



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**High COURT CIVIL APPEAL NO. 25 OF 2016**

**CK.....APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING LTD....RESPONDENT**

**(An Appeal from the Judgment and decree in Bungoma CMCC 69 of 2014 delivered on 10.5.2015 by Hon. J. King'ori Chief Magistrate)**

**JUDGMENT**

The Appellant CK (minor suing through next friend and father EMK) sued the Respondent Kenya Power & Lighting Co. Ltd seeking:

- a. General damages**
- b. Special damages**
- c. Damages or a helper, costs of an artificial hand, loss for failure to join a profession of his choice and damages for future medication and care.**
- d. Costs of the suit.**
- e. Interest of (a), (b) and (c) above at court rate.**

The claim arose out of incident where the Respondents electric power tripped and the appellant was electrocuted and injured as a result. As a result of the incident, the appellant sustained the following injuries:

- a. Amputation of right hand at the shoulder joint.**
- b. Multiple electrical burns measuring 5x6 cm and 28x0.5cm on the head.**
- c. Electrical burns measuring 5.5x3cm on the left side of the chin**
- d. Electrical burns on the abdomen measuring 5.5x3 cm**
- e. Electrical burns on the left hand fingers.**
- f. Loss of the 4<sup>th</sup> and 5<sup>th</sup> toes of the right foot.**
- g. Electrical shock lading to loss of consciousness.**

The Respondent/Defendant denied the claims of any negligence and averred that if the accident occurred, the same was caused by primarily or was significantly contributed by the Plaintiff own negligence. The Respondent/Defendant gave particulars of contributory negligence in paragraph 5 of their statement of defence.

By consent judgment on liability was entered at 85% in favour of the plaintiff as against the defendant and the plaintiff to bear 15% liability.

The only issue for trial and determinations was the quantum of damages. After hearing the plaintiff, the defendant opting not to offer evidence, the trial magistrate delivered his judgment dated 10<sup>th</sup> May 2016. In his judgment the learned trial magistrate stated:

**“I therefore enter judgment for the plaintiff s follows:**

- a. General damages Kshs 3,000,000/-**
- b. Special damages Kshs 2500/-**
- c. Costs of the suit.**
- d. Interest on (a), (b) and (c) above at court rates.”**

Aggrieved by the judgment the appellant filed this appeal on the following grounds.

- 1. That the learned magistrate erred in law and fact failing to award damages for costs of an artificial hand (prosthesis)**
- 2. That the learned trial magistrate erred in law and fact in classifying the cost of artificial hand (prosthesis) and the fitting of the same as future medical expenses.**
- 3. That the learned magistrate erred in law and fact in failing to award damages to the Appellant for loss and/or disadvantage to join a profession of his own choice having lost his right hand.**
- 4. That the learned magistrate erred in law and fact in failing to award the Appellant damages for a helper given the age of the Appellant and the fact that he had lost his mother in the same accident.**
- 5. That the learned trial magistrate erred in law and failed to consider the submission of the appellant put before him.**

By consent, this appeal was canvassed byway of written submissions. Counsel for both parties filed their respective submissions. Mr. Mwebi for the appellant submitted that the learned trial magistrate did not award damages for the cost of artificial hand (prosthesis) on the grounds that same was not pleaded. He submits that the appellant in paragraph 5 of the plaint had pleaded for these costs and PW1 produced documents showing the estimated costs of the prosthesis. He submitted that prosthesis was recommended by both the two doctors who examined the appellant. Counsel submitted that as a result of the incident and due to the injuries sustained, the appellant is unable to join a profession of his choice as he lost his right hand. He submits that this is a loss which ought to be compensated and suggested that a sum of 1,00,000 would be adequate. Finally counsel submitted that they pleaded for expenses of a helper to assist the appellant in all his personal chores which require the use of his two upper limbs he proposed that a sum of 10,828 per month for 30 years when the appellant is expected to have married a wife to take over those responsibilities.

The firm of E.K Owiny and Co. Advocates filed written submissions for the respondent. Counsel submitted that the trial court rightly declined to award cost for artificial hand because the same was not pleaded though the plaintiff in his evidence alluded to it as future medical expenses. Counsel submits that future medical expenses are costs which constitute special damages which must not only be pleaded but be proved. He submitted hat the plaintiff in his evidence relied on plaintiff exhibit 10 and 11 which were letters from London Prosthesis Centre and Moi Teaching & Referral Hospital, whose contents were only opinions and estimates over a long period of time in future and therefore speculative in nature. Finally counsel submits that damages for failure to join a profession of his choice and damages for helper were speculative and this court should resist the invitation to engage in speculative ventures.

From the appeal and submissions, the appellant was dissatisfied by the court declining to award costs of the prosthetic hand, and for a helper and for inability of the appellant due to the injuries sustained to join a profession of his choice. These issues were submitted to the trial court which after consideration rendered itself thus.

**“ The Plaintiff went to great length to make a case for an award for future medical expenses in the way of fitting a prosthetic hand at 3 stages of the Plaintiff minor’s life. The defendant has submitted that damages for future medical expenses are special damages and ought to be specifically pleaded and proved. He relies on Simon Taveta –vs- Mercy Mutitu Njeri Nyeri HCCA No. 26/2014 where the court of appeal held that:**

**“damages for future medical expenses are special damages and ought to be specifically pleaded and proved.”**

The defendant relies on Zachariah Waweru Thumbi –vs- Samwel Njoroge Thuku NBI HCCA 445/03 where the court stated.

**I have considered the rival submissions on future cost of the prosthetic arm. I note in the plaint that this is not specifically pleaded in the plaint. The plaintiff only alludes to the use of artificial arm generally in paragraph 5 and the court thereof is not specifically pleaded. The plaintiff nevertheless went to great length to show that upwards of Kshs 12,000,000/- will be required in the future.**

**A close reading of the defendant’s submissions makes me arrive at the conclusion that I may not award this. Even if the plaintiff had pleaded to Kshs 12,450,200/- specifically in the plaint, he would still require to prove that this amount was**

expended. The assessment looks speculative and is hard to prove not to mention it was not specifically pleaded. No award is made on this. The other claims of loss for failure to join a profession of his choice and damages for helper were not pleaded and proved and the submissions on them is disallowed.

On special damages Kshs 45,000/- was pleaded for medical report and medical expenses. I have considered all exhibits produced and find only 1 receipt of Kshs 2500 form Dr. Mulianga for the medical report.

The appellant submitted that the finding of the learned trial court was in error as the claim for future medical expenses were pleaded both in para 5 and also in the prayers.

In paragraph 5 of the plaint the appellant/plaintiff averred that as a result of the above injuries the Plaintiff is unable to carry out personal chores on his own, will permanently be confined to an artificial hand for the rest of his life, and will not be able to join and pursue profession on of his own choice and the plaintiff claims for damages for cost of artificial hand which shall be changed depending on the growth of the plaintiff, loss for failure to join a profession of his choice and further medication.

In his prayers the appellant prayed to court for:

**a. General damages**

**b. Special damages**

**c. Damages or a helper, costs of an artificial hand, loss for failure to join a profession of his choice and damages for future medication and care.**

**d. Costs of the suit.**

**e. Interest of (a), (b) and (c) above at court rate.**

The appellant submits that besides pleading the same, PW1 the appellant gave evidence and produced documents indicating the cost of prosthetic.

Counsel for respondent submit that the cost of prosthesis being a special damage must not only be pleaded but be strictly proved. He referred this court to Zacharia Waweru Thumbi vs Samwel Njoroge Thuku (2006) eKLR and Haha vs Singh (1985) eKLR in support of his submissions.

There is no doubt that a claim for future medical expenses constitute special damages. This has been held so in several decisions of court. Being special damages this must not only be specifically claimed or pleaded but also strictly proved for they are not direct natural or probable consequence of the act. The degree of certainty and particularity of proof will depend on the nature and circumstances of the case.

Para 5 of the plaint, the appellant averred that as a result of the injuries the Plaintiff sustained he particularly the amputation of the right hand at shoulder joint he will need the use of artificial arm and therefore claim for damages for cost of artificial hand. Thus he mentioned in his prayers where he stated that he will need services of a helper and costs of an artificial hand, prosthesis. Were these pleadings specific?

In Richard Okuku Ohoo –vs- South Nyanza sugar Co. (2013) eKLR the court of appeal on this issue stated.

**“ we agree with the leaned judge that the claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.**

In the Jivanji case a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus services Limited –vs- Murunga & Others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case.

