



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E091 OF 2023

KENYA POWER AND LIGHTING COMPANY.....APPELLANT
VERSUS
JAMES HILLARY KINYUA WANJIRU.....RESPONDENT
(Being an appeal from the judgment delivered by Hon. Martha Opanga (PM) on 3/10/2023
at Wang’uru PMCC No. 99 of 2020)

JUDGMENT

- [1] By a Plaint dated 27/7/2020, the Respondent sued the Appellant seeking special damages of Ksh. 102,000, general damages including damages for future medical expenses, costs of the suit plus interest. He pleaded that on or about 25/11/2019, he was grazing his two donkeys along Embu-Mwea Road at Tai Rice Mills near nice Digital City when the Appellant’s electricity transformer released its electrical current thereby electrocuting his 2 donkeys valued at Ksh. 100,000 and inflicting severe burns leading to their demise. He also sustained severe injuries on his body and lost his only source of income from the 2 donkeys at the rate of Ksh. 3,000 to Ksh. 3,500 per day.
- [2] The Appellant denied the claim by its statement of defence dated 25/8/2020 and prayed for the Respondent’s suit to be dismissed.
- [3] Upon full hearing of the case, the trial court found the Appellant to have been 100% liable for the accident and awarded general damages of Ksh. 150,000, Ksh. 4,140,000 for loss of user and special damages of Ksh. 102,000 together with costs and interest.

The Appeal

- [4] On appeal, the Appellant filed its memorandum of appeal on 2/11/2023 raising 7 grounds as follows:

1. *The learned trial magistrate erred both in law and fact in finding that the Appellant was liable at 100% despite the Appellant mounting serious challenge to the evidence tendered on liability and submissions filed thereto.*
2. *The learned trial magistrate erred both in law and fact and misdirected herself in awarding an exorbitant award for loss user by failing to appreciate that the award for loss of user had not been prayed for hence the award was beyond the scope of pleadings presented before court.*
3. *The learned trial magistrate erred both in law and fact and misdirected herself by failing to appreciate that a claim for loss of user was not pleaded nor supported with any evidence thereby arriving at an erroneously excessive award for loss of user.*
4. *The learned trial magistrate erred both in law and fact and misdirected herself by failing to appreciate the nature of an award for loss of user is under the armpit of special damages which must be specifically pleaded, prayed for and proven as well as the set legal principles to be considered when awarding loss of user thereby arriving at an erroneous exorbitant award for loss of user.*
5. *The learned trial magistrate erred both in law and fact and misdirected herself in awarding an exorbitant award for loss of user of Kshs. 4,140,000/= by allowing a daily income of Kshs. 3,500/= over an unreasonable period of time contrary to the established legal tenants governing the same.*
6. *The learned trial magistrate erred both in law and fact by totally disregarding the Appellant's submissions thereby arriving at an erroneous award for loss of user.*
7. *The learned trial magistrate erred both in law and fact in failing to consider the established principles governing the award on loss of user and allowing unproven daily earning over an unreasonable period thereby arriving at an erroneous finding and award for loss of user.*

Duty of the Court

[5] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the

advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others [1968] E.A. 123*).

Evidence

- [6] **PW1 James Hillary Kinyua Wanjiru**, the Respondent herein adopted his witness statement as his evidence in chief and produced the list of documents as exhibits 1-11. He went on to state that, *“I reside at Gakungu. I also suffered injuries. I was taken to hospital by good Samaritans. I reported to police. Police abstract was issued. Post Mortem was done by a Vet. Value of donkeys was Kshs. 100,000/-. My donkeys were electrocuted. I also suffered injuries. By death of my donkeys I suffered loss and damage. I also saw a doctor who compiled medical report at Kshs. 2,000/-. I pray for general damages. Special damages, cost of suit with interest.”*
- [7] On cross examination, he stated that, *“I don’t have my identity card in court. I am a Christian. I don’t go to church. I work six days in a week. I didn’t go to school. Accident occurred on 25/11/2019 at about 7.30 pm. I was with my donkeys. I tried to help my donkeys. I was also electrocuted. I found myself in hospital. I was taken to Mwea Comrade Hospital before I was transferred to Kimbimbi. I was not given treatment notes at Comrade Medical Center. I have no referral note. I was not given. Referring to medical report from Kimbimbi Hospital. It’s dated 26/11/2019. I reported incident to police. Police abstract was issued on 25/11/2019. Referring to P3 form time of report was 2204 hours. After I was issued with P3 form I was told to take it to Kimbimbi Sub-County Hospital. Referring to medical report. I didn’t go to Mt. Kenya ACK Hospital. I am 39 years. In the P3 its indicated 36. The ledger book has no signature or name.”*
- [8] In re-examination, he stated that, *“I was on the donkey cart. I was from work heading home. I was on my way home like the other days. When I reached Tai area I saw my donkeys start to shiver. In fact, the transformer should be removed from that area. I am 39 years. I have brought ledger book to show earnings I got from my donkey. I got between 3,000/--3,500/- from the donkey cart. One does not need to go to school to fill the ledger book. I didn’t tell you I was admitted at ACK. It’s not my mistake he wrote that on my report.”*
- [9] The Appellant closed its case without calling any witnesses.

Submissions

[10] The Appellant cites *Selle and Another v Associated Motor Boat Company and Others (1968) EA 123 and Kingoo and 2 others v Ntenge (Civil Appeal E798 of 2022) [2024] KEHC 7606 (KLR) (20 June 2024) (Judgment)* on the duty of the first appellate court. It urges that the relief for loss of user was not sought, and cites *Ogando v Watu Credit Limited & another (Civil Suit E098 of 2022) [2024] KEHC 3074 (KLR) (14 March 2024) (Judgment)*, *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd (2018) eKLR*, *Lamba v National Social Security Fund & another (Civil Appeal E168 of 2021) [2024] KEC 124 (KLR) (3 February 2023) (Judgment)*, *Karin Anne Challis v The Hon. Attorney General and 6 others (2002) eKLR*, *Kinyanjui v Njoki (Civil Appeal 298 of 2023) [2024] KEHC 9725 (KLR) (29 July 2024) (Judgment)*, *Cecilia W. Mwangi & Anor v Ruth W. Mwangi (1997) eKLR* and *David Bagaine v Martin Bundi (1997) eKLR*. It urges that the Appellant was doubly compensated for special damages and loss of user, and cites *Sabuni v Kenya Commercial [2002] KLR 1*, *Ryce Motors Limited & Another v Elias Muroki (1996) eKLR*, *Permuga Auto Spares & another v Margaret Korir Tagi (2015) eKLR*, *Raymond Muindi Simon v Takaful Insurance of Africa (2019) eKLR*, *Macharia v Kiruthi (Civil Appeal 023 of 2022) [2024] KEHC 3685 (KLR) (2 April 2024) (Judgment)* and *Kimeru Enterprises Limited v Mukaria (Civil Appeal E147 of 2022) [2024] KEHC 11177 (KLR) (19 September 2024) (Judgment)*. It faults the Respondent for failing to mitigate his loss and should only have been compensated for 6 months only, and cites *Samuel Kariuki Nyangoti v Johaan Distelberger (2017) eKLR*, *UAP Old Mutual & 2 others v Muchira (Civil Appeal E197 of 2023) [2024] KEHC 10954 (KLR) (19 September 2024) (Judgment)*, *Salaad v Motrext Limited (Civil Appeal 47 of 2018) [2024] KEHC 4547 (KLR) (5 April 2024) (Judgment)*, *Jackson Mwabili v Peterson Mateli (2020) eKLR* and *Peter Njuguna Joseph & another v Anna Moraa CA No. 23 of 1991 (UR)*.

[11] The Respondent urges that he specifically pleaded loss of user in the body of the plaint and the failure to include it under the final prayers was not fatal, and cites *Peter Kamau Gathoro v David Waweru Nganga (2020) eKLR*, *Kaniu & another v Tipper Hauliers Limited (Civil Appeal 43 of 2019) [2022] KEHC 16980 (KLR) (15 December 2022) (Judgment)*, *Elizabeth Kamene Ndolo v George Matata Ndolo (1996) eKLR*.

Analysis and Determination

[12] From the grounds of appeal, the issues for determination are whether the apportionment of liability was proper, whether loss of user was awardable and whether the Appellant's submissions were considered.

Liability

[13] The Respondent affirmed on thorough cross examination that, ***“Accident occurred on 25/11/2019 at about 7.30 pm. I was with my donkeys. I tried to help my donkeys. I was also electrocuted. I found myself in hospital.”*** The Respondent's evidence remained uncontroverted because no rebuttal evidence was led by the Appellant. In ***Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2009] KEHC 4030 (KLR)***, the court (*Lesiit J, as he then was*) held that; ***“It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged.”***

[14] This court finds that the Respondent proved the death of his 2 donkeys was a natural consequence of the electrocution by the Appellant's electricity transformer. The apportionment of liability at 100% was therefore justified.

Loss of user

[15] The trial court is faulted for awarding loss of user which was not specifically sought in the plaint. In ***Peter Kamau Gathoro v David Waweru Nganga [2020] KEHC 9856 (KLR)***, cited by the Respondent, the Court (*Ruth N. Sitati J*) exhaustively addressed the issued as follows:

“18. Clearly the issue of future medical expenses was specifically pleaded in the body of the plaint and I do not agree with the submissions of the respondent that the same ought to have been raised under the prayers' head for the issue to be regarded as pleaded or for it to be awardable by the court. Such an approach would be against the principle of substantive justice under Article 159 (2) of the

Constitution of Kenya in that our jurisprudence and decisional law no longer countenances this kind of technical and formalistic justice (See Civil Appeal No. 19 of 2016, Anchor Limited Vs. Sports Kenya) The issue of future medical expenses was plainly before the trial court both in the pleadings and in evidence and the court had a duty to decide on it even though it was not under the prayers' head of the plaint as the appellant had specifically prayed for it in the body of the plaint. The learned trial magistrate was therefore in err in holding that the claim for future medical expenses was not pleaded in the plaint.”

[16] In Karin Anne Challis v The Hon. Attorney General 7 6 Others (2002) eKLR, cited by the Appellant, the court (D.A Onyancha J.) said that:

“It is a cardinal principle of the court that it will only grant reliefs sought by a party. Indeed where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs. Using the same principle, I do hold that in a case where a party requires a cancellation or rectification or an amendment of a title, such a party must specifically plead such relief before a court of law can grant it.”

[17] This court thus finds that the Respondent specifically prayed for loss of user in the body of his Plaint, and the trial court was justified in awarding it.

[18] In Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR, the Court of Appeal stated that:

“In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases.”

[19] The Respondent acknowledged on cross examination that, *“I work six days in a week. The ledger book has no signature or name.”* He restated in re-examination that, *“I have brought ledger book to show earnings I got from my donkey. I got between 3,000/--3,500/- from the donkey cart.”*

[20] The trial court computed loss of user at a daily rate of Ksh.3,000 from 25/11/2019 to September 2023 in arriving at Ksh. 4,140,000.

[21] The Respondent was candid in his testimony that he only worked for 6 days in a week, which translates to 26 working days in a month.

[22] Whereas there is no doubt that the Respondent proved with specificity and strictness that he was entitled to an award for loss of user of his 2 donkeys, it was incumbent upon him to mitigate the loss through reasonable preventative actions.

[23] In Matunda Fruits Bus Services Ltd v Moses Wangila Wangila & another [2018] eKLR, the court (Joel Ngugi J as he then was) held that:

“The Appellant claims Kshs. 1,280,000.00 as loss of user. This was calculated using a figure of Kshs. 40,000/- per day for 32 days. To prove the damages under this heading, the Appellant produced Manifests for a given period in January - February, 2007...25. However, it is not entirely clear to me why it took 32 days to repair what would appear, in the context of a Public Service Vehicle, to be minor repairs. A party injured through the negligent actions of another has a duty to mitigate damages through prudent preventative action. The duty to mitigate should have kicked in here for the Appellant to ensure that the bus would be repaired as quickly as possible. In my view, a claim for loss of use must be for a reasonable period of time which is strictly necessary for the repairs to be made on the damaged vehicle. In most cases, absent exceptional circumstances, such reasonable period should not exceed fifteen days. In the present case, no exceptional circumstances were shown. I will, therefore, cap the number of days over which the Appellant can claim loss of use of the motor vehicle to fifteen days.”

[24] This court finds that the award of Ksh.4,140,000 was inordinately high in the circumstances because the Respondent had little regard for his duty to mitigate the loss.

[25] This Court has previously considered a period of 12 months as the outer limit of time by which, in ordinary cases, mitigation is required in a claim loss of user. In the circumstances of this case, the court must find that any loss after 12 months of the accident is not recoverable on the ground of failure to mitigate. The court finds that a sum

of Ksh. $3,000 \times 26 =$ Ksh. $78,000 \times 12$ months = Ksh. 936,000 would sufficiently compensate the Respondent for his loss.

[26] This court finds that there was a misapprehension of the evidence on record by the trial court to warrant this court's interference.

Consideration of the Appellant's submissions

[27] The complaint is manifestly unfounded because the trial court properly considered the Appellant's submissions against those of the Respondent before reaching the decision it did.

ORDERS

[28] Accordingly, for the reasons set out above, this court finds that the appeal is merited and it is allowed in the following terms:

1. The award of Ksh.4,140,000 for loss of user is set aside and substituted with a sum of Ksh.936,000.
2. The other awards remain unchanged.

[29] There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Kamindo for the Appellant.

Ms. Naliaka for Mr. Kiama for the Respondent.