



REPUBLIC OF KENYA



**Ogumbe (Suing as the legal administrator and representative of Mary Goreti Ogumbe - Deceased) v Kenya Power & Lighting Company (Civil Appeal E043 of 2024) [2025] KEHC 3159 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3159 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E043 OF 2024  
OA SEWE, J  
FEBRUARY 27, 2025**

**BETWEEN**

**PAMELA OTIENO OGUMBE (SUING AS THE LEGAL ADMINISTRATOR AND REPRESENTATIVE OF MARY GORETI OGUMBE - DECEASED) . APPELLANT**

**AND**

**KENYA POWER & LIGHTING COMPANY ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. S.O Onger, Senior Principal Magistrate, delivered on 31st May 2024 in Oyugis SPMCC No. 198 of 2022)*

**JUDGMENT**

1. This appeal arises from the Judgment delivered by Hon. S.O. Onger, SPM, on 31<sup>st</sup> May 2024 in Oyugis Senior Principal Magistrates Court Civil Case No. 198 of 2022: Pamela Otieno Ogumbe (suing as the legal administrator and representative of Mary Goreti Ogumbe (Deceased) 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 the electrocution of the deceased on the 29<sup>th</sup> August 2022.
2. The contention of the appellant was that the deceased was electrocuted after coming into contact with 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 Plaint dated 24<sup>th</sup> November 2022. At paragraph 5, the appellant supplied particulars under the *Fatal Accidents Act*, Chapter 32 of the Laws of Kenya, as well as particulars of special damage expended by her. She accordingly prayed for judgment 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 14<sup>th</sup> December 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 deceased and the third party, whose particulars were supplied at paragraph 11 of the Defence. In addition, the respondent 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 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 magistrate erred in law and fact in disregarding the appellant's submissions.
    - (d) That the learned 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 lower 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 learned 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 31<sup>st</sup> 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 8<sup>th</sup> 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 by law 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.
  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 electrocution of the deceased.

10. On whether the trial court erred in its finding on quantum, the appellant 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, *Ugenya Bus Services v Gachoki* [1982] eKLR and *West (H) and Sons Limited v Shepherd* [1964] AC 326 as to the applicable principles.
11. Accordingly, in regards to the claim for pain and suffering, the appellant proposed an award of Kshs. 50,000/=. She relied on *Climax Coaches Limited v Omukobo & another* (suing as the legal representative in the Estate of the late Nathan Omurunga Otuoma) (Civil Appeal E072 of 2023) [2014] KEHC 13057 (KLR) (25 October 2024) (Judgment) since death was instantaneous.
12. On loss of expectation of life, the appellant submitted that the deceased was a young and energetic woman who worked as a salonist. She therefore proposed an award of Kshs. 200,000/= under this head. On loss of dependency, the appellant pointed out that the deceased left behind a minor who was fully dependent on her for support. Accordingly, she urged the Court to adopt a dependency ratio of two-thirds and a multiplier of 40 years against a multiplicand of Kshs. 8109.90, which is the minimum wage for a general labourer as per [Legal Notice No. 125 of 2022](#). Hence, an award of Kshs. 2,595,168 was proposed under this head together with Special Damages of Kshs. 184,200/=.
13. In response to the appellant's written submissions, the respondent relied on its written submissions dated 2<sup>nd</sup> November 2024. The respondent was of the view that the issues for determination are:
  - (a) Whether the appellant is clothed with the requisite capacity to sue;
  - (b) Whether the appellant has proved liability against the respondent to the requisite standard;
  - (c) What is the assessment of quantum? And,
  - (c) Who should bear the costs of the appeal?
14. The respondent took issue with the fact that the deceased was survived by a minor and yet the Grant of Letters of Administration ad Litem was issued in the sole name of the appellant. The respondent premised this submission on Section 58(1)(a) of the [Law of Succession Act](#) and the case of *Re Estate of Esther Wangui Chege (Deceased)* [2021] eKLR, among other authorities and prayed for the dismissal of the appeal for lack of capacity to sue.
15. 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 illegal acts of a third party.
16. The respondent further submitted that the deceased 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) 5<sup>th</sup> 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.



