

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. E329 OF 2024**

**JOSEPHAT LELE  
KASUNGA..... APPELLANT**

**VERSUS**

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

**(Being an Appeal from the Judgment and Decree of Hon.  
V. Asiyu (PM) delivered on 6<sup>th</sup> November 2024 in Thika  
CMCC No. 678 of 2020)**

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 678 of 2020 arising from an accident of electrocution by live electric wires. The magistrate found that that the appellant had failed to prove his claim against the respondent and dismissed the suit awarding the respondent costs of the suit.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 8 grounds of appeal summarized as follows:-

- a) The learned trial magistrate erred in law and in fact by failing to appreciate that a police report is not proof of occurrence of an accident.
  - b) The learned trial magistrate erred in law and in fact by holding that police evidence was mandatory and necessary for him to sustain and prove his claim against the respondent.
  - c) The learned trial magistrate erred in law and in fact by ignoring the medical evidence which was consistent and buttressed his claim against the respondent.
  - d) The learned trial magistrate erred in law and in fact when he proceeded on wrong principles when assessing damages and failed to apply precedents and tenets of the law applicable.
3. Directions were issued that parties put in written submissions and the record shows that the appellant complied by filing his submissions whereas the respondent had not filed its submissions by the time of writing this judgment.

### **Appellant's Submissions**

4. The appellant submits that he tendered evidence that on the 11<sup>th</sup> March 2020, he was electrocuted after stepping on a live electric wire while grazing his flock at Ol Donyo Sabuk area. Dr. George Mwaura, PW2 buttressed his claim

by confirming that the appellant sustained electric burns as a result of the accident. On cross examination PW2 confirmed that there were power lines and electric cables at the scene of the accident. The witness further confirmed that he was not at the scene of the accident and that he did not possess any medical qualifications to prove that the

appellant mentally challenged and that the injuries sustained were as a result of an alleged road traffic accident.

5. The appellant argues that the respondent did not controvert the expert medical evidence to counter his case and thus there was no basis for the trial court to reject his evidence of electrocution and conclude otherwise. To support his contentions, the appellant relies on the case of **Dhalay vs Republic (1995-1998) EA 29** which was cited with approval in **Imathiu vs Mukiira (Civil Appeal E156 of 2022) [2023] KEHC 27211 (KLR) (19 December 2023) (Judgment)**.
6. The appellant submits that the police were not at the scene during the occurrence of the accident. He testified that at the material time, he was alone grazing livestock when he was electrocuted. The appellant submits that it is trite law that a police abstract is not proof of occurrence of an accident. The appellant further argues that since the police were not present when the incident occurred, any testimony by any police officer would amount to hearsay

evidence which is inadmissible. It was therefore wrong for the trial court to find that failure to call the police officer to prove electrocution was fatal to his claim. To support his contentions, the appellant relies on the case of **Florence Mutheu Musembi & Geoffrey Mutunga Kimiti vs Francis Karengi [2021] eKLR**.

7. The appellant submits that he sustained an electric shock leading to loss of consciousness and severe burns on the right hand and both lower limbs. The doctor established that healing was fair however there were scars on the right upper limb and both lower limbs. The

appellant refers to the case of **Agnes Wanjiku Ndegwa vs Kenya Power & Lighting Company [2014] eKLR** where the plaintiff sustained burn wounds on her neck, upper trunk posterior, left arm and right lower limb and was awarded general damages for pain and suffering in the sum of Kshs. 1,300,000/-. Further in **EW (Suing as the next friend and mother to BM (A Minor) vs Kenya Power and Lighting Company Limited & Another [2015] eKLR** the plaintiff sustained serious burns on the right upper limb and burns on the anterior abdomen and was awarded Kshs. 1,500,000/- as general damages for pain and suffering.

8. The appellant argues that in both cases, the injuries are similar and are comparable to the injuries he sustained. By awarding him Kshs. 300,000/- in the event that he has succeeded, the award was inordinately low and was not

fair compensation. The appellant further submits that he proved special damages of Kshs. 5,000/- by way of receipts and expert witness expenses of Kshs. 10,000/-.

### **Issues for determination.**

9. The main issues for determination are:-

- a) Whether the appellant proved his case on a balance of probabilities.
- b) If the case was proved, whether the award of general damages was inordinately low.

### **The Law**

10. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

**“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into**

**account of particular circumstances or probabilities materially to estimate the evidence.”**

11. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

**An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.**

12. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

**Whether the appellant proved his case in the trial court on a balance of probabilities**

13. It is trite law that he who alleges must prove. **Section 107 (1) of the Evidence Act**, Cap 80 Laws of Kenya, provides that:-

**Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

14. This degree of proof is well enunciated in the case of **Miller vs Minister of pensions [1947]** cited with approval in **D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati [2014] eKLR** where the court stated:-

**That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more**

**probable than not’, thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in**

**which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained.**

15. The appellant testified that he was grazing cattle on 11<sup>th</sup> March 2020 at Kiboko along Ol Donyo Sabuk near Kiboko Secondary School when he accidentally stepped on a live electric wire and was electrocuted sustaining serious burns on his neck, right hand and both lower limbs. The appellant further testified that he lost consciousness and was rescued by good Samaritans who took him to the local dispensary but found it closed. He later regained consciousness, bought some painkillers and sought medical attention at Donyo Sabuk Dispensary the following day. The appellant further testified that he continued treatment and was later referred to Ngoliba Health Centre where he was treated and thereafter referred to Thika Level 5 Hospital for further treatment.
16. The appellant called Dr. George Kungu Mwaura who testified as PW2 and stated that he examined the appellant on 20/10/2020 who had sustained electric burns and received treatment at Donyo Sabuk Dispensary.
17. The respondent called one witness, DW1 who was an investigator at Starden Insurance Investigators. DW1 testified that they carried

out investigations and concluded that the electrocution did not occur as alleged and the injuries sustained by the appellant were from a road traffic accident. To support his contentions, he produced the investigator's report as an exhibit.

18. The appellant produced an extract of the occurrence book dated 11<sup>th</sup> March 2020 indicating that he reported the incident vide OB 26/11/03/2020. The respondent's witness produced the investigator's report which had an extract copy of the same OB number which provided that one Esther Muthoki Kioko and Rose Mutheu made a report on behalf of the appellant stating that he told them he had been hit by a motorcycle that had fled the scene when he came back from grazing cattle. The two said they noticed that the appellant had burns on his neck, right hand finger and right leg. The burden of proof shifted back to the appellant to counter the facts by the respondent that the injuries he sustained arose from a road traffic accident.

19. It is noted that there was no evidence of the officer who received the report of the accident. Evidence of a police officer on the report made and their subsequent investigations was crucial to this case to establish the occurrence and reporting of the accident. He who alleges must prove.

20. It is my finding that the magistrate did not err in disposing the appellant's case for lack of proof.

21. In my considered view, this appeal lacks merit and it is hereby dismissed with costs to the respondent.

22. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 11<sup>TH</sup> DAY OF DECEMBER 2025.***

**F. MUCHEMI**  
**JUDGE**