



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 451 OF 2012

EW (suing as the next friend and mother to

BM (A minor).....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING

COMPANY LIMITED1ST DEFENDANT

JOSEPH WANG'ETHE2ND DEFENDANT

JUDGMENT

1. The plaintiff minor (BM) sues through his mother and next friend EW, claiming for special and general damages for the injuries he allegedly sustained on or about the 17th day of December, 2011, when he was electrocuted by live wire hanging loosely outside their tenanted house on a 3rd floor balcony in Kayole estate, Mihango area within Nairobi County on plot A3-225.
2. It is alleged that on the material date, the plaintiff minor was playing with his friends on the balcony of the 3rd floor building as described above when he came into contact with high voltage electric power pylons/lines and as consequence, he sustained severe electrocution leading to the amputation of his right upper limb and burns on the anterior abdomen. The plaintiff blamed both the defendants jointly and severally for negligence in the manner in which the flats were built and the connection of electricity to the block of flats where he lived with his mother.
3. The 1st defendant is sued being the sole supplier of electricity in Kenya and is blamed for installing live pylons next to a building without observing the security of the residents whereas the 2nd defendant was the landlord/owner of the premises wherein the plaintiff lived and is blamed for constructing the building and balcony next to live pylons.
4. The plaint dated 11th September 2012 sets out the 1st defendant's negligence as follows:
 - a. *Failing to adhere to the proper distance of the cable installation from the residential houses.*
 - b. *Erecting the high voltage power lines at a risky distance from the residential house without due regard to the proximity of the balcony and hence exposing the residents to danger.*
 - c. *Failing to ensure that the high voltage power lines which was a danger zone was situated at a sufficient distance from the building.*
 - d. *Failing to ensure that youngsters in the neighborhood did not touch or play with uninsulated live,*

electrical wires.

- e. *Failing to take any or any adequate measures to ensure that the high electric power cables that were installed close to residential houses were insulated .*
- f. *Failing to give the plaintiff or his next friend and the residents any warning of existence of live electric wire passing next to their building.*
- g. *Failing to ensure that the high voltage power lines which was a danger zone was situated at a sufficient distance from the building.*
- h. *Failing to take measures to prevent or adequately control the plaintiff's exposure to the live electric cables.*
- i. *Failing to heed to the plaintiff or next friend complaints in reference to the danger posted by exposed power lines.*
- j. *Allowing live electric power cables to come into contact with the balcony of house no. A3-225 hence causing the accident.*
- k. *Exposing the plaintiff to a risk of injury or damage of which they knew or sought to have known.*

5. The following are the pleaded particulars of negligence against the 2nd defendant.

- a. *Causing or permitting the claimant to be exposed to danger in which the 2nd defendant knew or ought to have known.*
- b. *Failing to comply with the safety regulations.*
- c. *Failing to ensure that the building was conformed in respect of the requirements relating to design and or construction of houses and also in accordance with the architectural plan.*
- d. *Failing to ensure that the building was inspected at suitable intervals so as to ensure that health and safety conditions were maintained and that any risks and dangers could be detected and remedied in good time.*
- e. *Failing to restrict the use of the building and in particular house no. A-3-225 from the plaintiff when he knew or ought to have known the risks and dangers involved.*
- f. *Failing in all circumstances to discharge the common duty of care.*
- g. *Failing to the plaintiff's or his next friend complaints in reference to danger posted by exposed power lines.*
- h. *Allowing live electric power cables to come into contact with the balcony of house no. A-3.225 hence causing the accident.*

6. The plaintiff is alleged to have suffered injuries involving

- a. *Electrocution with amputation of the right upper limb.*
- b. *Burns on anterior abdomen.*

7. The plaintiff also claimed for special damages particularized as follows:

- a. *Medical report shs 3000.*
- b. *Medical expenses shs 217,700.*
- c. *Cost of the future medical expenses including a series of bionic arms.*

8. It was further alleged that the plaintiff who was aged 5 years at the material time enjoyed a good health and lived a happy life, vigorous normal life, intelligent and aspired to becoming a pilot earning about Ksh 500,000 per month as per Kenya Airways guidelines and by reason of the aforesaid accident and resultant injuries his future earning capacity had drastically diminished and therefore claimed for damages for diminished earning capacity. Further, that having lost his right hand he was unable to attend to his personal needs and would require a domestic helper. He also claimed for general damages for pain and suffering, costs of the suit and interest.

