IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OKWENGU, SICHALE & KANTAI, (JJ.A)

CIVIL APPEAL NO. 15 OF 2016

BETWEEN

JOSEPH WANG'ETHE.....APPELLANT

AND

EW (*Suing as the next friend and mother to* BM (Minor).....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 56 OF 2017

KENYA POWER AND LIGHTING

COMPANY LIMITED.....APPELLANT

AND

EW (Suing as the next friend and mother to BM (Minor).....RESPONDENT

(Being appeals from the Judgment of the High Court of Kenya

*at Nairobi (**Aburili, J**.) dated 30th November 2015*

in

H.C.C.C. No. 451 of 2012)

****

JUDGMENT OF THE COURT

[**1**] On 17th December, 2011 there was an accident involving **BM** (the minor)**,** then aged 5 years. The minor was with other children on the balcony of the third floor of a building when he came into contact with a high voltage electric power line which electrocuted him. The minor suffered injuries which resulted in amputation of his right upper limb and burns on the abdomen. The minor through his mother **EW** (respondent in Civil Appeal No. 15 of 2016 and Civil Appeal No. 56 of 2017), sued **Kenya Power and Lighting Company Limited** who is the appellant in Civil Appeal No. 56 of 2017 (herein 1st appellant), and **Joseph Wang'ethe,** who is the appellant in Civil Appeal No. 15 of 2016 (herein 2nd appellant).

[**2**] In the plaint dated 11th September, 2012, the respondent contended that the accident was caused by the negligence of the 1st and 2nd appellants, particulars of which were duly given. The respondent claimed special damages of Kshs. 220,700 being the amount paid for the medical report and medical expenses; general damages for pain, suffering and loss of amenities; and general damages for diminished earning capacity.

[**3**] Both the appellants filed defences to the respondent's claim in which they each denied the respondent's claim. The 1st appellant maintained that the accident was wholly caused by the combined negligence of the minor and the 2nd appellant, while the 2nd appellant

maintained that the high electric voltage line was more than two meters away from his residential house, and that the respondent was the author of her own misfortune by failing to instruct and properly direct the minor. The 2nd appellant further denied being responsible for the installation and existence of the power lines, maintaining that the 1st appellant was the person responsible for such installation.

[**4**] During the trial, the respondent testified in support of her case and explained how her son was electrocuted and had to be admitted at Kenyatta National Hospital for two months. As a result of the injuries that he suffered, the minor had to be amputated on the right hand at the elbow joint. He also suffered burns on the stomach and thighs for which skin grafting was done. The respondent produced a hospital discharge summary, as well as a bundle of receipts for a total of Kshs. 212,050. She blamed the appellants for the accident, maintaining that the electric wires were very near the balcony.

[**5**] **Dr. Moses Kinuthia**, a medical practitioner who examined the minor and prepared a medical report, produced the report in evidence. He testified that the minor required a bionic arm costing Kshs. 5 million. He assessed his total permanent incapacity at 70%.

[**6**] The 1st appellant testified through **Thomas Moriango Omwenga** (Thomas), who is employed by the 1st appellant as a Safety Officer. He testified that he investigated the accident and prepared a report which he produced in evidence. He visited the scene and noted that the building where the minor had the accident, had infringed into the wayleave by 4ft 6inches. This was because the safety distance was at least 2.7 metres but the distance in this case was only 2ft 3 inches.

[**7**] The 2nd appellant did not call any evidence. The court decided *suo moto* to visit the *locus in quo*. During that visit, the court noted three live wires of high voltage which were still hanging outside the balcony to the house at an arm's length of about 1.7 metres from the balcony edge, and which protruded into the road reserve. The court also noted metal welded on the balcony, where tenants who occupied the upper floors including the former house occupied by the respondent, would hang clothes, which would touch on the live wires when the wind blows.

[**8**] Upon considering the oral and documentary evidence, as well as the observations at the *locus in quo*, the learned Judge found that the primary duty of care with regard to all electric power installation is on the 1st appellant as supplier of all electric energy in Kenya, and therefore, it had the responsibility to ensure that the power infrastructure installed for purposes of electrification is properly maintained to prevent accidents and also to take remedial measure where there is a high risk of injury or damage. In addition, the learned Judge found that the 1st appellant owed a higher duty of care to the occupiers of house No. A3225 and all other residents in the vicinity to ensure that high voltage wires were not precariously displayed next to buildings and that the 1st appellant was in breach of this duty of care. Furthermore, the court found the 2nd appellant partially to blame for the accident, as the balcony of the house protruded into the road reserve and was in the wayleave of the 1st appellant. The learned Judge apportioned liability as between the two appellants at 70% as against the 1st appellant and 30% as against the 2nd appellant.

[**9**] On the issue of damages, the learned Judge awarded Kshs.1.5million for pain and suffering; Ksh.2,628,960 for diminished/loss of earning capacity; Kshs. 5 million as cost of future medical expenses; and finally special damages at Kshs. 220,700, all totaling Kshs. 9,349,660. The court also awarded the respondent costs of the suit and interest on general damages and special damages.

[**10**] Being aggrieved by that judgment, each of the appellant lodged an appeal which appeals were duly consolidated.

[**11**] In its memorandum of appeal filed in **Civil Appeal No. 56 of 2017,** the 1st appellant raised fourteen grounds against the judgment of the trial court. In a nutshell, the 1st appellant faulted the trial court on its finding on liability, maintaining that the totality of the evidence pointed to a greater culpability on the part of the 2nd appellant. The 1st appellant also took issue with the damages awarded contending that the award for diminished/loss of earning capacity was unjustified and excessive, and that the learned Judge applied wrong principles in assessing the damages. In addition, the future medical expenses awarded were not specifically pleaded, and the amount awarded was too excessive and inconsistent with the medical report of **Dr. Museve,** that was produced in evidence by consent. Finally, the 1st appellant faulted the trial judge for ignoring its written submissions.

[**12**] In his memorandum of appeal filed in **Civil Appeal No. 15 of 2016,** the 2nd appellant raised six grounds. In brief, he faulted the learned Judge for disregarding the fact that the 1st appellant owed the respondent and all Kenyans a duty of care; and also disregarding the fact that the minor was negligent in touching the electricity line and failing to heed the presence and proximity of the electricity lines to the buildings. In addition, the 2nd respondent faulted the learned Judge for failing to determine the issue of the negligence of 1st appellant in failing to comply with the safety regulations and causing the minor to be exposed to danger, and apportioning liability against the 2nd appellant at 30% without any evidence of negligence on the part of the 2nd appellant. Finally, the 2nd appellant also took issue with the award of quantum of damages.

[**13**] Following direction given by the Court with the consent of the parties during Case Management, each party duly filed and exchanged written submissions, which each entirely relied upon in support of their position.

[**14**] The 1st appellant was represented by **Mr. Wachakana**, while the 2nd appellant was represented by **Mr. Menge**, instructed by Muchui & Co. Advocates and the respondent was represented by **Mr. Ngunjiri.**

[**15**] For the 1st appellant, it was submitted that the two appellants were independently sued for different reasons. Distinct particulars were given of the negligence of each particular appellant. The 1st appellant faulted the court for holding the two appellants jointly and severally liable, and failing to note that the 1st appellant had filed a notice of claim against the 2nd appellant as a co-respondent, and obtained directions as required by law. The 1st appellant pointed out that the implication of a joint and several liability finding, was that the respondent was at liberty to recover the entire damages awarded, from either of the appellants irrespective of the liability apportionment. Relying on the book: "**Winfield and Jolowicz on Tort"**, the 1st appellant argued that the common law distinguishes between joint and several liability, so that where a tort is committed by two or more people in furtherance of a common design, reference is made to joint tortfeasors, and where there are two independent acts of negligence which combine to produce a single harm, reference is made to several

tortfeasors because there was no "*community of design*" in their respective acts. The 1st appellant maintained that there was no community of design in the allegations of negligence pleaded against the two appellants, and therefore, they could only be several tortfeasors and not joint tortfeasors. In addition, the trial judge having apportioned the liability of each appellant, she should not have found them jointly and severally liable. The 1st appellant therefore urged the trial court to set aside the finding that the two appellants were jointly and severally liable.

[**16**] In regard to apportionment of liability, the 1st appellant argued that apportionment of liability was a finding of fact, which an appellate Court could only disturb if the finding is not based on any evidence, or is based on misapprehension of the evidence, or the judge acted on wrong principles in reaching that finding. The 1st appellant submitted that the respondent blamed the 1st appellant for failing to insulate the electric cable and the 2nd appellant for erecting the building so close to the electric power cables; that the 1st appellant's witness produced an investigation report wherein he blamed the 2nd appellant for the accident as his building infringed into the wayleave, and the visit by the trial Judge to the locus in quo confirmed that the 2nd appellant had infringed on the wayleave, and this was the root cause of the accident. It was submitted that the trial Judge did not state why she found the 1st appellant 70% liable and the 2nd appellant 30% liable, and that her conclusion that the 1st appellant owed a higher duty of care to the building occupiers, was not based on any evidence.

