



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 539 OF 2004**

**JAMES JOSEPH**

**RUGHENDO.....PLAINTIFF**

**VERSUS**

**KENYA POWER AND LIGHTING CO.**

**LTD.....DEFENDANT**

**JUDGMENT**

The Plaintiff was injured while in the course of his duties on 1<sup>st</sup> October, 1998. He was employed by the Defendant as Graduate Engineer trainee. The injuries were occasioned from electrical shock due to the switch becoming live while he was repairing the same.

He suffered the following injuries:-

- a) *Damage to the radial, ulnar and median nerves;*
- b) *3<sup>rd</sup> degree electrical burns involving the palms and both legs. Total burn area being 40%;*
- c) *Below the knee amputation of the right leg;*
- d) *Amputation of the left big toe and part of the second toe.*

The Plaintiff has also specified the special damages and costs on future treatment.

The Amended Defence dated 16<sup>th</sup> November, 2006 denies liability of the Defendant.

On 12<sup>th</sup> May, 2011 the parties filed following consent, namely:

***“By consent Judgment be entered for the Plaintiff against the Defendant on the agreed liability of 90:10 ratio.***

***It is further agreed that future medical expenses shall be calculated from the date hereof.***

***By consent, the special damages are also agreed at the sum of Kshs.56,500/=.***

***The parties to file written submissions for general damages on the basis of two medical reports of Dr. M.P. Simiyu dated 25<sup>th</sup> February, 2005 and that of Dr. W.M. Wokabi dated 9<sup>th</sup> October, 2008.”***

On the same date a further consent order was recorded, namely:-

***“Further Order: By consent, the two aforesaid medical reports are properly on record to be considered by the court.”***

On 9<sup>th</sup> June, 2011 the quotations for right knee prosthesis and pay-slip of the Plaintiff were produced having deemed to have been duly filed.

The counsel then relied on their respective submissions.

The learned counsel for the Plaintiff included the claim of diminution in his earning capacity in the claim of general damages. The summary of the principles of the award of Damages concerning the said claim propounded by the Court of Appeal emerging from the case of **BUTLER V.BUTLER** (1984) KLR 225 were stated as under in the case of **Mumias Sugar Company Ltd. -vs-Francis Wanalo [2007] eKLR** as under.

***From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following principles, among others emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the Plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”***

The court was urged that the claim of diminution of earning capacity as found in the case of **Mumias** (*supra*) be awarded as part of general damages and that in this case it should be substantial because the Plaintiff has suffered 70 percent permanent disability.

The Plaintiff submitted that he should be awarded Kshs.5,000,000/- in general damages for pain, suffering and loss of amenities and the sum of Kshs.4,000,000/- for diminution of earning capacity.

In respect of the claim for cost and maintenance of the prosthesis a sum of kshs.800,000/- was proposed. It was submitted that as per the recommendation of the Chief Orthopaedic Technologist and Director, the Plaintiff shall need five more prosthesis which cost shs.160,000/- even in 2004. Accordingly a sum of Ksh.800,000/- was claimed. A sum of Ksh.120,000/- was proposed for maintenance of prosthesis at ksh.4,000/- per year for 30 years.

Lastly a sum of Ksh.1,800,000/- was proposed for the cost of hiring a domestic help for 30 years at ksh.5,000/- per month. However, it was conceded that such help will not be exclusively for the Plaintiff and thus the said claim was reduced to ksh.1,000,000/-

The Plaintiff also seeks the costs of the suit and interest as per law on the judgment sum.

The Defendant has submitted that on the basis of the following cases cited, the general damages for pain, suffering and loss of amenities a sum of Kshs.1,500,000/- shall be appropriate.

**A. HCCC No. 244/1998, Nakuru, Ahmed Mohammed Adan vs Jimmy Tumino & 2 Others. Justice Koome 13<sup>th</sup> October, 2006:**

***The plaintiff herein sustained amputation of the left lower limb below the knee joint, multiple fractures of the tarsal bones of the right foot and burns on the planter aspect of the foot, compound fracture of the right malleolus and dislocation of the right ankle joint, burns of the planter aspect of the right foot and stiffness of the ankle joint. The permanent incapacity was assessed at 70%. The court awarded a sum of Kshs.1,900,000/=. However, the injuries herein were more serious than those in this present case.***

**B. HCCC NO. 261/05, NAKURU, Janes Muriithi Mugo -vs- Francis Kimani & Another. Justice Koome, 9<sup>th</sup> November, 2007.**

***The plaintiff sustained bilateral below knee traumatic amputation and both legs were severely mangled and were not salvageable. The court awarded a sum of Kshs.2,000,000/= for pain and suffering.***

***Your ladyship, the plaintiff in this case also suffered more severe injuries than those suffered by the plaintiff in this present case as it involved both legs.***

