REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 564 of 2000

HIRIBO MOHAMMED
FUKISHA…….....PLAINTIFF

-VERSUS-

REDLAND ROSES LIMITED….....……DEFENDANT

JUDGEMENT

A. DID DEFENDANT NEGLECT TO PROVIDE ANTI-CHEMICAL PROTECTIVE GEAR AND AS A RESULT PLAINTIFF AS A SPRAYER WAS INJURED? — PLAINTIFF'S PLEADINGS

The plaint in this suit, dated 7th April, 2000 was filed on 10th April, 2000. The plaintiff pleads that he had been employed by the defendant, a floriculture company, as a sprayer and he remained in service in that capacity from *16th June, 1996* to *February 1999* – a period of about two-and-a-half years. He pleads that he was retired on medical grounds.

The plaintiff claims breach of duty, relating to his working environment, by the defendant. He avers that it was a term of the employment contract that the defendant would provide a safe working condition and that he would provide protective gear for the plaintiff as he performed his flower-spraying duties. He pleads that during and in the course of his employment he was exposed to hazardous chemicals which caused him serious bodily injuries and as a result, he suffered loss and damage; for such injuries, loss and damage the plaintiff attributes cause to negligence and breach of contract on the part of the defendant.

The plaintiff states the particulars of negligence as follows: failing by the defendant to make any, or any adequate safeguard for the plaintiff while he performed the defendant's work; the defendant exposing the plaintiff to risk of damage the nature of which the defendant was aware, or should have been aware; the defendant failing to provide to the plaintiff suitable goggles, gloves, mouth masks and head-gear to enable the plaintiff to carry out the work in safety; the defendant directing and requiring or allowing the plaintiff to carry out the said work without providing him with any suitable goggles, gloves, mouth masks and head gear to protect the plaintiff, when the defendant knew or ought to have known that it was unsafe and dangerous for him to carry out the assigned work without protective gear; the defendant having failed to provide or maintain a safe or proper system of work; the defendant directing the plaintiff to carry out spraying work while the plaintiff's health was deteriorating.

It is claimed that while in the employ of the defendant, the plaintiff had suffered health injuries in the shape of: chemical *hepatitis 2,* due to hydrocarbon; chemical *dermatitis;* and chemical *pneumonitis.*

The defendant claimed general damages under the heads: loss of future earnings at the rate of

Kshs.3,030/= per month from the date of retirement; and pain, suffering and loss of amenities as a result of the injuries suffered. The plaintiff claims special damages in the sum of Kshs.5,000/=, the costs of the suit, and interests.

The plaintiff pleads that it is on account of the injuries he suffered at the work-place, that his health deteriorated so much that he had to be retired on medical grounds. He pleads that the defendant's responsibility for his health injuries may be taken for granted, on the basis of the principle of *res ipsa loquitur*.

B. PLAINTIFF MUST PROVE HIS CASE, AND MUST TAKE BLAME FOR NON-USE OF ESTABLISHED SAFETY PRACTICES – DEFENDANT'S PLEADINGS

In the defendant's statement of defence, dated and filed on 15th June, 2000 it is denied that under the plaintiff's contract of employment the defendant bore at all a duty to provide a safe working condition, or protective gear to the plaintiff. The defendant denies occurrence of the alleged chemical accident at the defendant's premises. It is pleaded in the alternative that "any disease which the plaintiff may prove he contracted and any consequential loss or damage were wholly caused or … contributed to by the negligence of the plaintiff". Particulars are given of alleged negligence on the part of the plaintiff: failing to wear the rubber gloves and/or apply the barrier cream provided for his use; failing to avoid dangers known to himself, and thus exposing himself to risks of injury; failing to wash his hands regularly and thoroughly in the facilities provided; failing to bring his peculiar skin sensitivities to the attention of any responsible officer of the defendant; failing to make use of adequate and suitable protective goggles, mouth masks and head-gear and to observe the work practices established for the safety of employees by the defendant; exposing himself to risk and damage.

The defendant pleads that the plaintiff, who as its employee had used chemicals in the spraying and ferti-irrigation departments between A*ugust 1997* and *January 1998*, and again between *November 1998* and *February 1999,* had been provided with full protective gear.

It is further pleaded that the defendant's company doctor had several times treated the plaintiff, but on none of those occasions did he ever present with a diagnosed chemical-related illness.

The defendant pleads that the plaintiff had freely contracted to accept transfer between the various departments in the floriculture work set-up.

The defendant denies the particulars of special damages, and denies that the plaintiff suffered any pain and/or loss as claimed in the plaint. The defendant denies that the doctrine of *res ipsa loquitur* can be pleaded in this case.

C. AGREED ISSUES FOR RESOLUTION

Counsel for the parties filed their list of agreed issues on 22nd January, 2002; and these are as follows:

a) Was the plaintiff employed by the defendant from 16th June, 1996 to February, 1999 on the terms contained in the plaint?

b) Was it a term of contract between the parties that the defendant would provide safe working conditions and protective gear to the plaintiff?

c) Did the plaintiff contract any disease while in the employ of the defendant as a result of being exposed to hazardous chemicals by the defendant?

d) Is the defendant liable for letting the plaintiff work under dangerous conditions and with hazardous chemicals?

e) Did the plaintiff cause or contribute to himself any disease which he may have contracted during his

employment with the defendant?

f) Has the plaintiff suffered damage owing to dangerous exposure occasioned by the defendant?

g) Who is to bear the costs of the suit?

D. THE PLAINTIFF'S CASE: TESTIMONIES

Hearing of this case first took place on *29th April, 2004* when learned counsel ***Mr. Owiti*** represented the plaintiff while learned counsel ***Mr. Majanja*** represented the defendant.

The plaintiff, ***Hiribo Mohammed Fukisha*** was sworn and examined as P.W.1. He testified that he was employed by the defendant as a sprayer on *16th June, 1996* as member of staff No. 0538 (Plaintiff's exhibit No. 1), even though his contract of service was dated 1st October, 1997 (Plaintiff's exhibit No. 2). He entered upon his job as a *casual worker;* and after he received a written contract he was paid a salary of Kshs.2,230/= per month, with a house allowance of Kshs.800/= per month, and a "chemical allowance" of Kshs.200/= per month.

The plaintiff, along with his co-employees, had been working in shifts; he would go out to the flower farms at 4.00 a.m., and continue with spraying duties until 6.00 a.m. when another shift would take over. He testified that when he had been a casual worker, he and his fellow casual workers had been given no protective gear when they went out to spray the flowers; but after he was given regular contract, he was now provided with protective devices which he shared with others. In the course of time, the defendant began to provide gum boots, masks, gloves overalls-with-hoods for each employee. In *December 1997*, all such protective gear was available to the plaintiff.

