



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 28 OF 2019

AMK (Suing as the mother & next

friend of JMK – Minor).....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

J U D G M E N T

1. **JMK (“the minor”)** was a beautiful young girl aged 13 years in August, 2017. At the time, she was in class 6 in **[Particulars Withheld]** Primary School within Meru County. On 28/8/2017, she arrived home from school in the evening and took up the usual chores of a rural girl of helping her mother, the plaintiff.

2. In the company of another, the minor went to the thickets within their family land to collect firewood for preparation of dinner. It is then that, among the firewood lying in the thicket that she held an electric cable wire belonging to the defendant and she was electrocuted. Luckily, she did not perish but she ended in hospital for 8 months where she had her two forearms amputated.

3. By a plaint dated 25/1/2019 amended on 24/10/2019, the next friend sued the defendant seeking general damages, special damages of Kshs.589,160/-, loss of earning capacity, future medical expenses and costs of the suit as well as interest. She blamed the defendant for the accident of 28/08/2017 and alleged various particulars of negligence against it.

4. The defendant denied the allegations contained in the statement of claim and put the plaintiff into strict proof thereof. It claimed that the minor was wholly to blame or substantially contributed to the said accident.

5. At the trial, the plaintiff testified and called two witnesses in support of her claim. **Pw1 AMK** narrated how her daughter was electrocuted on the material day and admitted at St. Theresa Mission Hospital, Kiirua for 8 months. She further told the Court that as a result of the accident, the minor is now disabled and dependent on her as she cannot do anything by herself.

6. The minor testified as **Pw2**. She corroborated the testimony of **Pw1** on how the accident occurred. The live electric cables were lying among the firewood in a thicket which she held while collecting firewood. She was electrocuted resulting in her amputation of her both hands at the elbow and she could no longer do anything for herself. She had also dropped out of school as a result.

7. **PW3 Dr. James Kihumba** testified and produced the medical report prepared by **Dr. Nicholas Koome**. According to the report, the minor was examined on 5/7/2018. She sustained electric burns to both upper limbs with dry gangrene up to the level of mid forearms. There were electric burns on the outer side of the sole of the right foot and on the left dorsal side of the sheen (leg near the ankle).

8. She was amputated on both forearms below the elbow and underwent surgical toileting of the wounds on the lower limbs, serial wound dressing of the wounds during which time antibiotics and pain killers were being administered. Nerve agents were given to help in regeneration of the affected nerves. She underwent physical and occupational therapy as well as psychological counseling. At the time of making the report, both wounds had healed from amputation, there were scars on both soles of the feet, there was a wound approximately 7 x 7 cm on the anterior aspect of the leg, but she was still suffering from psychological trauma.

9. She was also examined by **Dr. John Muchoki**, an Orthopaedic/Prosthesis/Orthotist who opined that she could still lead a near normal life if she was fitted with a functional myoelectric prosthesis. He estimated the cost to be approximately Kshs.20,000,000/- with annual maintenance cost of Kshs.100,000/-.

10. After the close of the plaintiff’s case, the defendant closed its case without calling any evidence.

11. The parties filed their respective submissions. The plaintiff urged that the defendant be held 100% liable having called no evidence in

rebuttal. That she had proved the special damages claimed. The amputation required the fitting of myoelectric prosthesis. A sum of Kshs. 5,000,000/- was submitted for pain and suffering, Kshs. 3,000,000/- for loss of earning capacity and Kshs.24,300,000/- for future medical expenses and maintenance costs.

12. The cases of **Millicient Atieno Ochuonyo v Katola Richard [2015] eKLR**, **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina – Deceased) [2016] eKLR** and **Kweri Peter & 2 others v Ann Wanjiku Maina [2017] Eklr** were relied on in support of those submissions.

13. The defendant submitted that it was not clear where the incident occurred and the minor was negligent in failing to ensure her own safety. That she should shoulder 20% liability.

14. On quantum, it was submitted that the plaintiff failed to prove special damages claimed since the receipts produced did not comply with ***Section 19 of the Stamp Duty Act CAP 48 Laws of Kenya***. For general damages and loss of earnings, the defendant submitted Kshs. 300,000/- for each. For future medical expenses, it was submitted that the evidence relied on was unreliable and a sum of Kshs. 900,000/- was proposed under that head.

15. The cases of **Leonard Nyongesa v Derrick Ngula Righa [2013] eKLR**, **Peter Waka Tungani v Mathai Timber & Hardware Supplies Ltd [2006] eKLR**, **Benuel Bosire v Lydia Kemunto Mokora [2019] eKLR** and **Comas Kipkoach Sigei v Madrugada Ltd & another [2010] Eklr** were relied on in support of those submissions.