9. The 1st defendant Kenya Power and Lightning Company Ltd filed defence on 23rd October 2012, admitting the occurrence of the accident involving the plaintiff minor on the material date and also admitting that the minor did suffer some electric shock on 17th December 2011 resulting in bodily injuries but denied that the accident in question was or at all caused by the negligence

attributed to it or its employees or agents. The 1st defendant further contended in their defence that the said accident was wholly attributable to the combined negligence of both the minor and the 2nd defendant who owned the subject building at Kayole estate. The 1st defendant blamed the plaintiff (minor) for

- a. *Touching the electricity line.*
- b. *Failing to heed the presence and proximity of the electricity line to the building.*
- c. *Failing to have any or any sufficient regard for his own safety.*
- d. *Going about his activities without due care and attention.*

10. The 2nd defendant was blamed for:

- a. *Erecting a residential building too close near an electricity line.*
- b. *Erecting a building without approved drawings of the same by City Council of Nairobi.*
- c. *Erecting a building on a road reserve.*
- d. *Erecting an illegal structure.*
- e. *Letting out the illegal structure.*
- f. *Exposing the tenants to the risk of being electrified or at the worst electrocuted.*
- g. *Failing to have any or any sufficient regard to the safety of his tenants.*

11. The 1st defendant denied particulars of diminished earning capacity, future medical expenses or prospects.

12. The plaintiff filed a reply to the 1st defendant's defence on 30th October 2012 reiterating the contents of the plaint as pleaded and denying all particulars of negligence attributed to the minor.

13. The 2nd defendant filed defence denying all the particulars of negligence attributed to him by the plaintiff. He also denied particulars of injuries sustained by the plaintiff and stated that he was not responsible for any special damages occasioned either. He also denied all the particulars of negligence attributed to him by the 1st defendant and averred that he was not responsible for the installation and existence of the aforesaid power lines as that that was a residential area and therefore it was the 1st defendant liable for installation and supply of power lines.

14. The plaintiff's next friend EW testified as PW1 and stated that the minor was her second born child (son) who was now (at the time of hearing) aged 9 years and that she signed authority to the advocate to file suit in her name on behalf of the minor on 10th March 2015. She adopted her witness statement dated 11th September 2012 as her evidence in chief. PW1 stated that on 17th December 2011, her son was playing at the balcony of their rented house No. A3-225, 3rd floor situated in Kayole estate Mihango area when he touched high electric power voltage lines which were erected so close to the balcony. As a result, her son was electrocuted. She immediately rushed him to Kenyatta National Hospital where his right arm was amputated at the elbow. She also reported to the police. He was hospitalized for 2 months. She produced a P3 form issued by the police as P exhibit 1 and discharge summary from Kenyatta National Hospital as P exhibit 2. She stated that she paid Kshs 212,050 as hospital bills and produced a bundle of receipts as exhibit. The plaintiff testified that at the time of accident, her son was in Pre unit. She also produced his school progress reports from Brilliant Great Care Academy. She testified that the minor also sustained burns on his stomach and thighs and grafting of skin had to be done. She produced Demand Notice to the two defendants issued by her advocate. She stated that her son had become permanently impaired and had to be assisted to do everything. That he wanted to become a pilot but having lost his right arm, he had lost that opportunity. She blamed the Landlord and the Kenya Power and Lighting Company since that was not the first time such an accident had occurred. She further testified that the accident was investigated by Kenya Power and Lighting Company who made a report that the wires had high voltage so they should be removed. She prayed for compensation for her son because his life had been changed. She also asked for costs of the suit and interest.

