



Makokha (Suing as the Administrator and Personal Representative of the Estate of Margaret Nafuna Makokha) v Kenya Power & Lighting Company (Civil Appeal E078 of 2024) [2025] KEHC 18929 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E078 OF 2024
AC BETT, J
DECEMBER 19, 2025**

BETWEEN

ENOKA WATAKO MAKOKHA APPELLANT

**SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF
THE ESTATE OF MARGARET NAFUNA MAKOKHA**

AND

KENYA POWER & LIGHTING COMPANY RESPONDENT

*(Being an appeal against the judgment and decree of Hon M. A. Oyango
(S.R.M) in Mumias SPMCC No E065 of 2023 delivered on 25/3/2024)*

JUDGMENT

1. This appeal arises from a judgment delivered in Mumias SPMC Case No. E025 of 2023.
2. The Appellant, suing as the administrator and personal representative of the estate of the late Margaret Nafuna Makokha, instituted the suit against the Respondent seeking general and special damages, costs, and interest for fatal injuries suffered by the deceased due to electrocution on 22nd December 2022. The Respondent denied liability and all allegations of negligence and attributed the death to the negligence of the deceased. Judgment was delivered on 25th March 2024, dismissing the suit for failure to prove the case on a balance of probabilities.
3. The Appellant was dissatisfied with the decision of the trial court and filed this appeal on the following grounds: -
 1. That the learned trial magistrate erred in law and in fact by failing to appreciate the standard of proof in civil cases.



2. That the learned trial magistrate erred in law and in fact by arriving at a finding against the weight of evidence tendered by the appellant, thereby occasioning a miscarriage of justice.
3. That the learned trial magistrate erred in law and in fact by failing to appreciate the fact that there are instances when the burden of proof shifts.
4. That the learned trial magistrate erred in law and in fact by entirely relying upon the evidence of DW1 when the same was not substantiated.
5. That the learned trial magistrate erred in law and in fact in failing to appreciate the physics behind how electricity operates and how a power surge occurs.
6. That the learned trial magistrate erred in law and in fact in disregarding the plaintiff's testimony together with that of PWII in its entirety without any legal basis and/or justification.
7. That the learned trial magistrate erred in law and in fact in dismissing the plaintiff's suit with costs to the defendant.

Appellant's case

4. PW1, Sanny Oundo, a minor, testified that on 22nd December 2022, while visiting his grandmother in Mayoni, he was electrocuted after touching a tin connected to an ice-making machine. He stated that electricity poles had fallen that day, and, as he went to check whether the ice had dried, the tin produced a cracking sound and became stuck to him. He screamed, and his grandmother, Margaret, who was coming from the bathroom, rushed to help him but was also electrocuted. Both fell, and he later found himself at Matungu Hospital, where he received treatment. He blamed the Appellant for failing to turn off the power during the repair.
5. On cross-examination, PW1 stated that on the fateful day. At the same time, at his grandmother's house, he operated an ice machine in the sitting room, saying that he had previously operated it successfully without supervision. He confirmed the machine was plugged into the socket and nothing else was connected. After the incident, he fainted and was later told that the machine had exploded, though nothing else had been damaged in the room. He said that a neighbouring house had its appliances damaged as well, but that neighbour was not a witness. He admitted that no photographs of the machine were brought to court and that only he and his mother were present to testify. He agreed that he was instructed to exercise caution with electricity, stated that there was power at the time, and that the Respondent was working outside.
6. PW2 relied on her recorded statement as her evidence in chief.
7. On cross-examination, she said that she had visited her mother on the material day, and that power lines were being repaired following heavy rains that had caused poles to fall. At approximately 2:00 p.m., repairs were underway outside while her son was alone in the house, checking the ice machine. Her mother, the deceased, was bathing in an unfinished section of the house. She stated the machine was the only electrical appliance in the room. She admitted that there were no photographs of the machine and no independent witness to confirm that repair work was ongoing. She stated the deceased was the first to reach the child, and she was unclothed and had touched water.
8. PW3 was the Appellant, who testified that the deceased, Margaret Nafuna, was his wife and that she died due to electrocution. He adopted the written statement dated 23rd May 2023. He was not present during her death but testified that the deceased had been taken to Butula Mortuary.



9. On cross-examination, PW3 confirmed he was not present during the incident and that his son, who witnessed it, was not in court. He admitted no one else was affected by the electricity that day. He said his wife earned KShs. 25,000/=per month from woodwork, but had no proof.

Respondent's Case

10. DW1, Tom Marunga, a distribution area engineer with Kenya Power based in Mumias, testified that he was in charge of the Mumias and Butere region. He adopted his witness statement and filed documents as his evidence-in-chief. He stated that he was informed of the incident on 16th March 2023 through KPLC's Nairobi office upon being served with a court summons. He visited the scene on 17th March 2023 at around 10:00 a.m., but was not permitted into the house and was limited to inspecting the meter and network.
11. He testified that there was no maintenance work by KPLC in the area on the date of the incident, and no report of power surges was received. He explained that KPLC is responsible up to the cut-out and meter, while internal wiring is the consumer's responsibility. He noted that the meter box had loose connections and excessive taping, indicating poor internal wiring. He concluded that the incident occurred within the consumer's premises and KPLC should not be held liable. He urged the court to dismiss the claim against KPLC.
12. On cross-examination, DW1 confirmed he works for Kenya Power but had no documents in court to prove it. He admitted he is not formally trained in investigations and was instructed by KPLC's head office to handle the matter. An external insurance investigator also questioned him, but he was not shown their report.
13. He visited the scene on 17th March 2023 and spoke with a neighbour who reported the electrocution incident but refused to give a name. He did not enter the house and could not verify the alleged loose sockets. He stated that the meter found at the house belonged to Constantin Miheso and not the premises in question, suggesting the connection was illegal. However, he provided no documents to support this and did not include the disconnection in his report. DW1 also testified that no incident was reported in KPLC's system on the material day and that working on live power lines is unsafe and unlikely to have been done. He admitted that the report established only probable cause and that the exact cause of the incident could not be determined.

Appellant's Submissions

14. The Appellant submits that the learned trial court erred in so far as it considered that the entire burden of proving the case was upon the Appellant under Section 107(1) of the *Evidence Act*, while the Respondent, being the custodian of records which should have included material records as to incidents of electrocution and staff deployment, did not produce such records; for this case, the records should have confirmed or dispelled the incidents that had allegedly occurred. The Appellant argued that the burden of proof was shifted to the Respondent under Section 112 of the *Evidence Act*, as the Respondent was in exclusive possession of the information necessary to prove or disprove the incident on 22nd December 2022.
15. The Appellant submits that although the Respondent's witness confirmed in cross-examination that KPLC keeps incident records and had commissioned a private investigation into the matter, neither the incident records nor the investigative report was produced in court. The failure to avail this evidence is said to amount to concealment of material facts, particularly since the Respondent's witness admitted the report was filed with the company's legal department. It is submitted that the only logical inference is that the findings were adverse to the Respondent and were deliberately withheld.



16. Further, the Appellant submits that the Respondent alleged that the electric meter at the deceased's home belonged to a third party and that there was an illegal connection, but no documentation was provided to support the claim, and no complaint by the alleged owner of the meter was tendered. The witness also claimed the power was disconnected after the incident, yet this was not recorded in the witness statement or report. The trial court has been faulted for having dismissed the claim because there was no independent witness or production of the ice-making machine. It is contended that there is no legal bar to family members testifying, particularly where they are eyewitnesses to the incident. The rejection of such evidence on the basis that the witnesses were related is, therefore, unfounded. Furthermore, the insistence on the production of the ice-making machine as evidence is akin to requiring the production of a vehicle in a road traffic accident claim, an expectation that the law does not support.
17. The Appellant relies on *Kenya Power & Lighting Co. Ltd versus Samuel Macharia Kinuthia*, HCCA No.130 of 2016 (Kiambu), wherein the High Court found in favour of the plaintiff because the defendant failed to produce internal records or to rebut the evidence effectively. Similarly, he argues that in *Rosemary Vassaux v Kenya Power & Lighting Co. Ltd (2014)* eKLR, the court applied the doctrine of *res ipsa loquitur*, holding the defendant liable because the harm arose from equipment under its control and would not have occurred if proper care had been taken.
18. In conclusion, the Appellant urges the court to allow the appeal.

Respondent's Submissions

19. The Respondent contends that the trial court rightly dismissed the Appellant's case, having correctly evaluated the evidence and found no proof of negligence on the Respondent's part. It is emphasized that the burden of proof lay on the Appellant under Sections 107 and 108 of the *Evidence Act*, which he failed to discharge. The Respondent submits that the Appellant did not prove the existence or condition of the ice-making machine, the occurrence of a power surge, or that repairs were ongoing on the material date. No expert evidence or technical explanation was offered to establish the cause of the alleged electrocution.
20. The Respondent faults the Appellant for failing to seek discovery of relevant documents, citing *Lustman & Co (1990) Ltd v Corporate Business Centre Ltd & 4 Others [2022]* eKLR, and asserts that the Appellant could not shift the evidential burden without first establishing a *prima facie* case. The Respondent argues that the absence of police reports, post-mortem reports, independent witnesses, or photographic evidence further weakened the claim.
21. Reliance is placed on *Kenya Power & Lighting Co. Ltd v Samuel Macharia Kinuthia (Kiambu HCCA No.130 of 2016)*, *Richard Muriuki Waheire v KPLC [2021]* eKLR, and *Scorpio Elegance Ltd v KPLC [2019]* eKLR, to assert that claims involving electrical faults require cogent, technical, and preferably expert-backed evidence.
22. It is submitted that the trial court's finding aligns with the principles set out in *Kenya Power & Lighting Co. Ltd v Ganjoni Towers Ltd [2024]* eKLR and *Statpack Industries v James Mbithi Munyao [2005]* eKLR, which held that liability must be based on proven negligence, not the mere occurrence of an incident.
23. The Respondent urges the court to dismiss the appeal and uphold the trial court's judgment. However, in the event the appeal succeeds, the Respondent supports the trial court's assessment of quantum at Kshs. 848,450/= as reasonable.



Analysis and Determination

24. As this is a first appeal, this court is guided by the principles in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, that an appellate court must reconsider the evidence, evaluate it afresh, and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. The Court of Appeal in *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982-88] 1 KAR 278 emphasized that appellate interference is warranted only where the trial court misdirected itself on law or fact, thereby causing a miscarriage of justice.
25. I have considered the pleadings, memorandum of appeal, and the parties' written submissions, and I have deduced the following issues for determination to be as follows:-
 - a. Whether the Appellant discharged the burden of proof.
 - b. Whether the trial court erred in dismissing the Appellant's claim.
 - c. Whether the court should allow the appeal.
26. In *Kenya Power & Lighting Co. Ltd v Ganjoni Towers Ltd* [2024] KECA 1803(KLR), the Court of Appeal reaffirmed that in claims of electrical negligence, the plaintiff must demonstrate, on a balance of probabilities, that the injury was caused by the Respondent's equipment or operations and that the Respondent failed to take reasonable care to prevent foreseeable harm.
27. Sections 107 and 109 of the *Evidence Act* imposes the evidential burden of proof of any fact on the party who wishes the court to believe in its existence. The Appellant contends the trial court erred by not shifting the burden to KPLC under Section 112, which applies when facts are peculiarly within a party's knowledge. The Appellant argues that KPLC withheld critical records, including the surge reports and the investigation findings, thereby warranting an adverse inference.
28. It is well settled that the burden of proof in an action for negligence is on the plaintiff. Without establishing a prima facie case of negligence on the part of the Respondent, the burden does not shift.
29. The Appellant's case was based on alleged ongoing repairs by the Respondent and the power surges caused by the repairs. In the first instance, the Appellant was required to prove that the deceased was a legitimate customer of KPLC. This was important in view of the Respondent's defence, which blamed the incident on the Appellant and specifically pleaded that the deceased tampered with and allowed the minor to tamper with electricity. It is trite knowledge that there are many illegal connections of electricity in the country. To establish a nexus between the incident and KPLC therefore, it was imperative that the Appellant provide evidence of legitimate consumption of KPLC's power through production of a power bill or official receipt proving the existence of a supplier-customer relationship with the Respondent that would give rise to a duty of care over electricity supplied to the deceased's house and provide a causal link for the incident.
30. As observed by the trial court, the Appellant produced an extract of Occurrence Book No. 11/2/1/2023, which indicated that an incident was reported on 2nd January 2023. However, the incident occurred on 22nd December 2022, 12 days before the report. Further, it is noted that the Occurrence Book did not specify what incident was reported. The Appellant further failed to call a police witness to adduce evidence and confirm whether a report of electrocution was made at their station. In the absence of proof of a specific electrocution incident report and in view of the time lapse between the date of the incident and the date of the report, there was nothing to corroborate the Appellant's claim.



31. In my view, the Appellant's evidence was insufficient to shift the burden of proof. As held in *Statpack Industries v James Mbithi Munyao* [2005] KEHC 2043(KLR), negligence must be proved specifically and cannot be inferred merely from the occurrence of an accident. The said court stated as follows:-

“Coming now to the more important issue of “causation”, it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.”

32. The record indicates that the Appellant only produced a mortuary admission and discharge form, a burial permit and a death certificate in support of his claim. None of the said documents is proof of the cause of death.

33. The court has carefully reviewed the evidence and agrees with the trial court's finding that the mere occurrence of the incident, without credible proof of a power surge, faulty transmission, or direct link to the Respondent's repairs, cannot by itself sustain a claim of negligence. It is also of the opinion that without proof of the cause of death, the Appellant failed to establish a causal link.

34. In *Kenya Power & Lighting Co. Ltd v Ganjoni Towers Ltd* (supra), the Court of Appeal held that negligence claims against KPLC require cogent evidence, not mere allegations, and the plaintiff must first establish a factual basis for liability. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi* [2004] eKLR, the Court of Appeal emphasized that the burden remains with the plaintiff unless a clear case shifts it under Section 112. Unlike *Kenya Power & Lighting Co. Ltd v Samuel Macharia Kinuthia* [2016] eKLR, where KPLC's failure to produce records was coupled with strong plaintiff evidence, for example, expert testimony, the Appellant in this case did not call an expert witness to support his claim that there was a power surge due to the Respondent's negligence or that the wiring in their house was not faulty at the time the incident occurred.

35. On whether the trial court erred in not considering the weight of the Appellant's case and considering the evidence of the Respondent, the Appellant argues that the trial court erred in rejecting PW1 and PW2's testimony for lack of independence and accepting DW1's unsubstantiated claims.

36. On the other hand, the Respondent's witness DW1 testified that there was faulty internal wiring and an illegal connection, supported by his site visit, and produced a report to support his claim. The trial court relied on DW1's evidence. He was a KPLC employee with technical expertise, and it was within the trial court's discretion to find the evidence credible.

37. The Appellant's failure to produce the ice-making machine, a qualified electrician who inspected the wiring or the ice-making machine after the incident, or even the testimony of a third party to corroborate the claim that there was a power surge in the area or that there were power repairs by KPLC, weakened the claim, as electrical fault cases require technical proof.

38. In *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] KECA 423 (KLR), the Court of Appeal held that:-

“If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”



39. In *Richard Muriuki Waheire v KPLC*(supra), the court dismissed a claim for lack of expert evidence linking KPLC's actions to the incident.
40. Regarding the doctrine of *res ipsa loquitur*, the same is not applicable as the incident occurred within private premises, and the duty was on the owner of the premises to prove that the electrical installations therein were sound in order to shift the burden of proof to KPLC.
41. The Court of Appeal in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi* (supra) held that appellate courts should not interfere with reasoned findings absent clear error.
42. Having painstakingly reviewed the evidence, it is my view that the trial court's evaluation was sound. I do not see any error in the trial court's finding. Consequently, I find that the learned trial magistrate correctly applied the law and properly evaluated the evidence before dismissing the suit. There is no basis for this court to interfere with those findings
43. I will not disturb the award on quantum as the same was not contested by either party.
44. Accordingly, the appeal is hereby dismissed. The judgment of the trial court delivered on 25th March 2024 is upheld in its entirety.
45. The Appellant shall bear the costs of this appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 19TH DAY OF DECEMBER 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Wandallah for the Appellant

Ms. Njage for the Respondent

Court Assistant: Polycap

