



**Nthuci v Kenya Power & Lighting Company Limited (Civil Suit
E001 of 2022) [2024] KEHC 1387 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL SUIT E001 OF 2022
LM NJUGUNA, J
FEBRUARY 14, 2024**

BETWEEN

SALESIO MACHARIA NTHUCI PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated 17th February 2022 in which he claimed that he was injured as a result of the defendant's negligence. The particulars of negligence were that on 26th November 2020, he was lawfully walking along Karie-Kabururu road when he was electrocuted by live electric cables negligently left lying bare on the ground by the defendant's employees, officers and/or agents. He is seeking judgment against the defendant for the following:
 - a. General damages for pain and suffering and loss of amenities;
 - b. Special damages of Kshs. 982,700/= plus interest thereon;
 - c. Damages for loss of earning capacity and permanent disability;
 - d. Costs of future medical expenses;
 - e. Costs of the suit; and
 - f. Interests on all monetary awards at court rates.
2. The defendant filed a statement of defense in which he denied the averments made in the plaint and attributed any negligence on the plaintiff, stating that he himself knowingly disregarded alternative routes and therefore touched the defendant's electric wires. The matter proceeded ex parte as the defendant failed to attend court on the day of the hearing.



3. At the hearing, PW1 was the plaintiff who adopted his statement as evidence-in-chief. He stated that on the said date, he was on his way to the shops when he touched live wires that had fallen by the roadside and he fell unconscious. That it was getting dark and visibility was poor so he did not see the fallen wires. That he regained consciousness at Embu level 5 hospital and he was referred to Kerugoya Level 4 Hospital before being referred to Our Lady of Lourdes Karira Hospital. He stated that he suffered serious burns on his chest and hands, which injuries led to amputation of his left hand. That since then, his life completely changed and he has not been able to do anything on his own. He produced medical reports by Dr. Koome Guantai, Dr. John Michuki and the P3 form as exhibits in the case. That according to Dr. Koome Guantai, he suffered 80% physical disability while Dr. John Michuki gave an account of future medical expenses to be incurred.
4. The court directed the plaintiff to file his submissions.
5. In his submissions, the plaintiff stated that the defendant is 100% liable for the accident given that it did not appear at the hearing and the plaintiff was not cross examined for purposes of rebutting the evidence adduced. On this argument, he relied on the cases of *Edward Muriga through Stanley Muriga v. Nathaniel D. Schulter*, Civil Appeal No. 23 of 1997 and *Chrispine Otieno Caleb v. Attorney General* (2014) eKLR. It was his argument that the doctrine of res ipsa loquitur is applicable in this case as the defendant's breach of its duty of care can be presumed through the events that occurred.
6. He also relied on the provisions of Sections 51 and 52 of the *Energy Act* 2006 and the case of *Kenya Power and Lighting Company v. Joseph Khaemba Njoria* (2005) eKLR and the principles laid down in the old case of *Rylands v. Fletcher* (1868) LR 3 HL 330, considering the fact that the defendant merely denied the facts in the plaint and did not prove that it exercised reasonable care to avert the accident. He relied on the case of *H.West and Son Ltd v. Sherpherd* (1964) AC 326 and stated that the court should award modest damages since no amount of money can restore the physical frame. That as a result of the accident, the plaintiff, who is a small scale miraa farmer, cannot continue with the business because his hand was amputated. That the burns and scars have also caused him physical and psychological pain and suffering and have interfered with his daily routine.
7. It was his argument that according to Dr. Koome Guantai's report, the plaintiff will need a myoelectric prosthesis for the left upper limb and that he suffered 80% permanent disability. He urged the court to follow the principles for assessment of general damages as laid down in the case of *Southern Engineering Company Ltd. v. Musingi Mutia* (1985) KLR 730. That for similar injuries, the courts awarded between Kshs. 4,000,000/= and Kshs. 4,500,000/= in the cases of *DA v. Kenya Power and Lighting Company Limited* (2021) eKLR, *FG (suing by his mother and next friend of CWK) v. Kenya Power & Lighting Company Limited & Another* (2022) eKLR and *AMK (suing as the mother and next friend of JMK-minor) v Kenya Power & Lighting Company Limited* (2020) eKLR.
8. He urged the court to award general damages of Kshs. 4,500,000/= given the trauma, the 3 month hospital stay, loss of a limb and the general nature of the injuries. It was his argument that he should be awarded future medical expenses, given the conclusions of both reports by Dr. Koome Guantai and Dr. John Michuki which show that the plaintiff will need further treatments and a prosthesis to restore him to his daily functionality. He placed reliance on the cases of *Kenya Bus Services Limited v. Gituma* (2004) 1 EA 91 and *Tracom Limited & Another v. Hassan Mohamed Adan* (2009) eKLR. That since the medical expenses cannot be ascertained with finality, he urged the court to consider and award the estimates provided in the medical reports. He relied on the case of *Hezron Waitbaka Ndarwa & Another v. Ezekiel Rubeni Maina* (2019) eKLR.
9. That Dr. John Michuki recommended a prosthesis worth Kshs. 10,000,000/= with an annual maintenance fee of Kshs. 100,000/=. That at the time of the accident, he was 30 years old and so