15. In cross examination by Miss Githma for the 1st defendant, the plaintiff's next friend stated that

- electric lines were very near the balcony about 2 feet away. That she had lived in that house since 2007 and only vacated in 2014. Further, that that was the 2nd accident after another child was electrocuted. She also stated that the owner of the house (flat) built it where it ought not to have been. She stated that the child cannot write well. That she arrived at the scene and found when the child had already been taken to hospital by neighbors.
16. In re-examination by Mr Wanjohi the plaintiff stated that she did not know whether the house had been constructed at the right place and that the incident was reported to Kenya Power and Lighting Company who investigated it but had done nothing to remedy the situation. Questioned by the court, the plaintiff stated that the child had now learnt how to use his left hand and that he was now in class 4.
 17. Dr Moses Kinuthia testified as PW2. That he had a Bachelors Degree in Medicine from University of Nairobi. He was also a medical practitioner. He examined the plaintiff minor Brandon Maina on 16th June 2012 and prepared a medical report. That the history was provided by his mother to the effect that the child was playing when he was electrocuted in Kayole. He found an amputated right hand at the elbow with burnt wounds on the abdomen and thighs. The minor had been hospitalized for 2 months. He was left with a stump on the right elbow, scar 10cm x 4cm on the lower abdomen. The doctor also saw the P3 form and discharge summary from Kenyatta National Hospital. The P3 showed the injury was classified as grievous harm. He further stated that such injury changes one's life completely and subjected the child to psychological trauma and loss of self esteem. The child would require a bionic arm at a cost of shs 5,000,000. He assessed total permanent incapacity at 70%. He produced a medical report and receipt for shs 3000/- as exhibits while also stating that his court attendance fee was shs 10,000 which he had been paid. In the Doctor's opinion, the child's career choices had been limited due to loss of his right hand and that since he had been right handed, his brain had to relearn to use the left hand which would take time because the hand plays a role in memory, reading and writing. Further, the witness testified that most careers require 2 arms without which the child cannot make choices even if it was in athletics since he is disabled for life. He estimated that the bionic arm has a life span of 5-10 years costing 2-3 million and that in his life time the minor will require 3 of them at a total of shs 5 million.
 18. In cross examination by Miss Githua, the witness stated that the child had suffered a permanent incapacity of 70% which assessment was based on the 2nd schedule of Cap 246 Laws of Kenya and that he will live as a person with disability. He stated that a bionic arm was different from an artificial arm as it can be controlled like a robot unlike the artificial arm which is like a stick and cosmetic and cannot be used to do anything.
 19. The 1st defendant called one witness Mr Thomas Moriango Omwenga who testified as DW1. He stated that he was an employee of Kenya Power and Lighting Company the 1st defendant as a safety officer. His work entailed ensuring safety of workers and to investigate accidents involving their power lines and to recommend preventive measures. DW1 stated that he investigated the accident subject matter of this suit and filed a report. He produced the original report as D exhibit 2. He testified that Kenya Power and Lighting Company received a report involving severe electric shock in Kayole Mihango area involving a child on 17th December 2011 on plot A3-223 Kayole and confirmed that the minor herein was the casualty. DW1 with an emergency team visited the scene of accident the following day and spoke to the mother and father of the child and also interviewed 7 people at the scene. The neighbor who witnessed the accident gave him the history and after investigations they found that the building was constructed close to the power line. That the child was playing when he touched live wire from an extended balcony. That the child had a small wire which other children he was playing with instructed him to strike the live wire with. DW1 further testified that the power line serves the area and below it was a low voltage line of 11KV which was the main supply line. He stated that all Kenya Power and Lighting Company lines are constructed on the way leaves. He further stated that from the base of the building to the way leave was 0.7 meters and that the building infringed on the way leaves by 4 feet and 6 inches since the standard distance from any fixed part of a building to the power line for safety purposes is 2.7 meters. In this case, DW1 stated that the distance was only 2 feet 3 inches which is 0.7 meters from the power line to the balcony's extended metals. He stated that several other buildings in the area were encroaching on the power line. He

- blamed the owner of the building for infringing into the way leave.
20. On being cross examined by Mr Wanjohi, DW1 stated that indeed an accident occurred involving the plaintiff and the Kenya Power and Lighting Company power lines and that the plaintiff did sustain serious electric shock and burns. He also stated that he was aware that a similar incident had occurred but it was not reported to the Kenya Power and Lighting Company. He confirmed that the building in question was connected to power but he could not tell when connection was done. Further, that when connecting power, it was expected that the safety of residents was taken into account but admitted that in some instances there are lapses and safety is never a factor in power connection. The 1st defendant's witness also conceded that in the circumstances of that area, it was not safe to connect the building to power where it was too close to the power line. Further, that before installation, they sought for way leaves permission from the City Council but he did not have any evidence that such permission was obtained for this case. He also stated that he could not confirm if infringement notices were issued to the landlord. He maintained that it was the landlord to blame for the accident since he constructed his building into the way leaves, albeit he had no evidence that any action was taken against him.
 21. In re-examination by Mr Mege advocate for the 1st defendant, DW1 stated that the approved electrical contractors ensure safe installation of power in the building before issuing certificate of completion of electrical installations and before Kenya Power and Lighting Company connects the power. He also stated that a line cannot be laid on a road reserve before a way leave permission is obtained.
 22. On being questioned, by the court, the witness stated that there were high voltage lines on the upper side and the low voltage lines were lower/below and that it was the high voltage lines which caused the accident. He also confirmed that the photograph on page 10 of the 1st defendant's bundle of documents showed the site/scene where the accident occurred.
 23. The 2nd defendant despite being served with hearing notices did not attend court to present his side of the defence. Parties agreed and produced the medical report by Dr George K. Musebe stated 19th August 2013 by consent as an exhibit for the 1st defendant.
 24. At the close of the parties' respective cases, the court was of the view that in order to appreciate the evidence as presented, it was necessary to visit the scene. I also directed that all parties including the 2nd defendant be served with notice of visitation and that DW1 to be present, with their advocates. On 11th June 2015 at noon, the court visited the scene of accident and except the 2nd defendant who failed to appear despite being served with notice, all other parties and their advocates were present.
 25. The 1st defendant's witness DW1 and PW1 directed the court to the site in Kayole, where we found buildings constructed very close to one another and access roads are very narrow. The area is business cum residential with high density population. The court was led into the building unto the balcony where the plaintiff lived, accessing it through a narrow steep stair case. As the court stood at the balcony, it could observe the site as described by DW1, on 3rd floor. The plaintiff showed the court the offensive power lines and the DW1 confirmed, adding that the lines still had the burnt marks which he showed to the court and the court was able to compare the scene 9,10,11,12,13 and sketch at page 14 of the defence exhibit 1. The court saw 3 loosely hanging high voltage electric lines which were not insulated, passing along the road reserve and next to the building, about 0.7 meters from the balcony, which was a scaring arms length, considering that the tenants freely hung their wet clothes nearby and as the wind blew, the court could see some clothes touching the live wires. There were also metals welded outside the balcony extending into the road reserve and close to the live power lines which the tenants used to fix ropes lines for hanging their clothes. The transformer was at the far right of the building on the same side of the road as the house where the plaintiff lived. DW1 informed the court that it was possible to insulate the live wires but that they would melt due to high voltage. At the material time, the court however noted that the metals shown at page 10 of the D ex 1 protruding into the road reserve were now slightly shorter and the DW1 confirmed that they had been shortened.
 26. All the parties' advocates filed written submissions. The 1st defendant filed on 20th July 2015, the plaintiff filed on 29th July 2015 whereas the 2nd defendant filed on 14th August 2015.
 27. I have carefully considered the pleadings on record, the evidence tendered in court both oral and documentary evidence as well as the court's own independent visit to the scene of

accident and observations made thereto . I have also carefully read through all the submissions filed by the parties' advocates as supported by statutory as well as case law. Albeit the parties framed several issues for determination, in my view, those issues can be summarized into four. These are:

1. *Who was to blame for the accident involving the minor plaintiff?*
2. *What damages are payable to the minor plaintiff to compensate him for the injuries that he sustained.*
3. *What orders should this court make?*
4. *Who should bear costs of this case?*

28. On the issue of who was to blame for the material accident, the plaintiff's evidence was that she found her son taken to Kenyatta National Hospital following an electrocution while he was playing on the balcony and she was only notified by her neighbors who had already taken him to Kenyatta National Hospital. DW1 also testified that the 1st defendant emergency team received a report of an electrocution in the area and him as the safety officer visited the scene with his fellow emergency team members where upon they confirmed that indeed the accident had occurred involving the plaintiff minor who was admitted at Kenyatta National Hospital. DW1 investigated the accident, interviewed several witnesses including the plaintiff's parents and neighbors. He learnt that the child was playing with other children from the balcony when other children told him to touch the live power lines with a metal and that is when he was electrocuted, losing his right hand. He took photographs of the scene, drew sketches and made recommendations which included:

1. That the way leave officer immediately do issue the landlords in the area with way leave infringement letters since the building had encroached into the way leaves .
2. That the landlord is held responsible for his actions and that the public be sensitized on the dangers of breaching power line clearances on the continuous basis.

29. DW1 could however not tell whether the above recommendations were acted upon. DW1 also conceded that there were lapses on safety during power connection exercise and that safety is never a factor in power connection. He also confirmed that indeed the plaintiff was electrocuted by the 1st defendant's high voltage power lines hanging close to the balcony and that he did sustain the pleaded injuries as a result of the said electrocution but in his view, it was the 2nd defendant landlord who was to blame since he constructed a building too close to the power lines (into the way leave).

