



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.223 OF 2016

ANTHONY MBWABI KHAYIMBA.....PLAINTIFF

VERSUS

LAXAMANBHAI CONSTRUCTION LTD.....DEFENDANT

JUDGMENT

The Plaintiff herein, Antony Mbwabi Khayimba, filed the plaint dated 22nd August, 2016, in which he has claimed general damages for pain and suffering, cost of future medical attention, care and expenses, loss of earning capacity and costs of the suit from the defendant Laxamanbhai Construction Limited following an accident that occurred on the 16th day of April 2016 at the defendant's construction site.

The plaintiff avers that on the said date, he was in the course of his employment within a construction site run, administered, managed and supervised by the defendant, its servants and/or agents when, while in the process of descending from the roof of the said construction site, he fell from the 3rd to the ground floor causing him to sustain grievous bodily injuries. He contends that the accident happened due to negligence on the part of the defendant/its servants and or agents.

That as a result of the accident, the plaintiff sustained injuries, suffered loss and damage which are particularized in paragraphs 6 and 7 of the plaint. He has prayed for judgment as per the plaint.

The defendant filed a defence on the 13th September, 2016 in which it has denied the plaintiff's claim. In particular, it denied that the plaintiff was an employee of the defendant at the material time, the occurrence of the accident as described in paragraph 6 of the plaint, particulars of injuries. It also denied that the principle of *Res Ipsa Loquitur* is applicable. The defendant avers that it took all reasonable precaution for the safety of the plaintiff while he was engaged in his work and at its premises, so as not to expose him to any risk or damage and/or injury and it provided and maintained an adequate and suitable working environment.

In the alternative and without prejudice, the defendant avers that such occurrence as the plaintiff may prove, was caused solely or substantially contributed to, by negligence on the part of the plaintiff's own negligence. The particulars of such negligence are set out in paragraph 7(a) – (g) of the plaint. The particulars of injuries, those of future medical attention and expenses as pleaded under paragraph 7 of the plaint are denied and so is the claim for general damages.

In a reply to defence filed on 28th September 2016 the plaintiff denies each and every allegation contained in the defence save for what is expressly admitted.

The plaintiff testified as the only witness in support of his case. It was his evidence that on the 16th April, 2016 he reported to work at the defendant's construction site, at Vienna, along State house Crescent where he used to work. On the material day, he was detailed to work on the 3rd floor and his work involved welding. As he was working with the welding machine and using a grader, he felt thirsty and decided to go downstairs and look for some water to drink. As he was going downstairs, he stepped on a mabati iron sheet and fell from the 3rd floor to the ground floor where he landed on a cemented ground.

He stated that the accident was caused by negligence on the part of the defendant because there was no protection to prevent a person in case of a fall from reaching the ground floor. After the accident, he suffered injuries that left him paralyzed from the waist down and he is now on a wheel chair. He was taken to Guru Nanak Hospital where he was admitted between the 16th April, 2016 to 28th April 2016. After the discharge he was again admitted at National Spinal Injury referral hospital. He produced the treatment cards as exhibits in the case. He stated that since he got injured, he has been staying at home and his family has been suffering since he cannot be able to work. He stated that he has not healed todate and he requires medical expenses current and future.

On cross-examination, he told the court that his work on that day was on the roof and he had used the stairs to go up the building and he did

not have a problem. It was his evidence that though the iron sheets that he stepped on were not supported, he was also under duty to take care of himself.

Justus Kyalo Kiliku gave evidence as the only defence witness. He adopted his witness statement dated the 26th May 2017 as his evidence in chief. In the said statement, he stated that, on the 16th April 2016, he was working with the plaintiff and other employees at the Vienna Construction site. They were tasked with installing the metal structure to support the glass roof in the said building while the plaintiff was grinding metal plates some three (3) meters away from where he was welding. He stated that he asked the plaintiff to step aside and move towards the wall that was adjacent to where both of them were working from, for his safety as he had noticed him wiping off welding residue from his eyes and he was concerned that he would slip from where he was standing.

That, he proceeded to carry on his duties and suddenly, he heard shouts from his colleagues on the ground floor and on looking he saw it was the plaintiff who had fallen. He blamed the plaintiff for the accident for failing to follow the instructions from their supervisor one Nilesh on the correct stairs to use while going down.

