REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.506 OF 2016

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

VERSUS

CHARLES MWENJI KIRICHU.....1ST RESPONDENT

PETER MAINA GAKURE.....2ND RESPONDENT

(Being an Appeal from the Judgment of Honourable Mr. D.W. Mburu (Principal Magistrate) delivered on the 17th day of November, 2016 in CMCC No. 5316 of 2014 at Nairobi)

JUDGMENT

The appeal herein arises from the judgment of the trial court in CMCC No. 5316 of 2014 which was delivered on the 22nd day of July 2016.

In that matter, the first Respondent who was the plaintiff sued the 2nd Respondent and the Appellant, seeking general damages for injuries that he sustained on the 25th day of June, 2012 while he was in the lawful course of his employment with the 2nd respondent. In the plaint, it was averred that, it was a term of the contract of employment between the first Respondent and the 2nd Respondent that, the 2nd Respondent shall take all reasonable precautions for the safety of the first Respondent while he was so engaged, upon his work, not to expose him to a risk of injury that he ought to have known and to provide and to maintain a safe and adequate working conditions to enable him to carry out his work safely and to take all reasonable measures to ensure that the place where he was carrying out his work was safe.

That on or about the 25th day of June, 2012 the first Respondent while in the lawful course of his employment with the 2nd Respondent within the 2nd Respondent's premises situated on plot number 13205 along Kasarani-Mwiki road, got injured and sustained injuries as a result. It is contended that the injury was as a result of unsafe system of work that the first Respondent had been provided with. The particulars of injuries and those of negligence against the Appellant and the 2nd Respondent are set out in paragraphs 6 and 7 of the plaint.

The Appellant filed its statement of defence on the 8th day of October, 2014 in which it denied the claim. It denied that there was a contract of employment between it and the first Respondent. The Appellant also denied that the first Respondent sustained any injuries on the material date and that he was in the course of his lawful duties when he was injured. The particulars of negligence attributed to the Appellant were also denied.

Alternatively, and without prejudice, the Appellant stated that if the said accident occurred, it was wholly caused or materially contributed to, by the negligence of the 2nd Respondent, the particulars of negligence are set out in paragraph 7(c) of the plaint. The Appellant also blamed the 1st Respondent for the occurrence of the accident and attributed negligence to him in paragraph 7(d) of the plaint.

Further and/or alternatively, it was alleged, that the first Respondent had full knowledge and understanding of the danger, if any, which is not admitted, from the risk of injury resulting from each and every one of the acts and omissions complained of and he consented to carrying out the said duties. It is further averred that the first Respondent was at the material time on a frolic of his own and the Appellant sought the dismissal of the suit. The 2nd Respondent did not file a defence to the claim. In a short reply to defence filed on 10th October, 2014, the first Respondent joins issues with the Appellant in its entire defence and reiterated the contents of the plaint.

At the hearing, the 1st Respondent testified as PW2. It was his evidence that on 25th June, 2012 he was building a house owned by 2nd Respondent, when some electric cables that were not coated were blown off by the wind which injured him on the hands and the trunk. He was taken to Neema Hospital – Ruaraka where he was given first aid and then taken to Kenyatta National Hospital where he was admitted until the 25th July 2012. He produced the receipts for the medical expenses and also the discharge summary.

He stated that he sued the 2nd Respondent because his house was near the electric cables and he had not provided him with protective gear

and the Appellant because their cables were loose, naked and had not been coated. He denied that he was negligent.

On examination, he stated that he noticed the house was very near the electric cables and he agreed to continue doing the work. That he appreciated the dangers posed by electricity. He stated that the cables were blown towards him by the wind and they touched the key rod that he was holding.

Dr. Anthony Obiero Wandugu examined the first Respondent and prepared a medical report for him. According to him, the first Respondent sustained electrical burns to the right upper arm, left upper arm and the trunk. Skin grafting was done and at the time he saw him, he complained of pain in the affected areas. He prepared the medical report and charged Kshs.2,000 for it. After hearing the case, the trial court entered judgment on liability at 100% against the Appellant and the 2nd Respondent jointly and severally. An award of Kshs.2 million, 700,000 and 1,920,000 were made for General damages, cost of domestic help and Diminished Earning capacity respectively.

