

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL APPEAL NO. E721 OF 2024

**KENYA POWER & LIGHTING COMPANY LTD
APPELLANT**

VERSUS

**FREDRICK OCHIENG' 1ST
RESPONDENT**

**NAIROBI CITY WATER & SEWERAGE CO. LTD 2ND
RESPONDENT**

***(Being an appeal from the judgment of Hon. S.A.
Opande (PM) delivered on 22nd May 2024 in Milimani
CMCC No. E1372 of 2021)***

JUDGMENT

Background

1. The 1st Respondent was engaged as a casual labourer, by or on behalf of the 2nd Respondent, to dig trenches for water pipe installation. During the course of the work, the 1st Respondent struck underground electric cables thereby resulting in an explosion that caused him burn injuries.
2. He was subsequently treated at Kenyatta National Hospital. Medical evidence indicated that he sustained electrical burn wounds on the head and neck, accompanied by pain, intolerance to bright light, without

permanent disfigurement. The injuries were expected to heal within three to four months.

3. The 1st Respondent instituted the suit before the lower court seeking general and special damages for the said injuries sustained in the course of his work as a casual labourer engaged in trench digging for purposes of laying water pipes.
4. It was the 1st Respondent's case that on 20th October 2020, while undertaking the said excavation works, he came into contact with underground electric cables belonging to the Appellant, which resulted in an explosion and consequent electrical burns.
5. Upon evaluating the evidence, the trial court found both the Appellant and the 2nd Respondent liable and apportioned liability equally at 50% each.
6. The trial court awarded the 1st Respondent Kshs. 400,000 as general damages, Kshs. 5,420 as special damages together with costs and interest.

The Appeal

7. The Appellant has, in this appeal, challenged the trial court's said decision, contending inter alia that:
 - a) ***The learned magistrate erred in apportioning liability at 50:50;***
 - b) ***Negligence on its part was not proved;***
 - c) ***The 2nd Respondent bore the primary duty of care;***

d) ***The trial court failed to properly evaluate the evidence on record.***

8. The Appellant seeks orders that the judgment on liability be set aside and that the 2nd Respondent be held 100% liable.
9. The appeal was canvassed by way of written submissions.

Submissions

10. The Appellant submitted that the 2nd Respondent, as the party undertaking the excavation works, bore the primary responsibility of conducting site surveys, identifying underground utilities and ensuring the safety of its workers.
11. It was further submitted that the workers engaged by the 2nd Respondent were digging indiscriminately and without proper supervision, thereby exposing themselves to risk.
12. The 1st Respondent, on the other hand, maintained that both the Appellant and the 2nd Respondent were negligent.
13. The 1st Respondent contended that the Appellant failed in its duty to properly secure, insulate and mark its electric cables and to warn the public of the attendant risks.

14. It was further submitted that the 2nd Respondent failed to provide a safe working environment, neglected to conduct proper site assessments and failed to equip its workers with protective gear or warnings regarding the risks involved.
15. The 1st Respondent urged the Court not to interfere with the trial court's finding on apportionment of liability, arguing that the same was based on sound legal principles and was supported by the evidence on record.

Issue for Determination

16. Having considered the pleadings, evidence and submissions, I find that the singular issue for determination is whether the trial magistrate erred in apportioning liability equally between the Appellant and the 2nd Respondent.

G. Analysis

17. It is trite law that a claim in negligence must be proved on a balance of probabilities. The burden lies with the claimant to establish the existence of a duty of care, breach of that duty, and resultant damage.
18. In the present case, it is not disputed that the 1st Respondent sustained injuries as a result of contact with electric cables during excavation works.
19. I find that the Appellant, as the entity responsible for the installation and maintenance of electrical

infrastructure, owed a duty of care to ensure that its installations were visible, safe and did not pose danger to members of the public.

20. In ***Kenya Power & Lighting Co. Ltd vs. Joseph Khaemba Njoria [2015] eKLR***, the Court held that the Appellant bears a responsibility to ensure that its power infrastructure is properly maintained so as to prevent accidents.

21. The evidence on record shows that the electric cables were exposed along water pathways and were not adequately secured or marked. In my view, this omission constituted a breach of the Appellant's duty of care.

22. The 2nd Respondent, on the other hand, as the party undertaking excavation works, equally owed a duty to ensure that the work site was safe.

23. The evidence on record reveals that no proper feasibility studies or site surveys were conducted prior to excavation and that the workers were digging without clear guidance or adequate safety measures.

24. I find that the failure by the 2nd Respondent to take reasonable precautions to identify underground utilities and to safeguard its workers amounted to negligence.

25. The question that then arises is whether the trial court erred in apportioning liability at 50:50.

26. The principles governing interference with apportionment of liability are well settled. In ***Khambi & Another vs.***

Mahithi & Another [1968] EA 70, it was held that an appellate court will not interfere with apportionment of liability unless it is based on wrong principles or is manifestly erroneous.

27. Similarly, in ***Hussein Omar Farah vs. Lento Agencies [2006] eKLR***, the Court held that where it is not possible to determine the degree of fault between two parties, liability may be apportioned equally.

28. Upon re-evaluating the evidence, I find that both the Appellant and the 2nd Respondent contributed to the occurrence of the accident through their respective acts and omissions.

29. I am therefore not persuaded that the trial court misapprehended the evidence or applied wrong principles in arriving at the finding on liability.

30. In the circumstances of this case, I find no basis upon which this Court can interfere with the trial court's apportionment of liability.

31. In the end, I find that the appeal on liability is devoid of merit. This means that the finding of the trial court apportioning liability at 50:50 between the Appellant and the 2nd Respondent is hereby upheld.

32. Accordingly, I make the following final orders:

a. The appeal is hereby dismissed;

b. The judgment of the trial court on liability is upheld;

c. The Appellant shall bear the costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2026.

**HON W. A. OKWANY
JUDGE**

**In the presence of
Muyuka for Appellant
Ms Mongeri for Macharia for 1st Respondent
Abdirzak - Court Assistant**