Kenya Power & Lighting Company Limited v IO Minor Suing Through His Next Friend and Father GIO (Civil Appeal E532 of 2021) [2024] KEHC 7845 (KLR) (Civ) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 7845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E532 OF 2021

DAS MAJANJA, J

JULY 2, 2024

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT

AND

IO MINOR SUING THROUGH HIS NEXT FRIEND AND FATHER GIO ..... RESPONDENT

(Being appeals from the Judgment and Decree of Hon. B.J. Makori,CM dated 19th December 2018 at the Magistrates Court at Milimani, Nairobi in Civil Case No.2308 of 2017)

JUDGMENT

Introduction and Background

1. By a plaint dated 30.03.2017, the Respondent filed suit in the Subordinate Court claiming that on 26.08.2015, he was visiting a neighbor in pipeline estate, Nairobi when he was electrocuted by a live electric wire causing injuries including amputation of the toes of the left foot, amputation of the right forearm, severe burns to the scalp and burns to the left thigh. He further averred that he lost his right forearm and suffered 100% disability which required him to be fitted with a bionic arm, that he suffered and continues to suffer severe mental agony and physical pain and that he has been permanently incapacitated on account of the injuries. He claimed that the injuries had diminished his earning capacity and that before the accident, he was healthy, vibrant and intelligent who enjoyed a vigorous normal life and that he aspired to become an engineer when he became of age. He thus claimed general and special damages.

2. In response, the Appellant filed a defence generally denying the Respondent's claim. In the alternative and without prejudice, it averred that the accident was caused wholly or substantially by the negligence of the Respondent. That the Respondent exposed himself to danger and knew or ought to have known

that the accident was inevitable in the circumstances. The Appellant thus relied on the doctrine of *Res Ipsa Loquitor*. It denied the injuries suffered by the Respondent or liability for the same and thus urged the court to dismiss the suit against it.

3. At the hearing the Respondent (PW 2) testified on his own behalf and called his father Gad Imayi Okisai (PW 1) as his witness. The Appellant did not call any witnesses but it produced the medical report of Dr. Maina Ruga dated 27.09.2017 with the consent of the Respondent. In the judgment rendered on 19.12.2018, the Subordinate Court found the Appellant 100% liable for the accident and also awarded him Kshs. 2,200,000.00 as general damages while relying on the case of *Umoja Rubber Products Limited v Bobson Rimba Lewa* [2015]eKLR. On damages for reduced earning capacity, it relied on *CM (a minor suing through mother and next friend MN v Joseph Mwangangi Maina* [2018]eKLR and awarded Kshs. 800,000.00. The learned magistrate awarded Kshs. 42,500.00 which were pleaded as special damages.

4. Both parties are dissatisfied with this judgment of the Subordinate Court and have appealed against it. The Appellant, through its amended memorandum of appeal dated 06.10.2022 appeals against the finding of both liability and the award of general damages. On his part, the Respondent appeals against the findings on damages for diminished earning capacity and its failure to award damages for future medical expenses and damages for loss of cosmetic value. The appeals have been canvassed by way of written submissions which I have considered and will make relevant references to in my analysis and determination below.

Analysis and Determination

5. As this is a first appeal, I have a duty to re-evaluate and re-assess the evidence before the subordinate court and at the same time, keep in mind the fact that the trial court interacted first hand with the parties (see *Selle v Associated Motor Boat Co.* [1968] EA 123).

6. I propose to first deal with the appeal on liability before dealing with the grounds on quantum. The Appellant submits that factoring in the Respondent's age of 15 at the time of the accident, he ought to have foreseen the danger he was exposed to and taken measures to avoid the accident and as such, he was partially to blame for the accident and the Appellant urges the court to award liability at 50:50 between the parties.

7. I am in agreement with the Respondent's submission that at the trial court, the Appellant did not lead any material evidence to enable the court arrive at a different determination on this issue of liability. Even though it filed a defence, the Appellant did not call any witness or produce any evidence in respect of liability. The effect of a defendant filing a defence but not calling evidence to challenge a plaintiff's testimony renders not only the defence unsubstantiated but also leaves the plaintiff's case unchallenged (see *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR).

8. The Respondent testified that he stepped on a live wire and was electrocuted. PW 1 gave evidence that the accident occurred at around 7 pm and that he reported the same to the Appellant's representative. When PW 1 visited the scene, he found live wires attached near the balcony from the transformer. This evidence was not challenged and there was no evidence from the Appellant of contributory negligence on the Respondent's part. It is clear that the Respondent could not have avoided the live wire which the Appellant had a duty to ensure was not a danger to members of the public. I hold that the Subordinate Court did not err in finding the Appellant fully liable.

9. Turning to the appeal on quantum, the general principal is that the assessment of damages is within the discretion of the trial court and an appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was

too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (See *Kemfro Africa Limited t/a "Meru Express Services (1976) & another v Lubia & another* (No 2) [1985] eKLR, *Peter M. Kariuki v Attorney General* [2014] eKLR and *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5)

10. The Appellant appeals against the sum of Kshs. 2,200,000.00 awarded by the Subordinate Court as general damages. It contends that it is too high and that it should be reduced to Kshs. 1,500,000.00. In making an award in respect of general damages, a court should also be mindful to make fair and consistent awards in line with the principle that similar injuries must attract similar awards (see *Maore v Geoffrey Mwenda* [2004]eKLR).

11. It was not in dispute that the Respondent sustained deep laceration wounds on the occipital scalp, 4th degree burns on the right forearm with subsequent gangrene and amputation and burns on the left foot with amputation of all toes. Before the Subordinate Court, the Respondent proposed a sum of Kshs. 2,000,000.00 and relied on the case of EW(suing as the next friend and mother to *BM (a minor) v Kenya Power and Lighting Company Limited and another* [2015]eKLR. On its part, the Appellant proposed Kshs. 500,000.00. It relied on the case of *JMA (minor suing through the uncle and next friend AAM v Paul Njogo Kihara* (2005)eKLR. The Subordinate Court relied on *Umoja Rubber Products Limited v Bobson Rimba Lewa* (*Supra*) to award Kshs. 2,200,000.00. Going through the aforementioned authorities, I find that the Respondent provided an authority that had injuries that were almost similar to those he suffered as they related to burns and amputations and bore more relevance as it involved a minor electrocuted as a result of the Appellant's negligence. I find that the authority relied on by the subordinate court was not cited by either party and misled the court to even award a sum that was higher than what was proposed by the parties themselves without any justification. This was an error in principle hence I substitute the sum of Kshs. 2,200,000.00 with Kshs. 2,000,000.00 proposed by the Respondent.

12. The Respondent appeals against the sum of Kshs. 800,000.00 awarded as reduced earning capacity. He submits that this amount is low as the Subordinate Court failed to consider relevant facts such as the age of the minor at the time of the accident, the Respondent's health and vibrancy, report forms and the minor's career aspiration. Further, that the trial court failed to consider and apply the formula for calculating reduced earning capacity as submitted by the Respondent and applied in the case of *EW (suing as mother and next friend of BM)* (*Supra*). The Respondent had proposed Kshs. 2,628,960.00 based on the minimum wage of Kshs. 10,954.00 as the multiplicand and 20 years as the multiplier. In its judgment, the Subordinate Court agreed and held that the Respondent's injuries had reduced his capacity to pursue some careers and had therefore reduced his future earning capacity. However, it applied a "global/conventional" award as opposed to the multiplier award proposed by the Respondent. It relied on the case of *CM (a minor suing through mother and next friend MN v Joseph Mwangangi Maina* (*Supra*). While the Respondent faults the Subordinate Court for not adopting the multiplier approach that it had proposed, there is no uniform method of assessing damages for loss of dependency and that a court has discretion of choosing to go the "multiplier" route or the "global/conventional" award route. Indeed, this court has held that a trial court cannot be faulted simply because of choosing one way as opposed to the other (see *Kenya Power & Lighting Company Limited Vs E.K.O & Another* [2018]eKLR and *Abraham v Kuira* [2023] KEHC 1740 (KLR)). Further, in *Albert Odawa v Gichumu Githenji* [2007]KLR Ringera J., stated that the multiplier approach is only useful and practical "…. where factors such as the age…., the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation". I therefore hold that the Respondent's proposal was quite speculative considering he was a minor and it was safer for the trial court to proceed and award a global sum. I do not find any error in this respect.

13. The Respondent also faults the Subordinate Court for failing to award him damages for loss of cosmetic value despite the evidence adduced. That the trial court failed to give reasons for failing to do so and the Respondent submits that this was in error on the part of the Court. That given the nature of the injuries, the Respondent deserves damages for loss of cosmetic value and thus prays for loss of cosmetic value in the sum of Kshs. 200, 000.00. In my view, the loss of cosmetic value is not a separate head of damages but is subsumed under the rubric of general damages for pain, suffering and loss of amenities.

14. Finally, the Respondent submits that the Subordinate Court failed to consider the Respondent's prayer for future medical treatment. That in the medical report produced in evidence, Dr.Kinuthia recommended that the Respondent be fitted with a bionic arm at an estimated cost of the Kshs. 7,000,000.00. That the trial court disregarded this vital piece of evidence which the Respondent addressed in their closing submissions but the trial court failed to consider it thereby failing to award it. The Respondent thus urges the court to award him Kshs 7,000,000.00 as damages for future medical treatment. From the record, the doctors' reports indicated that the Respondent would require a prosthetic limb replacement. Whereas the Respondent submits the medical report of Dr. Kinuthia indicated that the said bionic arm would be at an estimated cost of Kshs. 7,000,000.00, my perusal of the said report does not indicate anything of the sort. The Respondent did not substantiate this prayer and the Subordinate Court could only make this award based on the evidence before it regarding the costs of the subject prosthesis and the evidence of the medical reports produced (see *Dancan Kinyua & another Boniface Kigunda* [2020] eKLR). This ground by the Respondent fails.

Disposition

15. The net effect of my findings above is that the Appellant's appeal succeeds to the extent that the sum of Kshs. 2,200,000.00 awarded by the Subordinate Court as general damages is substituted with an award of Kshs. 2,000,000.00. The Respondent's cross-appeal fails in its entirety. The Respondent shall bear costs of both appeals assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JULY 2024.

D. S. MAJANJA

JUDGE

Mr Modi instructed by Modi and Company Advocates for the Appellant.

Mr Oluoch instructed by Ng'ani and Oluoch Advocates for the Respondent.