



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 99 OF 2012

KENYA POWER (previously sued as

KENYA POWER & LIGHTING COMPANY LTD.)APPELLANT

VERSUS

FREDRICK MUHAVI AMUSINDA

(suing as a personal representative of the estate of

ANZAVULA AMUSINDA- DCD)RESPONDENT

JUDGEMENT

INTRODUCTION

1. The appeal herein arises from the judgment and decree of the trial court at Vihiga in SRMCC No. 27 of 2010 where the appellant was found 100% liable for negligence which led to the electrocution of the respondent's son and the respondent was awarded Ksh. 1,780,000/= for damages together with costs of the suit.

2. The respondent had sued the appellant for negligently leaving an exposed live electricity cable of the security lights unattended and without putting a warning notice which led to the electrocution of the deceased ANZAVULA AMUSINDA when he passed by the exposed post leading to his death. The appellant sought for general damages under The Fatal Accident Act and Law Report Act, costs and interest.

3. The appellant filed a defence denying liability and on without prejudice and admission of liability averred that the accident was caused wholly or substantially contributed by the negligence of the deceased. The plaintiff gave evidence in support of his claim and called two witnesses on his part whereas the defendant gave evidence in support of their defence and called one witness.

The appeal.

4. Being aggrieved and dissatisfied by the judgment of the trial court the appellant filed their memorandum of appeal setting out the following grounds:-

1. That the honourable trial court failed in its duty and proceeded to err on liability for provision, supply and or maintenance of street lighting and imposing such liability on an innocent party the

appellant herein;

2. That the honourable trial court erred in fact and/or law in holding the defendant wholly liable when there was contrary evidence;

3. That the honourable trial court erred in both fact and/or law in misconstruing the reasonable acts of the appellant's agent and/or employees in covering naked live electricity wires with tape to prevent further and/or other incidents as an implied admission of liability on its part;

4. That the honourable trial court erred in fact or law in adopting a multiplier of 35 years which was unjustified and/or unexplained leading to an excessive award on loss of dependency;

5. That the honourable trial court erred in failing to award any dependency ratio on its final award for lost years despite the fact that the deceased was neither married nor had any children;

6. That the honourable trial court erred in both fact and or law in generally making an award on lost years contrary to the established principles of law.

5. The appellant wants the appeal allowed, judgment set aside or dismissed and this court to reassess the award on lost years downward.

Submissions.

6. The appeal was canvassed by way of written submissions which the parties filed and exchanged. The appellant's submissions were filed by the firm of E.K. Owinyi & Co. Advocates whereas the respondents were filed by the firm of Nyanga and Co. Advocates. On the 26th September, 2016 parties highlighted their submissions M/s. Wilunda for the appellant submitted on liability and relied on section 181 of the Local Governments Act Cap 265 (repealed). She submitted that since the accident took place at Mbale within a Local Authority area, the Local authority in this case Vihiga should be held liable.

7. Secondly, that the age of the deceased was stated to be 17 years by the doctor who testified but the father of the deceased told the court that the deceased was aged 30 years. She submits that a multiplier of 35 years was wrongly applied and proposes a multiplier of 20 year. She relied on the case of **MERU H.C.C.C. No. 16 of 2003 SOLICIO MUTHIKA M'RUKUNGA VS. MILLICENT WAIRIMU KIMANI and DAVID KIMANI NGANDU and NAIROBI H.C.C.C. 1525 of 2002 MOHAMMED ABDINOOR ADI VS. WISLON WANYEKI WARUTA and ABDIRIZAK MOHAMED** where there was no clarity of age and the court used 20 years.

8. On loss of dependency she submits that the beneficiaries of the deceased's estate were father, uncle, grandmother and that he had no children. She proposed the application of the ratio of 1/3 and a minimum wage of Ksh. 4,000/=. On loss of expectation of life she submits respondent cannot benefit on both awards on Law Reform Act Cap 26 and under Fatal Accident Act. That there has to be some deduction on specials. She submits that since the same were to be pleaded and proved the Ksh. 50,000/= awarded was not pleaded nor was there evidence tendered.