he proposed a multiplier of 35 years for the annual maintenance of the prosthesis. That a total sum of Kshs. 13,000,000/= would be modest for future medical expenses. He also relied on the cases of *Mumias Sugar Company Limited v. Francis Wanalo* (2007) eKLR and *Butler v. Butler* (1984) KLR 225 and urged the court to award him damages for loss of earning capacity using a multiplier of 35 years and a multiplicand of Kshs. 20,000/= and that a sum of Kshs. 4,200,000/= would suffice under this head.

10. That although he has not produced documentary evidence to support his claim, the same can be dealt with in accordance with the finding of the court in the case of *Jacob Ayiga Maruja & Another v. Simeon Obayo* (2005) eKLR. He urged the court to award special damages as they have been proved and he relied on the case of *David Bagine v. Martin Bundi* (1997) eKLR. That he should also be awarded costs of the suit under section 27 of the *Civil Procedure Act* and the case of *Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Another* (2016) eKLR.
11. The issues for determination are as follows:
 - a. Whether the defendant is liable for the injuries sustained by the plaintiff; and
 - b. Whether the plaintiff should be awarded damages as prayed.
12. In the plaint, the plaintiff stated that he was lawfully walking beside the road along Karie-Kabururu road when he was electrocuted by live electric cables negligently left lying bare on the ground by the defendant's employees, officers and/or agents. In his statement, he stated that it was at dusk and visibility was poor, therefore his path was not well lit. Liability is a matter of fact and should be ascertained from evidence. The court only recorded the evidence adduced by the plaintiff and this is to be subjected to the standard of proof which is on a balance of probabilities. I note that the defendant did not participate in the hearing and no reason was given for the same.
13. The Court of Appeal in *Micheal Hubert Kloss & Another v. David Seroney & 5 Others* [2009] eKLR relied on the case of *Stapley v. Gypsum Mines Ltd* (2) (1953) AC 663 at p. 681 where the court held as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”
14. The defendant's duty of care to the plaintiff is set out under Sections 51 and 52 of the *Energy Act* No. 12 of 2006 which states:
 - “ 51. Power of the licensee to enter land to inspect or repair lines
 - (1) After electric supply lines have been laid in accordance with this Act, the licensee or any person authorised by the licensee may,



from time to time as it becomes necessary, enter the land on which the electric supply lines are laid, with such assistance as may be necessary, for the purpose of inspecting or repairing the lines, or removing such lines in cases where the electric supply lines are no longer required.

- (2) Where electric supply lines are removed, the surface of the land shall forthwith be restored to its former condition as far as possible and in default thereof restoration may be carried out by the owner of the land, and the costs thereof shall be recoverable from the licensee.

52. Liability of licensee to make compensation for damage

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 conferred 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.”

15. This duty of care, when breached, places the liability for negligence on the defendant. According to section 53(5) and (8) the *Energy Act* No. 12 of 2006, the defendant bears the obligation of exercising due care in installing or removing its electric cables and where for any reason the wires are exposed or are lying along a street, the site should be secured/cordoned off and adequately lit. The provisions state:

“(5) Whenever a licensee carries out any work authorized by this section, he shall comply with the by-laws, if any, of the local authority concerned and shall complete that work with reasonable dispatch and reinstate the street broken up and remove any debris or rubbish occasioned thereby and shall, while the street is broken up or obstructed, cause the works to be, at all times, fenced and guarded and during the night, adequately lit.

- (8) Nothing in this section shall be construed as relieving a licensee of any liability in respect of any loss or damage caused by his negligence in carrying out such work or by his failure to comply with the provisions of this section.”

In the absence of rebuttal evidence, and going by the evidence that was adduced by the plaintiff, I am persuaded that the defendant is to be held 100% liable for the injuries and loss suffered by the plaintiff.

16. On the issue of quantum, I shall start with special damages which the plaintiff has prayed for Kshs. 982,700/=. This is the cumulative amount for medical expenses, medical reports and demand notice. Special damages must be specifically pleaded and strictly proved. From the receipts provided, there is a total of Kshs. 244,748/= paid to Our Lady of Lourdes Hospital and Nuclear Medical Laboratories. There is one receipt issued by Dr. Koome Guantai for Kshs. 10,000/= being payment for medical examination. The 2 receipts from Emajas Taxi Services are not signed and acknowledged as paid and so they will not be considered. There is also no proof of payment for the demand notice, therefore, the same will not be awarded under this head. Therefore, for special damages the court shall award Kshs. 254,748/=.



17. As for general damages for pain and suffering and loss of amenities, the medical reports show that the plaintiff was admitted in the 3 hospitals for a cumulative period of 3 months. During his hospital stay, he underwent treatment for the injuries which included amputation of his left arm. According to the report by Dr. Koome Guantai, the injuries sustained were as follows:
- a. 5th degree burns on the left forearm (burns extending deep into the bones of the forearm) and mixed 3rd and 4th degree burns to the arm;
 - b. Extensive mixed 2nd and 3rd degree burns to the torso on the left side;
 - c. Extensive mixed 2nd and 3rd degree burns to the right and left lower limbs; and
 - d. Loss of consciousness for 30 minutes after getting electrocuted.
18. In other cases where the plaintiffs suffered amputation of the upper limbs alongside other injuries, the courts decided as follows:
- (i) In the case of *Francis Kimani Kariuki v Hudson Wanambiri Kamulamba* (2005) eKLR the court awarded the Plaintiff Kshs 1,000,000 on this head for complete loss of his arm.
 - (ii) In the case of *Swaleb Sifuna Ali v Evans Maina & 2 Others* (2006) eKLR the court awarded the Plaintiff Kshs 1,300,000/- where the plaintiff lost his arm as a result of a traffic road accident.
 - (iii) In the case of *Robert Joseph Bandu v Falcon Coaches Ltd & Katana Kalume* (2008) eKLR, the Plaintiff lost his forearm in this case as well and suffered 70% disability. Similarly, the court awarded him Kshs 1,300,000/- on this head.
 - (iv) In the case of *Joseph Ibrahim Alasau v Steering Ship Contractors & Anor* (2008) eKLR, the Appellant had his arm amputated following injuries sustained while at his place of work. The Court of appeal awarded him Kshs 1,300,000/- on this head.
 - (v) In the case of *Grace Belinda Adhiambo v Bowers Okelo & Anor* (2017) eKLR the Plaintiff sustained injuries to her left arm which was amputated. The court awarded her Kshs 1,500,000 under this head.
19. I do note that the court made these awards many years ago and times have since changed, given the exigencies of inflation. However, there are more recent decisions on the same kinds of cases for instance in the case of *DA v Kenya Power & Lighting Company Limited* [2021] eKLR (*supra*), the court was faced with an identical set of facts and it awarded Kshs. 4,500,000/= as general damages for pain and suffering and loss of amenities. The court awarded a similar amount in the case of *FG (suing by his mother and next friend of CWK) v. Kenya Power & Lighting Company Limited & Another* (2022) eKLR(*supra*). The case of *AMK (suing as the mother and next friend of IMK-minor) v Kenya Power & Lighting Company Limited* (2020) eKLR(*supra*) the court awarded Kshs. 4,000,000/=. Being guided by precedence, I find that an award of Ksh. 4,000,000/= will suffice under the head of general damages for pain and suffering and loss of amenities.
20. The left upper limb was severed above the elbow following which the plaintiff underwent numerous debridement and skin grafting on the stump of the severed limb. The medical report showed that the plaintiff suffered grievous harm and will remain with 80% permanent disability and will need a myoelectric prosthesis. According to the report by Dr. John Muchoki, the stump is well healed and is ready to take a prosthesis. He recommended a myoelectric prosthesis which would include components parts, socket, sensor, terminal hooks and cables, totaling Kshs. 10,000,000/= and the unit would need to be maintained annually at a cost of approximately Kshs. 100,000/= .



