



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 29 OF 2018

(CORAM: F.M. GIKONYO J.)

DA.....PLAINTIFF

-versus-

KENYA POWER & LIGHTING

COMPANY LIMITED.....DEFENDANT

JUDGMENT

Brief facts

[1] By a plaint dated 23/10/2018, the plaintiff sued the defendant seeking general damages, special damages, loss of amenities, future medical expenses and costs of the suit as well as interest. He blamed the defendant for the accident of 30/10/2015 and alleged various particulars of negligence against it.

[2] The defendant denied the allegations contained in the plaint and put the plaintiff to strict proof thereof. It claimed that the plaintiff was to blame or substantially contributed to the said accident.

[3] At the trial, the plaintiff testified and called three witnesses in support of his claim.

EVIDENCE

Plaintiff's case

[4] The plaintiff is a primary school dropout having not completed his studies at [particulars withheld] Primary School. He was herding cattle at Kilemi/Kautine area Antubetwe Location in Igembe North District of Meru County on 30/10/2015 when he tripped and fell on a live electric wire that was lying loosely on the ground. As a result, he suffered electrocution and sustained severe injuries namely; 5th degree burns of the right forearm, 4th degree burns to the left distal shin, ankle, foot, 3rd degree burns to the right anaxilla, Amputation stump of the right forearm, Scars over anaxilla, left shin, ankle, Scars over foot, Stiffness of the ankle joint with obvious valgus deformity, Loss of right upper limb.

[5] Due to the injuries the Plaintiff fell unconscious. The plaintiff was admitted at Maua Methodist hospital for 4 months. His arm was amputated since it had severe burns.

[6] The plaintiff still complains of pain to date. He stated that a prosthesis costing Kshs 8 million was recommended for him. It will help him conduct his daily activities. Maintenance of the prosthesis is estimated to cost kshs. 1 million

[7] The plaintiff claims he has been attending physiotherapy which costs him ksh 1,500/= every session. He also purchases one bottle of massage oil which costs kshs. 2,000/= per month.

[8] The plaintiff wears a pressure garment on his left ankle to reduce formation of keloid on the scar. He uses two pieces per year whose estimated cost is kshs 5,000/= per piece.

[9] The plaintiff wears an ankle brace on the left ankle. He uses two pairs a year. He has estimated the cost of the same at Kshs. 4,500/= per piece.

[10] The plaintiff states that the stump on the elbow is covered with stockinet material to enable shaping of the future of prosthesis. He uses 3 pieces per year and one-piece costs Kshs. 3,500/=

[11] The plaintiff blames the Defendant 100% for the accident. The live wire was lying loosely due to the negligence of the Defendant.

[12] **PW1** –Dr. Nicholas Koome Guantai testified that he examined the plaintiff and wrote the medical report dated 9/12/2017 on injuries sustained by the plaintiff. He stated that the plaintiff was 18 years at the time and was school going. He relied on discharge summary from Maua Methodist hospital, orthopedic technologist report, dully filled p3 form and, radiographs.

[13] **PW1** established that the plaintiff had suffered 5th degree burn of the right forearm, 4th degree burns to the left distal sheen, ankle and foot and 3rd degree burn to the right axilla. According to him, the injuries were consistent with electrocution of high voltage electric current. The high voltage electric power caused severe injuries and the plaintiff spent 117 days of inpatient care; also caused loss of the right limb below the elbow and severe burns to other parts of his body. The loss of the right upper limb has led to severe debilitation and made him drop out of school since he could no longer write and this extensive period of convalesces as an outpatient. He estimated the degree of disability at 70%. His opinion was that he requires fitting with a myoelectric prosthesis and has been referred to an occupational therapist for review and costing of the prosthesis and to commence occupational therapy to learn to use his left upper limb. He requires an assistant to perform even the basic functions e.g., taking a bath and dressing.