9. Mr. Ariko for respondent submitted that the defence admitted liability at paragraph 2 of their defence which was an answer to the contents of paragraph 3 of the plaintiff. He made mention of Section 53 of the Energy Act and added that K.P.L.C. is the one that supplies, distributes and maintains power lines. On the age of the deceased he made mention of the post mortem report and the death certificate that shows the age of deceased as 17 years. He maintains that the trial magistrate did not err on the age of the deceased. On multiplier, he maintains that the same was fair and the court never erred. He wants the appeal dismissed.

10. This being a first appeal the duty of this court is to re-evaluate the evidence on record, analyse it and come up with its own findings and conclusion, bearing in mind that it didn't observe the demeanour of the witness during trial. See the case of **MWANASONIK VS. KENYA US SERVICES LTD.**

(Mombasa) Civil Appeal No. 35 of 1985 (ur) Hancox, J.A. Speaking for the court, stated of the duty of a first appellate court:-

“Although this Court of Appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary.”

11. Also, in **PETERS VS. SUNDAY POST LTD [1958] E.A. 424**, a decision of court of appeal for Eastern Africa, **Sir Kenneth O’Connor, P** said at page 429:-

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness. But the jurisdiction “(to review the evidence) should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion. Accordingly only when the finding of fact challenged on appeal is based on no evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this court interfere with it. See Ephantus Mwangi & Another vs. Wambugu (1983/84) 2 KCA 100 at page 118.”

The plaintiff’s case.

12. PW1 FREDRICK MUHARI AMUSINDA father to the deceased told the trial court that he received a report that his son had been electrocuted. He rushed to the scene where his son was lying and thereafter took him to hospital for a post mortem. He produced the death certificate PEXH. 1. He testified that the electrocution took place at Mbale market where the wires of electricity on the ground had been left naked. They buried the deceased. He was issued with interim letters of administration ad litem for purposes of this suit. He sued KPLC because they were negligent. He testified on cross-examination that he was not sure of the age of the deceased but the birth certificate was correct on the age of the deceased.

13. He maintained that the pole where the accident occurred belonged to the Kenya Power and Lighting Company and not the Municipal council of Vihiga. He told the trial court that he used to see the pole that caused the accident and that the wires were open. He had no idea on who was to do maintenance on the electricity between Kenya Power and Lighting and Vihiga Municipal Council. He reported the matter to the police at Mbale. He further testified that his son had neither children nor a wife at the time of his death. He sought for compensation in terms of damages, and costs of the suit.

14. PW2 KENNEDY MAHONG AJEGA was at Mbale on the 12th April, 2008 where the deceased was doing some casual job of loading and off loading cargo for business people. He told the trial court that the deceased touched an electricity pole and fell down. They then rushed him to hospital but he died. They went with the deceased’s father and reported the incident at the Mbale Police Station. He claims to have witnessed the incident and according to him the wires of electricity were naked for a long time. He also claimed that the council knew that the wires were naked and only repaired the same after the incident herein.

15. PW3 Dr. FRANCIS ODIRA OUKO, a medical practitioner for over 14 years performed the post mortem on the deceased on the 14th April, 2008 at Vihiga District Hospital. He stated that the deceased’s age was 17 years and that he was in good nutritional condition. Based on the history and the burns he formed the opinion that the death of the deceased was due to electronic shock due to electrocution. He produced the death certificate number 544196 and the post mortem report PEXh. 1.

Defence case.

16. The defence called one witness DW1 ABRAHAM MUSUSTA OLOO who has worked for Kenya Power and Lighting Company for over 38 years. He told the court that he received the report of the accident herein on 13th April, 2008. He went to the scene at Mbale Town but did not find the deceased body which had been taken to the mortuary. He told the trial court that Mbale town is under the County

Council of Mbale. He also told the court what he observed at the scene, a function box had been opened and on a street light pole which was open electric wires were exposed. He claimed that the lighting post was property of Mbale Municipality whose responsibility is to control the power. He also testified that it is their responsibility up to the meter but wiring is the responsibility of the customer.

