



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
STEPHEN MALEVE PLAINTIFF
V E R S U S
KENYA POWER & LIGHTING CO. LTD DEFENDANT

J U D G M E N T

The plaintiff in this case prays for judgment against the defendant for –

1. *General damages*
2. *Special damages*
3. *Loss of future earnings at Kshs. 311/- per day with effect from 14th September, 2006.*
4. *Interest and costs of this suit.*

The claim arises out of an accident in which, by consent, the parties agreed to apportionment of liability at 40% and 60% in favour of the plaintiff. The matter came before this court for assessment of damages since liability was no longer an issue.

The plaintiff's case is that on 14th September, 2006, while on duty fixing electric wires on top of an electric pole, his special shoes slid as he was turning to work on a second line after completing work on the first one. He slipped and fell down. He was rushed and admitted to hospital where he remained until he was discharged on 22nd October, 2006. According to the medical report compiled by Dr. S. J. Chidagaya and produced as the plaintiffs Exhibit 1(a), the plaintiff sustained serious injuries. These were as follows –

- (a) *Spinal injury with paraparesis*
- (b) *Dislocation of right hip*
- (c) *Head injury*
- (d) *Pneumothorax of the right lung*
- (e) *Right drop foot*

According to the doctor's report, these were "very serious" injuries. By 26th October, 2006, the day of the 1st report, the plaintiff was bed ridden and could not do anything for himself. He was expected to continue with physiotherapy/treatment of drop foot for quite sometimes. Testifying in October, 2007, the doctor said that he saw the plaintiff on 4th June, 2007, and the plaintiff was still unwell and could not work. In his opinion, the plaintiff was completely disabled and would not be able to work.

In cross examination by Mr. Gor for the defendant, the doctor agreed that the plaintiff had improved between 26th October, 2006 and 4th June, 2007. As of the latter date, he was not bed ridden, and he could walk slightly although with some difficulty. He was certainly not "a vegetable", and in the doctor's opinion he may improve further. In re-examination by Ms. Osino, however, he ceded a little ground and said that the plaintiff may or may not improve, and that he was not sure.

In his own evidence, the plaintiff testified that when he was discharged from hospital, he could not walk. He was taken home and placed on the bed. As he was totally incontinent and unable to take care of himself, he was assisted by one Joel Matavuta who was employed for that purpose by the plaintiff's brother, Jacob Maleve. Matavuta is paid Kshs. 3,000/- per month, and Jacob Maleve expects to be paid back when the case is finalized. At the beginning, Joel Matavuta used to wash, clothe and feed the plaintiff in addition to doing all other household chores. This evidence was corroborated by that of Joel Matavuta himself, who stated that immediately after the accident, the plaintiff could not even go to the toilet and that he used "to do everything on the bed." Both the plaintiff and Matavuta conceded that times have slightly changed for the better. The plaintiff told the court that his condition had improved and that it is still improving. On his part, Matavuta said that whereas at the beginning he started assisting the plaintiff by feeding and helping with the toilet, these days the plaintiff can feed himself and also take himself to the toilets. His condition has changed for the better and he continues to improve. The witness also confirmed that he is paid Kshs. 3,000/- per month for services rendered to the plaintiff, and that he will continue to assist the plaintiff until the plaintiff recovers.

Against this background, the plaintiff's counsel, Ms. Osino, cited some authorities and urged the court to award damages as follows –

- (i) *Pain and suffering and loss of amenities* Kshs. 3,000,000.00
- (ii) *Loss of future earning capacity* Kshs. 1,679,400.00
- (iii) *Nursing care and domestic help* Kshs. 2,430,000.00
- (iv) *Special damages* Kshs. 4,000.00

On the other hand, the defendant's counsel, Mr. Gor, also cited some authorities and urged the following awards –

Kshs.

- (i) *General damages* Kshs. 1,250,000.00
- (ii) *Loss of future earnings* Kshs. 970,000.00
- (iii) *Nursing care and* Kshs. 432,000.00

domestic help

(iv) *Medical report* *Kshs. 2,000.00*

The authorities cited in support of the plaintiff's claim include MACKENZIE MWEKE ALFRED MUEKE v. NZUKI MUIA HCCC No. 4293 of 1987 (NBI) in which a 45 year old civil servant sustained a dislocation fracture of the 3rd and 4th cervical vertebrae as a result of an accident. He could neither walk nor stand, and was confined to a wheel chair for the rest of his life. He was rendered completely incontinent and no longer able to return to his job. He was also going to need nursing care or a helper for the rest of his life. The court awarded Kshs. 800,000/- by way of general damages for pain and suffering in a judgment delivered on 13th December, 1989. In MATHEW MULIRO v. JOHN MICHAEL O. NYAOGA & ANOR, Nairobi HCCC No. 4483 of 1988, a form II student aged 17 suffered total paraplegia of lower limbs, and was going to be confined to a wheel chair for life. By a judgment delivered on 8th April, 1992, he was awarded Kshs. 1,000,000/- as general damages for pain, suffering and loss of amenities. Finally, in JOHN HUGO KINYAKI v. CMC MOTORS GROUP LTD & ANOR, Nairobi HCCC No. 1366 of 1997, the plaintiff was aged 39 years at the date of the accident. He suffered fracture of the thoracic spine vertebrae at 74 and 75 level resulting in paraplegia of the lower limbs assessed at 100% permanent disability. He also sustained fracture of the right tibia and fibula at the ankle joint. His bowel and bladder functions were permanently affected. He was awarded Kshs. 1,500,000/- on account of general damages for pain, suffering and loss of amenities.