The plaintiff testified that before December, 1997 protective gear was not available to him, and he had handled chemicals with inadequate protection. In his work he would sometimes carry containers of chemicals on his back; and sometimes chemicals would be issuing forth from machines, and the plaintiff would carry such machines and pump chemicals upon the plants.

P.W.1 averred that his spraying work had been done under supervision, and there were four supervisors who oversaw his work. It was not possible for him to complain to these supervisors about equipment, as a complaint could be visited with a dismissal.

The plaintiff testified that he had become ill in *1998*, and was seen by ***Dr. Sharma*** who was the company doctor. He averred that he was suffering fatigue and had a yellowing colour in his eyes and urine; his skin was flaking; he had difficulties breathing; he was experiencing headaches, and abnormal sweating. ***Dr. Sharma*** gave medication but did not disclose to the plaintiff his diagnosis of his health problem. ***Dr. Sharma*** had examined the plaintiff's mouth and eyes, and had administered a strong injection which caused him giddiness. He thereafter had two days' rest, but did not feel well when he resumed work thereafter. After about a month he saw the company doctor again, and the doctor sent him with a letter to be seen at Nazareth Hospital. At the hospital tests were carried out, after which P.W.1 was informed that he had a liver ailment. He was advised to follow a particular dietary regime: He should not eat meat or drink milk, or consume spices. The plaintiff was also advised to discontinue his work as a sprayer. In this regard he produced plaintiff's exhibit No. 4, a hospital attendance certificate from Nazareth Hospital, dated *16th January, 1998.* The document certifies that the plaintiff had been attended and accorded medical examination and laboratory tests. It states the ailment as "Liver problem? Hepatitis". The hospital document cautions the plaintiff: "Avoid animal protein, use dextrose/glucose. Avoid contact with chemicals". It is also stated on the hospital document: "needs Abdscan".

P.W.1 testified that he had been asked to undergo an X-ray examination, but he did not do so. He returned to the company doctor (***Dr. Sharma***) who allowed him three days of rest. Thereafter he returned to the spray department. He had not felt well from the time he was attended at Nazareth Hospital, and he had had bouts of vomiting, and had sustained sweat and yellowing of his body. When he saw ***Dr.***

Sharma, after visiting Nazareth Hospital, the doctor gave him medication to stop vomit, and also gave him dietary directions.

P.W.1 testified that the medication given by ***Dr. Sharma*** was not helpful, as he began to experience a burning sensation in his chest, and the yellowing of his skin did not cease. He had to see the doctor again in 1998 and also in February, 1999 when the doctor again sent him to Nazareth Hospital. He was asked to have a scan, which he did not undergo for shortage of money; and instead he took to Kiambu District Hospital the medical documents which he had obtained from Nazareth Hospital.

Dr. J. M. Kamau at the Kiambu District Hospital on *25th February, 1999* gave the plaintiff a letter to take to his employers (Plaintiff's Exhibit No. 5). This letter referred to ***Mohamed Fukisha*** (the plaintiff), a 25-year-old male, and it read in part as follows:

"The above has been reviewed in this hospital since March, 1998. [He] has a case of *Chemical Hepatitis 2 to Hydrocarbons.* He is a sprayer and highly exposed.

"Liver function tests done; then … diagnostic. The patient has also been seen on and off in[a] private hospital, viz. Nazareth Hospital. His health is poor and rapidly worsening. He also has *chemical dermatitis* (contact dermatitis) and his respiratory system is compromised with *chemical pneumonitis* .

"In view of his deteriorating health, he is advised to retire on medical grounds to facilitate faster recovery."

The plaintiff testified that he had difficulties in terminating his employment with the defendant and being paid his terminal dues. He produced his payslips for September 1988 (Plaintiff's Exhibit No. 6A); for October 1998 (Plaintiff's Exhibit No. 6B); for November 1998 (Plaintiff's Exhibit 6C); for December 1998 (Plaintiff's Exhibit No. 6D), and for January 1998 (Plaintiff's Exhibit No. 6E). His January 1999 pay was Kshs.2,234/=. After receiving his pay for February, 1999 the plaintiff left employment and gave instructions to his advocates to pursue matters relating to his rights; and his advocates, M/s Kirundi & Co. Advocates then, on 1st April, 1999 wrote a demand letter to the defendant (Plaintiff's Exhibit No. 7). The plaintiff testified that he has not been well ever since he left the employ of the defendant, and on this account he has not been able to secure employment. He prayed for compensation for injury to his health, as he considered the defendant responsible for his health problems. He was also praying for the costs of the suit.

P.W.2, ***Dr. Moses Ngugi*** was sworn and examined on *17th November, 2005* in the presence of learned counsel ***Mr. Kimani*** for the plaintiff, and ***Mr. Saende*** for the defendant – the two taking over from where ***Mr. Owiti*** and ***Mr. Majanja*** respectively had left on *29th April, 2004.*

P.W.2 testified that he is a holder of the MB. Ch.B. degree of the University of Nairobi and has been in medical practice since 1999. On *20th July, 2005* he had examined ***Hiribo Mohammed Fukisha*** (the plaintiff), a 32-year old male who lives at Ruiru. P.W.1 had given to ***Dr. Ngugi*** a brief history of his working experience: that between *1996* and *1999* he had been a chemical sprayer on a flower farm and had worked without protective gear as he handled pesticides and herbicides; he had experienced chemical irritation to his skin, around his face, hands and legs; he had had loss of appetite, and experienced general weakness of the body; he had undergone treatment at Nazareth Hospital and at the Kiambu District Hospital.

P.W.2 testified that he had examined the plaintiff some *six years* after the plaintiff had had contact with chemicals, and he was on that occasion complaining of painful eyes, decreased vision, photophobia, skin lesions, and occasional chest pain. In his own perception, P.W.2 testifies, the plaintiff was "*a young man of fair general condition*". He found the plaintiff to have had some loss of vision, which he assessed at 6 out of 12 He found on the plaintiff lesion and hypo-pigmentation to the skin, arms, face and back. From the examination and from the existing records, P.W.2 noted chemical injury to the plaintiff's eyes, skin and lungs. He noted that the records from Nazareth Hospital showed the presence of signs of liver

damage – possibly due to absorption of chemicals. Such damage had persisted, leading to decreased visual acuity and some skin changes. The plaintiff was complaining of chest pain, and this, in P.W.2's assessment, could be attributed to lung damage.

P.W.2 conducted a physical examination of the plaintiff's rib-cage; but no physical injury was apparent. He thought *"there could be lung impairment which could be treated with chest physiotherapy if pain persists"*. But the skin changes could persist for life. Hypo-pigmentation referred to patches of reduced skin colouration. These were small and widespread; P.W.2 considered that plastic surgery may not be necessary, as certain creams could help. In his assessment, the plaintiff's eyes required visual correction, with lens. The witness produced his medical report which was marked Plaintiff's Exhibit No. 8.

On cross-examination P.W.2 averred that he was not, as a doctor, a specialist in dermatology, but he had learnt all the elements of general practice. He testifies further that his sources on the basis of which he had given a medical opinion were: the patient's history; the treatment notes from both Nazareth Hospital and Kiambu District Hospital; and his own examination. He had carried out the visual acuity test on the plaintiff, but other tests such as the one on the liver, had been done at Nazareth Hospital and at the Kiambu District Hospital. His own examination had not shown any signs of liver damage; but he had not found it necessary to conduct a liver-function test. P.W.2 testified that had there been any liver damage since 1996 it would have been evident, depending on the nature of the damage.

P.W.2 testified that *contact dermatitis* results from harm to the skin; and the plaintiff had patches and lesions on the skin; the fact that the skin has not healed is confirmed by the non-uniformity of the skin, and the presence of scar-like features thereon.

P.W.2 testified further that chemical *pneumonitis* is the infection that is caused by particles inhaled. In the case of the plaintiff, he had found by physical examination that the rib cage was normal, and there were no signs of pneumonia. He formed the impression, from the physical examination, that the chemical *pneumonitis* could have healed. The witness testified that he could not have determined the causes of the chemical *pneumonitis* or the contact *dermatitis*. He averred that there is a plurality of possible causes of contact *dermatitis*, such as worms, chemicals, weeds, cloth. He testified that chemical *pneumonitis* is caused by reactions to chemicals inhaled, such as dust, vehicular fumes; by inhaling substance to which the lung reacts. P.W.2 testified that the yellowing of the skin, or jaundice, comes when the liver is compromised; the liver becomes unable to remove the poisons in the body.

On re-examination, P.W.2 testified that he did not find any signs of pneumonia in the plaintiff; but remarked that the complaint about chest pains meant that there was a compromise to the plaintiff's chest. He testified that contact *dermatitis* is a contact which causes pain on the skin; and from the plaintiff's work history he would "*conclude that the problem came from work experience*".

E. THE DEFENDANT'S CASE: TESTIMONIES

D.W.1, ***Vincent Otieno Ambogo*** was sworn on 7th June, 2006 and testified that he was the defendant's personnel officer in charge of records. He had worked in the records section for seven months, and was now familiar with the instant matter. He had read the file records on the plaintiff and knew that the plaintiff entered into an employment contract with the defendant on *1st October, 1997* though the contract was stated to be effective from *1st August, 1997*. From *August 1997* to *January, 1998* the plaintiff was deployed in the spraying department of the defendant; and thereafter he was moved to the ferti-irrigation and maintenance department where he remained until *March 1999* when he left the defendant's employ.

From the records, the plaintiff was complaining of being unwell at the time he left the defendant company. The witness was relying on office records, since the plaintiff had already left the defendant's employ when he (D.W.1) joined. From the records, D.W.1 testified that the plaintiff had worked for the defendant only for the short period of *1 year 3 months*. The witness has not learnt of any other person who became an employee of the defendant, and ended his employment in circumstances similar to those in which the plaintiff left.

On cross-examination, D.W.1 testified that he had joined the defendant company only as recently as 2005; he does not work in the field in the defendant's farms, though he does visit the outside units. He averred that he has familiarized himself with the defendant's works as a whole, and he was familiar with matters taking place in the field.

Since the witness joined the defendant's employ after the plaintiff had left, he could only speak from the records, which contain discharge sheets. He testified that he was surprised to learn that the plaintiff had left after working in the spray department for only *six months;* while there were those who had worked in that department for as many as six-to-seven years and they still work there today. He testified that the plaintiff had been employed by the defendant in *August, 1997,* and had left in *March, 1999* – and so he had worked for just about one-year-and-a-half.

D.W.2, ***Joakim Kimathi Njagi*** was sworn and gave his evidence on *7th June, 2006*. He testified that he is an employee of the defendant, and is a spraying supervisor and a scout. As a scout, he monitors the occurrence of pests and diseases on the defendant's flower farms. He supervises spraying work, and is responsible for allocating spraying duty. He joined the defendant's employ on *15th December, 1997* and has worked now for a total of eight years. The witness testified that when he joined the defendant as an employee, he found the plaintiff there, in service as a spray man. At that early stage, D.W.2 began work in the spray department, as a supervisor and scout; and he had occasions to supervise the plaintiff. The plaintiff left the spraying department soon after the witness was assigned duties there; and in his recollection, the plaintiff was redeployed in the ferti-irrigation department, in January, 1998. D.W.2 did not interact much with the plaintiff after the plaintiff left the spraying department.

On the mode of executing spraying work, D.W.2 testified that protective gear had been provided to sprayers, and this included: (i) overalls; (ii) spray suits – water-resistant; (iii) masks; (iv) goggles; (v) gloves. He testified that he had found these protective devices in use when he joined the defendant's employ, and there was no occasion when he ever saw any sprayer working without them; in his words, "*even the plaintiff used them; during the one month, I never saw him not using them*". Protective gear was available, D.W.2 averred, "*and all sprayers used them"*. D.W.2 was responsible for issuing the protective gear to sprayers, and a record was kept on the mode of issuing of the same. The sprayers would sign a standard form inventorising the specific protective gear, indicating the items they were using. D.W.2 produced the form as defendant's exhibit No. 2 – showing that on *28th May, 1997* the plaintiff was issued with a pair of gum boots and he duly signed for them; on *7th August, 1997* the plaintiff's old mask was replaced with a new one and he signed for it; on *7th June, 1997,* spraying overalls were supplied to the plaintiff; on *17th May, 1997* gloves were issued to the plaintiff – later replaced on *11th October, 1997.* These details are shown on the invoice and equipment-issue forms. D.W. 2 testified that it was the responsibility of the sprayer to report whenever new protective gear was required.

D.W.2 testified that he had heard that the plaintiff left employment because of illness, but he (D.W.2) had not known of any other case in which a sprayer in the defendant's employ had left work because of illness occasioned by chemicals.

The witness averred that in his role as a supervisor in the spraying section he directs spraying work; he visits the fields where spraying is in progress; and he handles pesticides himself. He testified that he has not, since he was deployed in the spraying department, had any medical complication occasioned by chemicals used in spraying.

D.W.2 testified that the defendant does have casual workers, and that sometimes they are confirmed on the permanent establishment; and that it is possible the plaintiff had at one time worked as a casual employee, before he was confirmed. He testified that there are casual employees who have worked in the spraying department, and when they have done so they have been provided with protective gear – for which they make an acknowledgement by signing appropriate forms.

On whether the chemicals used in the spraying department could have harmed the plaintiff's health, D.W.2 testified:

"If the plaintiff says spraying injured his health, I would say handling chemicals is no big deal. If you are equipped, there will be no problem. I even mix concentrated chemicals. I have worked with them for eight years … and I am still working with them."

On cross-examination D.W.2 restated that at no time, after he took up employment with the defendant, had he seen the plaintiff working without protective gear. He was definite that "*the equipment provided was enough for all the workers"*.

D.W.3, ***Martin Mwiti Richard,*** was sworn and gave his testimony on *7th June, 2006*. He averred that he joined the defendant as an employee on 10*th December, 1998* and was deployed in the maintenance department, before being re-deployed in the spraying department on *3rd March, 2001*. When he began his employment the plaintiff was working in the maintenance department.

D.W.3 testified that he was, like everyone else working in the spraying department, supplied with protective gear including: a mask; gloves; spray suits; overalls; and gum boots. He averred that he has remained in the spraying department to-date, but he has not suffered any adverse health condition. He testified that he has never seen any of his colleagues working without protective gear.

D.W.3 testified that one of the elements in the protective gear supplied to sprayers was *goggles*, which come as part of a complete mask. He testified that he was unaware of the company's practice regarding protective gear as at the time before he was employed; but he never saw anyone with a disease emanating from chemicals. He averred:

"It is an offence not to wear protective gear; anyone who fails to wear it goes for disciplinary action".

The witness never saw anyone in the spraying department working without protective gear.

On cross-examination D.W.3 averred that the mask supplied by the employer covers the face completely, but it has space for seeing, glass-covered.

D.W.4 was ***Professor Anastasia Nkatha Guantai*** who took her oath on 17th July, 2006. She testified that she holds a Ph.D in pharmacology and therapeutics, and is currently an Associate Professor at the University of Nairobi Medical School. She averred that the discipline of pharmacology and therapeutics is concerned with the ways in which medicine and drugs act on patients, and one of its spheres of concern is the adverse effects of chemicals.

Sometime in *1999* D.W.4 had been asked by the defendant's company doctor to assist in assessing the complaints of an employee, regarding his reactions to chemicals. That employee was ***Mohammed Fukisha*** (plaintiff). The witness visited the company and requested for the information list of chemicals in use, and the defendant provided her with a comprehensive list. She also requested reports from the hospitals which had attended to the employee, and the safety guidelines used; and she requested access to the chemical formulation and dispensing rooms; she requested to see the cleaning areas; she requested the World Health Organization guidelines on safe use of chemicals; she requested to be taken to the greenhouses, so as to assess likely pollution levels; she requested to see the employee- rotation scheme. All these requests were granted, and on the basis of the information secured, the witness prepared a report, dated *April, 2000* (defendant's exhibit No. 3). P.W.4 gave copies of her report to the client and to the company doctor.

D.W.4's report contained several findings: (i) that the WHO- recommended protection gadgets were in use; and these accorded the employees protection against exposure to chemicals; (ii) that the protective gadgets provided were in good order, and were regularly checked; (iii) that there were regular in-house training sessions for employees, on safe use of chemicals; (iv) that the defendant's employees did undergo regular medical check-up; (v) that there was in place an infrastructure of medical-care facilities on the farm; (vi) that guidelines for safe formulation and use of chemicals were available and in use; (vii) that there was on the defendant's premises a farm doctor, who was always available and on call, for

matters requiring medical attention; (viii) that there was in place a chemicals-dispensing and preparation room which was in good order; (ix) that a shower room and dressing room had been set up for employees, and it was properly maintained; (x) that there was a rotation scheme for employees, and they had short work-schedules, to minimize exposure to chemicals; (xi) that there were procedures in place to ensure that no particular chemical was in use for a long time; the purpose is to minimize resistance of parasites, and to minimize the duration of exposure to the chemicals; (xii) that the chemicals in use belonged to category 2 and category 3 of the WHO classifications; the classification is by levels of toxicity, and the most toxic chemicals are in category 1; those in category 2 are less toxic; and those in category 3 still less toxic.

D.W.4 found that although the list of compounds that could be used was long, not all of them were in use; they were sourced according to need. The defendant company was avoiding overstocking, which could lead to the temptation to use expired chemicals.

In relation to chemicals in use – which P.W.4 ascertained through a literature search – no cases of chemical *hepatitis* were found for the period running up-to the date of the report. She found while conducting her investigations that as of that time, the plaintiff had been in employment for only *one year*.

From the several findings, D.W.4 came to the conclusions, firstly, that the level of exposure of the plaintiff had been negligible – because of the working arrangements, and because of the safety gadgets in use; and secondly, that although chemicals may be associated with *hepatitis,* the gravity of this problem was dependent on the specific chemical involved, and its level of toxicity, the level of exposure, and the mode of exposure. *Mode of exposure* is exemplified by the possible inhalation of the chemicals used for the control of crop parasites; the possibility of direct ingestion; the possibility of skin contact. Given the farm safety arrangement in place, D.W.4 concluded that it would not have been possible for the plaintiff to have suffered toxicity.

D.W.4 testified that she had interviewed the farm manager, the stores manager, the field Manager, and she had talked to a number of workers, to the company doctor and the company nurse. She met some workers who had been at the farm for several years, but had had no medical condition associated with their workplace.

On cross-examination, the witness testified that she had visited the defendant's farm on three consecutive occasions, in the course of 2000; and she considered that these visits provided her with a remarkably extended opportunity during which she could ascertain the facts set out in her report.

On the possible cause of *hepatitis,* D.W.4 who said she was a pharmacist by profession, testified that this was disease of the liver, and its cause was related to the history of a patient. *Hepatitis* could come from ingestion; and viral *hepatitis* was *hepatitis* caused by a virus.

D.W.4 testified that her finding was that the workers were going for regular medical check-ups, even though she could not confirm that the plaintiff had also been going for such medical check-ups. She testified that in the absence of specific tests at the initial stage, it may not be clear what a person's existing health status is; and a patient's health could be re-defined, especially with reference to delicate organs such as the lungs and the liver. From the records it was apparent that the defendant's employees were regularly examined medically.