17. He claims that it was not reported to the company that a function box was open and they never maintain power/light at the market. As the Kenya Power they do not install function box but they get involved when a customer calls them in case of an electric problem and if it is their role they rectify upto the meter box from the transformer or line from the meter box. He adds that the company is not responsible for other distribution. He produced a report by the Chief Engineer West Kenya which report is marked as DExh. 1.

18. He also claimed that the deceased went to tamper with a live naked wire which electrocuted him as a result of which he died. He opines that the negligence on exposure of the naked wires is to be blamed on the municipality.

Analysis and Determination.

19. In an action for breach of statutory duty, as in an action for common law negligence, the claimant bears the burden of proving the causal connection between the breach of duty and the damages.

20. It is common ground in this case that the claimant proved that the deceased herein died as a result of being electrocuted by a naked electric wire. The appellants have claimed that they are not liable for breach of statutory duty/negligence and that the blame is on the Municipality for the Vihiga County Government. They have relied on section 187 of the Local Governments Act Cap 265 which is now repealed and of no effect. Kenya Power and Lighting Company is duty bound to supply electricity to the whole country and also to maintain its cables and ensure that they are not a danger to the people around which is their statutory duty. In the case of **Kenya Power & Lighting Company Ltd. vs. Joseph Khaemba Njoria [2005] eKLR** 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. It would not be reasonable to expect that as people walk along in towns, they should anticipate live electricity wires that might protrude from the ground.”

21. I agree with the sentiments of the court as expressed above. It was the duty of the appellant to repair broken live wires on poles and/or on the ground. The appellant owed a duty of care to the deceased to take all the necessary and reasonable steps which would have avoided the risk either by providing danger signs or having the broken wire repaired or insulated in wire mesh.

22. Everything considered, I think that the principles enunciated in the case of **DONAGHILE VS. STEVENSON [1932] AC 580** where it was stated that every person must take reasonable care to avoid acts or omissions which can reasonably be foreseen as likely to injure a neighbour, were established by evidence in this case. The appellants have not showed or demonstrated how they are not to blame for the breach of duty and/or negligence in this case. How the Municipal council comes in has also not been demonstrated I therefore find that there is no other way to look at liability herein but to hold the appellant 100% liable for negligence.

23. On quantum I rely on the principles enumerated in the case of **DENSHIRE MUTETI WAMBUA VS. KENYA POWER & LIGHTING CO. CIVIL APPEAL NO. 60 OF 2004** citing the case of **KEMFRO AFRICA LTD VS. A.B. LOBIA & ANOTHER [1982-1988] KRA 777 KNELLER J.A.** observed:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of

Appeal Eastern Africa to be that it must e satisfied that:-

- b. The judge in assessing the damages took into account irrelevant factors or;*
- b. Left out of account a relevant one (or);*
- c. That short of this the amount is inordinately low or so inordinately high that it must be an erroneous estimate of the damages.”*

26. It is evident from the birth certificate that the age of the deceased at the time of his death was 17 years. His age was therefore known and ascertained by the B/C. He was a casual labourer although there is nothing to show what his earnings were. The magistrate adopted a multiplier of 35 years and the figure of Ksh. 4,000/=. In cases where there is no proof of income, the court may adopt regulation of Wages General Amendment Order. The figure adopted by the magistrate is close to the minimum wage. I find the multiplicand adopted was reasonable and within the law. The multiplier adopted by the magistrate in this case was comparable to other decisions and I confirm the same.

25. I find that the judgment of the magistrate was based on cogent evidence in respect to liability and the award made by the magistrate comparable to award made in other cases with similar facts. The award was reasonable and was not inordinately high nor excessive. I therefore find no basis to interfere with the award of the learned magistrate.

26. The appeal is therefore dismissed for lack of merit. I uphold the judgment of the magistrate’s court. The appellant to meet the costs of this appeal and for the court below.

SIGNED, DATED AND DELIVERED at **KAKAMEGA** this **10TH** day of **NOVEMBER**, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**Akinyi for Wilunda****for the Appellant.**

.....**N/A****for the Respondent.**

.....**Anunda** **Court Assistant.**