

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI, & MUCHELULE JJ.A.)

CIVIL APPEAL NO. 199 OF

2020 BETWEEN

SINO HYDRO CORPORATION LIMITED.....APPELLANT

AND

KASSIM WEKHOBİ TOLOI.....1ST RESPONDENT

**KENYA POWER & LIGHTING CO. LTD 2ND
RESPONDENT**

*Being an appeal against the Judgment of the Employment and
Labour Relations Court at Kisumu (Nderi J.) dated 24th January,
2019*

in

ELR CA No. 12 of 2018)

JUDGMENT OF THE COURT

1. This is a second appeal; the initial decision was made in the Chief Magistrates' Court in Kisumu CMCC No. 331 of 2016 where in a judgment delivered on April 12, 2017, the trial court apportioned liability jointly and severally between Sino Hydro Corporation Limited "SHCL" and Kenya Power and Lighting Company Limited "KPLC" in favour of Kassim Wekhoba Toloı in the ratio 80:20, and awarded a global award of Kshs.12,151,328/=.

2. Being dissatisfied with the aforementioned judgment, KPLC and SHCL preferred respective appeals to the High Court of Kenya at Kisumu in Civil Appeal No. 40 of 2017 and Civil Appeal No. 41B of 2017 in which the learned judge (Nduma Nderi, J.) found no basis for the apportionment of liability against KPLC, and allowed its appeal. The learned judge dismissed the appeal by SHCL and ordered it to fully bear the 80% of the liability awarded, the learned judge only set aside the award of Kshs.1,728,000/= in respect of a domestic help for lack of proof.
3. A brief background will help put the appeal in perspective. On 5th February, 2013, Kassim Wakhobi Tolo [Kassim], an employee of the appellant while in employment as a crane driver at Nyamasaria area along Ahero-Kisumu Road and while under the supervision of the appellant's Mr. Young, was instructed to use the crane to remove garbage from a trench where a new bridge was under construction. While in the process, the crane touched the overhead electrical wire cables owned by KPLC, suffered electric shock with attendant severe injuries. Kassim sued both SHCL and KPLC seeking compensation for the injuries suffered.

4. On its part, the appellant denied the accident, maintaining that if the accident occurred then it was as a result of the sole and/or contributory negligence on the part of Kassim, by carelessly working and failing to heed the warning thereby exposing himself to danger; and not notifying KPLC in good time.
5. KPLC on its part stated that if the accident occurred then it was as a result of the negligence of Kassim by allowing the crane to touch the electric cables, exposing himself to danger, working on hanging uninsulated wires, failing to properly and carefully control the crane, failing to keep proper look out and attention and being reckless and/or careless in all regards and therefore allowing the accident to happen to its detriment.
6. The outcome was the apportionment of liability at 80% against the two companies, a decision which both SHCL and KPLC did not agree with leading to the appeal before the High Court. In the appeal SHCL faulted the trial court for awarding a global sum which was grossly excessive; and for apportioning liability at a ratio of 80:20 against the respondents jointly and severally.

7. In their appeal, KPLC faulted the trial magistrate for finding it liable in negligence to Kassim without evidence, lumping together liability, awarding costs for a domestic helper without proof, using a high multiplicand leading to excessive damages and challenged the apportionment of liability to Kassim at 20% against the evidence that showed that Kassim was to blame in negligence for the accident.
8. The learned judge overturned the judgment of the trial magistrate on liability and apportioned liability between the Kassim and the in the ratio of 80:20.
9. On the quantum of damages for pain and suffering the learned judge found that the trial magistrate's award of damages was proper and not excessive, and did not interfere therewith. The appeal by SHCL was dismissed save for the award of Kshs. 1,728,000/= in respect of the costs of domestic help, which was set aside as no evidence was led regarding the same.
10. Undeterred, SHCL filed this appeal relying on the grounds that:

(i) The learned judge misdirected himself in finding the appellant 80% liable for the material accident.

(ii) The learned judge misdirected himself in affirming the Trial Magistrate's award in General damages.

(iii) The learned judge misdirected himself in failing to properly re-evaluate the evidence tendered in the lower court and the submissions of the appellant.

(iv) The learned judge misdirected himself in failing to consider the admission of the 1st respondent that he had negligently touched the electricity wires.

11. The appellant prayed that the impugned judgment be set aside and substituted with an order dismissing Kassim's suit and allowing the appeal with costs.
12. In support of the appeal, the appellant contends that the learned judge misdirected himself in apportioning liability in favour of Kassim as against the SHCL yet the second respondent has a duty to ensure that its supply wires do not lie low beyond a certain height. Further, that while Kassim had a duty to ensure safety while controlling the crane, despite knowing the danger, he operated the crane in such a way that it touched the overhead electric wires and was injured in the process as such liability ought to have been shared between Kassim and KPLC.

