



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 323 OF 2010

KENYA POWER & LIGHTING CO. LTD APPELLANT

VERSUS

NEHEMIAH WACHIRARESPONDENT

(An appeal against the decree and judgment delivered by Hon. Mongare at the Principal Magistrate's Court, Nyahururu, in Civil Suit No. 37 of 2009 on 23rd November 2010)

JUDGMENT

1. This appeal arises from a suit which was filed in the Principal Magistrate's Court at Nyahururu by Nehemiah Wachira (hereinafter referred to as the Respondent). He had sued his employer, Kenya Power and Lighting Company Limited (hereinafter referred to as the Appellant).
2. The brief facts before the lower court are that the Respondent was working for the Appellant as a casual laborer within Nyahururu town. On the 29th July, 2008 the Respondent was assigned by the team leader to repair electric cables. He was working together with two other people. The team leader directed the Respondent to climb an electric post and he was to proceed with the repair as per the team leader's instructions. At this time electric power had been turned off by the emergency team to allow the ongoing repairs to the cables. Shortly after beginning the job at hand, the Respondent passed out and only regained consciousness at Nyahururu General Hospital after the electrocution incident. He was later transferred to Valley Hospital where he was treated and discharged.
3. The Respondent held the Appellant responsible for his injuries contending that the accident was caused by negligence on the part of the Appellant and its employee who switched on power before the green light was issued and also failed to keep a proper check on the safety of the crew. The Respondent claimed both general and special damages from the Appellant.
4. The Appellant filed a defence in which it denied that the Respondent had been on duty on the 29th July, 2008 and that he had not undertaken any repairs on a damaged electricity line on the material day. It further denied all allegations of negligence attributed to itself or its servants or employees. In the alternative the Appellant contended that if the accident had occurred then it was solely caused or substantially contributed to by the negligence on the part of the Respondent.
5. The Respondent produced a report from the hospital. He also produced a letter which was written by the employer informing the hospital that the Appellant would meet the hospital bills. The medical reports prepared by Dr. Kiamba and another by Dr. Malik were both produced into court as exhibits 'By Consent' of both parties.
6. The Respondent blamed the Appellant for the accident by contending that he turned the power back on whilst he was still working on the electric cables.
7. The Appellant did not call any witnesses. Counsel for each party filed their written submissions

- urging the trial court to find in favour of their client. Counsel for the Respondent urged the court to award him general damages of Kshs. 1,000,000/-.
8. Counsel for the Appellant submitted that the Respondent had not proved negligence and that the mere occurrence of an accident or injury does not imply that someone must have been negligent. On damages, Counsel for the Appellant relied on the report by Dr. Malik in which the doctor observed improvements in the function of the hand and awarded a physical disability of 5%. Counsel thus submitted a sum of Kshs. 80,000/- was adequate compensation for the injuries suffered.
 9. The trial magistrate in her judgment found that the Appellant was negligent in allowing an unqualified employee to man the switch and that it was as a result of their negligence the accident occurred. She further found no liability could attach to the Respondent and held the Appellant to be 100% liable. On damages the trial magistrate found that an award of Kshs. 700,000/- as adequate for the injuries suffered by the Respondent.
 10. Being aggrieved by the judgment, the Appellant has lodged this appeal raised five grounds in its Memorandum of Appeal as set out hereunder:
 - i. That the learned trial magistrate erred in law and in fact in failing to make a concise statement of the case, the points for determination and reasons for her decision in her judgment delivered on the 23rd November 2010.
 - ii. That the learned trial magistrate erred in law and in fact in holding the appellant 100% liable against the overwhelming evidence on record and erred in failing to find that the respondent did not prove his case on a balance of probability.
 - iii. That the learned magistrate erred in law and in fact in failing to consider the evidence on record and the appellant's submissions.
 - iv. That the learned magistrate erred in law and fact in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of damages payable.
 - v. That the learned trial magistrate erred in fact and in law in awarding a high amount of general damages of Kshs.700,000/- and costs against the injuries allegedly sustained by the respondent and further failed in applying wrong principles and failed to take into account material facts in arriving at an exaggerated award.
 11. The parties agreed the matter be disposed of by way of written submissions. Both parties filed their respective submissions which they highlighted in court on the 4th February, 2014.
 12. The learned Counsel for the Appellant, Mr. Omboyi submitted that judgment of the trial magistrate did not satisfy the provisions of Order 21(4) of the Civil Procedure Rules as it did not contain issues for determination and the trial magistrate did not give any reasons for finding the Appellant 100% liable. He relied on the decision of **Wamutu V. Kiarie** (1982) KLR 481.
 13. The learned Counsel further submitted that the trial magistrate was biased and that she based her reasons on extraneous issues not before court such as referring to the person manning the switchboard as unqualified and making assumptions that he must have been "*drunk or out of his senses*".
 14. On liability, it was the learned Counsel's submission that the trial magistrate applied strict liability in finding the Appellant liable. The Respondent had only pleaded negligence in his Complaint whereas he ought to have pleaded strict liability. Counsel submitted that the Respondent did not prove negligence on the part of the Appellant. That the respondent in his testimony had stated that he did not know what happened as he had passed out and came to on the following day at the Nyahururu General Hospital. Accordingly, Counsel submitted that there was no evidence that the Appellant contributed to the Respondent's injury.
 15. On the issue of damages, it was submitted that the sum of Kshs. 700,000/- assessed by the trial magistrate was inordinately and excessively high and was not in tandem with the injuries suffered by the respondent.
 16. Counsel prayed that the judgment be set aside and the award be substituted.
 17. For the Respondent, the court was urged to uphold the decision of the trial magistrate. Mr. Gakinya, learned counsel for the Respondent stated that the facts before the trial magistrate were clear. That the Respondent was an employee of the Appellant and was injured after its employee or servant switched on power before the respondent had completed working.

18. On damages, it was Counsel's submission that an award of general damages was the discretion of the trial court and as such the Appellate court ought not to interfere unless that discretion was based on wrong principles. According to Counsel, the evidence of the Respondent was uncontroverted and Counsel contended that the award for general damages was reasonable and based on comparable decisions.
19. Counsel urged the court to dismiss the appeal with costs.

ISSUES FOR DETERMINATION

20. Upon hearing the submissions of both Counsel this court finds the following issues for determination;
- i. Liability – did the trial magistrate consider extraneous factors
 - ii. Quantum – did the trial magistrate use wrong principles in assessing general damages.

ANALYSIS

21. This being the first appellate court it is incumbent upon the court to re-assess and re-evaluate the evidence on record and arrive at an independent conclusion. Refer to the case of **Sumaria & Another V. Allied Industries Limited**, (2007) KLR 1
22. On the issue of liability, the Respondent narrated to the court the duties he had been assigned by the Appellant of repairing the damaged electrical cables. That whilst carrying out the repairs an employee of the Appellant switched on the mains before the green light was given thereby causing the Respondent to be electrocuted and occasioning serious bodily injuries to the Respondent.
23. The Appellant called no witnesses to tell its version of what actually transpired on the material date and the trial court proceeded to find the Appellant 100% liable for the accident as the Respondent's evidence was un-challenged and un-controverted. The Appellant called no witness to support the claim of contributory negligence.
24. The production by the Respondent of the Discharge Summary made by Valley Hospital Nakuru is ample proof that the Respondent was injured as a result of the said accident on that material date.
25. This court having re-evaluated the unchallenged evidence of the Respondent agrees with the findings of the trial magistrate and finds the Appellant fully liable for the said accident. It shall bear 100% liability. This court finds no merit on this ground of appeal.
26. This court makes reference to the medical reports made by Dr Kiamba and Dr Malik which were produced into court '**BY CONSENT**'. The court finds that the injuries sustained by the Respondent are not in dispute. The dispute arises on the award made by the trial magistrate which constitutes the second issue relating to quantum of damages.
27. The principles that allow an appellate court to interfere with an award are laid down in the renowned case of **Arrow Car Ltd V. Bimomo & 2 Others**, C.A 344 of 2001. The Court of Appeal set down the principles that need to be observed which are *inter alia*;

“ a) An irrelevant factor was taken into account or;

b) A relevant factor was left out or;

c) The amount awarded as damages is so inordinately low or manifestly excessive that it amounts to a wholly erroneous estimate.....”

