



**Odhiambo v Kenya Power & Lighting Company (Civil Appeal
E044 of 2024) [2025] KEHC 3158 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E044 OF 2024
OA SEWE, J
FEBRUARY 27, 2025**

BETWEEN

NANCY AKINYI ODHIAMBO APPELLANT

AND

KENYA POWER & LIGHTING COMPANY RESPONDENT

*(Being an appeal from the Judgment and Decree of the Hon. S.O Ongeru, Senior
Principal Magistrate, delivered on 31st May 2024 in Oyugis SPMCC No. 157 of 2022)*

JUDGMENT

1. This appeal arises from the Judgment delivered by Hon. S.O. Ongeru, SPM, on 31st May 2024 in Oyugis Senior Principal Magistrate's Civil Case No. 157 of 2022: Nancy Akinyi Odhiambo v Kenya Power & Lighting Company. The appellant had sued the respondent in that suit, claiming general and special damages plus costs and interest on account of injuries suffered by her on the 29th August 2022.
2. The contention of the appellant was that she was injured after coming into contact with a victim who had been electrocuted by a live wire that was carelessly or negligently left unattended by the respondent or its agents/employees. Thus, the appellant supplied particulars of negligence and/or breach of statutory duty at paragraph 4 of the Complaint dated 3rd October 2022. At paragraph 5, she supplied particulars of injuries suffered, particulars of loss of amenities and future earning capacity as well as particulars of special damage expended by her. She accordingly prayed for judgment in her favour against the respondent for special damages, general damages, interest and costs of the suit.
3. The respondent denied the appellant's allegations vide its Defence dated 24th October 2022. In particular, the respondent denied negligence and averred that, if indeed the alleged accident occurred then the same occurred due to the negligence on the part of the appellant. The particulars thereof were supplied at paragraph 8 of the Defence. The respondent also pleaded the doctrine of volenti non fit injuria and put the appellant to strict proof of her claim.



4. Upon hearing the parties, the learned trial magistrate was not convinced that liability had been proved against the respondent. Accordingly, he dismissed the appellant's suit with costs to the respondent.
5. Being dissatisfied with the judgment of the lower court, the appellant filed this appeal on the following grounds:
 - (a) That the trial court misapprehended in substantial material respects the nature and legal tenets of the appellant's pleaded claim and as a result arrived at an erroneous and unjust decision.
 - (b) That the trial court's finding on liability is erroneous in so far as it failed to consider the evidence tendered.
 - (c) That the Learned Trial Magistrate erred in law and fact in disregarding the appellant's submissions.
 - (d) That the Learned Trial Magistrate erred in law and fact in disregarding the proof of quantum as presented by the appellant and in failing to properly analyze the same, thereby arriving at an erroneous decision.
 - (e) That the trial court erred in law and fact in making a finding and dismissing the suit without considering that the respondent owed the appellant the general public duty of care against the risk of electrocution.
 - (f) That the Trial Magistrate erred in law and fact in failing to accord any or due probative weight to the evidence tendered in support of the appellant's case, thus deciding the matter against the weight of evidence.
 - (g) That the judgment of the trial magistrate has occasioned a failure of justice.
6. Consequently, the appellant prayed that the appeal be allowed and that the judgment and decree of the lower court dated 31st May 2024 be set aside. She also prayed that the costs of the appeal be provided for.
7. The appeal was canvassed by way of written submissions. On behalf of the appellant, written submissions dated 8th November 2024 were filed by M/s O.H. Bunde & Company Advocates. Counsel proposed two issues for determination, namely:
 - (a) Whether the appellant proved liability against the respondent.
 - (b) Whether the trial court erred in the findings on quantum.
8. According to the appellant, the respondent is the legal entity charged with the mandate to distribute electric power in Kenya; and therefore all questions pertaining to the supply and distribution of electricity as well as maintenance of power lines fall within that statutory mandate. The appellant submitted that the accident occurred solely on account of the respondent's negligence in failing to monitor the supply of electricity. The appellant added that it is immaterial that the accident occurred due to an illegal connection by a third party, contending that it was the duty of the respondent to ensure no such connection was made in the first place.
9. In response to the respondent's assertion before the lower court that the appellant ought to have impleaded the third party as a defendant, she submitted that, in matters liability, it was the duty of the respondent to take out a Third Party Notice before the lower court, pursuant to Order 1 Rule 15 of the Civil Procedure Rules. Reliance was placed on *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka, Charles Nganga Mwaura* (suing as the legal representatives of the Estate of Ann Muthoni (deceased) [2013] eKLR for the proposition that the duty of constant checks, inspections



- and maintenance of electrical installations is placed upon the respondent by statute. It was therefore the submission of the appellant that the trial court erred in finding that the respondent is not liable for the injuries she suffered.
10. On whether the trial court erred in its finding on quantum, the appellant restated the particulars of her injuries and urged the Court to find that the proposed award by the trial court was on the lower side. She relied on *Sosphinaf Company Limited & James Gatiku Ndolo v Daniel Ng'ang'a Kanyi* [2006] eKLR and *Ugenya Bus Services v Gachoki* [1982] eKLR as to the applicable principles. In her view, and award of Kshs. 3,000,000/= would be more appropriate as general damages.
 11. In response to the appellant's written submissions, the respondent relied on its written submissions dated 2nd November 2024. The respondent was also of the view that the issues for determination are:
 - (a) Whether the appellant proved liability;
 - (b) What is the assessment of quantum? And,
 - (c) Who should bear the costs of the appeal?
 12. The respondent defended the decision of the trial court on liability and submitted that, since the appellant knew from the very beginning the person who had made the illegal connection, the suit ought to have been filed against that person. The respondent relied on *Lucia Atieno Malasre (suing as the personal representation and administrator of the estate of Bernard Oduor (deceased) v Kenya Power & Lighting Co. Ltd* [2019] eKLR, in which the Court found that Kenya Power & Lighting Co. Ltd could not be held responsible for the acts of a third party.
 13. The respondent further submitted that the appellant ought to bear part of the blame for having placed herself in peril by the manner of her dancing. The respondent relied on Halsbury's Laws of England Vol. 97 (2010) 5th Edition at page 80 to buttress its submission that the appellant was the author of her own misfortune and therefore cannot recover damages for her injuries even in the event of breach of statutory duty on the part of the defendant.
 14. The respondent also submitted at length on the burden of proof and made reference to Sections 107 and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya and the cases of *Eastern Produce (K) Ltd v Christopher Atiado Osoro*, Eldoret HCCA No. 43 of 2001 and *Statpack Industries v James Mbiti Munyao, Civil Appeal No. 152 of 2003*. Its contention was that the burden of proof was on the appellant and that she failed to discharge that burden, particularly in connection with her allegations of negligence.
 15. On quantum, the respondent referred the Court to the Medical Report prepared by Dr. Morebu who examined the appellant about two weeks after the incident as well as the 2nd Medical Report prepared by its doctor, which was produced by consent as the Defendant's Exhibit No. 2. According to the respondent, if anything, the appellant suffered minor electric shock for which Kshs. 200,000/= would suffice as general damages. The case of *Techpack Industries Limited v Idah Gakii Meme* [2021] eKLR, in which Kshs. 150,000/= was awarded for comparable injuries, was cited as the basis for this proposal.
 16. This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was presented before the lower court with a view of making its own conclusions thereon. (see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
 17. As pointed out hereinabove, the respondent adduced evidence before the lower court on 8th November 2023 in support of her case. She stated that she had gone for a funeral and that a certain lady, Mary Goreti (now deceased) fell down and when she touched her, she lost consciousness and found herself



in hospital. She explained that the deceased was electrocuted by a loose electric wire. She blamed the respondent for exposing her to the injuries she sustained.

18. The appellant called Dr. Morebu Momanyi (PW2) of Kisii County Referral Hospital as her witness. He testified that he examined the appellant on 15th September 2022 following her electrocution. He confirmed that the appellant sustained cut wounds and burns on the right upper and left upper limbs, left lower limbs and on the trunk; that she had been rendered unconscious and was attended to at Matata Nursing Hospital. In PW2's assessment the appellant, who was then 13 weeks pregnant, had sustained 20% disability.
19. The respondent, on its part, called one of its employees, Stephen Morgan Magera (DW1). He told the lower court that he conducted investigations into this incident with a view of ascertaining the cause. He visited the scene, conducted interviews and obtained relevant information about the incident. He found out that the cause of the accident was an unauthorized/illegal connection of electricity at the scene. He explained that there was a funeral at the home of one Margaret Aoko; and that because they were not connected to the grid, they opted to tap power from the neighbouring home of Benjamin Ouko Aguko.
20. DW1 further testified that, in such circumstances, Margaret Aoko ought to have made an application to the respondent for temporary connection, and would have been provided with the attendant safeguards to ensure the safety of all concerned; which was not done. He prepared a detailed report which he produced before the lower court as Defence Exhibit No. 1. He explained that the third party used assorted electrical cables, some of which were not insulated and caused them to be tied on live trees and around poles and bars of the tents. He also got to learn that it had rained heavily on that night and that the victims were engaged in religious activities, jumping and dancing barefoot when Mary Goreti got electrocuted and fell. She was later pronounced dead. Accordingly, in his report, he proposed legal action against the third party.
21. In the light of the foregoing summary, the facts are not in dispute namely, that the appellant was injured as a result of electric shock when she attempted to come to the aid of one Mary Goreti (now deceased) who had been electrocuted on the night of 29th August 2022. The victims were attending a funeral and in the course of singing and dancing barefoot at a night vigil, the deceased came into contact with a pole conveying live electric wires. There is also no dispute that it had rained and that the power was connected from the home of one Benjamin Ouko Aguko, about 350 metres away.
22. Accordingly, the issues for determination, as rightly pointed out by learned counsel, are confined to the question of liability and quantum. The burden of proof was on the appellant to prove her allegations of negligence to the requisite standard. In *Statpack Industries Ltd v James Mbithi Munyao* (supra) the point was made thus:

