REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 244 OF 2002

JOSEPH NG'ANG'A NDUNG'U .....APPELLANT

VERSUS

EVERREADY BATTERIES (K) LTD.....RESPONDENT

JUDGMENT

1. The plaintiff, Joseph Ng'ang'a Ndung'u who was an employee of the defendant for 13 years in its Paper Liner Machine Department sued the employer for general and special damages arising from occupational injuries sustained during the period leading to retirement in 2001 on medical grounds.

In the plaint dated 7th October 2002, the plaintiff particularised the heavy machines and machine parts that he was exposed to lifting, and twisting in a limited space without any assistance that he states caused him suffer muscular skeleton pain and prolapsed disc as stated in the particulars of injuries. He stated that the said injuries caused him to retire on medical grounds on 31st December 2001.

2. It is his claim that the employer was in breach of contract of employment and duty of care to take all reasonable precautions for his safety while he engaged upon the said work, and to provide a suitable working environment without any injury. He has particularised particulars of breach of both statutory duties and negligence.

3. The defendant in its defence dated 15th November 2002 filed a general denial, denied having employed the plaintiff and further denied all particulars of negligence and breach of statutory duty towards the plaintiff.

4. The plaintiff's evidence

The plaintiff testified as PW1. He produced a letter of appointment and confirmation of his employment with the defendant as PExh 1 and 2 on the 2nd November 2008. He testified that his work in the Engineering Department involved maintenance of machines and overhaul of the same then moved to production machines where he was assigned Paper Liner machine. He stated that while working, in July 1995 he hurt his back while attending a machine that was defective and while trying to dismantle it, his back was dislocated as it was too heavy, over 60 Kilogrammes and since then it was his testimony the back problem persisted. He testified that he informed the employer about the small space he was working from, that he needed more people to assist him lift the heavy machinery but it failed to provide the said assistance or enough space. For almost a year, he was on treatment of the back by the company doctor but by year 2000, the strain and pain were too much to bear. He produced a Letter PExt 4 by Doctor Omondi Ogandi certifying that he had suffered severed prolapsed disc and advised retirement on medical grounds. Thereafter the Ministry of Labour, and several other doctors confirmed the report on his injury.

He produced the medical reports prepared by Dr. Osodo, Dr. Obed Omuyoma and the Defence doctor, Dr. Malik that confirmed he had sustained a prolapsed disc. At time of retirement, he stated that as result of the injury, he has not been able to do any gainful employment. He blamed the company for failing to provide gadgets to help lift heavy objects and prayed for compensation.

5. Upon cross-examination, the plaintiff stated that he was made to lift heavy machines alone that were meant to be lifted by six people yet the company had lifting machines (forklift and chain list machine used for lifting heavy machine). He stated that in his department, there were no machines, that the above machines were big and there was no room to manouver when lifting them, and they could not be removed from one section to the paper liner machine section where he was working.

He further stated that in all the sections he worked, he used to lift the heavy machines alone.

6. **PW Dr. Obed Omuyoma** produced his medical report dated 5th August 2003 that stated lifting heavy objects lead to the plaintiffs weakness of lower back resulting to prolapsed of lower disc and at time of examination, he could not bend and complained of pain in back radiating to the lower limbs. He further stated that the plaintiff developed penile erection weakness leading to sexual weakness. He assessed permanent disability at 30%. In his prognosis, he stated that the probable cause of the condition was due to lifting heavy objects over a long period of time.

7. The defence did not call any evidence.

However, by consent, counsel recorded a consent on the 22nd March 2016, that medical reports by Dr. Antony Mubisi dated 25th August 2002 and Dr. Malik dated 14th January 2003 be admitted as exhibits without calling the makers. Parties then proceeded to file written submissions.

8. Evaluation of Evidence

It is not in dispute that the plaintiff was an employee of the defendant and sustained occupational injury while in the course of duty over 13 years period. It is also not disputed that for a period of about eight years the plaintiff was tasked with lifting heavy machinery and machine parts that hurt his back causing a prolapsed disc and severe pains at the back.

I have considered the Exhibits produced. The defendants Doctor Dr.Omondi Ogada (Exh 4) was of the opinion that it was difficult for the plaintiff to continue performing his duties which involved bending and lifting heavy load. He recommended retirement on medical grounds. Likewise, **Dr. Swaro and Dr. Obed Omuyoma** in their reports corroborated the defendants doctors report that the plaintiffs back injuries were as a result of continuous lifting of heavy load in poor posture.

In particular, **Dr. Swaro who is an occupational medicine physician** in his report Exh 6(a) was categorical that the plaintiff sustained spinal injury of severity nature and there is a likelihood that he would continue suffering from low back pain for the rest of his life.

9. The said injuries are hereby summarised:

- ***Spinal injury (Dr. Swaro)***

- ***Severe prolapsed inter verabral disc (Dr. Oganda & Dr. Omuyoma)***

- ***Facetal arthoropathy at the L2/L3, L3/L4 and L4/L5 levels marrow degeneration in SI sclerosis in L4, vertebral body towards is inferior end place (Dr. Swaro & MRI report).***

10. The defendant in its Advocates submissions denied that the plaintiff's injury was as a result of negligence while admitting that he was injured. Dr. Malik – the defendants external doctor in his medical report made an opinion that the plaintiff did not sustain any spinal defect, deformity or disability and therefore no permanent disability as shown by an MRI scan. It is stated that the doctors report was not

challenged and therefore ought to be taken as authoritative. It is to be noted that the defence did not avail the doctor for cross-examination.

11. Interrogating the three medical reports, I find the report by Dr. Swaro, an occupational physician, who is an expert in occupational injuries more authoritative. As I have stated above his evidence is well corroborated even by the defendants in house doctor. I discount Dr. Mali'ks medical report as it could not genuinely contradict three other reports of medical experts.

I am satisfied that the plaintiff's back injury was a result of prolonged lifting of heavy loads, at the defendants premises while in the course of his employment over a period of time.

12. On a claim based on negligence, the party claiming is under a duty to prove the particulars of negligence, or at least one of the particulars pleaded to succeed. In **Mr. Elgon Hardware Vs. United millers Ltd, CA 19 of 1996**, the court held that:

> "***It is the duty of a party alleging negligence to prove the same and a party cannot be allowed to prove that which he has not pleaded."***

The particulars of negligence attributed to the defendant are specifically pleaded in the plaint, that the defendant failed to provide cranes or any other lifting machines, failed to provide space which could accommodate many people to assist the plaintiff in lifting the heavy machinery, failing to provide safe working environment and exposing the plaintiff to a risk of damage of injury which it knew or ought to have known, among others.

13. The defendant did not challenge the plaintiff's evidence

The plaintiffs injury was not due to one particular act, as stated by the defence. Medical evidence was that it was a continuous process due to the exposure to lifting heavy load. It was the plaintiff's statement that he worked for the defendant for 13 years, and started experiencing the back pains in 1995, after six years performing same work in different departments, and which the company was duly aware, fully informed but failed to provide safe working conditions and environment to the plaintiff.

The defendant did not demonstrate any reasonable steps or at all that it took to ensure the plaintiff's safety as mandated in law, and as re affirmed in the case **Statpack Industries -vs- James Mbithi Munyao NBI C.A No 152 of 2003-** In the **Statpack Industries Case, Justice Visram** held

> ***"that an employer's duty of common law is to take all reasonable steps to ensure the employees safety. But the employer cannot baby-sit an employee. He is not expected to watch over the employee constantly."***

The circumstances in the said case were different.

In the present case, the employer knew and ought to have known that exposing a person to lifting heavy loads of over 50 Kilogrammes constantly and over a long period of time would be injurious to the back. This was a foreseeable risk. Space was constrained. The employer had sufficient machinery to lift heavy loads save for the space. The said employer in my view by ignoring requests by the plaintiff for assistance by way of more people and use of cranes and other machinery to lift the heavy loads would result to injury to the plaintiff. One does not need to be a doctor to foresee the effects of such acts. The authority is distinguishable as far as circumstances are concerned.

14. In my considered opinion the plaintiff has proved a casual link between his injury and the defendants negligence by his evidence and that of the medical Doctors as evidenced in their respective medical reports. See **Amalgamated Saw Mills Ltd -vs- Stephen Muturinguru HCCC No 75 of 2005.** It is in evidence that at time of employment of the plaintiff by the defendant in 1988, his medical reports gave a clean bill of health. It was only after a period of six years of continuous lifting of heavy machinery and loads that his back problem started to show signs of injury. He continued for another seven years during

which time the pains deteriorated, facts well captured in the medical reports.

I disagree with the defence submissions that the defendant provided a safe working environment and did all it could to secure the plaintiff from foreseeable accidents. No demonstration of anything that the defendant did was done. In deed no evidence was adduced at all by the defendant.

15. For the above reasons, I find that the plaintiff has proved on a balance of probability that his severe back injury was as a result of direct occupational hazard caused by negligence by the defendant in its failure to provide better working conditions to the plaintiff, a duty imposed upon it by statute and common law and also common sense. My findings are buttressed by findings in the case **Otieno Nalwoyo -vs- Mumias Sugar Co Ltd (2014) e KLR** where it was held:

> ***"---the duty of an employer to provide servants with a safe place of work is not merely to warn against unusual dangers known to them --- the master is under a duty of make his servants to take reasonable care to avoid harm---"***

The Factories Act too places such duty on an employer. I am further satisfied that the plaintiff has proved, not only one form of negligence against the employer, but many See **Kiema Mutuku -vs- Kenya Cargo Hauliers Ltd (1991) e KLR.**