28. Counsel for the Appellant argued that an award ought to be as close as possible to comparable injuries and decisions and proposed that an award for Kshs. 200,000/= would be adequate compensation.
29. Counsel urged the court to set aside the award and a substituted award be made by the court.
30. Counsel for the Respondent argued that the award was lower than the amount expected and the

- amount was also limited by the jurisdiction of the court. Counsel contended that the award set down in the judgment was reasonable and based on the comparable decisions that had been referred to and submitted at the initial trial.
31. Counsel prayed for the dismissal of the appeal with costs.
 32. This court has perused the authorities cited by both Counsels for the Appellant and Respondent at the initial trial and upon appeal. Based on the authorities cited the Appellant had proposed a sum of Kshs. 80,000/= as fair compensation at the initial trial which was later enhanced to Kshs. 200,000/= on appeal. The court record does not clearly indicate the sum sought by the Respondent in his submissions at the initial trial.
 33. This court makes reference to the authorities cited hereunder which it opines are comparable awards for damages with injuries which can be said to be comparable to those sustained by the Respondent.

a) **Henry Albert Andera V. Car & General (k) Limited**, Nairobi Civil Case No. 3187 of 1993 where the Plaintiff suffered compound fractures on the right ring and little fingers and fracture of the radius and ulna bones on the right forearm as a result of the negligence or breach of duty of his employer was awarded general damages of Kshs. 400,000. Judgment was delivered by Githinji J. on 9.5.2000.

b) **Michael Mutua Mutisya V. Ramesh Kakubhai**, Mombasa Civil Suit No. 160 of 1995 where Mwera J. in his decision delivered on 30th November 2005 assessed general damages at Kshs. 400,000 for a Plaintiff who sustained a crush injury of the right arm that required amputation following a road accident.

c) **Phillip Kipkorir Cheruiyot V. Nebco (k) Ltd & Another**, Kericho Civil Case No. 70 of 2000, Kimaru J. awarded Kshs. 600,000 for a fracture of the femur head and dislocation of the right shoulder joint, fracture of the right humerus and injury to the radial nerve resulting to wasting of all muscles of his arm.

34. When considering the award to grant, this court bears in mind the decision in **Cecilia W. Mwangi & Another V. Ruth W. Wangui** (1977) CA 251/96, where the Court of Appeal said 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 the members of the public, the most majority of whom cannot afford the burden in the form of increased costs for insurance cover or increase on fees.”

35. After re-evaluating the evidence on the injuries sustained by the Respondent and taking into account the above comparable decisions, this court finds that there is need to interfere with the award of Kshs. 700,000/= for general damages as the amount is manifestly excessive and was not within the limits of decided cases. The trial court arrived at an erroneous estimate and was thus based on a wrong principle. The award should have been within the range of Kshs. 450,000/= to Kshs. 500,000/= which could be within the limits of comparable decisions.
36. This ground of appeal is found to have merit.

CONCLUSION

37. The appeal is found to have merit and is hereby allowed.
38. The judgment of the lower court is hereby set aside. In its place this court enters judgment in favour of the Respondent in the sum of Kshs. 500,000/= for general damages together with costs and interest.
39. The amount shall not be subjected to contributory negligence as the ground of appeal on liability was found to have no merit.
40. The interest shall be computed from the initial date of judgment.
41. There shall be no award for special damages.

42. Each party shall bear its/his own costs of the Appeal.
43. It is so ordered.

Dated, Signed and Delivered at Nakuru 7th March, 2014.

A. MSHILA

JUDGE