30. The 2nd defendant on the other hand avoided the court all together and apart from filing his defence and his advocate making a few appearances but not on hearing dates despite being notified , neither him nor his advocate participated in the hearing, not even when the court notified him of its intention to visit the scene of accident did he avail himself or his representative and only reappeared by filing submissions on 14th August 2015 contending that he could not be held liable since the wires were 2 meters away from his house and not even an adult can reach those lines unless he has something in his hands and purposely stretches it to touch the aforesaid high voltage lines with an object in his hands. He also relied on his denials in his statement of defence and maintained that the 1st defendant is liable for installation and supply of the power lines. It therefore follow that the 2nd defendant5 had no evidence to offer. Parties must tender evidence in support of the allegations or contentions. This is a principle of law espoused in the Court of Appeal decision in the case of **JOHN WAINAINA KAGWE VS HUSSEIN DAIRY LTD- MOMBASA CIVIL APPEAL NO 215 OF 2010, per Githinji, Makhandia&Murgor JJA.** I add that neither can submissions on points of fact support a party's case where no evidence is adduced to prove that fact which is alleged. Further, submissions by counsel for the defendant from the bar however strong on matters of fact have never been a means of the parties tendering their evidence in court. Submissions are only meant to clarify issues and not for purposes of giving evidence. Furthermore, counsel's role in proceedings has never been that of witness giving evidence on behalf of their clients unless they are called

upon as witnesses in which event they would then relinquish their role as advocates for the party and step into the witness box to be cross examined, or unless they are parties to a particular dispute. This being a fresh case for trial and not an appeal or an application, it follows that the submissions on factual matters raised by the plaintiff and contested in the statements of defence filed by the 2nd defendant without calling evidence is no defence or at all. See also my decision in **HCC 140 OF 2008 Gideon Onchwati V Kenya Oil Co Ltd and Nation Media Group Ltd [2015] eKLR**.

31.

32. The 1st defendant on the other hand had submitted that liability has to be determined between the 1st and 2nd defendant and that since the plaintiff was a minor aged 5 years old, it is difficult to argue contributory negligence against him. The 1st defendant maintained that the 2nd defendant who never tendered any evidence in their defence should bear all the blame for the accident since he constructed his building into the road reserve and encroached on the 1st defendant's way leave granted. That the 2nd defendant's building was too close to the electric power lines especially the protruding metal pieces onto the balcony as shown in the photographs produced together with the investigation report and the court's own observation on visiting the scene. The 1st defendant further submitted that it was not possible to insulate the power lines because of the high voltage that would melt off any insulation. It was urged that the court should find the 1st defendant innocent and blame the 2nd defendant liable at 100%.

33. The plaintiff on the other hand submitted that Section 52 of the Energy Act, 2006 makes it incumbent for the owner of an electric line to be liable and to compensate any person who suffers any damage or injury caused by any defect and that from the evidence on record;

1. The accident was caused by power lines owned by the 1st defendant and not due to the installation and or connection of power to the 2nd defendant's premises;
2. DW1 admitted that a similar accident had occurred in 2008 but until 17th December 2011, no safety measures had been taken by the 1st defendant i.e. to serve the 2nd defendant with a notice of infringement and that even after the material accident to the minor, no legal action was taken against the 2nd defendant and to minimize risks.
3. DW1 did not produce the way-leaves granted before installing electricity in the area.
4. The visit to the scene revealed that albeit the 1st defendant blamed the 2nd defendant for the manner in which he put up his building, there were no measures the 1st defendant put in place to prevent or minimize the risk or injury including using underground cables and or insulating such wires.

34. The plaintiff relied on the case of **Kenya Power and Lighting Company v Joseph Khaemba Njoria [2005] e KLR** where GBN Kariuki J (as he then was) held that the power company has the responsibility to ensure that the power infrastructure it has installed in the country for the purposes of electrification is properly maintained to prevent accidents. Reliance was also placed on **Joseph Kiptonui Koskei vs KPL Co. Ltd [2010] e KLR** where Honourable Asike Makhandia J (as he then was) held that the defendant Kenya Power Lighting Company owed the plaintiff and every Kenyan a duty of care where it happen to have power lines and further that electric power is a dangerous commodity and if not properly secured can be a danger to society. The plaintiff also submitted that no liability can attach to him being 5 years at the material time of accident, relying on the decision in **Eliud Mwale Lewa & Another V Paka Tours Ltd & Another [2009] e KLR** where it was held that a child of 5 years cannot be found to have reached the age of reason and cannot be blame worthy in a case. The plaintiff concluded that albeit the 2nd defendant owed the plaintiff a duty of care, his duty cannot be of the same degree as that of the 1st defendant, since the 1st defendants were professionals and the sole company licensed by the authorities to install and distribute power hence, both defendants were liable jointly and severally but the plaintiff did not submit any proposals on the proportions of contributory negligence.

