



Kenya Power & Lighting Company v BA (Suing as a mother and next of friend of EOO - A Minor) (Civil Appeal E062 of 2023) [2024] KEHC 3555 (KLR) (21 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E062 OF 2023
RE ABURILI, J
MARCH 21, 2024**

BETWEEN

KENYA POWER & LIGHTING COMPANY APPELLANT

AND

BA (SUING AS A MOTHER AND NEXT OF FRIEND OF EOO - A MINOR) RESPONDENT

(An appeal arising out of the Judgement of the Honourable R.S. Kipngeno in the Principle Magistrate Court at Nyando delivered on the 14th June 2022 in Nyando SPMCC No. 329 of 2020)

JUDGMENT

Introduction

1. The appellant herein Kenya Power & Lighting Company was sued by the respondent for general and special damages for following an electrocution incident that occurred on the 10th October 2018 at Pap Onditi in Nyakach sub-county in which the claimant sustained burn injuries as a result of being exposed to the appellant's high voltage power cables that were dangerously exposed around the grazing field.
2. The appellant entered appearance and filed a statement of defense denying every material allegation and the particulars of negligence on its part or injuries sustained by the claimant/respondent. The parties had liability apportioned by consent in the ratio of 90:10 in favour of the respondent against the appellant who was to bear 90%.
3. On quantum of damages, the trial Magistrate made the following awards:
 - General damages for pain and suffering Kshs. 3,500,000
 - Damages for diminished capacity Kshs. 1,500,000



Costs of future medical expenses Kshs. 500,000

Special damages Kshs. 15,000

Total Kshs. 5,315,000

Less 10% contribution Kshs. 551,500

Total Kshs. 4,963,500

4. Aggrieved by the said awards the appellant filed a memorandum of appeal dated 27th April 2023 raising the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and in fact by failing to appreciate and consider the pleadings and evidence adduced in support thereof.
 - b. The learned trial magistrate erred both in law and in fact in failing to attach due weight to appellant's evidence and submissions and authorities attached thereto.
 - c. The learned trial magistrate erred both in law and in fact in assessing and awarding general damages and special damages wherein the respondent failed to prove his case.
 - d. The said award is in the circumstances inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the respondent.
 - e. The said award is disproportionate and not in line with other comparable awards made in respect of similar injuries.
 - f. The learned trial magistrate erred both in law and in fact by giving a very high award in quantum contrary to the evidence given in court.
 - g. That the learned trial magistrate's award lacked legal and factual basis and also amounted to an erroneous estimate of damages due in the particular case and was manifestly excessive.
 - h. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
5. The parties agreed to file submissions

The Appellant's Submissions

6. The appellant submitted that the trial court ought not to have given any consideration to the medical report by Prof Were Okombo as the same contained several glaring discrepancies as to the cause of the injuries sustained by the respondent which information was never accounted for and the report could not shed light on whether future medical treatment was necessary in the circumstance. Reliance was placed on the case of *Jospeh Kimantbi Nzau v Johnson Macharia* (2019) eKLR.
7. It was further submitted that the respondent never needed and/or sought any further treatment upon being discharged from JOOTRH
8. The appellant submitted that an award of Kshs. 1,500,000 would be commensurate with the injuries sustained by the respondent. Reliance was placed on the cases of *EW (Suing as The Next Friend & Mother to BM, a Minor) v Kenya Power & Lighting & Another* [2015] eKLR where the court awarded general damages of Kshs. 1,500,000 for a minor who was amputated on one arm and dropped out of school, *Crown Bus Service Ltd & 2 Others v BM A Minor suing through his next friend SMA* (2020) eKLR where the court awarded Kshs. 2,500,000 for a minor who had lost the right lower arm and



sustained several injuries amounting to 70% disability and the case of *JM (A Minor suing through the father and next friend CMK) v Githuya Transporters (K) Ltd* [2022] eKLR where the court awarded a minor who had a right amputation Kshs. 1,500,000 as special damages.

9. It was further submitted that the trial court erred in awarding the respondent Kshs. 1,500,000 as damages for diminished capacity without providing the multiplicand preferred in reaching the amount and thus this was an unjustifiable award which ought to be set aside.
10. The appellant also prayed for costs of the appeal.

The Respondent's Submissions

11. The respondent submitted that the appellant failed to produce any documentary evidence or witness testimony at the trial court and closed their case without countering the facts as presented by her and thus her evidence remained unchallenged
12. It was submitted that the Appellant had not laid a proper basis for setting aside the quantum awarded and further that the appellant was feigning ignorance that during cross examination Dr. Okombo noted error in cause of accident which he corrected and further that the nature of the injuries was confirmed and corroborated by other documents including the Appellant's own Doctor Okeyo.
13. The respondent submitted that the authorities cited by the Appellant were distinguishable and may not apply in the circumstance of this case given the peculiar nature of the case before the court, the evidence adduced and the status of the minor herein who had lost his father and bread winner of the family at the time of this incident.
14. The respondent relied on the cases of:
 - a. HCCC 29/2018 Meru- *DA v KPLC* (eKLR) where the minor in primary school was electrocuted while herding cattle. His right forearm was amputated, and he suffered 3rd, 4th & 5th degree of burns. Justice F.E Gikonyo in the judgement of 1st March 2021 awarded the following figures; a) General Damages for pain, suffering & loss of amenities - Kshs. 4,500,000/-, b) Special Damages - Kshs. 919,500/- c) Future medical Expenses - Kshs. 10,310,000/- (Total Award Kshs. 15,729,500).
 - b. HCCC 931/2005 *FG v KPLC* Nairobi where the minor was 13 years when he was electrocuted and suffered multiple burns and the court awarded General Damages of Kshs. 4,500,000 by judgement of 1st April 2022.
 - c. *AMK v KPLC* HCCC 28/2019 – MERU where the minor was 13 years old when she was electrocuted while attending to her chores of helping her mother in their rural home. She suffered burns and both her upper limbs had to be amputated. Justice A. Mabeya in the judgement of 14th April 2020 found in favour of the Minor and awarded the following: a) General damages Kshs. 4,000,000/-, b) Special Damages - Kshs. 556, 160/-, c) Loss of Earning Capacity - Filed on: - No Paid- - BY: Wesonga Wamalwa & Kariuki Associates - Reference: E3BZ9WLK - KSH. 0.00 Kshs. 1,000,000/- d) Future Medical Expenses - Kshs. 16,500,000/- (Total Award KSHS. 22,056,160).
 - d. CA 15/2016 & CA 56/2017 (consolidated) *Joseph Wangethe & KPLC v EW (Minor)* eKLR where Justices Okwengu, Sichale & Kantai (JJ. A) upheld the high court judgment in HCCC 451/2012 where the court had issued judgement as follows: a) Pain & Suffering Kshs. 1,500,000/-, Kshs. 2,628,960/- diminished/loss of earning capacity & Kshs. 5,000,000/= for future medical costs. (Total award was Kshs 9,349,660).



15. The respondent submitted that the subordinate court actually went below the comparable decisions on quantum and as such cannot be said to have awarded excessive and inordinately high damages but that on the contrary, this court should consider raising the damage awards higher to be in tandem with the comparable awards and also in consideration of the tough economic times that have since developed since the incident and judgement of the subordinate court.
16. The respondent submitted that the instant appeal ought to be dismissed with costs to her.

Analysis and Determination

17. Having considered the grounds of appeal and submissions, the issue is whether the damages awarded to the respondent was manifestly excessive. this being a first appellate Court, its role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & Anor. v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).
18. I have carefully and keenly read and understood the proceedings, the judgement appealed against as well as the Record of Appeal, the grounds thereof and the parties' submissions. The parties agreed to have liability apportioned in the ratio of 90:10 in favour of the respondent against the appellant and as such the only issue for determination is whether the trial court erred in its award of the general damages.
19. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another* (1982-88) I KAR 777:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.”
20. From the trial court record, the respondent pleaded and testified that the claimant plaintiff sustained the following injuries:
 - i. 37% burns to his back
 - ii. Severe burns to his right arm.
 - iii. Due to the severity of the burns in his arm, Amputation of the right hand.
 - iv. Severe burns to his left thigh.
 - v. Infections.
 - vi. Loss of amenities.
21. The aforementioned injuries were corroborated by the contents of the Discharge Summary (PEX3) from JOOTRH as well as the Medical Report dated 18.01.2019 from the Kisumu County Department of Health that confirmed that indeed the plaintiff minor was attended to at JOOTRH and that he



