



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 85 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

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

AND

M K suing through father and next friend K M.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.O. Wanyaga, RM dated 12th September 2017 at the Chief Magistrates Court at Maua in Civil Case No.41 of 2016)

JUDGMENT

1. The child subject to these proceedings was electrocuted on 23rd June 2015 at Kaene Sub-location, Meru County. She was under a mango tree where the appellant's powerlines were hanging loosely and were in contact with the tree. As a result of the electrocution the child sustained deep 3rd degree burns on the chest left side involving the breast and completely destroying the nipple and burns on the lower limbs. The burns left scarring all over the body. Her left toes were amputated. She was hospitalised for 3 months and underwent 6 surgeries including skin grafting. The child continues to suffer post-traumatic stress syndrome.

2. The parties agreed on the issue of liability which was apportioned at 90:10 in favour of the respondent. The trial court assessed damages and made the following award;

Special Damages	Kshs. 116,200/-
General Damages	Kshs. 1,000,000/-
Future medical expenses	Kshs. 3,820,000/-
Gross Total	Kshs. 4,936,200/-
Less 10%	
Net Award	Kshs.4,442,580/-

3. In the memorandum of appeal dated 4th October 2017, the appellant assailed the award on the ground that the award for future medical expenses was erroneous and without any basis as the same was not specifically pleaded, particularised, quantified and strictly proven as required by the law. In short, counsel for the appellant, contended that future medical expenses were in the nature of special damages and ought to have been proved.

4. The respondent's position was that he pleaded future medical expenses and since they were not ascertainable at the time of filing the plaint they were part of general damages. Counsel contended that the doctor gave evidence to support the claim for future medical expenses and that the trial magistrate did not err in making the award on the basis of the evidence presented.

5. In the amended plaint dated 30th May 2016, the respondent pleaded as follows;

7(a) during the pendency of the suit the minor plaintiff's psychological condition has continued to deteriorate and she had become

semi-invalid necessitating the next friend to hire a care giver at Kshs. 15,000/- per month and the plaintiff shall claim for the same.

7(b)The plaintiff shall also pray for future medical expenses not only include the caregiver expenses but also for future medical operations not quantifiable as at now but may be ascertained in due cause.

6. The trial magistrate held that the testimony of Dr Thiakunu (PW 1) was uncontested and therefore awarded Kshs. 2.5 million for breast reconstruction and Kshs. 1.2 million for ankle reconstruction together with Kshs. 120,000/- for occupational therapy making a total of Kshs. 3,820,000/-.

7. The law on whether future medical expenses should be pleaded or not is now settled. In **Kenya Bus Services Ltd v Gituma [2004] EA 91**, the Court of Appeal stated as follows:

And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded.

8. I have to set out, at paragraph 5 above, the manner in which the respondent pleaded his claim. He alludes to future medical expenses, states that they are quantifiable and that they may be ascertained in the future. The pleading therefore does not meet the required standard of pleading. Since the PW 1 was able to testify on the same, it means that these costs were ascertainable by the time the suit was heard. Nothing prevented the respondent from amending his plaint to reflect the claim. The Court of Appeal in **Mbaka Nguru & Another v James George Rakwaro NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR** observed as follows:

We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head

9. The principles upon which this court will intervene in award of damages made by the trial court were stated by the Court of Appeal in **Salim S. Zein & Another v Rose Mulee Mutua Civil Appeal No. 147 of 1994[1997] eKLR** as follows:

The appeal court must be satisfied either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately high it must be a wholly erroneous estimate of damages.

10. From what I have stated, it is apparent that the trial magistrate failed take into account the fact that future medical expenses were not pleaded as required by law. Consequently, I allow the appeal to the extent that I set aside the award for future medical expenses amounting to Kshs. 3,820,000/-.

11. The appellant shall have the costs of the appeal assessed at Kshs. 50,000/-.

DATED and DELIVERED at MERU this 5th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Mwarania instructed by Mwenda Mwarania, Akwalu and Company Advocates.

Mr Mbogo instructed by Mbogo and Muriuki Advocates for the respondent.