REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

(CORAM: OJWANG, J.)

CIVIL SUIT NO. 517 OF 1997

RUTH NTHENYA KILONZO……..…….PLAINTIFF

-VERSUS-

STANDARD CHARTERED BANK KENYA LTD…...…...RESPONDENT

JUDGEMENT

I. POOR WORKING-POSTURE, LONG WORK-HOURS CAUSED ME OSTEOARTHRITIS: PLAINTIFF'S CLAIM

The plaintiff herein was afflicted with illnesses while she served in the defendant's employ, and this occasioned the cessation of her service. Her ailments persisted thereafter and, as she attributed causation to the conditions in which she had been working, she brought this suit, seeking compensation under various heads of claim.

The plaintiff asserted in her plaint dated 4th February, 1997 and filed on 4th March, 1997 that, she was at all times material to this suit, an employee of the defendant, until the defendant terminated her employment, on medical grounds, on 1st October, 1995.

The plaintiff stated that while she worked for the defendant, she had been exposed to much stress which caused her severe injuries which were the proximate cause of her retirement, as a consequence of which she suffered loss and damage. The particulars of injuries were stated as: neck-bone erosions; cervical spondylitis; depressive illness; and numbness in the right upper arm. Particulars of loss were stated as: inability to secure any, or alternative employment; and loss of normal and enjoyable life. Such injuries, losses and damages, the plaintiff asserted, arose from negligence and/or breach of contract on the part of the defendant.

It was stated that the defendant had exposed the plaintiff to a risk of damage or injury, about which the defendant was, or ought to have been aware. The plaintiff asserted that the defendant had failed to take adequate precaution for her safety as she provided service to the defendant; that the defendant had subjected her to "long and excessive hours of work without any, or adequate breaks"; and that the defendant had subjected her to arduous and excessive work-loads without regard to her health, and without allowing her to take annual leave.

The plaintiff was seeking general damages; special damages; costs of the suit with interest thereon; and,

any other or further relief such as this Court may deem it just and proper to grant.

II. AILMENT UNRELATED TO WORKING CONDITIONS, AND THERE'S NO LIABILITY FOR LOSS OR DAMAGE: DEFENDANT'S RESPONSE

While admitting that the plaintiff had at all material times been its employee, the defendant denies the particulars stated regarding the plaintiff's cessation of employment; the defendant pleads that "the plaintiff retired on October 1st, 1995." The defendant denies that the plaintiff while in its employ, "was unduly exposed to considerable amounts of stress leading to her sustaining severe injuries culminating in her retirement from employment."

The defendant denies that it is the conditions of work to which the plaintiff had been subjected, that caused her neck-bone erosions, cervical spondylitis, depressive illness, and numbness in the right upper arm. The defendant denied the claim that it was owing to any failings on its part as employer, that the plaintiff did suffer loss or damage.

III. LITIGIOUS ISSUES

On 23rd May, 1997 the parties, by their respective advocates, filed the agreed issues for resolution through this process of litigation. I will set out these issues herein:

(a) Did the defendant terminate the plaintiff's employment, or did the plaintiff retire?

(b) Was the plaintiff unduly exposed to stress while she was employed by the defendant?

(c) Did the plaintiff suffer any injuries, loss or damage?

(d) If so, were the said injuries, loss or damage occasioned by negligence on the part of the defendant?

(e) Is the plaintiff entitled to damages?

(f) Who is to pay costs in this suit?

IV. ILLNESS WAS OCCASIONED BY WORKING POSTURE AND LACK OF REST: EVIDENCE IN SUPPORT OF PLAINTIFF'S CLAIM

Hearing of this case began before ***Hayanga, J*** on 15th April, 2002 when the plaintiff, then 52 years old, and married with six children, gave her testimony. She testified that she had worked for the defendant herein for 20 years and 8 months. She first worked in the ledgers department, where she spent some four years, before moving to the waste department. Thereafter the plaintiff worked for some eight months as a teller, before returning to the Waste department, following which she was promoted to the grade of cheque clerk. After serving in several other departments, the plaintiff was promoted to the position of section head in the correspondence department, and later she was transferred to the foreign exchange department.

The plaintiff testified that, as from 1975 when she was employed by the defendant, to 1993 she had worked long hours, sometimes even for 30 hours continuously, even though official working hours ran from 8.15 a.m. to 5.00 p.m. everyday. She complained that such long hours of work, in conditions of manual operations and mostly in a sitting posture, had undermined her health. She said she was given no leave from work in 1994 or 1995; and by 1995 she was now experiencing certain health problems. In August, 1995 it became necessary for the plaintiff to go for medical attention at the Guru Nanak Hospital, and physiotherapy was recommended. It was PW1's testimony that the doctor who attended her at the hospital, ***Dr. Wairagu***, had made certain remarks about her ailment; in her words: "He told me that I had an injury due to type of work in the office, including sitting in the same place, [and] bending for long and proceeding without going on leave….He said it was incurable… He wrote to my employer…" The doctor

asked in his letter that the plaintiff be retired on medical grounds. From this moment, runs the plaintiff's testimony: "I never went back to work"; and that would be from 20th August, 1995 when he saw ***Dr. Wairagu*** at the hospital. On actions taken by the plaintiff from the time he last saw ***Dr. Wairagu*** (20th August, 1995), the plaintiff thus testified:

> "I did not get [my October 1995] salary. I did not go back to work. [But] I was still employed by the Bank [defendant]…I did not write a letter to my [employer] saying I wished to retire, neither did I talk to [them] saying I [had] retired. No one had sought to know if I had retired or wished to retire. I have never written to [my employer] and never discussed verbally [with them, the question of retirement]. [I] had not agreed to retire, but I [expected] the employer to call me so that we would discuss [the issue of the injuries I had sustained]."

As the plaintiff kept away from, and was not in communication with the defendant, she had no knowledge of the basis upon which the employer computed terminal benefits for her. On this point she avers:

> "I was not consulted over this. I had not retired. It was not compensation for my injuries."

On *8th January, 1996* the plaintiff went to the employer's pension fund offices, where she found that a cheque for Kshs.402,649/= had been received on her account, save that deductions would be made in respect of loans which she had taken. Such deductions were then made and on the following day, 9th January, 1996 the plaintiff's account was credited with Kshs.149,323/40.

From that moment, the plaintiff testified, the defendant did no more business with her. She said she was retired, but without being paid certain monies: (i) local leave allowance for 1994 and 1995 – amounting to some Kshs.20,000/=; (ii) a unionisable employees' Industrial Court award, being a 20% - 25% salary increment dating back to 1st March, 1995.

On 20th February, 1996 the plaintiff referred her grievance to M/s. Murgor & Murgor Advocates, and the advocates wrote a letter of demand to the defendant. In the meantime, the plaintiff still considered herself an employee of the defendant; in her words:

> "According to me I had not retired. I was still working. I banked [a] cheque [received from the defendant]."

As the plaintiff's health was not improving, she was seen again by ***Dr. Wairagu*** and also by an orthopaedic surgeon, ***Prof. Mbindyo***. There was apparently no agreement between the advocates for the parties herein, as regards the reports of the two doctors; and so the plaintiff was asked to see the defendant's doctor, ***Dr. Hagembe***, for a second opinion.

On cross-examination by learned counsel ***Mr. Chacha Odera***, the plaintiff testified that when she had been employed by the defendant on 17th January, 1975 her employment had been regulated by certain terms and conditions, and even the hours and days of work had been agreed upon. She said the nature of the work had changed from time to time. She averred that the work she did for the bank, could not have been done except in a sitting position. She was a member of the union, and all unionisable employees were entitled to payment for any overtime work done, and the payslip accompanying monthly pay would show the number of hours during which an employee had worked. The plaintiff testified that the defendant sometimes did not pay for overtime work, and she among other employees would take up the matter with the Union.