Parties filed submissions in support of their respective cases. The court has considered the same together with the pleadings and the authorities relied on, by the parties. The issues that arise from the pleadings and the evidence for determination by the court are;

- 1) whether the defendant is liable for the accident.
- 2) Did the plaintiff through his negligence contribute to the occurrence of the accident and if so to what extent?
- 3) Is the plaintiff entitled to damages and what is the quantum.
- 4) Who should pay the costs of the suit.

From the evidence on record, it is clear that the plaintiff was an employee of the defendant. Though the defendant has denied it in the defence, the evidence adduced by DW1 confirms that he was an employee.

As to whether the defendant is liable for the accident, it is clear that the plaintiff was working on the 3rd floor of the construction site. In the submissions, counsel for the plaintiff has relied on various provisions of the occupational safety and health Act no. 15 of 2007.

Section 6(1) places a statutory and mandatory duty on an employer to ensure the safety, health and welfare of workers while working in their work places.

Section 6(2) provides that without prejudice to the generality of an occupier's duty under section 6(1), the duty of an occupier includes, but is not limited to among other provisions and prescriptions of the Act, the provisions and systems and procedures of work that are safe and without risks of health.....

The question that one needs to ask is, Did the defendant comply with these provisions of the law. The plaintiff in his evidence testified that the only exit available to him to descend from atop the building was the one that he used as the only other available one was filled with a heap of metal bars and they had been given express instructions not to use it. According to DW1, the supervisor, one Mr. Nilesh had that morning informed the workers that the scaffolding for the right side of the building was loose and was to be redone. That, as a temporary measure, a staircase was built adjacent to the wall where all staff were passing as they go to the ground floor. DW1 blamed the plaintiff as he decided to walk across that right side that was yet to be completed and which was not supported by strong beams. He stated that he was supposed to walk across the metal beam on his left side towards the temporary staircase as he waited for further instructions but he instead walked across the loose scaffolding which could not hold his weight and he fell.

It has not been denied by the defendant that there were materials on the staircase which made the stairs impassable and therefore the plaintiff had to use an alternative route. It is noted that though DW1 purports to blame the plaintiff for the accident, he is on record as stating, in cross examination, that he did not see the plaintiff fall and he did not see where he was passing before he fell. This simply means that he did not witness the accident. He confirmed that there were materials on the stairs and the plaintiff did not have any other way to use to the ground floor.

As rightly submitted by the defendant, the burden of proof in an action of damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which, and the breach of duty a casual connection must be established.

The defendants also relied on the case of **Kiema Muthungu Vs. Kenya Cargo Handling Service Ltd (1991) 2 KLR** where the court held that there can be no liability without fault and a plaintiff must prove some negligence on the part of the defendant where the claim is based on negligence.

The defendant relied on section 13(1)(a) and (c) of the occupational safety and health Act No.15 of 2007 and contended that the plaintiff was to blame for the accident. The said section provides;

Every employee shall, while at the work place –

- (a) Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the**

workplace.

(b) Report to the supervisor, any situation which he has reason to believe would present hazard and which he cannot correct.

This section also places some degree of duty on the employee to ensure his own safety and health and those of other employees, who may be affected by his own acts. The Court of Appeal in the case of **Mwanyule Vs. Said t/a Jomvu Total Service Station (2004) 1 KLR 47** had this to say about Employers liability;

“.....the employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against the risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution”

Whereas I concur with the above decision by the Court of Appeal, the evidence in this case shows that the staircase was not passable and a temporary route had been constructed for the employees to use. This is also supported by the evidence of DW1 who stated that the supervisor had warned the workers of that danger. The court, however, notes that the said Mr. Nilesh was not called as a witness in the case to confirm if indeed he had given the warning to the employees. But even assuming the said warning was given, the defendant still had a duty to ensure that the alternative route available was safe and secure to the employees. The plaintiff was working on the 3rd floor of the building, the defendant did not tell the court whether the building had floor or level support at the 1st or 2nd floor. If it had, the plaintiff would not have fallen all the way down to the ground floor, in which case, the injuries would not have been as serious. Section 77 of the Occupational Safety and Health Act No. 15 of 2007 provides;

“There shall, so far as practicable, be provided and maintained safe means of access to every place at which any person has at work”

Having considered and analysed the evidence as above, I find that the defendant was more to blame for the accident but at the same time, the plaintiff is not free of blame because he had worked at the site for long enough to know the dangerous areas of the construction site and therefore he was reasonably expected to take care of himself. I do apportion liability at 80:20% in favour of the plaintiff.

Having dealt with the first and second issue, I now address the quantum of damages that the plaintiff is entitled to. The injuries that he sustained are well captured in the medical report of the plaintiff by Dr. Theophilus Wangata. The main injuries that he sustained are;-

1. Spinal injury with paraplegia and urine and stool incontinence.
2. Wedge compression fracture of the spine at L1

He was initially admitted at Guru-Nanak hospital where surgery was done to the back with screws. He was transferred to National Spine Injury Hospital where he underwent physiotherapy and rehabilitation. He is currently on a wheel chair.

According to the doctor, when he saw him on the 23rd July, 2016, he was not able to do any simple household tasks such as personal grooming/dressing, he had both urine and stool incontinence, was experiencing muscle spasms and constipation and can only use a wheelchair and has erectile dysfunction since the accident.

The examination findings revealed that he is on wheel chair, he has a catheter in situ, he uses pampers, he is paraplegia and has complete paralysis of both lower limbs (muscle power grade –O sensory level of L.1, There is a surgical scar on the Lumbar spine, there is tenderness on palpation of the surgery site. Both upper limbs have normal muscle power and sensory function, he has pressure/bed sores on the right gluteal region and on the right heel. The extent of permanent and functional incapacity as a result of the injuries sustained in the accident by the plaintiff is 100%

The plaintiff has urged the court to award Kshs.12 million as general damages while the defendant has asked the court to award Kshs.5 million. I have looked at the authorities cited by both parties in this regard. The defendant has relied on the case of **Claytonne Chimwani Shitoka Vs. Njuguna Samuel & 2 others (2017) eKLR** and the defendant has relied on **Brian Muchiri Waihenya Vs. Jubilee Hauliers Limited & 2 others** in which a sum of Kshs.6million was awarded. I have noted the injuries in the case of Brian Muchiri and they were similar to the ones sustained by the plaintiff in the case herein. The case of Brian was decided four years ago and taking into account the inflation, I hereby award a total of Kshs.10 million as general damages.

Cost of future medical attention, care and expenses

(a) Wheelchair

According to Dr. Wangata, the plaintiff will be confined to a wheel chair for life. The wheelchair will require to be replaced every year due to wear and tear. He gave an estimate of the cost of a wheel chair at Kshs.60,000 with a life span of one year. Under this sub-head, the plaintiff has asked the court to award Kshs.3million based on 50 years.

The defendant on their part has submitted on a figure of Kshs.200,000/- based on a multiplier of 10 years and a replacement cost after every 3 years. The defendant's offer is on the lower side while that of the plaintiff is on the higher side. I note that the defendant did not subject the plaintiff to a 2nd medical examination for purposes of a 2nd medical opinion on the future medical care and expenses. However, when the plaintiff testified he stated that he has had the wheelchair that he is using for three years and though it has some minor problems, it is serving him well. I agree with the defendant that the wheelchair does not require to be replaced every year if the plaintiff's own evidence, is

anything to go by. To be fair to the plaintiff and so that his life is not unnecessarily interrupted by having a wheelchair that would keep breaking down every now and then, I believe that replacement of the same after every two years would be reasonable. I therefore make an award of Kshs.750,000 made up as follows;

60,000/- x 25 x ½

(b) Nurse Aid

In the doctor's report, he has opined that the plaintiff will require a nurse as he cannot perform simple and/or routine daily tasks or chores for himself. The plaintiff has asked the court to award Kshs.18million for 50 years at the rate of Kshs.30,000 per month. On their part, the defendant has submitted at Kshs.15,000 per month for 10 years. I award Kshs.4.5million at Kshs.15,000 per month for 25 years multiplied by 12.

(c) Catheter, urinary bags, diapers and napkins

Due to the plaintiff's inability to control urine, he requires catheters, urine bags, adult diapers, napkins, and bed pads.

According to Dr. Wangata the plaintiff will require the above items at a cost of Kshs.800 per week which translates to Kshs.3,200/- per month. Giving him 25 more productive life the total will be;-

$25 \times 12 \times 3200 = 960,000$

(c) Stool evacuation and related drugs

I have looked at the medical report and though the doctor stated that the plaintiff will require frequent use of drugs to evacuate stool weekly, he did not give an estimate on the cost of the same. I concur with the defendant that the court should not make an award under this head as the plaintiff has not specifically proved it.

