IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 298 OF 2012

KENYA POWER & LIGHTING COMPANY LIMITED…… APPELLANT

AND

JANE WANJIRU GITAU…….…… RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**J. B. Ojwang', J**.) dated the 27th day of February, 2004* inH.C.C.C. No. 1208 of 1997)

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JUDGMENT OF THE COURT

On 23rd May, 1994, **Jane Wanjiru Gitau** "*the respondent*" received a call from her farmhand with some unfortunate news that her two cows had died. Upon receiving the news, she returned to the farm, which sits on five acres behind Safari Park Hotel, Nairobi. The process of finding out what happened or caused the death was commenced by the respondent and her husband. The two cows, of Ayrshire breed, were according to her, the main source of income. She claimed that just that morning, she had milked the cows before she left the farm and the cows were then moved to a pasture where they met their untimely death.

She immediately called a qualified veterinary doctor, **Dr. Mukali Mugacia,** who over the years attended to the cows, for purposes of conducting post mortem and to shed light on the cause of the cows' demise. The doctor accompanied by the respondent's husband, also a qualified veterinary doctor, on examination noticed some burn marks on the cows' fur and deep skin slits with blood oozing out where the fur had been burnt. Near the carcasses, the doctors found some electric cables belonging to **Kenya Power & Lighting Company** "*the appellant*".

The veterinary doctors conducted further tests and concluded that the cause of death was electrocution and prepared a report to that effect. The respondent blamed and imputed negligence on the appellant's part for the cows' death. She therefore instituted a suit vide a plaint dated 21st May 1997, praying for compensation for the loss of the cows and loss of income. She gave the particulars of negligence on the appellant's part as failing to maintain the electric cable in good order and failing to repair the cables on time despite being called upon to do so.

In its defence, the appellant admitted that the death of the two cows was as a result of electrocution. However, it denied that the respondent was the owner of the cows or were on her land; it also denied negligence on its part and that the respondent had suffered any loss or damage.

On those set of facts and the evidence tendered during the trial, **J.B Ojwang' J**. (as he then was), found for the respondent in the now impugned judgment and awarded her Kshs. 200,000/- being the market price of the cows; Kshs. 1,080,000/- for loss of income from milk sales for 24 months; Kshs. 72,000/- being loss of income from manure sales for the same period and Kshs. 37,000/- for veterinary services. Both amounts attracted interest of 12% from the date of filing of the suit. The respondent was also awarded costs of the suit with interest from the date of judgment.

Dissatisfied with the judgment, the appellant lodged the instant appeal faulting the learned Judge for failing to consider that electrocution may have been caused by factors beyond its control, for instance, heavy downpour; placing the value of the cows at Kshs. 200,000/- when evidence tendered had shown the value to be Kshs. 40,000/-; contradicting himself by finding that the respondent was in a position to mitigate her loss but proceeding to award Kshs. 1,080,000/- and Kshs. 72,000/- as loss on income for 24 months and failing to take into consideration the overhead costs of rearing the cows; awarding the value of adult cows rather than heifers and further taking the period of loss at 24 months which is the period the heifers would have taken to mature; awarding the sum of Kshs. 37,000/- as professional fees when the same had not been pleaded; awarding interest at court rates on the loss of income from the date of filing suit rather than from the date of judgment and awarding interest on costs from the date of filing suit when the same could only be determined upon taxation.

The appeal was canvassed by way of written submissions. In its submissions, the appellant pointed out that since there was no plea of *res ipsa loquitor*, the respondent had a burden of proving the particulars of negligence which she had pleaded in her plaint, but failed to do so. That as it were, the respondent led no evidence at all proving that the power cables were faulty or of any report or complaint that had been made to it concerning the power cables. It asserted that the respondent was required to prove those claims. According to the appellant, simply stating that the cows were found dead next to the broken power cable was not sufficient especially given that there had been heavy downpour of rain on the day. The appellant further submitted that evidence had shown that a full grown cow in 1994 would cost between Kshs. 70,000-80,000/- or less. That the respondent's own witness, **Professor Mbithi,** a renowned veterinary surgeon, had testified that the respondent could have replaced the cows within a period of 3-6 months and at a cost of Kshs. 65,000/-. According to the witness, a young heifer would cost Kshs. 40,000/- and would take 12 months to mature. Therefore, and according to the appellant, the loss of income should have been proportionate to the period the respondent would have taken to replace the cows which she opined to be 3 to 6 months, since the Judge had also found that the respondent could have replaced her cows immediately.