On the other side of the divide, in addition to relying on MACKENZIE MUEKE ALFRED MUEKE v. NZUKI MUIA (supra) the defendant's counsel also relied on ISABELLA KWAMBOKA v. HENRY WANGAHU & ANOR., Nairobi HCCC No. 3308 of 1986 in which the plaintiff, a lady aged 24 at the time of the accident, sustained a crush injury of the 12th thoracic vertebrae resulting in total paralysis in both lower limbs and both motor and sensory nerve loss. She also lost control of the bladder and bowels. She was confined to a wheel chair throughout her life and had to stop working. As general damages for pain, suffering and loss of amenities, she was awarded Kshs. 850,000/- on 7th January, 1988. Finally, in SAMSON KIPRUTO CHEBOU v. ELDAMA RAVINE DISTRIBUTORS & ANOR., Nakuru HCCC No. 165 of 1986, the plaintiff was 39 years at the time of the accident. He sustained a fracture of the spine with damage to the spinal cord resulting in loss of lower limbs (paraplegia). Thereafter he could neither control his bladder, nor was he able to move without the aid of appliances. He also became dependant on others for even basic needs. Permanent disability was assessed at 100%, and he was awarded Kshs. 1,000,000/- as general damages for pain, suffering and loss of amenities. The judgment therein was delivered on 27th October, 1989.

Coming back to the instant case, the plaintiff was confined in hospital for five weeks and two days or thereabouts. At the time of his discharge from hospital, he was totally dependent on others even for such a basic need as feeding. He could not even go to the toilet, and "... he would do everything on the bed." With time, he kept improving to the point where he is now able to feed himself, and even take himself to the toilet. However he walks with difficulty because he has weakness of the right leg (drop foot) and both hands, and whenever he walks the leg swells and he feels pain. Otherwise he is not able to do any work any more.

Most of the decided cases referred to herein above were decided about 20 years ago. The awards range between Kshs. 800,000/- and Kshs. 1,500,000/-. At that time, the shilling was much stronger than it is today. Given that the plaintiff is not a vegetable; that by the grace of God he might continue to improve; and that the shilling has considerably lost the value it used to command in the 1980's and early 90's. I consider that for general damages, pain and suffering and loss of amenities, an award of Kshs. 1,750,000/- is reasonable.

It was the plaintiff's evidence that between the time he was engaged by the defendants as a casual artisan in 2004 and when he was injured in 2006, he had worked everyday, including Sundays. His wages were Kshs. 311/- per day. For that reason, while Ms. Osino suggested a multiplier of 30 days per month for 15 years, Mr. Gor for the defendant suggested a multiplier of 26 working days per month for 10

years. In all fairness, since the plaintiff had worked everyday of the year from 2004 to the date of the accident, it would be unfair to exclude all Sundays from the calculation of loss of future earnings. For those few exceptional Sundays when he might not work, I find that a multiplier of 28 days per month would be reasonable. The plaintiff having conceded in cross examination that there was no certainty that he would work with the defendants till the ripe age of 60, I further find that a multiplier of 12 years would also be more reasonable. In total, I would therefore award the plaintiff the sum of Kshs. 311 X 28 X 12 X 12. That amounts to Kshs. 1,253,952/- on account of loss of future earnings.

It is agreed that the plaintiff will need the nursing services and domestic help possibly for the rest of his life. He is currently paying for these services at Kshs. 3,000/- per month. Ms. Osino suggested on this sub-head a multiplier of 27 years. With respect, this is on the higher side. I would still go along with my multiplier of 12 years for this item with which Mr. Gor agrees. I would therefore award him the sum of Kshs. 3,000X12X12 which totals Kshs. 432,000/- for nursing care and domestic help.

Finally, the plaintiff pleaded in the plaint special damages in the sum of Kshs. 2,000/- paid in respect of the medical report. However, from the evidence, he paid for 2 medical reports for which he paid Kshs. 4,000/-. Ms. Osino urged the court to amend the plaint under Section 100 of the Civil Procedure Act and award the sum of Kshs. 4,000/-. I am afraid this may not be done. The rule governing special damages is very clear. Such damages must be specifically pleaded and strictly proved. Although there is proof that he paid Kshs. 4,000/- for the medical reports, he pleaded only Kshs. 2,000/- and that is the sum to which he is entitled. He is also entitled to the sum of Kshs. 3,000/- being witness expenses for the doctor's court attendance. He is further entitled to Kshs. 3,000/- per month by way of special damages for nursing care and domestic help from November, 2006 until the date of judgment.

In sum, the plaintiff is entitled to the following awards –

- (a) General damages for pain and suffering
and loss of amenities 1,750,000.00
- (b) Loss of future earnings 1,253,952.00
- (c) Nursing care and domestic help 432,000.00
- (d) (i) Medical Report 2,000.00

- (ii) Nursing care from November 2006
to January 2009 81,000.00

TOTAL 3,518,952.00

Less 40% 1,407,580.80

2,111,371.20

I accordingly enter judgment for the plaintiff for-

- (i) *The sum of Kshs. 2,111,371.20*
- (ii) *Interest thereon at court rates from the date of judgment until payment in full.*
- (iii) *The sum of Kshs. 49,800/- (being 60% of the sum of Kshs. 83,000/- which constitutes special damages) shall attract interest at court rates from the date of the filing of the suit until the date of*

judgment.

(iii) *Costs of the suit.*

Dated and delivered at Mombasa this 13th day of March, 2009.

L. NJAGI

JUDGE