(e) Recurrent chest, urinary tract and skin infections management

According to the doctor, the plaintiff is predisposed to recurrent chest, urinary track and skin infections because of being bed ridden. As a result, he shall require regular medical checkups as an outpatient for life. This will require that he hires a taxi at every visit to hospital which, visits are scheduled on a three month basis. Every visit will cost him approximately Kshs.3,000/- taxi charges, and approximately Kshs.4,000/- doctor's consultation fees. The purchase of medicines may cost approximately Kshs.4,000/- per month.

I have perused the plaint filed herein. The cost of hiring a taxi is claimed at Kshs.380,000. The defendant submits that the same is reasonable. I award Kshs.380,000 under that sub-head and Kshs.800,000 for recurrent chest, urinary tract and skin infection management.

(f) Pain killers and physiotherapy sessions

Under this head, I concur with the defendant that they were not pleaded and not proved and therefore I make no award under this head.

(g) Paraplegic patients bed

The doctor in his report has stated that the plaintiff shall require a special bed which can be turned by a hydraulic or electric system to ease pressure at pressure points. He has put the cost of the bed at Kshs.350,000/- and a special mattress which will cost Kshs.150,000/-.

The plaintiff in his submissions has asked for a total of Kshs.3,613,400 and Kshs.1,500,000 for the bed and the mattress respectively. There is no justification for the figures quoted by the plaintiff. The doctor has not stated that the bed and the mattress will require to be changed but common sense would dictate that they may need to be changed for the reasonable comfort of the plaintiff. I take it that, the same can be changed thrice in a period of the 25 years the multiplier that, the court finds reasonable. A sum of Kshs.1,500,000 is awarded under this sub-head.

(h) Loss of future earnings

The plaintiff produced a payslip marked as exhibit 4. According to the same, his net pay is Kshs.13,276. The plaintiff has submitted at kshs.3,473,808/- on the basis of the gross salary of Kshs.15,235 and 19 years while the defendant has submitted on a figure of Kshs.1,458,120 on the basis of Kshs.12,131 as the net salary and 10 years.

The plaintiff's basic salary was Kshs.15,236/- and 19 years while the defendant has submitted on a figure of Kshs.1,458,120 on the basis of Kshs.12,151 as the net salary and 10 years.

The plaintiff's basic salary was Kshs.15,236/- before the statutory deductions. The total statutory deductions amount a total of Kshs.950 leaving a balance of Kshs.14,286. The plaintiff would have retired at the age of 60 years, going by the civil service scheme. He therefore had a balance of 18 working years. I therefore award a total of Kshs.3,085,776. The house allowance is factored in the salary as can be seen on the pay slip and it cannot be awarded under a separate sub head.

(i)Erectile Dysfunction

Under this head, the plaintiff has claimed a total of Kshs.3 million. The defendant has submitted that no award should be made under this head as the same was not pleaded. I do concur with the defendant in that regard.

(j)Special damages

The court makes no award under this sub head as none was pleaded and/or claimed in the plaint.

In the end, judgment is hereby entered for the plaintiff against the defendant as follows;

(A) Liability

80:20% in favour of the plaintiff.

(B) General damages – 10,000,000.

(C) Cost of future medical attention, care and expenses

(i) Wheelchair – Kshs.750,000/-

(ii) Nursing aid – Kshs.4,500,000/-

(iii) Catheter, urine bags, diapers and napkins – Kshs.960,000/-

(iv) Stool evacuation and related drugs –Kshs. Nil

(v) Recurrent chest, urine track and skin infections management – Kshs.800,000/-

(vi) Cost of hiring a taxi – Kshs. 380,000/-

(vii) Pain killers and physiotherapy sessions – Kshs.Nil

(viii) Paraplegic bed – Kshs.1,500,000/-

(ix) Loss of future earnings – Kshs.3,085,776/-

(x) Erectile dysfunction – Nil

(xi) Special damages – Nil

Total - Kshs.21,976.776

less 20% contribution making a total of Kshs.17,590,620.80cts.

Special damages shall earn interest from the date of filing and general damages from the date of the judgment.

The plaintiff shall get the costs of the suit.

Dated, Signed and Delivered at Nairobi this 25th day of **October, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Plaintiff**

..... **For the Defendant**