



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL CASE NO 2 OF 2015

PENINAH MBOJE MWABILI.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. According to the Complaint dated 10th June 2015 that was filed on behalf of the Plaintiff by the firm of M/S Juma Nyaga & Co Advocates on 17th June 2015, the Plaintiff contended that she was owed a duty of care by the Defendant herein. However, on 25th March 2015, while at her shamba in Marapu Area, she was struck by live overhead power transmission cable, whereupon she sustained severe loss, harm, injury and damage.

2. She therefore sought the following reliefs in her Complaint:-

i. General and special damages

ii. Cost of and incidentals to this suit.

iii. Any other or further relief as the Honourable Court shall deem fit and just to grant.

3. On 2nd September 2015, the Plaintiff filed a Notice of Intention To Act in person of even date. Subsequently, the firm of M/S Onyango, Oballa & Partners filed a Notice of Appointment of Advocates dated 9th September 2015 on the same date. Her Notice of Motion application dated 10th October 2015 and filed on 12th October 2015 seeking to amend her Complaint was allowed on 9th November 2015.

4. Her Amended Complaint dated 14th November 2015, in which she had itemised particulars of negligence and breach of care of duty by the Defendant herein, the injuries that she sustained and her claim for special damages, was filed on 29th January 2016. She sought the following reliefs:-

a. Special damages of Kshs 26,100/=

b. General damages

i. for pain and suffering and loss of amenities

ii. For (sic) costs of artificial leg, wheelchair, and crutches as pleaded in paragraph (c) (d)(e) and (f) respectively.

iii. For loss of earning capacity and or (sic) diminished earning capacity as pleaded in paragraph 7(a) of the Amended Plaintiff.

iv. costs (sic) of hiring a house help as pleaded in paragraph 7 (b) of the Amended Plaintiff.

c. Costs of this suit and interest on a) (sic) and b) (sic) above.

d. Any other or further relief as the honourable court shall deem fit and just to grant.

5. Her Reply to the Defendant's Amended Defence was dated 2nd March 2015 and filed on 4th March 2015. She filed her List of Witnesses, List of Witnesses and her Bundle of Documents all dated 1st February 2016 on 29th February 2016. She also filed a Supplementary List of Witnesses and Further List of Documents both dated 6th June 2016 on 7th June 2016. Her Written Submissions and List of Authorities both dated 20th June 2016 were filed on 23rd June 2016.

6. The Plaintiff did not seek or obtain leave to file the Further Amended Plaintiff dated 6th June 2016 on 7th June 2016. The court did not therefore consider this Further Amended Plaintiff as it was in the court record irregularly.

7. On its part, the Defendant filed its Memorandum of Appearance and Statement of Defence dated 10th September 2015 on 14th September 2015. It amended its Statement of Defence on 2nd March 2016. The same was filed on 29th February 2016 (sic). Its List of Witnesses was also dated 2nd March 2016 and filed on 29th February 2016 (sic). Notably, the Defendant's aforesaid pleadings bore a later date from when they were filed. Its Written Submissions in which it attached the cases it was relying upon were dated 27th June 2016 and filed on 28th June 2016.

8. The parties' joint Statement of Agreed Issues was dated 10th March 2016 and filed on 15th March 2016.

9. On 7th June 2016, both parties recorded a consent on liability at 80%- 20% in favour of the Plaintiff herein. The hearing therefore proceeded on the question of quantum only. The Plaintiff and one (1) other witness testified on her behalf. However, the Defendant called no witnesses.

10. Both parties adopted the respective Written Statements and their Bundle of Documents in their entirety. They consented to the Medical Reports of Dr Udayan R. Sheth dated 1st February 2016 and that of Dr Adjoni Adede dated 29th January 2016 being tendered in evidence without calling the makers.

