REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 262 OF 2012

CRISPINUS BULUMA NYONGESA.....….....……PLAINTIFF

VERSUS

URGENT CARGO HANDLING LIMITED....…….....DEFENDANT

JUDGMENT

1. The Plaintiff's claim against his former employer, the Defendant, is for damages in negligence. He has pleaded that he undertook delivery duties for his employer using a delivery motor cycle, where he was required to manually carry luggage for delivery to and from the Defendant's storages and load/offload to and from designated clients offices and storages. That this duties and conditions over time created a physical strain on his body as he sometimes rode on rough roads.

On 4th August 2008, he suffered an accident when a pedestrian crushed into the motor-cycle along Maasai Road, Industrial Area, Nairobi. It is his claim that even after treatment, he continued to experience strain and pain on exertion of his body and in spite of his requests for further treatment, this was not heeded and upon resumption of duty, he was allocated the same strenuous assignments as before.

Subsequent to this incident, the Plaintiff noted that on 4th June 2009, he suffered a fracture of his back bone in the course of lifting and carrying heavy luggage for the Defendant. This was confirmed by an X-Ray done at an AAR clinic. The Plaintiff averred that the circumstances leading to the injury were all caused and contributed to directly and indirectly as a result of negligence on the part of the Defendant and its officers. Particulars of negligence were pleaded.

Particulars of injuries and resultant loss of amenities are also pleaded. They included breakage and dislocation of the backbone, generalized body trauma and pains.

The Defendant, in its statement of defence, admitted that the Plaintiff sprained his back while delivering cargo to a client in June 2009 but denied that the duties related to his employment were detrimental or created physical strain as alleged or that it was a result of its negligence. The Defendant further averred that it took all necessary precautions to ensure safety of the Plaintiff; the Defendant pleaded that it was not liable to the Plaintiff in negligence as sought, and that it had discharged its obligations to him by having in place an appropriate insurance cover and by defraying his medical bills.

The Defendant emphasized that since it also holds a work injury benefit Act insurance cover for its employees, it applied for a permanent disability settlement in the Plaintiff's favour which was not forthcoming as the Plaintiff was said to have had an existing pre-condition at the time of the accident (a

prolapsed disc) and the injuries were therefore not as a result of his employment with it. That an amount of Kshs. 140,385/- paid to the Plaintiff was in full and final payment thus the suit is an abuse of process which ought to be dismissed.

The Plaintiff testified and called one other witness, Dr. Moses Kinuthia. There were no witnesses who testified on behalf of the Defendant though the Defendant's witness statement filed on 24th July 2012 was admitted in evidence by consent of the parties. Written submissions were then filed on behalf of the parties.

I have considered the testimonies of the Plaintiff and his witness and the Defendant's witness statement. I have also considered the documents relied upon by the Plaintiff comprised in his list and bundle of documents dated 24th May 2012 and those of the Defendant dated 23rd July 2012. Finally I have considered the written submissions of the parties, including the cases cited.

There is an **agreed statement of issues filed on 24th January 2013**. After reading the pleadings, the testimonies of the witnesses, the documents admitted in evidence and the written submissions, it is apparent that the following facts are not in dispute –

1. That the Plaintiff was an employee of the Defendant at the material time.
2. That his duties included transporting luggage in a motor cycle and loading/offloading luggage from motor-vehicles to client's premises for the Defendant.
3. That the Plaintiff in the course of performing his duties suffered a prolapsed disc from which he never recovered and was eventually let go by the Defendant.
4. That the Defendant paid for the initial treatment of the Plaintiff and also paid him compensation amounting to Kshs. 140,385/-.

The main outstanding issues to be decided are therefore, in my view, the following –

1. **Whether the Defendant was under a duty to accord to the Plaintiff appropriate equipment while performing his duties.**
2. **If so, whether the Defendant is liable in negligence for the causation of the injuries and the exacerbating factors?**
3. **Whether the Plaintiff had a pre-existing prolapsed disc condition when he suffered injuries during the course of his duties.**
4. **Whether the Defendant is liable to the Plaintiff in damages?**
5. **What injuries did the Plaintiff suffer?**
6. **What damages, if any, are due to the Plaintiff?**

It will be appropriate to consider Issues Nos. 1 and 2 together. It is stated at **paragraph 562** of the **4th Edition**, **Vol 16** of ***Halsbury's Laws of England*** at follows:

> "**It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him from an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition, nor is he an insurer of his employee's safety; the exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take reasonable care of the employee's goods: the duty extends to his person."**

12. In the case of **Smith v Baker & Sons [1891] AC, 325** Lord Herchell stated as follows –

> **"It is clear that the contract between employer and employed involves, on the part of the**

former, a duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his obligations as not to subject those employed by him to unnecessary risk."

And at **paragraph 560** of the same **Vol 16** of ***Halsbury' Laws of England*** it is stated, *inter alia* -

"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances...so as not to expose them to an unnecessary risk."

13. Applying the above stated principles, our ***Court of Appeal*** in the case of **Mumende v Nyali Golf & Country Club [1991] KLR** held as follows –

"1. It is an implied term of employment that an employer will make the conditions of employment to his employee absolutely safe and will not expose his employees to any danger...but will not be responsible for the employee's own negligence in execution of such employment.

2. The employer was aware of the danger that the employee was subjected to and it failed to do what was required of it and for that reason it was negligent.

3. Just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection.

4. In measuring the degree of care one must balance the risk against the measures necessary to eliminate the risk."

It is common ground that apart from being a motor-cycle rider the Plaintiff's work also involved loading and offloading heavy luggage from vehicles to their destinations on behalf of the Defendant. There is no indication as to what kinds of luggage; but from the name of the Defendant Company it is evident that it handles cargo for its clients. The Plaintiff in all probability must have lifted large amounts of cargo.

The Plaintiff testified that while he was given a helmet and a jacket for his delivery duties, he wasn't provided with boots. It is during these trips that he got involved in two accidents and received medical treatment including two surgeries but he never fully recovered. This led to him being retired on the basis of temporary disability. In these circumstances what reasonable measures and care for the safety of its employee would an employer provide so that such employee is not exposed to unnecessary risk?

The evidence before the court is that when the Plaintiff was involved in two accidents while riding a motor-cycle in the course of his duties, he was treated and surgeries conducted through his medical cover. PW2 testified that when the Plaintiff consulted him, he explained the injuries he had sustained. He carried with him medical reports which the witness used to assess him. According to PW2, he made his findings based on the information given to him by the Plaintiff. According to this witness, the prolapsed disc could not have been a pre-existing condition and could only have been caused by the injuries he sustained during the accidents. He assessed the Plaintiff's total incapacity at 40% of the whole person.

In **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros. vs Augustine Munyao Kioko [2007]1 EA 139,**

"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified…."

PW2's opinion remains uncontroverted as the defence did not lead or call any evidence that

contradicted that opinion.

The Plaintiff's case is that the Defendant failed to provide him with protective wear which would have minimized the strain on his back during carriage and deliveries; that the Defendant exposed him to danger and that it failed to provide him a safe working environment.

The evidence before the court was that the Defendant provided the Plaintiff with a helmet and a reflector jacket while undertaking his delivery duties. This was the standard equipment supplied to an ordinary motor cycle rider making deliveries in the industry. While the Plaintiff complained that the loading and off-loading duties were forced on him as they were never part of his job description, he conceded in cross examination that he was never injured while loading.

The job-description of a motor-cycle rider especially one who delivers goods from his motor-cycle must entail some danger as he rides on roads used by motor-vehicles and pedestrians considering there are very few roads if any specially designed with motor-cycle/bicycle lanes. It therefore cannot be a serious complaint that working as a rider for the Defendant exposed the Plaintiff to injury, or failed to provide him a safe working environment.

Indeed, the Plaintiff acknowledged that when he got injured he got medical attention and was given days off by the Defendant in order to recuperate.

From the totality of the evidence before the court, the Defendant had provided the Plaintiff with all necessary equipment in accordance with the practice in the industry. Even if he was not provided with boots while riding, they would not in any way have prevented the accidents that occurred.

Given the nature of the Plaintiff's duties as a motor-cycle rider, it was not unexpected that some element of danger would be involved, this element being the possibility of being hit by a motor-vehicle or even coming into collision with pedestrians. It must have been a danger that the Plaintiff was well aware of, or should have been aware of when he took up the employment.

The fact that the accidents occurred in which the Plaintiff was injured cannot be attributable to any negligence of the Defendant. The Defendant had taken reasonable care to provide to the Plaintiff proper and necessary equipment for his work. The Defendant could not have warranted total or absolute security of the Plaintiff given the nature of his work. The Defendant had taken reasonable care for the safety of the Plaintiff as required under common law.

Upon these issues therefore, I find for the Defendant.

Issue No. 3 and 4

The Doctor's testimony sheds light on the issue of the state of health of the Plaintiff before the accidents. He was categorical that the prolapsed disc was as a result of the accidents that occurred in the course of the Plaintiff's work. He maintained that if he had been born with it, he would not have been able to walk again after the accidents.

Therefore, although the injuries sustained by the Plaintiff were not foreseeable and the Defendant would not have done anything to prevent the accidents from happening, they occurred in the course of his work.

Issues No 5 and 6:

PW2 who examined the Plaintiff and prepared a medical report dated 4th April 2012 indicated that

the Plaintiff had suffered a prolapsed disc which had not quite healed even after the surgeries he underwent.

In light of the findings in the preceding issues, I find that the Plaintiff has not proved his case against the Defendant on a balance of probabilities. The Defendant is not liable to him for the injuries he suffered and the consequences thereof. This suit must be dismissed.

It must be said for the Defendant that it did a lot to assist the Plaintiff. It paid all his medical bills and retained him for some time whereby he carried out 'light' duties before he was retired due to temporary disability.

However, he was not duly compensated under the Work Injury Benefit Act, Cap 236. Liability for statutory compensation is not based on the breach of duty or negligence of the employer. It is based on a legal policy that the employer should, subject to certain exceptions compensate the employee for injuries due to accidents and occupational diseases as inherent risks of employment. Here the employee has no obligation to prove the causative link between the employer's negligence and his injury or disease. Therefore, the Defendant is liable to compensate the Plaintiff under the Act.

As I might be wrong on the issue of liability, I must decide on the damages (and the quantum thereof) that the Plaintiff would have been entitled to had he succeeded on liability at common law.

Issue No. 7 What injuries (and consequences therefore) did the Plaintiff suffer?

Medical evidence was given by PW2 (Dr. Moses Kinuthia). He examined the Plaintiff, prepared a report and produced it in evidence.

The Plaintiff suffered a back injury with prolapsed disc with nerve encroachment. He underwent surgical operations to alleviate the pain. According to the witness he will require use of analgesics and physiotherapy due to the chronic pain. The use of analgesics for a long period of time will require use of acid suppressants as it has resulted in gastric ulceration. The back pain is bound to hinder his social and economic endeavours. PW2 assessed the Plaintiff's permanent residual disability at 40%.

Had he succeeded on liability, the Plaintiff would be entitled to the following heads of damages: -

i. For pain, suffering and loss of amenities.
ii. For future medical treatment and management.
iii. For loss of future earnings.
iv. Proved special damages.

In assessing damages, I note that the Plaintiff was born in 1973, which means that he is now aged 42 years. After factoring in the vagaries and uncertainties of life, I would award a multiplier of 14 years.

i. **Pain, suffering and loss of amenities**

I have considered the respective submissions of the parties on this item, including the cases cited.

The Plaintiff in his submissions has suggested KShs 3,000,000/00 under this head. The Defendant has suggested KShs 450,000/00. Doing the best that I can, I would award KShs 1,300,000/00 for pain, suffering and loss of amenities.

ii. **Future medical treatment and management**

Under this head, PW2 noted that he will require analgesics, physiotherapy and acid suppressants whose cost he did not quantify. It would be expected that PW2, a doctor, would have some knowledge in such things. It would be impossible for the Court to award under the head without any figures proposed by PW2.

iii. **Loss of future earnings**

I accept the testimony of PW2 that the back pain will permanently hinder the Plaintiff's social and economic endeavours. He may never be able to work again certainly not as a loader/rider. His chances of training for a job that he can do are therefore minimal.

The Plaintiff would thus be entitled to damages for loss of future earnings. His salary from employment with the Defendant was KShs 12,984/00 per month.

KShs 12,984/00 X 12 x 14 – KShs 2,181,312/00

iv. **Special damages**

Only KShs 13,000/00 for the medical report and court attendance fee was proved. I would have awarded the Plaintiff this sum.

As the Plaintiff has not succeeded on liability, his suit is dismissed. Regarding costs, in the circumstances of this case it would not be just to tax the Plaintiff with costs of the suit. Though costs will normally follow the event, in this case there is good reason to order that each party bears its own costs of the suit. It is so ordered.

Dated and delivered at Nairobi this 25th Day of November, 2015.

A.MBOGHOLI MSAGHA

JUDGE