13. Regarding the general damages, it is contended that the Kassim pleaded amputation of the right leg below the knee joint, several electric burns on the upper limbs, loss of libido and numbness of the hands. In his evidence, Dr Manasseh [PW2] testified that at that time, the Kassim's condition had improved and was no longer considered to have suffered a serious injury. Regarding the prosthesis, it is submitted that the he never proved that he must replace the hands with artificial limbs at a cost of Kshs.1 million yearly.
14. Regarding the evidence, the appellant faults the learned judge for failing to properly evaluate the same. It is contended that in his evidence, Kassim stated that the crane hit the electric wires and he was electrocuted. He further testified that he lifted the crane and hit the line afterwards he found himself in hospital. On being cross-examined, he admitted seeing the three electric wires up before he lifted the crane up and that the crane was not faulty at all.
15. It is contended that in as much as the appellant owed the duty of care to Kassim, it was incumbent upon him to take reasonable care when controlling the crane given the fact

that

he had been working for 2 years as the crane driver. SHCL ought not to have been held liable.

16. The learned judge is further faulted for failing to consider Kassim's admission that he was conversant with the scene having worked as a crane driver for 15 years. He admitted that the wires were 10-12 metres high and knew the crane would reach the power lines and agreed that the crane touched the power lines because he took it up.
17. In reply, KPLC contended that from the record, it is evident that Kassim was the SHCL's employee who was working in a dangerous environment with a crane below the power line which was live and potentially dangerous to the crane driver. In failing to ensure a safe working environment, SHCL was to blame.
18. It is further contended that in his decision, the learned judge was right to absolve the KPLC of any liability as there was no evidence that the wires were defective and thus posed danger at 12-15 metres high and that it was not aware of the garbage clearance at the bridge by the SHCL.
19. Regarding liability, KPLC argues that the Kassim, an experienced crane driver who had seen the electric cables and

knew they were dangerous, still operated the crane recklessly. Both the trial court and the first appellate court correctly assigned 20% liability to Kassim. Although SHCL complained, it did not specify the error in the apportionment. Relying on the cases of **Rukwaro and Another vs. Maina [2025] KECA 177 [KLR]** and **Alfarus Muli vs Lucy M. Luvuta & Another [1997] eKLR**, KPLC contends that because SHCL failed to demonstrate the alleged error, the Court should not modify the apportionment.

20. On damages, it is contended that SHCL has not given any reason why it claims it claims the learned judge was wrong in affirming the award of general damages. SHCL majored its submissions on the costs of replacing the artificial limbs at Kshs.1,000,000/= and future medical expenses. Be it as it may, there is no ground of appeal against the award of the cost of prosthesis and the replacement thereof or against the award for future medical expenses as such the submissions on those two grounds are disregarded.
21. Regarding the award of general damages, Kassim pleaded and proved that he sustained double amputation of both legs below the knee and electric burns on both arms, right

shoulder and

ring fingers that resulted in numbness of the hands. Dr. Manasseh assessed the disability at 90%. The trial court awarded him Kshs.5,000,000/= as general damages which award was upheld by the 1st appellate court.

22. KPLC further contends that SHCL has not established how the learned judge took into account an irrelevant factor or left out a relevant one or that the amount awarded is so inordinately high or a wholly erroneous estimate of the damage.

23. This being a second appeal, this court's duty is as was succinctly articulated in the case of **Kenya Breweries Limited vs. Godfrey Odoyo [2010] eKLR**, that:

“In a second appeal, however, such as this one before us, we resist the temptation of delving into matters of fact. This Court on a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse.”

24. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, in this appeal, it is clear that the determination of the appeal revolves around the question of liability and quantum of damages.

25. Kassim's case was that SHCL and KPLC were negligent as a result of which he sustained the injuries. Kassim testified and faulted SHCL for failing to provide a safe working environment and KPLC for failing to notify him of the live wire cables at the site.
26. Based on that evidence, and the evidence of SHCL and the KPLC, the Trial Magistrate believed that there was sufficient and adequate evidence to prove Kassim's case on a balance of probability as required by law; and held SHCL and the KPLC liable.
27. The Judge on first appeal, upon analysing the evidence, found that Kassim did not prove that the KPLC was liable as no evidence was led to the same.
28. Black's Law Dictionary, 8th Edition, defines liability as the quality or state of being legally obligated or accountable, or the legal responsibility to another or society, enforceable by civil remedy or criminal punishment.
29. Liability is an issue that is predominantly dependent on the facts of each case and the evidence adduced. In the case of **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs. Dancun Mwangi Wambugu, (1982-88), KAR 278**, the court laid down

the principle that a court on appeal will not normally interfere with a finding on fact by a trial Court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles.

30. A perusal of the judgment of the learned judge indicates that he properly directed his mind to the relevant legal principles, that the appeal before the court was a first appeal, and that the court had to re-evaluate the evidence and render its independent findings.

31. The learned judge's decision demonstrates that he thoroughly reviewed the evidence on record, as required by law, and having done so, arrived at an independent decision. For instance, when absolving KPLC from liability, the learned Judge noted that;

“In his judgment at Page 6, the learned magistrate found

“As to liability of the 2nd defendant, he was responsible for the live wires being at the scene of the accident. They were under a duty to provide information to the public and by extension to the Plaintiff on the danger of electricity. The Plaintiff clearly stated that there was no such information and/or warning.”