[14] **PW1** stated that he was paid Kshs. 15,000/=to prepare the report. He produced the report and receipt of payment to prepare the same as **Pexh. 1 (a) and (b) respectively**. He also produced discharge summary as **Pexh. 2**. He charged Kshs. 60,000/= as court attendance fee and produced the receipt as **Pexh. 3**. KMPDU Act stipulates the rates to be charged for court attendance which ranges between 50,000-120,000/=.

[15] He relied on the WIBA to assess the degree of disability. The plaintiff was predominantly right-handed hence cannot attend school or write. He estimated cost of prosthesis fitting only at USD 11,000/=

[16] **PW2 -John Muchoki** works at Meru level 5 hospital at Centre for orthopedic prosthetic and orthotics. He made the medical report for the plaintiff who lost his right upper limb due to electrocution; amputation was done below the elbow. He evaluated him for possible fitting of artificial prosthesis below elbow amputation. He estimated the cost at ksh 100,000/= after every 5 years. He produced the report as **Pexh. 4**

[17] **PW3- Charles Wangai** works at Meru level 5 hospital as a physiotherapist. He confirms the injuries as per the reports by **PW1** and **PW2**. His opinion was that the plaintiff sustained a near fatal electrocution and he confirmed that he has been seeing the plaintiff and produced the plaintiff's physiotherapy attendance card **Pexh 5 (a)**. He charged Kshs 15,000/= to prepare the report and produce the receipt as **Pexh 5 (b)**. He produced a bundle of receipts **Pexh 6 (I-Xlviii)** totaling Kshs 639,500/=. He produced the physiotherapy attendance card as **Pexh 7**. The attendance receipt as **Pexh 8** of kshs 5,000/=.

[18] **PW4 DA** the plaintiff herein produced immunization card as per **P Exh 9**. He produced receipts from Maua for Kshs 216,000/= as **Pexh (10 a-d)**. He also produced continuation card on physiotherapy **P Exh 11** and attendance receipts **P Exh 12(a-k)**. He stated that he was 16 years at the time of the accident and he was attending school but thereafter he had to drop. He was examined by Dr. Maina Ruga who was appointed by KPLC.

Defendant's case

[19] After the close of the plaintiff's case, the defendant closed its case without calling any evidence. The advocates agreed by consent to produce the two medical reports by Dr Maina Ruga. The report was to be filed alongside the written submissions. The parties filed their respective submissions.

ANALYSIS AND DTERMINATION

[20] I have considered the pleadings, evidence and submissions on record. The issues for determination are: -

1. Whether the defendant is liable for the injuries sustained by the Plaintiff. The question of contributory negligence will also be determined here.

2. Whether the plaintiff is entitled to the damages sought.

Liability

[21] The evidence on record is that on the material day, the Plaintiff was herding cattle at Kilemi/ Kautine area when he tripped and fell onto a live electric wire that was on the ground. The plaintiffs' counsel submitted that the defendant should be held 100% liable in negligence and relied on the case of **Kenya Power &Lighting Co. Ltd Vs Emmanuel Shapil Mgege and Another (2019) eKLR**.

[22] The defendant submitted that it was not clear where the incident occurred and the Plaintiff was negligent in failing to ensure his own safety. That he should be held 100% liable. The defendant counsel in disputing liability submitted that the plaintiff failed to discharge his burden of proof in respect of the electric wires loosely hanging and relied on the case of **Alfred Kioko Muteti Vs Timothy Miheso & Another (2015) eKLR**. where it was stated that the burden of prove lies with the plaintiff and further relied on **Section 107 of the Evidence Act** to further his argument.

[23] I have heard both accounts. The evidence adduced show that a live electric wire lay loosely on the ground. It was not also denied that the defendant is the sole entity that erects electric poles, maintains them and distributes the power through the cables mounted on those power lines. This evidence was not controverted even during cross-examination. Of importance is that, there was not any rebuttal of this evidence or any explanation of the dangerous state of affairs. In the absence of any supporting evidentiary material, the defence herein remained mere allegations incapable of displacing the evidence adduced by the plaintiff that the defendant was negligent in leaving a live wire to fall and remain on the ground.

[24] In this case, the evidence was not displaced or controverted. See **Edward Mariga v. Nathaniel David Schultzer & Another [1997] eKLR**. The defendant is aware of the extreme danger posed by high voltage electric power lines which traverse through areas which are inhabited or accessible by the public. As the installer of the electric power lines and cables thereto, the defendant has a statutory duty of supervising, inspecting and maintaining its electric installations under **Section 52 of the Energy Act**. This calls for a high degree of vigilance on its part in order to avert accidents. They therefore bear the duty to ensure the power lines or cables do not become source of injury to the members of public.

[25] Contributory negligence was claimed by the defendant on the basis that the plaintiff did not ensure his safety. The Plaintiff tripped and fell on the live electric cables lying on the ground. The plaintiff was not aware that a live electric wire lay on the ground. He was only going about his normal course of herding cattle, in that area. It is the defendant who should have ensured that the cables run overhead and not on the ground especially where they would come into contact with humans or animals.

[26] Accordingly, I am satisfied that the defendant was negligent and was to blame for the accident and that the Plaintiff was not at fault. I find and hold the defendant to be 100% liable for negligence.

QUANTUM

[27] As a result of electrocution, the plaintiff sustained severe injuries. He is entitled to damages. I will set out the damages to which he is entitled.

General damages

[28] The sad reality is as was stated in **H. West and Son Ltd v. Shepherd (1964) AC 326** that: -

“...money cannot renew a physical frame that has been battered and shattered.

[29] Nonetheless, there is hope for the victim, that: -

“...All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional ...”[**H. West and Son Ltd v. Shepherd (ibid)]**

[30] I am aware that astronomically high awards would lead to higher insurance premiums thereby affecting the economic equation of the country's economy. But I will be guided by the facts of the case.

[31] In the present case, the Plaintiff sustained 5th degree burn of the right forearm (charred like burnt firewood), 4th degree burns to the left distal shin, ankle and foot and 3rd degree burn to the right axilla. These were grave injuries which resulted in him being hospitalized for 117 days as well as extensive period of convalescence (healing outside the hospital). The degree of injury was assessed as 70% permanent disability.

[32] I saw the Plaintiff testify in court. He described his experience on the material day and the days that follow. From his evidence and that of the doctors, the court cannot help to state that indeed bad times come. At one time you are well. In a twinkling of an eye, you are struck down by extreme force of electric power to severe and extensive burns, great pain, complete disfiguration of physiques, body outlook and cosmetic complexion; and confined to permanent injury and disability. Your life is turned upside down. You cannot lead a normal life; your once impeccable frame and health is completely battered. Now, you have to turn to artificial limbs to help your limited operations. Robotic you become; at least this technology gives hope to victims; but learning how to use and live with a prosthetic arm reminds of the traumatic experience. Physiotherapy becomes your routine for life. His own experience; the plaintiff told the Court that his life has been full of trouble since the accident; he left school at class 4 due to the accident; he cannot do any work due to the accident and that he was 16 years at the time of the accident. Such is his reflection and state of mind that has been greatly affected and which will require continued counselling.

[33] What damages would be fair compensation for such? The plaintiff proposed an award of Kshs 5,000,000/= as sufficient compensation in general damages. They relied on the case of **Amrusina Makena Kiulio Amk (Suing as The Mother & Next Friend Of JMK- Minor) Versus Kenya Power and Lighting Company Limited (2020) eKLR**

[34] The defendant relied in the case of **John Nkuja Mbatia V Esther Muthomi Mhuri (2017) eKLR** where an award of Kshs 1,500,000/= for traumatic amputation of right upper limb was made. Also **Sofia Yusuf Kanyare V Ali Abdi Sabre & Another (2008) eKLR** where the plaintiff was awarded Kshs 1,750,000/= for loss of upper arm and kshs70,000/= for soft tissue injuries that had healed. And, **Ngugi Vs AG HCCC No. 15 Of 1994** where Rawal J. (as she then was) awarded Kshs 1,500,000/= in an electrocution accident where the plaintiff suffered severe brain injury and 65% disability in 2003. The defendant therefore proposed Kshs 1,500,000/= be awarded for injuries sustained by the plaintiff herein.

[35] The cases cited by the defendant were made several years ago. Further, in those cases the injuries were less severe compared to those in this case. I find the case cited by the plaintiff to be relevant to this case by virtue of it being recent and with similar injuries as this one. In view of the injuries suffered, loss of the right forearm, which left him in hospital for 117 days, the trauma and the nature and extent of the injuries, I find an award of **Kshs. 4,500,000/-** in general damages to be a fair compensation. I so award.

Future medical expenses.

[37] The defendant's counsel submitted that the two medical reports produced do not support the future medical expenses pleaded. The nature of future medical expenses is established in the medical reports by PW1-**Dr. Koome**, PW2 **Dr. Muchoki** and **PW3 physiotherapist Charles Wangai**. They opined that if the Plaintiff is fitted with functional myoelectric prosthesis, he will be able to perform his normal duties as nearly as he used to before the accident. This includes him attending studies.

[38] **PW2** in his report recommended a functional prosthesis (artificial limb) at a value of Kshs. 8,000,000/-. The prosthesis proposed therein would require annual maintenance of Kshs. 100, 000/- every five years. He stated that the proposed artificial arm would enable the plaintiff to meet his needs. That a cheaper artificial limb will cost kshs 1,000,000/= but would do limited work for the Plaintiff. According to **PW2**, these are ordinarily purchased from abroad. That he had sourced the information on the quotation from Ottobok (Germany).

[40] Contrary to the submission by the defendant, the expert opinion is that the nature of the injuries sustained requires future medical treatment and management of the plaintiff. The expert opinion herein was specific to the nature of injuries suffered by the plaintiff. The prosthesis recommended is of an advanced version which will ensure the plaintiff resumes his normal life and even going back to school. The proposed prosthesis provides the plaintiff with an opportunity to resume almost normal operations; such is the object of compensation. The court should not deny him the opportunity. See **Hezron Waithaka Ndarwa & another v Ezekiel Ruheni Maina [2019] eKLR**.

[41] In light thereof, I find the cases relied on by the defendant to be distinguishable or inapplicable. The quotation produced as **PExh.4** was sourced by a professional the efficacy of the prosthesis thereto has been clearly articulated by the doctor. No other or appropriate quotation or proposal was provided for comparison by or to assist the court. Accordingly, I find the quotation and the kind of proposed prosthesis to be appropriate for the plaintiff's situation. I award **Kshs. 8,000,000/-** for purchase of the prosthesis.

Maintenance of the prosthesis

[42] The evidence adduced by the experts support the proposition that the said prosthesis would require Kshs. 100,000/- for maintenance once every 5 years. The plaintiff proposed 35 years due to the age of the Plaintiff. In the case of **Daniel Kuna Nganga V Nairobi City Council [2013] e KLR**, **Nancy Oseko V BOG Maasai Girls High School HCC 171B of 2009** a multiplier of 20 years was adopted for a 23-year-old girl and **Agatha Wanjiru Njuguna V Mary Wanjuki Ikiki & 3 Others [2006] e KLR** the court used a multiplier of 25 years for a form 3 student. I will grant a multiplier of 30 years due to age of the Plaintiff herein. He was 16 years at the time of the accident. At the time of the judgment, he is 21 year or thereabout. The payment should also be available for investment to take care of any future inflation. Therefore, I award **Kshs. 600,000/-** for maintenance for the expect six sessions in the 30 years.

[44] According to **PW3** the plaintiff requires two ankle braces of Kshs 4,500/= per piece per year for a life time. on the basis of the multiplier I have adopted, the sum is calculated, thus; $4,500 \times 2 \times 30$ giving as sum of **Kshs 270,000/=** The plaintiff shall require physiotherapy at kshs 2,000/= per session twice per month for life. The same shall be calculated for 30 years ($2,000 \times 2 \times 12 \times 30$) Total cost **Kshs 1,440,000/=**

[45] Therefore, the total sum for future medical expenses comes to **Kshs. 10,310,000/-**.

Special damages

[46] The plaintiff's counsel submitted that the plaintiff produced receipts of **kshs 679,500** in respect of hospital medical expenses, physiotherapy, ankle braces, pressure garment. The defendant opposed this claim that the plaintiff did not prove the special damages pleaded and that final invoice produced is not a prove of payment and relied on the case of **Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited V Janevans Limited (2015) eKLR; Zacharia Waweru Thumbi V Samuel Njoroge Thuku (2006) eKLR** and **Sanya Hassan V Soma Properties Ltd**. He stated however, that receipts amounting to kshs 620,000/= should be admitted.

[47] **PW1** charged Kshs 15,000/= to prepare the report as per receipt produced as **Pexh. 1 (b)**. This has been proved as by law. **PW1** also charged Kshs 60,000/= to attend court as per receipt produced. Such expert witness expenses are awarded by court once incurred, I so award.

[48] **PW3** charged Kshs 15,000/= to prepare the report as per receipt produced as **Pexh 5 (b)**. This item has been proved as by law required. **PW3** also produced a bundle of receipts **Pexh 6 (I-Xlviii)**, physiotherapy attendance receipts **P Exh 12(a-k)** and the attendance receipt as **Pexh 8** of Kshs 5,000/=. totaling **Kshs 633,500/=**. The nature of injuries sustained required constant medical reviews and physiotherapy. These expenses properly fall under medical expenses as they were incurred during the pendency of the suit. I doubt such expenses should be denied simply because they were not specifically pleaded. It bears repeating, these expenses in so far as they continue to be incurred fall in future medical expenses and are awardable in law. I so award them but I will classify them under specials to avoid confusion.

[49] **PW4** also produced receipts from Maua for Kshs 216,000/= as **Pexh (10 a-d)**.

[50] It is trite law that special damages must be specifically pleaded and proved. The plaintiff pleaded special damages for which he produced receipts in support thereof. Contrary to the contention by the defendant, all the receipts produced by the plaintiff bore revenue stamps except **Pexh 8**. Receipts of expenses as at the time of filing suit add up to Kshs. 670,500 less receipt without the revenue stamp of Kshs. 5000 leaves a total of Kshs. 665, 500. I so award as special damages.

[51] However, the plaintiff continued with the treatment necessitated by the injuries he suffered and produced receipts for physiotherapy and related treatment in the sum of Kshs. 194, 000. He produced receipts of Kshs.194, 000. These expenses properly fall under future medical expenses as they are incurred after suit is filed and will continue in the future. It will be improper and unjust to deny the plaintiff such relief. I therefore award him a sum of Kshs. 194,000 for medical expenses already incurred but after filing suit.

[52] There is also doctor's attendance fee (PW1) of Kshs. 60,000. This kind of fee is awarded by the court after the witness has testified. I therefore award this sum.

[53] For the avoidance of confusion I will classify all these under special damages. The total sum shall therefore be Kshs. 919, 500.

[55] Ultimately, I enter judgment in favour of the plaintiff and against the defendant as follows: -

a) General damages for pain, suffering and loss of amenities - Kshs. 4,500,000/-

b) Special damages (add also medical expenses incurred after filing of suit and Doctor's attendance fee) - Kshs. 919,500/=

c) Future medical expenses- Kshs. 10,310,000/-.

Total.....Kshs.15,729,500/=

d) Costs to the plaintiff and interest. Interest on special damages in the sum of Kshs. 665,500 only to run from the date of filing suit while the rest of the awards from the date of this judgment.

Dated, signed and delivered at Narok through Microsoft Teams Online Application this 1st day of March 2021

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F. GIKONYO

JUDGE

In the Presence of:

1. Mr. Kerosi for Onyango for Defendant

2. Mwanzia for plaintiff

3. Mr. Kasaso – Court Assistant

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F. GIKONYO

JUDGE