REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E122 OF 2024

KENYA POWER AND LIGHTING CO. LTD…….....APPELLANT

VERSUS

PAUL OKUTOYI YWOYI……...1ST RESPONDENT
LANDSCAN ASSOCIATES……...….2ND RESPONDENT

(Appeal from the Judgement dated and delivered in Eldoret CMCC No. 979 of 2012 by Hon. Peter Areri on 9/05/2024)

JUDGMENT

1. This Appeal arises from the Judgment delivered in the said Magistrate's Court suit filed as a work injury claim, in which the trial Court entered Judgment in favour of the 1st Respondent (Plaintiff) against the Appellant (2nd Defendant) and the 2nd Respondent (1st Defendant), jointly and severally. The Judgment was in the following terms:

i)	Liability (jointly and severally)	100%
ii)	General Damages	Kshs 700,000/-
iii)	Special Damages	Kshs 6,500/-
iv)	**Total**	**Kshs 706,500/-**
v)	Plus costs and interest	

2. The background of the matter is that by the Plaint dated 4/12/2012 filed through **Messrs J. N Njuguna & Co. Advocates**, the 1st Respondent (Plaintiff) pleaded that he was carrying out his duties on 4/10/2012 as an employee of the 2nd Respondent, which was the agent of the Appellant, when as a result of the Appellant's and 2nd Respondent's negligence and breach of duty of care, he was hit by an electrical pole and sustained injuries. He listed particulars of negligence and breach, and also the injuries he sustained, and sought damages.

3. The 2nd Respondent (1st Defendant), in response, filed the Statement of Defence dated 21/01/2013 through **Messrs Mwinamo Lugonzo & Co. Advocates**, in which it generally

denied the claims or allegations made in the Plaint, and in the alternative, blamed the 1st Respondent for the accident, if any. The Appellant also averred that the 1st Respondent had concealed that he entered into a settlement with the Appellant under which the claim was marked as fully settled, and that both parties appended their signatures on the Settlement Agreement.

4. The Appellant (2nd Defendant), through **Messrs Kimaru Kiplagat & Co. Advocates**, filed the Statement of Defence dated 5/02/2013, in which, on a without prejudice basis, it agreed that the Appellant and the 2nd Respondent did indeed enter into a contract in which the 2nd Respondent was to undertake construction of electricity lines and repair on existing lines at an agreed renumeration. The Appellant however contended that the 2nd Respondent was wholly responsible for hiring staff, renumeration, duty of care of its employees, and all the affairs of its employees, and was not therefore working on behalf of or as an agent of the Appellant. The Appellant therefore pleaded that the 1st Respondent was not an employee of the Appellant and there was never any relationship, legal or otherwise, between it and the 1st Respondent, and neither was the Appellant vicariously liable for the torts or contractual issues between the 2nd Respondent and third parties, the 1st Respondent included. The Appellant then, too, generally denied the claims or allegations made in the Plaint, and in the alternative, also blamed the 1st Respondent for the accident, if any.

5. The matter then proceeded to full trial in which the 1st Respondent (Plaintiff) called 3 witnesses, the 2nd Respondent (1st Defendant) called 2 witnesses, and the Appellant (2nd Defendant) called 1 witness.

6. At the hearing, the 1st Respondent (Plaintiff) testified as **PW1**. He introduced himself as an electrician and stated that he has a payslip and a letter of employment transfer to demonstrate that he was employed by the 2nd Respondent. He then testified that he was on duty on 4/10/2012 as an employee of the 2nd Respondent to instal an electricity pole, that they were 4 people although they were supposed to be 8, his supervisor was the one holding the ladder while himself and 2 colleagues were holding the pole, and that the person holding the ladder was to ensure that it held the pole, but as they were erecting the pole, the person holding the ladder got overpowered and the pole fell, hitting the 1st Respondent on the leg, occasioning him injuries. Regarding the injuries suffered, he stated that it is his right leg that was fractured at the joint and was plastered, he was advised to use crutches and he was discharged, but later returned to hospital when the plaster was removed. He also stated that he has not healed properly, and still feels pain. He blamed the 2nd Respondent because it

lowered the manpower, and because he was not given any safety devices, and also blamed the Appellant for not making follow-up on how the 2nd Respondent was carrying out the works. The pay-slip, the employment transfer letter, medical treatment records and receipts were then all marked for identification. Under-cross examination by Counsel for the 2nd Respondent, the witness stated that he did not understand English but agreed that the transfer letter indicated that he was a casual labourer. He also agreed that the 2nd Respondent gave him a sum of Kshs 15,000/- for medical costs for treatment of the injuries. When shown the Agreement, he stated that the same was not explained to him, and denied that he agreed not to sue the 2nd Respondent. Under-cross examination by Counsel for the 1st Respondent, he stated that he sued the Appellant because it is the one that contracted the 2nd Respondent (his employer), although he agreed that he had no knowledge of the contents of the contract between the Appellant and the 2nd Respondent. In re-examination, he pointed out that the Appellant's name indeed appears in the subject documentation.