D.W.4 averred that from her findings, it was not possible to associate the plaintiff's complaint with the chemicals which were used in spraying. The witness had found safety gadgets in place, for the use of workers – gum boots; mouth masks; overalls; goggles; helmets; gloves. It was her belief that the supply of such protective gear was sufficient for all the workers. In her view, such gadgets were strictly required only by those workers who were involved in spraying; and she believed the supply of such equipment was sufficient for the spray workers.

D.W.4 testified that the very toxic chemicals were not in use at the defendant's farm; and the chemicals mainly in use were *organo-phosphates.*

Exposure to such chemicals would lead to the patient presenting with coughing; running nose; increased salivation; increased secretion of tears – and where exposure was acute, then the patient would present with nausea, diarrhoea, frequent urine, etc.

D.W.4 testified that if there occurred a case of *pneumonitis*, the cause could not just be chemicals, and it would be necessary for the patient to have comprehensive medical history taken; as well as a bio-chemical analysis of the patient. The witness testified that *pneumonitis* does not just occur overnight, and could be caused by various factors and not just chemicals; it can be caused by charcoal for cooking, or paraffin – because of the chemicals issuing therefrom. In D.W.4's view, a proper assessment of the plaintiff's health status would require an understanding of the environmental context in which the plaintiff had lived, before being employed by the defendant.

F. EMPLOYER'S CHEMICALS AND FAILURE TO PROVIDE PROTECTIVE GEAR CAUSED INJURY TO WORKER'S HEALTH: SUBMISSIONS FOR THE PLAINTIFF

Learned counsel ***Mr. Kimani*** submitted that the issues before the Court were: l*iability* and *quantum*. He submitted that the claim arises out of occupational diseases that the plaintiff contracted after working at the defendant's flower farm from 1996 to 1999.

Mr. Kimani submitted that the plaintiff worked for some *three years* for the defendant before he was retired on medical grounds; that he had begun working in *February 1996* when he was 22 years of age, and was retired in *February, 1999*. The health condition leading to the plaintiff's retirement, learned counsel urged, was *Hepatitis 2 to Hydro-carbons*, as shown in ***Dr. Kamau's*** certificate (Plaintiff's exhibit No. 5) issued at Kiambu District Hospital. Yet another health condition in that category, counsel urged, was chemical *dermatitis*; and yet another was compromise to the plaintiff's respiratory systems by chemical *pneumonitis.*

Learned counsel attributed liability to the defendant, and founded his further submissions on s.35(1) of the Workmen's Compensation Act (Cap. 236, Laws of Kenya). That section provides:

"***Where a medical practitioner grants a certificate –***

a) that a workman is suffering from a scheduled disease causing disablement or that the death of a workman was caused by any disablement; and

b) that such disease was due to the nature of the workman's employment and was contracted within the twenty-four months previous to the date of such disablement or death, the workman or his dependants shall be entitled to compensation under this Act as if such disablement has been cause by an accident …"

Learned counsel submitted that the plaintiff had contracted an *occupational disease* which falls under "*schedules diseases*" specified in the Third Schedule to the Workmen's Compensation Act.

The relevant Third Schedule entry thus reads:

Description of Disease	*Nature of Occupation*
Halogen derivatives of hydro-carbons of the aliphatic series	*The use or handling of, or exposure to fumes of, or vapour containing, any halogen derivative of any hydro-carbon of the aliphatic series*

Counsel submitted that the plaintiff's disease falls under the category thus specified in the Act: "*It is halogen derivatives of hydro-carbons of the aliphatic series. It is caused by the use or handling of, or exposure to such fumes."*

Counsel also cited as relevant s.35(3) of the Workmen's Compensation Act, which provides:

"***Nothing in this section shall affect the right of a workman to claim compensation under this Act in respect of a disease which he contracts, being a disease other than an occupational disease and being a disease which is a personal injury by accident arising out of and in the course of his employment within the meaning of this Act."***

Learned counsel attributed negligence to the defendant as an employer; and he submitted that the common law imposes a duty of care on the master to see that those working for him do not suffer injury as a consequence of his negligence. He urged that the defendant who was employed as a sprayer, had been exposed to hazardous fumes and dangerous chemicals in the course of his duty. Counsel submitted that it was to be concluded from doctors' reports, that the plaintiff contracted *dermatitis* due to contact with chemicals. It was counsel's further submissions that, even if the defendant may now have all required protective gear for spray workers available, it emerges from the plaintiff's evidence that "in the beginning there were no protective gears …" At this point, however, counsel made reference to Plaintiff's Exhibit No. 3. I have looked at that exhibit, but I do not see how it indicates the contention that the defendant worked without protective gear. That exhibit, I note, shows ***Hiribo Mohammed Fukisha*** (File No. C/3023) dressed in long-sleeved overalls and gumboots, head mask with goggles and mouth and nose cover, and he is conducting spray duties with a spray pump with a long nozzle, directed sideways as he holds it across his chest.

However, learned counsel urged that the defendant be found 100% liable, for the reason, as he sensed it, that the protective covers which the employer was providing were inadequate for all the workers, and that "*the workers were sharing mouth masks and there were no personal ones for use"*.

Against his background of submissions on fact and law, ***Mr. Kimani*** proceeded to quantify the damages the plaintiff claims. He submitted that the plaintiff, a healthy man of some 25 years of age, was at first employed for a monthly salary of Kshs.3,230/=, and that he could have worked for as many as 28 years, if it were not for the retirement occasioned by him contracting chemical *pneumonitis*, chemical *dermatitis* and chemical *hepatitis.* Were it not for the involuntary retirement, counsel urged, the plaintiff would have earned in his working life as much as Kshs.3,230 x 12 x 28 totalling to Kshs.1,085,280/=. He also proposed for the plaintiff a general-damages award of Kshs.1,000,000/=. Counsel was relying on the English case ***Nichols v. British Railways Board*** considered in Kemp and Kemp, ***The Quantum of Damages***, Vol. 2 ***(Personal Injury Reports***), p.11711, para. 11-711:

"***NICHOLS v. BRITISH RAILWAYS BOARD (***July 19, 1972; **O'Connor, J.).** Male, aged 51 Locomotive fitter. Suffered from hereditary disease of sickle cell anaemia. Overcome by carbon dioxide fumes. Blood clotting from oxygen deprivation as a result of exposure to gas had resulted in some damage to liver, but abnormality in liver function had cleared up by time of trial. Some brain damage but this was comparatively slight. Complained of headaches and giddiness. Some impairment of sexual function, but this was not as bad as plaintiff himself believed. Any further trouble with blood disease could not be attributed to accident. Off work about seventeen months. Agreed special damages: £1,580. General damages: £6,000 (December 1981 value: £22,000)."