The appellant further faulted the Judge for making the awards which were unsupported by evidence without any basis or rationale. According to the appellant the Judge fell into error by awarding loss of income for manure when in fact no evidence was placed before him to prove that loss. Similarly, the appellant faulted the award of loss of milk income as the Judge did not factor in costs of feeds and was based on the assumption that the cows produced 30 litres of milk which according to the appellant was contrary to the evidence. That according to the appellant's witness, the average cost of feeds would have been Kshs. 13,800/- per month with an estimated profit of Kshs. 30,600/- for the two cows per month which would have amounted to Kshs. 734,400/- for the 24 months.

The appellant further submits that the sum of Kshs. 37,000/- being alleged professional fees was not pleaded as special damages nor proved as it ought to be. It cited the authorities of **NSSF Board of Trustees v Sifa International Ltd (2016) eKLR** and **Coast Bus Service Ltd v Murunga Danyi & 2 Others, Civil Appeal No. 192 of 1992** for the proposition that special damages ought to be specifically pleaded and proved. The appellant also complained that the Judge should have awarded interest from the date of judgment, as opposed to the time of filing suit, since that is when the damages payable to the respondent were determined. That since the sums awarded had not been claimed as special damages in the suit, they became ascertainable when the Judge assessed them in his determination.

Relying on section 27 of the Civil Procedure Act, the appellant claimed that an award of interest on a principal sum was from the date of filing suit since it is presumed that there was a principal sum sought at the date of filing suit. However, in this case, no sums of money were specifically claimed at the time of

filing suit. The appellant cited the case of **Prem Lata v Peter Musa Mbiyu (1965) E. A 592** where it was held that interest on general damages should not be awarded for the period between the filing of suit and judgment. It further cited the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd (1970) EA 469** for a similar proposition. Faulting the Judge for awarding interest on costs from the date of judgment, the appellant was of the view that interest on costs ought to be from the date of taxation. This is because such costs become ascertainable upon the taxation of the bill of costs. As such, the appellant argues, any interest on cost ought to have been from the date of taxation which the appellant states was from 16th March 2005 when the bill of costs was taxed at Kshs. 106, 063/-. The appellant further submitted that interest may only be awarded for the period before judgment where the claim was for a liquidated sum.

Replying to the appellant's ground that the electrocution of the cows may have been caused by factors like rain, an act of God, the respondent submitted that the issue had not been raised in the High Court and so the same could not be raised at this stage. She maintained that the cows' death resulted from breach of duty of care owed to her and that the appellant could not rely on an act of God to absolve itself from liability. The respondent supported the Judge's finding that the value of each cow was Kshs. 100,000/ as had been supported by the evidence she had tendered. She pointed out that the compensation she sought was not of heifers as claimed by the appellant but that of grown up Ayrshire cows.

The respondent reiterated that the Judge had made the correct awards and that there was no misdirection on his part to warrant this Court's interference. It was further submitted that this Court could only interfere with the awards if it was proved that the amounts awarded were inordinately low or too high and that since this was not the case here, there was no miscarriage of justice for this Court to correct. It cited the cases of **Bashir Ahmed Butt v Uwais Ahmed Khan (1982--88) I KAR** and **Mbogo v Shah (1968) EA 93** for the proposition. In response to the ground of appeal faulting the learned Judge for awarding the value of grown cows and taking 24 months as the loss period which according to the appellant is the period over which the cows would have grown to maturity, the respondent reiterated that what was sought in the suit was the value of two adult Ayrshire cows and not heifers as the appellant had urged.