7. **PW2** was **Dr. Samuel Aluda**, who testified that he examined the 1st Respondent on 15/10/2012, who had been injured on 4/10/2012 and was treated at the Uasin Gishu District Hospital. He stated that the injuries suffered by the 1st Respondent were a swollen and tender right leg and a fracture of the right malleolus of the right tibia, and that he prepared a Medical Report and charged a fee of Kshs 1,500/-. He then produced the Medical Report and his receipt. Under cross-examination by Counsel for the 2nd Respondent, he agreed that the treatment notes do not indicate a fracture. Under cross-examination by Counsel for the Appellant, he stated that the 1st Respondent had healed and that he had the x-ray. In re-examination, he insisted that the 1st Respondent suffered a fracture.

8. **PW3** was **Sofia Toroitich**, who introduced herself as a Senior Clinical Officer at the Uasin Gishu District Hospital. She stated that the 1st Respondent was seen at the facility on 4/10/2012, and she then produced the treatment card. Under cross-examination by Counsel for the 2nd Respondent, she agreed that the treatment not did not indicate any fracture. Under cross-examination by Counsel for the Appellant, she stated that the 1st Respondent was not admitted at the hospital. In re-examination, she agreed that she could not confirm whether the 1st Respondent suffered a fracture.

9. At the close of the 1st Respondent's (Plaintiff's) case, the parties, by consent, agreed to production of the documents earlier marked for identification during the 1st Respondent's testimony, which was then done.

10. For the defence, the 1st witness was one **Boniface Wanyama (DW1)** who adopted his Witness Statement, and stated that he entered into a Memorandum of Understanding between the 1st Respondent and the 2nd Respondent. Under cross-examination by Counsel for the 1st Respondent, he stated that he is a director of the 2nd Respondent, and agreed that the 1st Respondent was its employee, and also that he had no evidence to show that the 1st Respondent was supplied with safety apparel. He also stated that his supervisor confirmed to him that the 1st Respondent suffered injuries while in the course of duty, that there were 6 people erecting the post, and he further agreed that the 2nd Respondent was contracted by the Appellant to carry out the works. Regarding the Agreement entered into with the 1st Respondent, he denied that the 1st Respondent was forced into the same, and further stated that he did not know whether they were required to insure their employees. He testified that they gave the 1st Respondent a sum of Kshs 15,000/- as compensation pursuant to an agreement, and that the Appellant was not involved in the Agreement. Under cross-examination by Counsel for the Appellant, he stated that the 1st Respondent was their casual employee. He also stated that it was the responsibility of the 2nd Defendant to ensure the works were performed, and contended that as such, the Appellant was not liable for the injuries suffered by the 1st Respondent.

11. **DW2** was one **Alubale Andambi**, who introduced himself as an Advocate of the High Court. He testified that he is the one who prepared the Agreement between the Appellant and the 1st Respondent, dated 13/10/2012, and referred to above, and contended that he explained the consequences thereof in Kiswahili. Under cross-examination by Counsel for the 1st Respondent, he agreed that he was the Advocate for the 2nd Respondent, that the Agreement does not indicate that he explained to the 1st Respondent his right to have legal representation, and also that the Agreement was not filed at the Ministry of Labour. Under cross-examination by Counsel for the Appellant, he agreed that the Agreement was entirely between the 1st Respondent and the 2nd Respondent, and did not involve the Appellant.

12. **DW3** was one **Sakwa Mulisha**, who introduced himself as an employee of the Appellant, and adopted his Witness Statement. He confirmed that the Appellant had an agreement with the 2nd Respondent to construct power lines and agreed that it was during one such task that the accident occurred in which the 1st Respondent, the 2nd Respondent's employee (a casual worker), sustained injuries. He agreed that the accident occurred when the 1st Respondent was discharging his duties under the instructions of the 2nd Respondent. He then produced a copy of the Agreement and testified that he prepared a Report about the accident, and that from the enquiries made, it is the 2nd Respondent which was to blame for the accident as it

