



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO 93 OF 2012**

**NICKSON MUTHOKA MUTAVI.....APPELLANT**

**VERSUS**

**KENYA AGRICULTURAL RESEARCH INSTITUTE.....RESPONDENT**

**(An Appeal arising out of the Judgment of M.W Murage CM delivered on 11<sup>th</sup> June 2012 in  
Machakos Chief Magistrate's Court Civil Case No. 1234 of 2008)**

**JUDGMENT**

The Appellant was the original Plaintiff and the Respondent the original Defendant in the original trial in Machakos Chief Magistrate's Court Civil Case No. 1234 of 2008. The Appellant instituted the said suit in the trial Court for general damages, special damages and future medical expenses on account of the Respondent's breach of its statutory duty to provide him with a safe working environment. The learned trial magistrate, Chief Magistrate M.W. Murage, in a judgment delivered on 21<sup>st</sup> May 2013, dismissed the suit for reasons that the Appellant had not proved any negligence on the part of the Respondent and was solely to blame for the accident.

The Appellant being dissatisfied with the said judgment filed a Memorandum of Appeal dated 10<sup>th</sup> July 2012 appealing against the judgment of the trial magistrate. The grounds of appeal are as follows:

1. The Learned Trial magistrate erred in law and in fact in failing to appreciate and find that the Appellant had proved his case on a balance of probability.
2. The Learned trial magistrate erred in law and in fact in, finding that, though the Respondent did not adduce evidence to demonstrate the nature and scope of the Appellant's employment, nevertheless the Appellant did his work in a manner that was injurious to his own safety and contrary to instructions.
3. The Learned trial magistrate erred in law and in fact in finding that the "the electricity lines were external factors in the defendant's farm" without any evidence from the record to support such a finding and thus took into account extraneous matters.
4. The learned Trial Magistrate grossly erred in law and in fact in holding that the manner in which the accident occurred could not have been prevented even if the plaintiff had safety gadgets which finding is not supported by any evidence before the court, pleadings, or by any logical inference.
5. The Learned Trial Magistrate erred in holding, without any evidence tendered in support

thereof, that the accident could not have been foreseen or averted by any precaution on the part of the Respondent. The said holding is not founded on fact or presumption of law.

6. The learned Trial Magistrate erred in fact and in law by holding that the appellant was the author of his own mischief without any evidence that he would have otherwise carried out the instructions of the Respondent without danger to himself.

7. The Learned Trial Magistrate erred in law and infact in holding that the Appellant had been fore-warned that he was carrying out instructions under live wires and thereby authored his own mischief by being careless.

8. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that any concessions, or agreements or way leaves that may have existed between the Respondent and the power supplier could have reasonably have been within the knowledge of the appellant.

9. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that it was outside the scope of the knowledge of the employee to know the legality of carrying out works under live electricity poles, or whether indeed power lines were live or not.

10. The Learned Trial Magistrate erred in her assessment of the damage that would have been awarded to the Appellant as the same was based on wrong principle and the amount arrived at was inordinately low and injustice would be occasioned.

The Appellant is praying for orders for substitution of the order dismissing his suit along the appeal, and that damages be reassessed and increased upwards.

### **The Facts**

The brief facts of this appeal are that the Appellant instituted the suit in the trial Court by filling a plaint therein dated 29<sup>th</sup> October 2012. The Appellant claimed that he entered into a contract with the Respondent in which he was to work as a general help in the Respondent's farm at Kiboko from 1.1.2008 to 31.3. 2008. Further, that on 14.1.2008 while discharging his duties as directed by the Respondent, namely connecting irrigation pipes, he was electrocuted and suffered electrical burns which endangered his life.

The Appellant averred that the Respondent was in breach of its statutory duty and negligent by directing him to work in an unsafe environment; exposing him to the danger of electrocution; failing to provide him with safety gear; and not drawing his attention to or warning him to be cautious about electrocution. The particulars of injuries suffered by the Appellant were 3<sup>rd</sup> degree burns on the abdomen right side of 7%, 3<sup>rd</sup> degree burns on the both palms of 1%, 4<sup>th</sup> degree burns on the right leg of 4%, and 3<sup>rd</sup> degree burns on the left foot both sole and dorsum. The Appellant was hospitalized for four months and his right leg was amputated below the knee.