The respondent maintained that professional fees of Kshs. 37,000/- had been proved and the Judge could not be faulted for awarding the same. According to the respondent, there was testimony by **Dr. Mukali Mugacha** and herself proving the damages and since the same was not rebutted or controverted, then the issue could not be raised now before this Court. The respondent further submitted that the authorities relied on by the appellant to show that interest awarded ought to be from the date of judgment rather than from the date of filing suit, were distinguishable and inapplicable since they related to personal injuries while the present suit was concerned with compensatory damages aimed at putting the respondent in the position she would have been in if the loss had not been occasioned. She therefore supported the Judge's exercise of discretion to award interest as from the date of filing suit and also awarding costs from the date of judgment. According to the respondent, the Judge was right to award interest on costs from the date of judgment since section 27 (2) of the Civil Procedure Act did not provide for taxation before the interests can be awarded as submitted by the appellant. Further, that interest on the taxed costs ought to be calculated from 27th February 2004 which is when the impugned judgment was rendered.

In conclusion, the respondent remained adamant that liability on the appellant's part was proved as required by section 107 (1) of the Evidence Act and urged this Court not to interfere with the award of damages since the Judge did not proceed on wrong principles or materially misapprehended the evidence.

In our view the determination of this appeal will turn on the following issues;

i. Whether liability was provide against the appellant's liability.

ii. Whether the Hon. Judge correctly assessed and awarded damages.

iii. Whether the Hon. Judge erred in awarding interest on loss of income for milk and manure sales from the date of filing suit and costs from the date of judgment

Starting with the first issue, the cause of action in this suit was the alleged negligence on the appellant that caused the respondent to suffer loss of her cows. In her plaint, the respondent gives the particulars of negligence as failing to maintain the power lines in good order or repair and to repair the power lines despite being informed to do so. In accordance with sections **107** and **108** of the Evidence Act, he who alleges must prove and therefore the respondent was bound to prove those particulars of negligence on the appellant's part for liability to attach. We must therefore determine whether the respondent indeed discharged that burden. In doing so, we must bear in mind our mandate as a first appellate court to reconsider the evidence tendered before the trial court, re-evaluate it and come to our own conclusions. In doing so, we ought also to bear in mind that we neither saw nor heard the witnesses and make due allowance. Further, we are not bound necessarily to follow the trial judge's findings of fact if it appears either that the Judge had misapprehended the facts or erroneously applied the law to those facts or failed to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. See **Selle & Another v Associated Motor Boat Company Ltd & Others (1968) EA 123; Seascapes Ltd v Development Finance Company of Kenya Ltd, Civil Appeal No. 247 of 2002.**

In his determination, the Judge found the appellant liable in negligence on the basis that the power cables that ran through the respondent's land were the property of the appellant such that only it could have kept them under inspection to ensure that they were in a good state of repair.

However, the respondent failed to plead *res ipsa loquitor,* a fact which the learned Judge acknowledged. This in turn behooved the respondent to tender evidence to establish how the appellant breached the duty of care owed to her through its negligence. As it is however, nowhere in the record does it reflect that the respondent tendered any evidence to prove that the appellant had failed to maintain the power lines in good repair. The other aspect of negligence given by the respondent was that the appellant had failed to repair the power lines despite being informed that the power lines were faulty. The respondent was bound to tender evidence of such report or complaint made to the appellant and prove that it failed to heed to such complaint or report or failed to act on the information. No such evidence was led.

Be that as it may, every case must ultimately be determined on its own set of facts and circumstances. The appellant in its defence admits that the cows met their death through electrocution. It has not denied that the power cables that electrocuted the cows belonged to it. Though it denies in its defence that the cows belonged to the respondent, it did not prove that allegation. The appellant's denial through its defence that the cows were not on the respondent's land or property was not pursued so as to fall for consideration. It also did not tender evidence to rebut or controvert the respondent's claim that it, through its servants or agents, was negligent to extent that it caused damage or loss to the respondent. In his judgment, the Judge in imputing liability on the appellant's part agreed with the respondent's submission before that court that no evidence was led to dispute the claim of negligence on its part. The Judge further pointed out that though the appellant's employees were called to the *locus in quo*, none of them were called to testify in its defense. Indeed the Judge noted and agreed that in its defense, the appellant confined itself to the level of possible compensation to the respondent. The appellant's counsel in fact in her opening remarks at the trial conceded that there was no denial of the fact that the cows were electrocuted on 23rd May 1994. According to counsel, the only issue for determination was with regard to the loss suffered by the respondent. Accordingly, liability was not in dispute.

