



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 455 OF 2012**

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

**-VERSUS-**

**THOMAS OJORO OKUDO.....RESPONDENT**

*(An appeal from the judgment delivered by D. Ole Keiwua (Mr.) (Principal Magistrate)*

*on 31<sup>st</sup> July, 2012 in CMCC NO. 2814 OF 2010)*

**JUDGMENT**

1. The respondent who was the plaintiff in Civil Suit No. 2814 of 2010 filed a suit against the appellant through the plaint dated 19<sup>th</sup> March, 2010. Therein, he sought for general and special damages plus costs of the suit and interest thereon.

2. It is pleaded that the respondent was at all material times an employee of the appellant, working as an overhead linesman. The respondent pleaded that on or about the 23<sup>rd</sup> of March, 2007 while lawfully working at the appellant's Kericho Sub-station, and having been assigned the duty of mounting copper wires from the main switch to the transformer, the respondent was electrocuted, thereby sustaining serious injuries as a result.

3. The respondent averred that the appellant was vicariously liable for breaching its statutory duty of care owed to him pursuant to their contractual relationship. The particulars of the injuries suffered were set out in the plaint, as were the special damages being claimed.

4. In its statement of defence filed on 5<sup>th</sup> October, 2010 the appellant while admitting that the respondent was its employee, denied the allegation that the said respondent had on the material date been assigned the duty of mounting the copper wires. The appellant further contested the particulars of negligence and/or breach of statutory duty and contract respectively.

5. Instead, the appellant pleaded that if at all the facts were as claimed, then the respondent was either solely to blame for the incident or contributed to the same. In this respect, the particulars of negligence were laid out in the defence.

6. At the trial, the respondent testified as the sole witness for the plaintiff's case, whereas the appellant equally relied on the evidence of one (1) witness before closing their respective cases.

7. Upon filing of written submissions by the parties, the trial court rendered its decision in favour of the respondent as follows:

*a) Liability: 90%*

*b) General damages-Kshs.700,000/= subject to 10% contribution*

*c) Special damages-Kshs.2,000/=*

***Total -Kshs.638,000/=***

8. Being aggrieved by the aforesaid decision, the appellant has seen it fit to lodge an appeal against the same. Its memorandum of appeal dated 29<sup>th</sup> August, 2012 constitutes four (4) grounds namely:

(i) THAT the learned trial magistrate erred in failing to consider the evidence put forward by the appellant that it did not instruct the respondent to do the work he was doing when the accident occurred.

(ii) THAT the learned trial magistrate erred in failing to hold that the respondent had failed to discharge the burden of proof placed on him.

(iii) THAT the learned trial magistrate erred in failing to consider the appellant's submissions.

(iv) THAT the learned trial magistrate erred in entering judgment for the respondent on the terms awarded.

9. The appeal was canvassed through written submissions which both parties have filed. To begin with, the appellant submitted that the learned trial magistrate gave no reason for accepting the respondent's evidence over and above that given by the appellant's witness, citing the case of *Nduta Mbile v John Gachau Gitonga [2017] eKLR*.

10. The appellant further contended that the respondent did not discharge the burden of proof by establishing that it was the appellant who had assigned him the task of mounting the copper wires or calling a separate witness to corroborate his testimony, and the learned trial magistrate ought to have found as such. Consequently, the appellant has urged this court to allow the appeal, thus dismissing the respondent's suit. Reference was made to various authorities.

11. In reply, the respondent argued that it is not disputed that he was an employee of the appellant at all material times and that he was injured in the course of his employment, adding that he could not call either of his colleagues at the time to corroborate his evidence as they feared for the status of their jobs.

12. Ultimately, the respondent took the position that whereas the learned trial magistrate found the appellant 90% liable, the said magistrate ought to have arrived at a finding of 100% on liability instead.

13. On quantum, the respondent argued that while the appellant has not challenged the trial court's award, the nature of injuries sustained by himself warranted a higher award on general damages than what was awarded by the learned trial magistrate. The respondent has therefore urged this court to substitute the same with an award of Kshs.2,500,000/=.

14. In rejoinder, the appellant filed further submissions dated 26<sup>th</sup> February, 2019 to the effect that its appeal was limited to the issue of liability and hence the respondent's submissions cannot stand, given that he never filed a cross-appeal. Either way, the appellant has taken the position that the award of Kshs.700,000/= as general damages was reasonable and need not be interfered with.

15. I have considered the rival submissions on appeal alongside the relevant authorities relied upon. In the same way, I have dutifully re-evaluated the evidence placed before the trial court and studied its ultimate decision.

