

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

KENYA POWER & LIGHTING COMPANY.....
APPELLANT

VERSUS

PATRICK GITHUKA NG'ANG'A.....1ST

RESPONDENT

NAIROBI CITY WATER

& SEWERAGE COMPANY.....2ND RESPONDENT

(Appeal from the judgement and decree, of Hon. SA Opande, Principal Magistrate, of 16th February 2024, in Milimani CMCC No. E1377 of 2021)

JUDGEMENT

1. The suit, at the trial court, was filed by the 1st respondent, against the appellant and the 2nd respondent. He sought compensation for injuries he sustained as he dug holes to lay waterpipes, when he encountered live wires, belonging to the appellant, and was electrocuted. He had been engaged by the 2nd respondent to do that work. He blamed both the appellant and the 2nd respondent for his predicament. He attributed negligence on both of them.
2. The claim was resisted by the appellant and the 2nd respondent. The appellant attributed negligence on the 1st respondent, for exposing himself to danger. The 2nd respondent attributed negligence on the 1st respondent, for failing to have due regard for his own safety.
3. A trial was conducted. The 1st respondent testified on 3rd April 2023. The witnesses, for the appellant and the 2nd respondent, also testified on that day. Judgement was delivered, on 16th February 2024. Liability was apportioned, equally, between the appellant and the 2nd

respondent. General damages were assessed at Kshs. 900,000.00; and specials at Kshs. 3,000.00; plus, costs and interests.

4. The appellant was aggrieved, and brought the appeal herein. It dwells only on liability.
5. The appellant and the 1st respondent filed written submissions, complete with the authorities that they rely on. I have read through them and noted the arguments made.
6. It is remarkable that, in their respective defence statements, the appellant and the 2nd respondent did not blame each other, or attribute liability to each other, rather both of them blamed the 1st respondent. Yet, the 1st respondent was a mere casual labourer, who just did what he was instructed to do, and who had no technical knowledge of where live wires or electrical cables were. He was instructed, by the officials of the 2nd respondent, on where to dig the trenches, to lay waterpipes. He trusted them to know better. The fact that he was instructed to dig a trench, where underground electricity cables passed, was adequate proof of lack of duty of care, or of negligence, on the part of the 2nd respondent.
7. I note, though, that the 2nd respondent, through its witness, attributed liability, not on the 1st respondent, contrary to what was pleaded in the defence, but on a Titus Ndambuki, to whose premises the waterpipes were being laid, and who had allegedly hired the 1st respondent, and for being negligent with respect to the digging. Yet, the 1st respondent had testified that he was engaged by the 2nd respondent, and not Titus Ndambuki. Yet, again, the witness for the 2nd respondent testified that it was him, the witness, who established the point at which the waterpipes were to be laid, and said that it was safe for water pipes to be laid there. It could be that Titus Ndambuki contracted the diggers, but the site of the digging was established by DW2, an employee of the 2nd respondent.

8. The offending live wires belonged to the appellant. It was the appellant who ought to have known where its cables were, and to warn the public in general, including the respondents, of where they were, to obviate disaster. By laying down such wires, at whichever place, exposed the public to danger. Of course, by placing them underground, the appellant avoided general danger. However, as members of the public could dig the ground, for one reason or other, it would be prudent for warnings, of one sort or other, to be given, to obviate danger. If such warning signs were at the site, where the 1st respondent was working, they would, no doubt, have been noted, and the respondents would have avoided working near there. Secondly, DW2 would have seen them, and directed the 1st respondent away from them.
9. There was dereliction of duty, on the side of both the appellant and the 2nd respondent, and the trial court quite properly found both of them liable. The issue of either of them being 100% liable should not arise.
10. In the first place, the appellant, in its defence, did not attribute liability at 100% against the 2nd respondent. In its defence, the appellant blamed the 1st respondent. Yet, in the testimony of its witness, liability was attributed on the 2nd respondent, and not the 1st respondent. Its evidence, through that testimony, was not aligned or attuned to its pleadings. Parties are bound by their pleadings. The trial court could not attribute full liability on the 2nd respondent, when the appellant had not attributed liability on it at all. The 1st respondent blamed both the appellant and the 2nd respondent, yet in their separate defences, both blamed him, but, in the testimonies of their respective witnesses, they blamed others, instead of blaming the 1st respondent, contrary to what was averred in their pleadings. The appellant blamed the 2nd respondent, while the 2nd respondent blamed a Titus Ndambuki, who was not even a party to the suit.
11. The 1st respondent properly established liability on both the appellant and the 2nd respondent. One owned the live wires, while the

other instructed the 1st respondent to dig over the live wires. The trial court properly found both of them liable. It behoved them to bring out facts that would have assisted the court apportion liability as between themselves. They did not. They presented witnesses whose testimonies were not aligned to their respective defences. Their defences blamed the 1st respondent for his problems, but the testimonies of their witnesses pointed at other people and entities. In the face of that the trial court was left with no option, but to apportion liability equally between them.

12. I find no merit in the appeal herein, and I hereby dismiss it, with costs to the 1st respondent. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT
BUSIA, ON THIS 5TH DAY OF DECEMBER 2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Muyuka, instructed by Ngaywa & Kibet Partners LLP, Advocates for the appellant.

Ms. Mwongeli, instructed by Mirara & Associates, Advocates for the 1st respondent.