The Appellant filed this Appeal wherein it has listed eight (8) grounds of Appeal. From the said grounds, the Appeal is both on liability and the quantum of damages awarded to the 1st Respondent.

The Appeal proceeded by way of written submissions. In its submissions, the Appellant averred that the 1st Respondent failed to prove his case on a balance of probability. That the particulars of negligence attributed to the Appellant were not proven in that the first Respondent did not prove that the Appellant failed to maintain the electric lines or cables.

It was contended that the first respondent was aware of the danger and he consented to carrying out the duties and therefore, he is barred from bringing any claim. The case of **Kenya Power and Lighting Company Limited Vs.Nathan Karanja Gachoka & Another (2016) eKLR** was relied on. The Appellant submitted that liability ought to be apportioned between it and the 2nd Respondents and the Appellant to be found 10% to blame if at all. It relied on the provisions of Section 6 of occupational safety, and health Act which imposes a duty on every occupier to ensure the safety health and welfare at work of all persons working in his work place.

On damages, it was submitted that the awarded sums of Kshs.2,000,000 and 1,920,000 as general damages and diminished earning capacity respectively was inordinately high and ought to be interfered with. Relevant authorities were cited among them that of **Loise Njoki Kariuki Vs. Bensrican Wambuka Waswa & Another 2013 (eKLR)** and that of **Kingsholme Limited & 2 others Vs. Mary Wangui (2016) eKLR.** On loss of earning capacity, the Appellant relied on the case of **Cecilia W. Mwangi & Another** and submitted that the same was excessive and should be reduced to Kshs.708,000/-

In its further submissions the Appellant contended that the claim for domestic help ought not to be awarded as the same was not pleaded. It relied on the case of **Housing Finance Company of Kenya Vs. J.N. Wafubwa (2014) eKLR** where the court of Appeal stated that cases must be decided on the issues on record and if its desired to raise other issues they must be placed on record by amendment.

On the part of the first Respondent, it was submitted that the strict liability rule enunciated in **Rylands Vs. Fletcher** applies in this case. The 1st Respondent argued that since the Appellant manufactures electricity, the Appellant was under an absolute duty not to allow the electricity to escape and to cause damage, if it escapes and since it indeed escaped the Appellant was liable for the consequence of that escape. That the 2nd Respondent could not be held liable because he did not own the power lines that electrocuted the 1st Respondent. The 1st Respondent contended that the same power lines had previously caused injuries to five other workers and the appellant was aware of the accidents but did not relocate the power lines. Further, it was submitted that the Appellant has in its investigation report confirmed it was negligent. The said report was produced as an exhibit and going by that report the Appellant should be held 100% liable. The case of **Kenya Power & Lighting Company Limited Vs. Joseph Khaemba Njoria (2005) eKLR** was relied on in which the court held:

> ***"There can be no question the power company (Kplc) has a responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is properly maintained to prevent accidents. The deceased could not be blamed for not seeing the wire"*** and that of ***Sokoro Saw Mills Limited Vs. Benard Muthambi Njega Civil Appeal No. 38/1995*** where it was held that the place of employment should be safe as to the exercise of a reasonable skill and care would permit.

On whether the 1st Respondent was electrocuted by the Appellant's power lines, the 1st Respondent averred that the evidence on record is clear that he was. That his evidence was corroborated by that of Thomas Omwenga.

The first Respondent further submitted that the Appellant was negligent for leaving naked live wires dangerously exposed, failing to routinely fix electricity poles in order to ensure that the electricity wires are properly fastened and exposing the 1st Respondent to a risk of injury or damage which they knew or ought to have known. That the Appellant was able to foresee that leaving naked wires dangerously exposed and failing to fasten electricity wires could lead to damage or injury. It was submitted that the 2nd Respondent could not be held liable because he does own the power line that electrocuted the first Respondent and that the said power was not being used by the first Respondent in the course of his employment on the material day.