17. 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 the burden of proving negligence.
18. On quantum, the respondent proposed a total sum of Kshs. 771,231.60 made up as follows:
  - (a) Under *Law Reform Act*:
    - Pain and Suffering Kshs. 10,000/=
    - Loss of expectation of life – Kshs. 80,000/=
  - (b) Under the *Fatal Accidents Act*:
    - Dependency ratio – one third;
    - Multiplicand – Kshs. 8109.90
    - Multiplier- 21 years
19. This being a first appeal, it is the duty of this Court to re-evaluate the evidence presented before the lower court and make its own conclusions thereon. (see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
20. The appellant testified before the lower court on 8<sup>th</sup> November 2023 in support of her case. She stated that the deceased was her daughter; and that she died on 29<sup>th</sup> August 2022. She stated that the deceased was attending a funeral of a neighbor and was electrocuted by a loose wire on the ground and died on the spot. She adopted her witness statement and produced the documents filed before the lower court as exhibits. The documents included the Certificate of Death and Letters of Administration ad Litem.
21. The appellant also adopted the evidence of PW1 in Oyugis SPMCC No. 157 of 2022 as her PW2 before the lower court. PW2 stated that she had gone for a funeral and that the deceased fell down and when she touched her, she lost consciousness and found herself in hospital. She explained that deceased was next to an electricity pole which had a loose wire that electrocuted her. She blamed the respondent for exposing her to the injuries she sustained.
22. The respondent adopted the evidence of one of its employees, Stephen Morgan Mangera in Oyugis SPMCC No. 157 of 2022. He had 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 the home was not connected to the grid, they opted to tap power from the home of Benjamin Ouko Aguko.
23. DW1 further testified that, in the circumstances, an application for temporary connection ought to have been made to the respondent; in which event the respondent would have afforded all concerned the attendant safeguards. 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 the deceased got electrocuted and fell. She was later pronounced dead. Accordingly, in his report, he proposed legal action against the third party.



24. In the light of the foregoing summary, the facts are not in dispute namely, that the deceased was electrocuted on the night of 29<sup>th</sup> August 2022. She was attending a funeral and in the course of singing and dancing barefoot at a night vigil, she 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.
25. A technical objection was raised as to the capacity of the appellant to sue on behalf of the estate of Mary Goreti Achieng (deceased). In this regard, although the Court was addressed at length by the parties in their written submissions, it is my considered view that, granted the outcome of the lower court case, the issue is moot and I find no need to belabor the point. According to Black's Law Dictionary, Tenth Edition, at page 1161, a "moot case" is defined as "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." Hon. Mativo, J. (as he then was) in *Daniel Kaminja & 3 Others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR, explained that:
23. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.
24. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Time and again, it has been expressed that a court should not act in vain.[15]
25. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.[16]
26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.
26. Similarly, in *Wanjiru Gikonyo and others v National Assembly of Kenya and others* (supra) it was held:
- "27. Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.



28. Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time. The exception it must be noted exists where the court is allowed by law to offer advisory opinions. A good example is Article 163(6) of *the Constitution* on powers of the Supreme Court of Kenya to give advisory opinions at the request of the national government on matters concerning county governments.”
27. Accordingly, the only proper issues for determination are the questions of liability and quantum, in respect of which 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.”
28. In its Complaint before the lower court, the appellant alleged the following particulars against the respondent:
- (a) Failing to ensure that electricity would not escape from wires;
  - (b) Failing to keep power checks, or ensure that the electric wires were insulated;
  - (c) Failing to give any warning of loose, live, hanging electric wires;
  - (d) Failing to ensure that youngsters in the neighbourhood did not touch uninsulated, loose, live electric wires;
  - (e) Failing to take safety precautions to ensure that passers-by would not be injured by the flow of electricity;
  - (f) Failing to maintain power lines in good mechanical condition;
  - (g) Failing to take adequate, or any measures, by way of inspection, maintenance or repair to ensure that electric wires are safe to the public.
29. The foregoing particulars presuppose that the line in question was installed by the respondent; which is not the case. There is indubitable evidence that the connection to the scene of accident was illegally made, and that the connection was tapped without the knowledge of the respondent from the home of one Benjamin Ouko Aguko who was not a party to the lower court proceedings. It is manifest therefore that the necessary link between the appellant’s injury and the allegations of negligence against the respondent was not made. I agree entirely with the position taken by the lower court that liability was not proved.
30. 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..."

31. 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..."

32. On quantum, 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..."

33. Indeed, in *H. West and Son Ltd v Shepherd* (supra) 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..."

34. 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. As the special damage component was likewise proved, the conclusion that I come to in this appeal is that it lacks merit and it is hereby dismissed with each party to bear own costs

It is so ordered.

**DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**OLGA SEWE**

**JUDGE**