LEGAL ANALYSIS

11. Issues No 1- 5 of the Statement of Agreed Issues related to the issue of liability of the Defendant and were therefore spent. The remaining issues for determination by the court were as follows:-

a. What injury loss and or (sic) damage were sustained by the Plaintiff?

b. is (sic) the Plaintiff entitled to the special damages pleaded in the amended plaintiff?

c. Should the Plaintiff be paid general damages for pain and suffering and loss of amenities for the injuries sustained and if so how much?

d. Does the Plaintiff require future treatment and if so how much?

e. Was the Plaintiff involved in gain (sic) self employment before the injuries and if so, did she suffer loss of earning capacity and or (sic) diminished earning capacity after the accident?

f. If the Plaintiff sustained loss of earning capacity as stated in issue 7, what is the multiplier, what is the multiplicand?

g. does (sic) the plaintiff require house help, if so for how much and at what monthly pay?

h. Should judgment be entered for the Plaintiff as pleaded in the Amended plaint (sic)?

i. Who bears the costs of this suit?

12. In view of the fact that the Plaintiff had claimed damages under different heads, the court found it prudent to address each of these claims separately as shown hereunder.

I. GENERAL DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES

13. The Plaintiff testified that she suffered amputation of both legs, electrocution injury and electric burns on her neck and both legs. According to the Medical Report by Dr Ajoni Adede and the Discharge Summary, the Plaintiff was admitted at Moi County Referral Hospital for three (3) months. It was her evidence that she had been completely immobilised as a result of the injuries that she sustained.

14. From Dr Ajoni Adede's doctor's prognosis, the Plaintiff suffered ninety five (95%) per cent permanent disability, diminished capacity for work, increased dependence, loss of self esteem, loss of ability to move without assistance, psycho-trauma and depression, burns scars, exposure to diseases and antigenic overstimulation from massive blood transfusion.

15. Elina Chao (hereinafter referred to as "PW 2") testified that the Plaintiff employed her from the year 2015. Her work entailed but was not limited to cleaning the Plaintiff's clothes and house, cooking for her and moving her from one part of the house to the other.

16. It was therefore the Plaintiff's advocates' submission that a sum of Kshs 8,000,000/= would be adequate to compensate the Plaintiff for the injuries that she had sustained. In arriving at the said figure, the said advocates relied on the cases of **Everlyne Shivachi vs Thara Trading Co Limited [2013] eKLR**, **Cosmas Mutiso Muema vs Kenya Road Transporters Limited & Another [2014] eKLR**, **Regina Mwikali Wilson vs Stephen M Gichuhi & Another [2015] eKLR** and **Catherine Njeri Njoroge vs Benard N Njeru [2016] eKLR**.

17. In the case of **Everlyne Shivachi vs Thara Trading Co Ltd** (Supra), the Plaintiff therein had sustained more severe injuries as she had suffered a fracture of both arms in addition to amputation of both legs and had been hospitalized for five and a half (5 ½) months. In 2013, the court awarded the Plaintiff therein a sum of Kshs 5,000,000/= for pain and suffering and loss of amenities.

18. In the case of **Cosmas Mutiso Muema vs Kenya Road Transporters Limited & Another** (Supra), the Plaintiff therein also suffered very serious injuries. These were crushed left leg leading to amputation below the knee, fractures to the cervical spine, fractures to the skull, fractures to the ribs, dislocation to the right knee and vertebrae amongst other injuries. In 2014, the court awarded the Plaintiff therein a sum of 2,000,000/= for pain and suffering and loss of amenities.

19. In the case of **Regina Mwikali Wilson vs Stephen M Gachuhi & Another** (Supra), the Plaintiff therein suffered serious injuries which did not lead to amputation of any limb. In 2015, the court awarded the Plaintiff therein a sum of Kshs 2,500,000/= for general damages for pain and suffering and loss of amenities.

20. In the case of **Catherine Njeri Njoroge vs Benard N Njeru** (Supra), the Plaintiff sustained an injury leading to total amputation of the right lower limb at the hip, fracture of the femur and compound fracture of the superior and anterior pubic ramus of the right bone. In 2016, the court awarded the Plaintiff therein a sum of Kshs 3,000,000/= general damages for pain and suffering and loss of amenities.

21. On its part, the Defendant argued that a sum of Kshs 3,500,000/= would be adequate compensation as a re-examination of the Plaintiff by its doctor, Dr Udayan Sheth showed that the Plaintiff suffered permanent incapacity at thirty (30%) per cent. The said doctor opined that the stumps had healed well with no contracture or tenderness.

22. Evidently, there was a huge disparity in the findings of the permanent incapacity given by the two (2) aforementioned doctors making it difficult for the court to really say for a fact what the more reasonable permanent incapacity that the Plaintiff herein suffered was. Suffice it to state that the Plaintiff had suffered double amputation and that the court was more inclined to take the incapacity that was given by Dr Udayan Sheth as he was a Consultant Orthopaedic Surgeon.

23. As all the cases that were presented to me were by courts of equal jurisdiction as this one, none of them bound it. They were, however, useful in providing a good comparative of what be reasonable to compensate the Plaintiff herein. Indeed, in the case of **Bayusuf Freighters Limited vs Patrick Mbatha Kyengo [2014] eKLR** that was relied upon by the Plaintiff herein, the Court of Appeal cited the case of **Shabani vs City Council of Nairobi (1985) KLR 516** in which it had rendered itself as follows:-

“There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is...to have regard to recent award in comparable cases in the local courts.”

24. The court noted that in the case of **Mwaura Muiruri vs Suera Flowers Limited & Another [2014] eKLR** that the Plaintiff placed reliance upon, where the injuries did not involve an amputation, Emukule J addressed the different heads of general damages separately. He awarded a total sum of Kshs 1,900,000/= for pain and suffering, loss of amenities and loss of earning capacity separately. The specific award for loss of amenities was Kshs 300,000/=.

25. General damages connotes a generic term for the different heads of claims, which are monetary award but where no particular value can be attached. At the very least, it can only be assessed to compensate an injured party but not to bring him to the exact position he was in before such injury. The inability to perform any duties must therefore be taken into account at the time of awarding general damages.

26. A claim for loss of amenities is thus encompassed and/or is included in a claim general damages and need not be awarded separately. Allowing an extra amount in the sum of Kshs 2,000,000/= to form a distinct and separate award for loss of amenities as had been submitted by the Plaintiff would grossly exaggerate the claim herein.

27. The sum of Kshs 8,000,000/= that the Plaintiff had prayed for in respect of pain and suffering was also manifestly high. Indeed, the global claim for general damages herein would be Kshs 10,000,000/=, an amount no economy in our jurisdiction can sustain for the sort of injuries the Plaintiff herein sustained.

28. On the other hand, a sum of Kshs 3,000,000/= that had been proposed by the Defendant was on the lower side. In fact, the case it had relied upon was decided almost ten (10) years ago. The case of **Everlyne Shivachi vs Thara Trading Co Ltd** was, however, a more reasonable comparison to the case herein as it was a case of double amputation .

29. This court took cognisance of the fact that no amount of damages can be sufficient to compensate a person who has suffered an injury. In this case, bearing in mind the inflationary trends and the injuries that the Plaintiff herein sustained, the court was of the view that a sum of Kshs 5,000,000/= general damages for pain and suffering and loss of amenities would be fair and reasonable in the circumstances of the case herein.

II. LOSS OF EARNING CAPACITY AND/OR DIMINISHED EARNING CAPACITY

During her cross-examination, the Plaintiff stated that before the accident, she used to farm and earned a monthly income of Kshs 10,000/=. She said that she no longer worked and had nothing to sustain herself but that she paid PW 2 a salary of Kshs 9,000/= every month. She told this court that this amount was contributed by her relatives. She also testified that she had one child who was in college and another in boarding school.

31. She submitted that she ought to be awarded a sum of Kshs 3,600,000/= under this head. She adopted a multiplicand of Kshs 10,000/= and bearing the vagaries of life, she proposed a multiplier of 30 as she expected to live to the ripe age of seventy five (75) years. The claim was thus computed as follows:-

$$\text{Kshs } 10,000 \times 12 \text{ months} \times 30 \text{ years} = \text{Kshs } 3,600,000/=.$$

32. The Defendant rightly pointed that compensation for future earnings ought to be awarded only for real assessable loss proved by evidence. As was cited in the case of **Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR** that the Plaintiff relied upon, it was held that there was no formulae of assessing loss of earning capacity and that the award is a token one, modest or substantial depending on the circumstances of the case.

33. The Defendant opined that the Plaintiff could be awarded a sum of Kshs 900,000/= for loss of earning capacity by adopting a multiplicand of Kshs 5,000/= and a multiplier of 15 years. Notably, the sum of Kshs 5,000/= was really not the multiplicand and it was sufficient to have referred to the same as income.

34. The multiplier of 30 that the Plaintiff had proposed was very high bearing in mind that she was forty six (46) years at the time of the injury and she was expected to have been economically productive until about the age of sixty (60) years which has been pegged as the retirement age for civil servants in Kenya. This retirement age of sixty (60) years was not to suggest that the Plaintiff would have worked until the said age. It was merely a guideline to assist the court in assessing what the reasonable multiplier in her case would have been.

35. Had the Defendant not conceded this amount, this court would not have awarded the same as the Plaintiff did not provide any proof to demonstrate that she indeed had an income of Kshs 10,000/= before the incident or that she had children that she was still education.

36. In the circumstances foregoing, the court adopted the proposal by the Defendant and awarded a sum of Kshs 900,000/= made up as follows:-

$$\text{Kshs } 5,000/= \times 12 \times 30 = \text{Kshs } 900,000/=.$$

III. SPECIAL DAMAGES

37. According to the Plaintiff, she was examined by Dr Ajoni Adede who prepared the Medical Report dated 29th January 2016. She paid him a sum of Kshs 3,000/=. She claimed for this amount as well as a sum of Kshs 25,000/= and Kshs 1,100/= for costs of attending the doctor to obtain a medical report and treatment and medical expenses respectively giving a total of Kshs 26,100/= in her Amended Plaintiff.

38. In her Written Submissions, she claimed a sum of Kshs 159,826/= as per her Further Amended Plaintiff. As can be seen hereinabove, there was no leave to file the said Further Amended Plaintiff. This claim could not therefore be sustained by the Amended Plaintiff as parties are bound by their pleadings. The claim for Special damages was therefore limited to the sum of Kshs 26,100/=.

39. The court saw a receipt dated 29th January 2016 for the sum of Kshs 25,000/= being taxi fare to Mombasa from Sagalla, Receipt No 3131 in the sum of Kshs 3,000/= for a Medical report and several receipts exceeding the sum of Kshs 1,100/=. Notably, it was not clear which receipt supported the sum of Kshs 1,100/=. However, as there were several receipts in excess of the said sum of Kshs 1,100/=. the

court found that the Plaintiff had proved her claim for special damages in the sum of Kshs 26,100/=. The same is hereby awarded.

IV. LOSS OF ARTIFICIAL LEG, WHEEL CHAIR AND CRUTCHES

40. It was the Plaintiff's testimony that her doctor had recommended that she would require two (2) artificial legs that would cost Kshs 300,000/=. They were to be replaced every fifteen (15) years and serviced at least every three (3) years at a cost of Kshs 7,500/=. She also said that she would require a motorised wheelchair at a cost of Kshs 25,000/=. The same would be replaceable every ten (10) years to enable her move. She also said that she would require crutches at a cost of Kshs 3,000/=. The same would be replaced every five (5) years. As could be discerned from her Written Submissions, her total claim under this head was Kshs 765,000/=.

41. The court noted that the Plaintiff could not lay a claim to the motorised wheelchair, crutches and artificial legs all at the same time. She had to make a choice of which of the three (3) items she wanted more so as she had already employed PW 2 to move her around. Indeed, a careful perusal of the Medical Report by Dr Ajoni Adede did not in any way seem to recommend that the Plaintiff would require artificial legs, wheel chairs and crutches at the same time.

42. Notably, he did not even recommend that she use a particular gadget. His Medical Report merely gave the cost of the said items. It was therefore misleading for the Plaintiff to aver that the said doctor had recommended that she be given all the three (3) items. In trying to establish which item this court could have allowed, this court took note of the Plaintiff's averments during her Cross-examination when she stated that she would want to be assisted in buying artificial legs or crutches.

43. However, as the Defendant rightly argued, there was no proof of the cost of the aforesaid items. The court noted that Dr Ajoni Adede was a family physician/specialist venerologist. He was not an Orthopaedic surgeon. He gave an opinion relating to the cost, maintenance and replacement of the said orthopaedic items. If at all he had any expertise on the costing, use and maintenance of gadgets that would have assisted the Plaintiff in her mobility, he ought to have indicated how he came to be knowledgeable in an area that was not of his expertise. He did not do so. He also ought to have provided documents showing the costs of the items from AIC Kijabe Mission Hospital as that is where he based his opinion on.