**“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council –vs- Nakaye (1972) EA 446, Ouma –vs- Nairobi City Council (1976) KLR 297 and the latest decision of this court on this point which appears to be Eldama Ravine Distributors Limited and another –vs- Chebon Civil Appeal No. 22 of 1991(UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:**

**“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma –vs- Nairobi City Council (1976) KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage form Bowen LJ’s Judgment at 532-533 in Ratcliffe –vs- Evans (1892) QB 524, an English leading case of pleading and proof of damage.**

**“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and p roof of damage, as is reasonable, having regard to the**

**circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”**

The claim for cost of prosthetic was specifically pleaded in paragraph 5 of the Plea and the prayers specifically sought those costs. The respondent submits that the specific amount sought was not pleaded and that proof in cases of future medical treatment must be accompanied by proof that the expense was incurred and payment made in respect thereto and not anything else. I do not think so. A claim of future medical expense or costs are costs arising from the tort which the plaintiff will continue incurring even into the future. It is not expenses already incurred. It is expenses which from the medical examination will be incurred by the plaintiff either to alleviate suffering or treat complications arising from the injuries sustained. It is based on estimates by experts in this case doctors. It will be absurd for a court to tell the plaintiff to wait to pay for the medical treatment in a complication that will occur in future and then come back to re-open the suit and claim the same as damages. With present medical knowledge, the medical personnel are capable of estimating future costs of medical treatment on a plaintiff who has sustained serious injuries. I therefore set aside the order of dismissal under this head.

The appellant gave evidence and produced medical reports on the case of artificial hand.

He testified “that he has not known to feed himself properly. I have to feed him myself. He cannot do some carriers like engineering where he needs the use of 2 hands. He needs better education facilities to achieve his dream. He needs a prosthetic hand. I have consulted a hospital in London and I was given a scheme for rehabilitation dated 31.7.2014. He will need \$10,000 to be charged every 2 years which makes it \$30,000 up to age 12 when he will need \$28000 for 1<sup>st</sup> option Otto Bock mechanical elbow or \$50,000 Electric elbow.

Expenses traveling to and from London also need to be met. I contacted Moi teaching & Referral hospital who also gave me a scheme where they could fix the prosthetic if it was procured from London prosthetic Centre. I produce the letter from London Prosthetic (P.Ex. 10) and the letter from Moi teaching Hospital (P.Ex 11). I am comfortable with the Kenya option. I wish that the Court assists me with educating the child by providing infrastructure, provide a hand, helper and in providing a medical cover and care, costs of the case. Much of the bill was covered by NHIF but not much really. The boy was referred for a 2<sup>nd</sup> Medical opinion by Tobia Otieno on 5/5//2012.”

The plaintiff further evidence gave the Kenyan Option as hereunder:

#### 1. COSTS OF PROSTHETIC HAND

i. At age 5-12 the prosthetic hand will cost £10,000/- i.e Kshs 1,600,000/-

ii. At age of 12-18, the prosthetic hand will cost £18,000/- i.e Kshs 2,880,000/-

iii. At age 18 the prosthetic hand will cost £44,000/- i.e Kshs 7,168,000/-

Hence total cost of the prosthetic hand will be Kshs 11,648,000/-

2. Cost of the socket for adjustment and replacement Kshs 30,000/- x3 = Kshs 90,000/-

3. Repair of the Prosthetic hand approximated at 10% of the nature which will be at least Kshs 160,000/- x 3 stage 3 = Kshs 480,000/-

4. Air transport for DHL Global is approximated at Kshs 5,000/- x3 = Kshs 15,000/-

5. Cost of fitting the prosthetic hand at Moi Teaching and Referral Hospital approximated at Kshs 50,000/- x3 = kshs 150,000/-

Both the medical report by Dr. Tobias Otieno the Orthopedic Surgeon and Moi Teaching & Referral Hospital recommended the use of the prosthetic hand by the plaintiff for his day today activities. The respondent has given the cost options from London and Moi Teaching & Referral Hospital.

I find the Moi Teaching & Referral Hospital option practicable as it does not involve expenses of travelling to the countries. I therefore allow the expense of prosthetic hand to be replaced twice before he is 18 years and after he is eighteen (18) years.

I therefore allow Kshs 1,600,000 for first placement and 2,888,000 for 2<sup>nd</sup> placement all totaling Kshs 4,488,000 (four million, four hundred and eighty eight thousand only).

Having made provision for the prosthetic hand, I do not find the prayer for wages of a domestic worker until he marries and damages for inability to join a profession of his choice without merit and are dismissed.

In the result, I enter judgment for appellant for costs of future prosthetic hand of Kshs 4,488,000 less 15% contribution of 673,200 to total to 3,814,800 with costs of this appeal.

**Dated and Delivered at Bungoma this 2<sup>nd</sup> day of February, 2021**

**S.N. RIECHI**

**JUDGE**