**C. HCCC NO. 31/97 ELDORET, Fredrick Nabachenja –vs- Gian Singh Bandal. Justice R. Nambuye. 8<sup>th</sup> July, 1999.**

***The plaintiff herein suffered head injury, brain convulsion and loss of consciousness, multiple crush injury to the right leg leading to amputation of permanent disability was assessed at 70%. The court awarded a sum of Kshs.750,000/=for pain and suffering and loss of amenities.***

**D. HCCC 157/01, NAKURU. Samson Omari –vs- Simon Kamau and Another L. Kimaru J. 14<sup>th</sup> November, 2007**

***The plaintiff herein sustained injuries on the left leg was amputated below the knee, fracture and dislocation of the right ankle. He was awarded a sum of Kshs.1,500,00/=.***

As regards the claim of diminished capacity of earning it was submitted that the Plaintiff is employed by

the Defendant ever since the accident. He was also promoted along the years of employment. His salary is now Kshs.122,931/- which was Kshs.24,911/- as at the time of accident. Thus he has not shown any proof for the claim of diminished earning capacity. Even if it can be stated that the claim under this head is a part of general damages, the claim has to be proved with a substantive evidence, in absence whereof the claim cannot be granted.

In response to the claim of cost of replacement of prosthesis, it was submitted that the Defendant has always provided for the replacement and the medical expenses. Moreover, the prosthesis, since 1997, the year of the accident has been changed twice, the last being replaced in the year 2008.

The first was in the year 1998. The Defendant has undertaken to meet the expenses, in any event.

Similarly, as regards the claim for the cost for domestic help, it is submitted that the Plaintiff has not proved that he requires any help as a result of his injuries. It is stated that he is now almost independent, is driving and manages his affair. The court was urged to dismiss this claim.

I have considered the rival proposals and submissions along with the medical reports and authorities.

The Plaintiff did suffer serious injuries and the Defendant has admitted 90% liability for the same. The special damages in the sum of Kshs.56,500/- is also admitted.

As per the medical reports, the plaintiff suffered following injuries:-

1. *Bilateral electrical damage to the upper limbs Radial, Ulna and Median Nerve.*
2. *Third degree electrical burns involving the palms of both hands – Total burn surface area 40%.*
3. *Gangrene right leg just below the knee.*
4. *Gangrene left foot dorsal aspect, big toe and the 2<sup>nd</sup> toe.*

The physical examination done on 25<sup>th</sup> February, 2005 showed that his both hands are deformed and the small muscles of palms are grossly wasted. His right knee is amputated and he is using the prosthesis. The conclusion of the checking was as under.

**“Both his hands are grossly deformed and scarred due to the nerve damage as a direct result of the burns injury. Despite various rehabilitation procedure, the functions of the hands have been grossly compromised. He is unlikely to ever achieve apprehensile and facile functions of both hands. His right prosthesis requires replacement every six (6) years.**

**Hence the permanent residual incapacity**

**Right upper limb 15%**

**Left upper limb 20%**

**Below knee amputation right lower limb 30%**

**Loss of big toe and 2<sup>nd</sup> toe left lower limb 5%**

**Total percentage incapacity 70%”**

It is indisputable that the Plaintiff suffered serious injuries at an early age of his youth. His both hands are deformed and have been impaired to be used to their full capacity, the left leg is amputated and is now used with the support of prosthesis. I do note that although as per the medical report produced by the Plaintiff the same needs to be changed every six years, in reality they are changed twice as per the Defendant since the accident.

Considering the authorities and all relevant factors brought before the court, and doing best to alleviate the sufferings of the Plaintiff I shall give Kshs.3,000,000/- as the general damages inclusive of the diminishing capacity of earning noting that the Plaintiff has all along continued serving the Defendant. I also rely on the observation of *Lord Denning MR in Failey vs John Thompson Ltd. [1973] 2 Lloyd’s Rep 40 at page 41:*

**“it is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”**

In respect of the cost of prosthesis I shall grant the cost for two prosthesis as Defendant is expected to provide for upto the age of retirement of the

Plaintiff .Similarly I shall also provide for maintenance accordingly for 15 years.

I shall also grant a sum of shs. 400,000/- under the head of domestic help.

I shall give judgment for the Plaintiff in the sum of shs3,742,200/ - specified as under.

General damages .....	shs.3,000,000/-
Cost of prosthesis.....	shs.320,000/-
Maintenance .....	shs.60,000/-
Cost of domestic help.....	shs.400,000/-
Total.....	<b>shs3,780,000/-</b>
Less 10% liability of the Plaintiff.....	<u>shs 37,800/-</u>
The amount of the judgment.....	<b><u>shs3,742,200/-</u></b>

The Defendant shall pay costs and interest as per law.

Orders accordingly.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of October, 2011**

**K. H. RAWAL**  
**JUDGE**  
**24.10.2010**