On re-examination, the plaintiff testified that she started doing overtime work right from the time she was employed by the defendant, in 1975; and there were times she would go beyond the normal working time of 8.00 a.m. – 4.30 pm, up to midnight. During the first two years the plaintiff did her work manually, but afterwards she worked as a machine operator.

The plaintiff testified that through her doctor's letter of 22nd August, 1995 to the defendant, which made

reference to her neck injury, the defendant was duly informed of her health status. She said the defendant had retired her from employment on 1st October, 1995 when she was still sick, and without paying for her treatment.

The plaintiff was later recalled as a witness, and gave evidence before me (26th July, 2005) as I heard this case from where ***Hayanga, J.*** had stopped, in November, 2003. She said she still experiences neck pain, which she attributed to prolonged work while sitting in one posture, while she was in the employ of the defendant. She said she experiences pain in the back, in the right hand and shoulders, and suffers severe headaches. She said she uses a cervical collar, and has to undergo physiotherapy from time to time. She further described her health status as follows: "My body movements [are restricted]. One hand only moves up to a certain angle, then I begin to feel pain. I can only read in certain positions. I have never worked since I left Standard Chartered. There is no work that I can do to support myself or my family. I can turn my neck a little on one side, but not the other side."

PW2, ***Dr. Simon Githae Wairagu*** testified that he is a medical doctor, consultant physician and kidney specialist, and had first seen the plaintiff herein on 17th August, 1995. He had taken the history, and examined the plaintiff. The plaintiff informed PW2 that for two years she had had pain in the neck and in the upper limb. When the witness examined PW1 he formed the impression that she had a stiffness of the neck, on the nape; and for this, PW2 gave a muscle relaxant, and also recommended physiotherapy, as well as the use of a neck collar. In PW2's assessment, PW1 was suffering from *osteoarthritis*, which is thus defined in the ***Concise Oxford English Dictionary***, 11th ed. (revised) (p.1012):

> ***"[Medicine*] degeneration of joint cartilage and the underlying bone, most common from middle age onward, causing pain and stiffness."**

The witness associated such a health condition with s*pondylitis* and *spondylosis*. "*Spondylitis*" is thus defined in the ***Concise Oxford English Dictionary*** (op. cit., at p.1394):

> **"[*Medicine*] inflammation of the joints of the backbone."**

And "s*pondylosis*" is thus (i*bid*.) defined:

> **"[*Medicine]* a painful condition of the spine resulting from the degeneration of the intervertebral discs."**

Such a health condition, PW2 testified, is associated with *osteoporosis*, defined *(ibid*.) as: "*a medical condition in which the bones become brittle from loss of tissue, typically due to hormonal changes, or deficiency of calcium or vitamin D*." It results, according to PW2, in pressure on the nerves, and, in the case of the plaintiff herein, there was such pressure on the nerves leading up to the right hand; and the resulting friction between the vertebral bones and the muscle had led to pressure on the neck. PW2 had made such conclusions on the basis of indications read from x-ray films.

PW2 attempted to propose causes of such a health condition afflicting the plaintiff. He said such a condition could come about due to the working posture taken by a person; it could come about due to trauma; it could result from a reduction in certain blood-elements, such as calcium; it could come about due to the biological process of ageing; it could also result from infection of the bones.

Those parameters were in PW2's mind, when he obtained from the plaintiff the historical account that she had not previously had any neck injuries, and that she had no history of infection. He conducted blood tests on the plaintiff, and found her blood showing reduced levels of *calcium*. It was PW2's testimony that the plaintiff was aged about 45 years, when he examined her in 1995. He made the recommendation that the plaintiff should see an orthopaedic surgeon, and he prescribed certain courses of management/treatment: physiotherapy; seating with support for the back; muscle relaxant; analgesics.

It was PW2's testimony that spondylosis was not a curable condition, and, as he had received information

that the plaintiff's continuing absence from her work-place was raising difficulty with the employer [defendant], he wrote to the defendant giving a medical explanation for the plaintiff's absence; and he suggested that the plaintiff be retired on medical grounds.

On cross-examination by learned counsel ***Mr. Chacha Odera,*** PW2 said he was not sure if some people happen to be more predisposed to spondylosis than others; but he acknowledged he was not an expert on this subject. PW2 had been told that the plaintiff had had difficulty taking her leave days, when she had been working for the defendant; and he had written a letter to the plaintiff's advocates, about the time when the suit had been lodged.

PW2, ***Professor Benjamin Stephen Mbindyo***, an orthopaedic surgeon, testified that he had examined the plaintiff on 1st November, 1996. According to the history he took from the plaintiff, she had been working with machines, for the defendant, as from January, 1975; and in 1995 she had felt neck pains radiating towards her head and her right arm. She had felt numbness in the arm and head, and had taken treatment at the Guru Nanak Hospital, following which she took an 8-week sick leave in August 1995; and on 1st October, 1995 she had been retired on medical grounds.

Although the plaintiff had been undergoing treatment for neck pains, PW3 did not find her to have any injury to the neck; he found no joint disease, and nothing that would cause pain to the neck. But he found weakness in the plaintiff's right arm; tenderness, stiffness and pain in her neck. X-ray revealed that there was wear and tear in the 5th and 6th cervical spines. In his opinion the plaintiff was experiencing severe *spondylitis t*o the neck and arm, resulting in pain, weakness and numbness. It was his opinion, too, that the plaintiff had experienced stress on the cervical spine, on account of working on a machine on poor posture; and that this had led to 100% bodily disability. This opinion was stated in a formal report to the plaintiff's advocates.

PW3 testified that the plaintiff "was in a lot of pain" when he saw her; it was a case of "severe cervical osteoarthritis." Such a condition has a plurality of possible causes: injury; after-effects of disease; congenital abnormalities; poor posture; etc. PW3 testified that any strenuous work conducted in a bending position will lead to stress to joints, ligaments, vertebral discs and muscles, and could lead to osteoarthritis. He testified too that, poor posture can precipitate a degeneration of the vertebral disc and, if the disc protrudes, it can occasion much pain, and the emergence of such pain can be sudden or gradual.

So, what exactly caused the plaintiff's ailment? This was PW3's answer: "In her case, I thought only poor posture could have occasioned degeneration"; and in his opinion such a condition was "not curable" and could "only be minimised", *inter alia*, by way of surgery "to relieve the pressure on the nerves". PW3 went on to aver, on cross-examination: "There are many other causes of the condition; but poor posture appeared to me to be the main contribution. It is known that the kind of work she was doing could cause the condition. It is not for sure, of course, that there were no other factors. She said she had been using a secretarial seat." In PW3's opinion, which he stated on re-examination, the plaintiff's condition was to be blamed on "prolonged work, poor posture."

V. WORKING CONDITIONS WERE ENTIRELY NORMAL; AILMENT REMAINED UNCOMMUNICATED FOR LONG; PLAINTIFF HERSELF SOUGHT RETIREMENT: DEFENCE TESTIMONY

DW1, ***Patrick Maina Gikonyo*** gave his testimony before me on 11th July, 2006. He is the defendant's Human Resources & Relationships Manager and has been at his post over the last 20 years. He deals with day-to-day human resource matters, and relies on records kept by the defendant. He could say from the records that the plaintiff had been in the unionised (non-management) category of the defendant's employees, and had been in employment until October, 1995. During the 1994-1995 period, the defendant had had a Collective Bargaining Agreement with KUCFAW (Kenya Union of Commercial, Food and Allied Workers), which defined the entitlements of the unionisable staff of the defendant, such as the plaintiff. The negotiations leading to the agreement were conducted by KUCFAW for the workers, and Kenya Bankers Association (to which the defendant herein belonged) for the Bank-members of K.B.A. Under the agreement workers were under obligation to give 41 hours of work per week; and any work

outside those defined hours was "overtime", in respect of which additional payment was to be made by the employer. How were the records of such working-time kept? In the words of DW1:

> "If an employee works overtime, this is reflected on the payslip. Daily attendance slips [were required] to be signed by each member of staff. This helps with computation of dues. [where] overtime [payment] is not included, …the remedy was that the employee would raise the matter with the Manager, or …the Human Resources [Department] would follow up and address the question."

DW1's testimony was that the terms of the plaintiff's employment had been accorded fulfilment in the normal manner. The plaintiff "never complained about overtime"; DW1 saw no record of any complaints emanating from her. The words of the witness may be quoted:

> ***"Mrs. Kilonzo*** said she once worked for 31 hours continuously – but if so, no record shows it. If she says she was denied leave, such does not exist in our records."

As regards unsuitability of furniture used by the plaintiff as she discharged her duties, again, the witness said no record of any complaint on her part existed.

DW1 said:

> "We take workplace safety very seriously. We received no complaint from ***Mrs. Kilonzo***. We provided [her] with the normal seats which bank tellers and cashiers use. These are very standard."

On the question of compensation for leave-days not taken by an employee, DW1 testified that there were recognised procedures which applied to all employees, including the plaintiff herein:

> "When an employee leaves, we compute and encash for any leave days not taken. She had not taken 21 days; we did a computation, and encashed for her at the time of her departure."

DW1 testified that the retirement of the plaintiff had been recommended by her own doctor (PW2); and the defendant did not take action on that recommendation before obtaining a second opinion from another doctor, ***Dr. Aluoch,*** who after discussing the matter with the plaintiff, also recommended (MFI3) retirement on medical grounds. The letter of retirement had indicated to the plaintiff that upon retirement she would be entitled immediately to a payment of Kshs.402,649/=; there would be a further payment later. In the plaintiff's advocates' letter of 13th March, 1996 they had been concerned not about injuries to the plaintiff while she worked for the defendant, but with payments that were due to the plaintiff; it was only much later, DW1 testified, that it became known that the plaintiff was demanding damages for injuries to her while she worked for the defendant.

On cross-examination DW1 testified that he had been stationed at the defendant's head office, whereas the plaintiff had worked at a branch outfit, and so he never came to know her personally. He was relying on records, which showed that the plaintiff had worked for the defendant mostly as a teller, though she also did other duties such as being a machine operator, and a cheque clerk. The witness was not certain as regards the averment by the plaintiff that she did not take leave during 1994 and 1995 – because leave arrangements are decentralised and managed at branch level; but he was sure that all leave days not taken were paid for, under the collective bargaining agreement between KUCFAW and the Kenya Bankers Association (KBA). DW1 testified that the plaintiff's leave entitlements upto September, 1995 had been as follows: (i) local leave allowance for 1994 amounted to Kshs.2,395/=; (ii) local leave allowance for 1995 amounted to Kshs.1776/40; (iii) leave days for 1995 (28 days) amounted to Kshs.19,949/45; (iv) taxation element amounted to Kshs.3711/=; (v) hence total paid to the plaintiff for the period in question, was Kshs.20,389/=. Although the collective bargaining agreement had provided for payment of local leave allowance, this had not been paid to the plaintiff in respect of 1994; and so the defendant had now made up for that shortfall in payments due to the plaintiff.

DW1 testified that the retirement of the plaintiff in 1995 was at the instance of the plaintiff herself: "It

began from her, when she saw a doctor at Guru Nanak Hospital [PW2] who recommended retirement on medical grounds." Apart from her doctor's letter to the defendant, no written personal request was received; though, in the testimony of DW1, there was an internal memorandum to the effect that the plaintiff had approached the bank's welfare manager with her doctor's letter, requesting retirement. The defendant's doctor who gave a second opinion, had reported that "retirement on medical grounds was the plaintiff's own choice", and so the defendant granted "her own choice."

DW1 testified that it was his understanding that the plaintiff had been taken ill while she was an employee of the defendant. The defendant had a procedure for handling such cases of illness: granting sick leave, with full pay for the first eight weeks, and thereafter half pay, following which the employer reviews the situation, and takes an appropriate decision. The witness said he did not know when exactly the plaintiff had fallen ill. By the collective bargaining agreement, she could have remained on sick leave for as long as 16 weeks; but there was no record of when she fell ill, though her claim is that she fell ill on 9th August, 1995. She was retired on medical grounds on 1st October, 1995 – and that would be less than two months since she allegedly fell ill. The first time the defendant learned of the plaintiff's illness is when ***Dr. Wairagu*** (PW2) wrote the letter of 22nd August, 1995 recommending retirement on medical grounds.

DW1 said he did not understand the plaintiff's complaint, regarding not having taken leave; in his words:

> "We treat every case according to its own merits. If [the plaintiff] says her not going on leave led to complications, I would say I am not sure she had not gone on leave. For 1995 she did not go on leave. We have had no dispute as to terminal dues for 1994; I have no record of a dispute…For 1994 I cannot say the possibility exists that ***Mrs. Kilonzo*** was compensated. I saw the claims regarding illness later [one year after she left the defendant's employ], not at the time she left the bank."

VI. DEFENDANT FAILED TO PROVIDE A SAFE WORKING SYSTEM FOR ITS EMPLOYEES INCLUDING PLAINTIFF, IT WAS NEGLIGENT, PLAINTIFF WAS INJURED: SUBMISSIONS FOR PLAINTIFF

Learned counsel ***Mrs. Murgor***, for the plaintiff, stated the claim thus: "by reason of the defendant's wilful neglect in failing to provide safe and stress-free working conditions, [the plaintiff] developed a condition known as *cervical spondylosis*, after which the defendant callously retired her on medical grounds." Learned counsel further contended that the plaintiff, while in the defendant's employ, "was exposed to a [considerable] amount of physical and mental stress leading to her sustaining the severe injuries that culminated in her premature retirement on medical grounds, as a result of which she suffered loss and damage"; the same, ***Mrs. Murgor*** contended, had the result that "the plaintiff suffered 100% permanent disability making it impossible for [her] to secure any or alternative employment", and had led to the destiny that she "suffered loss of normal and enjoyable life."

Such alleged loss and damage, counsel urged, was "caused directly by the defendant's negligence and/or breach on the part of the defendant, as [the plaintiff] was exposed to a risk of damage or injury which, had the defendant exercised due diligence, it could have foreseen." It was urged that the defendant had "failed to take any, or adequate precautions for the safety of the plaintiff while she was engaged in its employment…"

Learned counsel clearly set store by the representations of ***Dr. Wairagu*** (PW2), the doctor who first raised the idea that the plaintiff's ailment was occasioned by posture assumed during Bank work, and who wrote a letter to the defendant on *22nd August, 1995* proposing that the plaintiff be retired on medical grounds. In counsel's words:

> "According to ***Dr. Wairagu***, the [condition of *osteoporosis*, *spondylosis* or cervical s*pondylosis*] was caused by the posture of a person particularly [at work-time], where [the person is] constantly working in a hunched position. ***Dr. Wairagu*** testified that, the condition could also arise where a person had suffered from injuries to the neck. He stated that from the x-rays that he had taken, and

from inquires made [into] the plaintiff's history, there was no evidence of physical injuries to the neck suffered by the plaintiff. Based on these findings, ***Dr. Wairagu*** was able to establish that the condition could be attributed to the conditions of work at her work place."

Mrs. Murgor also relied on the testimony of PW3, ***Professor Mbindyo***, an orthopaedic surgeon. Of PW3's testimony, learned counsel urged:

> "In the opinion of ***Professor Mbindyo,*** the plaintiff suffered from severe spondylosis of the neck, compression of nerves to the arms [- which] led to pains, weakness and numbness. He concluded that the plaintiff would be forced to wear a neck cervical collar at all times. The weakness of the arm had stopped her from working and participating in sport. He found that the condition resulted from stress [to] the cervical spine… He also found [that there was a] 100% … permanent bodily disability."

Learned counsel attributed weakness to the defendant's case on the ground that, whereas a second opinion on the plaintiff's ailment had been obtained from both ***Dr. Aluoch*** and ***Mr. Hagembe***, at the instance of the defendant, neither of these doctors had appeared in Court to give evidence. Counsel urged that the reports made by the said two doctors were, in the circumstances, incomplete and carried little weight.

Learned counsel contested the value of the testimony of the defendant's only witness, ***Patrick Maina Gikonyo***: "He frankly admitted that he was not personally aware of the predicament of the plaintiff, but had read her file at head office. His evidence, [therefore], was of little value as far as rebutting the plaintiff's case was concerned." DW1's evidence, counsel urged, "did not… shed any light on the actual safety (or lack of it) of the employees, or the prevailing working conditions in the defendant's Bank branches [at] the material time, or indeed the manner in which the work was carried out." On that basis counsel submitted that, "in effect, the plaintiff's evidence regarding the unsafe and oppressive work conditions [the plaintiff] was subjected to remained unchallenged. ***Mr. Gikonyo's*** evidence is confined to what the working conditions should have been, and not what actually happened in practice." Of the collective bargaining agreement which would have afforded the plaintiff certain protections, learned counsel urged:

> "…it is clear that the defendant's policies and the terms and conditions of employment under the KUCFAW /[KBA] agreement were flagrantly and deliberately [flouted], and were certainly not adhered to in the [branch institutions] and in particular, in the plaintiff's case."

Mrs. Murgor noted that it was common cause that the plaintiff had been paid Kshs.20,389/85 in respect of local leave allowance for 1994 and 1995, and urged that DW1's failure to produce any evidence showing that the plaintiff had actually taken leave during the two periods of time, showed that the defendant had failed to rebut the plaintiff's evidence in that regard: "The fact that the plaintiff was paid in the manner that she was, establishes that her leave had fallen due, and that she had not been allowed to proceed on leave due to the demands continually made on her by the defendant."

It was learned counsel's contention that the very testimony of the defence witness bespoke negligence having marked the working conditions the defendant had provided to the plaintiff: normal seats for bank tellers and cashiers; furniture of a "very standard" nature. DW1's evidence, counsel contended, "only demonstrated …the glaring inadequacies of the defendant's system of work, where there was complete lack of concern for the plaintiff"; it "clearly showed [the] definite lack of co-ordination between the defendant's branches and the defendant's head office management who were ultimately responsible for the safety and welfare of all staff including the plaintiff."

Learned counsel stated the core question in this case as: "what or who is liable for the debilitating condition that led to the plaintiff's retirement on medical grounds." She urged, on the basis of her appraisal of the evidence, that "the defendant failed to provide a safe working system for its employees including the plaintiff."

Mrs. Murgor submitted that the lack of care for employees including the plaintiff, being attributed to the

defendant herein, was contrary to recognised law. In this regard, counsel cited the English House of Lords decision, ***Wilson and Clyde Coal Co. Ltd. v. English*** [1938] A.C. 57, in which it was held that all employers have a duty to take reasonable care to ensure the safety of their employees, and, in particular, in the provision of a safe place of work, safe tools and equipment, and a safe system of work.

Learned counsel also relied on an English Court of Appeal decision, ***Hatton v. Sutherland – Barber v. Somerset County Council – Jones v. Sandwell Metropolitan Borough Council – Bishop v. Baker Refractories Ltd*** [consolidated] [2002] 2 All E.R. 1. In each of those conjoined appeals, the defendant-employer appealed against a finding of liability for an employee's psychiatric illness caused by stress at work. Two of the claimants were teachers in public-sector schools; the third was an administrative assistant at a local-authority training centre; and the fourth was a raw-materials operative in a factory. In the first two appeals the plaintiffs had not told their employers that their health was suffering due to overwork. In the third appeal, the claimant had twice appealed to her employer, that her health was placed at risk by the conditions of work; the employer, though acknowledging that the claimant deserved some help, took no action in that regard. In the fourth appeal, the claimant had been unable to cope with a certain re-organisation of work arrangements; although his doctor had, in the premises, advised him to change jobs he did not communicate this to his employer.

In the four appeals, the Court of Appeal addressed its mind to the principles that governed the relevant claims: were such claims subject to a special category of legal principle, or were the ordinary principles of employer-liability applicable? Was the harm complained of, in each case, reasonably foreseeable? Were there categories of occupations which should be regarded as inherently stressful, so that resulting physical or psychological harm was always to be regarded as foreseeable? In what circumstances ought the employer to be held to have been in breach of his duty? What was the cause of the injuries complained of, by the respective claimants? If causation, in that regard, was not singular, then how should damages be apportioned?

The decision of the Court in the four appeals is summarised in the head-note to the law report (p.2) as follows:

> **"Factors likely to be relevant in answering the threshold question included the nature and extent of the work done by the employee, and signs from the employee of impending harm to health. The employer was generally entitled to take what he was told by his employee at face value, unless he had good reason to think to the contrary. He did not generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisors. To trigger a duty to take steps, the indications of impending harm to health arising from stress at work had to be plain enough for any reasonable employer to realise that he should do something about it. The employer would be in breach of duty if he had failed to take the steps which were reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which might occur, the costs and practicability of preventing it and the justifications for running the risk. The size and scope of the employer's operation, its resources, and the demands it faced were relevant in deciding what was reasonable: those included the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties. An employer could only reasonable be expected to take steps which were likely to do some good, and the Court was likely to need expert evidence on that. An employer who offered a confidential advice service, with referral to appropriate counselling or treatment services, was unlikely to be found in breach of duty. If the only reasonable and effective step would have been to dismiss or demote the employee, the employer would not be in breach of duty in allowing a willing employee to continue in the job. In all [the four] cases, therefore, it was necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care. The claimant had to show that the breach of duty had caused or materially contributed to the harm suffered. It was not enough to show that occupational stress had caused the harm. Where the harm suffered had more than one cause, the employer should only pay for that proportion of the harm suffered which was attributable to his wrongdoing, unless the harm was truly indivisible. It was for the defendant to raise the question of *apportionment.* The**

> **assessment of damages would take account of any pre-existing disorder or vulnerability and of the chance that *the claimant would have succumbed to a stress-related disorder in any event***. [Emphases supplied]."

From the foregoing decision which, I think, will come to constitute a reference-point, in litigation involving employer-employee liability in respect of working conditions, learned counsel ***Mrs. Murgor*** sought to extract certain principles: that the factors to be taken into account by the Court included, (i) whether the harm sustained by the claimant was foreseeable; (ii) whether any occupations were to be regarded as so inherently stressful that resulting physical or psychological harm was always foreseeable; (iii) existence of circumstances in which the employer could be said to be in breach of duty; (iv) causation of the harm in question; (v) apportionment of damages, where the harm was attributable to several causes.

Learned counsel stated the basic principle of liability where it is claimed that illness linked to stress has originated from work-place situations, and this is taken from the English House of Lords decision in ***White & Others v. Chief Constable of South Yorkshire Police & Others*** [1999] 2 A.C. 455. The principle in that case is that employer- liability for physical injury is to be placed in the same class as liability for psychiatric or related liability – and both are governed by the tort law of *negligence*. The relevant passage in the ***White*** case is, in the words of ***Lord Griffiths*** (p.463):

> "***If some very minor physical injury is suffered and this triggers a far more serious psychiatric disorder no one questions that damages are recoverable for the psychiatric disorder. If the victim of the negligence escapes minor physical injury but the shock of fear of the peril in which he is placed by the defendant's negligent conduct causes psychiatric injury I can see no sensible reason why he should not recover for that psychiatric damage."***

On the basis of the foregoing principles, ***Mrs. Murgor*** urged that in the instant matter, "the plaintiff suffered physical injury or illness arising from the excessive physical strain and stress of undertaking her duties in the defendant's Bank. Therefore, the rules that should be applied in the case at hand would be the ordinary rules of tort – a duty of care on the part of the employer to take care for the reasonable safety [of] their employees."

In applying the ordinary rules of tort, liability of an employer in respect of an employee's psychiatric injury is dependent on *foreseeability*, and, as stated in the English case, ***Walker v. Northumberland County Council*** [1995] 1 All E.R. 737 (***Colman, J*** at p.752), *"…the question is whether it ought to have been foreseen that **Mr. Walker** was exposed to a risk of mental illness materially higher than that which would ordinarily affect a social services middle manager in his position with a really heavy workload. For if the foreseeable risk were not materially greater than that, there would not, as a matter of reasonable conduct, be any basis upon which the council's duty to act arose."*

The same principle is succinctly stated in ***White and Others v. Chief Constable of South Yorkshire Police and Others*** [1999] A.C. 455 at pp. 470 – 471 (***Lord Goff of Chiveley***):

> "**At all events, the principle of foreseeability of psychiatric injury has long been held to be subject to two special qualifications. First, in assessing whether psychiatric injury is reasonably foreseeable, it is assumed that the plaintiff is a *person of reasonable fortitude*. Second, as a concomitant of the first, the question of foreseeability of psychiatric injury is addressed with hindsight**…[emphasis supplied]."

Mrs. Murgor recalled those entries in the record of evidence, which showed that the plaintiff in the instant case had complained to her head of department at the defendant Bank, that she was unwell, and needed to go on leave; and to her superiors she had complained of recurrent headaches, and pains in her right hand and neck, felt by her during work-time. Such complaints, learned counsel urged, should have been "sufficient indication to the defendant" that the stress to which the plaintiff was exposed ought to be relived; but "instead, the plaintiff was transferred to a desperately understaffed branch, and [directed] to continue working while suffering from declining health." Counsel urged that the defendant had been remiss in failing to reckon with clear and unequivocal signs of impending breakdown, and in abstaining

from stemming injury to the plaintiff.

It was learned counsel's contention that the defendant had been in breach of duty towards its employee, the plaintiff; and for the nature of this duty counsel relied on judicial authority which has endeavoured to define the applicable law in the matter of employer-employee relations.

Pertinent authority in this regard is ***Walker v. Northumberland County Council*** [1995] 1 All E.R. 737 in which the following passage (***per Colman, J*** at p.749) appears:

> ***"There has been little judicial authority on the extent to which an employer owes his employees a duty not to cause them psychiatric damage by the volume or character of the work which the employees are required to perform. It is a clear law that an employer has a duty to provide his employee with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable. Whereas the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the employee as distinct from injury to his mental health, there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employer's duty of care or from the co-extensive implied term in the contract of employment."***

The learned Judge in that case went on to enunciate the law relating to *duty of care* and *standard of care:*

> **"…once a duty of care has been established the standard of care required for the performance of that duty must be measured against the yardstick of reasonable conduct on the part of a person in the position of that person who owes the duty. The law does not impose upon him the duty of an insurer against all injury or damage caused by him, however unlikely or unexpected and whatever the practical difficulties of guarding against it. It calls for no more than a reasonable response, what is reasonable being measured by the nature of the neighbourhood relationship, the magnitude of the risk of injury which was reasonably foreseeable, the seriousness of the consequence for the person to whom the duty is owed of the risk eventuating, and the cost and practicability of preventing the risk."**

Learned counsel urged, in the instant case, that the plaintiff was suffering from stress due to heavy work-load, but her request to take leave and to rest and rejuvenate herself, had been refused by the defendant; had such leave been allowed, it was contended, "this would have enabled her to [keep] on working with the defendant, possibly until the retirement age of 55 years." Counsel urged that "it was the failure by the defendant to take necessary steps to enable the plaintiff [to] proceed on leave, that …led the plaintiff to sustain the present injuries." Counsel submitted that "when the defendant failed to allow [the plaintiff] to proceed on leave, [the defendant] breached its duty to take reasonable care [for] the safety of the plaintiff." She urged that there was further breach of duty when the defendant "being fully aware of the plaintiff's ailments, …failed to [reduce] her workload, or her work-hours, or find additional staff with whom [she could] share the workload."

Mrs. Murgor drew an analogy between the circumstances of the plaintiffs claim, and the duty held to rest on the owner of a motor vehicle which breaks down and causes injury to a claimant, in ***David Nandwa v. Kenya Kazi Ltd*** (1982 – 88) 1 K.A.R. 1178 – that of establishing that the defendant had taken all reasonable care to keep its motor vehicle in good and safe mechanical condition. It was urged that the defendant herein had given no evidence "to establish that it had taken all reasonable care to reduce the plaintiff's workload or work-hours…" Learned counsel held that the defendant had failed to provide a safe working system for the plaintiff, and so it must be held liable for the consequences of its omissions.

Mrs. Murgor submitted that it had been proved on a balance of probabilities, that the defendant did not "provide the plaintiff with safe tools and equipment to carry out her duties on its behalf and for its benefit, and neither did the defendant provide for a safe system of working for its clerical staff, …at least in the case of the plaintiff."

Counsel stated from the plaintiff's evidence, that she had been physically strained, and mentally stressed

due to overwork, whenever she was required to work for long hours extending into the night. The plaintiff had drawn her plight to the attention of the branch manager**,** ***Mr. Alui***, and her head of department, ***Mr. Njoroge***, but "nothing was done to either decrease her working hours, [or to provide] her with a suitable orthopaedic chair and desk, [or to] reduce her workload, [or to] allow her to proceed on leave."

Learned counsel submitted that the harm sustained by the plaintiff was foreseeable: "The fact that the defendant completely failed to take any steps to avert the risk of harm despite being advised by the plaintiff of her deteriorating health, establishes unequivocally that it was reasonably foreseeable that the plaintiff would suffer harm arising from the defendant's omissions." Counsel urged that the defendant was in breach of its duty of care when it "failed to take the obvious and reasonable steps in the circumstances to avoid the harm or injury which the plaintiff eventually and foreseeably sustained." Counsel urged that no undue cost would have been entailed by the defendant taking reasonable courses of action to remedy the harm that fell upon the plaintiff.

After considering two medical reports, one by ***Mr. Hagembe*** who did not come to testify, and the other by ***Professor Mbindyo*** who came as a witness for the plaintiff, ***Mrs. Murgor*** submitted that "the injuries/disease of the plaintiff [were] directly caused by the excessive physical and mental strain imposed on the plaintiff by the conditions of work for and on behalf of the defendant and [by] the defendant's deliberate and wilful failure to take any remedial steps even when notified." Counsel submitted that the defendant, as employer, owed the plaintiff a duty of care to provide a safe system of work and so was liable for the injuries the plaintiff sustained while working for the defendant. She urged that the defendant had not presented any credible evidence to rebut the plaintiff's case, and had given no proof that it had taken steps to avert the ill-health to which the plaintiff eventually succumbed.

In that context, learned counsel submitted that the plaintiff was entitled to an award of damages; and her proposal on amount was clearly predicated on the supposition that the defendant was wholly answerable for the plaintiff's ailment. How did counsel justify such a proposition? Her justification was based on her own apprehension of the medical reports by ***Dr. Wairagu*** (PW2) and ***Professor Mbinyo*** (PW3). Counsel thus contended:

> "The plaintiff was thoroughly examined by ***Dr. Wairagu*** and ***Professor Mbindyo***. Both doctors….confirmed that the plaintiff suffered from severe cervical spondylosis.
>
> "From the testimony and report of ***Professor Mbindyo***, the plaintiff suffers from cervical spondylosis of the 5^{th} and 6^{th} cervical spine. He further stated in his report that her condition cannot be cured nor benefit from surgical treatment, and she would need to be on medication and physiotherapy for her ailments for the rest of her lifetime. She was unlikely to recover adequately to be able to resume any meaningful gainful employment. ***Professor Mbindyo*** concluded by stating that the plaintiff suffers one hundred per cent…body permanent disability."

That perception of the evidence of PW2 and PW3, I believe, is learned counsel's foundation for claiming general damages on the scale she urges. So she relies on the Court of Appeal decision in ***Kenya Bus Services Ltd. v. Gituma*** [2004] 1 E.A. 91, in which it was held (headnote, p.91):

> ***"General damages must be assessed on the combined effect of all the injuries and not calculated as the sum of independent assessments for each injury."***

Learned counsel relied on the High Court case, ***James Maina Gachanga v. Francis Murungi Muriithi & Another***, H.C.C.C. No. 2241 of 1996 in which a collision of two motor vehicles occasioned the plaintiff a fracture of the right humerus, a dislocation of the right shoulder, *brachal plexis* injury with total paralysis of the right arm, fracture of the tibia and fibula, cuts on leg, knee, hands and hip – and general damages was assessed at Kshs.800,000/= in 2005. Counsel urged that in the ***Gituma*** case (*supra),* the plaintiff had suffered a fracture of the tibia, right femur, right scapular, and soft tissue injuries causing loss of power in the upper right arm, and the Court had awarded Kshs.870,000/= in general damages. In another High Court case decided in 2006, ***Anthony Mwondu Maina v. Samuel Gitau Njenga,*** H.C.C.C. No. 1150 of 2001 the plaintiff suffered laceration on the forehead and in the occipital region, a compound fracture of

the radius and ulna of the left arm, a fracture of the olecranon process of the left elbow; and an award of Kshs.1,200,000/= in general damages was made.

The plaintiff also claimed special damages, mainly comprising charges paid for physiotherapy, medication and CT scan – for physiotherapy being Kshs.432,500/=; for medication being Kshs.128,000/=; and for CT scan being Kshs.7,000/= - all amounting to Kshs.568,015/=.

VII. NEGLIGENCE AS KNOWN TO LAW HAS NOT BEEN PROVED, SO THERE'S NO LIABILITY: SUBMISSIONS FOR DEFENDANT

Learned counsel ***Mr. Chacha Odera*** submitted that since the instant claim is in tort law, the *onus* of proof lay squarely on the plaintiff, but the standard of proof required was on a balance of probabilities. The *locus classicus* on that principle is found in the statement of ***Sir Percy Winfield,*** quoted in ***Clerk & Lindsell on Torts***, 15th ed (London: Sweet & Maxwell, 1982), at p.1:

> "***Tortious liability arises from the breach of a duty primarily fixed by the law; such duty towards persons generally and its breach is redressible by an action for unliquidated damages" [from Winfield, Province of the Law of Tort, p.32].***

Since, learned counsel urged, the plaintiff had alleged in her pleadings that her injuries were occasioned by the negligence of the defendant, she "must establish negligence on the part of the defendant and prove the particulars of [the] negligence pleaded." Negligence in that regard, it was urged, is as defined in ***Charlesworth & Percy on Negligence***, 8th ed by ***R.A. Percy*** (London: Sweet & Maxwell, 1990) (p.3):

> **"Three meanings of negligence. In current forensic speech, negligence had three meanings. They are: (1) a state of mind, in which it is opposed to intention; (2) careless conduct; and (3) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings."**

The tenor and effect of the foregoing statement of principle, learned counsel urged, is that negligence as a state of mind is the opposite of intention; that an act is intentional when it is purposeful and when done with the desire or object of producing a particular result; and that an act is negligent when it is done carelessly or with indifference and it comes, in those circumstances, to a particular result which may not have been desired.

Mr. Chacha Odera submitted that the notion of negligence when applied to signify careless conduct, yet without a reference to any duty to take care imposed, would fail to demonstrate a negligence that is actionable in law. Actionable negligence, it was urged, had to be with regard to *reasonable care taken in an ordinary situation*. Learned counsel here called in aid the old English case, ***Blyth v. The Company of Proprietors of the Birmingham Waterwork***s (1856) 11 Ex 781 (E.R. Vol. CLVI 1047), in which the following passage ***(Alderson, B*** at p.1049) appears:

> **"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the *average circumstances* of the temperature in the ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide. The result was *an accident, for which the defendants cannot be held liable*** [emphases supplied]."

Was the plaintiff, in the instant case, exposed to long hours of work and this led to her ailment? Learned counsel contested that claim of the plaintiff's: "She was a unionisable member of staff and, apart from the terms of employment contained in her letter of appointment, her terms were further governed by the Collective Bargaining Agreement between her Union and the Kenya Bankers Association of which the defendant was a member." Counsel urged that the plaintiff had "conceded that the said agreement set out working hours of the Union members and made provision for lunch breaks," and "this position was confirmed by the defendant's witness."

Counsel also urged that the plaintiff had conceded that "all overtime worked by an employee [was] logged in and the same reflected [on] the monthly payslip. She agreed that she had never had occasion to complain about her overtime hours being under-logged, and that her pay-slips reflected the overtime hours she worked."

Counsel submitted that the plaintiff had produced no record of overtime hours as shown on her pay-slips, as a basis for demonstrating that she had worked overtime for an excessive period of time. ***Mr. Chacha Odera*** noted that the plaintiff had conceded she never raised the matter of long hours of work with her Union; and the defendant's witness confirmed that there was no record of complaint about long hours worked by the plaintiff, whether from the plaintiff herself, or from her Union.

On the question of denied leave, learned counsel submitted that there was only scanty evidence that the plaintiff had not been allowed to take leave: there was no record that she had claimed pay in lieu of leave, and there was no such a claim in the plaint; and no complaint was on record on this score, whether from the plaintiff herself, or from her Union.

As regards the contention that it's on account of poor work-posture that the plaintiff developed cervical spondylosis, learned counsel urged that the plaintiff could not have discharged her work-obligation under contact, except by sitting down; counsel urged, from the evidence, that "indeed all other employees executed their tasks by sitting down," and, by the testimony of the defendant's witness, from such other workers "there has been no complaint of injuries due to poor posture."

It was the defence case that, the work-posture adopted by a person is "a personal choice and an employer cannot be expected to [micro]-manage the manner in which that person sits."

What is the duty of an employer in the position of the defendant herein, towards an employee in the position of the plaintiff herein? In the words of counsel,

> "The duty of an employer is that which would be expected of a reasonable person, and it is the defence submission that a reasonable employer would not be expected to supervise the way an employee sits, considering that an employee is an adult [and is] expected to make reasonable decisions."

Mr. Chacha Odera submitted that the plaintiff had failed to discharge her onus of proof, of the claim that the defendant was negligent and, in this way, caused her alleged injuries. The plaintiff did not produce her payslips to vindicate her claim regarding long hours of overtime worked – whether of her own accord, or upon prodding by way of cross-examination.

In this regard counsel invoked the terms of s.112 of the Evidence Act (Cap.80), which stipulates:

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

This statement of the law is reflected in case law, including, in particular, the Court of Appeal decision in ***A.B.N. Amro Bank, N.V. v. Le Monde Foods Ltd.,*** Civil Application No. Nai 15 of 2002; in that case the learned Judges of Appeal remarked:

> ***"We would repeat that the property owned by Le Monde Foods Ltd, the respondent, is a matter so peculiarly within its knowledge that the Bank cannot be expected to give evidence on them; only the respondent can do so…***
>
> ***"The property which this respondent has is a fact specially within its knowledge and it was only the respondent who could give evidence on it."***

Learned counsel in the instant case urged that the Court was entitled to make an adverse inference as against the party failing to produce evidence that was especially within that party's knowledge.

Similarly, counsel ascribed failure of proof of the claim, to the fact that "[no] evidence was produced to show that the seat used by the plaintiff was unsuitable." Expert opinion, it was urged, would be necessary to link the nature of the seat used by the plaintiff, to the injuries claimed to have been suffered. Even the doctors who blamed poor sitting posture for the plaintiff's ailments, had not, apparently, examined the type of seat which the plaintiff had used, while working for the defendant.

Mr. Chacha Odera, quite unlike learned counsel for the plaintiff, did not apprehend the medical report of ***Professor Mbindyo*** (PW3) as an unequivocal statement that the plaintiff's ailments had been occasioned by the conditions of work in the defendant's employ. That report, counsel urged, gave the opinion that cervical spondylitis is caused i*nter alia* by abnormal stresses and strains of the joints arising from long periods of working in poor posture, and with the neck bent; that the said condition can affect anybody who works in poor posture over long periods of time; that the plaintiff suffered from cervical spondylitis of the 5^{th} and 6^{th} cervical spine whose cause cannot for sure be conclusively confirmed – but whatever the cause, a condition which was worsened by the type of work she was doing for the defendant. Counsel submitted:

> "The plaintiff's own expert witness was unable to tie causation of the plaintiff's condition to the work she was doing for the defendant. The closest the expert came to placing any contributory blame on the defendant was that the nature of the job may have worsened the condition. But even then, the…Professor has opined that what may have worsened the plaintiff's condition is the posture she adopted while working."

It was submitted that no evidence showed that any information had been placed before the defendant, while the plaintiff worked for the defendant, that "she had a condition which required the defendant to treat her differently from all other normal employees." It was submitted too that, PW2's testimony that poor work-posture would have worsened the plaintiff's condition, should be taken to lay the blame squarely at the doors of the plaintiff herself. Learned counsel submitted that no liability in tort law had been proved, attributable to the defendant.

On the basis of the foregoing submissions, learned counsel now addressed himself to the damages set out in the claim. He urged that the cases cited in support of the claim for general damages had no bearing on the plaintiff's alleged injuries; those cases, it was urged, related to more severe injuries – fractures in particular – whereas the plaintiff had suffered no fractures. Were the plaintiff to succeed in her claim on liability, then, in the submission of learned counsel, an award of Kshs.500,000/= would be sufficient as general damages. But counsel urged that the plaintiff had failed to establish a nexus between her work as an employee of the defendant, and her injuries; and she had also failed to establish negligence on the part of the defendant – and consequently the suit should be dismissed with costs.

Counsel urged too that the claim for special damages could not succeed; for the plaintiff had not specifically pleaded the same. The governing principle is set out in ***Coast Bus Service Ltd. V. Sisco Murunga Ndanyi & Others,*** Civil Appeal No. 192 of 1992:

> **"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those [in]** ***Kampala City Council v. Nakaye*** **[1972] E.A. 446;** ***Ouma v. Nairobi City Council*** **[1976] KLR 297 and the latest decision of this Court [of Appeal] on this point which appears to be** ***Eldama***

Ravine Distributors Ltd & Another v. Samson Kipruto Chebon, **Civil appeal No. 22 of 1991…**

> **"We would restate the position. Special damages must be pleaded with as much particularity as the circumstances permit, and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damages were 'to be supplied at the time of trial.'"**

Learned counsel urged, on the authority of the ***Coast Bus Service*** case, that the production of evidence of what purports to be special damages, "is not good enough if the claim was not specifically pleaded." He urged that the plaintiff had "failed to specifically plead the special damages claim," and that on this account, she was not entitled to that claim.

VIII. WAS CAUSE OF AILMENT ASCERTAINED? WHEN DID AILMENT START? DID DEFENDANT KNOW, OR OUGHT THEY TO HAVE KNOWN, OF RISK OF AILMENT? DID DEFENDANT FAIL TO PURSUE SOME REASONABLE COURSE WHICH WOULD HAVE AVERTED PLAINTIFF'S AILMENT? ? AN ASSESSMENT

For twenty-odd years, the plaintiff worked for the defendant, performing a varied range of clerical duties. During that period the plaintiff's conditions of work were regulated by contract, by Collective Bargaining Agreement, and by general management practices adopted by the defendant. There is no evidence of incapacity on the part of the plaintiff, in the discharge of her work, just as there is no evidence of any serious complaint by her, in respect of her rights, deserts or needs as a worker, right through up to the time she was retired. Evidence shows that the plaintiff intended the said retirement, which was expressly requested by her doctor, ***Dr. Wairagu*** (PW2), and it was duly effected on 1st October, 1995. Retirement came after the plaintiff had quietly left her place of work when she fell ill, and was thereafter examined by several doctors. It is clear that it is the opinions of these doctors, and more particularly that of PW2, that convinced the plaintiff she had a claim in the tort of negligence against the employer, and hence the instant suit.

The nub of the plaintiff's case is founded on the medical diagnosis, in the first place of ***Dr. Simon Githae Wairagu*** (PW2), and secondly, of ***Professor Benjamin Stephen Mbindyo*** (PW3). PW2, though not an orthopaedic surgeon, was the first doctor to see the ailing plaintiff on 17th August, 1995 and, thereafter, she (in her own words) "never returned to work" for the defendant. Apparently with the plaintiff's instruction, PW2 on 22nd August, 1995 wrote a letter to the defendant asking that she be retired on medical grounds. To this doctor (PW2), the plaintiff gave the history that, for two years (and that would run back to 1993/1994), she had been experiencing pain in her neck and upper limb.

Dr. Wairagu (PW2) concluded after examining the plaintiff, that she had a stiffness of the neck – and for this he gave medication, and recommended physiotherapy and the use of a neck collar. In PW2's assessment the plaintiff was suffering from *osteoarthritis* – which is "degeneration of joint cartilage and the underlying bone, most common from middle age onward, causing pain and stiffness." PW2 indicated a plurality of possible causes of the plaintiff's health condition; and in his listing he included: trauma; poor working posture; reduction in certain blood elements such as calcium; the biological process of ageing (and he recorded that the plaintiff was then aged 45 years); etc. PW2 carried out a test, and found the plaintiff to have reduced calcium in the blood.

I have noted from the evidence – and this coincides with the submission of counsel for the defendant, though not with that of counsel for the plaintiff – that the orthopaedic surgeon, ***Professor Mbindyo*** (PW3) to whom PW2 referred the matter, also did not state affirmatively that the plaintiff's suffering of osteoarthritis was caused by her work as a bank clerk; it was, however, PW2's opinion that "poor working posture" could have aggravated the plaintiff's condition.

The foregoing aspect of the evidence, precisely, is what constitutes the main difficulty with the setting for the plaintiff's case. That case is that the defendant, by providing an unsuitable work set-up; by not providing the best furniture to the plaintiff; by keeping the plaintiff on continuous work for too long; by committing the plaintiff to a "poor posture" as she worked; by denying the plaintiff leave, and moments

of rest – occasioned the pressure on her figure which led to health deterioration and to cervical spondylosis which now afflicts her, disabling her, denying her the amenities of life, and hindering her from taking up any gainful employment.

Were it to be established that, indeed, the foregoing was the sequence of events leading to the plaintiff's current ailment, then it could be maintained that the cause was the defendant's wrong-doing. The plaintiff proceeds on that basis, and demands compensation under the tort-head of negligence.

The plaintiff's advocate invested much time and labour in putting up the case of negligence against the defendant. The main line of persuasive authorities relied on by counsel, however, is concerned with psychiatric injury which may ensue in the wake of physical injury in the work-place, or which may arise independently on account of stressful work done by an employee.

From the evidence on record, psychiatric injury on the part of the plaintiff is not alleged. The value of the several psychiatric-injury cases raised for the plaintiff, I think, is that they do indeed shed much light on the nature of an employer's responsibility for the safety of the employee at the work-place. It emerges that the employer is under duty, subject to the nature and inherent risks of the work entailed, to provide safe and secure conditions of work for employees.

With respect to such a duty of the employer, whether or not it is duly discharged, and so the employer bears no liability in the tort of negligence, is determined not on any absolute standards, but on the basis of, firstly, the circumstances prevailing, and secondly, reasonable degree of care. This principle is well captured ***in Blyth v. The Company of Proprietors of the Birmingham Waterworks***, Vol. CLVI E.R. 1047, at p.1049 (***Alderson, B.):***

> ***"The defendants [would be liable if] they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done***."

From the meritorious interpretations of law in the foursome cases in [2002] 2 A ll E.R. 1 which ***Mrs. Murgor*** relied on, it is clear that the employer's tort liability in respect of employees' working conditions extends to such stressful situations as may lead to psychiatric harm for an employee. But what was proved, in the case of the plaintiff herein, was that during the period she was employed by the defendant, she was found to be suffering from *cervical spondylosis.*

On the basis of authority I would agree that if it were to be demonstrated that the plaintiff's affliction with cervical spondylosis was *due to* working conditions in the defendant's employ, and that the defendant had failed to take *reasonable measures* to avert it, then liability would clearly fall on the defendant.

In the context of the foregoing principles, I will now consider the facts of this case.

Although ***Dr. Wairagu*** (PW2) had suggested that it was the stressful working conditions in the defendant Bank, accompanied with poor working posture, that led the plaintiff to develop cervical spondylitis, he gave no basis, with respect, for that finding –considering in particular that he had found the plaintiff to be low on blood calcium, and part of his testimony was that such a condition could predispose the plaintiff to suffer osteoarthritis. (PW2 did not attempt to establish any linkage between the working conditions and the level of blood calcium found on the plaintiff). The orthopaedic surgeon, ***Professor Mbindyo*** (PW3) indeed did not testify in affirmative terms, that it was the defendant's works that occasioned the plaintiff's ailment; his testimony, as I apprehend it, was that if the plaintiff's ailment had arisen from any of the several possible causes, then a "poor posture" at work could aggravate it. So there is no proof laid before this Court, that it certainly was the type and the conditions of work, in the defendant's employ, that caused the plaintiff to develop cervical spondylosis.

But suppose the working conditions at the defendant Bank did *aggravate* the plaintiff's ailment, what proof has been placed before the Court?

Although it is claimed that the long hours of sitting, and the posture assumed during such sitting,

contributed to the plaintiff's ailment, no proof has been laid before the Court as to the kind of seat the plaintiff had been using, and no attempt has been made to identify and to describe the main defects of such a seat. The closest the Court came to knowing something about the said seat, was when the defendant's witness said that the plaintiff had been using the standard kind of seat that clerks at the Bank, in general, were using. This implied, I think, that such seats were in all respects *normal*, and could not reasonably be expected to cause cervical spondylosis to the user. The plaintiff did not show that such seats had any inherently-harmful characteristics.

"Poor posture" is an important plank in the plaintiff's case: the defendant allegedly subjected the plaintiff to a poor posture during working time. "Posture" is thus defined in ***Longman Modern English Dictionary*** (***Ed. O.Watson***) (London: Longman, 1976): "The way a person holds himself." It is obvious – and of this, I will take judicial notice – that most clerical work in a bank would be done from a sitting position. But while sitting, quite clearly, just as learned counsel ***Mr. Chacha Odera*** urged, an employee would adopt a suitable posture according to habit, or need. It is not, I think, obvious that a reasonable employer should monitor and regulate continuously the sitting posture that its employees adopt at work.

The foregoing point would, I believe, be subject to such knowledge as the employer may come to have, regarding any *special health needs* of a particular employee. From the evidence, it is clear that the plaintiff had not freely communicated with the defendant on such special health-needs as she may have had; and when she left the defendant's premises in August, 1995 she just headed straight to hospital, did not return, and did not communicate with the defendant. Only towards the cessation of her employment (from the evidence, in 1994 and 1995), did the plaintiff complain to her superiors, ***Mr. Njoroge*** and ***Mr. Alui,*** about the workload assigned to her; and this, it is notable, coincides perfectly with the *ex post facto* complaints about not being allowed to go on leave in respect of 1994 and 1995. (Her employment with the defendant ended on 1st October, 1995).

From the evidence, no reliable proof of refused-leave for the plaintiff has been given; there were no documents to prove the claim; and there were no records of complaints, whether to the employer or to the plaintiff's Trade Union (KUCFAW).

It is obvious to me that the crux of the plaintiff's case founded on negligence has not been proved.

From the testimony of ***Professor Mbindyo*** (PW3) there is the *possibility* that stressful work in the defendant's employ did aggravate the plaintiff's cervical spondylosis. Yet if that is so, then on the evidence before the Court, such an aggravation of ailment can only be related to the period *1994 – 1995* when the plaintiff had made complaints to ***Mr. Njoroge*** and ***Mr. Alui***. It is not apparent to this Court, in all the circumstances of this case, that a reasonable employer, in the absence of the complaints laid before ***Mr. Njoroge*** and ***Mr. Alui,*** would have been placed under duty to provide some special workload-relief to the plaintiff.

Since the plaintiff's complaint was registered with the defendant only in *1994*, and in 1995 she was diagnosed with cervical spondylosis, it may be considered that the defendant, in exercise of reasonable care, would have taken some action to avert any possibility of aggravation to her ailment, though only *as from 1994*. In the light of the complaints made to ***Mr. Njoroge*** and ***Mr. Alui***, the defendant if it was a reasonable employer, would have reviewed the plaintiff's workload, to alleviate her suffering.

While I hold, therefore, that there is no basis for ascribing to the defendant responsibility for the plaintiff's ailment, and so the claim must in substance fail, the plaintiff will be entitled to nominal damages in respect of her complaints to ***Mr. Njoroge*** and ***Mr. Alui*** which were not acted upon by the defendant, a fact which raises the possibility that failure of reasonable action in the course of 1994 and 1995 by the defendant, would have added to the plaintiff's ailment.

The foregoing holding resolves the question of general damages, which I will proportion accordingly; and it also disposes of the question of special damages. Special damages *have no life of their own*, save as

dictated by the substantive finding on *liability*. If, as already determined, the defendant would not bear liability on the main claim, then no special damages can be attributed to the defendant. Besides, just as learned counsel for the defendant did urge, the law requires special damages to be pleaded and specifically proved; the claim made in the plaint that "[special damages]…to be adduced at the hearing hereof" cannot be sustained: ***Coast Bus Service Ltd. v. Sisco Murunga Ndanyi & Others,*** Civil Appeal No. 192 of 1992.

The decree emerging from this judgement shall carry the following elements:

1. The plaintiff's prayer for general damages is refused.

2. The defendant shall pay nominal damages to the plaintiff in the sum of Kshs.150,000/=, and the same shall bear interest at Court rate with effect from the date hereof.

3. The plaintiff's prayer for special damages is refused.

4. There shall be no order as to costs.

5. If any matter whatsoever shall arise relating to this Judgement or the decree extracted therefrom, the same shall be heard and determined under the direction of a Judge of the Civil Division of the High Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 10th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Plaintiff: Mrs. Murgor, Instructed by M/s. Murgor & Murgor Advocates

For the Defendant: Mr. Chacha Odera, instructed by M/s. Oraro & Co. Advocates