



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 358 OF 2015

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

VERSUS

ABDUL NYAKUNDI ACHUKA.....RESPONDENT

(Being an appeal from the Judgment of Hon A. Lorot (Mr), Senior Principal Magistrate Ag (SPM)

at the Chief Magistrate's Court at Milimani in Civil Case No 4898 of 2012 delivered on 3rd July 2015)

BETWEEN

ABDUL NYAKUNDI ACHUKA.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO LTD.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In his decision of 3rd July 2015, the Learned Trial Magistrate, A. Lorot (Mr), Senior Principal Magistrate (SPM), delivered judgment in favour of the Respondent against the Appellant for a sum of Kshs 302,000/= made up as follows:-

General Damages	Kshs 300,000/=
Special Damages	Kshs 2,000/=
Total	Kshs 302,000/=

Plus costs and interest from date of judgment. He found the Appellant to have been wholly liable for the injuries that the Respondent sustained.

2. Being dissatisfied with the said judgment, on 3rd July 2015, the Appellant filed its Memorandum of Appeal dated and filed on 28th July 2015. It relied on two (2) Grounds of Appeal.

3. The Appellant's Written Submissions were dated 7th June 2018 and filed on 11th June 2018 while those of the Respondent were dated 12th June 2018 and filed on 3rd July 2018.

4. When the matter came before the court on 26th September 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd[1968] EA 123 and Peters vs Sunday Post Limited [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. Having looked at the parties' respective submissions, it was clear that the only two (2) issues that had been placed before this court for determination were:-

1. Whether or not the Appellant was liable for the injuries the Respondent sustained; and

2. Whether or not the damages that were awarded by the Trial Court were manifestly excessive and/or inordinately high to have warranted interference by this court.

8. The court therefore addressed the said issues under the following headings shown hereinunder.

I. LIABILITY

9. The Appellant contended that the Plaintiff did not state for a fact what caused the fire as he was inside the house when he heard a loud bang and screams and rushed out and consequently, his evidence on causation was inadequate.

10. It added that his evidence that electrical cables came into contact and burnt contradicted the doctor's Report that he sustained injuries when a transformer exploded.

11. On his part, the Respondent submitted that the Appellant was the owner and supplier of electricity at Kibera and hence it was its primary duty to be on reasonable look out to ensure that there was no "escape" of electricity from the transformer of electric mains. He was therefore emphatic that the Appellant ought to have been held hundred (100%) per cent liable.

12. During trial, only the Respondent testified. His evidence was that on 25th August 2009 at around 10.00 am, he was in his mother's house resting when a very strong wind shook the house. It was followed by a loud bang. He heard screams and went outside where he found his mother, sister and her children lying down. They had been electrocuted. The many sparks came in contact with him and threw him down.

13. The Learned Trial Magistrate attributed liability against the Appellant on a hundred (100%) per cent for the reason that it did not bother to question liability.

14. Notably, the Appellant did not call witnesses. There was no other evidence that this court could weigh against the Respondent's testimony to establish the veracity or authenticity of the same or otherwise. Having failed to call any witness to give evidence on its behalf, the Respondent's testimony remained uncontroverted and/or unrebutted.

15. Whether or not the Respondent was injured as a result of cables coming into contact or the Transformer exploding was immaterial in view of this court's observations herein above. This court did not therefore find any ground for departing from the Learned Trial Magistrate's conclusion on the question of liability. It found that the Learned Trial Magistrate had arrived at a correct conclusion

II. QUANTUM

16. In his evidence, the Respondent told the Trial Court that the sparks burnt his right side of his face and his right hand. He stated that he was admitted at Kenyatta National Hospital (KNH) for one (1) week. He adduced in evidence Discharge Summary from KNH, the duly completed P3 Form, the Medical Reports of Dr A K Mwaura and Dr R P Shah who examined him after the incident and the invoice for Dr A K Mwaura's Medical Report.

17. In their Written Submissions to the lower court, the Appellant had submitted that general damages in the sum of Kshs 40,000/= would adequately compensate the Respondent for the injuries that he had sustained. On his part, the Respondent had proposed Kshs 700,000/= general damages. The Learned Trial Magistrate awarded him Kshs 300,000/= general damages.

