



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 123 OF 2015**

**PATRICK KINAKA MUNYAO.....PLAINTIFF**

**- V E R S U S -**

**CEMENTERS LIMITED..... RESPONDENT**

**JUDGEMENT**

1. Patrick Kinaka Munyao the plaintiff herein filed a compensatory suit via the plaint dated 24/3/2015 against Cementers Limited, the defendant herein for damages on account of an accident that occurred on 12<sup>th</sup> January 2014 at the defendant's construction site at Yaya Centre, located along Lenana Road in Nairobi. The plaintiff being an employee of the defendant was assigned the duty of tying metals together, when a lump of soil fell on his back when at work occasioning him serious bodily injuries.
2. The plaintiff in this suit is seeking for special and general damages on account of the injuries he sustained in the accident as an employee of the defendant.
3. The plaint and summons were served upon the defendant, Cementers Limited, who filed their statement of defence on 8/05/15 where he denied that the plaintiff was injured in the course of his employment. The defendant further averred that if the plaintiff was injured as alleged, then such injuries were not occasioned by the defendant's negligence and/or breach of its statutory duty.
4. Consequently, the suit proceeded for hearing. By consent the learned counsel appearing in this matter agreed that the list of documents filed on 16.11.16 be deemed as properly filed. the defendant witness statements of Mike Aggrey Nyago dated 20/8/2015 be adopted. On special damages the parties recorded a consent and agreed at kshs.290,810.
5. The trial proceeded on the basis that the plaintiff was injured on 12/11/2014 while in the cause of the employment of the defendant. The only issue to be determined is whether or not the defendant is to blame and if yes, then how much is the plaintiff entitled to as compensation.
6. It was further consented by counsels that the medical reports of Prof. Jon. E. A. Ating'a dated 27.1.2015, Dr. Job Podo dated 1/4/15 and that of f Dr. P. M. Wambugu dated 31/7/15 be produced by consent without calling for the makers. Lastly the list of documents on the plaintiff bundle were produced by consent.
7. When this suit came up for hearing, the plaintiff's case was supported by the evidence of the plaintiff himself, Patrick Kinaka Munyao. When he took the witness stand as PW1, he stated that on 12/01/14 while at his place of work, he was fitting metal when some soil fell on his back injuring his spine. He stated that the defendant was his employer and a copy of the employment contract was produced as evidence, where PW1 used to earn Ksh.600 per day. As a result of the accident, he has visited several

hospitals seeking for treatment and has since been confined to a wheelchair. That his body has been paralysed from his waist downwards. PW1 produced medical reports as PExh 1a, (b) and (c) for the three doctors and who examined him. He went ahead to state that the plaintiff paid for his hospital bills and his wheelchair that he uses currently and for medical expenses that PW1 incurred not paid for by the defendant, he produced receipts as exhibits.

8. PW1 continued to state in his open testimony in court that the said accident had changed his life completely and that he is now confined to a wheel chair and not able to provide for his wife Stella and child Mussenya Kinanka, a girl aged 2 years, as well as pay rent as evidenced in the rent receipt produced for Ksh.1,000.00/- per month. He is forced to take a taxi to and from Hospital where he regularly goes for treatment and physiotherapy as recommended by Dr. Wambugu. He goes ahead to state that he cannot control urine and stool passage and for this reason he needs a nurse to take care of him, the same was corroborated by Dr. Wambugu's medical report. He also stated that he cannot perform any sexual intercourse with his wife.

9. PW1 was further cross examined by Mr. Njogoro, learned Counsel for the Defendant who reiterated the facts as he had given in his testimony to court, and added more information relating to the accident. PW1 stated that he was with one Felix at the time of the accident, where he was fixing steel in order to establish the foundation, a job he has always done. Usually there is a net fixed to prevent the excavated soil from falling which wasn't on site during the time of the accident. He admitted that he was issued with helmet, boots, gloves and overall. The Co-employee Felix managed to escape from the falling soil, and assisted to take PW1 to hospital. It is in PW1's statement while in cross-examination that the protective gear given to him by his employer did not protect him from the falling soil.

10. Counsel for the plaintiff closed his case and thereafter learned Counsel for the Defendant closed his case without summoning witnesses. At the close of evidence, counsels entered a consent to file written submissions, which were only be limited to the issue of quantum of damages to which the plaintiff will be entitled.

11. In his plaint, the plaintiff stated that he sustained the following injuries; permanent injury to the spinal cord, fracture of T10 bone, inability to use lower limbs, inconsistency of faeces and urine, recurrent pains, loss of bodily functions, thoracic permanent paraplegia with complete deficit from T10 and loss of consortium. This is corroborated by Dr.Bondo, Dr. Prof. Ating'a and Dr. P.M Wambugu's medical reports. As a result of the aforesaid injuries the plaintiff was assessed to have suffered 100% permanent disability. The plaintiff beseeched this court to grant him Ksh.6,000,00/- for general damages for pain and suffering. On arriving at this quantum, the plaintiff was guided by the case of **Nakuru HCCC NO.157 OF 2012 Ngure Edward Karega –vs- Yusuf Doran Nassir (2014) eKLR**, in which the court awarded Ksh.5,000,000 for general damages for pain and suffering in 2014 (where the plaintiff sustained a fracture on the 6<sup>th</sup> cervical and, on the right leg rendering him incapacitated and not able to work.) The plaintiff stated that bearing the high rate of inflation, Ksh.6,000,000 up from Ksh.5,000,000 awarded in 2014 will be sufficient. I am convinced that the sum of 6,000,000 would suffice for general damages for pain and suffering.

12. As for general damages for loss of consortium, the plaintiff beseeched the court to award him Ksh.900,000.00/ and relied on the case of **FKM & another –vs- Evans Ngore & another (2016) eKLR** where the plaintiff suffered similar injuries as those suffered by the plaintiff herein and was awarded K.Sh.800,000/- I am convinced that a sum of 900,000 would suffice for general damages for loss of consortium.

13. The plaintiff has also asked this court to award him Ksh. 4,680,000/- general damages for loss of earning and justified it as follows; that the plaintiff will not be able to work again to earn a living and support his family. He was 28years old at the time of the accident and now 30 years old, earning a salary of Ksh.600/- per week amounting to Ksh.12,000 /- per month. The plaintiff is stating that he would have worked up to 60 years and therefore applied a multiplier of 25 years. The loss of earning for the plaintiff was worked out as follows.

Loss of earning from January 2014- January 2017. Kshs.  $15,600 \times 12 \times 3 =$  Kshs.561,600/(why not  $12,000 \times 12 \times 3 = 432,000/-$ )

-Loss of earning capacity Kshs.  $15600 \times 12 \times 25 =$  Kshs.4,680,000.

14. The plaintiff relied on the case of **Nairobi HCCC NO.1436 of 1998 Salim Kanzungu –vs- Kenya Ports Authority** where the plaintiff was 24 years old at the time of his accident as a lorry driver for a company and a multiplier of 26 years was adopted.

15. The plaintiff has also asked for special damages as agreed at the date of hearing as well as future expenses on the plaintiff that include cost of regular checkups and transport/taxi, cost of house rent, cost of catheter, urine bags, uridoms, laxatives, stool control and costs of drugs to evacuate stool, cost of wheel chair, hydraulic system bed with Rippo Mattress and lastly the cost for hiring a permanent nursing assistant.

16. The defendant on the other hand proposed the following awards; general damages for pain at suffering and loss of amenities at Ksh. 5,000,000/- and relied on the case of **H.C.C.CNO.157 of 2012 (Nakuru) Ngure Edward Karega –vs- Yusuf Doran Nassir** where the plaintiff suffered injury to the spinal cord resulting to paraplegia and permanent incapacity was assessed at 100% and was awarded Ksh. 5,000,000/-

17. For general damages for loss of consortium, the defendant proposed Ksh.800,000/-

The defendant further proposed and urged the court to adopt a multiplier of 20 years which in their view they thought to be reasonable in the circumstances pertaining to the plaintiff.

The multiplier to be applied is what seems to be the point of contention because that is where the difference in the amounts proposed by the plaintiff and the defendant.

18. Plaintiff settled on a total figure of Ksh.27,737,410/- applying a multiplier of 25 where as the defendant settled on a final figure of Ksh.20,047,810/- applying a multiplier of 20. The defendant also said that the plaintiff is entitled to cost and interest on the damages payable from the date of judgment until payment in full.

19. In the end I enter judgment in favour of the plaintiff and against the defendant as follows:

**1. Agreed special damages as at the date**

**of hearing Kshs. 290,000/-**

**2. General damages for pain suffering**

**and loss of amenities Ksh. 6,000,000/-**

**3. General damage for loss of consortium Ksh.900,000/-**

**4. Loss of earning from January 2014 to**

**January 2017  $12,000 \times 12 \times 3$  Ksh.432,000/-**

**5. Loss of earning capacity from**

**2017 for life  $12,000 \times 12 \times 25 =$  ksh.3,600,000/-**

**6. Cost of regular checkups and**

transport/Taxi charges	Ksh.2,300,000/-
<b>7. Cost of Catheter, urine bags, uridoms,</b>	
<b>Laxatives</b>	<b>Ksh.1,500,000/-</b>
<b>8. Cost of wheel chair - 6 wheel chairs</b>	<b>Ksh.360,000/-</b>
<b>9. Hydraulic system bed with Rippo</b>	
<b>Mattress</b>	<b>Ksh.500,000/-</b>
<b>10. Permanent nursing assistant</b>	<b><u>Ksh.6,000,000/-</u></b>
<b>Total Sum</b>	<b>ksh.21,987,000/-</b>
<b>11. Cost of the suit.</b>	

Dated, Signed and Delivered in open court this 18<sup>th</sup> day of August, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant