



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CIVIL CASE 238 OF 2004**

**J M A**

**(minor suing through the uncle and next friend**

**A A M).....PLAINTIFF**

**VERSUS**

**PAUL NJOGO KIHARA.....DEFENDANT**

**JUDGMENT**

**I: PROCEDURE**

1. When the Children's Act 2001 was passed it has brought great benefit to the plight and rights of the children. In the past a case such as is before me would have gone unnoticed. This case involves a minor male aged 9 years in 2003 who had his left forearm shredded in a grass shredding machine that belonged to the defendant, Paul Njogo Kihara. The children's officer investigated the circumstances and appear not to have come to any conclusion on the matter. They managed to ensure that the minor was treated medically and that he was enrolled in school.

2. The father to minor, sued as the next of friend to the minor. His name is J M A and the minor child is A A M. The grounds of suing was that the defendant had told the minor child to work. Part of this work was to shred the grass at the machine room, much to the annoyance of the plaintiff's father.

3. The plaintiff's father seeks, on behalf of the minor damages, future medical expenses, costs interest and any other relief that the court may deem fit to grant.

4. The hearing was held in camera because of the minor child.

**II: LIABILITY**

5. I am of the belief that both parties are misconceived in this suit as to the real issues in question. This suit is really one concerning TORT under the common law. It is not a matter of whether the defendant had ordered the minor to work or not. To my mind there is nothing wrong for children to work to earn a vocation during their spare time in order that they become responsible citizens. A child who works does so as part of her or his education. Where, on the other hand, the work exceeds the children's rights to education, to play and the rights to their basic rights then this becomes child labour and as such who ever is responsible should be compelled to stop and if they don't are to be punished.

## 6. How does TORT come into this case?

### Brief Back Ground

On the 28<sup>th</sup> of May 2003 the minor child said he was at the farm in which his father is employed as a milkman and a labourer cutting grass. This court found as fact that the plaintiffs father worked for the defendant. He was paid Ksh.2000/- a month but appeared to also be given milk by the defendant. He had two wives and children, the minor being one of them.

7. The task of the plaintiffs father as a labourer was to cut grass and milk the cows which he would deliver. The defendant had other workers.

8. All parties agreed that there was a grass cutting machine (chaff cutter) which was about 3 feet high. At the bottom was a shredding teeth to feed grass. An electrical switch to operate the grass machine was situated about 7 feet up. The whole machine was enclosed in a building that seem to have been built around the machine.

There was a door to this small building. The dispute before court was whether the plaintiffs father held the keys to this door or the defendant?

9. Nonetheless on the material day, the minor said he was called by the defendant who took him to the said machine room. It was the defendant who switched the machine then told him to feed in the grass. The defendant then left him doing this work. The minor, in the process of feeding in the grass had his left arm caught and shredded as if it was the grass. He screamed and was rescued and assisted.

10. His father stated that he was in the farm cutting grass. The defendants wife who gave evidence confirmed this. On hearing the screams they ran to the machine room. They found the minor having been injured.

11. The defendant on the other hand had an alibai.

On the material day he was indeed in the nearby town about 4 miles away. He was no where near the accident. He called a witness to this effect and also called a machine mechanic who repairs the machine. He, the mechanic stated he always obtained the keys from the plaintiffs father.

12. As stated earlier on, TORT is where one owes a duty of care to another. The said machine belonged to the defendant . He had a duty to take precaution to ensure that the said machine was safe to operate. I believe he did this by building a structure around the machine, by placing a door to the structure which is locked and by ensuring the switch is 7 feet above the ground that only an adult could reach it. The mechanic who came to give evidence confirmed all this to court but further confirms the grinding shredding teeth to the machine had no protective guard.

13. The fact that the minor was in the machine room, displays that the said minor was a frequent visitor to the machine room. If it is part of the policy NOT to allow children into the machine room whether adults are there or not, then minor would not have been there. If per chance warnings to children had been given, the liability on children is not imputed on them. A child is not held liable for the wrong committed by him. Under criminal law the age of responsibility is given. In civil laws the circumstances of a case is important to note, besides the age.

14. I would in this instance find that the minor was in the machine room. It was physically impossible for the minor to reach a switch at 7 feet high. The minors arm was shredded and caught in the machine. This action indeed speaks for itself.

15. Negligence herein is seen by the defendant failing to take adequate precaution and safety of the minor whilst in the said machine room. Any normal person possessing a dangerous machine should take reasonable care to ensure that there was a guard over the machine.

I hereby find that liability against the defendant be computed at 100% against the defendant.

## **II: QUANTUM.**

### **16. General Damages**

#### **i) Pain and suffering**

The minor was rushed to hospital. The defendant provided the funds for treatment at the hospital. As a result of the arm being shredded from below the elbow the same was amputated.

The medical doctor who examined the minor came to court and gave evidence.

17. Dr. P.M. Wambugu

MB Chb.M.Med (Surg) Nrbi.

Date of report 11.11.03

This doctor is not an Orthopedic doctor. It would have been advisable if the doctor specialized in bones would have seen and examined the minor.

18. The very brief report given by Dr. Wambugu herein consisting of one and half pages stated that the minor sustained a sharp crushing trauma due to the accident. He informed that there was an amputation of the elbow due to crushed bones of the fore arm and hand.

19. He further made recommendation that the degree of permanent incapacitation is 65%. That the young lad would require prosthesis Ksh.150,000/- and revision of the stump Ksh.75,000/-.

20. The advocate for the plaintiff prayed that this court awards Ksh.15 million. The advocate relied on the case law of:-

Evans Njoroge V Affiliated Business Hccc1695/96 Mbito,J.

The case concerned an industrial accident claim which an adult male had his right hand caught up in a machine and had to be later amputated at the level of the wrist. The judge awarded Ksh.300,000/-.

21. From the evidence before court, I find that the medical report wanting. It could have given more of a scientific finding on the injuries and the effects upon the minor. I had been shown the amputated forearm, the minor being present to court.

I would find that a fair award under this head is Ksh.500,000/-

The plaintiff's advocate submitted and spoke on to the heads of damages of:-

- a) Future Medical care
- b) Loss of earning
- c) Loss of future earning

23. It seems that in the plaint the plaintiff did not plead for these damages. A party is bound by their pleading. I would make no award under these claims. In the event that they were pleaded, the law requires I should state what my award would have been. (I note the prayer but not pleaded of further medical care).

**i) Future medical care**

The doctor said that the plaintiff would need regular check up. This he estimates at Ksh.75,000/-. The reasons being that the youth is growing and the strip would also grow.

There is no indication how these figures were arrived at and have only the doctors words. The advocate for the defendant said Ksh.100,000/- would be fair.

I would not make award under this claim

24. There was an indication of prosthesis for the minor. The doctor recommends Ksh.150,000/-. This figure come from the doctor without any estimation from the manufactures. I would not made award but as prosthesis is an option for the minor to work better the award of Ksh.150,000/- would have been given. The defendant said Ksh.30,000/- was fair and Ksh.40,000/- for an artificial arm.

**25. (ii) Loss of earning**

This claim would not arrive as the minor had never been in employment and paid. No award would be incurred.

**ii) Loss of future earning**

The plaintiff advocate sort an award of Ksh.3,200/- (being minimum wage) x 50 years x 12 = Ksh.1.6 million as a fair award.

The advocate for the defendant stated Ksh.270,000/- was reasonable being Ksh1,500 x 12.

26. I would have not awarded anything under this head. If it had been proved I would have had 3,000/- x 12 x 10/= Ksh.360,000/-. The plaintiff would have had 10 years to adjust to his situation.

I hereby dismiss these claim but enter judgment for the plaintiff on the proved heads of damages.

**III: Special Damages**

There was no claim under this head except for Ksh.1,500/- being the medical report fee. Their report fee was submitted by the doctor. The stamp duty was placed after the same was issued and without complying with section 20 of the stamp duty act.

I would find that this claim not to be awarded until compliance of the receipt be made with the collector of stamp duty, Ardhi house.

I hereby give the summary of this case as follows:-

1. TORT
2. Accident
3. Minor child male – aged 9 years old in 2003
4. Injuries:

Shredded left forearm resulting to amputation below left elbow

5. Liability:- 100% against the defendant

6. Quantum

I: General Damages

i) Pain and suffering Ksh.500,000/-

II: Special Damages

Medical report fee Ksh. 1,500/-

Subject to compliance with

Stamp duty act \_\_\_\_\_

Total Ksh.500,000/- only

7. Not pleaded and dismissed.

i) Future medical care

ii) Loss of earning

iii) Loss of future earning

I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this suit.

Dated this 27<sup>th</sup> day of May 2005 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

A. Kimathi & Co. Advocates for the plaintiff

R.W. Nganga & Co. Advocates for the defendant

Order: Further mention 31.5.05 at 8.45 a.m.

Mention notice to issue to both advocates.

**M.A. Ang'awa**

**Judge**

Order: Further mention 7.7.05 at 8.45 a.m.

Mention notice to both advocates for further orders

**M.A. ANG'AWA**

**Judge**

**17.6.05**