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 as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."
23. In its Complaint before the lower court, the appellant alleged the following particulars against the respondent:
 - (a) Failing to keep and maintain its electric supply lines in a good state of repair;
 - (b) Failing to ensure that its electricity lines were properly fixed or fastened;



- (c) Failing to ensure that its electricity supply lines would not expose the general public (and in particular the plaintiff) to a risk of danger or injury;
 - (d) Failing to inspect and note probable danger caused to the general public by the said electricity supply lines;
 - (e) Failing to repair, remove and or in any other way terminate the cause of danger caused to the general public by the said live electricity supply line;
 - (f) Failing to insulate the live electricity supply line;
 - (g) Knowing and ought to have known that a collapsed live electric supply wire was bound to cause injury to a person or anything which came into contact with it either deliberately or accidentally and taken remedial measures;
 - (h) Failing to provide danger signs or leaving the broken wire repaired and or insulated in a wire mesh.
24. The foregoing particulars presuppose that the line in question was installed by or under the control of the respondent; which is not the case. There is indubitable evidence that the connection to the scene of accident was illegally made, and that electric power was tapped from the home of one Benjamin Ouko Aguko who was not a party to the lower court proceedings. It is manifest therefore that the link between the appellant's injury and the allegations of negligence against the respondent was not established. I agree entirely with the position taken by the lower court that liability was not proved.
25. I am fortified in this stance by the decision of Hon. Ochieng J. in *Lucia Atieno Malasre (suing as the personal representative and administrator of the estate of Bernard Oduor (deceased) v Kenya Power & Lighting Co. Ltd (supra)* that:
- 31. ...Onyango had no authority to tap from the electric power which the Defendant had provided him with, for use in running his welding business.
 - 32. As it is Onyango who placed the cable at the place where the deceased was electrocuted, I find that it is he who was culpable for the fatal incident.
 - 33. No evidence was led to show that the Defendant was aware of the presence of the cable at the said place, prior to the incident.
 - 34. Secondly, there was no evidence adduced to show that if the Defendant had exercised due diligence, it ought to have become aware about the cable at that location.
 - 35. It has not been demonstrated that the Defendant was supposed to take any of the actions which the Plaintiff cited as the Particulars of Negligence and/or Breach of Duty; but that the Defendant failed to discharge any such obligation or that it discharged any such obligation negligently.
 - 36. The Defendant supplied power to the house of Dan Onyango, and Onyango was supposed to use the said power domestically. It has not been shown that the power which the Defendant supplied to Onyango's house was either unsafe or that it posed a danger to the public.



37. As the Defendant was not aware of the unlawful connection which Onyango made, I find that the Defendant could not have been expected to put up warning notices alerting the public about the danger of the cable in issue.
38. The cable which caused the electrocution of Bernard Oduor did not lie on the ground as a result of a sag of the Electric Transmission wires installed by the Defendant.
39. The Appellant appears to suggest that even though the Defendant was not responsible for the fixing of the cable which led to Bernard's electrocution, the Defendant had a duty to have the said cable insulated. I found no evidence or law which imposed such a duty upon the Defendant.
40. In the result, I hold the considered view that the evidence adduced in court did not prove the case which the Plaintiff had particularized in the Plaint.
41. Contrary to the Appellant's submission that the deceased was electrocuted by an apparatus belonging to the Respondent, the evidence shows that the cable which caused the accident belonged to Dan Onyango..."

26. Indeed, as was observed by Sir Kenneth O'Connor in *Peters vs. Sunday Post Limited* [1958] EA 424:

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

27. On quantum, the uncontroverted evidence of the appellant, which was augmented by the evidence of Dr. Morebu (PW2), was that she lost consciousness for one day; suffered multiple deep extensive burns on the right upper limbs, left upper limbs and on the trunk. She also suffered deep extensive burns on the right lower limb. She was hospitalized at Matata Nursing Hospital for treatment. In PW2's opinion the appellant had suffered 20% disability. The lower court assessed general damages at Kshs. 500,000/=.

28. Needless to say that assessment of damages is at the discretion of the trial court and that an appellate court can only interfere if it is shown that the court acted on wrong principles, or that it awarded so excessive or so little damages that no reasonable court would allow it; or that the court took into consideration matters that it ought not to have taken into consideration or failed to consider matters that it ought to have considered, and as a result arrived at the wrong decision. In *Butt vs. Khan* [1981] KLR 349 it was held that:

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."

29. Indeed, in *H. West and Son Ltd v. Shepherd* (1964) AC 326 it was acknowledged that:

...money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in



the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional...”

30. As counsel for the appellant did not draw the Court’s attention to any such comparable authorities as would lead the Court to the conclusion that the lower court’s award is manifestly excessive and therefore erroneous, I find no justifiable cause for disturbing the lower court’s assessment of quantum payable. The special damage component was subject to strict proof and need no belabouring.
31. In the result, this appeal lacks merit and is hereby dismissed. Granted the peculiar circumstances of this appeal, each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 27TH DAY OF FEBRUARY 2025.

OLGA SEWE

JUDGE