failed to provide safe working procedures. He stated further that it was not the responsibility of the Appellant to pay salaries, or shoulder liability for the workers, or to supervise the works. He then produced the Accident Investigations Report dated 23/11/2012, and contended that it was not right for the 1st Respondent to sue the Appellant. Under cross-examination by Counsel for the 1st Respondent, he agreed that the Appellant was the principal while the 2nd Respondent was the agent, that there is no clause excluding the Appellant from liability for actions and omissions of the 2nd Respondent, that the Appellant had a duty to verify the tools to be used by the 2nd Respondent for the works, and that according to the contract between them, the 2nd Respondent was obligated to ensure compliance with the requirements listed therein. He further agreed that the documentation describes the 1st Respondent as an employee of the Appellant, and confirmed that his findings were that the working team had one man less manpower as required, and they also did not have appropriate tools and equipment for carrying out the works, that they lacked proper training, and were also not insured. In re-examination, he stated that what the Agreement required the Appellant to do was to verify the tools used, not to supervise the works, which is different from verification

13. After the hearing, the trial Court, as aforesaid, found liability at 100% against the Appellant and the 2nd Respondent and entered Judgment in favour of the Respondent as against the Appellant and the 2nd Respondent, jointly and severally. Dissatisfied with the decision, the Appellant filed this Appeal by way of the Memorandum dated 28/05/2024, premised on the following 6 grounds:

i) **That the learned trial magistrate erred in law and fact in holding the Appellant and the 2nd Respondent 100% liable jointly and severally in view of the evidence on record.**

ii) **That the learned trial magistrate erred in law and in fact in failing to hold that the 2nd Respondent was an independent contractor and therefore the Appellant could not be held vicariously liable for the acts and/or omissions of the 2nd Respondent.**

iii) **That the learned trial magistrate erred in law and fact in completely misapprehending the law of agency.**

iv) **That without prejudice to the aforegoing, the learned trial magistrate erred in law and fact in adopting and/or using the wrong principles in making a determination as to the damages payable to the 1st Respondent.**

v) **That the learned trial magistrate erred in law and fact in awarding a sum of Kshs. 700,000/= as general damages to the 1st Respondent which damages are inordinately high in view of the evidence on record and the relevant authorities and/or precedents with comparable injuries.**

vi) **That the learned trial magistrate erred in law and fact in failing to consider the submissions by the Appellant for guidance to arrive at a sound decision/judgement.**

14. The Appeal was then canvassed by way of written Submissions. The Appellant's Submissions is dated 5/05/2025 and is filed through **Messrs Onyinkwa & Co Advocates**, while the 1st Respondent's Submissions is dated 27/10/2025, and is filed through **Messrs. J. N. Njuguna & Co. Advocates**. For the 2nd Respondent, its Counsel **Mr. Mwinamo**, informed the Court that the Appeal is between the Appellant and the 1st Respondent, and that he would not be therefore filing any Submissions.

Appellants' Submissions

15. Counsel for the Appellant submitted that the 2nd Respondent was an independent contractor in the arrangement, not an agent, that the distinction between an agent and an independent contractor lies in the degree of control exercised by the principal, and that an independent contractor is one who is entrusted to undertake a specific project but is left free to carry out the assigned work and to choose the method for accomplishing it without close supervision. He urged that for instance, independent contractors usually use their own equipment and workers to accomplish the task, while, on the other hand, an agent is an employee of the principal who works under the instructions and control of the principal. He thus contended that the principal provides equipment and workforce and the agent is only there to represent the principal to third parties. He submitted that the evidence on record shows that the 2nd Respondent was an independent contractor, that the offer letter from the Appellant to the 2nd Respondent dated 3/9/2009 clearly shows that the 2nd Respondent qualified as a contractor for construction and maintenance of specific electricity lines for a period of 3 years, and thus, the 2nd Respondent was not under the supervision of the Appellant as it chose the tools and employed its own workforce such as the 1st Respondent to provide the contracted services to the Appellant. He submitted that no evidence was led to show that the Appellant

directed or controlled the manner in which the 2nd Respondent carried out the work, and he cited the case of **Kenya Power & Lighting v Okeyo & another (Civil Appeal 3 of 2021) (2022) eKLR**. Counsel thus averred that the trial Court erred in finding that an agency relationship existed between the Appellant and the 2nd Respondent. On vicarious liability, he referred to the **Black's Law Dictionary 10th Edition**, which defines the same as liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties. He submitted that the doctrine of vicarious liability is predicated on a relationship akin to employment or agency, where the principal has control over the manner in which the work is accomplished, and that therefore, the lack of an employment or agency relationship or control negates any basis for vicarious liability.

