



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 737 OF 2005

ISAAC JOMO ODINGA.....1ST PLAINTIFF

EERLYNE NALIKA..... 2ND PLAINTIFF

(suing as The Administrators and personal

representatives of the Estate of ALBERT PETER ZEDI)

VERSUS

BIDCO OIL REFINERIES LIMITED.....DEFENDANT

JUDGEMENT

1. Isaac Jomo Odinga and Everlyne Naliaka, the 1st and 2nd plaintiffs respectively, sued Bidco Oil Refineries Ltd, the defendant herein, vide the plaint dated 17.3.2005 in which they sought for general and special damages by the estate of deceased following the death of Albert Zedi while in the course of duty at the defendant's premises. In the aforesaid plaint the plaintiff gave the particulars of negligence on the part of the defendant as follows.

1. ***Failing to provide a safe place and/or system of work at the premises.***
2. ***Failing to take adequate precautions towards the plaintiffs safety while he was engaged in their employment.***
3. ***Exposing the plaintiff to risk of injury which they knew or ought to have known.***
4. ***Causing the plaintiff to work in a place which was not safely sealed.***
5. ***Failing to provide the plaintiff with security while engaged in his duty.***

2. The defendant denied the plaintiff's claim. The defendant specifically averred that the deceased death was not as at result of its negligence. The defendant further averred that the deceased was employed as a casual hence he was not earning a monthly pay.

3. The plaintiff's case was supported by the evidence of Isaac Jomo Odinga (PW 1), the 1st plaintiff who told this court that the late Albert Peter Zedi worked for the defendant from 1991 until 2002 when he mysteriously disappeared. PW 1 stated that the was informed that the deceased reported on night duty on 16.10.2002 at the defendant's premises in Thika and never returned home. He further stated that he was told by the deceased's colleagues that the deceased had indicated that he would pass by the store department to collect tin lids after his tea break. PW 1 said he went to report to the police on 18.10.2002 when he was told that the deceased had not reported to work. On 20.10.2002 PW 1 said he received a phone call from the deceased 's colleague informing him of the discovery of the deceased's decomposing body in one of the defendants stores. PW 1 said

he quickly visited the store and made the following observations on the deceased body:

1. ***The body had blood stains.***
2. ***The body was swollen.***
3. ***The body had injuries on the head, neck and legs.***
4. ***The body was lying on its back.***
5. ***The body was lying on a heap of cartons.***

4. PW1 also stated that the police investigating discovered that the deceased's clothes had been burnt. One of the deceased's colleagues was held and charged as a suspect though he was later acquitted. PW 1 presented evidence showing that the deceased was married with two young children. PW1 stated that the deceased used to support his family since his wife was not employed. In cross-examination PW 1 admitted that the bulk of his evidence was what was passed to him by the police and the deceased's colleagues.

5. The defendant summoned one Patrick Muyembe (DW1) to testify in support of its case. DW 1 told this court that the late Albert Zedi used to work for the defendant in the department of production/packaging where he was the supervisor. He confirmed that the deceased reported for night duty on 16.10.2002 and was assigned the duty of packaging together with another employee by the name Benson Njuguna. At around 4.30am. DW1 said he received inquiries about the whereabouts of the deceased. He said he was told that the deceased had gone to answer a call of nature at 2.00am and never came back. DW1 further stated that they checked for the deceased in the whole packaging section but did not find. He said he was informed by the watchmen guarding the gate that the deceased left for his home. DW 1 said he took an off duty and reported back on 20.10.2002 only to be told that the deceased body had been found in the packaging material stores. DW1 stated that the police carried out investigations leading to the arrest and prosecution of the defendant's chief security officer for the offence of destroying evidence while 3 of the Defendant's employees were charged with the offence of murder against the deceased. The suspects were eventually acquitted for lack of evidence. Thereafter the Attorney General instituted inquiry proceedings whose outcome have never been disclosed to date. It is the evidence of DW 1 that the defendant cannot be blamed.

6. At the close of evidence learned counsels were invited to make final submissions. I have considered those submissions plus the evidence. Parties to this suit filed the following agreed issues.

1. ***Whether or not the deceased was an employee of the defendant.***
2. ***Whether or not a contract of service existed between the deceased and the defendant.***
3. ***Whether or not Albert Peter Zedi died in the course of his employment with the Defendant.***
4. ***Whether or not the defendant was under any statutory duty to provide a safe environment and/or system of work.***
5. ***Whether or not the defendant breached this duty to provide safe environment for the deceased to work in.***
6. ***Whether or not the deceased estate has suffered any loss or damage as a result of his death.***
7. ***Are the administrators entitled to claim on behalf of the deceased estate any damages from the defendant for the benefit of the deceased.***
8. ***Whether or not the deceased mother, widow, daughters and brother are dependants within the meaning of fatal accidents act.***
9. ***Whether or not the deceased estate is entitled to general and special damages pleaded.***
10. ***Whether or not an inquest into the death of the deceased has any bearing on this suit.***

7. There is no doubt that the first 3 issues have been answered by the evidence in the affirmative. In other words there is credible evidence showing that the deceased was an employee of the defendant and that he died while performing his duties within the defendant's premises.

8. I propose to deal with the 4th and 5th issues together.

According to the defendant, since the deceased was a casual labourer, no statutory duty was imposed on it over the safety of the deceased. In my view, I do not think that is the correct position in law. Whether an employee is hired on permanent or temporary terms, the duty imposed upon the employer to provide a safe working environment does not shift.

9. The 5th issue is whether or not the defendant breached any statutory duty to provide a safe working environment or system of work? It is the submission of the defendant that it provided a safe working environment. The plaintiff on his part provided the particulars of negligence on the part of the defendant. The evidence tendered by PW 1 appears to be what he gathered while he went to search for his late brother. The evidence tendered by PW1 and that of DW1 agree in many ways. First, that the deceased was on duty on 16.10.2002 and that he lost his life while working. It took the defendant a couple of days to discover the deceased's body was actually lying in the defendant's store. The deceased's supervisor (DW1) took an off duty despite the fact that the deceased had been reported missing. He did not even bother to report to his immediate superiors or the police until 20.10.2002 when the deceased's decomposing body was discovered. DW1 clearly stated that the deceased used to work in the packaging department. He confirmed that the deceased's body was actually found at the packaging material stores. The question which lingers in my mind is why did it take long for the defendant to discover the deceased's body and yet it was clear that he died inside the packaging material store where he was working. DW 1 revealed that the chief security officer was charged with the offence of destroying evidence. Was there an attempt to cover up the cause of the deceased's death?

10. Though there was no direct evidence tendered by the plaintiff to establish liability against the defendant, this court is entitled to rely on circumstantial evidence to weigh the defendant's culpability.

11. It is clear in my mind that the evidence tendered shows that the deceased's working environment was not safe. The plaintiff clearly gave the particulars of defendant's negligence but the defendant made a general denial. This court expected the defendant to present evidence showing that indeed the environment its employees worked were secure, sealed and well guarded. If there were proper working security system the deceased's body could have easily been found within a short time. I am convinced that the circumstantial evidence which presents itself indicts the defendant to be liable.

12. Having found the defendant liable, I now turn my attention to the question of quantum. The plaintiff prayed to be awarded damages as follows:

i. *Pain and suffering* = ksh.100,000/=

ii. *Loss of dependency* ksh.1,689,600 calculated as follows

$$9600 \times 22 \times 12 \times \frac{2}{3} = 1,689,600$$

iii. *Special damages* kshs. 163,610/=

13. The defendant was of the view that the plaintiff was only entitled to kshs.100,000/= for loss of expectation of life and nothing else because he was a casual labourer.

14. I have considered the rival submissions over quantum. I am convinced that the plaintiff is entitled to the award of pain and suffering. The deceased disappeared only for his lifeless body to be discovered after 4 days. The post-mortem report shows that the deceased suffered multiple soft tissue injuries. I think the appropriate award I will give is ksh.100,000/=

15. On dependency, there is evidence that the deceased was aged 33 years at the time of his death. He had a jobless wife and two children. The plaintiff produced evidence showing the deceased earned a cumulative monthly salary of ksh.9,600/=. By the time of his death, the deceased had worked for 8 years for the defendant. There was no evidence to show that he had disciplinary issues. I will

presume that he will have worked upto the age of 55 years. The deceased being a family man is expected to support the family.

16.I suppose he will spend 1/3 of his pay on the family. I will therefore award the plaintiff ksh.844,800/= which is calculated as follows: $9,600 \times 22 \times \frac{1}{3} \times 12 = 844,800$.

On special damages I am satisfied the sum of kshs.163,610 was properly pleaded proved.

17.In the end I enter judgement in favour of the plaintiff and against the defendant in the following terms:

i. General damages for pain & suffering	ksh.100,000/=
ii. Loss of dependency	ksh.844,800/=
iii. Special damages	<u>ksh.163,610/=</u>
Total	ksh.1,108,410/=

iv. Costs of the suit .

Dated, Signed and delivered in open court this 13th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant