



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Power & Lighting Co. Limited v Tuva (Civil Appeal E289 of 2022)  
[2024] KEHC 3335 (KLR) (Appeals) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
APPEALS  
CIVIL APPEAL E289 OF 2022  
AN ONGERI, J  
APRIL 5, 2024**

**BETWEEN**

**KENYA POWER & LIGHTING CO. LIMITED ..... APPELLANT**

**AND**

**ROISE KALIYO TUVA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. H. M. Nyaga  
(CM) in Milimani CMCC No. 408 of 2020 delivered on 14/4/2022)*

**JUDGMENT**

1. The respondent was the plaintiff in Milimani CMCC No. 408 of 2020 where she sued the appellant seeking the general damages for injuries the respondent sustained when she was electrocuted while in her house on 22/09/2017.
2. The parties entered into a consent and apportioned liability at 80:20% in favour of the respondent against the appellant.
3. The trial court assessed damages as follows  
General damages 1,500,000  
Loss of earning capacity 4,800,000  
Less 20% contributor  
Negligence 5,040,000  
Plus special damages 464,060  
Total 5,604,060



4. The appellant has appealed against quantum on the following grounds;
  - i. That the learned trial magistrate erred in law and in fact in awarding Kshs.4,800,000/= for damages on loss of earnings which was not specifically pleaded in the plaint and proved so as to amount to a miscarriage of justice.
  - ii. That the learned trial Magistrate erred in law and fact by failing to give a reasoned judgment on the loss of future earning capacity and or diminished earning capacity pleaded in the Plaint.
  - iii. That the learned Trial Magistrate erred in law and in fact in failing to give a distinction between loss of future earning capacity and loss of future earnings in his judgment.
  - iv. That the learned Trial Magistrate erred in law and in fact in disregarding the Appellant's submissions and judicial authorities on compensation of loss of earnings with the resultant miscarriage of Justice to the appellant.
  - v. That the learned Trial Magistrate's erred in awarding damages on loss of earnings without considering the medical evidence before the Court in particular the medical report by Professor Khainga and Dr. Wambugu where the degree of permanent incapacitation was assessed at 60% and 10% respectively and as such the trial Magistrate failed to appreciate that the Plaintiff can still engage in other income generating activities as she is not 100% incapacitated.
  - vi. That further to the above, the learned magistrate erred in Law and fact in awarding loss of future earnings based on 100% disability and failed to take into account that the Plaintiffs permanent disability was not 100%.
  - vii. That the trial Magistrate erred in law and in fact in adopting a monthly income of Kshs.20,000/= which was excessive and not supported by any evidence on record.
  - viii. That further to the above, the trial Magistrate erred in law and in fact in adopting a monthly income of Kshs.20,000/= to compute loss of earnings without giving reasons how he reached at the said amount and disregarding the trite law that damages for loss of future earnings are awarded for a real assessable loss proved by evidence and the Respondent/ Plaintiff's exact income in this case was not adequately proved at the trial court.
  - ix. That the trial Magistrate erred in law and in fact in adopting a multiplier of 20 years yet no evidence was led during the hearing as to the age of the Plaintiff.
  - x. That the trial Magistrate erred in law and in fact in adopting a multiplier of 20 years which was excessive in the circumstances.
  - xi. That the learned trial magistrate erred in law and in fact in failing to subject the award for special damages to contributory negligence.
5. The parties filed written submissions as follows; the appellant submitted that the plaint dated 18/12/2019 the respondent pleaded for general damages for loss of future earning capacity and not loss of future earnings.
6. That the trial court therefore erred in awarding the respondent Kshs. 4,800,000 under the same head. The appellant argued that loss of future earning capacity is also called diminished earning capacity which is awarded by an award in general damages once proved.



7. That it was stated in *Ndoro Kaka Kakondo v Salt Manufacturers K Limited* [2016] eKLR;

“Damages for Zoss of future earning capacity and/or diminished earning capacity, unlike damages for loss of earnings, is a type of remedy based on the claimant's potential earning power. It focuses on the claimant's ability to earn income. The remedy is granted based on the difference in potential earning power, not on what the claimant actually earned in the past. Even if a person is unemployed at the time the injury occurs, he would be entitled to pursue damages for loss of future earning capacity or diminished earning capacity. This item is therefore treated as general damages, which though not required to be specifically proved, must be proved on the balance of probability”
8. The appellant submitted that the trial court erred in law and in fact in failing to distinguish between loss of future earnings and loss of future earning capacity. The trial court in its judgement used the terms interchangeably yet the two are different. That further having established that the respondent did not plead loss of earnings the trial misapprehended the applicable principle while making its award.
9. The appellant submitted further that the respondent produced medical reports dated 23/1/2018 which Prof Khainga awarded 60% degree of permanent incapacitation and another dated 5/10/2018 which Dr. P. M. Wambugu awarded the respondent 10% permanent incapacitation without calling the makers to court.
10. The appellant argued that the respondent is not 100% incapacitated to entitled her to an award using the multiplier/multiplicand approach. The respondent did not provide any tangible evidence to prove that from the date of the electrocution she has not been able to engage in any gainful work. The claim for loss of future earning was therefore not proved.
11. The appellant further argued that the trial court erred in adopting Kshs. 20,000 as the multiplicand. The respondent did not produce income tax returns or audited accounts to prove her net income. The respondent further testified that she operates a wine and spirit shop and an mpesa shop. However, she did not produce a licence and or any documentary evidence to prove the existence of the said business.
12. The appellant contended that the trial court erred in adopting a multiplier of 20 years yet no evidence was led during the hearing as the age of the respondent. The appellant proposed a multiplier of 10 years would be sufficient.
13. The appellant argued that the general damages awarded was excessive. The respondent in this case sustained 3<sup>rd</sup> degree burns and the prognosis by Dr. Wambugu indicated that upon examining the Respondent, he did not elicit any loss of memory, eye cataracts or altered mental status. He also noted that the Respondent had residual scarring of both palms and also on both thighs which scars are of significant cosmetic concern.
14. Dr Wambugu indicated that the respondent's grasping ability is normal and though she indicated that she involuntarily drops held objects it was not elicitable.
15. In light of this the appellant proposed an award of Kshs 600,000 under this head. In support the appellant cited *Mary Wairimu Njuguna v Kenya Power & Lightining Company Limited* [2018] eKLR where the appellant in this case was awarded Kshs. 500,000 for electric burn on the right arm, blisters on the dorsum of the right hand, eye injury with bi lateral conjunctivitis and reduced visual acuity on both eyes, acute kidney shut down, contusion and bleeding on the lower back and light nerve damage on the left lower limb.



16. The respondent on their part submitted that the nature of the injuries sustained by the respondent were clearly captured in her evidence produced before the trial court in form of Treatment records from Aga Khan Hospital; Diagnosis report by Prof Paul G. Kioy and a Medical report by Prof Stanley Ominde Khainga.
17. Further, that the said medical records confirmed that the plaintiff sustained the following injuries:
  - (i) 3rd Degree electrical burns;
  - (ii) Permanent incapacity in terms of neurological status of her hands,
  - (iii) Chronic headaches and dizziness;
  - (iv) Permanent incapacity of 60%;
  - (v) Skin grafting operation conducted on her;
  - (vi) Loss of sensation and reduced power in the hands;
  - (vii) Effacement of her fingerprints;
  - (viii) Scars on both palms of her hands;
  - (ix) Ugly hypo pigmented scars Right lumbar, and iliac areas of her abdomen and Ugly hypertrophic scars on anterior upper half of her thighs including the skin grafted areas and donor sites.
18. The respondent submitted that the award of Kshs. 1,500,000 was not an error pursuant to comparable cases, specifically *Kenya Power & Lighting Co Ltd v Emmanuel Shapil Ndege & another (NCCK)* [2019] eKLR where the appellate court upheld an award of Kshs 3,002,000 as general damages for pain and suffering in favour of the plaintiff who had suffered severe electrical burns on his body sustaining disability of the elbow joints and left wrist.
19. On loss of future earning capacity the respondent submitted that she pleaded and prayed for damages for loss of earning capacity and or diminished earning capacity. The respondent argued that there is no requirement for specifically pleading for loss of future earning capacity. All the law requires is proof on a balance of probability for the claim to be allowed.
20. The respondent submitted that respondent's claim was for damages for loss of earning capacity. Hence, any reference to "loss of earnings" either in our submissions or the lower court judgment must have been borne in error. In any event and rightly so, the trial court did award damages for loss of future earning capacity (diminished earning capacity).
21. The respondent submitted that there is no formula cast in stone for assessing loss of earning capacity and that the courts have employed an interchange of multiplicand approach and the global award approach depending on the circumstances of the case.
22. It was the respondent's submissions that the lower court judiciously exercised its discretion in employing the multiplicand approach. As to proof of earning the respondent provided proof of earnings where she produced her bank statements to confirm transactions she used to make during the period she was working.
23. On special damages the respondent submitted that she agrees with the appellants that there was an error or mistake on the part of the trial court. In as much as there is merit on this ground, the appellant



- should have sought to review the said decision rather than waste this court's time in the web of an appeal.
24. The trial court considered both submissions as follows; on general damages the trial court considered *H.West & Son Limited v Shepherd* (1964) AC 326 that highlighted that general damages ought to be reasonable and at the same time should aim at some form of uniformity as much as possible so that comparable injuries should be compensated by comparable awards. Based on this the trial court awarded Kshs. 1,500,000 adequate under his head.
  25. On loss of future earnings the trial court found that the respondent had met the required burden of proof which is to prove loss of future earnings on a balance of probabilities. The trial court estimated the respondent's earnings at Kshs 20,000 and that she was at a relative age of 29. A multiplier of 20 was adopted and thus loss of earning capacity was  $20,000 \times 12 \times 20 = 4,800,000$
  26. On special damages the trial court added up the receipts provided to the sum of Kshs. 464,060.
  27. This being a first appellate court, the duty of the first appellate court is to re-evaluate the evidence adduced before the Trial court and to arrive at my own conclusion whether to support the findings of the Trial court while bearing in mind that the Trial court had the opportunity to see the witnesses.
  28. The sole issue for determination in this appeal is whether the Trial court made an error in the assessment of damages.
  29. The appellant submitted that the Trial court made an error in failing to give a distinction between loss of future earning capacity and loss of future earnings in the judgment.
  30. The appellant also stated that the court failed to subject the special damages to contributory negligence.
  31. I find that it is not in dispute that the respondent suffered the following injuries;
    - a. 3rd degree electrical burns
    - b. Permanent incapacity in hands
    - c. Chronic headaches and dizziness
    - d. Hypertrophic and hypo pigmented scars
    - e. Effacement of fingerprints.Permanent incapacity of 60%
  32. I have considered the following comparable authorities;
    - a. *Bernard Mutuku Kimolo v East African Growers Limited* [2018] eKLR where the respondent was electrocuted and suffered severe burns on scalp and forehead with loss of sight in the left eye. Liability was maintained at a ratio of 50:50 and Kshs. 1,500,000 maintained as general damages.
    - b. *FG (Suing By His Mother and next friend of CWK v Kenya Power & Lighting Co. Limited & another* [2022] eKLR the court awarded Kshs. 4,500,000 for substantial burns on the right arm and lasting scars caused by electrocution.
  33. The appellant is aggrieved that the trial magistrate erred in awarding Kshs.4,800,000/= for damages on loss of earnings which was not specifically pleaded in the plaint and proved so as to amount to a miscarriage of justice.



34. Further, that the learned trial Magistrate erred in law and fact by failing to give a reasoned judgment on the loss of future earning capacity and or diminished earning capacity pleaded in the Plaintiff.
35. I have perused the plaint and I find that in paragraph 10, the respondent pleaded as follows;
- “The plaintiff avers that she was aged 28 years and engaged in a business operating a wine and spirit shop together with an Mpesa shop earning her approximately Kshs:60,000/= per month and by reason of the said accident she has been unable to resume her economic activities and has suffered and continues to suffer loss and damage. Due to the incapacitating injuries she sustained in the said accident, together with a prolonged hospital admission caused her business to fail, she has been unable to resume effectively to compete has been greatly curtailed and she claims damages for loss of future earnings capacity as the degree of functional disability was assessed at 60% further requires a lifetime treatment owing to her condition.”
36. I find that paragraph 10 pleaded the issue of loss of future income. I agree with the appellant that loss of future income is not the same as the loss of future earning capacity and/or diminished earning capacity pleaded at paragraph 13(c) of the plaint.
37. In my opinion the trial court ought to have awarded the respondent both general damages for loss of future earning capacity or diminished earning capacity and loss of future income pleaded in paragraph 10 of the plaint.
38. In the case of *Nyatogo v Mini Bakeries Limited* (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR) (10 March 2023) (Judgment), the court held as follows;
- “Diminished earning capacity refers to decrease in a person’s earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.
35. Usually, loss of earning capacity is concerned with the effect of the injury on the person’s future earning ability as opposed to the present loss.
36. However, it is the responsibility of the respondent to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future in order to get an award under that head.
37. Such a claim should then be evaluated by the court based on the nature of the injury vis-vis the type of work done by the person, his age, how long the injuries might last, the degree of incapacity and such other factors. In short, the court must show how it has arrived at that amount, it not just by coming up with a random figure”.
39. The trial court estimated the respondent’s earnings at Kshs 20,000 based on what was pleaded in paragraph 10 and found that the respondent was at a relative age of 29. A multiplier of 20 was adopted and thus loss of earning capacity was  $20,000 \times 12 \times 20 = 4,800,000$ .
40. The respondent testified as PW1 and her testimony was not controverted by the appellant. She produced her bank statements to prove she was earning an income which she lost as a result of the injuries sustained.



41. She said in her testimony before the Trial court at page 280 of the record of appeal that her income amounted to Kshs.70,000 per month.

42. In the case of *Alpharama Limited v Joseph Kariuki Cebron* [2017] eKLR stated thus:

“...To assess loss of earning capacity in the future, the court must consider to what extent the claimant’s ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the “multiplicand”), which is the annual loss of earnings. The multiplicand will then be multiplied by a “multiplier”. The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired..... On the same vein the multiplier approach is just but one aid the court applies in assessment of damages. It is not the only one. The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors....”

43. In view of the above authorities, I find that the Trial court had a basis for adopting the multiplicand approach in assessing damages for loss of earnings.

44. The respondent was 28 years old and a multiplier of 20 years was not excessive. The respondent’s evidence was that she was earning Kshs. 70,000 per month. She pleaded Kshs. 60,000 at paragraph 10 of the plaint and I find that the multiplicand of Kshs. 20,000 adopted by the Trial court was reasonable.

45. I agree with the respondent’s submissions that there is there is no formula cast in stone for assessing loss of earning capacity and that the courts have employed an interchange of multiplicand approach and the global award approach depending on the circumstances of the case.

46. The special damages awarded were in respect of actual loss incurred by the respondent and there is no indication that the parties agreed that the same be subjected to contributory negligence.

47. I find that the appeal herein has no merit and I dismiss it with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

**A. N. ONGERI**

.....

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

