REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 514 of 1990

BENSON KAMAU GICHINU …….…….……. PLAINTIFF

VERSUS

NGATA WATER ENGINEERING LTD ……. DEFENDANT

JUDGMENT

This matter has had a long history; the suit was filed in 1990. Apparently the matter was heard and judgment was entered but the original file disappeared. By a ruling dated 6th May 2004, it was directed that the matter be heard afresh. The hearing of the suit, commenced on 18th December 2006. The plaintiff gave evidence in support of his claim for special and general damages for the pain, suffering and loss of amenities as a result of an industrial accident that he suffered on 16th March 1987.

The plaintiff was an employee of the defendant company and on the 16th March 1987, the plaintiff was operating a machine at the Golil Soap Factory in Nakuru. The machine was defective due to the fact that it had been water soaked; the machine automatically engaged itself and hit the plaintiff who was operating the drilling rig. As the result of the said injury the plaintiff suffered fractures of the right ulna and radius, deep wound on the right forearm, the plaintiff was treated at the Nakuru Provincial General Hospital where the broken arm was plastered for a period of ten weeks.

On 14th June 1999, the plaintiff was examined by ***Dr. Wellington Kiamba*** who confirmed that the injuries sustained by the plaintiff during the accident had healed. He noted that the plaintiff continues to suffer from residual pain on the right shoulder and wrist joints. ***Dr. Wellington Kiamba*** classified the degree of injuries as grievous and in his prognosis; the plaintiff should be awarded temporary disability of four months (three months total disability and one month partial).

The plaintiff produced the letter of employment which was issued to him on 25th February 1987 by the defendant company. The letter shows that, he was engaged on water borehole drilling at Golil Soap Factory. He also produced a report that was written by the defendant company regarding the accident that occurred on 16th March 1987 involving the plaintiff.

From the said report, it is indicated the cause of the accident was;

"***The bailer-friction clutch that got soaked by rain water then (****automatically****) engaged itself, hauling the 5" bailer from the floor on to Kamau Gachuno who was operating the drilling rig. The bailer hit Kamau on the right arm squeezing him against the flame of the drilling rig fracturing his arm. He was admitted at Nakuru General Hospital on 16th March, 1987."***

The plaintiff blames the defendant for the negligence and the injuries that he suffered while at the place of work.

The defendant did not offer any evidence although the counsel for the defendant filed written submissions. Counsel for the defendant urged this court to find that the plaintiff ought to have exercised a certain degree of care when handling the drilling machine which had been soaked in rain water. In the circumstances Counsel invited the court to find that the defendant is not entirely to blame for the accident.

In that regard, Counsel submitted that the plaintiff should bear 50% of the liability as he was partly to blame for the accident. On quantum, Counsel urged this court to consider an awarded of Kshs.150, 000/- for the injuries sustained by the plaintiff which have so far healed. He put forward the following cases in support of that preposition;

John Otieno Vs Geoffrey Muruthi Njagi – Hccc No.1195 of 1985, **Moses Ndwiga Njamburu Vs The Attorney General – Hccc No. 1055 of 1988** and **Halima Abiera Guyu Vs Tana & Athi River Development Authority – Hccc No. 5 of 1999**.

On the issue of liability, am satisfied that from the plaintiff's evidence and the report that was prepared by the plaintiff's company regarding this accident that the defendant was to blame for the defective machine that malfunctioned. If the plaintiff was to blame even partly, northing would have been easier than stating so in that report that was prepared by the defendant themselves. The defendant did not call any evidence to establish that there was contribution of negligence on the part of the plaintiff.

In the case of **Embu Public Road Services Ltd –Vs- Riimi [1968] EALR 22**, the Court of Appeal held as follows;

"***Where circumstances of the accident give rise to the inference of negligence, then the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or the explanation for the accident was consistent only with an absence of negligence" (Mzuri Muhididdin Vs Nazzar Bin Seil)"***

Further in the case of **Nandwa Vs Kenya Kazi Ltd [1988] KLR 488** it was held

"***In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a asset of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference***."

Taking the totality of the evidence and the above well established principles of common law, l attribute the cause of the plaintiff's injuries to the defendant's failure to provide a safe working environment and equipment.

On quantum, the plaintiff suffered a fracture and injuries on the forearm which have healed. He was immobilized for a period of ten weeks, I would award the plaintiff Kshs.150, 000/- for general damages.

I have taken into consideration the authorities cited and the fact that these injuries were sustained 20 years ago and the plaintiff has healed. Special damages were not pleaded and it is trite law that the same must be pleaded. Judgment is hereby entered for the plaintiff for Kshs.150, 000/- with costs of this suit and interest at court rate.

Judgment read and delivered on 9th day of March 2007.

MARTHA KOOME

JUDGE