



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO.60 OF 2013**

**CONSOLIDATED WITH NOS. 54, 56, 57, 58, 59, 61, 62 & 63 ALL OF 2013**

*(Appeal from the judgment of Hon. KIBET SAMBU (PM) dated and*

*delivered on 29<sup>TH</sup> May, 2013, in the original Kisii CMCC No.184 of 2010)*

**KENYA POWER & LIGHTNING CO. LTD.....APPELLANT/APPLICANT**

**VERSUS**

**JOHN MAKORI.....RESPONDENT**

**JUDGMENT**

1. The respondent herein JOHN MAKORI filed a suit in the subordinate court against the Appellant Kenya Power & Lighting Company seeking to be paid damages arising out of injuries he allegedly sustained on 13<sup>th</sup> December, 2009 at about 7 p.m. while walking along Kisii – Nyamaturo road. The respondent's case was that he stumbled upon the appellant's dangling electric wires/cables and was consequently electrocuted.
2. The respondent blamed her injuries on the negligence of the appellant for failing to take safety measures to properly install their electric cables to that they are not a danger to members of the public who use the same road.
3. In their pleadings filed before the subordinate court, the appellant denied that it was liable for the injuries that the respondent sustained or that it ever owned, erected, attended to or was otherwise concerned with any electrical connection and/or installation within that area. The appellant further pleaded that the respondent was responsible for his own injuries. The appellant further attributed the hanging state of the electric cables/wires to vandals who damaged and stole the cables thereby exposing the live wires.
4. In the course of the proceedings and after the defence closed its case, the parties entered into a consent through their respective counsels in which it was agreed that this instant case to be treated as a test suit in respect to other related suits being Kisii CMCC Nos. 178, 179, 180, 181, 182, 183, 185, 186 and 187 of 2010.
5. It was further agreed, by consent, that the testimonies of the respondent and appellant herein be adopted and applied in all the aforesaid related suits save for the variation on dates in respect to Kisii CMCC Nos. 178-182 of 2010 whereupon all the respective cases were marked as closed.

6. The respondent testified that on 13<sup>th</sup> December 2009 at about 7.p.m. he was walking along Kisii-Nyamataro road when she at Bochoru area, he stumbled onto some live wires/cables that electrocuted him and he fell down thereby causing him the following injuries:
  - **Chest contusion**
  - **Cut on the head**
  - **Injury to the forearm**
  - **Bruises on both hands and legs.**
  - **Joint pains to the right hip.**
7. The respondent stated that he was following the said accident rushed to Kisii Level 5 Hospital for treatment where he was treated and discharged. He had fully recovered at the time of his testimony in court.
8. The respondent called 1 witness, Dr. Ezekiel Zoga who confirmed the respondent's injuries to court. Dr. Zoga stated that he examined the respondent and prepared and signed a medico-legal report which he produced as P.Exhibit 2. The respondent's treatment notes form Kisii Level 5 Hospital were produced as P. Exhibit1.
9. By a further consent of the parties, the treatment notes and medical reports of all the other claimants in the aforementioned related suits were also similarly produced as exhibits.
10. The appellant called one witness, **CAROLINE KWAMBOKA BOSIRE**, the in charge of patient records at Kisii Level 5 Hospital. Her testimony was that even though the treatment cards/notes produced by the respondent and by consent of the parties bore the official logo and rubber stamp of Kisii level 5 Hospital, the respective numbers assigned to the claimants in the cards were not reflected in their hospital records of patients attendance register. Her testimony was that the hospitals records did not reflect the claimant's details as having been treated there on the material day or at all. She however conceded that in cases of emergencies, the normal procedure of patients' registration could be by passed. On further cross-examination DW1 conceded that the patients' attendance register that she produced did not bear the logo or letter head of the hospital and therefore one could not tell its origin.
11. After the hearing of the case, the trial magistrate found that the appellant was 100% liable for the respondent's injuries and awarded him Kshs. 80,000/= general damages.
12. The appellant, being aggrieved by the said judgment, has now filed this appeal against both the findings on liability and quantum and has set out the following grounds of appeal.
  1. **The Learned Trial Magistrate erred in fact and Law in finding that the Respondent had proved his case on a balance of probability, contrary to the evidence on record.**
  2. **The Learned trial Magistrate erred both in Law and in fact in holding the Appellant liable and fixing liability at 100%, or at all.**
  3. **The Honorable Trial Magistrate erred in law and in fact by failing to reach a finding that the Respondent had not sufficiently or at all, proved his claim and thus no damages and/or compensation could issue and/or ensue from fictitious claim.**
  4. **That the Learned Trial Magistrate erred in law and in fact by proceeding to ignore the testimony of DW1 who confirmed that the outpatient numbers reflected in the treatment notes uttered by the Respondent and purported to have been obtained from Kisii Level 5 District Hospital, were fictitious and non-existent as at the date the Respondent claims to have been treated.**
  5. **The Learned Trial Magistrate erred in Law and in fact by proceeding to asses general damages in the sum of Kshs. 80,000/=, in favour of the Respondent, which quantum was excessive in the circumstance and not supported by the law.**
  6. **The Learned Trial Magistrate erred in law and in fact when the same declined to dismiss the Respondent's suit even when it was apparent that the claim was fraudulent and fictitious.**

13. When the appeal came up for directions on 12<sup>th</sup> February, 2015, parties agreed to canvass their arguments on appeal by way of written submissions. Mr. O.M. Otieno appeared for the appellant while Mr. Nyambati acted for the respondent.

### **Appellants Submissions**

14. The appellant stated the 2 issues arising from the appeal to be:

- a. **Whether the respondent's proved his case against the appellant on a balance of probabilities.**
- b. **Whether the award on quantum was excessive.**

15. On proof of the respondent's case on a balance of probabilities, the appellant cited Sections 107 and 108 of the Evidence Act and submitted that the respondent did not discharge the burden of proof placed upon him under the law because, according to the appellant, the respondent did not prove that the offending dangling electric cables/wires belonged to the appellant.

16. The appellant added that the photographs of the scene, produced as PExhibit 4, were not sufficient proof of the ownership of the electric cables/wires. The appellant argued that it was therefore a misdirection on the part of the court to hold that the appellant was liable for the respondent's injuries in the absence of proof of ownership of the electric cables/wires.

17. The appellant further contended that the respondent failed to prove that the hanging/fallen state of the electric cables was as a result of its negligence or that of its agent/servants and no-one else. It was the appellant's contention that the respondent was the author of his own misfortune by failing to carry a torch that would have assisted him to see the cables and wires clearly in the dark so as to avoid stumbling into them. In this regard, the appellant stated that the trial court ought to have apportioned liability at 50% for both parties.

18. The appellant also argued that since DW1 adduced evidence to the effect that the respondent was never treated at the Kisii Level 5 Hospital, as their names were not reflected in the hospital patients' register, the respondent's injuries were therefore not proved and the evidence of PW2, was in the circumstances, secondary evidence with no probative value.

19. On quantum, the appellant submitted that the award of Kshs. 80,000 was excessive taking into account the nature of the injuries suffered by the respondent and comparable awards made in previous cases. The appellant submitted that the trial court ought to have made an award of Kshs. 60,000/= general damages.

### **Respondent's submissions.**

20. The respondent stated the 4 issues for determination to be whether the appellant owed the respondent any duty of care, whether the accident occurred, whether the award of damages was excessive and whether the appellant controverted the respondent's evidence.

21. The respondent submitted that the appellant owed the respondent a duty of care not to leave its power cables and wires dangling and hanging dangerously.

22. The respondent submitted that in the instant case, the appellant knew or ought to have known that the dangling electric wires were bound to cause injury to members of public using the same road.

23. The respondent contended that he did not contribute to the electrocution in any way whatsoever.

24. The respondent argued that he had proved his case on a balance of probabilities and the burden of proof shifted to the appellant to prove that the respondent was never electrocuted as he had alleged, which burden the appellant did not discharge. According to the respondent, the appellant ought to have called a witness to prove that the dangling wires that allegedly caused the

respondent's injuries was non-existent or did not belong to the appellant.

25. On quantum, the respondent submitted that the award of Kshs. 80,000/= general damages was fair just and could not be impeached on appeal since the award of damages is at the discretion of the court.

**Analysis and determination.**

26. I have taken due consideration of the record of appeal the submissions of the parties and the authorities cited. I note that the main issues that require this court's determination are:

- a. **Whether the respondent proved his case against the appellant on a balance of probabilities.**
- b. **Whether the respondent contributed to the accident and by extension, his own injuries.**
- c. **Whether the award of damages on quantum was excessive.**

27. This being a first appeal, the court is under an obligation to re-evaluate the evidence on record with a view to making its own findings on the above issues bearing in mind that the fact that it neither heard nor saw the witnesses testify.

28. In respect to proof of the respondent's case on a balance of probabilities, I find that the respondent testified on the circumstances leading to his injuries due to electrocution. The respondent produced documentary evidence to wit, treatment documents from Kisii Level 5 Hospital in support of his injuries. The respondent further called PW2 Dr. Zoga who examined, prepared and produced a medical report in respect to the injuries sustained by the respondent.

29. It is worthy to note that the treatment notes from Kisii Level 5 hospital were admitted as exhibits by consent of the parties.

30. In response to the respondent's case, the appellant called DW1 **CAROLINE KWAMBOKA BOSIRE** whose testimony was to challenge the authenticity of the treatment notes that had been produced by the respondent as exhibits.

