



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE 188 OF 2005

JOSEPH MAGANGA KASHA.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD..... DEFENDANT

JUDGMENT

The Facts

1. Joseph Kasha, the Plaintiff, went to work as usual on the morning of 2nd December, 2004. He had no thought of what would shortly befall him. His work with the Defendant, Kenya Power and Lighting Company, involved installing electricity poles. He was assigned to work with a team of ten persons supervised by Paul Mutune, the Defendant's only witness, who was a senior artisan.
2. That morning they were allotted the work of erecting three poles at Bamburi Mwembelegeza. DW1 testified that each pole was thirty two feet long. When they got there at about 8.00 a.m. they prayed, as was their habit, dug three holes of five feet deep each, and uneventfully erected the first two poles.
3. The usual procedure after digging the holes, was to place a skidboard to guide the pole into the hole, tie four ropes at the centre of the pole, then slide the pole into the hole. At this point, once the pole had slid in, other men on the ground pulled taut on the ropes - which are strung in different directions - so that the pole was raised vertically. They then secured it in the upright position, leaving the three ropes hanging loose.
4. At around 12.00 noon, Kasha prepared to climb the third pole. He was wearing his overalls, and safety boots. He also had his climbing irons on his feet. He slung the safety belt around the pole, then climbed using the climbing irons, which have teeth to grip the pole. He climbed up to where the four ropes were hanging, about fifteen feet up.
5. The evidence at this point is somewhat unclear. The Plaintiff in cross examination said that the safety belt slipped or broke, he was not quite sure which, and he fell down backwards to the ground, injuring himself. DW1, who was supervising from the ground, said that the Plaintiff had untied the first rope, and let it down. It was when he untied the second rope and let it down, that it accidentally got caught on his climbing irons. Being a thick and heavy rope, it caused his irons to lose grip and he slipped down the pole and fell on his back. In cross examination, DW1 testified that if the irons slip they cannot grip some other place lower down on the pole, and you have to hold onto the pole with your hands. I accept DW1's evidence on this aspect as clearer and more cogent than the Plaintiff's.

Injuries

6. After falling down, Kasha sustained serious injuries and was rushed to AgaKhan Hospital by the Defendant's vehicle. He was X-rayed, taken for a CT scan and admitted. He was discharged on 4th February, 2005, two months after admission, and produced a discharge summary as PExb 1. Kasha testified that when he fell, he suffered injuries on his waist and back. He became paralysed from his waist downwards.

7. The medical evidence was adduced by Dr. Stephen K. Ndegwa (PW2) and he filed a medical report. The evidence is not contradicted by any other medical report.

The medical report particularises the injuries as follows:

"1. very severe and debilitating spinal injuries with:

- **Burst displaced fracture of thoracic spine**
- **Wedge compression fracture of lumbar spin and also on the left transverse process.**
- **Spinal cord and exit nerve compression leading to total paralysis below L1**
- **Bone fragments within the spinal canal**
- **Urine and stool incontinence**
- **Erectile dysfunction**

2. Fracture of the head of the right and left T12 ribs"

8. The doctor concluded that the injuries were severe and debilitating multiple bone and spinal cord injuries leading to complete paralysis of both lower limbs. In his opinion, Joseph:

- **Has healed with 100% permanent disability due to the permanent disability due to the spinal cord injuries**
- **Has a ruined working life and will never be able to resume his usual work**
- **Has a ruined sexual life while single and with no children of his own."**

Kasha will forever be dependent and in need of full time home based nursing care.

The Issues

9. The parties had narrowed their issues into an agreed list of issues for determination as follows:

1 Was the Plaintiff injured on 2nd December, 2004 while in the course of employment with the Defendant?

2 If the answer to (1) above is in the affirmative, what is the nature and and extent of the injuries sustained?

3 Is the Defendant principally or vicariously liable for the occurrence of the accident and the injuries sustained by the Plaintiff?

4 Is the Plaintiff the sole author of his misfortune?

5 Is the defence of *volenti non fit injuria* applicable?

5 Is the Plaintiff entitled to General and Special Damages and if so, what amounts are payable?

7 Did the Plaintiff issue a demand letter to the Defendant prior to institution of this suit?

8 Which party shall pay the costs of this suit?

10. Mr. Kiarie, for the defence, concedes that the Plaintiff was injured in the course of his employment, and that the injuries were as stated in the medical report. However, counsel argued that the Plaintiff did not, strictly, suffer 100% permanent disability, as he testified in cross examination that he could use his hands to do work and engage in any other occupation subject to occasional therapy.