16. Going by the grounds set out in the memorandum of appeal, it is clear the appeal touches solely on liability; this was confirmed in the appellant's submissions. I am also aware that no cross-appeal was filed by the respondent. In the premises, I have no reason to address either the issue of quantum or the respondent's sentiments in respect to substituting the finding on quantum. That being the case, I will consider the four (4) grounds of appeal together, beginning with the evidence tendered before the trial court.

17. The respondent who was PW1 gave evidence that he worked for the appellant as a casual employee and that on the material day, he and other employees travelled to Kericho to install a new transformer. He stated that while in the company of someone named Benard, he set up a ladder as required and was in the process of climbing on it when he got electrocuted and lost consciousness, only to find himself in hospital when he came to.

18. The witness testified to the fact that he sustained serious burns as a result of the electrocution and was treated at Kericho Nursing Home and later on, at Aga Khan Hospital.

19. During cross examination, the respondent affirmed that he acted on the instructions of one Joshua, his then team leader who was present at the site and had instructed him to use the ladder to access the pole. The respondent also clarified that he had undergone safety training and stated on re-examination that he had worked with the appellant for eight (8) years and that on the material day, he was not aware that the power was on.

20. Joshua Ochido gave evidence as DW1, stating that he worked with the appellant at all material times. This witness confirmed the employment of the respondent and the duties they were to undertake in Kericho on the date of the accident. However, the witness testified that on that day, they did not pick poles but were assigned to take ballast and sand to work on a trench in Kericho.

21. It was the witness' testimony that he had instructed the employees to clear bricks for the lorry they were using to get space and soon thereafter, he heard a noise only to realize the respondent had been electrocuted by the fault turnover and burnt, at which point they rushed him to hospital. DW1 carefully added that the employees were not permitted to go near the fault thrower, hence the respondent had no business being in its vicinity to begin with. That either way, he had protective gear.

22. On cross examination, the said witness pointed out, inter alia, that the respondent had worked with the appellant since 2006 and had undergone proper training for the performance of his duties.

23. The learned trial magistrate, upon evaluating the evidence placed before him, appreciated that the respondent was an employee of the appellant on casual basis, reasoning that no evidence was adduced to show that he was trained for the job he undertook. The Learned

Magistrate further pointed out that the appellant through its servants/agents had not only exposed the respondent to risk by instructing him to climb the pole, but had failed to ensure a safe working environment for him. In the end, the learned trial magistrate found the appellant 90% liable for the injuries suffered by the respondent.

24. From the foregoing, I am able to establish that the respondent was indeed employed by the appellant. Moreover, it remains uncontroverted that his injuries were sustained in the course of his employment. The real issue is whether the same resulted from some fault on the part of the appellant and consequently, whether the learned trial magistrate arrived at a proper finding on liability.

25. With reference to the oral testimony of DW1 on the one hand, it is evident that among the duties of the respondent was the duty of picking poles, though he indicated that they did not pick poles on the material date. On the other hand, the respondent gave evidence that he was acting on DW1's instructions when he climbed up the ladder to install a new transformer on the pole. There is no way of ascertaining with clarity whether or not the respondent's instructions were to climb the pole on that particular day. What remains clear, nonetheless, is that it was in the ordinary course of the respondent's duty to work on the poles which is what he claims to have been doing when he sustained his injuries.

26. Furthermore, while DW1 maintained that the appellant took all necessary precautions in ensuring the safety of its employees through providing them with protective gear for instance, he did not adduce any evidence to support this claim.

27. In view of the foregoing, I am persuaded that the learned trial magistrate's decision to hold the appellant liable for the injuries suffered by the respondent was reasonable in the circumstances.

28. Needless to say that, it is my observation that the respondent admitted to having undergone training for safety purposes. This was revisited in DW1's testimony when he stated that the respondent had been trained. Moreover, the respondent himself testified that he had worked for the appellant for a number of years prior to the accident and this was verified in the oral evidence of DW1. It therefore follows that the respondent had a reasonable level of awareness of what the nature of his job entailed and was equally responsible for taking the necessary precautions in ensuring his own safety.

29. Resultantly, while I disagree with the learned trial magistrate's finding that there was no evidence to indicate that the respondent had been trained, I am satisfied that the circumstances of this case warranted an apportionment of liability as was done by the said magistrate. I find the same to be reasonable and see no need to interfere. In any event, I have every reason to conclude that the evidence and submissions by both parties were duly considered.

30. In the end, I find no merit in the appeal and do not hesitate to dismiss it with costs to the respondent. Resultantly, the decision of the trial court is upheld.

**Dated, signed and delivered at NAIROBI this 18<sup>th</sup> day of July, 2019.**

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**L. NJUGUNA**

**JUDGE**

**In the presence of:**

.....**for the Appellant**

.....**for the Respondent**