



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 101 of 2007

MAKAU KISWILI PLAINTIFF

VERSUS

ATHI-RIVER MINING LTD. DEFENDANT

JUDGMENT

1. The Plaintiff herein, Makau Kiswili by his Complaint dated 12/11/2007 averred as follows;

That on 4/10/2006, he was employed by the defendant at its cement plant within Athi-River when he was seriously injured by a gush of steam at high temperature. It was his case that he had been allocated the duty of cleaning the steam boiler and he entered it with his tools viz an overall piece of clothing, hammer, chisel and a polythene bag. That when the steam gushed upwards towards him, he was only able to rush out through an opening on the side of the steam boiler but he suffered 60% burns and was taken to Nairobi West Hospital for treatment. He pleaded that the Defendant was negligent in that it failed to take adequate provisions to protect him and exposed him to a risk of damage and injury of which it ought to have known about. That the Defendant failed to provide him with a safe environment to work in and as a result thereof, he lost the capacity to earn a living and he incurred Kshs.7,500/= as medical expenses and he also claims damages.

2. In a Statement of Defence filed on 31/1/2008 the Defendant denied all the allegations of negligence as pleaded in the Complaint and denied the accident of 4/10/2006 but in the alternative negligence is pleaded to have been on the part of the Plaintiff. It is pleaded at paragraph 7 thereof that he acted recklessly, wantonly, carelessly and dangerously and that he went to work in an unauthorized place and was the author of his own misfortune.

3. At the hearing, PW1, Dr. W Wokabi produced a medical report P. Exh.1 indicating that the Plaintiff as a result of the accident suffered 60% burns on his body surface and stated that the scars would remain ugly and permanent. He estimated however that the scars on the neck and the pinna could be surgically excised at a cost of Kshs.120,000/=. He also estimated that the Plaintiff's limitation is at the rate of 20%.

4. PW2, the Plaintiff, in his evidence stated that on the material day, one Mr Mungai, a Supervisor, asked him to wash the boiler which is shaped like a bottle and he was given a chisel and a hammer as well as a paper bag to store the debris to be removed from the boiler. After 15 minutes of work, he suddenly heard a hissing noise from the bottom of the boiler and hot steam rose towards him. He was scalded as he struggled to escape and he was taken to Athi-River Medical Clinic and later to Nairobi West Hospital and Kenyatta National Hospital.

5. At the time, he was earning Kshs.6,080/= and he was 25 years old and he blamed the Defendant for failing to provide him with protective gear and a safe working environment.

6. No evidence was called on behalf of the Defendant and I agree with the advocate for the Plaintiff that when the defence followed that line of thinking, then this court, having regard to the oral testimony of the Plaintiff and the doctor; the documents produced with the consent of the Defendant can only conclude as follows:-

That the accident in issue did happen on 4/10/2006 at the Defendant's Athi-River plant in circumstances detailed out by the Plaintiff. As to whether the Defendant was guilty of negligence, where an employee is working in a dangerous place such as a steam boiler, the Defendant has a common law duty of care to him and where there is evidence that it failed in that duty, then negligence can be properly attributed to it. In this case, the Plaintiff could only clean the inside of the boiler when the steam pipes had been switched off and when it was wholly safe to do so. When steam rises without warning to a lone cleaner, then the duty of care has been breached. No explanation has been tendered and I can only reasonably conclude that there is no answer to the allegation of breach of that duty and negligence as pleaded cannot be questioned. I will hold the Defendant 100% liable and will dismiss the bare assertion that the Plaintiff was the author of his own misfortune.

7. The above opinion necessarily leads me to the more difficult question of quantum. PW2, Dr. Wokabi concluded in his report that the Plaintiff suffered 60% burns and was 20% limited in his general movements. He also noted that the injuries were life threatening but quick action saved the Plaintiff's life. In deciding the quantum of damages, these matters are important to consider and therefore;

On special damages, Kshs.7,500/= was pleaded but I have seen no evidence of expenditure in that sum. It would seem that the Defendant settled all the medical expenses incurred by the Plaintiff. Special damages must be specifically pleaded and strictly proved – see Wambua vs Patel & Another (1986) KLR 336 and where the basis for the claim is not properly laid out and no evidence is given in proof, then the claim must fail.

8. The advocate for the Defendant however has no problem if the court attendance fee of Kshs.10,000/= payable to Dr. Wokabi plus Kshs.2,000/= for his report is paid and I will award that sum as special damages.

9. In the Plaintiff, there is the claim for future nursing and medical care. A sum of Kshs.120,000/= has been claimed. Based on the unchallenged evidence of Dr. Wokabi that sum is payable to enable the Plaintiff to excise the ugly scars on the neck and pinna.

10. For general damages for pain, suffering and loss of amenities, Kshs.2,000,000 has been claimed and the reason given is that the Plaintiff is incapacitated and feels weak, itches and is affected physically and aesthetically. I am asked to be guided by the decision in Lewis Waiyaki vs Berkelcy Steward Ltd & Another H.C.C.C 3086/1981 where a 55 year old Plaintiff was awarded Kshs.3.342 Million as general damages for crippling injuries. Further, in Trufena Achieng Abuto & Another vs William Ambani Mise t/a Ahero Total Service Station C.A 177/1995 where the Appellant suffered first degree burns to the head, neck, left arm and right hand and required skin grafting and risked developing skin cancer and surgery to free some body joints, Kshs.350,000/= was awarded to one Appellant and Kshs.200,000/= to another.

11. Counsel for the Respondent however proposes Kshs.600,000/= as damages for pain and suffering and loss of amenities but in my opinion, noting the severe injuries suffered, (60% of the body) and the trauma suffered, Kshs.1,500,000 is fair in the circumstances and I do so noting the trends of inflation since the case of Nzilani Ndari vs Boniface Musyoka 1998 e KLR which has been relied on was decided.

12. On the heading loss of future earnings or loss of earning capacity, I saw the Plaintiff in court and I have already referred to Dr. Wokabi's report. In the report, the doctor stated that the injuries "to the upper limb and legs will limit him a lot as he goes about his day to day chores. For the next 2 years he is not likely to be gainfully employed." The report is dated 22/10/2007. It is agreed that he was earning

Kshs.6,080/= and his advocate proposes a multiplier of 30 years but the advocate for the Defendant proposes a multiplier of 12 years. I agree with the advocate for the Defendant that the multiplier of 30 years is too high in view of Dr. Wokabi's findings and so I will instead adopt a multiplier of 15 years since the Plaintiff is 25 years and taking into account the fact that disability is only 20% and for that limited period.

13. In the event, under this heading, the award shall be $Kshs.6,080 \times 12 \times 15 = 1,094,400$.

In the end, judgment is entered as follows:-

Pain and Suffering and Loss

of Amenities – Kshs.1,500,000

Loss of Earnings – Kshs.1,094,400

Future Medication – Kshs. 120,000

Special Damages – Kshs. 12,000

Kshs. 2,726,400

14. The Plaintiff will also have costs of this suit and interest as prayed in the Plaint.

15. Orders accordingly.

Dated and delivered at Machakos this 19th day of August 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Bw'omote for Plaintiff

Mr Ochoo for Defendant

ISAAC LENAOLA

JUDGE