

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL NO. E007 OF 2025

KENYA POWER & LIGHTING COMPANY LTD.....

APPELLANT

VERSUS

NELSON NDEGE OMARE.....

RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment and decree of the lower court delivered on 24.12.2024 in Kisii CMCC No. E387 of 2023 by Hon. B.O. Omwansa (SPM).
2. The Appellant was the defendant in the lower court. Being aggrieved, they preferred the following material grounds of appeal in the Memorandum of Appeal dated 23.1.2025:
 - (a) The learned magistrate erred in law and fact in awarding too high and unjustified Ksh. 5,000,000/= for general damages without regard to the relevant principles in the assessment of damages.
 - (b) The learned magistrate erred in law and fact in awarding too high and unjustified Ksh. 3,000,000/= as award for future medical expenses contrary to judicial precedent.

- (c) The learned magistrate erred in law and fact in failing to give due regard to the pleadings, evidence and submissions thereby arriving at a wrong conclusion.

Pleadings

3. In the plaint dated 24.5.2023, the Respondent sought general damages for pain and suffering, future medical expenses and special damages of Kshs. 599,958/-.
4. The claim arose from the accident that occurred on 21.6.2020 when the Respondent was walking at Nyambara area. He was electrocuted and injured by a live wire negligently left by the Appellant's agents or servants thereby suffering severe personal injuries.
5. The Respondent set forth particulars of negligence on the part of the agents of the Appellant and the following injuries were pleaded:
- (a) Loss of consciousness for 2 days
 - (b) Deep extensive full thickness burns on the right lower limbs
 - (c) Burns on the whole right arm
 - (d) Extensive full thickness burns on the entire back
 - (e) Deep extensive burns on the left lower limb
 - (f) Extensive burns on the left arm
6. The Appellant entered appearance and filed defence dated 3.10.2023 denying the averments in the plaint and blaming the accident on the Respondent.

Evidence

7. The Respondent was PW1. He produced the documents in the list of documents dated 24.5.2023 and relied on his witness statement of the same date. It was his case that he suffered injuries to the whole body except the head. He lost libido and was admitted for 18 months. The medical report dated 6.10.2023 was produced without calling the maker.
8. DW1 was Mangera Morongo. He was an officer of the Appellant. He testified that he was not present at the time of the accident and did not visit the scene.
9. The appeal turned on quantum only.

Analysis

10. This being a first appeal, the court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
11. In the case of **Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123**, the court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the

principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

12. The learned magistrate awarded Kshs. 5,000,000/= for general damages, Ksh. 3,000,000/= for future medical expenses and Ksh. 599,958/= for special damages. It is settled that for the appellate court to interfere with this award, it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.
13. Damages must be commensurate with similar injuries. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in **Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001**, it is not for the appellate court to set aside the trial court's exercise of

discretion and substitute its own simply because if it had been the trial court it would have exercised discretion differently.

14. The Respondent pleaded that he suffered the following injuries:

- (a) Loss of consciousness for 2 days
- (b) Deep extensive full thickness burns on the right lower limbs
- (c) Burns on the whole right arm
- (d) Extensive full thickness burns on the entire back
- (e) Deep extensive burns on the left lower limb
- (f) Extensive burns on the left arm

15. The above injuries were not disputed. The medical reports by both parties were produced without calling the makers. The only divergent view in the reports was the degree of injury. The Respondent's medical report assessed 45% permanent disability while the Appellant's medical report assessed 30% permanent disability. In any event, the medical reports are merely persuasive to this court. Furthermore, in **Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29**, it was held that:

"It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court

would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

16. In assessing injuries, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in **Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR** stated that *"comparable injuries should attract comparable awards."*

17. The principle on the award of damages is settled. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR** the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) *The award should be commensurable with the injuries sustained.*

3) *Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.*

4) *Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.*

5) *The awards should not be inordinately low or high.*

18. Therefore, I find the following cases to present similar fact situation to the appeal herein.

19. In the case of **Nthuci v Kenya Power & Lighting Company Limited [2024] KEHC 1387 (KLR)** the court awarded Ksh. 4,000,000/= for general damages for pain and suffering and loss of amenities to the Plaintiff who suffered the following injuries:

- (a) 5th degree burns on the left forearm (burns extending deep into the bones of the forearm) and mixed 3rd and 4th degree burns to the arm;
- (b) Extensive mixed 2nd and 3rd degree burns to the torso on the left side;
- (c) Extensive mixed 2nd and 3rd degree burns to the right and left lower limbs; and
- (d) Loss of consciousness for 30 minutes after getting electrocuted.

20. In **Kenya Power & Lighting Co Ltd v Emmanuel Shapil Ndege & another (NCCCK) [2019] KEHC 10863 (KLR)**, the respondent sustained severe electric burns on his body leaving a permanent damage to the affected parts. He suffered 70% permanent disability and that the elbow joints may be reduced by surgical intervention by plastic corrective surgery. The court upheld an award in general damages of Ksh. 3,000,000/= in 2019.

21. The medical reports appeared to base the assessment of burns in terms of the percentage of permanent disability and not the degree of burns. I find that based on the above comparable injuries, the injuries suffered by the Respondent herein were slightly less severe. The award of Ksh. 5,000,000/= in general damages was inordinately high. An award of Ksh. 2,500,000/= would be commensurate with the injuries that the Respondent suffered.

22. On future medical expenses, the Appellant was under duty to plead even an approximate amount that would constitute future medical expenses. In the case of **Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006**, the Court of Appeal stated:-

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken,

and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

23. Future medical expenses as special damages should be pleaded and proved. As was held in the cases of **Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98** and **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992**, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.

24. The Respondent pleaded that he needed neurological and occupational therapy follow up. He would also need corrective plastic surgery due to disfiguring scars and contractures. The lower court awarded Ksh. 3,000,000/=. The award was inordinately high. The plastic surgery was not for replacement of a lost body part. It was for cosmetic purpose. The medical reports did not project any amount of damages to be awarded for the required future medical expenses. Though proved that

there was need for future medical expenses, there was no proof of the same. The court cannot award an abstract figure.

25. Parties addressed the court below on loss of future earning capacity. The court did not address the same. It appears the court confused the two. They are not the same. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in **Butler vs. Butler [1984] KLR 225**, as follows:-

a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;

b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in

addition to another, as where the claimant was in employment then and/or at the date of the trial;

e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

26. The Respondent suffered 30% disability according to Dr. Jared N Oeba. Dr. Morebu indicated that this was 45% permanent disability. Dr. Oeba, a consultant orthopedic and trauma surgeon compared the reports and came to a conclusion and gave believable reasons.

27. This court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in **Shah and Another vs. Shah and Others [2003] 1 EA 290:**

“The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of

an expert if it finds good reasons for not doing so.”

28. Further, the Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that:

“... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

29. Courts must give proper respect to the opinions of experts. Such opinions are not, as it were, binding on the courts and the courts must accept them as stated in **Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29**, where it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, Civil Appeal No. 128 of 1995. There

the Court said with regard to the evidence of experts:-

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

30. The Respondent was a cobbler. His income was not shown. The court shall therefore apply the Regulation of Wages (General) (Amendment) Order, 2018, that was applicable as at 21.06.2020. Under the regulation, a cobbler in Kisii was entitled as a general labourer to a sum of Ksh.12,522.70/= per month. If this is worked up for 10 years at 30% disability it works as follows:

$$\text{Ksh. } 12522.70 \times 12 \times 10 \times 30\% = \text{Ksh. } 450,817.20/=$$

If we use the Respondent's disability, it works out as follows:

$$\text{Ksh. } 12522.70 \times 12 \times 10 \times 45\% = \text{Ksh. } 676,225.80/=$$

31. The amounts are practically the same. Therefore, I respectively set aside Ksh. 3,000,000/= and substitute it with an award under loss of future earning capacity of Ksh. 676,225.80. This is because, though Dr. Oreba posited that the

disability was now due to healing secondary to grafting, he agreed that the initial percentage was correct. I therefore award the same.

32. On special damages, a sum of Ksh. 599,958/= was awarded. It is not clear the basis for the award of transport expenses and postage. The latter fall within the realm of costs. Special damages must be specifically pleaded and proved. What constitutes proof of special damages was addressed in the case of **David Bagine Vs Martin Bundi [1997] eKLR**, where the Court of Appeal stated as follows: -

" It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus: "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

33. A sum of Ksh. 98,000/= and postage of Ksh. 380/= do not relate to the accident. There is no basis for picking the most

expensive mode of transport and then claim. The said amount is set aside. A sum of Ksh. 501,578/= is awarded in special damages.

Determination

34. In the upshot, I make the following orders: -

- (a) The judgment of the lower court on general damages is set aside and substituted with an award of Ksh. 2,500,000/=.
- (b) A sum of Ksh. 599,958/= in special damages is set aside. In lieu thereof, a sum of Ksh. 501,578/= is awarded. Special damages attract interest from the date of filing.
- (c) The judgment of the lower court on future medical expenses is set aside and substituted with loss of future earning capacity of Ksh. 676,225.80/=.
- (d) The claim for future medical expenses was not proved.
- (e) The Appellant shall have costs of the appeal assessed at Ksh. 65,000/=.
- (f) 30 days stay of execution.
- (g) File is closed.

DELIVERED, DATED and SIGNED at **NYERI** on this **11th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Ms. Anuru for the Appellant

Ms. Shilwatso for the Respondent

Court Assistant – Michael

ORIGINAL