21. On the issue of future medical expenses, from the evidence adduced, it is true that a prosthesis will go a long way in restoring the plaintiff's quality of life, even though the same does not compensate for his severed arm. In the case of AMK (Suing as the mother & next friend of JMK – Minor) v Kenya Power & Lighting Company Limited [2020] eKLR (*supra*), the court awarded a total of Kshs, 16,000,000/= for transportation, assembly and maintenance of a myoelectric prosthesis, when faced with similar facts. It was the plaintiff's submission herein that a total of KShs. 10,000,000/= would suffice for acquiring the prosthesis. Under this head, an award of 10,000,000/= is modest in the circumstances.
22. On the issue of loss of earnings, the plaintiff stated that he is a small scale miraa farmer and vendor. It was also his case that he used to assist other farmers in picking miraa from their farms. That due to the injuries he sustained, he will not be able to continue the farming and trade as it used to be before the accident. It is on this basis that he prayed for loss of earnings at the rate of Kshs. 20,000/= per month. He urged the court to consider this as a multiplicand and multiplier of 35 years, arguing that the plaintiff is likely to continue in his farming and business until the age of 65 years.
23. Loss of earnings is a relief under the head of special damages and the same must be strictly proved. This was the position taken by the Court of Appeal in the case of Cecilia W. Mwangi and Another v Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR. Additionally, in the case of Douglas Kalafa Ombeva v David Ngama [2013] eKLR it was held thus:

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”

The plaintiff has failed to prove loss of earnings and so the same will not be awarded by this court.
24. In the end, having considered the facts of the case, the evidence and arguments before the court and the relevant laws, I find that the suit partially succeeds with orders as follows:
 - a. The defendant is 100% liable for the accident;
 - b. The defendant to pay the plaintiff Special damages of Kshs. 254,748/= with interest from the date of filing the suit, that is 17th February 2022 until payment in full;
 - c. The defendant to pay the plaintiff General damages for pain and suffering and loss of amenities of Kshs. 4,000,000/= with interest from the date of this judgment until payment in full;
 - d. The defendant to pay the plaintiff Kshs. 10,000,000/= for future medical expenses;
 - e. The plaintiff shall have the costs of this suit with interest; and
 - f. Interests payable on orders (b) and (c) above to be at court rates.
25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

..... for the Plaintiff

..... for the Defendant