The appellant alleged that there was heavy downpour on the material day that might have caused the power lines to fall. The appellant did in fact attempt to introduce the defence of an act of God (*vis major*) to infer that failure of the power cables was not attributable to it or was caused by circumstances that were beyond its control *to wit*, heavy downpour. However, the trial judge rightly found that no plea of act of God had been pleaded by the appellant and so rejected the attempt to rely on it. The claim of negligence on the appellant's part therefore went unchallenged and stood. On the basis of the foregoing, we would agree with the finding by the trial Judge that the appellant was liable in negligence to the respondent.

Did the Judge correctly assess and award damages and interest? In her plaint, the respondent sought a replacement of the value of the two cows; loss of income; costs and any other relief that the court might deem fit to grant. In the said plaint, the respondent did not seek or plead any special damages.

The appellant has faulted the Judge for awarding Kshs. 200,000/- as compensation for the two cows when according to it evidence had shown that replacing the heifers was Kshs. 40,000/-. In its submissions the appellant has gone to great lengths to show that the Judge wrongly awarded the price of an adult cow rather than of a heifer which the respondent had lost. That assertion is erroneous since it came out during the trial that the respondent's cows were not heifers. The respondent testified that she had two cows, which she milked, and each had a heifer. It is the two cows she used to milk that were electrocuted and which she wanted replaced. The appellant's argument that the Judge ought to have compensated the respondent for heifers as opposed to adult cows does not therefore, hold.

During the trial, the respondent testified that in 1994 the price of one grade cow ranged between Kshs. 60,000 and 80,000/-. However, at the time of trial, in 2003, the respondent stated that the price ranged from Kshs. 100,000 to 115,000/-. The appellant's own witness, **Prof. Mbithi** estimated the price of grade cows in 1994 to have been Kshs. 65,000/-.Exercising his discretion the trial judge awarded Kshs. 100, 000/- as the price for each cow. We do not see any reason to warrant this Court's interference with the Judge's exercise of discretion as it was based on sound evidence. Moreover, this court is not bound to interfere with such exercise of discretion merely because the judges of this Court would have exercised the discretion differently. See **Export processing Zones Authority v Kapa Oil Limited & 6 Others, Civil Appeal No. 190 of 2011.**

The appellant has further faulted the trial court for making an award of Kshs. 1,080,000/- and Kshs. 72,000/- being loss of income for milk and manure sales respectively for 24 months. The appellant's complaint is first on the 24 months the Judge factored as the period the respondent, mitigating her losses would have taken to replace her cows. During trial, the appellant's witness, Prof. Mbithi had stated that in his own estimation, the respondent would have been able to replace her cows within 3 to 6 months if she wanted to. So how did the Judge reach the 24 months period as the compensatory period? The Judge rendered himself as follows;

> **"From the evidence given in the present case, it is beyond doubt that the plaintiff is not a financially deprived person, nor an ignorant person who could not make suitable arrangements with banks to enable her to purchase animals to replace her dead cows, had she been minded to do so. Professor Mbithi who gave evidence for the Defendant stated that within two-to-three months of the death of the cows, the Plaintiff would have replaced them if she had wanted to do so, and this looks like a quite reasonable estimate. He was, however, prepared to allow as much as two years or so as the maximum period during which replacement could have been done."** (Emphasis)

The appellant disputes that the last portion of the above excerpt was borne out of the evidence of the witness as contained in the record. However, that submission by the appellant is not factual. This is because the record reflects that in his examination-in-chief, Prof. Mbithi testified that it would have been reasonable to have expected the respondent to replace her Ayrshire cows within 3 to 6 months. This is especially when you factor in the fact that sometime was bound to pass before the respondent could earn income if she had replace the cows. But was the 24 months period factored by the learned Judge reasonable in the circumstances of this case? The guiding principles on mitigation of loss were discussed in the case of **African Highland Produce Ltd v John Kisorio (2001) eKLR** where the Court of Appeal held as follows;

> **"It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues. He cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. The plaintiff is under no obligation to injure himself in his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant."**

In the above case, the Court found that the respondent had not taken reasonable steps to mitigate his loss. He had not acted prudently. He acted unreasonably and the High Court erred in granting him any loss of user for more than 21 days which was the period necessary to effect full repairs of his car.