[**17**] In regard to the award of general damages for pain, suffering and loss of amenities, the 1st appellant pointed out that it had referred the court to several authorities which would have justified an award of no more than Kshs. 500,000. Although the respondent sought an award of Kshs. 2 million, she relied on an authority, **Sofia Yusuf Kanyare v Ali Abdi Sabre & Anor. [2008] eKLR**, which involved much more severe injuries than those sustained by the minor. The 1st appellant urged the Court to set aside the award of Kshs. 1.5 million made by the trial Judge for general damages for pain, suffering and loss of amenities, as the award was manifestly excessive.

[**18**] In regard to the award for diminished/loss of earning capacity, it was submitted that the minor being five years old at the time of filing suit, the question was that posed in **Butler v Butler [1984] KLR 225** that:

> **"…what is the present value of the risk that at a future date or time, the plaintiff will suffer financial disadvantage in the labour market because of his injuries?"**

[**19**] Furthermore, the 1st appellant relying also on **Hassan vs. Nathan Mwangi Kamau Transporters [1986] KLR 457**, where **Kneller JA,** identified the relevant principles the court should consider in assessing damages for lost years. The 1st appellant submitted that although the minor lost his right hand and both doctors who examined him opined that the injuries would limit his sporting and future career choices, no credible evidence was tendered to show that the minor had been talented in sports or other physically involving career, and that given his age, his career prospects were too remote and speculative. The 1st appellant faulted the award made by the learned Judge of Kshs. 2,528,960 as it was based on total loss of earning capacity, and did not take into account the assessment of permanent disability at 70% to 50%; and that the claim for loss of future earning capacity was too remote and the court ought to have awarded at best a token of Kshs. 100,000.

[**20**] In regard to future medical expenses, the 1st appellant submitted that the respondent did not produce adequate evidence, including invoices and pricelists to corroborate **Dr. Kinuthia's** evidence. The court also failed to consider the report prepared by **Dr. Museve**, which was admitted in evidence by consent of the parties, and which gave the overall estimated future costs to be between Kshs.1,530,000 and Kshs.1,560,000. The 1st appellant therefore urged the Court to set aside the award of Kshs. 5 million made by the trial court for future medical expenses, and substitute it with an award of Kshs.1,350,000.

[**21**] The 2nd appellant faulted the trial Judge for blaming him to the extent of 30%. In his view, the trial Judge disregarded the fact that the 1st appellant owed the minor and every Kenyan a duty of care in regard to electric power, which is a commodity which needs to be properly secured. The 2nd appellant maintained that the 1st appellant knew or ought to have known that it was dangerous to have those power lines of high voltage pass near a building without proper safety measures being kept in place. The 2nd appellant referred the court to **section 63** of the **Electric Power Act, Cap 314 Laws of Kenya** under which the 1st appellant has the mandate to ensure that all electrical installations are properly done in the manner specified in the Act. The 2nd appellant referred the court to his defence in which he had stated that the residential house was far from the high voltage electric lines.

[**22**] The 2nd appellant argued that the court should have considered his defence and submissions on the issue of liability and quantum. He maintained that he was condemned unheard as he was not given audience and his defence and submissions were ignored. To that extent, his rights under **Article 50(1)** of the Constitution was violated. The 2nd appellant maintained that the trial Judge was biased and unfair towards him. He therefore urged the Court to rectify that error by considering his defence.

[**23**] The 2nd appellant asserted that the trial Judge erred in failing to find the respondent contributorily negligent. This was because the respondent failed to protect the minor from danger, and was partially to blame for the action of the minor in touching the high voltage wire as she left the minor without due care and attention. The 2nd appellant argued that the apportionment of 30% liability against him was done without any evidence of negligence. He maintained that the 1st defendant should have been held 100% liable for the injuries sustained by the minor.

[**24**] In regard to the damages awarded, the 2nd appellant relying on **Cecilia W. Mwangi & Anor v Ruth W. Wangui [1977], Civil Appeal No. 251 of 1996**, argued that the amount awarded to the respondent was manifestly excessive. He maintained that in any case, the amount awarded should be shared between the two appellants. The 2nd appellant ended by urging the court to set aside the entire judgment of the High Court.