16. Authorities cited by the defendant in its submission concern circumstances where the employee is tasked with doing manual jobs requiring no supervision and not working with machines essentially dangerous machinery, and in the present case, heavy machines requiring other machines to lift them or move them as opposed to one employee lifting single handedly loads of over 50 Kilogrammes, over a long period of time. It is my further finding that the defendant could foresee the dangers it had exposed the plaintiff to which was evident by the company doctors medical report that the injury was due to prolonged lifting of heavy loads. I find it untenable that for five years, the plaintiff complained of the back injury and continued to be treated by the company doctor but the Defendant did not think of improving the working conditions for the plaintiff. May be the plaintiff should have opted to leave the employment but necessity of employment may not have allowed him do so. In **Latimer -vs- AEC (1953) Ac 643 Lord Delvin LJ stated:**

> ***"In my opinion there is no legal duty to an employer to prevent an adult employee from doing his work if he or she is willing to do. If there is a slight risk, it is for the employee to weigh it against the desirability, or perhaps the necessity of employment---"***

It is common knowledge in the Kenyan economy that employment is a precious commodity and one has to think deeply before abandoning such. However, this does not negate the employer's duty to his employees to provide a save working environment.

In its totality the plaintiff has proved negligence on the part of the defendant, and consequentially, it is liable in its damages.

17. ***Quantum* of damages**

I have stated the plaintiffs injuries as contained in the three medical reports by Doctors Antony Mubisi Swaro,Obed Omuyoma, and Omondi Ogada**.**

I have considered the case of **Martiti Waweru Mukuria -vs- Agustine Mwangele Khaemba &another, (2014) e KLR.**

For injuries close to what the plaintiff sustained, the court awarded Kshs.1,200,000/= in general damages in December 2014.

While considering damages to award, I must be conscious that money cannot review a physical frame which has been battered and shattered. Sums awarded ought to be reasonable, and moderate with some

uniformity according to predence, and conventional. As stated in the case **Hassan -vs- Nathan Mwangi Kamau Transporters & 5 Others (Nairobi CA 123 of 1985):**

> ***"inordinately high awards will lead to monstrously high premiums for insurance of all sorts and is to be avoided for the sake of everyone in the country."***

I shall award a sum of Kshs.1,000,000/= damages for pain and suffering.

> ***(a) Pain and Suffering and Loss of amenities***
>
> ***There is no doubt that the plaintiff sustained serious injuries to his back. Dr. Omuyoma assessed permanent disability at 30%.***
>
> ***The plaintiff submitted a sum of Kshs.2,000,000/= and cited the case Raphael Oloo above where the plaintiff was warded Kshs.1,000,000/= for similar injuries in 2001.***
>
> ***The defendant proposed a sum of Kshs.1.2 Million.***
>
> ***Among the medical reports produced by the plaintiff, only Dr. Obed Omuyoma defended his report in court.***
>
> ***He did not indicate that the plaintiff would require Kshs.5,000/= monthly treatment charges.***

During this testimony on the 27th May 2014, the plaintiff stated that he last visited his doctor for treatment in 2013. It is therefore not clear on what basis Dr. Swaro recommended the future treatment costs of Kshs.5,000/= per month. I decline to award the same as the claim has not been sufficiently proved.

> ***(b) Loss of future earnings In his plaint Paragraph 8, the plaintiff stated that as a result of the injuries, the was retired on medical grounds at 38 years old, had lost his then salary of Kshs.25,245/= per month and would have worked up to 60 years if not for the injury. He therefore claimed damages for loss of future earnings.***

In the case **Simon Kinyua -vs-Eveready Batteries Ltd Nakuru HCCC No. 98 of 2002,** a case very similar to the present one, Justice Lesiit considered that the plaintiff therein, retired at 39 years, and the medical reports that he would no longer be able to do manual work allowed the claim for future loss of earnings and adopted a multiplier of 16 years upon the salary he was then earning.

The plaintiffs Advocate submits that a multiplier of 18 years against a salary of Kshs.25,245 would be reasonable.

The defendants Advocate submitted for a global award of Kshs.2,000,000/= as adequate compensation if negligence was proved.

In **Raphael Oloo -vs- Industrial Plant (EA) Ltd (2001) e KLR**, the court allowed a claim for loss of future earnings when the plaintiff sustained injuries to the low back, could not bend or lift heavy objects and was likely to develop complications. The court adopted a multiplier of 15 years. Going by precedence, and the doctors opinions that the plaintiff may never be able to work for the rest of his life, I shall adopt a multiplier of 12 years, against his proved salary of Kshs. 25,245. That comes to Kshs.3,635,280/=. Made up as follows:

> **25,245 X 12 X 12 =3,635,280.**

18. **Special damages**

A sum of Kshs.16,000/= is pleaded, but only Kshs.13,000/= was proved this being medical report charges

to Dr. Omuyoma and Dr. Swaro.

I shall allow the said special damage of Kshs.13,000/=.

19. The upshot of the above is that there shall be judgment against the defendant as follows:

(a) Damages for loss of future earnings - Kshs.3,635,280/=

(b) Damages for pain and suffering and loss of amenities - Kshs.1,000,000/=

(c) Future Medical expenses - Nil

(d) Special Damages - Kshs. 13,000/=

The plaintiff shall have costs of the suit.

Dated, signed and delivered in open court this 22nd day of September 2016.

JANET MULWA

JUDGE