Similarly in this case, there is evidence that it was reasonable expectation for the respondent to have replaced her cows within 3 to 6 months. The Judge in the judgment also acknowledges that fact. In our view, therefore, the period of 24 months was too long and had no factual basis which must call for our intervention. We would accordingly reduce the 24 months period for loss of income on milk and mature sales to 6 months. Acting prudently in the mitigation of her loss and considering the economic status of the respondent it is reasonable that in a 6 months period, the respondent would have managed to replace her cows and continue earning. In any case, the respondent did not rebut the appellant's evidence to the effect that she could replace her cows within 3 to 6 months.

The appellant further challenges the Judge's award of interest under the loss of income from the date of filing suit. According to the appellant the Judge erred in doing so since the assessment of damages payable to the respondent was determined on the date of judgment. That before the judgment, the damages were at large and unascertained and so interest could not accrue. This is especially since the damages were not claimed as special damages. The appellant also relied on section 27 of the Civil Procedure Act for the proposition that interest can only accrue on the principal sum from the date of filing suit, if pleaded, since it presumes there was a principal sum claimed at the institution of suit. In **Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya [2015] eKLR,** the Court of Appeal observed as follows;

> *"**In the case of Salim & another versus Kikava (supra) this Court revisited and confirmed the provisions of section 26 of the Civil Procedure Act (supra) that interest on damages assessed at large starts running from the date of assessment as the date when liability arises. We find no reason as to why the learned trial judge should have departed from a path well beaten as regards awarding of interest on damages at large**."*

The law therefore is that interest on general damages accrues from the time when the damages are assessed or ascertained; that is, on the date of judgment. In this case, the Judge erred in awarding interest on general damages from the date of filing suit as liability and assessment had not been ascertained. We therefore, allow this ground of appeal and rule that the interest awarded on loss of income from milk and manure should be calculated from the date of judgment and not from the date of filing suit. There is no merit in the complaint that no evidence was led in respect of loss of income on manure sales. Such evidence was indeed tendered.

Then there is the award of Kshs. 37,000/- as professional fees paid with the rate of 12% per annum with effect from the date of filing suit. The appellant has challenged this particular award on the ground that professional fees are special damages and the same should have been specifically pleaded and proved. It is settled law that special damages must be specifically pleaded and proved by the plaintiff before being awarded. See **NSSF Board of Trustees v Sifa International Ltd (2016) eKLR.** As such, the award of Kshs. 37,000/- should fail if it's found to have been awarded by the Judge as special damages since it had not been pleaded.

We have no doubt at all in our minds that this award was in the nature of special damages. By the time of lodging the suit, the respondent had already incurred this expense. There is no reason(s) why the respondent could not have pleaded it specifically. On the basis of the foregoing authorities, we are satisfied that this award was erroneous, since being in the nature of special damages, it ought to have been specifically pleaded and proved.

The appellant has further challenged the trial judge's award of interest on costs from the date of judgment. According to the appellant, the interest on costs should accrue from the date of taxation of the bill of costs, in this case, 16th March 2005, and not from the date of judgment since by then they had not been ascertained.

Costs and interest thereon are awarded at the discretion of the Court. See Section 27 of the Civil Procedure Act. Nothing has been put forth to demonstrate that in awarding interest on costs from the date of judgment, the trial court erred or exercised its discretion injudiciously. There is no basis for the submission that interest on costs must accrue from the date of taxation. The order for costs and interest is made on the date when the judgment is rendered. It automatically follows that interest should accrue from that date.

In the end, the appeal partially succeeds in the following terms:

1. Interest on loss of income on milk and manure sales will accrue from the date of judgment and not from the date of filing suit.

2. Loss of income for milk and manure shall be reduced from 24 months to 6 months, which will total to Kshs.288,000/-.

3. The award of Kshs. 37,000/- as professional fees is disallowed.

4. The rest of the other grounds of appeal are dismissed. Each party to meet its own costs of this appeal.

Dated and delivered at Nairobi this 2nd day of February, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR