



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO 130 OF 2016

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

VERSUS

SAMUEL MACHARIA KINUTHIA.....RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court

at Thika (G. Onsarigo RM) dated 19th December 2013 in CMCC NO 252 of 2011)

JUDGMENT

1. The Respondent's claim against the Appellant was for general and special damages (Shs 3,930) arising from injuries he suffered when he was burnt by electrical wires he had accidentally stepped on. He suffered burns on the head, right forearm and buttocks.
2. He accused the Respondent of being negligent in the storage of the electrical wires. The Appellant denied the respondent's claims accusing him of being negligent and interfering with the powerline extension.
3. The trial court found for the respondent and awarded him general damages of Kshs 250,000/- special damages of Kshs 3,390/- together with costs of the suit and interest.
4. Being aggrieved by the decision the Appellant filed this appeal citing the following grounds:
 - (i) *That the learned magistrate erred in law and in fact in awarding an excessive amount in general damages of Kshs. 253,930 which was not commensurate to the claim and the alleged injuries suffered by the Claimant.*
 - (ii) *That the learned magistrate erred in law and in fact in his analysis of evidence and the law applicable thereby making wrong conclusions and deductions as pertains to liability and general damages.*
 - (iii) *That the learned magistrate erred in law and in fact in failing to look into the totality of the evidence and pleading before the court.*
 - (iv) *That the learned magistrate erred in law and in fact misapprehended the facts of the case leading to erroneous application of the facts to law.*
5. The appeal was disposed of by way of written submissions. In his submissions M/S K. Macharia for the Appellant submitted that the Respondent did not prove any negligence on the part of the Appellant as the only reason the Appellant was found liable by the court was that the witness who testified did not have downloads from their system showing how the same was working.
6. Counsel further submitted that there was no independent evidence that was called by the Respondent to collaborate their case even though he claimed there was a report to the Police Station. No one visited the scene to confirm if it was actually true there were such fallen wires. Hence, it was counsel's submission that the credibility of this report was questionable and could not be relied on as no investigations were carried out by police. It was thus counsel's submission that liability cannot be derived from such a report.
7. Lastly, he submitted that even though the Respondent may have suffered burns, the same did not occur as he stated and were not caused by the Appellant's power lines. That the Respondent may have been injured by domestic power or fire which the Appellant was not responsible for. Counsel further termed the Respondent's claim as fabricated and submitted that the Respondent was simply trying to get

compensation from the Appellant whom he perceived to be having money.

8. The appeal was opposed by the Respondent through M/s Shem Kebongo & Company. On ground 1 of the appeal counsel submitted that the Respondent reported the accident at Kabati Police Station where he was issued with a note (EXB.2) which confirmed the occurrence of the accident. That the respondent also produced treatment notes from Thika Level Five Hospital as (EXB.1) confirming the injuries he suffered. Counsel thus urged the court to uphold the decision of the trial court.

9. On quantum counsel submitted by relying on **Butt v Khan (1977) 1KAR where Law JA** laid out the principles upon which an Appellant Court will disturb an award for damages as follows:-

“An Appellant Court will not disturb an award for damages unless it is in ordnately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.”

10. Counsel thus submitted that the Appellant was misguided since the trial court only awarded compensation that was relevant to the injuries suffered as proved by Dr. Mwaura & the treatment notes.

11. In his evidence the Respondent Samuel Macharia who testified as PW1 stated that on 28/2/2011, he was leaving work at Triple A at around 9:00 p.m using Gikono road. While walking, he found electrical wires on the road and the same electrocuted him on the head and right buttocks where he suffered burns. He immediately rushed to a chemist where he bought medicine and also drank milk. Thereafter, he went to Kabati Police Station and reported the incident as (OB/18/19/2/201 and then proceeded to hospital. He produced treatment notes dated 19/2/2011 (PEXB.1). After leaving Thika Level 5 hospital, he was told to go to Kiambu for treatment after 6 months. He was issued with treatment notes from Catholic Dispensary Tinganga, receipts and appointment book (PEXB.3).

12. Later, he was sent by his advocate to Dr. Karanja and paid Kshs. 3,000 (PEXB.5) for him to prepare a medical report. Thereafter, his advocate wrote a demand letter (PEXB.6) to the appellant dated 21st /4/2011. A P3 form (PEXB.7) was then filled dated 19/02/2011. He stated that he still experienced some discomfort in form of headaches and blamed the Appellant for carelessly leaving electrical wires on the road as there was no warning indicating that the electric pole was on the ground.

13. By consent of the parties the medical report (DEXB.4) by Dr. Keroga dated 22nd February was admitted.

14. PW2 **PC Naftali Njeru** from Kabati Police Station confirmed that (PW1) reported his electrocution on 18/02/2011 and the same was recorded in their occurrence book (PEXB.2). On cross examination, he confirmed that no body visited the scene.

15. The Appellant called one witness Ibrahim Kiogora Rogongo (DW1) an engineer with the Appellant at Kongari. He told the court that in 2011 he was based at Thika branch as the in charge of emergencies. He confirmed that he was aware of this incident from their company secretary but said no complaint was ever lodged to their customer care department.

16. He explained that when a complaint is lodged to their customer care department, they give someone a complaint number and if the main line is down, they are usually alerted by receipt of different complaints. He further stated that from his experience, once a person came into contact with an electricity line, one cannot survive and that the line PW1 came into contact with was a high voltage line. Thus, he stated that they did not register any complaint, and were not informed by police of the said incident and they did not therefore receive any police abstract.

17. He further explained that high power voltage lines were being monitored at strategic locations through a automatic circuit breaker and in case there is an incident beyond the breaker, the same is automatically recorded in their system. On cross examination, he stated that they did not have any computer records for 18th February 2011 nor did they visit any police station to find out whether an accident happened.

18. This being a first appeal I have a duty to appreciate the entire evidence subjecting it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to see or hear the witnesses and I must give an allowance for that. See **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] E.A 123; Peters v Sunday Post Ltd [1958] EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Anor Civil Appeal No 345 of 2000: (Okubasu, Githinji & Waki JJA).**

I should also bear in mind that it is not open to this court to review the findings of the trial court just because it would have found differently had it been hearing the matter for the first time.

19. I have considered the pleadings, evidence on record, grounds of appeal, the submissions and authorities by both counsel. The appellant raised four (4) grounds of appeal. I have however considered them and the issues I find falling for determination are:

(i) *Whether PW1 was electrocuted?*

(ii) *Who is to blame for PW1's electrocution?*

(iii) *Whether the award of the trial court was manifestly high?*

20. **Issue No (i) Whether PW1 was electrocuted?**

The Respondent testified that on the 18/02/2011 9 p.m he was from his place of work at Triple A Growers along Gikono road when he stepped on electrical wires which were on the road. He produced treatment notes (**PEXB.1**) from Thika Level Five Hospital which confirmed that indeed PW1 suffered the said injuries. PW2(PC Naftali Njeru) from Kabati Police Station confirmed that Pw1 reported the said incident which was recorded in the OB (**PEXB.2**). The Appellant in their evidence (DW1) insisted that no accident or incident was reported to have occurred hence, PW1 was not injured in the manner that he had explained. DW1 further clarified that all incidents are captured automatically in their system where the same can be downloaded, printed and that the said system was maintained and managed by the Appellant.

21. DW1 did not however produce any of the reports establishing what had transpired on the material date, hence, the respondent's case was never controverted as the appellant failed to produce any of the reports stored in their computer even after revealing to the trial court that he had been notified by their Company Secretary about the said incident. Furthermore, DW1 confirmed that he did not visit any police station to confirm whether any electrical accident occurred on 18th February 2011. Therefore, the respondent proved on a balance of probability that indeed he was electrocuted on 28/2/2011.

22. Issue No (ii) Who is responsible for PW1's Electrocutation?

The Respondent testified that the Appellant was to blame since they left electric wires on the ground without warning. The Respondent indicated that he stepped on the electric wires on the road accidentally at night since he could not see them. He also told the trial court that the said wires were from the Appellant's electric pole which had fallen on the ground. In **Kenya Power and Lighting Company v Joseph Khaemba Njoria [2005] e KLR GBB Kariuki J** (as he then was) held that the power company had the responsibility to ensure that the power infrastructure it has installed in the country for the purposes of electrification is properly maintained to prevent accidents. Similar sentiments were also expressed in **Joseph Kiptonui Koskei vs KPL Co. Ltd [2010] eKLR** where **Asike Makhandia J** (as he then was) held that the defendant Kenya Power Lighting Company owed the plaintiff and every Kenyan a duty of care where it happens to have power lines and further that electric power is a dangerous commodity and if not properly secured can be a danger to society.

23. Indeed, Section 52 of the Energy Act is clear that :

“ The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by the loss or damage or breaking of any electric supply line, or by reason of any defect in any electric supply line.”

From the above statutory provision, there can be no doubt that the Appellant 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 Appellant's power pole had fallen on the road with wires hanging and road users were not forewarned.

24. Issue No (iii) Whether the award by the trial court was manifestly high?

It is an established principle of law that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lobia and Another [1982-88] 1 KAR 727**, **Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).

25. In the present appeal, the trial magistrate awarded general damages in the sum of Kshs. 250,000 and special damages of Kshs. 3,390.

26. The principles of making awards in personal injury claims were laid down by the Court of Appeal in **Cecilia W. Mwangi Vs Ruth Mwangi Nyeri C.A. No.251 of 1996 (unreported)** where the court stated as follows:

“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 awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees.”

27. M/S Shem Kebongo for the Respondent submitted that the Appellant was misguided since the trial magistrate only awarded compensation that was relevant to the injuries suffered. According to the medical report by Dr. George K. Karanja, the Respondent suffered the following injuries:-

- i) Electric burns on the scalp assessed at 1%
- ii) Electric burns on the right forearm assessed at 5%
- iii) Electric burns on the buttocks assessed at 1%

In his assessment and prognosis Dr. Karanja noted that the injuries were harm and the trauma was quite significant but if managed well, the healing would be complete and only scarring would remain.

28. I find that, the trial magistrate considered all the evidence and the submissions that were made before him and that included all the relevant authorities that were cited by the respective counsel and awarded a sum of Kshs. 250,000/= as general damages and Kshs. 3,390/= as

special damages. It has not been shown that the trial magistrate took into account any irrelevant factor or left out of account a relevant one. The Appellant failed to demonstrate that the sum awarded is so inordinately high to constitute an erroneous estimate of the damage.

29. In the circumstances, I have no reason for interfering with the trial court's judgment and consequently this appeal is dismissed with costs to the Respondent.

Orders accordingly.

Signed and dated this 4th day of October 2018 in Nairobi.

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HEDWIG I. ONG'UDI

JUDGE