



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 373 of 2008

KIRINJIT SINGH MAGON PLAINTIFF

VERSUS

BONANZA RICE MILLERS LTD DEFENDANT

JUDGMENT

This matter came up for hearing as a formal proof, as interlocutory Judgment against the Defendant was entered on 14th November 2008. It means that the averments made by the Plaintiff are not controverted and the Plaintiff has to give evidence on the liability and quantum of damages.

The Plaintiff was at all relevant time working as General Manager/Accountant for the Defendant company and amongst his several duties, he was assigned the duty of depositing and withdrawing cash from the company's Bank for official use. The Plaintiff owned a motor vehicle bearing Registration No. KAE 359Q. On 31st August, 2006 using his own car, he went to the Bank to withdraw money for payment of salaries to the staff of the Defendant company. He was not given any escort to perform that task.

On arrival at the Company's premises' gate the compound was opened and soon he entered the compound he saw some people who opened his car-door and tried to pull him out. While he was trying to untie the seat belt he was shot twice on his knee and left side of stomach. The person who shot him pulled him out of the vehicle and threw him on the ground. Of course, thereafter he was rushed to the hospital, Mater Hospital, and admitted there and treated.

On his discharge on 7th September 2006, he was placed on treatment as an outpatient. He was on non-weight bearing on his broken leg. On medical advice, he was admitted to Aga Khan for surgery in December 2006.

As he was not properly cured, he went to India for further surgery at Jas Lok Hospital, Mumbai to undergo further treatment/surgery, in June, 2007, He still is in pain and on medication.

Dr. A.O. Wandugu has made evaluation of his injuries and given his medical opinion and diagnosis on the injuries sustained by the Plaintiff vide his report of 16th July, 2008.

According to the said report the Plaintiff sustained following injuries.

Injuries Sustained

- 1. Penetrating bullet wound to the upper thigh (R) gluteal region lateral aspect including the lower abdomen.**
- 2. Comminuted compound fracture of the lower end of the (L) femur as evidenced by multiple fractures (shattering) of the condyles with fragments.**
- 3. Damage to the knee ligaments – both external and internal.**

The plaintiff, as per the report is still in lot of pain in the (R) gluteal region affecting the leg and in (L) knee joint. The injuries have resulted in limps on both legs and a swollen knee joint. He has several surgical scars.

Lastly his opinion and prognosis are as under, namely:-

Professional Opinion and Prognosis

- 1. He suffered very severe injuries, a lot of pain, much suffering, inconveniences and mental anguish. This is emphasized by the number of days of Hospitalization and the management processes – MAJOR COMPLICATED SURGICAL OPERATIONS.**
- 2. The injuries are consistent with the nature of forces that caused them - BLUNT.**
- 3. His current medical complaints and findings on clinical examination are also consistent with the injuries sustained and are a DIRECT RESULT OF THEM.**
- 4. The injuries have resulted in chronic disabling pains in the affected areas, a source of chronic ill-health which MIGHT need medication on and off.**
- 5. The injuries have resulted in scars which are rather uncosmetic in the affected areas.**
- 6. The injuries have resulted in PERMANENT TOTAL DESTRUCTION of the (L) knee joint and PERMANENT WEAKNESS of the same leg which is going to be PROGRESSIVE. The injuries have also resulted in PERMANENT WEAKNESS of the (R) leg.**
- 7. The injuries have resulted in POST-TRAUMATIC STRESS DISORDER. This needs counseling and occasional medication.**
- 8. He still attends clinics on and off.**

NB: For all practical purposes the (L) leg is over

90% disabled, as at time of writing report.

By the nature of the injuries his sexual performance has been severely compromised.

It seems as if his life is on a downward trend socio-economically.

He has opined that (L) leg is over 90% disabled and that the Plaintiff is unable to live a normal life with lot of restraint on his leg movement and sitting and standing position.

The Plaintiff produced details of treatment, invoices and receipts for the treatment from all the three hospitals. He has also produced receipts for physiotherapy and purchase of medicines prescribed and pain killers. He definitely stressed that he is still in lot of pain and has to go for further check up and possible treatment to India.

He has made a total calculation of the expenses incurred which amounted to Shs. 2,885,635/=.

He also produced receipts for Shs. 7,000/= from Dr. A. O. Wandugu for preparing his report.

He testified that apart from a lay maasai as a guard, the Defendant company was not providing for any security or measures for the safety of its employees. Even while he was asked to deposit in or withdraw money from the Bank, no adequate measures were taken to safeguard his safety and also the safety of money. The alarm system is only switched on during night time. He thus stressed that the Defendant Company is solely responsible for his injuries, pain and suffering as well for payment of medical charges.

The learned counsel for the Plaintiff Mr. Isoe relied and submitted on the skeleton submissions filed by him and contended that Dr. Wandugu has given his opinion that his left leg is for all practical purposes 90% disabled.

Mr. Isoe relied on the Judgment in the case of **Sanya Hassan and Another Versus Soma Properties Ltd. (H.C. No. 1517 of 2002)** (Unreported).

In this case a shopper in the Sarit Centre was hit by a bullet during cross-fires between the Police and robbers from the nearby Bank. The incident thus, in a way, took place in the Public area. I do not think the facts of the Sanya's case (**Supra**) are very much relevant except on the finding that there cannot be a waiver of right of the duty of care of the employer in favour of the employee so far as his personal safety on the hands of criminals is concerned.

It is trite law that the employer has a duty of care for the safety of the persons employed by him during working hours at the premises where an employee is performing his duties.

The Plaintiff herein was on an errand on behalf of the employer when he was sent to withdraw money from the Bank.

He was coming back to the place of work and while in the premises he was attacked by robbers and shot. I have his uncontroverted evidence that no measures were taken by his employer for his safety while he was asked to undertake a risky task.

In the case of **Sanya Hassan & another v. Soma Properties Ltd (2004) eKLR**. A passage from the English case of **Letang V. Ottawa Electric Railway Company (1926) A.C. 725** was quoted, namely:-

“Volenti non fit injuria affords no defence to an action of damages for personal injuries due to the dangerous condition at premises which the Plaintiff has been invited to on an errand of business unless he has freely voluntarily agreed to incur it.”

I do not have any evidence that the Plaintiff volunteered to be shot in the premises of his employer and I do find that employer was obliged to take care of the safety of all its employees and the Plaintiff thus owed a duty of care by the Defendant Company.

I do not have any evidence of any contributory negligence by the Plaintiff and thus find that the Defendant is 100 per cent liable for the injuries suffered by the Plaintiff.

The Plaintiff has satisfactorily proved the special damages in the sum of Shs. 2,885,635/= in respect of the medical expenses and Shs. 7,000/= for the medical report, which adds up to Shs. 2,892,635/- and I do award the same, to the Plaintiff.

As per the evidence from the Plaintiff and medical report he has undergone successive surgeries and continued medical treatment till to-day. He is still under pain and walks with the aid of a walking stick (I saw the same in the court). His left leg has 90 percent permanent disability.

Considering the serious and permanent nature of the injuries, I assess the general damages for pain and suffering in the sum of Shs. 2,500,000/=.

There is no evidence on the estimate of future treatment as well as loss of earning and, I do not make any finding thereon.

The upshot is that I allow the plaint and enter Judgment against the Defendant in the sum of Shs. 5,392,635/- with costs and interest.

Dated, Signed and Delivered at Nairobi this **18th** day of **November 2009**.

K.H. RAWAL

JUDGE

18.11.2009