11. I note that there is a second Amended Plaintiff dated and filed on 30th March, 2011. There is, however, no application or order of court for such amended plaintiff and I have disregarded it. Instead I rely on the Amended Plaintiff allowed by consent on 24th November, 2010 and annexed to the Plaintiff's Affidavit in support of his application filed on 6th October, 2010, and annexed as "JMK2." No amended defence is on record as having been filed in answer to the amended plaintiff.

Whether the Defendant is principally or vicariously liable for the accident and injuries sustained by plaintiff.

12. In his Amended plaintiff, the plaintiff particularised the Defendant's negligence to include:

a) *Failing to take adequate precautions for the safety of the Plaintiff*

b) *Exposing the Plaintiff to a risk of damages or injury which the Defendant knew or reasonably ought to have known.*

c) *Failing to provide and or maintain suitable planttackle and or appliances to enable the plaintiff work in safety.*

e) *Failing to provide or maintain a proper system of work.*

13. As earlier stated, I am persuaded that the accident occurred when the Plaintiff's climbing iron got entangled and was obstructed by the second rope that the Plaintiff had untied. DW1 said it was a heavy 3/4 inch rope. As the Plaintiff tried to unhook it from his leg irons, the rope either dislodged the contact between his leg iron and the pole, or he slipped. Whichever the case, he fell. This is an occurrence that the Defendant should readily have foreseen.

14. Pole climbing, like rock climbing, is an intrinsically risky and dangerous job. Rock climbers safeguard themselves from certain types of fall by a harness to hold them in swing when they slip. The pole climbed by the Plaintiff was 32 feet, and he climbed about half way to remove the ropes. There is no clear evidence that when he slipped, the safety belt also broke. He slid down the pole under gravity, held against the pole by the belt so that he had no control over the manner and position of his landing. Had the belt been spiked or had there been a safety harness, the fall could have been prevented or the drop rate reduced to prevent serious injury.

15. I therefore agree with the Plaintiff that the Defendant should have foreseen and provided a system of work or tackle or harness to prevent or reduce the downward trajectory under full gravitational pull. I would ascribe the liability of the Defendant at 80% in this regard.

Whether the Plaintiff was the sole author of his misfortune.

16. I have already held that the liability of the Defendant is 80%. I consider that the Plaintiff contributed to the accident by his carelessness in allowing or causing the rope he had untied to fall onto

his climbing irons. He had done this sort of work many times before without incident, according to his testimony. His climbing irons have teeth to secure him against the pole when climbing. However, it is clear that the heavy rope interfered with the grip of the climbing irons when it was untied, and dangled down and struck them. It was when he tried to disentangle the irons from the rope that he lost grip, slipped, and fell.

17. I find the evidence of DW1 clear and concise on how the Plaintiff's slipping occurred. He said in evidence in chief:

"He (Plaintiff) opened the first rope and let it down. The second one he removed and it dangled onto and caught the climbing iron. The rope is 3/4 inch thick and heavy. It caused him to slip down the pole and he fell on his back."

In cross-examination he said:

"There are two climbing irons. They have teeth.... if the irons slip they cannot grip somewhere else lower; you have to hold the pole by your hands."

18. The Plaintiff himself gave no evidence in chief on how the accident occurred. He concentrated on the injuries. In his cross examination, he was hesitant and uncertain when questioned on how the

"As I was going up, almost to the top, as I pulled the rope to tie it, that is when I fell... The belt slipped or broke - I'm not sure, than I fell backwards."

As earlier stated, Plaintiff's evidence is tentative and uncertain, and I am more persuaded by the evidence of DW1. I find that the Plaintiff contributed to this accident as stated earlier, and I attach 20% liability on him.

Volenti non fit Injuria

19. The defence asserts that this defence maxim is applicable on the basis that there was no proof of negligence on the Plaintiff. I have already found the Defendant was 80% to blame for not availing effective measures to prevent an accident slip when one was up a pole.

The defence that the Plaintiff took a voluntary risk well knowing the consequences does not avail the Defendant in this case. The Defendant had availed only climbing irons and a safety belt to the Plaintiff. It was not unforeseeable that the climbing irons could be interfered with or fail. There were no grips spikes or fasteners on the safety belt to prevent it slipping when the climbing irons failed. Safety from falling due to failure of the climbing irons was solely the responsibility of the Defendant.

General Damages, Pain suffering and loss of amenities

20. I turn to the damages now. The Plaintiff claims Kshs. 4,000,000/- under this head. These are based on the nature of injuries. There is no dispute on the injuries which I have already set out in detail. The Plaintiff cited the cases of **Jackson Makau Mutunga vs Star Transport** HCC Nairobi 554 of 1999 and **William Mutungi vs Samuel Nyutu and Another** Nairobi HCC 2735 of 1998.

In the **Jackson** Case, the Plaintiff suffered paraplegia from the waist down but also fractures to his arm. The Plaintiff there was awarded Kshs. 1, 500,000 in 1999. In the **William Mutungi** case, the Plaintiff also suffered injuries that left him a paraplegic from the waist down. He was awarded Kshs. 3, 000,000/- in 2001.

21. The Defence argued for a maximum award of Kshs. 3,000,000/-. Authorities cited were **Dominic Mutua Maureen vs Bestways Phobes Ltd HCC 255 OF 2001 Mombasa**. There the Plaintiff suffered paraplegia from the waist down and was awarded Kshs. 2,500,000/= in 2005. In **Patrick Mwangi Irungu vs Charles Macharia Mwangi and Another** HCC 188 of 2005 Nakuru, the Plaintiff suffered paraplegia

and was awarded Kshs. 1,500,000/- in 2008. However, I did not have the benefit of reading the full authorities cited by the Deferent which were provided in a summarised digest.

22. I have also taken into account the case of **Margaret Mnyasi Karisa**(suing **thro' Milikan Wabuti Fredrick**) vs **Mohamed Jerah** HCC 232 OF 2008 Mombasa. There, the Plaintiff suffered total paralysis from the neck downwards, was bedridden with 100% permanent disability. Justice Azangalala awarded Kshs. 2,000,000/- as general damages for pain, suffering and loss of amenities in February, 2010.

23. On the basis of submissions of counsel and on the authorities, I think an award of Kshs. 3, 000, 000/- will be apt in this case. I will so award.

Undisputed Special damages

24. I now deal with the costs of wheelchair, Special Toilet and Orthopaedic bed/mattress. In the Amended plaint the Plaintiff sought Kshs. 200,000/-, Kshs. 100,000/- and Kshs. 80,000/- respectively. But in the submissions, he doubled the figures to account for anticipated replacement and or repair. As these are not pleaded or properly substantiated, I award the pleaded amounts which have not been disputed by the Defendant.

Special damages for the medical report at Kshs. 2,000/- was pleaded and proved by a receipt Number 5319 (PExb 4). I also award the same.

25. The plaint states that the Plaintiff was 22 years old when he sustained the injuries. He was then a casual worker and may have been expected to work up to the age of retirement. The Plaintiff places this at age 60 - a multiplier of 38 years - for purposes of the claim on future earnings. But for claims on cost of home-based nursing care; cost of catheter/urine bag; cost of physiotherapy and consultation, Plaintiff included an additional 10 years, hence a multiplier of 48 years. He argues for the higher multiplier on the basis that the Plaintiff may well live to 70 years, and will still be under dependency.

26. That argument is both unpersuasive and based on speculation. In addition, it does not take into account the fact that any award will be a lump sum payable at the present, and may therefore, be invested to good return in the future.

On the other hand, the Defendant assumed that the Plaintiff would work up to 50 years, which would mean a multiplier of 28 years. However, in the submissions, the Defence has used a multiplier of 20 years which is not explained at all. I, therefore, accept a multiplier of 38 years, and will use it herein.

27. For loss of future earnings, the evidence was that the Plaintiff earned 311/= per day as a casual worker. In cross examination he said he was paid Kshs. 311/- per day or Kshs. 1,555/- weekly.

DW1 confirmed the amounts.

I will therefore take a month of 4 weeks at Kshs. 1,555/= per week, and given that the Plaintiff was a casual, find his monthly pay was Kshs. 6,220/=. His loss of earnings is therefore $6220 \times 12 \times 38 =$ Kshs. 2,836,320/=. I will award that amount.

28. The other costs were partuclarised as follows in the amended Plaint; and I have worked out the awards based on the multiplier found herein:

Hiring Domestic aid	Kshs. 10,000/= per month X 12 X 38 = Kshs. 4,560,000
Catheters and Urine bag	Kshs. 1,500/= per month X 12 X 38 = Kshs. 684,000
Physiotherapy	Kshs. 1,000/= per month X 12 X 38 =Kshs. 456,000