18. The Discharge Summary from KNH showed that the Respondent sustained superficial burns to the right arm and forearm and the right zygomatic region. The P3 Form showed that he had right side facial burns. He had also healed from burns on the lateral aspect of the right arm and forearm.

19. In his prognosis contained in his Medical Report dated 2nd June 2011, Dr A K Mwaura observed that the Respondent had sustained soft tissue injuries which had healed with a faint scar on the right fore arm. In his Medical Report dated 18th April 2012, Dr R P Shah put temporary disability at one (1) day and permanent incapacity at zero. By the time he examined the Respondent, Dr R P Shah did not see any scars on the Respondent's face and right upper limb.

20. Dr R P Shah pointed out that there was no mention of even a single days stay in the Discharge Summary from KNH and he indicated that he would be ready to testify in respect of that issue. He was, however, not called as a witness.

21. A perusal of the Discharge Summary shows the date the Respondent was admitted but not the date of discharge. The P3 Form showed that he was admitted at KNH from 25th August 2009 to 3rd September 2009. In his Medical Report, Dr A K Mwaura alluded to the Respondent having been admitted for several days. As the Appellant did not call any witnesses to rebut the Respondent's evidence, this court accepted the Respondent's evidence that he was admitted for one (1) week at KNH.

22. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

23. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

24. Indeed, in the case of Kigaraari vs Aya(1982-88) 1 KAR 768, it was stated as follows:-

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

25. As was held in the case of Selle vs Associated Motor Boat Company Ltd (Supra), an appellate court ought not to interfere with an award for damages merely because it could have awarded a lower figure.

26. However, bearing in mind the observations in Kigaraari vs Aya (Supra), the fact that the Respondent was admitted in hospital for one (1) week but that his injuries had healed with a faint scar on the right arm, this court took the view that the sum of Kshs 300,000/= general damages that was awarded by the Learned Trial Magistrate was inordinately high. Taking into account the doctrine of *stare decisis*, this court came to the conclusion that a sum of Kshs 200,000/= general damages for loss of amenities was reasonable compensation for the injuries the Respondent had sustained.

27. In arriving at the said conclusion, this court had due regard to the case of Joseph Kiptonui Koskei vs KPLC [2018] eKLR where the court therein awarded the plaintiff therein Kshs 1,200,000/= general damages where he had sustained burns which healed with complications requiring constructive surgery. This case was relied upon by both parties.

28. It also considered the case of Albert Ndwaru Karega vs Mugo Njahia Karanja [1999] eKLR where Ang'awa J as she then was awarded the plaintiff therein Kshs 100,000/= general damages in 1999 for superficial burns.

29. In the case of Devki Steel Mills Ltd vs Stephen Ngui Musyoki [2008] eKLR although she allowed the appeal therein on the ground that the respondent therein had not established liability on the part of the appellant therein, Okwengu JA (as she then was) stated therein, that she would have awarded the respondent therein a sum of Kshs 100,000/= general damages where the Respondent had sustained burns.

30. In the case of Prime Steel Mills Ltd vs Amos Kip'Kogei Sialo [2017] eKLR, Kemei J declined to disturb the award of Kshs 180,000/= general damages the respondent therein had been awarded for superficial burns.

31. It was the view that the decision in the case of Devki Steel Mills Ltd vs Jared Osoro [2014] eKLR was distinguishable from the facts of this case as the Respondent therein did not counter the appellant's submissions.

32. Accordingly, having considered the parties' respective submissions, there was merit in the Appellant's submission that the damages that were awarded by the lower court were inordinately high and hence warranted interference by this court.

DISPOSITION

33. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal was partially successful. The effect of this was that the judgment that was entered in favour of the Respondent against the Appellant in the sum of Kshs 302,000/= is hereby set aside and/or vacated and is hereby replaced with judgment in favour of the Respondent against the Appellant for the sum of Kshs 202,000/= made as follow:-

General damages Kshs 200,000/=

Special damages Kshs 2,000/=

Kshs 202,000/=

Plus costs and interest thereon at court rates from the date of judgment.

34. As the Appeal was partially successful, each party will bear its own cost's of the Appeal herein.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 6th day of December 2018

J. KAMAU

JUDGE