



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

CIVIL SUIT 56 OF 2004

JAMES NYABOGA MASOGO.....PLAINTIFF

VERSUS

KIPKEBE LTD.....DEFENDANT

JUDGMENT

The plaintiff, James Nyaboga Masogo has sued the defendant Kipkebe Ltd seeking to be paid damages on account of injuries he alleged to have sustained while he was in the employment of the defendant. The plaintiff averred that on the 17th June 2003 when he was employed by the defendant as a turn boy, and while he was disconnecting the trailer from the tractor, the tractor moved and sandwiched him between the tractor and the trailer and thus caused him to sustain severe injuries. The plaintiff averred that he sustained the said injuries due to the breach of statutory duty of care owed to him by the defendant, who *inter alia*, failed to provide him with a safe working environment and further exposed him to an unnecessary risk of injury by not putting in place systems that would reduce such risk as to injury. The plaintiff set out the particulars of negligence on the part of the defendant and on the part of the driver of the tractor.

The plaintiff averred that he would rely on the doctrine of *res ipsa loquitur* to establish the negligence of the defendant. The plaintiff set out the particulars of injury and particulars of special damages. The plaintiff pleaded that he should be paid the sum of Ksh.123,000/= being the treatment costs, the costs of the medical report and the cost of future medical expenses. He further pleaded to be paid a sum of Ksh.5000/= per month being the cost of nursing care. The plaintiff averred that he should be paid damages for loss of earning capacity because the said injury had completely incapacitated him. He further prayed to be awarded general damages for pain, suffering and loss of amenities. He asked the court to pay him costs of the suit.

The defendant filed a defence. It denied that it had breached any statutory duty of care owed to the plaintiff. It further denied that the plaintiff was its employee at the material time. It averred that it was not negligent nor were its employees negligent when the plaintiff was injured on the 17th June, 2003 or on any other date. The defendant specifically denied the particulars of breach of statutory duty and negligence as pleaded by the plaintiff. Further and in the alternative to the denial of the plaintiff's claim, the defendant averred that the plaintiff was guilty of fraud in that he had filed this claim against the defendant in the clear knowledge that he had been injured elsewhere.

The defendant set out the particulars of fraud. The defendant further averred that if the accident did indeed occur, then it was solely caused or substantially contributed by the negligence of the plaintiff who,

inter alia, failed to take heed of the safety instructions that he had been given by the defendant. The defendant further averred that the plaintiff was negligent because he had placed himself in a dangerous place of work while intoxicated. The defendant urged the court to dismiss the plaintiff's suit with costs. The plaintiff filed a reply to the defence in which he denied that he was negligent or had in any way contributed to the said accident.

At the hearing of the case, the plaintiff called two witnesses in support of his case. He testified as PW1. He testified that at the material time, he had been employed by the defendant as a general labourer. He was later assigned to work as a turn boy of a tractor. He produced his employment card as *plaintiff's exhibit No.1*. His work entailed loading and unloading goods on the tractor. He also used to connect and disconnect the trailer on the tractor. He recalled that on the 17th June 2003 he went to work as usual. He was a turn boy of a tractor which was ferrying stones from a quarry to a school which was being constructed. He recalled that after work, the tractor was taken to the yard. The tractor was being driven by Enock Mose. He was instructed by the driver to disconnect the trailer from the tractor. He recalled that he put a log under the connecting section of the tractor. He then removed the pin that connected the tractor to the trailer. He testified that at that stage, the driver was required to slowly move the tractor forward by engaging the forward gear.

The plaintiff recalled that instead of the driver engaging the forward gear, he engaged the reverse gear as a consequence of which the rear wheel of the tractor hit him on the back as a result of which he sustained serious injuries on his back. The plaintiff conceded that at the time he was hit by the rear wheel of the tractor, he was standing in a dangerous position. He however insisted that for the trailer to be disengaged from the tractor, he was required to stand in the position that he stood so that he could remove the pin that connected the trailer to the tractor. He denied the suggestion by the defendant that he had engaged in dangerous work ethic or was reckless when he was involved in the said accident. He testified that he had not been trained by the defendant to disengage the trailer from the tractor but had learnt to do so in the job. The plaintiff blamed the driver of the tractor for the injuries that he sustained. He was of the view that if the driver had not engaged the reverse gear instead of the forward gear, then he would not have been injured.

He recalled that immediately after the accident, he became unconscious and was taken to the dispensary of the defendant. His condition being serious, he was transferred to Kaplong Hospital where he was admitted for 3 days before he was discharged. He went home for a day he was returned again to the hospital. He was admitted at Kapkatet Hospital where he was x-rayed. He was referred to Moi Teaching and Referral Hospital, Eldoret where he was treated. He produced the x-ray forms as *plaintiff's exhibit No.3* and the medical treatment chits as *plaintiff's exhibit No.4*. He was later seen by Dr. Oketch who prepared a medical report which was produced as *plaintiff's exhibit No.5*. The plaintiff testified that he paid Ksh.3000/= for the preparation of the said report. The receipt was produced as *plaintiff's exhibit No.6*. He recalled that since he was injured, he has been unable to engage in any gainful employment. Before he was injured, he was paid a salary of Ksh.4,023/50. He produced the pay slip for the month of November 2003 as *plaintiff's exhibit No.7*. LD105 form which was filled by the defendant was produced as *plaintiff's exhibit No.8*.

The plaintiff testified that he was not paid any sum of money under Workmen Compensation. He was terminated from employment on medical grounds on the 19th March 2004 (*termination letter produced as plaintiff's exhibit No.9*). The plaintiff produced invoices which showed that he had been invoiced the sum of Ksh.13,350/= as medical expenses. The invoices were produced as *plaintiff's exhibit No.10 (a) & (b)*. The plaintiff testified that because of the injuries that he had sustained during the accident, he could not walk without clutches. He further could not walk for long distances. He complained of constant pain in his body. He further stated that as a result of the accident, he had lost his sexual functions. He testified that at the time of the accident he was married with four children. His wife had left him because of his impotence. He prayed for this court to award him compensation including the sum of Ksh.5,000/= per month for nursing care.

PW2 Dr. Stephen Oketch testified that he saw the plaintiff on the 17th May 2004. At the time of examination, the plaintiff was 28 years old. He stated that the plaintiff had sustained a compression injury

to the spinal cord. There was a prolapsed inter vertebrae disc. There was a dislocation and sprain to inter vertebral bone. There were soft tissue injuries to the back muscle. The plaintiff was wearing a lumbar corset and had weaknesses on the lower limb due to partial paralysis. The muscle bulk was reduced in both lower limbs. The plaintiff has sustained partial loss of bowel control. He had inability to stand and walk. He had persistent back ache and incontinent of urine and stool. The plaintiff complained of being impotent.

Dr. Oketch was of the opinion that the plaintiff had sustained permanent spine injury and paralysis of the lower limbs. His chances of recovery were slim. He assessed the permanent incapacity of the plaintiff to be 80%. The medical report was produced as *plaintiff's exhibit No.5*. He was of the further opinion that the plaintiff would wear the lumbar corset for the rest of his live because the said corset was meant to reduce the movement on the spinal cord. He reiterated that although the injuries sustained by the plaintiff were serious, there was a possibility that he could still recover. He however discounted the possibility as slim. He testified that he had partially relied on the medical treatment notes of the plaintiff to write his report. The plaintiff then closed his case.

The defendant did not offer any evidence in its defence. At the close of both the plaintiff's and the defendant's case, it was agreed by consent that the plaintiff and the defendant would file written closing submission both on liability and on quantum. Both the plaintiff and the defendant filed closing written submissions. I have read the said closing written submissions. I have also carefully considered the pleadings filed by the parties to this suit and the evidence that was adduced in court by the plaintiff. The issues for determination by this court are two fold;

(a) Whether the circumstances under which the plaintiff was injured in such that the defendant can be held liable.

(b) What quantum of damages should be paid to the plaintiff if the defendant is found liable?

On the first issue, the plaintiff offered uncontroverted evidence that he was injured while he was on duty. He produced his employment card which confirmed that he was working for the defendant at the time he was injured. He testified that although he was employed as a general labourer, he was assigned the duty to be a turn boy on one of the tractors owned by the defendant. His duties included uncoupling the trailer from the tractor after the day's work. It is apparent that the defendant did not train the plaintiff on any safety practices when disengaging the trailer from the tractor. The plaintiff testified that he learnt to uncouple the trailer from the tractor on the job. When the trailer was being disengaged from the tractor, the plaintiff was required to stand between the tractor and the trailer. He recalled that he placed a log, as he was instructed to by the driver, between the tractor and the trailer. He then removed the pin that connected the trailer to the tractor. The driver of the tractor was then required to slowly engage the forward gear so as to disengage the tractor from the trailer. On the material day, instead of the driver engaging the forward gear, he engaged the reverse gear as a result of which the plaintiff was hit on the back by the rear wheel of the tractor. He fell down and became unconscious. He was taken to hospital for treatment.

The testimony by the plaintiff as to the circumstances of the accident was uncontroverted. The defendant did not adduce any evidence to challenge the plaintiff's account of how the accident took place. Has the plaintiff established that he was injured by the negligence of the defendant? It is clear that the plaintiff was injured when the driver of the tractor engaged the reverse gear instead of the forward gear to disengage the tractor from the trailer. The driver was at the material time an employee of the defendant. It is clear that the driver of the tractor was negligent when he failed to engage the forward gear and instead carelessly engaged the reverse gear resulting in the injury that the plaintiff sustained.

Although the plaintiff was standing behind the wheel of the tractor, between the tractor and the trailer, which was inherently a dangerous position, it is clear from the evidence adduced that the plaintiff was required to be standing in that position so that he could remove the pin that held the tractor and the trailer together. The plaintiff testified that he had not been trained on any safety precaution to take while disengaging the trailer from the tractor. Having evaluated the evidence on record, it is clear that the

defendant is liable for the injuries that the plaintiff sustained. It is the driver's act of engaging the reverse gear and putting the tractor in motion that caused the injuries that the plaintiff sustained. In the circumstances therefore I hold that the said driver acted negligently when he engaged the reverse gear. He is solely liable for the said accident. He was employed by the defendant. The defendant is therefore vicariously liable in law for the acts of his employees. The defendant shall therefore bear 100% liability in negligence.

On quantum, the plaintiff was examined by Dr. Oketch on the 17th May 2004 nearly one year after he was injured. In his medical report which was produced as *plaintiff's exhibit No.5*, he observed that the plaintiff had sustained injuries to his back and the spinal column. The nature of the injuries were; Compression injuries to the spinal cord, prolapsed inter vertebral disc, dislocation and spraining of the vertebral bones and soft tissue and back muscle contusion. Dr. Oketch was of the opinion that following the injuries, the plaintiff had developed paralysis of the lower limbs, incontinence of urine and stool, inability to stand or walk persistent back pain and inability to get an erection. He had also developed loss of sensation in the lower limbs.

Dr. Oketch's opinion is however qualified by the fact that when the plaintiff testified before court, his condition had improved. The court observed that the plaintiff was walking using clutches. Dr. Oketch was of the opinion that the injuries which the plaintiff had sustained were of a permanent nature and the chances of his condition improving were slim. He formed the opinion that the plaintiff would suffer persistent back pains that would require the use of pain killers for a long time to come. The plaintiff would also be required to undergo physiotherapy and wear a corset to restrict the movement of the spinal column probably for the rest of his life. He assessed the degree of permanent incapacity to be 80%. As a result of the injuries that the plaintiff sustained, he was terminated from employment on medical grounds.

The plaintiff has submitted that he should be paid general damages of Ksh.2,000,000/= pain suffering and loss of amenities. He also has submitted that he should be paid Ksh.1,207,050/= for loss of earning capacity. He further wants to be paid the sum of Ksh.1,500,000/= as costs of future nursing care. The plaintiff has relied on the case of **Job Kenyansa Mirangi vs E.A Breweries & Anor. Nakuru HCCC No.149 of 2000 (unreported)**, **Simon Mwangi Mureithi vs Martin Shikuku & Others Nakuru HCCC No.198 of 2003 (unreported)**, **Dr. Paul Mubia Mathu vs Ibrahim Kariuki Gichimu Nakuru HCCC No.60 of 2001 (unreported)** and **Mbaka Nguru vs James Rakwar CA Civil Appeal No.133 of 1998 (unreported)**. On the other hand, the defendant has submitted that the plaintiff should be paid damages of Ksh.1,000,000/=. It has relied on the decision of **Reuben Mayo Wewuga vs Michael Odindo, Nairobi HCCA No.1728 of 1999 (unreported)**.

I have carefully considered the said submission made by the plaintiff and the defendant including the decided cases relied upon in their submissions. I have also considered the injuries that the plaintiff sustained. The injuries that the plaintiff sustained were not as serious as those of the plaintiffs in the cases relied on by the plaintiff in his submission. I had the privilege of hearing the *Job Kenyansa* case. In that case, the plaintiff was a complete paraplegic. The injuries that he had sustained were such that he was permanently on a wheel chair. His spinal cord was transected. In the present case, the plaintiff's condition had improved to the extent that he is able to walk on clutches. Dr. Oketch testified that the condition of the plaintiff may improve though the chances were slim.

Doing the best that I can on the circumstance of this case, and in light of the decided cases, I hereby award the plaintiff general damages of Ksh.1,700,000/= for pain, suffering and loss of amenities. The plaintiff proved special damages of Ksh.13,350/= being medical expenses and Ksh.3,000/= being the costs of the preparation of the medical report. I will award him the said proven damages of Ksh.16,350/=.

As regard the cost of future medical expenses, the plaintiff did not place any evidence before this court to support such a claim for costs of future medical expenses. I will not make any award under such a head. The plaintiff also sought to be awarded cost of nursing care. It is clear that the said claim is not merited in the circumstances of this case. The plaintiff can walk and does not require any nursing care. Nursing care can only be considered in cases where the injured person cannot take care of himself. I will therefore make no award under this head.

As regard whether the plaintiff should be paid for the loss of income as a result of the injuries that he sustained, I think the plaintiff will be adequately compensated by the award of general damages. The award of damages by a court of law is not meant to put the plaintiff in a better position than he would have been had he not been injured. It is meant to compensate him for the injuries that he had sustained. In the circumstances therefore, I hold that the plaintiff should adjust himself to his present condition and look for means to earn a living that would be commensurate with his current physical condition. The awards of general damages for pain, suffering and loss of amenities would enable him make that adjustment.

The upshot of the above is that judgment is entered for the plaintiff against the defendant as hereunder.

(i) **On liability,**

The defendant shall bear 100% liability.

(ii) **On quantum,**

(a) General damages for pain suffering and loss of amenitiesKsh.1,700,000/=.

(b) Special damages.....Ksh.16,350/=.

Total.....Ksh.1,716,350/=.

(iii) The Plaintiff shall have the costs of the suit.

(iv) Interest on special damages shall be paid from the date of filing of suit while interest on general shall be paid from the delivery of this judgment.

DATED at KERICHO this 7th day of June, 2007

L. KIMARU

JUDGE