[**25**] In her submissions, the respondent maintained that the trial Judge correctly found the two appellants liable, as there was ample evidence that the minor was electrocuted by the electric power cables, and that the two appellants were to blame for the accident as the 1st appellant was the one responsible for installation and maintenance of electric cables, and the 2nd appellant was the owner of the flat which was built on a way leave, and was too close to the high voltage electric power lines. The respondent argued that the trial Judge correctly found that the minor who was only 5 years old, could not be blamed for the accident, as he was not of the age of reason to know that touching a live and naked electric power cable was dangerous.

[**26**] In regard to the finding that the two appellants were jointly and severally liable, the respondent relied on '**Winfield and Jolowicz on Tort'** wherein it is stated:

> **"Where, however, two or more breaches of duty by different persons cause the claimant to suffer a single indivisible injury…the law in such a case is that the claimant is entitled to sue all or any of them for the full amount of his loss, and each is said to be jointly and severally liable for it."**

[**27**] The respondent also relied on **Hellen Njenga v Wachira Murage & Another [2015] eKLR**, in which the High Court quoting another High Court decision, **Dubai Electronics vs Total K. Limited & Others, HCCC Nrb CC 870/98** stated as follows:

> **" '*Clearly, therefore, where you have joint liability, all the tortfeasors are and each of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and/or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability*'.**
>
> **Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them."**

[**28**] On the award for damages for diminished/loss of earning capacity, the respondent submitted that the rationale for this award was as explained in **Mwaura Muiruri –vs- Suera Flowers Limited & Another [2014] eKLR** in which the Court of Appeal decision in **Mumias Sugar Company Limited –vs- Francis Wanalo [2007] eKLR** was followed. In addition, that a claim under this head need not be specifically proved. In this regard the respondent cited **Ndoro Kaka Kakondo –vs- Salt Manufacturers (K) Limited [2016] eKLR** where the Court essentially held that damages under this head are treated as general damages. She therefore posited that the trial Judge was right in awarding the sum of Kshs. 2,628,960/- as it was a proper estimate of what income the minor would have earned in his adulthood. This, the respondent contended, had been proved on a balance of probabilities by producing school progress reports of the minor indicating early academic promise.

[**29**] On the award of Kshs.5,000,000 for the cost of future medical expenses, the respondent argued that the claim was pleaded in the plaint as a cost to be ascertained later and thus the appellants were well informed of this claim. The respondent cited **Tracom Limited & Another –vs- Hassan Mohammed Adan [2009] eKLR** where this Court affirmed the trial court's view that the appellant having pleaded for cost of future medical expenses, and stated that the cost would be ascertained later, the claim for future medical expenses was properly pleaded.

[**30**] The respondent submitted that the medical report produced by **Dr. Kinuthia** provided the amount of Kshs. 5,000,000 as the cost of a bionic arm, and although the appellants claimed the costs were too high, none of them produced any evidence to disprove this claim or demonstrate that the estimated costs were high. The respondent therefore urged the Court to dismiss the appeals and uphold the judgment of the High Court.

[**31**] This being a first appeal, this Court is mandated to review and subject the evidence that was adduced in the lower court to a fresh analysis in order to arrive at its own independent conclusions.

In **Kenya Ports Authorities vs. Kuston (Kenya) Limited [2009] 2EA 212**, this Court explained this mandate as follows:

> **"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard, the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

[**32**] We have already set out in a nutshell the respondent's claim and the defence that was raised by the appellants. In our view, three main issues arise in this appeal. These are: whether the trial Judge erred in finding the appellants jointly and severally liable; whether the apportionment of liability was proper; and whether there is justification for this Court to interfere with the court's discretion in assessment of damages.

[**33**] The respondent's cause of action was anchored on the alleged negligence on the part of both appellants, which she alleged caused the minor to suffer injuries. In the plaint, specific particulars of negligence were alleged in regard to each appellant. In support of her claim, the respondent testified and explained how the minor was injured and why she blamed the appellants. None of the appellants disputed the fact that the minor was electrocuted as a result of coming into contact with the electric power lines, and that he did suffer injuries. However, the 1st appellant claimed that both the respondent and the minor substantially contributed to the accident, the respondent by neglecting the minor, and the minor by intentionally touching the wire cables. In her judgment, the learned Judge came to the conclusion that the minor being only five years old, he could not be blamed for the accident as there was no evidence that he had the right sense to know the danger posed by the power lines.