On the damages awarded to the first Respondent, it was averred that the Appellant has not shown the court in what manner the trial court erred in assessing damages or that the damages awarded are too high to be a wholly erroneous estimate but it represents reasonable compensation for the injuries by the 1st Respondent and the court was asked not to interfere with the award.

The court has considered the Appeal together with the submissions by the parties and the authorities relied upon. The Appeal is on both quantum and liability.

The cause of action by the first Respondent is based on the tort of negligence. In his plaint, he blamed the Appellant and the 2nd Respondent for negligence that led to the injuries that he sustained. According to him, the 2nd Respondent could not be held liable because he did not own

the power lines that electrocuted the 1st Respondent. In his evidence the 1st Respondent blamed the Appellant for the accident because the cables were not coated and they were near the house that he was building. The 1st Respondent also stated that the Appellant's cables were loose and that is why they were pushed by the wind. According to him, if the cables were coated he could not have been electrocuted. The Appellant on the other hand submitted that the first Respondent did not adduce evidence to show that indeed the electric cables were loose and not properly maintained. The Appellant also blamed the first respondent for the accident. It was averred that he, with full knowledge and understanding of the danger, consented to carrying out the duties. In support of this contention the case of **Power and Lighting Company Limited Vs. Nathan Karanja Gachoka & another (2016) eKLR** was cited in which, the court found the deceased who had hanged clothes on live electric wires and consequently electrocuted was to blame.

Though the Appellant argues that the first Respondent was also to blame, the circumstances of this case are different from those in the case of Kenya Power and Lighting Company Limited (supra) in that, in our case, the first Respondent did not interfere with the cables, they were blown by the wind to where he was. Though they may have been near the building where he was working from, he could not have foreseen the danger of the cables being blown by the wind to reach him where he was.

Regarding the liability of the 2nd Respondent, it is interesting that the 1st Respondent in his plaint pleaded negligence against the 2nd Respondent but in his submissions in the Appeal, he exonerated him from the blame. In his evidence, he stated that he sued him because his house was near the electric cable and for failing to provide him with a protective gear which could have averted or reduced the extent of the injuries. As rightly submitted by the Appellant, section 6 of the occupational safety and health Act imposes a duty on every occupier to ensure safety, health and welfare at work of all persons working in his work place. The Act also mandates every employer to provide and maintain adequate, effective and suitable protective clothing and appliances including where necessary, suitable gloves, footwear, goggles and head coverings.

In his evidence, the first Respondent blamed the 2nd Respondent because his house was near electric cables and for failure to provide him with protective gear. The 2nd Respondent did not file a defence to the claim and did not call any witnesses during the hearing. This court finds that he is also to blame to some extent for the accident that caused injuries to the first Respondent.

With regard to the liability of the Appellant the first respondent has blamed it for the accident as their cables were loose, they were naked and were not coated. In the accident investigation report dated 25th June, 2012 which form part of record having been produced by consent of the parties, the report shows that the Application for supply of power was made in the year 2011 and the application was made when the building was still at the initial stages and the designer might not have seen the building plans and therefore was not aware that the building was going to be provided with balconies on the side along which the 11Kv line passed. If the designer had bothered to see the building plans, he could have advised on how the power would have been supplied without it posing any danger to the occupier of the building.

The report has also considered some actions to prevent re-occurrence of a similar incident. Some of the suggested actions are for the Appellant to redesign the 11KV feeder into vertical formation with bracket to improve on clearance, use underground cables and re-routing of the line. The report also capture the fact that another construction worker namely Crispin Oluoch Ouma was also electrocuted on the 11th November, 2011 during which incident four other workers were injured. In view of that, the Appellant ought to have taken preventive measures by using the suggested action to avert more injuries. They did not and this failure resulted to the accident that caused injuries to the first Respondent. The Appellant has a duty to properly maintain the power infrastructure. This is in line with the holding in the case of Kenya Power & Lighting Co. (supra) in which the court held:

> **"There can be no question that the power company (Kplc) has a responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is …..properly maintained to prevent accidents….The deceased could not be blamed for not seeing the wire"**

The report also blames the 2nd Respondent for infringement on the way leave of the 11K Breweries 2 feeder clearance and that he should be advised to do away with the balconies facing the feeder.

Having considered the evidence as aforesaid, I find that both the Appellant and the 2nd Respondent were to blame for the accident. From what the court can be able to gather from the evidence, the building was by then under construction which means that the cables pre-existed the building. However, the court also notes that if the cables were coated and were not loose, probably the accident would not have occurred. I find that the Appellant and the 2nd Respondent were to blame and I do apportion liability at 60:40 against the Appellant and 2nd Respondent respectively.

On the quantum of damages, the 1st Respondent claimed general damages for the injuries suffered. According to the medical report by Dr. A.O. Wandugu he sustained burns – electrical to the (R) upper arm, (L) upper arm and the Trunk. He was attended at Kenyatta National Hospital where he was admitted on 25/6/2012 and discharged on 25/9/2012. The injuries led to surgical amputation (R) arm below the elbow with refashioning which resulted into permanent absence of the (R) forearm with 100% disability of the arm. The learned magistrate awarded Kshs.2,000,000 as general damages for pain and suffering, Kshs.700,000 for domestic help and Kshs.1,920,000 for diminished earning capacity. The 1st Respondent has asked the court not to interfere with the award on damages. The Appellant submitted that the damages as awarded are inordinately high and has relied on the case of **Ceciliah W. Mwangi & Another Vs. Ruth W. Mwangi (1997) eKLR** here the court observed:

> **"It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford, large award inevitably are passed on to members of public, the vast majority of whom cannot afford the burden……"**

The Appellant has urged the court to reduce the general damages to Kshs.1,500,000 and has cited the case of **Loise Njoki Kariuki Vs. Bendricon Wamboka Waswa & Another (2015) eKLR** in which the plaintiff's right forearm was amputated below the elbow joint. It has

also relied on the case of **EW (suing as the next friend and mother to Bn (a minor) Vs. KPLC & Another (2015) eKLR** in which a minor sustained severe electrocution that led to amputation of his right upper limb and burns on the anterior abdomen. A sum of Kshs.1,500,000 was awarded. In awarding Kshs.2,000,000 the learned magistrate relied on the case of **George Raguka Ogola Vs. A.G. (2008) eKLR.** I find that the sum of Kshs.2,000,000 awarded by the learned magistrate is reasonable.

On the clam of diminished earnings, the learned magistrate applied a multiplier of 10 years and monthly income of Kshs.16,000/-. The 1st Respondent in his evidence told the court that he was a mason. Infact the accident occurred when he was in the course of duty. He was aged 42 years at the time of the accident. I find that the sum awarded is reasonable and I find no reason to interfere with it.

On the cost for domestic help, the Appellant has submitted that the same ought not to have been awarded as it was not pleaded.

As held in the case of **Charles C. Sande Vs. Kenya Co-operative Creameries Limited Civil Appeal No. 152/1992.**

> **"All the rules of pleading and procedure are designed to crystallize the issues a Judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are"**

I wholly concur with the submissions by the Appellant that that part of the claim was not pleaded and no evidence was led to support the same.

In the premises, the Appeal partially succeeds in the following terms;

1) Liability at 60:40 in favour of the Appellant.

2) General damages – Kshs.2,000,000/-

3) Diminished earning capacity – Kshs.1,920,000/-

4) Cost of domestic help – Nil

General damages to earn interest from the date of the judgment.

Each party shall bear its own costs of the Appeal.

Dated, Signed and Delivered at Nairobi this 4th day of October, 2018

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L. NJUGUNA

JUDGE

In the presence of:

……..*For the Appellant*

……*For the Respondents*