16. He submitted that the 2nd Respondent was neither an employee nor an agent of the Appellant, but was an independent contractor, and further, that even if the Appellant benefited from the construction works as held by the trial Magistrate, mere benefit, alone, does not create vicarious liability without control. He thus posited that the trial Magistrate imposed liability without establishing the correct legal relationship, thereby unfairly burdening the Appellant. On quantum, he contended that the Medical Report by **Dr. Aluda** indicated that the injuries sustained by the 1st Respondent were healing save for pains which however subside with the use of analgesics. He also submitted that it is a well-established principle that an award for general damages must reflect the trend of previous, recent, and comparable awards. He then sought to distinguish the authority relied upon by the trial Magistrate by arguing that in that case, the Plaintiff sustained more severe injuries as compared to those sustained herein, and thus not comparable. He proposed an award in the region of Kshs 250,000/- to Kshs 300,000/-

1st Respondent's Submissions

17. Counsel for the Respondent, on his part, submitted that the fact that the 1st Respondent was an employee of the 2nd Respondent was not disputed, as is the fact that the Plaintiff was injured while on duty. He referred to the witness' testimonies and urged that the evidence established that the Appellant was vicariously liable since under the terms of the subject contract, the Appellant had a duty to verify the tools of trade that the 2nd Respondent was to use, and that the contract did not contain a clause excluding the Appellant from liability for the actions or omissions of the 2nd Respondent. Counsel also referred to the Investigations Report produced by **DW3**, and submitted that from the findings thereof, it was patently clear that the occurrence of the accident resulted from both the 2nd Respondent's and the

Appellant's breach of their duty of care, and that therefore, the trial Magistrate properly found the 2nd Respondent and the Appellant 100% liable, jointly and severally. Regarding quantum, Counsel submitted that the award of Kshs 700,000/- in general damages was reasonable, proportionate and commensurate to the nature and severity of the injuries sustained by the Plaintiff.

Determination

18. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court, and draw its own conclusion (see for instance, the case of **Kenya Ports Authority vs Kuston (Kenya) Ltd [2009] 2 EA 212**.

19. The issues that arise for determination in this Appeal, are evidently the following;

i) **Whether the trial Court erred in finding the Appellant jointly and severally liable at 100% with the 2nd Respondent for the accident the subject hereof.**

ii) **Whether the trial Court's award in general damages was inordinately high or excessive.**

20. In answering the first issue, regarding the extent of the powers of an Appellate Court in interfering with the trial Court's findings of fact, it is settled that an appellate Court will only interfere with the conclusions and findings of a trial Court if the same was not supported by evidence or were premised on wrong principles of law. This was the import of the holding in the case of **Mwangi V. Wambugu (1984) KLR 453**, in which the Court of Appeal held, ***inter alia***, as follows:

> **"A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

21. In this case, it is not in dispute that the Appellant contracted the 1st Respondent by way of the letter dated 3/09/2009 (prequalification letter) for the works of construction and maintenance

of power lines. It is also not in dispute the 2nd Respondent, when the accident occurred and from which he suffered injuries, was working in the course of his duties as an employee, casual or otherwise, of the 1st Respondent, in execution of the works referred to in the said letter. To this extent, the trial Court found the 1st Respondent directly liable, on the ground of negligence and/or breach of the duty of care, for the accident from which the 2nd Respondent suffered injuries. That finding has not been appealed against by the 1st Respondent.

22. It is therefore not in dispute that the 1st Respondent was not an employee of the Appellant. The question now is whether the accident from which the 1st Respondent suffered injuries, and which occurred in the course of the 1st Respondent carrying out the works as an employee of the 1st Respondent, could also be attributed to the Appellant. In other words, can the Appellant be justifiably held vicariously liable for the actions or omissions of the 1st Respondent in the carrying out of the works? Posed in a different manner, was the 1st Respondent, once contracted, working as an independent contractor, or as an agent of the Appellant?

23. It is interesting that the 2nd Respondent's witness, **DW2**, vehemently defended the Appellant and strongly sought to exonerate the Appellant from being included in any finding of liability. **DW2** asserted that the "buck rested" with the 2nd Respondent, and as such, no liability whatsoever should attach to the Appellant by extension. That position may be understandable to the extent that the 1st Respondent would obviously wish to retain the lucrative contract "swung its way" by the Appellant, since any inclusion of the Appellant in a finding of joint liability would evidently jeopardize the 2nd Respondent's attractiveness in being considered by the Appellant for award of future contracts. The 2nd Respondent's said position may not therefore be borne out of any legal considerations, but most likely out of commercial interests.

24. Back to the issue at hand, "vicarious liability" is defined in the **Black's Law Dictionary 10th Edition by Bryan A. Garner** as ***"liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties - also termed as imputed liability".***

25. The Court of Appeal, on its part, in the case of **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another [2014] KECA 297 (KLR)**, stated the following:

> **"….. The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously**

liable if its employee was acting within the course and scope of employment at the time the delict was committed."

26. In the case of **Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123, De Lestang, VP,** stated that:

"A person employing another is not liable for that other's collateral negligence unless the relation of master and servant existed between them at the material time; the existence of the right of control is usually a decisive factor in deciding whether the relationship of master and servant exists."

27. Discussing the above quote in the case of **Board of Governors St Mary's School v Boli Festus Andrew Sio 2020 KECA 952 (KLR)**, the Court of Appeal held as follows:

"What Selle and Another (supra) is saying is that a principal will be responsible for the acts of a servant where the servant is carrying out a task on behalf of the principal. That is not the same when the task involves employment of an independent contractor.

This issue is well captured in Charlesworth on Negligence 4th Edition, Sweet and Maxwell. On the subject of "independent contractors" the learned author declares that an employer is not liable for the negligence of an independent contractor or his servant in the execution of his contract. He says:

"Unquestioningly, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commits some casual act of wrong or negligence, the employer is not answerable."

…..

So the general rule is that an employer who has employed an independent contractor to undertake services or work on his behalf is not responsible for any tort committed by the contract or in the course of his work. The employer is also not liable for the tortious act committed by the contractor's employees.

In the English case of Pickard v Smith (1861) 10 C.B. (N.S.) 470 Williams, J. expressed himself as follows on this subject as we have shown in the quote from Charlesworth on Negligence (supra) that a person cannot be liable for an act or breach which is not traceable to him."

28. In this case, there was no employer-employee relationship between the 1st Respondent and the Appellant, nor, in my view, was it demonstrated that there was any principal-agent relationship between them. All indication is that the 2nd Respondent entered into the contract with the Appellant as a complete independent contractor. I say so because no exercise of control over the 2nd Respondent by the Appellant in performance of the works was demonstrated.

29. As aforesaid, the distinction between an agent and an independent contractor lies in the degree of control exercised by the principal. As correctly submitted by Counsel for the Appellant, an independent contractor is one who undertakes a specific project but is left free to execute the assigned work, including, to choose the method for execution without close supervision. Independent contractors usually therefore use own equipment and workers to execute the task, while, on the other hand, an agent is an employee of the principal who works under full instructions and control of the principal. No evidence whatsoever was led to demonstrate that the Appellant directed or controlled the manner in which the 2nd Respondent carried out the works. As further correctly submitted by Counsel, the doctrine of vicarious liability is predicated on a relationship akin to employment or agency, where the principal has control over the manner in which the work is accomplished, and that therefore, the lack of an employment or agency relationship or control negates any basis for vicarious liability. I agree that even if the Appellant was the beneficiary of the works, mere benefit alone by the Appellant, without any evidence of exercise of control by the Appellant over how the 2nd Respondent (1st Respondent's employer) carried out the works are to be performed, cannot and does not create vicarious liability. Evidently, the trial Magistrate imposed liability without ascertaining the correct legal relationship.

30. Under the above circumstances, I do not find any basis upon which the trial Court could conclude that Appellant could be held vicariously liable for the negligence of the 1st Respondent, particularly, suffering of injuries by the 1st Respondent's employees as a result of accidents occurring in the course of carrying out the works for which the 1st Respondent was contracted by the Appellant. By apportioning liability to both the Appellant and the 2nd Respondent, the trial clearly made an error of principle. The trial Court clearly erred in finding that an agency relationship existed between the Appellant and the 2nd Respondent.

31. Since the Appellant has succeeded at the first hurdle of liability, the second issue, namely the award of general damages against it, does not now arise. This is because the 1st Respondent,

against whom the trial Court also found liable, has not appealed herein. This Judgment therefore ends at this point.

Final Orders

32. The upshot of my findings above is that this Appeal succeeds, and accordingly, the portion of the trial Court's Judgment finding the Appellant jointly liable for the accident the subject hereof is hereby set aside.

33. Although the Appeal has succeeded, I do not believe that the 2nd Respondent's joinder of the Appellant in the case was entirely without merit. It may have genuinely not have been so clear to the 2nd Respondent at the time of filing the suit whom between the Appellant and the 1st Respondent was liable. I therefore direct that the Appellant and the 2nd Respondent shall bear their own costs of the Appeal, and also of the lower Court suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 27TH DAY OF FEBRUARY 2026

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:
N/A for the Respondents
Ms. Ghati for the Appellant
Court Assistant: Brian Kimathi