



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.15 OF 2018

KENYA POWER AND LIGHTING COMPANY LIMITED.....APPELLANT

-VERSUS-

DMN (Minor suing through the father and next friend SNK).....1ST RESPONDENT

THE TRUSTEES OF PCEA MUHITO CHURCH.....2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the judgment of Honourable W. Kagendo CM delivered on 14th February, 2018 in Nyeri CMCC No.333 of 2015; the 1st respondent through his father and next friend sued the appellant for injuries suffered on the 30th November, 2008 while at Sunday School when he was electrocuted by high voltage wires; as a result thereof the 1st respondent suffered severe burns to both his arms; the burns being so severe led to the unfortunate amputation of his arms;

2. After a full trial, the trial Court made the following awards:-

- Liability: 70:30:10 in favour of the 1st respondent
- General damages for pain and suffering – Kshs.1,500,000/=
- Loss of earning capacity – Kshs.2,007,360/=
- Future medical expenses- Kshs.2,600,000/=
- Specialized training – Kshs.480,000/=
- Special damages- Kshs.163,780/=

3. Being dissatisfied with the judgment of the trial Court, the appellant filed this instant appeal and listed six (6) grounds of appeal as are summarized hereunder;-

a. The learned Magistrate erred in both law and in fact when she failed to consider the fact that the plaintiff had not proved his claim for future medical expenses and thus erred in awarding a sum of Kshs.2,600,000/- while no basis had been laid for the same.

b. The learned Magistrate erred in both law and in fact when she awarded a sum of Kshs.480,000/- as costs of special training while the same had been proved and no evidence led on the same had not been proved and no evidence led on the same hence arriving at an erroneous award.

c. The learned Magistrate erred in both law and in fact when she awarded a sum of Kshs.2,007,360/- as damages for loss of earning capacity while the same had not been proved and no evidence led to support the same hence arriving at an erroneous and exaggerated award.

d. The learned Magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the appellant on record and the authorities annexed therein in support of the appellant's case.

e. The learned Magistrate erred in fact and in law by failing to follow rules of precedents in awarding damages.

f. The learned Magistrate erred both in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the 1st respondent as against the appellant.

4. When this Appeal came up for directions, the parties consented to confine the Appeal to the issue of quantum and in particular the awards granted under Loss of earning capacity, future medical expenses and specialized training; after having read the written submissions filed by both parties and having perused the Record of Appeal this court has adopted and framed the same issues for determination; and the issues are as set out hereunder;

- i. Loss of earning capacity
- ii. Future Medical Expenses
- iii. Specialized training

ANALYSIS AND DETERMINATION:

5. Before addressing this issue, it is important that to state that the principles to be considered when reviewing an Appeal on damages are laid out in the Court of Appeal case of *Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR*; this decision sets out the parameters under which an appellate court will interfere with an award in general damages; it held that: -

‘An appellate court will not disturb an award for general 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...’

6. Similarly, in the case of *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003* the Court of Appeal held that: -

‘We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Mariga V Musila [1984] KLR 257).’

Loss of earning capacity

7. The plaint filed in the trial Court – indicates ‘Particulars loss of future earnings (sic)’; this is followed by a working out that arrives at a sum of Kshs.2,509,200/=; on the last page of the Plaint, the plaintiff/respondent had pleaded at paragraph 9 (c) ‘loss of future earnings of Kshs.2,509,200/=’.

8. The learned Magistrate proceeded to grant an award titled ‘loss of earning capacity’ at Kshs.2,007,360/=; this head of damages was not pleaded or prayed for by the 1st respondent in his plaint; he had prayed for loss of earnings and not loss of earning capacity.

9. The two heads of damages are distinct and very different; the former are special damages that need to be strictly proved while the latter forms part of general damages.

10. In the case of *William J Butler v Maura Kathleen Butler [1984] eKLR*, the Court of Appeal differentiated the two heads of damages as follows,

“A plaintiff’s loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury.

11. It is a different head of damages from one of actual loss of future earnings which can readily be proved at the time of the trial; the difference was explained in this way:

“... compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages....”

12. In this instant appeal the 1st respondent prayed for loss of earnings which has to be proved; there is no evidence on record to support a claim for lost earnings; further, the 1st respondent was obviously not gainfully employed or undertaking any trade at the time of the accident as he was a minor; as per the evidence on record, the 1st respondent was a student at Gachirio Primary School; the 1st respondent should have therefore pleaded and prayed for general damages for loss of earning capacity but instead prayed for loss of earnings of Kshs.2,509,200/= which he did not prove; it is trite law that a party is bound by its pleadings.

13. In the circumstances this court is satisfied that the trial magistrate misapprehended the evidence before her and considered matters that she shouldn’t have thereby arriving at the erroneous award; it therefore follows that there is a need to interfere with the award for loss of earning capacity; which award shall be disallowed as it was not pleaded;

14. This ground of appeal is found to have merit and is hereby allowed;

Future Medical Expenses

15. It goes without question that this falls under special damages which by its very nature needs to be proved; the 1st respondent in his plaint prayed for Kshs.2,600,000/=; there was however no evidence tendered to support this prayer; the 1st respondent's doctor did give evidence that there would be future procedures that would be done to the 1st respondent but he did not quantify the cost thereof; how then did the 1st respondent come up with the said figure?

16. It was incumbent upon the 1st respondent to tender evidence in support of this specific claim; the Court of Appeal in *Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716* held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

17. Upon perusal of the judgment it is noted that the trial Magistrate in making this award made the following remarks;

“this is a very modest figure....”.

18. With respect to the learned trial magistrate it is trite law that special damages must be strictly proved regardless of whether they can be considered modest in the circumstances.

19. This court finds that this prayer was not proved and there is need to interfere with the award made;

20. This ground of appeal is found to be meritorious and is hereby allowed;

Specialized training

21. In his pleadings, the 1st respondent prayed for the sum of Kshs.480,000/=; there was evidence tendered showing that the 1st respondent was attending Joyland Special School and that his father was paying school fees to the said school;

22. This court finds no reason to interfere with the trial court's decision to award the sum prayed for;

23. This ground of appeal is found lacking in merit and is disallowed;

FINDINGS AND DETERMINATION

24. For the forgoing reasons this court makes the following findings and determinations;

- i. The appeal is found to be partially meritorious;
- ii. This court finds that loss of earning capacity was not pleaded and therefore the award is hereby set aside;
- iii. This court finds that future medical expenses were not proved to the desired threshold and therefore the award is hereby set aside;
- iv. The award for specialized training is found to have been proved to the desired threshold;
- v. The Respondents shall have costs and interest in the lower court;
- vi. Each party shall bear its/their own costs on this appeal.

Dated, Signed and Delivered at Nyeri this 20th day of February, 2020

HON.A.MSHILA

JUDGE