CIVIL

· Doctrine of Res Ipsa Loquitor.

· Fatal Accident where deceased was 50 yrs.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 209 OF 2007

AMANI KUFAA BAKARI (*Suing as the administrator of the Estate of*

BAKARI JUMA MAJEPO KUFAA)……PLAINTIFF

-VERSUS-

WANAINCHI MARINE PRODUCTS (K) LIMITED…....….....DEFENDANT

JUDGMENT

This case was partly heard by Justice Njagi and Justice M. Ibrahim (as he then was). It was concluded before Justice Ibrahim. Both Judges are no longer stationed at the Mombasa Law courts. The responsibility of writing this judgment has therefore fallen on my shoulders.

Bakari Juma Majepo Kufaa (deceased) herein after called Bakari was an employee of the defendant company. He was an electrician/boiler attendant. The defendant company is a fish processing company. It uses steam boilers to process fish. In order to maximize the life of those boilers, they are given maintenance from time to time. The defendant's general manager stated in evidence that the maintenance was done by removing scales that accumulate in the boiler. The de-scaling involved the use of chemicals. The defendant general manager said that the chemical is called de-scalant. The de-scaling is carried out by the defendant's qualified attendant. The boiler room has two boilers. It also has two exits. The general manager of the defendant when being examined in chief stated as follows:

"The de-scalant – we do not mix it with anything. I do not know the chemical composition of the de-scalant. I do not know it as hydrochloric acid or whether it contained in (sic) it."

He further stated that the company used to switch off the boilers 2 to 3 days before the day that the de-scaling was to be done. PW2 Thomas Munialo was employed by the defendant company at the same time as Bakari. PW2 said that he was employed by the defendant in the year 2003 as a factory cleaner. In November that year, he began to do what he called boiler related duties. On 24th July, 2006, he was on duty and in the company of Bakari and another employee called Shem Mboya (deceased). They were

carrying out de-scaling of the boilers. Before such de-scaling, they normally got authorization from the management. Whilst de-scaling, they were dressed in cotton overalls which were short sleeved. They were also provided with short woolen gloves. On the material date, PW2 noted that Bakari was wearing those gloves. He said that the de-scaling involves the use of concentrated hydrolic acid. They normally used 15 jericans of 20 litres of that chemical to do the de-scaling. That the chemical if it got into contact with clothes it corroded the clothes. If the clothes corroded, the chemical would then burn their skin. PW2 had participated in de-scaling twice before the 24th of July, 2006. PW2 further stated in examination in chief:

"There is a man-hole at the top of the boiler. Then the chemical is poured into the boiler one by one. The man-hole is approximately 2 ½ metres from the base of the boiler. Mr. Bakari would pour the content of the jerican into the boiler, rinse the jerican with water and pour the contents also into the boiler. On that day (24th July 2006) four of the jericans had been emptied into the boiler."

It was the evidence of PW2 that both Bakari and Shem were on top of the boiler. Bakari was emptying the chemical into the man-hole whilst Shem was opening the lid. Pw2 was on the floor of the boiler room. After Bakari emptied the four jericans into the boiler, there was an explosion. PW2 ran out of the boiler room using the emergency door. When he returned to the room, he found that the content of the boiler had sprayed all over the room. He saw Bakari at the back of the machine trying to find his way out, he noted that he was in a terrible state because his skin was pilled off. He led Bakari by the hand and he noted that Bakari's skin remained on his hands. He however, led him to the front office and informed the management what had happened. Shem too was taken out of the boiler room. Although both Bakari and Shem were taken to hospital they both succumbed to their injuries and died. The general manager of the defendant company confirmed that he was the one who took Bakari to hospital. Surprisingly though, on being asked about the accident, the general manager said:

"I do not know what happened. I do not know how the accident occurred. I was told there was an explosion. I do not know the cause."

Although the general manager talked of employees being supplied with leather gloves, cotton overalls and gum boots. He could not confirm if Bakari was wearing them on that material date. He also could not confirm the effect on cotton, leather or rubber when in contact with the chemical.

The uncontroverted evidence is that Bakari was 50 years old when he died on 2nd August 2006. He survived 8 days after the accident. The wife of Bakari Majabu Shilingi Akida (PW3) said that she got married to Bakari under the muslim faith on 10th December 1989. They were blessed with four children namely:

Amani Kufaa – Born in 1982

Pesa Bakari – Born in 1985

Mbwana Bakari – Born in 1990

Shilingi Bakari – Born in 1991

She produced their respective birth certificates. She also stated that Bakari had another child called Hamisi Bakari with an estranged wife but there was no evidence of the existence of that child before the court. she said that she was a housewife and Bakari would give her Kshs. 15,000 to cater for hospital bills whilst Bakari would purchase the food, pay the school fees and buy clothes. There was no evidence of a member of family of Bakari who suffered from ill health to justify the amount of Ksh. 15,000 given to his wife. There are two issues that require determination by the court.

Firstly, is whether the defendant is liable for the accident that caused the death of Bakari. Secondly is, if the defendant is liable what should the court award the estate of Bakari.

Plaintiff in submissions stated that since Bakari was injured in the course of his employment the defendant owed him a duty of care. The plaintiff relied on the case, **MUMENDE VS NYALI GOLF & COUNTRY CLUB [1991]KLR** where it was held:

"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 to avoid any negligence but will not be responsible of 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."

Although the defendant pleaded in its defence that Bakari had a duty to take reasonable precaution, and that pleading was advanced in oral evidence, the defendant however failed to give evidence on the negligence on the part of Bakari. It will therefore be assumed that the defence abandoned that pleading. The defendant in submissions stated as follows:

"It was not shown that there was anything the defendant did or failed to do that led to the explosion."

The defendant then referred to two inspection reports done under Factories Act Cap 514 which were submitted in evidence. Defence relied on those reports to show that there was no evidence adduced by the plaintiff that the accident was as a result of an act of the defendant or omission. The plaintiff relied on the doctrine of Res Ipsa Loquitor. In the case of **KAGO VS NJENGA [1981] KLR 186** the court had this to say on that doctrine:

"For the defence to rebut the presumption of negligence arising from res ipsa Loquitur they have to avoid liability by showing either that there was no negligence on their part or that the accident was due to circumstances beyond their control. In this case, evidence showed that the tyre burst before impact hence this was considered probable cause of the accident……"

The defence in my view did not rebut the presumption of negligence arising from that doctrine. Further the inspection report that the defendant relied upon to prove that the defendant was not negligent has a part where the one carrying out the inspection had to indicate if there were any parts of the boiler that were inaccessible to him for examination. The inspector in respect of both reports submitted by the defence stated in response to that question:

"away from inspection – hole and under lagging."

Is it possible that the hole which was in-accessible to the inspector is the one that Bakari poured the chemical into before the explosion? The defendant needed to call the maker of the inspection report to clarify that. They did not. The court cannot confirm, then, that the hole was safe. The manager of the defendant company stated that the standard procedure, before de-scaling was done, was to stop the boilers 2 to 3 days before. The responsibility of stopping the boilers did not fall under him. No other witness was called by the defence to testify that the boilers that Bakari and Shem were working on were switched off as per the normal procedure. It was also very telling that the defendant company way not particular about the qualifications of those who undertook the very dangerous tasks of de-scaling. This is obvious from the evidence of PW2 who said that he was moved from cleaning the factory floor to working in the de-scaling of the boilers. The question is was he trained in the complex and dangerous job of de-scaling? Similarly, the question that begs an answer is whether Bakari was trained to de-scale the boilers. The evidence of PW2 was not contradicted. He Pw2, did also stated that he had been involved in two other de-

scaling processes before the fateful day. He further stated that after the death of Bakari and Shem he was appointed to do the de-scaling work. From the evidence adduced on behalf of the defendant by the manager it becames clear that the defendant company did not know the effect of the chemical used by Bakari and Shem on their clothing let alone their skin. The only evidence in that regard which was before court was from PW2. He said that the chemical when it was in contact with clothing it caused the clothes to corrode. That corrosion in turn affected the skin. What is worrying about the evidence offered by the defendant was that even though the evidence was given before court five years after the accident the company had not investigated what caused the accident which costed the lives of two of their workers. It would be expected that the company would have carried out such investigation to ensure that such explosion did not occur again. As it will be recalled the defendant's manager 5 years after the accident did not know how the accident occurred. To be precise, he stated:

"I do not know the cause."