35. From the above exposition, it is not disputed that an accident did occur as described by the plaintiff and DW1, involving the plaintiff minor and that he sustained serious injuries as a

consequence thereof, as pleaded and proved in court. It is also not in dispute that the plaintiff minor aged 5 years at the material time could not have contributed to the accident as he had not reached the age of reason and cannot be blame worthy in a case, and neither was there evidence that the plaintiff minor had the right sense to know the danger posed by the power lines as conceded by the 1st defendant despite pleading in their defence that the plaintiff was negligent. It is therefore for this court to determine who between the 1st and 2nd defendants was to blame and in what proportions if at all.

36. As correctly submitted by the plaintiff's counsel, the primary duty of care with regard to all electric power installations is on the 1st defendant supplier of all electric energy in Kenya. And indeed, Section 52 of the Energy Act is clear that :

“ The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority confirmed by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by the loss or damage or breaking of any electric supply line, or by reason of any defect in any electric supply line.”

37. From the above statutory provision, there can be no question that the power company has a responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is not only properly maintained to prevent accidents but also that they take remedial measures where there is likelihood of risk to prevent any potential injury or damage. (See **KPLC Ltd V Joseph Khaemba Njoria** (supra).

38. From the evidence of DW1, and the investigation report produced as E exhibit 2; it is clear that the philosophy of the 1st defendant is “ *All accidents are preventable*” The question is was the material accident foreseeable and therefore was it preventable and if so by who?

39. The DW1 testified that after investigations, they blamed the 2nd defendant for constructing his building on the way leave. The court's visit to the scene indeed revealed that the 2nd defendant's building especially the balcony and the protruding metals were extending into the road reserve such that the 3 high voltage electric lines were at an arm's length. The metals however appeared to have been shortened a little after the accident otherwise the electric wires were at the same place they were as at the time of the material accident. The DW1 stated that they were to issue the 2nd defendant with a way leave infringement letters and to sensitize the public on the dangers of breaching the power line clearances. However, there was no evidence that from the time of accident on 17th December 2011 up to date of hearing of this suit in June 2015, the 1st defendant had issued any way leave infringement notice to the 2nd defendant and or demanded compliance or taken any legal steps against the 2nd defendant. In addition, the DW1 did admit that sometimes safety was never a factor during power installations. Third, is that DW1 admitted that there were alternative means of displaying power lines including installing underground cables which was more secure especially in the densely populated area like Kayole. He also conceded that the 1st defendant could also insulate the live wires albeit it was costly and that they would melt due to high voltage. From that piece of evidence, no doubt, the 1st defendant owed a higher duty of care to the occupiers of House No. A3-225 and all other residents in the vicinity wherein the plaintiff resided to ensure that high voltage live wires were not precariously displayed next to the buildings.

40. Since there is electricity supply to all the buildings on site as observed by the court, the 1st defendant must be regularly inspecting the lines or reading the supply meters for billing purposes. They therefore must have been aware of the potential risks posed to occupiers of those buildings by the high voltage naked lines hanging very close to the balconies, and ought to have taken remedial measures to mitigate the risk, loss and damage that was foreseeable. The 1st defendant breached that duty of care and there was no indication during the hearing that there was such future intention to minimize the risk of more people being electrocuted since wet clothes hung close to the said naked live wires from the occupiers' balconies, very

precariously. It is for those reasons that I find the 1st respondent liable for the accident, injury and loss and damage occasioned to or suffered by the plaintiff minor. On the other hand, the court finds that from the evidence on record as adduced by DW1 and the court's own observation upon visiting the site of the accident, the 2nd defendant was partially to blame for the accident. The balcony from where the court stood to observe the scene of accident and where the minor plaintiff stood when he was electrocuted is at an arm's length to the precarious live high voltage 3 electric wires. The balcony protrudes into the road reserve and therefore in the way leave of the 1st defendant. Albeit it was submitted that there was no evidence of way leave by the 1st defendant, this court finds that the 1st defendant could not have installed those power lines without way leave. In my view, where the electric power lines of high voltage pass near a building, there ought not to be such a balcony facing the high voltage lines. The balcony should be at the rear side of the building to reduce or minimize the risk of people being electrocuted. It is for those reasons that I find the 2nd defendant landlord owner of the premises from which the child stood at the balcony and was electrocuted to blame to the extent of 30% and the 1st defendant liable to the extent of 70%.

