REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 457 OF 2009

TRACISIO MAINA MWANGI.....PLAINTIFF

VERSUS

1. **EVAN MWEHA**
2. **JOHN WANYANGE MWEHA.....DEFENDANTS**

J U D G E M E N T

1. This is a claim for special and general damages on account of injuries the Plaintiff sustained while welding some parts of the 1st Defendant's motor-vehicle registration number KAY 719 E, a tipper lorry. The Plaintiff's case as set out in the **plaint dated 26th August 2009** is that on 20th July 2008 the 1st Defendant requested him to weld his motor-vehicle in at Huruma, Nairobi at a consideration; that in the course of doing so the 2nd Defendant, as agent or servant of the 1st Defendant, negligently interfered with the switches or levers of the said motor-vehicle, thereby causing an accident; and that the Plaintiff thereby suffered serious injuries which rendered him paralyzed from the waist down. He has been wheel-chair bound since he left hospital.

2. It is the Plaintiff's further case that he was injured due to the negligence of the 2nd Defendant whose acts, he contends, the 1st Defendant is vicariously liable for. Particulars of the Defendants' negligence and breach of duty are set out in paragraph 4 of the plaint. Particulars of injury are also set out in the same paragraph. The Plaintiff has also pleaded the doctrine of *res ipsa loquitor*.

3. In his **statement of defence dated 21st December 2006** the 1st Defendant denied that the Plaintiff was welding his motor-vehicle at the material time. The particulars of negligence attributed to him were specifically denied and the Plaintiff put to strict proof thereof. The 1st Defendant also put forth the defence of *volenti non fit injuria*, pleading that the Plaintiff fully understood and appreciated the risks and dangers attendant to his work. The 1st Defendant further pleaded in the alternative that any injury, loss or damage suffered by the Plaintiff was caused in whole, or substantially contributed to, by the Plaintiff's own negligence. Particulars of the Plaintiff's negligence were pleaded.

4. The 2nd Defendant did not enter appearance nor file defence. Interlocutory judgement was entered against him on 29th January 2013.

5. At the hearing of the suit the Plaintiff testified as PW2 and called one witness, **Dr Washington Wokabi** (PW1), a medical doctor specializing in surgery. He examined the Plaintiff and prepared a

medical report, which he produced in evidence as **Exhibit P1**. He noted the Plaintiff's injuries had rendered him paralysed from the waist down. He assessed his **permanent disability at 100%**. In cross-examination PW1 stated that in preparing the medical report he relied on a discharge summary from the ***Kenyatta National Hospital***. He further testified that the Plaintiff could no longer practise his trade of welding.

6. The Plaintiff adopted his witness statement as his testimony-in-chief and produced his documents in evidence. Upon cross-examination he stated that though he had trained in electric welding after his primary school education, he did not have a certificate for it. He also confirmed that he was not the 1st Defendant's employee but only got specific work to do for him.

7. The Plaintiff further stated that the repairs he was instructed to carry out pleaded in this case were done at the 1st Defendant's workshop; that he was to weld the mechanism that lifts the load-bed of the tipper; that he was supervised by the 2nd Defendant accompanied by two other people; that when he identified the problem he requested the 2nd Defendant to lower the tipper load-bed to a point where he could reach it while standing on the ground, which he did; that the alternator was then disconnected so that he could start welding; and that the engine of the lorry was left running so that the load-bed would remain up.

8. He stated in cross-examination that though he could not tell what was going on in the cabin as he welded, he saw the 2nd Defendant pass by him and enter the cabin; and that was when the tipper load-bed came down and crushed him. When he screamed the 2nd Defendant came out of the cabin and saw what had happened. He then went back into the cabin and lifted the load-bed. He remained conscious throughout. He did not report the incident to the police. He was treated at various hospitals and now lives with his parents as his wife left him after the accident. He attends ***Mukurwe-ini District Hospital*** for check-ups and was taught how to get in and out of bed at the ***National Spinal Injury Hospital***, ***Nairobi***.

9. The Plaintiff maintained that his estimated income was KShs 20,000/00 per month. He had not registered his welding business; despite it being an open-air business he was able to educate his children, pay rent, and meet his and his family's other needs. He blamed the 2nd Defendant for the accident because he did something in the cabin to bring down the tipper load-bed. The metal prop used to support the load-bed had been removed so that it could be lowered in order for him to reach where he needed to weld. But he insisted that the load-bed could not have come down on its own while the engine was running; however, he conceded that if the metal prop had been in place the load-bed would not have come down.

10. In re-examination the Plaintiff was categorical that it was the 2nd Defendant's responsibility to operate the engine and lift or lower the tipper load-bed. He had carried out similar repairs before on the lorry and the engine would be running as he welded. He maintained that he saw the 2nd Defendant go into the cabin before the load-bed came down and crushed him.

11. From the pleadings and the evidence available the following are the issues for determination in this suit –

(i) Whether the Defendants owed any duty of care to the Plaintiff?

(ii) Whether the accident in which the Plaintiff was injured was caused by the Defendants' negligence?

(III) Whether the Plaintiff was negligent and contributed to the accident?

(IV) What injuries did the Plaintiff suffer?

(V) What damages, if any (and quantum thereof), are due to the Plaintiff?

12. I will deal with the first three issues together. The Plaintiff stated that he was contracted to weld the 1st Defendant's motor-vehicle. Unlike a mere employee, an independent contractor, by virtue of the contract, has authority to determine the manner in which inherently dangerous construction work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions. Having assumed responsibility for workplace safety, an independent contractor may not hold a hiring party liable for injuries resulting from the contractor's own failure to effectively guard against risks inherent in the contracted work.

13. There are also various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person's duties are an integral part of the employer's business. *See* ***Beloff -vs- Preddram Limited [1973] All ER 241***. The greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service. *See* ***Simmons –vs- Heath Laudry Company [1910] 1 KB 543, O' Kelly –vs- Trusthouse Forte*** **[1983] 3 ALL ER 456**. That test is however not conclusive.

14. This passage in ***Halsbury's Laws of England*** **Vol. I 26, 4th edition** paragraph 3 is instructive -

> ***"There is no single test for determining whether a person is an employee, the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer, stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contribution; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration".***

15. It is thus important to distinguish between a **contract *of* service** and a **contract *for* services**. Denning, LJ in ***Stevenson Jordan and Harrison Ltd –vs- Macdonald and Evans [1952] 1 TLR 101 at 110*** opined -

> ***"I fully agree with all that my Lord has said on all the issues in this case. It raises the troublesome question of the distinction between a contract of service and a contract for services. The test usually applied is whether the employer has the right to control the manner of doing the work. Thus in <u>Collins Vs. Herts County Council</u>, Mr. Justice*** **Hilbery said:**
>
> ***"The distinction between a contract for services and a contract of service can be summarized in this way: In the one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but how it shall be done.***
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> ***In <u>Cassidy –vs- Ministry of Health</u>, Lord Justice Somervell pointed out that that test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship. Lord Justice Somervell went on to say: "One perhaps cannot get much beyond this 'Was the contract a contract of service within the meaning which an ordinary person would give under the words?"' I respectfully agree. As my Lord has said, it is almost impossible to give a precise definition of the distinction. It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the***

business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not intergraded into it but is only accessory to it".

16. In this case, it is clear that the Plaintiff and the 1st Defendant entered into a contract for services, not a contract of service. He was not an employee of the 1st Defendant but an independent contractor. The 1st Defendant thus did not owe to him any duty of care as a servant. But that is not the end of the matter.

17. The 2nd Defendant was an agent of the 1st Defendant in the control of the lorry as the Plaintiff worked on it. He was the one charged with the responsibility of operating the lorry, particularly in operation of the mechanism that lifted and lowered the load-bed. He certainly owed the Plaintiff a duty of care. An agent is defined in **legal dictionary.thefreedictionary.com** as -

> "…**a person who is authorized to act for another (the agent's principal) through employment, by contract or apparent authority. The agent can bind the principal by contract or create liability if he/she causes injury while in the scope of the agency. Who is an agent and what is his/her authority are often difficult and crucial factual issues."**

18. The unchallenged testimony of the Plaintiff was that the load-bed came down on him immediately after the 2nd Defendant entered the cabin where the levers/switches that operate the lifting/lowering mechanism were situated. The inference was that the 2nd Defendant negligently operated that mechanism while knowing that the Plaintiff was beneath it, thus causing the load-bed to come down.

19. There is no evidence offered by the Defendants to the effect that the accident occurred otherwise than as testified by the Plaintiff. I am satisfied that the accident in which the Plaintiff was injured was caused by the negligence of the 2nd Defendant. He was an agent of the 1st Defendant in the control and management of the lorry as the Plaintiff worked on it. The 1st Defendant is thus vicariously liable for his negligence.

20. But I also find the Plaintiff guilty of contributory negligence. His own testimony was that at the time of the accident he had removed the metal prop that he had initially used to support the load-bed so that he could reach where he was welding whilst standing on the ground. He also stated that he did not bother to look for a shorter prop to use because he was confident that the bowl could not itself come down when the engine was running.

21. A more cautious or prudent person would have still used a metal prop just in case anything went wrong. That kind of measure would have been more in consonance with the training and experience he had acquired over the years as a welder. He was therefore negligent and contributed to the accident. I will apportion to him **30% contributory negligence** in the circumstances.

22. I will now deal with the fourth and fifth issues. What injuries did the Plaintiff suffer? What damages, if any, are due to him?

23. The available medical evidence from PW1 is that the Plaintiff suffered a back injury when the tipper load-bed came down on him, thereby compressing his spinal cord. The injury paralysed him from the waist down. He has no control of his urine and stool. For stool, he uses diapers and urine is drained through a catheter. He cannot engage in sexual activity and may never engage in any gainful employment. He will require a wheel-chair for the rest of his life. The wheel-chair would cost about Kshs. 60,000/00 and would last about 5 years. PW1 further testified to the following needs of the Plaintiff -

- An assistant full-time @ Kshs. 10,000/00 per month for life.

- Diapers and condoms @ Kshs. 2,000/00 per month for life.
- Regular medical check-ups every 3 to 6 months.

- Special hydraulic bed @ KShs 30,000/00.

24. The Plaintiff is entitled to damages for pain, suffering and loss of amenities; loss of future earnings; future medical treatment, care and equipment; and proved special damages.

Pain, suffering and loss of amenities

25. The Plaintiff was treated in different hospitals. It was his testimony that he never lost consciousness. He must have suffered considerable pain. He is now wheel-chair bound and has to depend on other people for most of his needs. The ordinary amenities of life will now be out of reach for him.

26. The Plaintiff in his submissions has suggested KShs 3,000,000/00 under this head. The 1st Defendant has suggested KShs 1,500,000/00. An award **KShs 2,500,000/00** for pain, suffering and loss of amenities is reasonable. I will award that sum.

Loss of future earnings

27. The Plaintiff was aged 37 years at the time of the accident. After factoring in the vagaries and uncertainties of life, a multiplier of 14 years would seem appropriate. I will award the same.

28. In line with the testimony of PW1 the Plaintiff may never be able to work again, certainly never as a welder. His level of education is primary school (Standard 8). His chances of training for a job that he can do from his wheel-chair are minimal.

29. The Plaintiff is thus entitled to damages for loss of future earnings. He estimated the income from his welding trade at about KShs 20,000/00 per month or thereabout. Though no documentary evidence was tendered as proof of this income, the ***Court of Appeal*** noted in the case of ***Jacob Ayiga Maruja & Another –vs- Simeon Obayo [2005] eKLR*** noted -

> **"...We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things..."**

30. I am satisfied from the available evidence that the Plaintiff had an income from his welding trade that enabled him to take care of his and his family's needs. I will accept his estimate of that income at KShs 20,000/00 nett. The award for this head therefore works out as follows -

KShs 20,000/00 x 12 x 14 – KShs 3,360,000/00

Future medical treatment and management

31. There was no figure suggested by PW1 although he specified that the Plaintiff would require follow up every 3 to 6 months. Kshs 2,000/00 per visit is not unreasonable. The award under this head is -

KShs 2,000/00 x 12 x 14 – KShs 336,000/00

Necessary equipment

32. There is no doubt that the Plaintiff will require a good, versatile wheel-chair for the rest of his life which will need replacement every 5 years. A special bed and mattress would ease his discomfort. As indicated by PW1 the wheel-chair and special bed cost approximately KShs 60,000/00 and KShs 30,000/00 respectively. PW1, a doctor, would have knowledge in such things. The Plaintiff will thus

need three replacements for his wheel-chair. These awards therefore come to -

- Wheel-chair KShs 60,000/00 x 3 = KShs 180,000/00

- Special bed….....30,000/00

Domestic care

33. The Plaintiff certainly requires an assistant, preferably a nurse, for the rest of his life. A salary of KShs 10,000/00 per month for such an assistant is not unreasonable. The award under this head will be –

KShs 10,000/00 x 12 x 14 = KShs 1,680,000/00

Special damages

34. KShs 168,000/00 was claimed. Only **KShs. 7,000/00** for the medical report (Exhibit P1) and court attendance fee was proved. I will award that sum.

35. I will thus enter judgment for the Plaintiff against the Defendants jointly and severally as follows -

Pain, suffering and loss of amenities...….…KShs 2,500,000/00

Future medical treatment and

management……..……336,000/00

Wheel-chair and special bed)……..…..…….210,000/00

Domestic care……....……1,680,000/00

Future earnings……..……...…….3,360,000/00

Special damages……..…….....……..7,000/00

Total…..…….……KShs 8,093,000/00

Less 30% contributory negligence…....…….……2,427,900/00

KShs. 5,665,100/00

36. The general damages will carry interest at court rates from the date of judgment, but from the date of filing suit for the specials. The Plaintiff will also have costs of the suit, also reduced by 30%. It is so ordered.

DATED, SIGNED AND PRONOUCED IN OPEN COURT

THIS 19TH DAY OF SEPTEMBER 2014.

H.P.G. WAWERU

JUDGE