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Case Action:	Judgment
Judge:	Joseph Kiplagat Serгон
Citation:	FG (Suing By His Mother and next friend of CWK v Kenya Power & Lighting Co.Limited & another [2022] eKLR
Advocates:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 931 OF 2005

FG (Suing by his mother and NEXT FRIEND of CWK.....PLAINTIFF

-VERSUS-

KENYA POWER & LIGHTING CO.LIMITED.....1ST DEFENDANT

HANNAH WANGUI MWANGI.....2ND DEFENDANT

JUDGMENT

1. CWK, the plaintiff herein and the mother and next friend of FG (“the child”) instituted a suit against the 1st and 2nd defendants by way of the plaint dated 22/07/2005 and a further further amended plaint dated 19/10/2009 and sought for general damages and special damages of Kshs.238,710/= together with costs of the suit and interest thereon.

2. The plaintiff pleaded in its plaint that on or about 26th July 2002 on LR No.Loc2/Mariira parcel number 1367, the plaintiff was lawfully on the premises having been sent by his mother to return a bucket to the 2nd defendant when ,due to carelessness and or negligence of the defendants the plaintiff stepped on naked and live wires which had been left exposed and without any warning on the path of the plaintiff leading to the electrocution of the plaintiff thereby causing severe injuries to the plaintiff.

3. Upon service of summons, the 1st defendant entered appearance and filed their statement of defence on 24th September, 2005, the 2nd defendant filed her statement of defence on 29th September 2005 to refute the plaintiff’s claim.

4. At the hearing, the plaintiff testified and summoned two (2) other witness while the 1st defendant called one (1) witness to testify. The second defendant was deceased at the time of the hearing, and no substitute had been made.

5. The plaintiff who was PW1 adopted his signed witness statement as evidence and produced his bundle of documents as PEXH 1-6, 8-10 and document No.7 is marked for identification as P.M.F.I 7.

6. In cross-examination, it was the testimony of the plaintiff that he did not step on a naked electric wire. That he was electrocuted on the right ankle and right foot and that there was a large bang before he was electrocuted.

7. The witness also testified that he was injured in the month of July 2002 when he was in class two, aged 13 years and did not know the dangers of live electric wires.

8. In re-examination, the plaintiff stated that the residence he was shown in the defendant's bundle of documents in reference to the 2nd defendant's property at the time did not have iron sheets and had electric wires overhead, injuring his hand and leg.

9. Ms. CWK (PW2) adopted her signed witness statement as evidence and testified that it is has been stated that she heard screams on 26th July 2000 instead of 26th July 2002.

10. In cross-examination, it was the testimony of the PW2 that on the tragic day, her son travelled via the 2nd defendant's residence, and when he arrived, she had already gone to the tea purchasing center, and when she returned, she saw her son surrounded by people, and he took her to Kigumo Health Centre.

11. In re-examination, the PW2 reported that her son was in good health before to the event.
12. Professor Kiama Wangai PW3 stated that he is a medical practitioner and holds a Bachelor of medicine and a Masters both from the University of Nairobi.
13. The witness testified that he recalls preparing a medical report on FGK (plaintiff), who was electrocuted on July 26, 2002, when he was 16 years old. He had substantial burns on his right arm and foot, as well as the injuries listed in my report.
14. The doctor stated that the scars had healed at the time of the assessment, but he had significant arm injuries and lasting scars, necessitating Kshs.200,000/= in corrective procedures and that the injuries were caused by electrocution when the flames comes into contact with the skin. He also presented the medical report and receipts as PEXH 7,7A and 7B.
15. In cross-examination, it was the testimony of the PW3 that he examined the plaintiff three years after the electrocution and that the surgery is to eliminate the scars and that the entry and departure routes of electric power can be seen while the wound is fresh.
16. In re-examination, the PW3 stated that there was a contact of electric power as gathered from the history of the patient.
17. For the defence, David Ngunjiri (DW1) adopted his witness statement dated 18th March 2018 and stated that he has worked for Kenya Power since 1992, possesses a Diploma in electrical and electronic engineering, and has received wire construction and maintenance training from the 1st defendant.
18. He testified that on April 1, 2004, power was to be put in the 2nd defendant's home, and there was an application to reroute an overhead power line, with images in the bundle of documents showing the power line's position after rerouting.
19. In cross-examination, it was the testimony of the DW1 that the plaintiff could not be held responsible for the accident or for coming into contact with live wires. They had wires running through the structures, and the 2nd defendant built too close to the power lines.
20. It is DW1's testimony that the plaintiff is to blame for the accident and that the 1st defendant did not endanger the life of the boy.
21. In re-examination, the DW1 stated that the 2nd defendant had made an application for power on 15th may 2002 and when he gave out the quotation it was in the year 2004.
22. At the close of the hearing, this court invited the parties to file and exchange written submissions.
23. The plaintiff vide his original and supplementary submissions, on the issue of liability submitted that the 1st defendant, a monopolist, produced and perpetuated a public nuisance by maintaining electricity on the suit premises, and that they failed to ensure that electricity would not escape from the transformer or electric mains, causing harm to the plaintiff as a result of their negligence.
24. In its submissions, the plaintiff submitted that the 1st defendant owes the plaintiff a duty of care to ensure that electrical energy is distributed and transmitted in the prescribed manner and in a safe manner, as well as a duty of care to ensure that all transmission grids and electrical supply lines are in good working order and do not pose any danger.
25. The plaintiff relied on several authorities, one of them being the case of *Kenya Power & Lighting Limited v Nathan Karanja Gachoka & another (2016) eKLR* Hon.Lady Justice Janet Mulwa held that:

“all electrical installations are the mandate of the Kenya Power and lighting Company limited who has a duty to ensure that the electrical installations are done by its qualified staff and in the manner specified in the Electric Power Act Cap 314 and the Rules e thereunder. Kenya Power and Lighting Company is the only entity mandated to install, supervise, inspect and maintain electric installations. Evidence tendered that live wires were left uncoated ad hanging and were being used to hang clothes by the deceased and other persons in the plot. The duty for constant checks, inspections and maintenance of electrical installations is placed upon the appellat by statute Its failure to do so and its employees admission that there was a leakage from the wires that

caused the electrocution, having not been challenged then leaves me to come to the same conclusion that the appellant failed to maintain, inspect and supervise electric installations into the plot leading to the deceased's death. See Section 63, and 109 of the Electric Power Act, Cap 314."

26. The plaintiff further relied on the case of **David M Ndetei v Orbit Chemical Industries Limited (2014) Eklr** it was held that:

"the prerequisites of a strict liability claim are that the defendant made a "non-natural" or "special" use of his land; that the defendant brought onto his land something that was likely to do mischief if it escaped; the substance in question escaped; and the Plaintiff's property was damaged because of the escape."

27. It is the plaintiff's submission that it has demonstrated that his case meets the threshold as set out in the case of *Stevenson v Donoghue*.

28. The plaintiff contends that the 1st defendant is solely to blame for failing to ensure that the electrical lines that were installed in the deceased (2nd defendant) property were properly fixed or fastened to prevent the plaintiff from being permanently in a state of disability to date due to the injuries sustained from the accident.

29. On the issue of damages, the plaintiff submitted that general damages of Kshs.10,000,000/= which is a reasonable amount considering the inflation, the nature of injuries and the dire effects that the accident has caused on his life as he was a child at the time of the accident who lost his opportunity to access and enjoy his right to health as a result of the 1st defendant's negligence.

30. The plaintiff submits that he does not have a bright future and cannot access nor do work like his peers as a result of the injuries and shall forever suffer from the loss of dignity as a result of the visible scars and emotional pain that he has on his body.

31. On special damages, the plaintiff quantifies his special damages to Kshs.238,710/= as supported by the receipts submitted as her medical report dated 9th August 2019 in regards to his future medical expenses for corrective surgery.

32. In reply, the 1st defendant submitted that the entire suit is essentially one of occupiers liability and that the fault lies on the 2nd defendant (the deceased) who had constructed her building under the high voltage power lines. On this the 1st defendant relied on the case of **Ali v Gitau (1992) eKLR**, the High Court held as follows:

"I will now proceed to look at their duties under the statute. This duty is governed by the Occupiers Liability Act cap 34 Laws of Kenya. S 3(2) provides for a common duty of care whereby the occupier of any premises owes a common duty of care to his visitors which is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

33. On whether the 1st defendant should be found jointly liable with the 2nd defendant, the 1st defendant submits that in paragraph 8 of the their defence dated 24th September 2015, it pleaded the alternative defence of contributory negligence. On this the 1st defendant relied on the case **United Millers Limited & Another v John Mangoro Njogu (2016) eKLR** the High Court held as follows:

"This bring into sharp focus the doctrine of volenti non fit injuria, that is voluntary assumption of risk. The general principles applicable to that defence were stated by the Judicial Committee in Letang vs Ottawa Electric Railway Company[2] in the following terms quoted from the judgment of Wills J. in Osborne vs The London and North Western Railway Company[3]

"If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is applicable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it'

Volenti non fit injuria means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. It must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling

of constraint so that nothing shall interfere with the freedom of his will”

34. It is the 1st defendant’s submission that the plaintiff was 13 years old running an errand at the 2nd defendant’s premises and by going to the roof of the building and reaching out to touch the electrical wires, the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk, he impliedly agreed to incur it.

35. The 1st defendant relied on the case of **EW(Suing as the next friend and mother to BM (A minor) v Kenya Power and Lightning Company Limited & Another (2015) eKLR**, the Court held that

“it is not disputed that an accident did occur as described by the plaintiff and DW1, involving the plaintiff minor and that he sustained serious injuries as a consequence thereof, as pleaded and proved in court. It is also not in dispute that the plaintiff minor aged 5 years at the material time could not have contributed to the accident as he had not reached the age of reason and cannot be blame worthy in a case, and neither was there evidence that the plaintiff minor had the right sense to know the danger posed by the power lines as conceded by the 1st defendant despite pleading in their defence that the plaintiff was negligent. It is therefore for this court to determine who between the 1st and 2nd defendants was to blame and in what proportions if at all.”

36. The 1st defendant contends that the plaintiff was 13 years old at the time of the accident and that he assumed the risk by touching the wires, and that this assumption of risk should result in the 1st defendant’s liability being reduced, and thus propose that if the 1st defendant is found jointly liable with the 2nd defendant, the 1st defendant should only bear 10% liability.

37. I have considered the evidence tendered alongside the rival submissions and authorities relied upon. The following are the issues arising for determination:

- i. *Whether the 1st defendant is liable for the injuries sustained by the minor,*
- ii. *Did the minor contribute to the occurrence of the accident" If so, to what extent"*
- iii. *Whether the plaintiff is entitled to the damages sought.*

38. On the first issue, the evidence on record is that on the material date the minor, then aged 13, and was in class 3.PW2 testified that the plaintiff was born normal child with no disabilities /defects but however due to the negligence of the 1st defendant the plaintiff was electrocuted and hence injured.

39. The plaintiff avers that as a result of the electrocution he was forced to drop out of school due to the physical injuries, the ridicule and mockery he received from the peers and forced to learn chores using his left hand since the right one is not functional.

40. On the other hand, the 1st defendant’s witness testified that it was not clear how the plaintiff came into contact with the power line but given that the 2nd defendant had constructed a building directly underneath the high voltage power line, it is likely the plaintiff reached out to touch the wire.

41. It should also be noted that there was an application by the plaintiff seeking to remove the 2nd defendant in the matter which was dismissed but unfortunately she passed away before this matter was concluded.

42. The 1st defendant has although insisted to still involve the 2nd defendant in this matter stating that she still a party to the suit as the plaintiff allowed his claim against her to abate.

43. Order 24 rule 1 Civil Procedure Rules provides that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

44. The 1st defendant is the sole installer, distributor and supplier of electric energy in Kenya. It has a statutory duty of supervising, inspecting and maintaining its electric installations under **Section 52 of the Energy Act**. This calls for a high degree of vigilance on its part in order to avert accidents.

45. Contributory negligence was claimed by the 1st defendant on the basis that the plaintiff did not ensure his safety. The Plaintiff touched the live electric cables lying in the 2nd defendant's house. He was only a young boy who at the time could not have known the dangers of live wires pose. It is the 1st defendant who should have ensured that the cables run overhead and not on the ground especially where they would come into contact with humans or animals.

46. Accordingly, I am satisfied that the 1st defendant was negligent and was to blame for the accident and that the minor was at no fault. I find and hold the 1st defendant to be 100% liable for negligence. That settles the first and second issue.

47. The next issue is one of quantum. The plaintiff sought Kshs.238,710/= as special damages. It is trite law that special damages must be specifically pleaded and proved. The plaintiff pleaded special damages for which she produced receipts in support thereof totaling Kshs. 238,710/=.

48. The defendant opposed this claim, stating that no evidence was led to show how much future medical expenses may cost and that medical report and doctor's attendance fee, the receipts for these amounts were not filed and the court should not award them.

49. To my mind the contention by the 1st defendant did not arise as all the three receipts produced by the PW3. I am satisfied that out of the pleaded sum, the plaintiff was able to prove special damages in the sum of Kshs.238,710/= as special damages. That amount is allowed.

50. On general damages, in **H. West and Son Ltd v. Shepherd (1964) AC 326** the Court held: -

“... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general 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 it still must be that amounts which are awarded are to a considerable extent conventional”

51. In the present case, the minor sustained electric burns, he had substantial burns on his right arm and foot, these were grave injuries which resulted in the plaintiff losing his opportunity to access and enjoy his rights to health and he also lost his dignity as a result of the visible scars and emotional pain.

52. The 1st defendant relied on the case of **Devki Steel Mills Limited v Joseph Mulwa Nairobi, High Court Civil Appeal 658 of 2002(2004) eKLR** the plaintiff was electrocuted and suffered burns on the head, right hand,thumb,elbow,right foot and stomach. He was awarded general damages of Kshs.150,000/=.

53. In this case, the minor was injured at age 13 at the time of the accident who lost his opportunity to access and enjoy his right to health. He does not have a bright future and cannot access nor do work like his peers as a result of the injuries.

54. In the case of **DA v Kenya Power & Lighting Company Limited [2021] eKLR** an award of Kshs. 4,500,000/- in general damages was found to be a fair compensation in an electrocution accident where the plaintiff suffered loss of the right forearm, which left him in hospital for a while, the trauma and the nature and extent of the injuries suffered.

55. Accordingly, I enter judgment in favour of the plaintiff against the 1st defendant for the following: -

i. General damages - **Kshs.4,500,000/=**

ii. Special damages - **Kshs. 238,710/=**

Total **Kshs.4,738,710/=**

iii. Costs of the suit

iv. Interest on general damages at court rates from date of this judgment until payment in full.

v. Interest on special damages (e) at court rates from date of filing suit until payment in full.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 1st day of April, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant



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