41. On the quantum payable, the plaintiff pleaded and testified that he sustained injuries involving:

- a. *Amputation of the right upper limbs and*
- b. *Burns on anterior abdomen.*

42. The above injuries were as per the medical report of Dr Moses Kinuthia who also found that indeed the minor sustained amputation of the right upper arm and skin grafting was done to cover the burnt injuries on the abdomen leaving scars. He was left with a 10 cm stump from the shoulder and 10 x 4cm scar on the right anterior abdomen. He was left with psychological trauma which is for a life time, low self esteem and will require a bionic arm to alleviate the loss of use of the arm which has a near natural arm, estimated at shs 5,000,000. His total permanent incapacity was assessed at 70% -seventy per cent. The plaintiff was admitted in hospital for 2 months where various modes of treatment were administered. He no doubt suffered pain. The plaintiff's counsel proposed a figure of shs 2,000,000 general damages for pain and suffering to compensate the pain and suffering, relying on the case of **Sofia Yusuf Kanyare V Ali Abdi Sabre & Another [2008] e KLR** where the plaintiff sustained loss of ten teeth, soft tissue injuries and amputation of the right upper arm. He was awarded Ksh 1,750,000 general damages for pain and suffering.

43. The 1st defendant proposed a sum of 300,000 under pain and suffering, relying on **Kisumu CA 46/2001 Messay Jaggery Ltd V Maurice Ochieng Maengo** where the respondent who sustained amputation of his left hand and arm at the level above the elbow joint was awarded shs 200,000 as general damages for pain, suffering and loss of amenities which sum was approved by the Court of Appeal on 17th July 2004. It also relied on **Nairobi CA 24/2005 Douglas Kafala Ombeva V David Ngama** where the appellant sustained fracture of right femur resulting in his right arm being amputated. The trial court awarded him shs 300,000 which the Court of Appeal enhanced to shs 500,000 on account that the trial court appear not to have taken into account loss of earning capacity. The 1st defendant also relied on **Nakuru HCC 99/2005 Peter Waka Tungani V Mathai Timber & Hardware Suppliers Ltd** where the plaintiff sustained an injury to the right hand resulting in amputation thereof at shoulder level. He was awarded shs 300,000 general damages for pain and suffering and loss of amenities on 17th November 2006.

44. The 2nd defendant on the other hand never made any proposals on quantum and simply urged the court to find that the 2nd defendant was not negligent. The plaintiff's injuries were also confirmed by Dr George Museve whose medical report was produced in evidence by consent. The court did view the minor who was in court throughout the proceedings.

45. Taking into account the authorities cited by the plaintiff's advocate and those cited by the 1st defendant, and considering that those authorities were made 9-15 years ago; and conscious of the fact that general damages are not intended to enrich an injured plaintiff but to put him back to the position he was before the injury, and considering inflation, I would award the plaintiff

Kshs 1,500,000 general damages for pain and suffering and loss of amenities. The plaintiff also pleaded damages for diminished earning capacity relying on the case of **Butler vs Butler [1984] e KLR 225**. Relying on the case of **Daniel Kuna Nganga V Nairobi City Council [2013] e KLR**, **Nancy Oseko V BOG Maasai Girls High School HCC 171B of 2009** where a multiplier of 20 years for a 23 year old girl was used and **Agatha Wanjiru Njuguna V Mary Wanjuki Ikiki & 3 Others [2006] e KLR** where the court used a multiplier of 25 years for a form 3 student, the plaintiff prayed for loss of diminished earning using the earnings of shs 10,954 x 30 years x 12 x 1/3 = 1,314,480 .

46. The 1st defendant submitted that there was no evidence of what the plaintiff would be earning or that he will be prevented from being the best he can be in any academic and professional discipline. It relied on **Peter Waka** case and submitted that the claim was too remote but nonetheless relied on **Mumias Sugar Company Ltd V Francis Wanala**, citing **Douglas Kafala Ombera** and proposed shs 100,000 taking into cognizance of the fact that the arm loss had limited the plaintiff options particularly with regard to physically involving careers like sports.

47. On this aspect of diminished earning capacity, the plaintiff's mother pleaded and testified that he was a bright child as shown by his school academic report forms produced. That he wanted to become a pilot when he grows up but that that dream has been dampened by the loss of the right hand. In **Cecilia W. Mwangi V Ruth W. Mwangi, Nyeri CA 251/96**, the Court of Appeal held that damages for diminished earning capacity can be classified as general damages but these have also to be proved on the balance of probability. It follows that the court can award loss of or diminished earning capacity where it is proved on a balance of probabilities. I am guided under this head by the decision in **Butler V Butler [1984] KRL 225** where it was held that:

1. *“ A persons’ loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury.*
2. *Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earning is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as a part of general damages .*
3. *Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now qualified separately and no interest is recoverable on them.*
4. *Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.*
5. *Loss of earning capacity or earning power may and should be included as an item within the general damages but where it is not so included, it is not proper to award it under its own heading.*
6. *The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualification of the claimant, his remaining length of working life; his disabilities and previous services if any.”*

48. Applying the above principles to this case, the plaintiff at the time of accident was only 5 years of age. He was at the time of hearing of this case 9 years, a very active and healthy boy, other than the disability of loss of his right hand and the scars on his thigh and abdomen caused by the burns which the court was shown. From the school progress report forms submitted to court, the plaintiff is no doubt a bright person who can live and achieve his dreams save that he cannot be a pilot, athlete or perform any duties that require both hands. He should have been able to fully work at least from age 25 to 60 years if not longer. But due allowance must be given for the uncertainties of life. I will therefore award him a multiplier of 20 years. As to his earnings, since the minor cannot be expected to be earning any income until he attains about 25 years, this court adopts the minimum wage of 10,954 proposed by the plaintiff's advocate.

49. Accordingly, I award damages in the sum of 2,628,960 for loss of earning capacity calculated as

follows: $10,954 \times 12 \times 20 = 2,628,960$. The plaintiff's advocate used a dependency ratio of $\frac{1}{3}$ which is not applicable in cases of persons who are alive. The plaintiff also pleaded for damages for future medical expenses in the sum of Kshs 5,000,000 being the cost of a bionic arm. According to Dr Moses Kinuthia, the plaintiff will need such arm replaced at least three times in his life time and that the bionic arm would be functional unlike prosthetic arm. Dr Kinuthia did not avail any evidence of the exact cost now and in future taking into account inflationary trends. This court expected the manufacturers or dealers price list since it is expected that the arm that the minor would use now as a minor would be different from the arm that he would use as an adult. It is however clear from the Doctor's medical report and testimony that the plaintiff will require a bionic arm to function. In the premise and in the absence of any evidence to the contrary, I award the plaintiff **Kshs 5,000,000** to cover the cost of three bionic arms in his lifetime.

50. The plaintiff also pleaded and produced receipts to prove special damages in the sum of **kshs 220,700**. I award him this figure I reject the figure of shs 10,000/- being Dr. Kinuthia's court attendance costs though proved, it was not pleaded and in any event, this was a cost of the suit being a witness expense and not a special damage.

51. Accordingly, I enter judgment for the plaintiff against the defendants jointly and severally as follows:

a. **Liability:**

- i. As against the 1st defendant 70%.
- ii. As against the 2nd defendant 30%.

- b. General damages for pain and suffering Kshs **1,500,000**
- c. Damages for diminished/loss of earning capacity Kshs **2,628,960**
- d. Costs of future medical expenses to wit, bionic arms Kshs **5,000,000**
- e. Special damages **Kshs 220,700**

Total Kshs 9,349,660

- a. Costs of the suit
- f. Interest on general damages at court rates from date of this judgment until payment in full.
- g. Interest on special damages (e) at court rates from date of filing suit until payment in full.

52. I further order that damages awarded for pain and suffering, diminished earning capacity and cost of future medical expenses shall be deposited in a joint Bank account operated by the minor's mother EW and the Deputy Registrar of the High Court and only interest thereof shall be utilized by the next friend towards the upkeep until he attains the age of 18 years or the case of the cost of future medical expenses until a bionic arm is found for purchase.

Dated, signed and delivered in open court at Nairobi this 30TH day of November, 2015.

R.E. ABURILI

JUDGE

30.11.2015

Coram R.E. ABURILI J

C.A. Adline

Ms Chepngetich holding brief for Ngunjiri for plaintiff.

Ms Onkoba holding brief for Mr Mege for 1st defendant

N/A for 2nd defendant

COURT- Judgment read and delivered in open court as scheduled.

Judgment to be typed.

R.E. ABURILI

JUDGE

Miss Onkoba - I pray for stay.

Miss Chepngetich - I do not object.

Court - there shall be stay of for 30 days.

R.E. ABURILI

JUDGE

30/11/2015