



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.E 068 OF 2021**

**BETWEEN**

**SO [Minor suing through her next friend] JAM.....APPELLANT**

**AND**

**KENYA POWER & LIGHTING COMPANY LTD.....RESPONDENT**

*(Being an Appeal from the judgment in Mbita Senior Resident Magistrate's SRMCC No. 31 of 2020 by Hon. Nicodemus N. Moseti –Senior Resident Magistrate).*

**JUDGMENT**

1. SO a minor suing through her next friend JAM, the appellant herein was the plaintiff in Mbita Senior Resident Magistrate's SRMCC No. 31 of 2020. He had sued for compensation for injuries from a live wire which had dislodged from a pole of the defendant company. The learned trial magistrate delivered judgment dated 28<sup>th</sup> July, 2021 where the appellant was awarded Kshs. 140, 000/= general damages.

2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by the firm of Ochoki & Company Advocates. He raised the following grounds of appeal:

a) The learned trial magistrate erred in principle and law as laid out in precedents by awarding damages that was inordinately too low in the circumstances and not commensurate with the loss sugared thus reaching an erroneous decision.

b) The learned trial magistrate erred in law and in fact in disregarding and/or failing to take into account the appellant's written submissions which had articulated relevant issues of law thereby arriving at an erroneous decision both in law and principle.

c) The learned trial magistrate misapprehended the evidence on record in particular the permanent disability as assessed and failed to properly and exhaustively evaluate the evidence and/or based on no evidence.

d) The leaned trial magistrate erred in law and in principle by adopting a wrong approach in computation of the general damages, by departing from the trends contained in the authorities cited by the appellant herein which authorities are binding upon him and therefore adopting an erroneous principle thus occasioning a miscarriage of justice.

e) The leaned trial magistrate erred in law and fact by disregarding future medical expenses and the holding in the decisions cited by the appellant in written submissions which were binding on him.

f) The learned trial magistrate acted in error when he failed to properly evaluate the evidence on record thus reaching an erroneous decision by awarding general damages of kshs.140, 000/- which was inordinately low under the circumstances.

- g) The learned trial magistrate acted in error when he relied on extraneous issues as a basis of determination on assessment of quantum.
- h) The learned trial magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him.
- i) The learned trial magistrate erred in law and in fact by failing to assess quantum of damages or at all in favour of the appellant.

3. The respondent was represented by the firm of Ogejo, Omboto & Kijala Advocates who prayed for the dismissal of the appeal.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. On 21<sup>st</sup> April, 2021 the parties recorded the following consent:

**By consent of the parties judgment on liability is agreed at the ratio of 75% as against the defendant and 25% as against the plaintiff.**

The learned trial magistrate was left with the task of deciding the appropriate award in general damages.

6. When the minor came into contact with the live wire from the respondent's supply post, he sustained the following injuries:

- a) Burn wounds on the left trunk;
- b) Burn wounds on the left arm;
- c) Burn wounds on the hands; and
- d) Burn wounds on the feet.

7. The doctor assessed the burns at 30%. He said the recovery would take a long time. The healing was going to leave large disfiguring ugly hypertrophic scars and keloids. The appellant will require physiotherapy with occupational therapy. Permanent disability was anticipated and the burns were likely to complicate later to a marjolin ulcer; an aggressive type of skin cancer.

The respondent proposed an award of Kshs.75, 000/= while the appellant proposed an award of Kshs.3, 000, 000/=.

8. After perusing the entire record, the only issue for my consideration is whether the quantum of damages was inordinately low. An appellate court will not disturb an award of damages unless it be shown that the trial court proceeded on wrong principles or that he misapprehended the evidence in some material respect thus arriving at an erroneous award. in **Butt vs. Khan [1981] KLR 349** at page 356 Law J.A. Said:

**...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.**

9. In the case of **J S (Suing as Father and Next Friend of K S) v Kenya Power & Lighting Company Ltd [2015] eKLR** the minor was awarded Kshs. 1,600,000/= general damages for pain, suffering and loss of amenities including future medical care. The minor had sustained the following injuries:

- (i) lost a lot of blood and had been transfused;

(ii) Suffered lots of pain;

(iii) Suffered loss of 20% of his body skin;

(iv) Electric shock the appellant sustained had affected his behaviour, and he was very irritable and would sometimes talk to himself;

(v) The appellant was still undergoing counselling;

(vi) ugly scars on the body;

(vii) Had impaired movement of the right elbow joint which required further physiotherapy;

(viii) He suffered a total of 8% partial incapacity.

10. I had the benefit of perusing the other authorities cited by both parties and I agree with the appellant that the award was inordinately low.

11. After considering the injuries sustained by the minor and the prognosis given by the doctor, I will set aside the award by the learned trial magistrate and substitute it with an award of Kshs.2, 000,000/= general damages. Costs of the appeal be borne by the respondent.

**DELIVERED AND SIGNED AT HOMA BAY THIS 16TH DAY OF DECEMBER, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**



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