The Appellant claimed special damages of Kshs 48,548/= as medical expenses incurred during treatment of the said injuries, Kshs 120,000/= for further medical costs, general damages for pain and suffering and loss of amenities and costs of the suit.

The Respondent filed a defence in the trial Court dated 8<sup>th</sup> June 2009 in which it denied that the Appellant was in its employment, or that he was discharging his duties at its premises when he was electrocuted. It also denied that it was in breach of any statutory duty towards the Appellant or was negligent, and that the Appellant suffered any damage loss and injury as alleged. The Respondent stated that if any injury was suffered by the Appellant, it was solely caused by the Appellant's own negligence and recklessness, and by conducting himself in a manner not expected of a reasonable man in the circumstances. Further, that the said injury could not have been prevented by the Respondent and could not be foreseen.

The Appellant testified in the trial Court as PW1 and called one additional witness. The Respondent did not call any witnesses to testify. The Appellant testified that he started working with the Respondent on 1<sup>st</sup> January 2008 and produced an employment contract he signed dated 20<sup>th</sup> January 2007 as evidence. He further testified that on the material day, being 14<sup>th</sup> January 2008, he was on duty at the Respondent's Kiboko station, and his work that day was to collect aluminum irrigation pipes, and place them in a heap on the farm. He stated that he lifted one such hydrant pipe, and it touched electricity wires that were near the fence of the farm as a result of which he got an electric shock and lost consciousness.

The Appellant further testified that he woke up after one week at Makindu hospital, where he was admitted for a month. He stated that he sustained burns to the head, on the abdomen, the right leg and burns on the left foot. Further, that his right leg was amputated below the knee and he was fitted with an artificial leg in 2009. The medical report on the injuries was produced by consent of both parties. The Appellant also produced receipts for hospital expenses and purchase of drugs, and a letter written to the Respondent dated 14<sup>th</sup> January 2008 about his injuries.

It was the Appellant's testimony that he blamed the Respondent for the accident for the reasons that he had no protection apparel, and there was no indication of the presence of danger. Further, that he did not expect the electricity wires to be live, and that the hydrant pipe had to be lifted, as it had been left in a standing position next to a water hydrant to warn people about the said hydrant.

The Appellant called Samuel Mutinda Kisavi (PW2) as his witness. The witness corroborated the Appellant's account of the work that was being done on the material day and the electrocution of the Appellant.

### **The Submissions**

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellant's Advocates, Andrew Makundi & Co. Advocates filed submissions dated 26<sup>th</sup> October 2015, while the submissions filed by Respondent's Advocates, Anthony Burugu & Co. Advocates, are dated 1<sup>st</sup> December 2015.

The Appellant in his submissions urged on the 1<sup>st</sup> and 2<sup>nd</sup> grounds of his appeal that the Appellant proved his case on a balance of probability, by proving that he was lawfully employed by the Respondent and producing a copy of the engagement contract. Further, that as an employer, the Respondent had a duty of care to his employee, and it did not bring any witnesses to controvert the Appellant's evidence that he was not offered a safe working environment. Various judicial decisions were cited by the Appellant in support of these positions.

On Grounds 3, 4 and 5 of the Appeal, the Appellant submitted that the Respondent was aware of the working environment of the Appellant, and the finding by the trial Magistrate that the electricity cables being external factors was unfounded and unsupported by any evidence. Therefore, that the failure to provide the Appellant with the necessary protective gadgets was negligence *per se*.

The Appellant's submissions on grounds 6, 7, 8 and 9 of the appeal were that the trial magistrate erred in the holding that the Appellant was the author of his own mischief, as there was no evidence on record produced by the Respondent that the Appellant authored his own misfortune, nor that he was warned in advance that he was carrying out the instructions under live wires. Further, that the Appellant had no expertise in matters to do with electricity as his duties were to carry pipes from one place to another.

It was submitted on the last ground of appeal that the assessment of damages by the trial magistrate was based on the wrong principle and the amount arrived at of Kshs 1.5 million inordinately low, as the trial magistrate did not give any reasoning and also acknowledged that the Appellant suffered 48% permanent incapacity resulting from his injuries. It was submitted that a sum of Kshs 3 million would suffice in this regard, and several judicial authorities were cited in support.

The Respondent on his part submitted that the burden of proof rested wholly on the Appellant to prove the particulars of negligence set out in his Complaint, and that the fact that the Respondent did not call any evidence did not discharge his burden. It was further submitted that the trial court's findings were properly elicited from the evidence of the Appellant during the trial, as the Respondent is an agricultural research institute and has no connection with the power lines running through its farm. Further, that the power lines were not being used by the Plaintiff in the course of his employment on the material day, and the Appellant confirmed that he knew the dangers posed by the electrical cables.

### **The Issues and Determination**

The issues for determination in this appeal are firstly, whether or not the learned Trial Magistrate erred on matters of fact or law in finding that the Appellant had not proved any negligence on the part of the Respondent and was solely to blame for the accident, and in dismissing the Appellant's claim. Secondly if there was an error made in the said findings, what quantum of damages should be awarded to the Appellant. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja, [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123 and Peters vs. Sunday Post [1958] E.A. 424.**

The applicable law as regards this appeal has been stated in various legal treatises and judicial decisions. As regards an action in negligence it is stated in **Halsbury's Laws Of England, 4th Edition** at paragraph 662 at page 476 as follows with respect to the what is required to be proved in an action such as the Appellant's:-

**“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”**

In addition in **Winfield and Jolowicz on Tort, Seventeenth Edition** the nature of an employer's duty is explained in detail in paragraphs 8-10 to 8-14 at pages 376 to 382, which in summary is the duty to take reasonable care so to carry on operations as not to subject persons employed to unnecessary risk, and this includes the duty to provide competent staff, adequate plant and equipment, a safe place of work and a safe system of working.

The essentials of an action for breach of statutory duty are also stated in **Clerk & Lindsell on Torts, Eighteenth Edition** at paragraph 11-04 page 600 as follows:

**“1. The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss would not have occurred if the defendant had complied with terms of the statute. This rule performs a function similar to that of remoteness of damage.**

- 2. It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.**
- 3. As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused his loss, which he will fail to do if the damage would have occurred in any event.**
- 4. Finally, there is the question whether there are any defences available to the action.”**

The relevant statute in Kenya when it comes to employers statutory obligation to ensure safety at the workplace is the Occupational Safety and Health Act (Chapter 514 of the Laws of Kenya), whose application under section 3 thereof is stated as follows:

**“(1) This Act shall apply to all workplaces where any person is at work, whether temporarily or permanently.**

**(2) The purpose of this Act is to—**

**(a) secure the safety, health and welfare of persons at work; and**

**(b) protect persons other than persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work.”**

It was held by the Court of Appeal sitting in Nyeri in this regard in **Purity Wambui Murithii v Highlands Mineral Water Co. Ltd**, [2015] eKLR as follows:

**“Section 6(1) of the Occupational Safety and Health Act provides:-**

**“Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace.”**

**It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer’s failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further Section 13(1)(a) of the Occupational Safety and Health Act provides:-**

**“13(1) Every employee shall, while at the workplace –**

**(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.**

**Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.”**

The principles of law that can be distilled from the above legal authorities is that for the Appellant to succeed in his claim, he has to prove, among others, that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment. Further, the Appellant also has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Respondent, and to show that he was also not negligent in the performance of his duties.

In the present appeal, the evidence by the Appellant that he was employed by the Respondent at their farm in Kiboko, and that on the day of the accident he was carrying out duties assigned to him in the course of his employment was not disputed or controverted by the Respondent. This Court notes in this respect that the Appellant did produce in evidence a project engagement contract dated 20<sup>th</sup> December 2007 as his exhibit 1 in the trial Court. Furthermore, it is not disputed that the Appellant was injured in an accident that occurred while carrying out the said duties, which were to take irrigation pipes to a designated area of the Respondent’s farm.

What is disputed is whether the Respondent was negligent and in breach of his statutory duty in failing to provide a safe working place and system to the Appellant, and therefore liable for the accident. The evidence in this regard by the Appellant was that he was not provided with any protective gadgets such as gloves and gumboots, and that the Respondent did not give any warnings as to the existence of live electric wires. Again, this Court is mindful that this evidence was not controverted by the Respondent.

The trial Court's finding in this regard was that the electrical lines were external factors in the Respondent's farm which just happened to pass through the farm, and that the Respondent's instructions had nothing to do with the electricity lines. However, it has been held that an employer's duty of care will remain even if the place of work is not under his control. In **Wilson vs Tyneside Window Cleaning Co (1958) 2 Q.B 110** it was held as follows at pg 122:

**"...so viewed, the question whether the master was in control of the premises ceases to be a matter of technicality and becomes one of the ingredients albeit a very important one in a consideration of the question of fact whether in all the circumstances, the master took reasonable care"**

It is also evident from the provisions of section 6 (1) and (2) of the Occupational Safety and Health Act that an employer's duty of providing a safe working environment is not restricted only to its areas of control. The said provisions are as follows:

**"(1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.**

**(2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—**

**(a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;**

**(b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;**

**(c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;**

**(d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;**

**(e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;**

**(f) informing all persons employed of—**

**(i) any risks from new technologies; and**

**(ii) imminent danger; and**

**(g) ensuring that every person employed participates in the application and review of safety and health measures."**

It is therefore my view that even if the Respondent was not responsible for, or in control of the said electricity lines, it was under a duty to give advice, instructions or orders about the hazards that they posed and were likely to be encountered by its employees, as the electricity lines were passing through its farm and specifically in the place where the Appellant was performing his duties. The Respondent did not bring any evidence of any safety precautions and instructions it provided to the Appellant in this regard. There was therefore a breach of its duty to provide a safe place of work and system of working. It is thus my holding that the trial magistrate's finding that the Respondent was not negligent or in breach of its statutory duty, and that the Appellant was solely to blame for the accident was erroneous.

The Respondent claimed that the Appellant was also negligent. However it did not bring any evidence of the same. I am of the view that any contributory negligence by the Appellant would be minimal. This is for the reason that the Appellant would not have been injured if he had not been sent to work at the location of the accident by the Respondent, whom this Court has found failed in its primary responsibility to provide a safe working place and system. However and notwithstanding this observation, it is my finding that to the extent that the Appellant saw the electricity lines and knew the risks they posed, he must also bear some blame for the accident. I therefore apportion liability to the Respondent at the ratio of 80:20 in favour of the Appellant.

As regards the issue of quantum of damages that can as a result be awarded to the Appellant, I note that the applicable principles of law are that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**, **Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).

In this appeal it has already been found that the trial magistrate erred by not taking into account the relevant factor of the Respondent's liability. As regards the special damages sought, the Appellant did produce as his exhibit 3 a bundle of hospital receipts for Kshs 26,150/=, and as his exhibit 4 a bundle of receipts for Kshs 20,898/=, being payment for the costs of drugs. He therefore was able to prove a claim for special damages of Kshs. 47,148/=

On the prayer for general damages, the trial magistrate found that damages of Kshs 1.5 million would have been awarded had the Respondent been found liable. The Appellant in his submissions in the trial court and in this appeal relied on the findings in various judicial authorities for his position that a sum of Kshs 3 million would be reasonable as general damages. The decision that I find comparable in terms of the nature of injury suffered and timing of the accident is that of **Charles Kimani Nganga vs Kenya Power & Lighting Company (2006) e KLR**. A sum of Kshs 2,500,000/= was awarded to the Plaintiff therein as general damages in February 2006, after he suffered burns and blisters on both legs, wounds and scars on both hands and the left leg, and scars on both hands and left legs, loss of memory and concentration.

In the present appeal in addition to similar injuries suffered by the Appellant, the medical report by Dr. Kimuyu dated 15<sup>th</sup> July 2010 that was produced by consent of the parties as the Appellant's exhibit 2, also showed that he suffered permanent incapacity of 48%. Further, that the Appellant's fitted prosthesis did not fit as it was shorter than the other limb, and he would require fitting of a new prosthesis which was estimated to cost Kshs 80,000/= as at the date of the report. In the premises and taking into account inflationary factors, I do find that the sum of Kshs 3,000,000/= would be a reasonable award for general damages.

The Appellant's appeal herein is accordingly allowed for the above reasons, and I hereby set aside the judgment of the trial court and substitute it with a total award of damages of Kshs 2,437,718. 40/= to the Appellant, which has been computed as follows:

a. General damages for

Pain and suffering 3,000,000.00

b. Special damages 47,148.00

3,047,148.00

Less 20% contribution 609,429.60

**Total** **2,437,718. 40**

The Respondent shall meet 80% of the costs of this appeal and of the suit in Machakos Chief Magistrate's Court Civil Case No. 1234 of 2008.

It is so ordered.

**DATED AT MACHAKOS THIS 20<sup>TH</sup> DAY OF JANUARY 2016.**

**P. NYAMWEYA**

**JUDGE**