Case Number:	Civil Appeal 165 of 2016
Date Delivered:	03 Oct 2019
Case Class:	Civil
Court:	High Court at Eldoret
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji
Citation:	Zipporah Wambui v Nelly Mukite Wanyama (Suing as wife and administrator of the estate of the late George Nafula Wanjala & another [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	T. Cherere Chief Magistrate
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Firm of Kariuki Mwaniki for the Appellant Mrs Nyamweya bolding brief for Mr. Andambi for the Respondent
History County:	Uasin Gishu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 165 OF 2016

ZIPPORAH WAMBUI.....APPELLANT

VERSUS

NELLY MUKITE WANYAMA (Suing as wife and administrator of the

estate of the late GEORGE NAFULA WANJALA.....1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED.....2ND RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate Honourable T. Cherere in Eldoret CMCC No. 800 of 2015, dated 15th November, 2015)

JUDGMENT

1. Zippora Wambui hereinafter referred to as the Appellant is aggrieved by the judgment of the Chief Magistrate Eldoret in which the magistrate gave judgment in favour of the 1st Respondent EVANS ONGUNYA hereinafter referred to as the Respondent for Kshs.2,190,000/=.

2. The appellant having been dissatisfied with the said judgment preferred an appeal before this court on the following grounds:-

a. That the trial magistrate erred in law and in fact in finding the appellant liable.

b. That the trial magistrate erred in law and in fact in apportioning liability between the appellant and the 2nd defendant on a 50:50 basis.

c. That the trial magistrate erred in law and in fact in failing to consider and appreciate the evidence on record and make proper conclusion.

d. That the trial magistrate erred in law and in fact in the quantification of the claim.

e. That the learned trial magistrate erred in law and in fact in failing to find that the deceased was the author of his mistake and the appellant was not culpable.

f. That the trial magistrate erred in law and in fact in failing to consider and analyse the appellants written submissions on record.

3. In their submission the appellant submitted that he was not liable for the

misfortune that befell the deceased in any way as she did not construct the premises in question where the deceased used to reside but inherited the same from her father.

4. That she was not aware that the naked wires had been tied on one of the roof tassels where an electric line was passing which electrocuted the deceased and a neighbor.

5. Though the wire was insulated, the clothing line due to the weight of the clothes was able to cut through it and get energized. That

it was the duty of the 2nd respondent to inspect and ensure that electric wires were properly maintained.

6. Further, that there was no evidence that the appellant had anything to do with the clothing line or there was anything negligent on the part of the appellant and therefore the trial magistrate erred in concluding that the house was not in good state.

7. The trial magistrate ought not to have not apportioned liability at 50:50 since the 2nd defendant by virtue of statute had a greater responsibility.

8. As regards to damages, the deceased died instantly and therefore an

award of Kshs. 200,000 for pain and suffering was not proper. Also, a multiplier of 25 years instead of 15 years bearing in mind the nature of the deceased's work and that he was 31 years at that time. The plaintiff failed to produce pay slips yet the deceased was employed. A multiplier of Kshs. 8,000 would have been sufficient.

9. Lastly, the appellant prayed that the judgment against her be quashed and the 2nd respondent bears 100% liability or in alternative liability be apportioned jointly and severally and contributory negligence be considered.

10. The respondent on their part submitted that they were in agreement with the appellant that judgment should have been against both defendants jointly and severally.

11. On quantum, the respondent on pain and suffering stated that there is no death which does not come with some element of pain since death involves destruction of some vital part of the body organs and comes with pain however short.

12. They further urged the court not to disturb the trial magistrate's findings both on quantum and liability, save for the issue of jointly and severally.

13. This appeal is limited to the issue of liability and the quantum of damages awarded by the subordinate court. The parties agreed to canvass the appeal by way of written submissions.

14. As a first appellate Court, my duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)"

15. The Respondents' case was founded on the alleged negligence of the Appellant. As such, they were by law required to establish on a balance of probabilities that:

a. The Appellant owed the Respondent a duty of care;

b. The Appellant breached that duty, and;

c. The Respondent suffered injury as a result of that breach.

16. The Respondents' case, at the trial court was that the deceased sustained fatal injuries following an electrocution incident as he, the deceased, was hanging clothes on a cloth line that had contact with an electric cable. The plaintiff blamed the appellant for

negligence for:-

a. Failing to maintain its electricity supply lines in 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 to a risk of danger or injury.

d. Failing to inspect and note any probable danger caused to the general public by the said electricity supply lines.

e. Failing to repair, remove or in any way terminate the danger caused to the general public by the said electricity supply line.

f. Exposing the plaintiff to a risk of danger or injury that it knew and ought to have known.

g. Failed to take any effective measure for his security.

h. Failed to provide adequate warning to the plaintiff of the danger exposed to him by the electricity line.

17. The 1st defendant filed her defence denying all the allegation against her and blamed the plaintiff and the 2nd defendant for the occurrence of the accident herein.

18. It was the plaintiff's testimony that at the time of the incident they had leased the premise of the 1st defendant. She further stated that the deceased was electrocuted while assisting a neighbor who was being electrocuted while hanging clothes. As a result of the accident, the deceased sustained fatal injuries.

19. The 1st defendant on her part testified that she blamed Evans Ongunya who tied the clothes line and it was for this reason that the accident occurred. That she inherited the property from her father and therefore was not to blame for the accident.

20. On the 2nd Respondent's side, *Jared Mwakha* an employee of Kenya Power & Lighting Company Limited visited the scene of the accident and realized that a cloth line had been tied to the house frame. Next to the frame was an internal wiring of the customer.

21. The insulation of the internal wiring had been worn out and there was a contact between it and the clothes line. That the clothes line was energized causing the electrocution. Lastly, that the internal wiring was done by the owner of the plot and therefore Kenya Power & Lighting Company Limited was not to blame for the accident.

22. Further, that internal wiring of the plot were done by the owner of the plot. She was instructed to rectify the wiring to facilitate reconnection of power which had been disconnected. The 1st defendant, who is the owner of the plot, allowed tying of clothes over the internal wiring causing the accident.

23. *Shakwa Mulisha* also an employee of Kenya Power & Lighting Company Limited, the safety in charge of North Rift Region, stated that the cover of the cloth line had worn out due to the friction caused by the cloth line. That the cables did not have conduits for protection of cables from exposure.

24. On appeal, the Appellant maintained that the Respondent had not proved the elements of negligence, that is; the duty, breach, causation and damages. The appellant further submitted that the 2nd Respondent was liable for the accident due to the safety violations which they were responsible of enforcing.

25. The Appellant also argues that the there was no evidence that she was negligent and that the 2nd respondent owed a duty of care which it failed by not inspecting the wires and advicing the appellant to repair.

26. The magistrate erred in apportioning liability to 50:50 as against the defendant having made bold declaration on the status of its liability. The 2nd Respondent was responsible for the injuries as it knew of the dangerous condition and failed to repair the same or

give adequate advice to the customer.

27. The primary argument of the Appellant on quantum was that the award on pain and suffering was not relevant since the deceased died on the spot. Also, that the multiplicand and dependency ratio was also high.

28. The Respondent in opposing the appeal submitted that they totally associated themselves with the findings of the trial court on its judgment and prayed for judgment against both defendants jointly and severally.

29. Further that there is no death without pain since it involves some destruction of vital body organs. The award of Kshs. 50,000 be upheld. They urged the court not to interfere with the trial court findings on liability and quantum.

30. Coming to the important issue of "causation", 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.

31. It is trite that all electrical installations are in the mandate of the Kenya Power and lighting Company limited who has a duty to ensure that the electrical installations are done by its qualified staff and in the manner specified in the **Electric Power Act Cap 314** and the Rules thereunder. Kenya Power and Lighting Company is the only entity mandated to install, supervise, inspect and maintain electric installations.

32. The duty for constant checks, inspections and maintenance of electrical installations is placed upon the 2nd Respondent by statute. Its failure to do so and its employees admission that there was a leakage from the wires that caused the electrocution, having not been challenged, leads to the conclusion that the 2nd respondent failed to maintain, inspect and supervise electric installations into the plot leading to *George Nefula Wanjala's* electrocution. See **Section 63, and 109 of the Electric Power Act, Cap 314**.

33. The 1st respondent were by their evidence able to prove the necessary causation and the link between the appellant's and the 2nd respondent negligence and the fatal injury to the deceased. That evidence, is sufficient to link the two and therefore sufficient to hold both liable. See ***Statpack Industries vs James Mbithi Munyao (2005) eKLR*** as stated in the ***Timsales Ltd vs Stephen Gachie (2005) eKLR***, an accident can be caused by many factors and a link must therefore be established. The appellant failed to prove its assertions in its statement of defence, and they therefore remain as such.

34. The uncontroverted evidence must bring out the fault and negligence of a defendant, and a court should not take its truthfulness without interrogation for the reason only that, it is uncontroverted. A plaintiff must prove his case on a balance of probability whether the evidence is unchallenged or not.

In ***Kanyungu Njogu vs Daniel Kimani Maingi (2000) e KLR*** it was held that:

" when a court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that one probability was more probable than the other"

35. In the case ***Grace Kanini Muthini vs KBS and Another Nyeri H.C. Miscl Appl. No. 270 of 2000*** the Court of Appeal was faced with two probabilities as to between the parties who may have caused an accident. The plaintiff was said to have contributed to the accident by failing to take care of his own safety and permitted the accident to occur. The plaintiff was however required to prove her case on a balance of probability that she did not contribute to the accident. The Judge rendered that:

" --- I can only decide the case on a balance of probability if there is evidence to enable me say that it was more probable than that the second defendant wholly or partly contributed to the accident."

36. As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life.

37. In ***Rose vs Ford, (1937) AC 826*** it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in ***Benham vs Gambling, (1941) AC 157*** it was further held that only moderate awards should be granted under this head for the following reasons:

"In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects."

38. The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.

Having weighed the evidence adduced in the lower court, the judgment passed, grounds of appeal and submissions by both sides. I do find that:-

The trial court, given the evidence, was right in finding both defendant equally liable. The appellant herein as was correctly expressed in the judgment, was the owner of the house having inherited it from her father. She was the landlady and had the responsibility of ensuring it was in safe habitable condition and did not pose a foreseeable danger to the tenant. She did not do that in relation to existence of the internal naked cables which were dangerously exposed. For the 2nd defendant, they were aware of the said danger and the need for rectification but did not disconnect the electric supply to enforce rectification and safety. The trial court having correctly apportioned liability for each defendant, could not therefore have held them jointly and severally liable.

39. On the award for damages, in Butt v Khan (1981) KLR 349, the court held that:-

"The appellate court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at a misconceived estimates."

In ***shabani v City Council of Nairobi (1985) KLR 516,*** the court 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 based on some wrong principle or on a misapprehension of the evidence".

40. In this matter, I find that the trial court applied the legal principles appropriately and arrived at a fair and reasonable award for the damages. I have no cause to disturb the same. The appeal therefore fails with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **3rd** day of **October, 2019**

In the presence of:

Firm of Kariuki Mwaniki for the Appellant absent

Mrs Nyamweya bolding brief for Mr. Andambi for the Respondent

Ms Abigael – Court Assistant