44. The Plaintiff was expected to prove her case but she failed to satisfy this court that the figures she gave were the correct figures. In the absence of any proof of the costs of any of the items, this court hereby regrettably rejects this claim as it cannot pluck figures from the air.

V. COST OF HIRE OF DOMESTIC HELP

45. During her cross-examination, the Plaintiff stated that before the accident, she used to farm and that she used to earn an income of Kshs 10,000/= every month. She said that she no longer worked and had nothing to sustain herself but that she paid PW 2 a salary of Kshs 9,000/= every month, which amount she said was contributions from her relatives.

46. PW 2 stated that she earned a salary of Kshs 9,000/= per month. On being cross-examined, she was categorical that she had no blood relationship with the Plaintiff save that she was her employee. She said that did not have any documentation to show that she earned the said sum of Kshs 9,000/=.

47. It was the Plaintiff's submission that since she was aged forty seven (47) years and that she would require help until about the age of seventy seven (77) years, an award in the sum of Kshs 3,240,000/= would be adequate compensation. She based the sum of Kshs 9,000/= on the minimum wage of 2016 that has been provided under Legal Notice No 117 for all municipalities including Voi where she resided.

48. This court was of the view that the claim for hire of domestic help was not proven as the PW 2 did not furnish the court with any documentary evidence to prove her salary or to provide any proof that she was

indeed the Plaintiff's employee. An assertion that she earned the said sum or that she was the Plaintiff's employee without any proof remained just a mere assertion.

49. However, as the Plaintiff was amputated on both legs, it was obvious that she would need assistance from a third party to ensure her chores were done. She would not be able to rely on relatives throughout her life. In view of the fact that the court would have dismissed this claim but the Defendant was prepared to consider the same, the court thus awarded the Plaintiff a sum of Kshs 900,000/= under this head as had been proposed by the Defendant.

50. The same was computed as follows:-

Kshs 5,000/= x 12 x 15=

Kshs 900,000/=

DISPOSITION

51. In a nutshell, the court entered judgment in favour of the Plaintiff against the Defendant as follows:-

a. General damages for pain and suffering

and loss of amenities

Kshs 5,000,000/=

b. Special Damages

Kshs 26,100/=

c. Loss of earning

Kshs 900,000/=

d. Hire of Domestic Help

Kshs 900,000/=

Kshs 6,826, 100/=

Less 20% contribution

Kshs 1,365,220/=

Kshs 5,460,880/=

Plus costs and interest thereon at court rates from the date of judgment.

52. It is, however, important to point out that the costs will be awarded at the scale of the lower court as the Senior Principal Magistrate's Court at Voi had jurisdiction to deal with this matter, the pecuniary jurisdiction being Kshs 15,000,000/= which was even more than the quantum the Plaintiff herein had claimed.

53. Indeed, this court had at the very beginning sought to know from the Plaintiff's counsel why the matter had been filed in the High Court of Kenya, Voi. The said counsel indicated that the quantum would exceed the jurisdiction of the lower court whereupon this court assumed jurisdiction. It is now evident that the claim as pleaded was well within the jurisdiction of the lower court.

54. In conclusion, the court wishes to point out that it was not easy for court to follow the Plaintiff's case. There were several documents that were filed at different times and as can be seen hereinabove, the Further Amended Plaintiff was filed without leave of this court. Assuming the receipts she had submitted had proven her claim of special damages in the sum of Kshs 159,826/= as set out in the Further Amended Plaintiff, this caused the Plaintiff to lose a sum of Kshs 133,726/= as she was bound by the pleadings of the Amended Plaintiff.

55. There was also no correlation of the receipts to the Plaintiff's Witness Statement and her evidence leading the court to spend an inordinately long period of time poring over the said documentation to establish what the same related to. Cases should be presented in a cogent and systematic manner that is easy to follow. It is hoped that the Plaintiff's advocates herein will improve the presentation of their cases

in future for ease of rendering decisions.

56. Orders accordingly.

DATED and **DELIVERED** at **VOI** this **28TH** day of **JULY** 2016

J. KAMAU

JUDGE