



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL SUIT NUMBER 143 OF 2003**

**JUMA LUKALE OLUTALI.....PLAINTIFF**

**VERSUS**

**EVEREADY BATTERIES (K) LTD.....RESPONDENT**

**JUDGMENT**

**1. Background and Pleadings**

The plaintiff was an employee of the defendant at its plant in Nakuru from August 1981 upto the July 2002, a period of 21 years when he was retired on medical grounds. He was a general fitter involved in installing new machinery in the factory, maintaining the machines and later promoted to technical operator until his retirement with a salary of Kshs.28,043/=.

2. In his plaint dated and filed on the 27<sup>th</sup> April 2003, it is his claim that over the period he was exposed to considerable concentration of depolarising chemical fumes vaporous and excessive heat and inhaling such fumes and poisonous chemicals and in addition lifting heavy weights from which he sustained serious injuries and deceases that are stated as:

***a) Chronic allergenic rhinitis and sinusitis***

***c) Obstructive lung disease/bronchospasm/Asthma***

***d) Recurrent prolapse of the rectum***

It is his claim that as a result of the above injuries he was retired on medical grounds at the age of 42 years. He therefore sued the defendant alleging breach of statutory duties, negligence and demanded compensation in terms of special and general damages including future medical treatment and loss of earning capacity.

He stated the particulars of negligence and breach of statutory duties pursuant to provisions of the **Factory's Act Cap 514 Laws of Kenya.**

3. In its defence dated 5<sup>th</sup> September 2003 the defendant denied the claim, breach of statutory duties and that the plaintiff was retired on medical grounds. The plaintiff filed a bundle of document in support of his claim as follows:

*1. Medical examination documents*

*2. Environmental sampling data for Eveready Batteries Kenya Limited.*

*3. Material safety data sheets for various chemical elements used at Eveready Batteries Limited.*

*4. Treatment documents and medical history summaries*

*5. Job safety health analysis sheets.*

*6. Accreditation documents for organizations doing tests on air samples from Eveready Batteries Kenya Limited.*

*7. Medical report by Dr. Joseph A. Aluoch dated 23<sup>rd</sup> January 2004.*

*8. Medical report by M.s. Msluk Crater X-Ray Clinic dated 16<sup>th</sup> June 2003.*

During the hearing numerous other documents were produced as exhibits. The defendant too filed its documents dated 26<sup>th</sup> January 2011.

#### **4. The Plaintiff's Case**

##### **Juma Lukale the plaintiff testified as PW4.**

He produced as exhibits letter of employment, probation confirmation and promotions letters from August 1981 to February 2003 when he retired. (PExt. 15, 16, 17 and 28).

He testified that in 1991 he developed chest pains, back pains and breathing problems. That in 2003 February, Dr. Taiswa at Kakamega General Hospital examined and X-rayed him and prepared a report (PEx. 19) recommending retirement on medical grounds. He testified further that upon Dr. Taiswa's medical report, the Defendant referred him to its Dr. Olwany of Sunrise Hospital (PEx. 2) for further medical examination. It was his evidence that the findings and report of the company doctor were never given to him, but was told he did not qualify to be retired on the medical grounds.

5. He further testified that the company then referred him to the Medical and Dentists Board for an independent opinion, but was not the report.

The plaintiff further testified that he reported his woes to the Ministry of Labour who by its officer M. Nyongesa mounted investigations and prepared three reports PEx. 1, 2 and 3.

He further stated that the Ministry of Labour referred him for further extermination to Occupational Health expert doctors. He named them as Dr. Swaro, Dr. Ogada and Dr. Sakari. He produced their reports as PEx. 4, 5 and 6 respectively.

He was further referred to Dr. Joseph Oluoch who too prepared a report.

6. The plaintiff's testimony giving rise to his ill health was that since 1991 he developed chest pains leading to breathing with difficulties and that at the factory, he was not given safety boots, ear plugs, safety glasses, cotton gloves or overalls, nor respirator to cover his mouth and nose.

He testified that there were harmful fumes at the **can room** where he worked from room which was very hot due to the fumes from the chemicals and dust.

It was his evidence that in the can room, he was using compressed air and Kerosene to wash the machines instead of a respirator that the company failed to supply him.

7. On the back pains, it was his evidence that it was due to lifting heavy objects and, spare parts of various machines including bending to load cartons in the machines for the long period.

He stated that the company ought to have fitted a hopper for loading and overhead cranes for lifting the heavy spare parts.

It was his testimony that since 2003 he was on treatment and continues on such treatment at a cost of between Kshs.1,888/= to Kshs.3,600/= per month.

When cross examined by Mr. Musangi Advocate for the Defendant, the stated that when he joined the company he was certified healthy and reiterated that his back injury was due to lifting heavy objects, and that he was not provided with masks in the can room where he worked.

#### **8.PW1 WAS PETER WANGILA NYONGESA**

He was an employee of the Ministry of Labour, Occupational Health Services Department.

He holds a Bachelors Degree in Biochemistry and Physiology from the University of Nairobi and a certificate in Biological Control Methods of Harmful Industrial Substances, MBA in Human Resource Management with specialization in Occupational Health and Safety verses productivity.

He investigated the plaintiffs complaints about the defendants workplace/factory.

Together with the Medical reports from the various doctors, he prepared a report **PExt.3** on the working conditions and the environment.

I shall analyse the report later in this judgment.

9. **DR. OMONDI OGADA** testified as PW2. He is a Cardiac specialist with a Bachelors and Masters Degree in Medicine and specialist in Cardiology. He produced his report on the examination of the plaintiff – PExt 4. He had attended to him for 3 years when he was the defendant company's doctor. He stated that the plaintiff's illness was work related and fumes in the factory contributed to development of bronchitis. He produced the report and a bundle of receipts and subscriptions and affirmed that he continued to consult him after leaving the company.

10.**DR. MUBISI SWARO** also testified as PW3. He produced his report – PExt 6. He holds a Bachelors and Masters degrees in Occupational Health and has 30 years experience. He diagnosed the plaintiff as suffering from chronic allergic, rhinitis and sinusitis. His conclusion was that the plaintiff sustained occupationally induced respiratory track illness due to prolonged exposure to hazardous fumes, vapour, dust of the chemicals at this work place, and so recommended his retirement on medical grounds. He also produced a receipt for Kshs.15,000/= PExt. 7 court attendance fees including medical report fees.

11.On cross examination of the above Doctors , PW2 Dr. Omondi Ogada stated that safety equipment were applied in the company including applied extractors fans and ventilation fans and could not state any safety step that the company could have taken that it failed to do. He reiterated that he recommended the plaintiff for retirement on medical grounds based on illness but did not apportion any blame to the company. He stated that bronchitis can also be caused by genetic predisposition, that the could too have developed bronchitis from the work he was doing and *lumbago* from prolonged lifting of heavy objects.

12. The defendant closed its case without calling any evidence, and proceeded to file its submissions. Likewise the plaintiffs written submissions were filed.

#### **13. Analysis of Evidence, Submissions and findings**

There are material facts that are common to both parties and not in dispute.

That the plaintiff worked for the defendant company for 21 years performing the same work, that he developed health problems in the course of his work, that the doctors who examined and treated the plaintiff concluded that the plaintiff's illness was work related.

#### **14. Issues For Determination**

From the evidence and pleadings the issues for determination are therefore:

- a) Whether the defendant breached its duty to the plaintiff as stipulated in the Factories Act, Cap 514 Laws of Kenya.*
- b) Whether the defendant was negligent.*
- c) Whether the plaintiff's illness was a result of the nature of work and the working conditions in the defendant's factory.*
- d) Whether the plaintiff is entitled to the reliefs sought in the plaint.*

15. The plaintiff's evidence and that of his witnesses were not controverted or challenged. The defendant failed to call any evidence despite denying all the allegations labelled against it by the plaintiff and the evidence adduced. It is trite that the burden of proof of any allegation of fact lies with the person who alleges. See **Section 107 and 108 of the Evidence Act**. Consequences of such action is that the claims and evidence by the plaintiff stand unsubstantiated and unchallenged, that parties' pleadings remain mere statements of facts. It is also trite that failure to adduce any evidence means that the evidence adduced by the plaintiff against the party is uncontroverted and unchallenged. See **Trust Park Ltd -vs- Paramount Universal Bank Ltd & 2 Others Nairobi HCCC No. 1243 of 2001 and Linus Ng'anga Kiongo & 3 Others -vs- Town Council of Kikuyu (2012) e KLR, D.T Dobie (K) Ltd -v- Wanyonyi Wafula Chebukati (2014) e KLR**.

The thread running through the decisions is that a party's statement of defence remains as mere statements if no evidence is adduced to challenge the plaintiff's evidence.

16. This is the position in the present case.

The Doctor's evidence stated in their respective medical records speak for themselves. Dr. Omondi Ogada the defendant's company doctor who had treated the plaintiff for over three years stated that the plaintiff's illness was work related, and the fumes contributed to his bronchitis. He also stated that his condition will be treated for life. Although he did not attach full liability to the company by stating the protective measures he recommended for the company, he fell short of confirming that the protective devices were indeed given to and were being used by the employees.

17. He could not fully blame the exposure of the plaintiff to fumes and dangerous chemical emissions in the workplace to the illness stating it could also be genetic. He further stated that bronchitis is a hyperactive condition and if one is exposed to the minimum level of the irritants over long period of time one could develop inflammation of the airways. He confirmed that the plaintiff's back problem may have been caused by the nature of his work, bending for prolonged periods of time and lifting heavy objects.

18. It is therefore safe to conclude that the plaintiff's health problems- chronic allergic rhinitis and sinusitis, obstructive lung disease and Asthma were substantively caused by the plaintiff's exposure to harmful fumes from chemicals and dust as he was not provided with protective masks, respirators, earplug that would have minimised the injury to his lungs. That evidence was uncontroverted. The prolonged lifting of heavy machinery too caused the plaintiff's back and *lumbago* injury. No evidence was adduced that the company had provided cranes to lift the machines.

19. I have taken into account that the plaintiff's illness and injury could too have been caused by or contributed to by a genetic factor as explained by the two doctors, and further that the plaintiff could also

have opted to leave such employment before the condition became serious. The Factories Act imposes upon an employer statutory obligations to take all practical measures to protect employees against inhalation of dust, fumes and other harmful impurities, as well as provisions of suitable protective devices in line with the nature of work.

See **Sections 51 and 53 of the Factories Act**. In **Nakuru HCCC No. 90 of 1996 Thomas Mukhaya -vs- African Diatomite Industries Ltd** where the court held

***“---that the law requires a reasonable employer to provide its workmen with some protective devices as clothings while doing the kind of work done by the plaintiff and the employer must also ensure that the devices are reasonably used.”***

20. The evidence adduced by the plaintiff and his witnesses is evident that the defendant breached the statutory duty imposed upon it by the law towards its employees, including the plaintiff. That evidence was not contraverted or challenged. No evidence was adduced that the environment was safe for the plaintiff, nor was any demonstration that any protective devices were given or supplied to the plaintiff. Indeed the doctors confirmed that the injuries and illness of the plaintiff were work related. Citing the case of **Amalgamated Saw Mills Ltd -vs- Stephen Muturinguru HCCA No. 75 of 2005**, I am satisfied that a link was established between the plaintiff's illness and the environment and work conditions at the defendant's factory. Sufficient evidence was adduced to establish that necessary link.

See also **Timsales Ltd -vs- Willy Ng'ang'a Wanjohi Nakuru HCCA NO. 230 of 2004**.

21. For those reasons I find that the defendant failed to adhere to the conditions set out under the Factories Act and that resulted to plaintiff's illness, suffering and loss to the extent of 80% by its negligence and breach of duty of care. Having come to the findings above, it therefore follows that the defendant is liable in damages to the plaintiff to that extent.

## **22. Quantum of damages**

As stated in the case **West H & Sons Ltd -vs- Shephard (1964) A.C. 326** and cited with approval in **Cecilia W. Mwangi & Another -vs- Ruth W. Mwangi – C.A No. 251 of 1996**, money cannot renew a physical frame which has been battered and shattered, but a court will award a fair and reasonable compensation.

The three doctors' medical reports give an in-depth nature of the plaintiff's injuries and the long time effects to the plaintiff. I need not repeat them.

The plaintiff seeks damage for:

- a) Pain and suffering***
- b) Loss of future earnings***
- c) Future medical expenses***
- d) Special damages***

### **(a) Pain and Suffering**

The plaintiff proposes a sum of Kshs.1,200,000/= while the defendant proposes a global award of the same amount.

I have considered the authorities cited by both parties. In the case **Crispinus Buluma Nyongesa -vs- Urgent Cargo Handling Ltd (2015) e KLR**

The court awarded Kshs.1,300,000 for pain and suffering and loss of amenities, but for slightly more serious injuries.

In **HCA No.140 of 2010(Kakamega) Ben Mengesa -vs- Edith Makungu Lande (2013) e KLR** a sum of Kshs.900,000/= was upheld for serious back injuries due to lifting of heavy objects.

On this subhead, doing the best I can, I shall award a sum of Kshs.1,000,000/=.

**(b) Loss of future earnings**

The plaintiff was retired on medical grounds at the age of 42 years with a salary of Kshs.28,043/=. I have looked at the payslip. The NET salary for the last month, April 2003 after Statutory Deductions - Pay as You Earn(PAYE), National Social Security Fund(NSSF) and National Hospital Insurance Fund (NHIF) is Kshs.24,737/=. He would have worked for another 18 years to reach retirement age with an increased salary as months and years passed on. But uncertainties of life have to be considered. I shall therefore apply a salary of Kshs.28,000/= against a multiplier of 10 years, thus:

$$10 \times 12 \times 28,000/= \text{ Kshs.3,360,000/=}$$

**(c) Future Medical Treatment Expenses**

The defendant's Dr.Omondi Ogada opined that the plaintiff would require treatment for the rest of his life. He stated that he spends between Kshs.1,800/=-3,600/= monthly on medication. This is a necessary expense. It is pleaded and was supported by evidence.

I shall apply a sum of: **Kshs.2,500/=** as an average expense per month.

$$\text{Thus } \text{Kshs.2,500} \times 12 \times 10 = \underline{\text{Kshs.300,000/=}}$$

**23. Special Damages**

A sum of Kshs.21,000/= is pleaded the plaintiff produced payment receipts towards the medical expenses. The sum of Kshs.21,000/= is allowed.

24. The plaintiff has substantively proved his case against the defendant on a balance of probability to the extent of 80%. He shall be awarded costs of the suit at 80% .

25. Consequently and in summary, judgment is entered for the plaintiff against the defendant as follows:

**(1) Liability-80% against the Defendant**

**(2) Damages for for**

**(a) Pain and suffering- Kshs.1,000,000/=**

**(b) Future Medical expenses –Kshs.300,000/=**

**(c) Loss of future capacity and earnings - Kshs.3,360,000/=**

**(d) Special damages- Kshs. 21,000/=**

**Total = Kshs.4,681,000/=**

**80% thereof =Kshs.3,744,800/=**

26. The above sum shall attract interest at court rates from the date of this judgment.

27.The plaintiff is awarded 80% of the costs of the suit.

**Dated, Signed and Delivered this 25<sup>th</sup> Day of May 2017.**