16. With respect to the learned magistrate, this finding was based on no evidence at all.

Overhead

Power cables cut the length and breadth of Kenya lawfully to provide electricity to the people of Kenya. Indeed, the electricity is an essential amenity to provide domestic and industrial power to the country. There was absolutely no evidence that the Kenya Power and Lighting Company was aware that the Plaintiff was at the fateful site removing garbage. No evidence at all was led to establish that the 1st Respondent had contacted Kenya Power Company to switch off power in that area where works were being conducted. It is true that the Plaintiff had no way of knowing that the overhead power cable was live. However the responsibility squarely lay with his employer to ensure the site was safe before sending the Plaintiff to carry out the works as per instructions.

17. Furthermore, the learned magistrate made an assumption based on no evidence at all that members of the public did not know the dangers of live power cables and that Kenya Power and Lighting Company had not provided such information to the public.

18. Accordingly, the court finds that the learned magistrate erred in finding the 2nd respondent, Kenya Power and Lighting Company liable for the injuries sustained by the Plaintiff in the course of duty at the 1st Respondent's site and under the direct supervision and instructions of Mr. Young, a supervisor of the 1st respondent.

32. In that regard, the learned judge found that the trial magistrate erred in finding KPLC liable for the injuries sustained by the Kassim in the course of duty at the appellant's site.

33. Regarding the apportionment of liability, the learned judge

agreed with the trial court's decision in finding SHCL
80%

liable and Kassim 20% liable for the accident. We take note of Kassim's admission that he knew he had a duty to ensure that the crane did not touch the power lines. He stated that he was controlling the crane when it touched the wire and that the crane was not faulty. Further, DW1 Kassim's co-worker, confirmed to the court that the electric wires were on normal poles and had not fallen down and that Kassim was an experienced crane driver who was electrocuted when the crane touched the wires. The evidence reveals that Mr Young from SHCL, was the one supervising the operations and should have contacted KPLC. The particulars in the pleadings mentioned negligence of the employer, this was a supervised operation where the employee assumed the wires were not live. The learned judge thus correctly found Kassim 20% liable based on his admission that he had negligently caused the crane to touch the power lines.

34. On the question of quantum of damages, SHCL faults the learned judge for affirming the trial court's award. However, SHCL has not given any reason why it claims the learned judge was wrong in affirming the award of general damages.

35. This Court has pronounced itself in the case of **Butt vs.**

Khan [1978] eKLR as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately 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 so arrived at a figure which was either inordinately high or low.”

36. Similarly, in the case of Catholic **Diocese of Kisumu vs.**

Sophia Achieng Tete [2004] 2 KLR 55 the Court set out

the circumstances under which an appellate court can

interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

37. In his determination, the learned judge found no basis for

faulting the trial court’s findings when he stated thus;

“On the issue of the multiplier of 20 used by the learned magistrate in assessing loss of

future earnings, the trial court found that the Plaintiff

was 37 years old and earned Kshs.25,000/= a month. The court considered the proposal by the Plaintiff of an award of Ksh.6.9 Million based on a multiplier of 23 years which was the remaining number of years to the retirement age of 60. The court also considered the proposal by the 2nd defendant of a multiplier of 15 owing to the disability of 90%. The court considered the cases cited by the 2nd defendant including HCC Malindi 46 of 2009 Abubakar Bode VS T.S.S. Transporters 2011 eKLR 1 in which a 35 years old Plaintiff got an award based on 15 years multiplier and Mombasa HCC NO. 468 of 2001 Dennis O. Nyangilo vs. African Marine & another 2005 eKLR in which a 35 years Plaintiff got an award based on a 20 year multiplier hence the award of Kshs. 5,425,328/= on this head. It is clear that the learned Judge properly addressed himself to the applicable principles on liability and on quantum. The learned Judge took into account all the relevant factors, and the award of damages that she awarded was not inordinately high or low to warrant disturbance by this Court. The learned Judge properly re-evaluated the evidence as the court of first appeal and reached the right conclusions.”

...

Equally, the award of General damages for pain and suffering by the learned magistrate was sound and based on the extent of injuries sustained by the Plaintiff and the extent of permanent disability assessed by the doctor who testified as PW2 to be 90%...

The award of Kshs.5 million on this head cannot be faulted by this court therefore.

38. SHCL has not demonstrated how the learned judge misapprehended the evidence on record, hence arriving at a wrong decision. There is no evidence that the learned

judge

considered extraneous or irrelevant matters or failed to consider relevant material placed before him that could have influenced the outcome of the case. The first appellate court analyzed the issues of fact and law properly, hence no justification to interfere with that judgment.

Ultimately it is our finding that the appeal lacks merit and is dismissed in its entirety, with costs to the respondents.

Dated and delivered at Kisumu this 3rd day of October 2025.

ASIKE-MAKHANDIA

.....
..... JUDGE OF APPEAL

H. A. OMONDI

.....
..... JUDGE OF APPEAL

A. O. MUCHELULE

.....
..... JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR