REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Civil Appeal 281 of 2004

EVEREADY BATTERIES (K) LIMITED ……...…...…… APPELLANT

AND

SIMON KINYUA ……...…… RESPONDENT

***(Appeal from the Judgment of the High Court of Kenya Nakuru (Lesiit, J) dated 6th April, 2004* In H.C.C. Suit No. 98 of 2004)**
****

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendant from a judgment of the superior court (Lesiit, J) delivered on 6th April, 2004 in which the learned Judge ordered the appellant to pay the respondent a total sum of Kshs.4,327,872/- as general damages, loss of future earnings, and cost of future medical expenses.

The respondent herein (Simon Kinyua) sued the appellant, Eveready Batteries (K) Ltd. in the superior court seeking general and special damages arising from a claim brought under the English Common Law and the Factories Act (Cap. 514 Laws of Kenya). It was the respondent's case that the appellant was in breach of its statutory duty under the Factories Act as a result of which the respondent suffered injures and loss of future earnings.

This being a first appeal it is our duty to re-evaluate the evidence, analyze it and come to our own conclusions but in so doing we must give allowance to the fact that we have neither seen nor heard the witnesses – see SELLE V. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A. 123 and JIVANJI V. SANYO ELECTRICAL COMPANY LTD. [2003] KLR 425.

By an amended plaint dated 27th May, 2002 the respondent herein sued the appellant seeking judgment for general and special damages. In order to appreciate the nature of the dispute we would reproduce herein the salient paragraphs of the Amended Plaint which were as follows:-

" 1. The Plaintiff is an adult male of sound mind and his address of service for the purpose of this suit shall be care of MUSEMBI NDOLO & CO., ADVOCATES, BELPAR HOUSE, 2ND FLOOR, COURT ROAD, OPPOSITE NATIONAL BANK, P.O. BOX 545, NAKURU.

2. *The Defendant is a Limited Liability Company with its physical address as GEORGE MORARA AVENUE, P.O. BOX 1321, NAKURU. (Summons to be effected through the Plaintiff's Advocates Office).*

3. The Defendants are and were at all material times manufacturers of dry cells at their Factory situated at Nakuru Industrial area which was and is a factory for the purposes of Factories Act (1972)

Cap 514 Laws of Kenya.

4. Between 1st September, 1989 to 4th February, 2002 (hereinafter referred to as the said Period) the Plaintiff was employed by the Defendants as a Machine Operator at the Defendant's said premises at a monthly salary of Kshs.16,242/-

5. During the said period the plaintiff in his course of his said employment was engaged in operating Paper Liner Machine (PLM) Cell Tapping Machine (CTM) and Cell Assembly Machine (CAM), cleaning the said machines using compressed air and Kerosene, sweeping the room within the Paper Liner Machine area as well as writing the production report and checking the quality of the products.

6. In the course of carrying out his said work at the said factory, the Plaintiff was exposed to a considerable concentration of depolarizing chemicals, fumes and dust And inhaling such fumes and dust and in consequences of the Plaintiff inhaling such dusts and fumes and poisonous chemicals, he sustained severe injuries and has suffered loss and damages.

7. As from 1995 to the time of filing this suit, the Plaintiff has been on and off admitted in various hospitals as a result of the said injuries.

PARTICULARS OF INJURIES

(a) Upper Respiratory Hypersensitivity

(b) Purulent Sinusitis

(c) Chest Pain

(d) Cough and difficult in breathing

(e) Congestion of the nose

(f) Irritation of bronchial tubes

(g) Pulmonary emphysema

(h) Loss of sight

(i) Severe Pain of left ear.

8. As a result of the said injuries on 4th February, 2002, the Plaintiff was retired on Medical grounds. At the time of his retirement, the Plaintiff was aged 39 years earning a monthly salary of Kshs.16,242/- and could have continued working upto the age of sixty (60) years as per Collective Bargaining Agreement and as a result of the said injuries and early retirement, the plaintiff has suffered loss and damages.

PARTICULARS OF SPECIAL DAMAGES

(I) Future medical treatment and expenses (to be ascertained at the trial) of Kshs.20,000/- per month and the Plaintiff claims for general damages for loss of future earnings and shortening of his life expectancy.

9. The said injuries and loss and damages were occasioned to the plaintiff by reasons of a breach on the part of the Defendants, their servant, or agent of their statutory duties of the Factories Act (Cap 514 Laws of Kenya).

BREACH OF STATUTORY DUTIES

(a) In connection with the said process carried on at the said factory there was given off fumes and dusts of such a character and to such extent as to be injuries (sic) to the persons, including the Plaintiff employed and there and or handling and mixing various depolarizing chemicals with resultant dust in substantial quantities, but the Defendants did not take any or any practical measures to protect the persons including the plaintiff employed in the said factory against inhalation of the said dust or to prevent its accumulation in the workroom of the said factory, as required by the provision of section 35 and 36 of the Factories Act (Cap 514) or at all.

(b) The Defendants did not provide or maintain any exhaust appliances so as to Prevent the said dust entering the air of the workroom in the said factory as required under the provisions of Section 51 of the Factories Act (CAP 514) Or at all.

10. Further, the injuries and loss and damages were occasioned to the plaintiff by reason of

negligence and or breach of duty on the part of the Defendants, their savants or agents under the Common Law.

PARTICULARS OF NEGLIGENCE/BREACH OF DUTY

(a) During the handling, mixing and batching of the depolarizing substance, the Plaintiff was not provided with the correct type of the respirator during his working period save the normal dust mask, which was inappropriate and inadequate in the circumstance.

(b) Exposing the Plaintiff to a risk of damage or injury of which they knew or ought to have known.

(c) Failing to provide any fans or suction plant or other suitable or adequate Appliances to enable the said work to be carried out safely.

(d) Failing to take any or any practicable measures to protect the persons working in the said factory, including the plaintiff, against inhalation of the said dust or to prevent its accumulation in the workroom in the said factory.

(e) Causing or permitting the plaintiff to be exposed to substantial quantities of the said dust and to inhalation of the same when they knew or ought to have known that such exposure and inhalation were likely to be injurious or offensive to him.

(f) In the premises , failing to provide or maintain any or any proper or safe system of working at the said factory. The above are the best particulars hereof which the plaintiff can give until after discovery and/or interrogatories herein.

9. The Plaintiff further avers that here is no other suit pending , and that there have been no previous proceedings, in any other court between the Plaintiff and the Defendants over the same subject matter.

10. THAT, the cause of action arose within the jurisdiction of this honourable court."

The appellant relied on its earlier defence filed and dated 16th May, 2002 in answer to the original plaint dated 10th April, 2002. In its defence the appellant denied all the allegations in the plaint and asked the superior court to dismiss the respondent's suit with costs. After the close of pleadings the hearing of the suit commenced before Lessit, J. on 26th March, 2003.

The first witness for the respondent was Dr. William David Onula Sakari (PW1) who testified that one Kinyua (the respondent herein) was referred to him for examination. After his examination Dr. Sakari concluded that the respondent had suffered Upper Respiratory Hyper Sensitivity with Secondary Purulent Sinusitis. Dr. Sakari further observed that the said condition of the respondent was caused by fumes at the place of work.

The second witness was Dr. Anthony Muhisi Swaro (PW2), a Medical Practioner with MBCHB and a Diploma in Industrial Health. Dr. Swaro examined the respondent at the respondent's advocate's request. Upon examining the respondent Dr. Swaro prepared a comprehensive report dated 9th June, 2002. In that report Dr. Swaro's conclusion prognosis and assessment were as follows:-

"1. *Kinyua contracted Asthma like illness and bronchitis as a result of being exposed to chlorine and kerosene which are irritant chemicals for a prolonged period of time without using adequate protective gear.*

2. He must have endured much suffering and pain from these occupational caused illnesses.

3. *Five months after he left employment and exposure he continues to suffer hoarseness of the voice, bronchitis, manifestation of obstructive long disease and sinus thickening with secondary sinusitis.*

4. These illnesses are likely to disturb him for a long time although without exposure the symptoms may subside gradually.

5. His upper respiratory system has become hyper sensitive and exposure to any respiratory system irritant should be avoided at all costs.

6. He will need to keep taking prescribed drugs i.e. these will cost about 5000/- per month.

7. He may need rehabilitation and retraining this may cost 150,000/-

I expect the current impairment due to the occupational exposure to be in the neighbourhood of 15% of the normal body function."

The third witness was the respondent (as the plaintiff in the superior court) whose evidence was a detailed account of how he was employed by the appellant in September, 1988 as a Recovery Operator and Joggan Cleaner. He was so engaged until 1993 when he was deployed to Paper Liner Machine (PLM), Cell Tapping Machine (CTM) and Cell Assembly Machine (CAM) sections. It was the respondent's evidence that he also did cleaning both under the machines and using compressed air and spray guns he cleaned inside the machines themselves. The respondent further testified that he was not provided with any protective devices except while doing cleaning duties. He said that it was the duty of supervisors to supply employees with protective devices. He conceded that he was supplied with masks but it was his view that these masks were inadequate to protect him from dust, fumes and chemical mist. The respondent testified how he was fit when he joined employment but fell ill in 1995. He visited company clinic with chest pain, difficulties in breathing, hoarseness, loss of voice and nose problems. He was treated by the company doctor (Dr. Ogada) who recommended that he be deployed to a different working area which had no chemical fumes or that he be retired on medical grounds. He was finally retired on medical grounds vide a letter dated 4th February, 2002 in which it was stated:-

"Dear Simon,

Following the Company Doctor's letter dated 30th January, 2002 concerning your medical condition which is said to be incompatible with your current work environment and which is the subject of your agreement with Company to retire on medical grounds, we are pleased to confirm the same with this letter

Your final dues will be calculated according to the terms and conditions of service laid down in the current Collective Bargaining Agreement.

Your Company service is 12 years and 5 months and this requires each party give two months' notice or salary in lieu in the event of termination of employment. The Company has considered this and waived this requirement in your favour and you will instead be paid two months' salary in addition to your final dues.

I wish to take this opportunity to thank you on behalf of the Company, for the good and loyal service you have rendered to this organization, and wish you the best of health and a happy life of retirement with success in all you may plan to do in the future. Your last working day is 4th February, 2002.

Yours truly,

J.S. MURAGE

HEAD OF PERSONNEL"

It was the respondent's evidence that at the time of his retirement he was earning Kshs.16,242/- and that he would have worked for 21 years had he not been retired on medical grounds.

The fourth witness on the respondent's side was Dr. Omondi Ogada (PW4) whose evidence was that he recommended for the respondent either to avoid fumes at work-place or be retired on medical grounds. Dr. Ogada went on to testify that his recommendation was based on his personal knowledge of where the respondent worked and the fumes he was exposed to.

The last witness for the respondent was Tom Okeyo Apiyo (PW5) an Occupational Health and Safety Officer with the Ministry of Labour. He had visited the offices of the appellant in 2002 for purposes of inspection. It was Apiyo's conclusion that the respondent's health could have been impaired by the chemicals he was exposed to in the course of his work.

After the respondent closed his case the appellant called six witnesses who adduced evidence and produced exhibits in support of its case. The first witness was Raphael Mwenja Mwangi (DW1) a Senior Production Supervisor in the appellant's Production Department. He confirmed that the respondent had joined the appellant company in 1988 on contract terms and was confirmed in 1989. He testified that the respondent's duties entailed joggan cleaning of machines after production and that he also swept floors. He was also involved in the placing or removing batteries from trays. This witness admitted the presence of dust particles which the respondent came into contact with in the course of his work. He testified further that the respondent was trained on safety on the job for a year and that dust masks were available and accessible to members of staff. This witness concluded his evidence by stating that review on job safety was done generally after every six months.

The second witness was Dr. Joseph Aluoch (DW2) whose evidence was disregarded by the superior court after it transpired that he had visited the factory, interviewed third parties and carried out investigations without any notice or warning to the respondent. We have noted the remarks of the learned Judge as regards Dr. Aluoch's conduct in the matter and on our part we agree that his evidence was properly excluded.

The third witness for the appellant was Abdul Sabuni Sabonyo (DW3) a holder of Diploma in Medical Laboratory Technology and Higher Diploma in Clinical Biochemistry certificate of Quality Control in Medical Laboratory Sciences (U.K). This witness testified that 3 MK(K) Ltd. supplied respirators to the appellant company during the time he worked with the company for nine years up to November, 2002. He identified four different respirators as those supplied to the appellant company.

Muriuki Willy Mwangi (DW4) was a Community Nurse working with the appellant as from 1990 and he made extracts of the respondent's attendance cards at the company clinic between 1988 and 2001.

Morris Oduor Mumala (DW5) was described by the learned Judge as the appellant's representative in the case. His evidence was very important as it touched on vital aspects of safe conditions in the company. He testified how the appellant company conducted New Employee Safety Training (NEST) when the respondent joined the company. This covered safety wear and safety procedures while at the place of work. This witness identified various masks introduced by the company. He confirmed that the respondent had been issued with the relevant masks.

This witness further went on to testify that the appellant company was monitored quarterly through various samples and tests. It was his evidence that the appellant company maintained threshold (toxic) limit values (TLV) air contaminants at levels between the maximum safety levels recommended by the Ministry of Labour as from 1990. At the close of his evidence the witness denied any breach of statutory duty on part of the appellant.

The last witness for the appellant was James M. Lawrence (DW6). This witness was described as an External Consultant Industrial Hygienist with the appellant company who had a first degree in chemistry and masters degree in chemical engineering with 30 years experience. It was his evidence that he had visited the appellant company's three facilities in Kenya to assess the status of hygiene. He said that he had been contracted as a consultant by the appellant's parent company in March 2002. The opinion of the consultant was summarized thus:-

(i) At PLM after seeing two results one done in 1995 and another in 2002, the exposure levels were well below any recognized harmful effect level. He formed opinion that based on these results use of masks were not necessary at PLM even during cleaning

(ii) Exposure to Manganese would cause nervous disorder. He admitted as per Exhibit 19 it could also cause respiratory irritation.

(iii) Kerosene exposure if at high levels would give liver and kidney effect. He admitted as per defence Exhibit 19. It could also cause irritation of eyes, nose and throat.

(iv) Zinc Chloride exposure would cause respiratory problems.

(v) Zinc Oxide exposure through inhalation would cause respiratory Harmful effects.

(vi) Carbon black would cause Black lung disease, shortness of breath, coughing and difficulty in breathing.

That exposure had to be for a period of 30 years to create to the noted harmful effects.

That Kenya Government guideline standards were much lower than those of Eveready."

The learned Judge considered the evidence and the submissions and framed the issues for determination as follows:-

"(1) Was there failure of duty or breach of statutory duty on the part of the defendant?

(2) Did the defendant take practicable measures to protect the plaintiff against inhalation of dust fumes and depolarizing chemicals?

(3) Is the defendant liable to the plaintiff and if so to what extent?"

The learned Judge then stated that all the issues would be dealt with under the breach of duty. We may add here that the learned Judge's approach was proper since the respondent's claim was, indeed, anchored on breach of statutory duty of the appellant company.

In the course of her judgment the learned Judge stated :-

"The test to apply to determine whether or not the Statutory Duty was breached is subjective. It is that once an employer knew or ought to have known that his workmen were exposed to a material risk that would be injurious to the health, safety or welfare of its worker and that that risk could be diminished, if not, eliminated, it was the employer's duty to take reasonable steps to ensure due care for the safety of its employees. The steps to be taken include not only making available protective clothing and appliances but ensuring that the employee used them at all times. Further provide exhaust appliances

where practicable and maintain them. A further duty was to train the employees on the dangers or risks they were exposed to in order to sensitize them to be persuaded to use clothing or appliances provided and to ensure their safety."

Bearing the foregoing in her mind the learned Judge proceeded to consider the evidence of various witnesses. She found that the respondent's medical condition was due to exposure to fumes and dust at the place of work. The learned Judge went on to conclude that the appellant company knew or ought to have known that it had exposed the respondent to risk.

Having so found the learned Judge then considered whether the appellant had taken practicable measures to protect the respondent against inhalation of dust, fumes and chemicals. She found that the appellant company had not taken such measures.

The issue of availability of masks was important in this case. While it was the appellant's stand that these were readily available and accessible, it was the respondent's stand that these were not readily available and that even if they were available they were not adequate. On this issue the learned Judge expressed herself thus:-

Concerning the availability of masks, even though it is not an issue in the pleadings, the evidence before the court was so clear that masks were not freely available. An employee had to requisition for one to his Supervisor in writing who in turn requisitioned to the stores. In the event that the Supervisor failed to approve the requisition no masks could be issued. On the issue of practicable measures taken to protect the plaintiff, Kinyua in this case I do find that masks were not made freely available to him. indeed apart form the provision of materials on safety measures and dangers workers were exposed to around defendant's working place, nothing was done to freely avail masks leave alone to persuade employees to wear them. To the contrary, it does appear to me that the duty to protect was reversed with the employee persuading the employer through a requisition to issue him with a mask. No steps were taken to persuade or encourage Kinyua and other employees to wear masks."

Having so found the learned Judge had no difficulty in finding in favour of the respondent that the appellant was in breach of its statutory duty. The learned Judge then proceeded to assess the quantum of damages.

From what we have said so far it is clear that the respondent's claim was based on breach of statutory duty. The relevant law is Factories Act (Cap. 514 Laws of Kenya). The preamble to this Act states:-

"An Act of Parliament to make provision for the health, safety and welfare of persons employed in factories and other places, and for matters incidental thereto and connected therewith."

The learned counsel for the appellant Mr. Musangi filed a Memorandum of Appeal containing 13 grounds of appeal.

The hearing of this appeal commenced before us on 28th February, 2007 when Mr. Musangi addressed us at length but could not complete his submissions. The appeal was adjourned for further submissions in Nairobi on 26th June, 2007 when Mr. Musangi continued with his submissions which he completed on the following day (27th June, 2007). Mr. Mindo, teaming up with Mr. Ndolo for the respondent, made brief but clear reply to Mr. Musangi's submissions.

We have given this appeal very careful consideration and it is our view that the issue of liability is most crucial. We shall approach the matter from the relevant legislation which is the Factories Act (Cap. 514 Laws of Kenya). Part VII of this Act provides for "*Health, Safety and Welfare – Special Provisions and Rules*." Section 51 (1) of this Act provides:-

"In every factory in which, in connexion with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken

to protect the persons employed against inhalation of the dust of fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

And *section 53* of the same Act provides:-

"Where in any factory workers are employed in any process involving exposure to wet or to any injurious or offensive substance, suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings, shall be provided and maintained for the use of such workers."

We have considered the evidence before the learned Judge and the submissions by counsel appearing. Can it be said that the appellant was in breach of statutory duty in this case?

In the English case of CROOKALL VS. VICKERS – ARMSTRONG LTD [1955] 2 ALL. E.R, 12 issues similar to what we are dealing with were considered and it was held practicable measures to protect persons employed against inhalation of the dust included the provision of masks and taking of steps to induce the workmen to wear them.

In the present appeal we are dealing with the issue of statutory duty. Was the appellant in breach? Evidence was adduced to show that various steps were taken to train employees on safety measures. There was scientific evidence of the external consultant James Lawrence (DW6) who went into details to show to what length the appellant went in ensuring safety of workers. The respondent alleged breach of statutory duty and it was upon him to prove negligence on the part of the employer.

As we have already stated earlier in this judgment, it is our duty to subject the entire evidence to re-examination and re-evaluation. We have already said that, in essence, the respondent's claim was based on negligence and breach of statutory duty by the appellant. The respondent claimed to have been exposed to chemical fumes and dust at his place of work which resulted in injury specified in the amended plaint. It was the respondent's evidence that he had not been provided with appropriate masks and adequate ventilation. It was the respondent's case that the appellant exposed him to unsafe working conditions. In its defence, the appellant pleaded that it had provided a safe system of working conditions for all its employees including the respondent and that it provided training on safety. We have considered what evidence was tendered by either side together with submissions by counsel for both sides. The appellant tendered evidence as regards the working environment vide Exhibits 10-13. Those documents showed that the appellant was engaged in assessment of environment by selecting employees at random and carrying out tests in working conditions. From the evidence of experts it would appear plainly that the respondent and other employees were working clearly in a safe environment. The evidence of two witnesses called by the appellant was crucial in deciding whether the appellant was in breach of statutory duty as defined by the Factories Act. The two witnesses were Mumala (DW5) and Lawrence (DW6). It is to be observed that the respondent in his evidence merely stated that the masks provided to him were inadequate. He did not deny being supplied with masks. The appellant through exhibits produced in the trial court demonstrated that masks were actually provided . These masks were manufactured in U.S.A. The learned Judge found that these masks were not readily available. Unfortunately, that finding was not based on available evidence.

On our own assessment of available evidence we are satisfied that the respondent and other employees were provided with the necessary masks and that the appellant took the necessary measures to ensure that its workers operated under safe and healthy environment . We are therefore unable to agree with the learned Judge on her finding that the appellant was in any breach of its statutory duty under the Factories Act. With that conclusion we find it unnecessary to go into the issue of quantum of damages as the same does not arise now.

In view of the foregoing and the reasons given thereof we are satisfied that the respondent failed to prove his case on the balance of probability in the superior court and hence we have no alternative but to

allow this appeal. Consequently, the judgment and the decree of the superior court together with all consequential orders are hereby set aside in their entirety. The appellant will have the costs of this appeal and of the suit in the superior court. Those shall be our orders.

Dated and delivered at Nakuru this 27th day of September, 2007.

P. K. TUNOI

…….
JUDGE OF APPEAL

E. O. O'KUBASU

……

JUDGE OF APPEAL

E. M. GITHINJI

……..
JUDGE OF APPEAL