had sustained the injuries as pleaded in the plaint dated 11th September 2019. In addition, the P3 form(PEX9) also detailed the injuries sustained by the plaintiff as pleaded in the plaint and went further to classify the nature of injuries sustained by the plaintiff as Grievous Harm. The assorted photographs of the plaintiff minor filed and produced in court as exhibits also clearly show the injuries sustained involving burns and an amputated right arm from the shoulder.

22. The burden of proof lies with he who alleges. This is the stipulation in Sections 107-109 of the Evidence Act. PW1, Prof. Were Okombo testified that he examined the plaintiff after the incident and noted that the plaintiff had not yet fully recovered and still had pain on various parts of the burns. He concluded that the injuries sustained had a negative impact on the plaintiff's health and productivity. It was his recommendation that the plaintiff required further treatment that included cosmetic surgery, physiotherapy and analgesics all that would cost Kshs. 2,200,000.
23. In cross-examination, he admitted that he had made a mistake in his report, PEX1(a), by stating that the cause of the accident was a Road Traffic Accident whereas it was electrocution. He reiterated the same in his re-examination. PW2 was the respondent who reiterated the contents of the plaint after which the plaintiff's closed their case.
24. The appellant closed its case without calling any witnesses or producing any documents.
25. Where a plaintiff adduces evidence in support of his or her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”
26. However, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove his or her case on a balance of probabilities. In the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR, the court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.

(See Kirugi and Another v Kabiya and Others [1983] e KLR).
27. The respondent despite the absence of evidence from the appellant was obligated to prove her case for the injured minor on a balance of probabilities.
28. I have perused the evidence adduced by the witnesses for the plaintiff minor on the injuries sustained and which remained uncontroverted even under thorough cross-examination by the appellant.
29. Mary Kasango J recently stated as follows in the case of regarding proof of injuries

“I begin in response to that submission by reiterating that the respondent did not all adduce evidence to support their defence and further, that they did not have Sharon re-examined by



doctor of their choice. This calls to mind the holding in the case *Chaabhadiya Enterprises v David Wambutsi Wambukoya* (2017) eKLR as follows:-

“In the case of *Ephantus Mwangi & Geoffrey Nguyo Ngatia v Duncan Mwangi Wambugu* (1982-88) 1 KLR 2871 Justice R. Nambuye (as she then was) stated as follows:

‘Medical evidence cannot be attacked from the bar. If the defence doubted the injuries they should have sent the patient to be examined by a doctor of their choice. In the absence of that, this court has no alternative but to go by that medical evidence on record.’”

15. The respondents seek to attack clear evidence of two doctors whose reports were before the trial court which stated that Sharon needed future medical intervention.

.....”

30. The appellants never sought for a second medical opinion on the injuries sustained by the minor, which injuries are self-evidently severe and scary, from observation the photographs produced as exhibits and the medical reports and discharge summary.

31. Accordingly, it is my view that the respondent proved that the plaintiff minor sustained severe burns on his right arm and thigh, 37% burns on the back as well as severe burns on the right arm leading to the amputation of the right arm from the shoulder.

32. I now turn to consider whether the general damages awarded by the trial court were excessive. As regards the quantum, the Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

33. It was therefore held by the same Court in *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”



34. Similarly, in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

35. I have considered the award made and the authorities relied upon. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment... It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award... it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

36. In the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR the Court of Appeal held that:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should



be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

Damages for pain and suffering

37. The Plaintiff’s evidence in the lower court was that the minor sustained severe burns on his right arm and thigh, 37% burns on the back as well as an amputation of the right hand. He was admitted at JOOTRH for 50 days.
38. Prof. Were Okombo testified that he examined the plaintiff after the incident and noted that the plaintiff had not yet fully recovered and still had pain on various parts of the burns. He concluded that the injuries sustained had a negative impact on the plaintiff’s health and productivity. It was his recommendation that the plaintiff required further treatment that included cosmetic surgery, physiotherapy and analgesics all that would costs Kshs. 2,200,000.
39. General damages for pain and suffering are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff – see *Halsbury’s Laws of England* 4th Ed. Reissue Vol 12(1) at page 348, paragraph 883.
40. The sentiments of the English court in *Lim Poh Choo v Health Authority* (1978)1 ALLER 332 were echoed by Potter J in *Tayab v Kinany* (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* (1964) AC 326, at page 345 are as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the 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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (emphasis added)
41. The Respondent defended the award of Kshs. 3,500,000 as general damages and went on to submit that the trial court actually granted a lower sum based on comparable cases. The Appellant on its part argued that an award of Kshs. 1,500,000 would be sufficient.
42. In *Agnes Wanjiku Ndegwa v Kenya Power and lighting Ltd* [2014] e KLR the plaintiff suffered extensive burns to the neck, upper trunk, thigh buttocks left and right lower limbs and feet. She lost the right fifth toe. Total permanent disability was assessed at between 30 and 35% by two doctors. In the 2014 judgment, the Court awarded her Kshs. 1,300,000 general damages for pain and suffering.
43. In the case of *J.S (suing as father and next friend of K.S) V Kenya Power and Lightning Ltd* [2015] eKLR which also involved burn injuries due to electric shock, where the minor had suffered superficial burns to the right upper limb (11%), the right leg (6%), and superficial and deep burns on the right foot (4%). The injuries left ugly scars and displacement of the left elbow joint and loss of 20% of body skin. He was awarded Kshs. 1,900,000 in general damages for pain and suffering. The injuries suffered by the present Respondent are accordingly more severe and it is appreciated that no two injuries can be exactly the same hence the courts only use comparable cases.



44. In *James Joseph Rughendo v Kenya Power and Lighting Co.* [2011] e KLR, in 2011, the court awarded Kshs. 3,000,000 as general damages for pain and suffering to the plaintiff who sustained 70% permanent disability following electrical shock which caused:
- bilateral damage of upper limbs –radial- ulna and median nerve
 - third degree electrical burns to 40% of both palms and hands
 - gangrene to right leg leading to amputation below the knee
 - gangrene to the left dorsal aspect leading to amputation of the left big toe and part of the second toe
45. The injuries cited above were similar but more serious than those sustained by the respondent minor herein.
46. In the much older case of the case of *George Ragoka v AG* [2008] eKLR where the plaintiff whose right arm was amputated, the trial court awarded Ksh.2,000,000 as general damages and Kshs.1,800,000 for diminished earning capacity.
47. In *Joseph Wangethe v EW(suing as next friend and mother of BM, minor* [2019] e KLR where the minor suffered
48. Having considered the injuries sustained by the plaintiff respondent minor, which injuries involved severe burns with amputation of the entire right hand and was in hospital for 50 days before being discharged and had not healed at the time of hearing the case nearly five years later; and taking into account comparable cases and the effects of inflation and time lapse since those awards were made in the cited cases, I find that the award of Kshs 3,500,000 general damages for pain, suffering and loss of amenities was not inordinately high as to warrant interference by this court. I uphold the award.

Costs of future medical expenses

49. On the issue of future medical expenses, the Court of Appeal in *Tracom Limited & another v Hasssan Mohamed Adan* [2009] eKLR, stated that the appellant having pleaded for the cost of future medical expenses and stated that the cost would be ascertained later, the claim for future medical expenses was properly pleaded. The Court the held as follows, citing other decisions on the subject:

“The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd vs. Gituma* (2004) 1 EA 91, this Court, stated:-

‘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 damage 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 right should be pleaded. ‘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.” (Emphasis supplied)

50. As has been held above, inasmuch as future medical expenses are in the realm of special damages, it may not be practical for the parties to be able to fully ascertain the exact amount that will be required in the future, it therefore suffices to give an estimate as the respondents did during their testimony.
51. PW1, Prof Were placed the cost of future medical expenses at Kshs. 2,200,000. The appellant chose not to testify and did not present before the Court evidence to debunk the figures in the quotation from the Professor Doctor. They did not file any document to disprove the claim that the figures proposed were excessive. They did not call a witness who would have rebutted the contents of the said report produced as PEX1(a) nor did the appellant provide the trial court with an alternative document to compare with the documents whose contents they are now challenging.
52. As was held in *Tracom Limited & another v Hasssan Mohamed Adan* (*supra*), it was not mandatory for the respondent to delve into detail of the future expenses at that stage, noting that the minor suffered first degree burns which left him with hyperpigmentation marks on the entire back, shoulder, chest and abdomen and had an amputated arm with permanent disability being assessed at 70%. He had not fully recovered as at the time the doctor was testifying in court in November 2021. The doctor recommended plastic surgery, physiotherapy and analgesics and estimated the cost of future treatment to be 2.2 million.
53. In the circumstances, and in the absence of a cross-appeal by the respondent, for a higher figure, I find no reason to interfere with the award made by the trial court. I uphold it.

Damages for diminished earning capacity

54. The appellant has challenged the award made under diminished capacity contending that there was no multiplicand provided or preferred in reaching the amount hence it was unjustified and therefore the award ought to be set aside.
55. The principles to be considered in determining whether an injured person is entitled to damages under this head were settled by the Court of Appeal in *Butler vs Butler* [1984] KLR 225. It was held there as follows -
 - “ 1. 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 as paid as before the accident are lessened by his injury.
 2. 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.
 3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.



4. Loss of earning capacity can be a claim on its own, as where the 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.
 5. 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 proper to award it under its own heading.
 6. 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.”
56. It is however, necessary to distinguish between the claim for loss of future earnings and loss of or diminished earning capacity. There is a distinction between loss of earning capacity and loss of future earnings. In the case of *SJ vs. Francesco Di Nello & Another* [2015] Eklr, the Court of Appeal stated as follows:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley V John Thomson Ltd* [1973] 2 Lloyd’s Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

57. Assessment of damages in respect to diminished earning capacity is also a matter in the discretion of the trial court and it depends on the circumstances of each case. Where a victim is an adult and employed, there is general consensus that the person’s concerns that the person’s earning capacity is diminished when, say, he loses an arm in an accident. The same is not applicable where the victim is a child such as in this instance because the person is still growing but of course, the issue of permanent disability/incapacity cannot be disregarded.
58. In *Beatrice Anyango Okoth v Rift Valley Railways (Kenya) Limited & another* (2018) eKLR, the court in making an award for diminished capacity stated thus:

“69....damages under this heading are awarded where it is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished or just lowered....

70...The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula in assessing damages



for lost and diminished earning capacity provided the judge takes into account the relevant factors....”

59. In *Mumias Sugar Co. versus Francis Warabo* [2007] eKLR, the court was faced with a similar scenario while the victim of the accident was a minor. In assessing loss of future earnings, the court observed that it was not possible to ascertain what income she would make since she was still a minor and gave a token award of Kshs. 500,000 as damages for future earning capacity noting that it might be very true that she could reach her near full potential in future. The court observed as follows: -
- “...that assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge’s findings unless he has either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision....”
60. In the (supra) *Mumias Sugar case*, the disability suffered was assessed at 15%. In this present case, the minor suffered severe injuries involving burns all over his body with the more severe one leading the amputation of his right arm from the shoulder which indeed diminishes his capacity to get employed and earn compared to if he had his arm on. The permanent disability was assessed at 70% based on the testimony of PW1, Prof. Were, which in my view is a disability.
61. In the case of *JM (A minor suing through the father and the next friend CMK v Githuya Transporters (K) Ltd* [2022] eKLR, where the minor was 5 years old the trial court awarded damages for diminished capacity of Kshs. 800,000. The award made by the trial court under this head being Kshs 1,500,000 was in my view, sufficient considering the degree of the respondent minor’s permanent disability of 70% disability. I therefore find no reason to interfere with the award made by the trial court. I uphold the same.
62. In the end, I find the appeal herein entirely devoid of merit and I dismiss the same with costs to the respondent assessed at Ksh 50,000 payable within 30 days of today.
63. Mention before the Deputy Registrar on 8/5/2024 to confirm settlement of the costs. the lower court file to be returned forthwith.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2024

R.E. ABURILI

JUDGE