In my view that statement revealed callousness of the defendant company considering that that statement was made 5years after the accident and further considering that, the company continued doing business as it had done before the accident. Now, if the general manager of the defendant company did not know what caused the explosion, despite what one would expect, that he had at his disposal expertise to make that determination; how could the plaintiff be expected to know? The plaintiff who was the son of Bakari at the time of the accident was attending a college and had no dealings with the defendant company and could not be expected to know how the de-scaling was done. It is for that reason that I find the doctrine of Res Ipsa Loquitur does apply in this case and the defendant failed to rebut it. That being so, the answer to the first issue is that the defendant is liable for the injury and the death of Bakari.

QUANTUM

DW1 stated that Bakari worked for 24 days in a month. The plaintiff apart from saying that Bakari was earning kshs. 1,344 per day did not state how many days Bakari worked in a month. The court will therefore accept the evidence of DW1 on the number of days worked by Bakari. It follows that the total earning for a month therefore was Ksh. 32, 256. Bakari was in hospital before his death for 8 days. The description of the injuries suffered by Bakari were vividly explained by PW2 as stated earlier in this judgment. The plaintiff when he went to the hospital to see Bakari following the accident he narrated how he found him as follows:

"I saw my father at Mombasa Hospital where we were told he had been admitted. I found him at the I.C.U unit. I saw him myself through the glass as we were not permitted to go inside. He had suffered serious injuries. Even though doctors had applied ointment on all his body, I could see the skin peeling off from his body, and the whole body was swollen so that it looked much bigger than usual."

That description is supported by the Mombasa Hospital discharge abstract which stated that Bakari had suffered 95% burn by acid. Bakari died of multiple organ failure due to severe burns. Considering all that evidence on the pain and suffering, I will award the plaintiff Ksh. 300,000 for pain and suffering. I find support for that award in the case **MARIETTA KALEE KALELI VS MISTRY MULJINAREED CONSTRUCTION CO. LTD MBS HCC NO. 66 OF 1997** where the court made a similar award. It should be borne in mind that Bakari must have suffered excruciating pain for 8 days he was in hospital.

Bakari died at the age of 50. No evidence was adduced either by the plaintiff or by the defendant on the defendant's policy of retirement. I will therefore assume that retirement age was 60 years. Bakari therefore had 10 more years in employment. The undisputed evidence was that Bakari was the sole bread winner of his family. Dependency therefore will be taken to be 2/3. Dependency will be worked out at 32,256 x 12 x 10 x 2/3. The plaintiff only proved by documents Ksh. 1000 in special damages.

Before I conclude this judgment, I need to state that I was not persuaded by the judgment of the case **LYDIA NTEMBI KAIRANYA & ANOR VS A.G NRB HCC NO. 618 OF 1997** where the court made a finding that a party who obtains unlimited letter of administration to file a suit on behalf of the deceased's estate had no power to prosecute such a case. That in my view is limiting the power of a

limited grant. In my view, it is natural for a party who is granted power to file suit to proceed to prosecute such a suit. It cannot be the intention of the court that issues such a grant intends that person to only file a suit for the deceased estate and then someone else would prosecute it. I therefore find that the plaintiff had capacity to prosecute the suit. The judgment of the court is as follows:

1. The loss of dependency 32,256 x 12 x 10 x 2/3 =2,580,480

2. Pain and suffering Ksh. 300,000.

3. Special damages ksh. 1000.

4. There shall be interest at court rate from the date of filing suit to payment in full of the special damage awarded herein and interest at court rate on 2,880,400 from the date of this judgment until payment in full.

5. The judgment amount shall be apportioned as follows:

(a) Majabu Shilingi Akida – ***30%***

(b) Amani Kufaa – ***15%***

(c) Pesa Bakari – ***15%***

(d) Mbwana Bakari – ***15%***

(e) Shilingi Bakari - ***25%***

6. ***The costs of the suit are awarded to the plaintiff.***

DATED and **DELIVERED** at **MOMBASA** this ***29th*** day of ***March, 2012.***

MARY KASANGO

JUDGE