



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 146 OF 2011

PATRICK M. WERE.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

JUDGMENT

The plaintiff Patrick M. Were was an employee of Kenya Power & Lighting Company Ltd (KPTC) and on 14/4/2010, while in the course of duty, he was injured in an accident whereby he sustained serious electrical burns and he attributes the injuries to the negligence of the defendant. At paragraph 4 of the plaint, the plaintiff blamed the defendant for:-

- a. Failing to provide the plaintiff with safe working place;**
- b. Exposing the plaintiff to risk and injury;**
- c. Failing to take adequate safety precautions to protect the plaintiff from any dangers that could arise from the work he was engaged in;**
- d. Exposing the plaintiff to danger the defendant knew or ought to have known;**
- e. Requiring the plaintiff to work on their installations without switching off the electricity.**

As a result the plaintiff suffered the following injuries:

- 1. Deep electric burns on the face, neck, chest, abdomen, back and both hands.**
- 2. Contractures and keloid scars on the abdomen neck and back;**
- 3. Contractures and keloid scars on right upper arm with right shoulder joint of abduction to 15 degrees limitation of forward and backward extensions to 20%, Elbow joint contracture deformity of 30 degrees, lack of pronation and supination;**
- 4. left upper arm – left shoulder joint limitation of abduction 20 degrees limitation of forward and backward extension to 20%;**
- 5. Neck: contracture with severe limitation of extension and rotations.**

All leading to a general disability of 70% of total body function.

The defendant filed a defence dated 30/7/2011 in which it was admitted that the plaintiff was indeed an authorized employee of the defendant but denied all allegations of negligence attributed to the defendant and its agents/servants and alleged that if any accident occurred, it was due to the negligence of the plaintiff. The particulars of negligence attributed to the plaintiff are at paragraph 6 of the defence which include inter alia:

- **Failure to work with due care and attention, failure to adhere to proper work procedures as would be necessarily expected as he was trained to do, performing his work in unworkmalike nature and failure to use the protective apparel provided to him.**

The case proceeded to hearing and only the plaintiff testified in support of his case. He recalled that on 14/4/2010, while at work at Industrial area in Nakuru, he was on duty at night, overtime shift. He was repairing lines in a substation. His work was repairing and constructing power lines. The lines were cut and after wires were pulled the supervisor called him to go and join the lines so that power could pass through. He was joining on top of an electric post. He was requested to test to find out if the line had electricity and when he tested there was an explosion; that the wire was joined by a plastic and when he tested, there was electric current in the 3 wires and they exploded. He said that when work is ongoing on the wires, electricity is supposed to have been switched off and that it was the supervisor who was supposed to ensure that electricity was switched off. He denied that it was his duty to go and switch off the line. As a result of the explosion, he was injured, admitted at Valley Hospital for 11 months and costs of hospitalization were paid by the defendant. A report was prepared dated 17/10/2010, which explains the injuries he sustained. The said report which was prepared by Dr. Moses Okech of Valley Hospital was produced in evidence by consent. He explained that his right hand is paralysed, his body pains, he cannot raise his neck fully, the right ear does not hear well, upper body (upper torso) is not flexible. He said that the Doctor recommended plastic surgery and reconstruction which would cost Kshs.2,000,000/-. He also produced a letter dated 18/3/2011 from the Regional Managing Director of the defendant which disclosed that investigations were carried out and those responsible for the accident were reprimanded and it was recommended that the plaintiff be compensated (PEX.2).

When the case came up for defence hearing, Mr. Ondeande did not call any witnesses but closed the defence case. There is therefore no evidence in support of the defence in which the defendant denied liability and attributed negligence on the plaintiff. The counsel agreed to file and exchange submissions which they did. On the issue of liability, the plaintiff's counsel submitted that the defendant did not call any evidence in defence and therefore the plaintiff's evidence remains unchallenged and the defendants should be held to be 100% liable.

The defendant's counsel, submitted that it was the duty of the plaintiff who was alleging negligence to prove his case on a balance of probability but that in this case the plaintiff had not done so. He submitted that there fact that an injury occurs at a person's place of work does not ipso facto connote that the employer is negligent; that the plaintiff failed to prove that the employer was negligent because he failed to prove causation which is central in proving the defendant's liability. Counsel relied on the case of **Amalgamated Saw Mills Ltd v Stephen Muturi Nguru HCA 75/2005** where J Musinga held:-

“Revisiting the more important issue of causation, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable.”

Counsel urged that in this case the plaintiff undertook to join the wires when the wire was on which means that he voluntarily assumed the risk, that he was aware of the risk and chose to take it. In the alternative, counsel urged that if the court were to find the defendant liable then the plaintiff should be held to have contributed to the occurrence.

There is no dispute that the plaintiff was an employee of the defendant at the time the accident occurred and he was seriously injured. After the plaintiff testified, the defendant did not call any witness in support of their defence to controvert the plaintiff's evidence. The plaintiff's evidence remains uncontroverted. The only question is whether the plaintiff's evidence goes to prove that the defendant was negligent which led to the plaintiff being injured.

In a case based on negligence, causation must be proved by the plaintiff. He must prove that the negligence of the defendant or his employee and/or agent caused him injury. Where causation is not established a court should not pity the injured person and award him damages for consolation.

The plaintiff testified that his duty included joining of wires so that electric power could pass through. He was required to test whether the line had electricity before joining. When he tested there was an explosion. He said that electricity should have been switched off when the work was on going and it is the supervisor who was charged with ensuring that the power was switched off. Since the electricity was supposed to have been switched off during the repairs, it was the supervisor, an employee of the defendant who failed to do his work of switching off the power, which resulted in the explosion occurred.

The plaintiff produced in evidence a letter from the Regional Manager West to Managing Director and Chief Executive Officer which indicates at paragraph 1 that investigations were carried out and those who were found to have been negligent were reprimanded for negligence. The letter clearly discloses that the defendant admitted that its officers were negligent which goes to corroborate PW1's evidence that somebody failed to do his job and left the power on in the wires that the complainant was supposed to join.

Did the plaintiff contribute to the occurrence of the accident in which he was injured? The fact that an injury occurs at ones place of work does not necessarily mean that the employer is negligent. The plaintiff said that he was required to test the wires for power before joining. If there was power, it means he would have been injured anyway. He did not explain how he would have avoided what happened if there was power in the lines. In my view, it means that there was some safety measure that the plaintiff failed to undertake to avoid being

injured even if there was electrify in the line because that was the purpose of testing. Since he was injured, it is my view, that either the plaintiff did something wrong or omitted to do something that would have avoided the explosion. In the end, I find that although it is the defendant's employee who was negligent by leaving the power on, I am satisfied that some of the blame must go to the plaintiff and I will apportion liability at 90% as against the defendant and 10% as against the plaintiff.

The medical evidence contained in the medical report of Dr. Okech (PEX.1) was not controverted. The Doctor was of the opinion that the plaintiff suffered 70% permanent incapacity. The court saw the plaintiff in court and noted the severity of the injuries on his body, the neck and chin and almost connected making it difficult for him to turn unless he turns the whole body. The doctor has recommended surgical reconstruction at a cost of Kshs.2,000,000/-. The doctor's report was made in 2010 and believes the cost may have escalated now that we are near the end of 2014. That figure has not been contested by the defence. For general damages, the counsel suggested an award of Kshs.3,5 million as being reasonable. He urged the court to be guided by the decision in **Lewis Waiyaki v Berkelcy Steward Ltd HCC 308/1981**, where a plaintiff aged 55 years was awarded Kshs.3.342 million for crippling injuries.

In **James Joseph Rughendo v KPLC Ltd (2011)EKLR**, the plaintiffs sustained permanent incapacity of 70% and the court made an award of 3 million in general damages in 2011.

On the other hand the defence submitted an award of Kshs.1,500,000/- and relied on the decision of **John Machoka v KIPLC Ltd HCC 52/2003** where the plaintiff suffered inflammation of testicles, tissue, penile, shaft, deep burns on the right side of the tongue and right leg exposing the tibia and bruises on the thighs. An award of shs.800,000/- was made in 2004. Reliance was also made on **Simon Nganga**

Kibunja v James Kihara Wambugu HCC 22114/1984 an award of Ksh.600,000/- was made for permanent incapacity of 100%.

I do agree with the defendant's submission that in awarding damages the court is only making a fair compensation for the loss and injury suffered and in **Lim Poh Choo**, Lord Denning MR said:-

“In considering damages in personal injury claims, it is often said: ‘the defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration.’ That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error much as may befall of us. I stress this so as to remove the misapprehension, so often compensated for all the loss and detriment she has suffered. That is not the law she is only entitled to what is in the circumstances, a fair compensation, fair both to her and the defendants.”

Having considered the decisions in which awards were made though decisions cited by the defendant, are comparable as regards the injuries sustained, the awards were made 10 years and 30 years ago respectively. This court must take into account the incidence of inflation over the years. In doing my best to fairly compensate the plaintiff, I hereby make an award of Kshs.3,000,000/- in general damages for loss of amenities. The doctor also suggested that the plaintiff will need Kshs.2,000,000/- for future operations and treatment. The plaintiff will also have the Kshs.2,000,000/- for future medical expenses. The proved special are Kshs.3,000/- to which the plaintiff will also be entitled.

In the end the plaintiff will have judgment as follows:-

Loss of amenities	-	Kshs.3,000,000.00
Future medical expenses	-	Kshs.2,000,000.00
Special damages	-	<u>Kshs. 3,000.00</u>
	=	Kshs.5,003,000.00
Less 10% contribution	-	<u>Kshs. 500,300.00</u>
TOTAL	=	<u>Kshs.4,502,700.00</u>

The plaintiff will have judgment against the defendant for **Kshs.4,502,700/-**. The plaintiff will also have costs of this suit and interest.

DATED and DELIVERED this 3rd day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mwangi for the plaintiff

Mr. Tombe for the defendant

Kennedy – Court Assistant