[**34**] In **Butt vs. Khan [1981] KLR 349** this Court held that a child of tender years cannot be found to have been contributorily negligent, unless it is proved that the child knew or ought to have known that he should not do the act or make the omission.

[**35**] In **BB (A Minor suing through his next friend and father GON) v Ragae Kamau Kanja [2019] eKLR**, this Court addressing the issue of contributory negligence by a minor stated as follows:

> **"…each case should be determined on its own merits and there should be no hard and fast rule that a child cannot be held**

contributorily negligent in an accident. The appellant has not pointed to our satisfaction facts which absolve the minor from any contributory negligence for the accident."

[**36**] In addressing the issue of contributory negligence, the trial Judge properly directed herself by considering the age of the minor and the circumstances in which he suffered the injuries. We cannot fault the finding of the trial Judge that the minor could not fully comprehend the dangers involved in touching a live electric power cable. Nor was there any evidence produced before the court upon which the court could conclude that the minor ought to have known that electric cables were dangerous.

[**37**] In its submissions, the 1st appellant alleged negligence on the part of the respondent. However, in its statement of defence, the 1st appellant did not allege any negligence against the respondent, but only alleged and gave particulars of negligence of the minor and the 2nd appellant. In addition, there was no evidence adduced by the 1st appellant upon which the respondent could be blamed for the accident. As regards the minor, the accident occurred when he was playing with the other children, and in the natural action of a child of five years discovering his surroundings, the minor touched the electric cable. In the circumstances, no negligence can be attributed to the respondent.

[**38**] We take judicial notice that the 1st appellant has the monopoly to install and maintain electricity power cables. Therefore, it was its responsibility to ensure that the wayleave was adhered to and high voltage electric power lines were not situated where it could pose any danger. The evidence was clear that there was a building that protruded on the wayleave. Although the 2nd appellant filed a defence denying any liability, the 2nd appellant who was the owner of the building protruding on the wayleave did not offer any evidence at the trial. This means that the evidence regarding the building having been built on the way leave, was not disputed. The trial Judge visited the scene and ascertained as did the 1st appellant's witness who investigated the accident that the proximity of the building to the cables contributed to the accident. In the circumstances, we come to the conclusion that the accident was caused by the negligence of both appellants: the 2nd appellant in allowing his building to extend and infringe on the way leave, and the 1st appellant in failing to take action on the infringement and ensure that the high voltage electric cables did not pose any danger.

[**39**] The next question that we must address is whether the appellants were jointly and severally liable for the negligence. In "**Charlesworth and Percy on Negligence"** 12th edition at para 3-87, it is stated:

> **"Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely that the same evidence would support an action against them individually. There must be concurrence in the act or acts causing damage not merely a coincidence of secret acts which by their conjoined effect cause damage. Accordingly, they will be jointly liable for a tort which they both commit or which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time."**

[**40**] In this case, the minor suffered injuries as a result of the wrongful acts of both 1st and 2nd appellants. The cause of action against each appellant was supported by the same evidence. Their position can be equated to injuries suffered in a collision involving two vehicles arising from the negligence of each of the drivers, and for which the two drivers will be jointly and severally liable. In the circumstances, the 1st and 2nd appellants were jointly and severally liable and the respondent is at liberty to recover the damages awarded from all of them as apportioned, or only one of them.

[**41**] Finally, as regards the 1st appellant's claim for indemnity and/or contribution against the 2nd appellant, that is a matter that is between the two appellants and does not affect the respondent's right to reap the benefits of the judgment issued in her favour. Nevertheless, the trial Judge addressed the issue of contribution and apportioned liability between the two appellants at 70% as against 1st appellant and 30% as against 2nd appellant. We cannot fault this finding given that the 1st appellant had a higher responsibility of supplying and maintaining high voltage electric cables, and ensuring that the high voltage electric cables did not pose any danger. Had the 1st appellant properly carried out this responsibility, no high voltage electric cables would have been allowed to remain near the building.

[**42**] In the circumstances, we come to the conclusion that the two appeals have no merit. They are accordingly dismissed in their entirety. The respondent shall have costs of the appeals.

It is so ordered.

Dated and delivered at Nairobi this 6th day of December, 2019.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR