalf of **Kenya Power**, the 1<sup>st</sup> Defendant before the lower court and the 2<sup>nd</sup> Respondent herein, evidence was called from **Harritone Sakwa Mulisha, DW1**. He adopted his witness statement dated **28 September 2016** wherein he stated that the 2<sup>nd</sup> Respondent did not commission or oversee the alleged project in question; and added that the 2<sup>nd</sup> Respondent was not to blame for the alleged accident. She confirmed that the work of laying the infrastructure for the installation of electric power had been given by the Ministry of Energy to the Appellant; and that the 2<sup>nd</sup> Respondent would only assume responsibility for them after completion of the works and formal hand-over of the works.

[12] **Dennis Kipruto Lagat (DW2)** testified on behalf of the Appellant before the lower court. In similar fashion, he adopted his witness statement dated **4 March 2016** as his evidence before the lower court. He confirmed that, sometime in **November 2013**, the Appellant received a letter of complaint from the 1<sup>st</sup> Respondent, by which he was also seeking compensation for his cow which had allegedly fallen and died in a hole; and that the hole was alleged to have been dug by the Appellant for the purpose of construction of an electricity pole. It was the evidence of **DW2** that he visited the scene but was unable to verify the 1<sup>st</sup> Respondent's allegations since the alleged incident had happened close to three months prior to the date of his visit.

[13] Drawing from his own personal knowledge, **DW1** stated that the breadth of any hole dug for purposes of erecting an electricity pole is approximately 2 feet; and that it is not feasible for a 350 Kg, 7 month pregnant cow to fall into and fit into such a hole. He further blamed the 1<sup>st</sup> Respondent for failing to watch over his animals so as to prevent such an occurrence. He pointed out that the Appellant had sought for a second opinion from the Ministry of Agriculture and was advised that the estimated market value of a 350 Kg pregnant heifer ranged between **Kshs. 75,000/=** to **Kshs. 85,000/=**.

[14] Needless to say that, having alleged negligence on the part of the Defendants before the lower court, it was the responsibility of the 1<sup>st</sup> Respondent to prove those allegations of negligence to the satisfaction of the lower court. Indeed, **Section 107(1)** of the *Evidence Act*, **Chapter 80 of the Laws of Kenya**, is explicit that:

*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

[15] Likewise, **Sections 109** and **112** of the *Evidence Act* provide that:

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

...

*112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*

[16] Thus, in **Statpack Industries vs. James Mbithi Munyao** (supra) **Hon. Visram, J.** (as he then was) aptly stated that:

**"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 a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."**

[17] Having re-evaluated the evidence that was adduced before the lower court in respect of the twin issues of **liability** and **quantum**, (into which the Grounds of Appeal are hereby reduced) there was sufficient proof that the Appellant was, at all material times charged with the responsibility of putting up electricity posts in the *locus in quo*. There appears to be no dispute that on the **6 October 2013**, while the 1<sup>st</sup> Respondent's cattle were grazing within **Kapchemutwa Forest**, one of them accidentally fell into a trench and died as a result. The 1<sup>st</sup> Respondent showed the lower court photographs that he took of the dead animal; and therefore the hypothetical situation presented by **DW2**,

that it is not feasible for a 350 Kg, 7 month pregnant cow to fall into and fit into a hole meant for an electricity post was thereby completely displaced.

[18] It is noteworthy too that the area Chief was also called as a witness and he confirmed that a report was promptly made to him by the 1<sup>st</sup> Respondent that his cow had fallen into one of the holes dug by the Appellant; and that he gave him a referral letter to take to the Veterinary Office. The letter was produced before the lower court and marked **the Plaintiff's Exhibit No. 3.** and indeed, the Veterinary Officer **PW2**, confirmed that he took action on the basis of that letter.

[19] The evidence adduced before the lower court pointed to the Appellant as the entity charged with the construction of the power line in question and therefore the lower court found as a matter of fact that although **DW2's** evidence was that the Appellant had completed the works and handed over the project to the 2<sup>nd</sup> Respondent in **2013**, the hole in question had been left uncovered and unfenced by the Appellant; thereby posing a danger to people and animals. Accordingly, the trial court cannot be faulted for its finding that the hole in question had been dug by the Appellant and therefore that the Appellant was solely and fully liable for the 1<sup>st</sup> Respondent's loss.

[20] Any allegations by the Appellant to the effect that the 1<sup>st</sup> Respondent contributed to the accident by not keeping watch over his animals were misplaced because no such allegations were pleaded in the Defence filed by the Appellant before the lower court. The decision of the Court of Appeal in **Maina Kaniaru & another v Josephat M. Wang'ondy [1995] eKLR** is instructive, that:

"...it should have been apparent to counsel for the respondent right from the beginning that the issue of contributory negligence might possibly arise but despite his very wide experience he did not plead it. Moreover, he did not take the appropriate steps to amend the defence until the trial commenced. It was quite clear at the outset that the action was for damages resulting from the negligence of the respondent. There was no allegation that the deceased had been negligent. In those circumstances, was it right for the learned judge to make a finding of negligence against the deceased in the absence of a plea to that effect? In our view it was wrong for him to do so.

In the case of *Fookes v Slaytor*, [1978] ICLR 1293 the plaintiff, while driving at night, came into collision with the unlighted trailer of an articulated vehicle parked by the side of the road as a result of which he suffered personal injuries. He brought an action for damages for negligence against the driver and owners of the articulated vehicle. After the owners had delivered a defence alleging that the driver was not acting as their servant or agent, the action against them was discontinued. The driver did not serve a defence. On the plaintiff's application he was ordered to deliver a defence within a stated time, failing which he would be debarred from defending. He failed to deliver a defence and, although he was informed of the date and time of the hearing in the county court, he did not appear and was not represented. The plaintiff gave evidence of the accident. The judge found that the defendant had been negligent but that the plaintiff's own negligence had contributed to the accident and he reduced the amount of damages by one third.

On appeal by the plaintiff it was held, allowing the appeal, that contributory negligence had to be specifically pleaded by way of defence to a plaintiff's claim of negligence; that, since there had been no such plea, the judge had erred in law in finding that the plaintiff's negligence had contributed to the accident.

The authority, though not of course in any way binding on this Court, is directly on the point and is in favour of the proposition on which the appellant relies herein. With all due respect to the learned judge it was not open for him to treat the matter as if there was a plea of contributory negligence before him..."

[21] As to the whether the lower court erred on quantum, I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Hence, in the case of **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (see also **Kemfro Africa Ltd T/A Meru Express Services & Another vs. A.M. Lubia & Another**, supra)

[22] Similarly, in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[23] The Judgment of the lower court shows that reliance was placed on the technical evidence of **PW2** as to the value of the heifer; its expected average milk production and calving projections. Whereas the Appellant proposed an award of **Kshs. 75,000/=** to **Kshs. 85,000/=** no technical report was presented in support of that proposal to counter the **1<sup>st</sup> Respondent's Exhibit 4**. Thus, I find no reason to fault the

quantum of **Kshs. 294,000/=** awarded by the lower court; there being no evidence that the lower court proceeded on wrong principles or that he misapprehended the evidence adduced before him.

**[24]** In the result, it is my finding that the appeal is completely devoid of merit and it is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8<sup>TH</sup> DAY OF MAY 2019**

**OLGA SEWE**

**JUDGE**