16. Having considered the pleadings, evidence and submissions on record, the issues for determination are: -

- a. *Whether the defendant is liable for the injuries sustained by the minor,*
- b. *Did the minor contribute to the occurrence of the accident? If so, to what extent?*
- c. *Whether the plaintiff is entitled to the damages sought.*

17. On the first issue, the evidence on record is that on the material the minor, then aged 13, came from school and went to collect firewood from their farm. While collecting the firewood, she held electric power cable which were lying in the thicket amongst the firewood. She testified that she has always known that power lines always run overhead on poles. Unknown to the mother or the minor, a power pole and not on the ground had fallen a distance away from their home.

18. This evidence was neither denied nor challenged. The defence chose not to call any evidence to either rebut or explain away the plaintiff's evidence. It was not 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.

19. The defence relied on its statement of defence. However, that cannot constitute evidence capable of displacing the plaintiff's evidence. Where a party fails to call evidence in support of its pleading (be it a plaint or defence), the evidence of the opposing party is to be believed as having not been rebutted, unless effectively and displaced in cross-examination. In this case, the evidence was not displaced in cross-examination. Accordingly, the evidence of the plaintiff was uncontroverted. See **Edward Mariga v. Nathaniel David Schulter & Another [1997] Eklr.**

20. The defendant is the sole installer, distributor and supplier of electric energy in Kenya. It 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.

21. In this case, the minor touched live electric cables lying on a thicket amongst firewood. There is nothing she could have done to avoid them. She was in her normal course of collecting firewood, as she must have done over the years on the family land. It is the defendant who should have ensured that the cables run overhead and not on the ground where they would come into contact with the minor.

22. Accordingly, I am satisfied that the defendant was negligent and was to blame for the accident and that the minor was at no fault. I find and hold the defendant to be 100% liable for negligence. That settles the first and second issue.

23. The next issue is one of quantum. The plaintiff sought Kshs.589,160/- as special damages. It is trite law that special damages must be specifically pleaded and proved. The plaintiff pleaded special damages for which she produced receipts in support thereof totaling Kshs. 556,160/-.

24. The defendant opposed this claim relying on ***section 19 of the stamp Duty Act, CAP 48 Laws of Kenya***. Under that provision, it is a requirement that receipts produced in evidence must have a revenue stamp for them to be admissible.

25. To my mind the contention by the defendant does not arise as all the three receipts produced by the plaintiff bore revenue stamps. I am satisfied that out of the pleaded sum, the plaintiff was able to prove special damages in the sum of Kshs.556,160/- as special damages. That amount is allowed.

26. On general damages, in **H. West and Son Ltd v. Shepherd (1964) AC 326** the Court held: -

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

27. A Court must be mindful that higher awards would lead to higher insurance premiums thereby affecting the economic equation of the country's economy.

28. In the present case, the minor sustained electric burns to both upper limbs with dry gangrene up to the level of mid forearms; electric burns at the lateral plantar side of the right foot (exit point of the current) and electric burns on the left shin, dorsal and plantar aspect left foot. These were grave injuries which resulted in her being hospitalized for eight (8) months as well as extensive period of convalescence (healing outside the hospital). The degree of injury was assessed as grievous harm with 100% disability.

29. As pointed out, money cannot renew the physical frame of the minor. However, the damages ought to be reasonable in the circumstances. The Court will also take into consideration that she has claimed loss of future earnings and future medical expenses which would be awards to try and restore her to her original condition.

30. The cases cited by the defendant were made 20 years ago. Further, in those cases the injuries minor compared to those in this case. In **Joseph Were Wangéthe v EW [2019] Eklr**, an award of Kshs.1,500,000/- was made upheld for amputation of the right upper limb and burns on anterior abdomen with two months hospitalization of a 5 year old.

31. I saw the minor testify in court. She seemed to have been terribly devastated by the incident. She told the Court that she was a beautiful girl before the accident but with the amputation, she no longer was. That is her state of mind and it has affected her and will require continued counselling.

32. In view of the injuries suffered, loss of two fore limbs, which chained her in hospital for eight (8) months, the trauma and the nature and extent of the injuries, an award of Kshs. 4,000,000/- as general damages would be an adequate award.

33. On loss of earning capacity, the plaintiff sought Kshs.3,000,000/- while the defence submitted for Kshs.300,000/-.

34. The defendant relied on **Peter Waka Tungani v. Mathai Timber & Hardware Supplies Ltd [2001] Eklr**, where the plaintiff was awarded Kshs.276,180/- for an amputation on the right hand on shoulder level. This was inapplicable as the plaintiff therein was earning a specific sum of Kshs.1,800/- per month. The other cases of **Messay Jaggery Ltd v Maurice Ochieng Maengo ksm CA 46/2001** and **Douglas Kafala Ombeva v David Ngama Nbi CA 24/2005** were both unreported and the defendant did not supply copies.

35. In **P. I. v Zena Roses Ltd & Another [2015] Eklr**, the Court held: -

“In my view, it is true to say that the future of a minor is unknown as opposed to that of an adult who is engaged in an occupation that earns him or her a living. It can also be contrasted with that of a middle aged person who may be in college or in whose life there is indication of what kind of livelihood he would engage himself/herself in when he grew up. For the case of minors, it is my view that tabulation for damages for loss of future earnings and lost years can be gauged depending on what evidence is brought before the court. For instance, a good case can be argued where evidence is shown that the minor is in school, well performing and that it is hoped, based on his or her performance, would engage himself or herself in this or that occupation. That is why evidence before a trial court must not be led in a casual manner thinking that the court would make an assumption of what earnings the minor may get in future or what he would become once he grew up. It is not sufficient to just state that the minor was either in kindergarten, primary or secondary school. A good case would be argued when evidence is brought to show or persuade the court that despite the fact that the minor was in the tender years of school, it was hoped that he would have a good future when he grew up.”

36. In the present case, the minor was injured at age 13. It was her dream to be either a doctor or a musician. She dropped out of school at class 6. A letter from her primary school produced as **PExh.3** described her as an obedient and bright pupil.

37. In **Benuel Bosire v Lydia Kemunto Mokora [2019] Eklr**, an award of Kshs. 300,000/- was made where a minor suffered 40% disability. In the present case, the disability was assessed at 100%. A global award of Kshs. 1,000,000/- will be adequate taking into consideration that in the event of her succeeding in her claim for future medical expenses, she may be restored to some degree of normalcy.

38. As regards future medical expenses, there were reports by **Dr. Koome** and **Dr. Muchoki**. They opined that if the minor is fitted with functional myoelectric prosthesis, she will be able to perform her normal duties as nearly as she used to before the accident. This includes her attending studies and thereby enabling her pursue her dreams.

39. **Dr. Muchoki** made two reports dated 5/7/2018 and 20/9/2019, respectively. The earlier report priced the prosthesis at a lower value of Kshs.7,000,000/-. The prosthesis proposed therein would not enable the minor to achieve the level of performance expected at her age. It would require annual maintenance of Kshs. 300,000/-. That at age of 25, the minor would require a new set of prosthesis sockets at a cost of Kshs. 5,000,000/-. That would make it expensive yet its functional performance is minimal limited.

40. The later report was in respect of a bilateral functional myoelectric prosthesis whose cost was estimated at Kshs. 20,000,000/- with an annual maintenance cost of Kshs. 100,000/-. According to **PW3**, these are ordinarily purchased from abroad for **Dr. Muchoki** to fix them. That a German Orthopaedic industry company had been consulted and had given a quotation of Euros 90,939/80. The quotation was produced as **PExh.13**. **Pw3** stated that the said figure did not include transportation, assembling of parts and operational costs to fix the prosthesis.

41. I saw the minor testify. She was full of life and upbeat that she may yet again have a chance of going back to school and study on Dr. Muchoki's assurance. She could do absolutely nothing by herself. It is the mother who had to remove her clothing for the Court to see the injuries sustained. She stated that she cannot bath, eat, cloth or go to toilet without the help of her mother. Surely, she must live her life at whatever cost! Her normal life needs to be restored.

42. In **Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR**: -

“In my view its correct to state that a court may find that an expert’s opinion is based on illogical or even irrational reasoning and reject it.[17] A judge may give little weight to an expert’s testimony where he finds the expert’s reasoning speculative[18] or manifestly illogical.[19] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert’s process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.”

43. In the present case. I found the medical evidence logical and compelling. The cases relied on by the defendant were inapplicable. The prosthesis recommended is of an advanced version which will ensure the minor resumes her studies for whose passion she displayed in Court. That is an opportunity which any Court with conscience should never deny her, the expense notwithstanding. See **Hezron Waitthaka Ndarwa & another v Ezekiel Ruheni Maina [2019] eKLR**.

44. In this regard, I accept the quotation produced as **PExh.13** since there was no other quotation in respect of which the Court could compare. Since the cost of purchase is Euros 90,940 together with transportation, assembling and operationalization, I award Kshs.16,000,000/- for future medical expenses.

45. There was evidence that the said prosthesis would require to be maintained at an annual expense of Kshs.100,000/-. The plaintiff proposed 43 years due to the age of the minor. I will grant a period of 15 years due to accelerated payment thereby allowing investment of the monies. This will make it Kshs.1,500,000/- bringing the total sum for future medical expenses to Kshs.16,500,000/-.

46. Accordingly, I enter judgment in favour of the plaintiff against the defendant for the following: -

a) General damages	-	Kshs.4,000,000/-
b) Special damages	-	Kshs. 556,160/-
c) Loss of earning capacity	-	Kshs.1,000,000/-
d) Future medical expenses-		<u>Kshs.16,500,000/-</u>
Total		<u>Kshs.22,056,160/-</u>

47. I award costs to the plaintiff and interest. Interest on special damages to run from the date of filing suit while the rest is from the date of this judgment.

DATED and **DELIVERED** at Meru this 14th day April of 2020.

A. MABEYA

JUDGE