31. It is my finding that having admitted the respondent's treatment documents as exhibits by consent, the appellant could not in the same breath, purport to challenge their authenticity or validity through DW1, if from the onset, the appellant's case was that the respondents were not injured or were not treated at the said Kisii Level 5 Hospital as they had alleged, then it would have been expected that the appellant would object to the production of the treatment notes from the very word go. This position is supported by the holding of Nambuye J.A. in **Emmanuel Kuria Gathoni vs Commissioners of Police & Another (2012) eKLR** when she stated that once documents are accepted by both parties, they become protected documents under 64-67 of the Evidence Act which means that the document itself is proof of its contents and no oral evidence can be tendered to controvert it.

32. It is therefore my finding that the respondent proved his case against the appellant on a balance of probability in this regard.

33. The appellant further alluded to the fact that the respondent did not prove that the offending dangling electric cables and wires belonged to the appellant, and not any other company or body in this case the Rural electrification Authority. On this point, this court relies on the case of **Kenya Power and Lighting Company vs Joseph Khaemba Njoria [2005] eKLR** where GBM Kariuki J. (as he then was) held that the power company has 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. Similarly, in the case of **Joseph Kiptonui Koskei vs Kenya Power and Lighting Ltd [2010] eKLR** it was held that the defendant Kenya Power and 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 the society.

34. It is therefore my finding that the respondent proved, on a balance of probabilities, that the appellant owned the power lines that caused him the injuries he had complained of and that upon testifying over the same, the burden of proof shifted to the appellant to counter the respondent's claim by proving the contrary position. The appellant did not discharge this burden placed on it and I therefore hold that the respondent proved, on a balance of probabilities, that the appellant owned the power lines/cable.

35. On whether or not the respondent contributed to the accident and should therefore be held partly liable for the same, I agree with the submissions of the respondent that there was no way any person walking along the road where the electric wires and cables were dangling could have reasonably expected or anticipated that the wires were hanging loose or low so as to avoid the accident. This was quite an unusual occurrence which could not have been foreseen by any pedestrian using the affected road and I find that the blame lay squarely and fully at the doorstep of the appellant who was under obligation, knowing fully well the danger that loosely hanging live electric wires could pose to members of the public, to maintain their power lines at all times so as to ensure that they do not cause any harm or danger to members of the public.

36. I concur with the decision in the case of *Kenya Power and Lighting Co. vs Joseph Khaemba Njoria (supra) eKLR* in which it was 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 county for purposes of electrification is properly-maintained to prevent accident. The deceased could not be blamed for not seeing the wire. It would not be reasonable to expect that as people walk along towns, they should anticipate live electric wires that might protrude from the ground or form walls and endanger their lives.”**

37. On quantum, it is now trite law that the appellate court will only interfere with the exercise of the discretion by the trial court when assessing damages if the trial court took into account an irrelevant fact, or left out of account a relevant fact or the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. See *Kanga vs Manyoka (1961) EA 705, 709, 7013, Kemfro Africa t/a Meru Express & Another vs A. M. Lubia & Another (1982-88) IKAR 727 and C.A. No. 66 of 1982 Zablon Mangu vs Morris W. Musila (unreported)*.

38. In the instant appeal, the appellant has not shown that the trial magistrate in assessing damages, took into account an irrelevant fact or left out a relevant fact or made an award that was so inordinately high that it must be a wholly erroneous estimate of damages. In fact, the appellant has proposed that an award of Kshs. 60,000/= would have been a more appropriate award than the Kshs. 80,000/= that was made to the respondent. It is my finding that a difference of Kshs. 20,000/= between the appellants proposal on quantum of damages and the 80,000/= award made by the court is not an inordinately wide margin to warrant this court's interference with the trial magistrate's award. I find that the trial magistrate's exercise of discretion in making the award of damages was in line with the principles observed by the courts in making awards for damages and I further find that the discretion was exercised judiciously. The trial magistrate considered the injuries suffered by the respondent and the comparable awards previously made by the courts for similar injuries before arriving at the award of Kshs. 80,000/= general damages. Moreover, the proposal by the appellant for Kshs. 60,000/= is not way off the mark from the award of Kshs. 80,000/= made by the trial court. I find no reason to interfere with the award made by the trial court for damages.

39. For the above reasons, I find that this appeal lacks merit and I hereby dismiss it with costs to the respondents. I hereby wish to for clarity and avoidance of doubt that this case having been a test suit, the decision will be applicable to all the other entire related suits filed before the lower court,

being Kisii CMCC Nos. 178, 179, 180, 181, 182, 183, 185, 186 and 187 of 2010.

**Dated, signed and delivered in open court this 6<sup>th</sup> day of June, 2016**

**HON. W. A.OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the Appellant
- Mr. Oguttu for the Respondent
- Omwoyo: court clerk