Learned counsel also relied on the English case ***Towlerton v. William Sugden and Sons***, recounted in Kemp and Kemp, ***The Quantum of Damages***, Vol. 2 (***Personal Injury Reports***) at page 4461, paragraph 4-460:

"Female aged 51. Farmer Steam press operator. One of 10 per cent population who was sensitive to nickel. Due to dye in cloth developed rash on hands and forearm in October 1977. Skin on hands broke down. By December 1977 she was having to wear bandages on both arms and hands. Due to damages to skin nickel was able to penetrate her system resulting from further dermatitis. Now suffered from irritation, blisters and skin lesions and severe nervous depression. Her daily life was seriously affected. She could not do the shopping, housework or anything involving contact with metal. Insofar as dermatitis was caused by nickel it would be permanent. For all practical purposes now unemployable. ***Special damages:*** £6,796. ***Total General Damages***: £14,962.50 …"

Counsel relied too on the English case, ***Teague v. Lockwood Foods,*** summarized in Kemp and Kemp,

the ***Quantum of Damages***, Vol. 2 (***Personal Injury Reports***), p. 4461 (para. 4-461):

"Male, aged 65, Former lathe turner. As a result of working with coolant oil which was insufficiently diluted, he contracted dermatitis. First, developed rash on right forearm and eyelids became swollen. Off work about 6 weeks in all. Over next two years had intermittent flare-ups and condition became established and independent of original cause, so that it was likely to continue indefinitely. Now had areas or sheets of lichenified eczema covering insides of both forearms, whole front of chest covered by one sheet lichenified eczema and had patches on left cheek and jaw. Suffered constant irritation at night, so that his wife now slept by herself. Unable to do gardening or sunbathe and too embarrassed to go swimming. Found social occasions, such as going in a crowd to a restaurant unpleasant and embarrassing, as heat caused him to scratch. Made redundant three months before expected retirement in September, 1981. Unable to pursue post-retirement ambition of doing work on own lathe. ***Special damages:*** £80. ***General damages***: £6,000."

Drawing inspiration from the foregoing cases, ***Mr. Kimani*** prayed for Kshs.5,000/= as proved special damages; Kshs.1,000,000/= as general damages; and Kshs.1,085,280/= as loss of earnings – coming to a total of Kshs.2,090,280/=.

G. CONTRACTING TO DO HAZARDOUS WORK CREATES SHARED DUTY OF CARE; AND WHERE SEVERAL FACTORS ARE PRONE TO CAUSE HEALTH INJURY, BURDEN OF PROOF RESTS ON PLAINTIFF – SUBMISSIONS

FOR DEFENDANT

Learned counsel ***Mr. Saende*** submitted that from the evidence, the period of exposure of the plaintiff to chemicals was only *six months*, during which he served in the spraying department. This was from *August 1997* to *January, 1998* after which he was transferred to the ferti-irrigation and maintenance department, where he remained upto March, 1999. The indication in the employment contract, that the defendant worked in the spraying department, therefore would not, counsel submitted, reflect the true position on the ground.

Mr. Saende submitted that the defendant was not liable in respect of dangerous conditions of work as claimed by the plaintiff. For D.W.2 (***Joakim Kimathi Njagi***) testified that the defendant had taken adequate precautions including providing personal protective equipment, full face masks, PVC gloves, water-proof spraying suits and overalls to be worn under the spraying suit, and gumboots. This evidence, learned counsel observed, had been corroborated by D.W.3 who also averred that the defendant enforced use of the safety equipment through disciplinary measures. And, counsel further submitted, D.W.4 had testified that there were additional safety measures, in the shape of medical check-ups for workers every three months. D.W.4 had also testified that the defendant did use guidelines for the safe formulation and use of chemicals. In these circumstances, counsel submitted that the defendant was not in breach of the duty of care owed to the plaintiff.

Learned counsel submitted that the duty of care in the law of negligence is a shared responsibility, and so it was a relevant question whether the plaintiff himself had taken due care to avoid health injuries to himself. Of potentially-risky jobs contracted to be done by an employee, this Court (***Mwera, J***.) had thus held in ***Tembo Investments Limited v. Josephat Kazungu,*** Civil Appeal No. 91 of 2003 (Mombasa):

"***It is an acceptable principle in claims by an employee against an employer in cases like this that if the task to be performed by the former carries an element of risk or danger, the employer is not wholly … responsible for taking precautions to ensure the servant's safety. That duty only goes as far as … is reasonable and … [as far as] the practical extent of taking precaution. Of course, the higher the risk, the higher the level of precaution, but never in full at all. The servant ought to share in that duty of taking precaution. Here the respondent was a watchman and he knew that his work was risky".***

Mr. Saende submitted that the plaintiff herein had not taken any precautions to avert the effects of the exposure*: "If he worked without the equipment provided by the defendant as he claims then he was the*

one who failed in his duty to take precautions …"

Did the plaintiff contract any disease while in the employ of the defendant *as a result of exposure to hazardous chemicals*? Counsel noted that P.W.2 (***Dr. Moses Ngugi***) had testified that it was impossible to tell what chemicals had caused the plaintiff's illness; and that *dermatitis* could be caused by a plurality of substances; and that D.W.4 (***Professor Anastasia Nkatha Guantai***) had given evidence that there was no basis for assigning the cause of the plaintiff's *hepatitis* to horticultural chemicals used at the defendant's farm. D.W.4 had testified that *hepatitis* could be caused by *several factors*; and she had not found any documentation of chemical *hepatitis* in relation to the chemicals in use. Counsel cited the English House of Lords decision in ***Wilsher v. Essex Area Health Authority*** [1988] 2 WLR 557 as authority for the proposition that where a plaintiff's injury could have been caused by any of six possible factors of which the defendant's negligence was only one, the *onus was on the plaintiff to establish the causation.* ***Mr. Saende*** submitted that the plaintiff had not established a casual link between his exposure level, on the one hand, and his ill-health on the other.

Learned counsel submitted that while the defendant indeed owed the plaintiff a duty of care, this duty was *shared*; this duty was not breached by the defendant, and the plaintiff's illness was not caused by any breach of duty on the part of the defendant, the elements of *negligence* have not been proved, and so the defendant should be held to bear no liability in negligence.

However, counsel submitted, should the Court find the defendant liable, then a reasonable approach to the award of damages should be adopted. Firstly counsel agreed to *special damages* in the sum of *Kshs.5,000/=*, for the medical report and hospital bills. Secondly, counsel urged that this was not a meet case for exemplary damages, especially as the defendant had put in place adequate measures to ensure the safety of workers.

Thirdly, and with regard to *general damages*, learned counsel proposed a figure of Kshs.200,000/= for pain and suffering. It was urged that the plaintiff's liver function is, in the evidence, recorded to be back to normal; and the plaintiff's liver is reported by doctors to have resolved. This leaves *dermatitis* as the only injury in respect of which a claim can be made. And on this point counsel relied on the English case, ***Cowan v. Durham County Council,*** summarized in Kemp and Kemp, ***The Quantum of Damages,*** Vol. 2 ***(Personal Injury Reports),*** p. 4462 at paragraph 4-461/1:

"***The plaintiff was a man aged 39 years at the date of the trial. From 1966 he worked as a labourer for the defendants, in which capacity he reached road-laying machinery and his skin was brought into contact with diesel oil. Contact with diesel oil is likely to cause dermatitis. In October 1976 a rash broke out on both hands and spread to both wrists, the stomach and the thighs. The plaintiff continued to work as a labourer for the defendants until May 1977, at which time dermatitis was diagnosed. Because he had continued working after the onset of dermatitis the plaintiff's skin became sensitised to nickel. The evidence was that the plaintiff's primary dermatitis had only been advanced by four or five years as a result of the defendant's negligence and breach of statutory duty, but had there been no negligence and breach of statutory duty the plaintiff's skin would not have become sensitised to nickel. As a result of his skin being sensitised to nickel the plaintiff was effectively prevented from coming into contact with metal objects because nickel was a common ingredient of metal alloys. The plaintiff had to use wooden-handled tools. He was permanently unfit for work in the capacity in which he had been employed by the defendants. He was also unable to carry out maintenance work on his motor car or do painting in his house. The Judge awarded the plaintiff general damages for pain and suffering and loss of amenity of £2,500. He also awarded £600, being a multiplier of 12 applied to a figure of £50 per annum, in respect of the plaintiff's inability to maintain his motor car or paint his house and £10,000 in respect of future loss of earnings."***

While urging the relevance of the ***Cowan*** case, counsel submitted that it should only apply with modifications to suit it to the Kenyan economic situation. He submitted that the plaintiff's salary of Kshs.2230 per month should be added to the house allowance of Kshs.800/= per month to give a total monthly earning of Kshs.3,030/=; and as the plaintiff would have worked upto the age of 45 (a reasonable age considering the nature of his work), his loss of future earnings would be Kshs.3,030 x 12 x 20 =

Kshs727,200/=. Learned counsel urged that the total amount which should be awarded in damages should be Kshs.932,200/=.

H. ANALYSIS

1. Issues of Fact

From the testimonies given for the parties in this case, certain facts have emerged which I will set out here:

a) Though there was conflicting testimony as to the period during which the plaintiff was in the employ of the defendant, it emerges from all the evidence that he was at first a *casual worker*, as from *16th June 1996*, but *15 months* later, on *1st October, 1997* he was given a formal contract of employment which provided for a salary, house allowance and "*chemical allowance"*. The contract backdated the effective date of employment to *1st August, 1997*, and defined his position as *sprayer.*

b) There is evidence that from *1st August 1997* to *January 1998*, i.e. a period of *five months*, at the very beginning of his contractual employment, the plaintiff was working in the spraying department.

c) The plaintiff's evidence is that during the entire period of his service as a casual worker, from *16th June, 1996* to *1st August, 1997* – i.e. a period of *13 months* he was working in the *Spraying* department; and this evidence has not been seriously contested by the defendant, and so I take it to be true.

d) It is clear, in the circumstances as recounted above, that for 13 months of the casual-work period, and 5 months of the contractual-work period, i.e. a total of *18 months*, the plaintiff was working in the *Spraying* department.

e) In *January, 1998* after five months of contractual work in *Spraying*, the plaintiff was transferred to another department, the *ferti-irrigation and maintenance* department. No evidence was adduced that he was ever re-deployed in the Spraying department. Therefore I take it as a fact that the plaintiff had one continuous period of engagement in the Spraying department, running to *18 months*, from the beginning of his working engagement with the defendant.

f) There is evidence that the plaintiff became ill after the first five months of service as an employee on contract, in the Spraying department. On *16th January, 1998* he obtained a medical certificate from Nazareth Hospital. This certificate stated that he had a liver disease – *hepatitis*. On the basis of that certificate, and the record obtained from Nazareth Hospital, ***Dr. J. M. Kamau*** of Kiambu District Hospital on *25th February, 1999* (i.e. one year since the plaintiff had been examined at Nazareth Hospital) gave the plaintiff a letter recommending retirement on medical grounds.

g) It is therefore clear that in the one-year preceding his retirement in March, 1999 the plaintiff had not served in the Spraying department.

h) The plaintiff was examined again some *seven* years after he had left the employ of the defendant. ***Dr. Moses Ngugi*** (P.W.2) examined him on *20th July, 2005* and took into account the medical record made by Nazareth Hospital on *16th January, 1998.* Although ***Dr. Ngugi*** found no physical injury in the plaintiff's rib-cage, he observed from the Nazareth Hospital record that *"there could be lung impairment which could be treated with chest physiotherapy if pain persists"*. P.W.2 noted chemical injury to the plaintiff's eyes, skin and lungs. He concluded that the ailment of contact *dermatitis* would have come from the plaintiff's work experience.

i) ***Dr. Moses Ngugi*** (D.W.2) testified that contact *dermatitis* could be caused by any one of several contacts – such as with worms, weeds, cloth, chemicals; and ***Professor Anastasia Nkatha Guantai*** (D.W.4) testified that a proper assessment of the plaintiff's health status would require an understanding

of the environmental context in which he had lived before taking up employment with the defendant.

j) During the plaintiff's working experience in the Spraying department – and I have already determined as a fact that he did spraying work for a continuous period of *18 months*, from *16th June, 1996* to *January, 1998* – was he provided with *protective apparel* against chemical harm? The plaintiff's evidence is that for the first *13 months* of his work as a casual worker, he had no access to protective gear during spraying work; that he worked under four supervisors who would entertain no complaints or demands from him; and that even after he was given a formal contract in *August, 1997* he had no protective gear, and that prior to *December, 1997* the defendant did not provide protective gear even to contract workers such as himself. This would mean that for a continuous period of *18 months* the plaintiff worked as a sprayer without protective cover.

k) How does the defence meet the claim that upto *December, 1997* it had not provided anti-chemical protective gear to the plaintiff? My assessment of the defence evidence in this respect is that it is largely *apriori,* and only a limited part is founded on actual perception**.** ***Professor Guantai*** (P.W.4) testified that she had found in place at the defendant's farm the WHO – recommended protective gear; she found workers to be taking regular medical check-ups; she found that very toxic chemicals were not in use; she found all the necessary worker-health infrastructure in place –and concluded that the level of the plaintiff's exposure to chemicals would have been negligible; that the plaintiff could not have suffered toxicity. D.W.2 (***Joakim Kimathi Njagi)*** gave a specific day, *28th May, 1997* when the plaintiff was issued with protective gear. (This coincides with the 18 months during which the plaintiff averred that he had no protective gear). D.W.2 averred that even if the plaintiff had been a casual labourer for some time, protective gear had been provided to casuals, as well as to workers on contract. D.W.2 testified that during the one month (December-January, 1997) when he was a supervisor in the Spray department and the plaintiff worked there, he never saw the plaintiff work without protective gear; in his words: "*the equipment provided was enough for all workers."*

What conclusion is to be drawn from this conflicting state of evidence? As I have noted earlier, one of the exhibits tendered by the plaintiff (plaintiff's exh.No.3) shows him, while in the course of spraying work, fully clad in protective gear; there was no evidence tendered that the apparel in that exhibit was in any manner incomplete. Hence I must draw the conclusion that *during at least part of the 18 months* when he claims to have been given no protective clothing, the truth is to the contrary — namely that there was in place an arrangement for protective clothing for the spray workers *including the plaintiff.* Moreover, as I have noted again, there is positive evidence from DW2 (***Joakim Kimathi Njagi***) that on *28th May, 1997* the plaintiff had been issued with protective gear.

It is my finding on *fact,* therefore, that the defendant had not failed – and certainly not for the continuous period of 18 months during which blame has been assigned – to provide protective clothing for the use of the plaintiff, as he conducted spraying work. I therefore find no negligence on the part of the defendant, in the shape of failure to supply protective clothing; and as a corollary, I would find that if the plaintiff did not use such protective clothing, he would have contributed to any injury caused to himself.

2. Issues of Law

The plaintiff's case is founded firstly on claims of fact which, when considered in the light of the *common law* which is the general law in force in this country in the sphere of civil liability, might lead to liability being ascribed to the defendant.

From my assessment of the evidence, it is not possible to fix the defendant with liability based on the common law tort of negligence.

However, the *obligation of an employer to make payment to an employee who is injured* in an accident or mishap involving potentially dangerous substances used in the course of employment, in Kenya, is founded upon *statute law* – the Workmen's Compensation Act (Cap. 236).

S.35(1) of the Workmen's Compensation Act provides:

"***Where a medical practitioner grants a certificate —***

(a) that a workman is suffering from a scheduled disease causing disablement and

(b) that such disease was due to the nature of the workman's employment and was contracted within the twenty-four months previous to the date of such disablement…,

the workman…shall be entitled to claim compensation under this Act as if such disablement had been caused by an accident…"

S.36(1) of the same Act provides:

"***Compensation shall be payable by the employer who last employed the workman during the period of twenty-four months referred to in section 35 unless the employer proves that the disease was not contracted while the workman was in such employment."***

S.37(3) of the Act thus provides:

"***Compensation under this Part IV [i.e. Part – Occupational Diseases] shall be calculated with reference to the earnings of the workman under the employment from whom the compensation is recoverable, and the monthly earnings of the workman shall be computed in such manner as is best calculated to give the rate per month at which the workman was being remunerated at the date of the grant of the certificate referred to in section 35…"***

S.38 of the Act provides for *presumption* that the health-injury complained of has arisen out of the employment in question:

"***If a workman who becomes disabled by …any scheduled disease was within the period of twenty-four months immediately preceding the disablement … employed in any occupation specified in the Third Schedule opposite such disease, it shall be presumed, unless or until the contrary is proved, that the disease was due to the nature of such employment."***

The Third Schedule to the Workmen's Compensation Act (Cap.236) is an accompaniment to Part IV of the Act and gives the description of "*occupational diseases";* and the relevant component may here be set out:

DESCRIPTION OF DISEASE	*NATURE OF OCCUPATION*
Inflammation or ulceration of the skin produced by dust, liquid or vapour (including chrome ulceration or its sequelae)	*Exposure to dust, liquid or vapour*
Primary epitheliomatous cancer or ulceration of the skin	*The use or handling of, or exposure to, tar, pitch, bitumen or mineral oil (including paraffin), or any compound, product or residue of any of these substances*

Halogen derivatives of hydro-carbons of the aliphatic series	*The use or handling of, or exposure to the fumes of, or vapour containing, any halogen derivative of any hydro-carbon of the aliphatic series*
Organo-phosphorus compounds	*The use or handling of, or exposure to the fumes of, or vapour containing, any of the organo-phosphorus compounds.*

It is on record that on *16th January, 1998* the plaintiff had obtained a certificate from Nazareth Hospital indicating that he had been diagnosed with a liver disease; and ***Dr. Kamau*** at the Kiambu District Hospital, on *25th February, 1999* recommended the plaintiff's retirement on medical grounds on account of having contracted *chemical hepatitis 2 to Hydro-carbons*, *chemical dermatitis* and *chemical pneumonitis*. In the later report of ***Dr. M. Ngugi*** (plaintiff's exh.No.8) (2005) it was reported that the plaintiff had not completely healed and had decreased visual acuity and noticeable skin changes.

The plaintiff's health condition deteriorated, as I find from the evidence, within 24 months of his coming into the employ of the defendant. There is evidence of medical certification of the plaintiff's ailments. DW4 gave evidence, which I believe to be true, that the main chemical category used by the defendant in spraying their flowers is *organo-phosphates*. In my assessment, the ailments suffered by the plaintiff fall squarely within the category of "occupational diseases" specified in the Third Schedule to the Workmen's Compensation Act (Cap.236).

And so taking into account the facts adduced in the evidence, as well as the applicable law, I now hold that an obligation falls on the defendant to compensate the plaintiff, on the terms of compensation specified in s.37(3) of the Workmen's Compensation Act (Cap.236).

Apart from the special damages and the damages payable under the Workmen's Compensation Act, the plaintiff prays for Kshs.1,000,000/= as general damages. General damages are compensatory damages as assessed by the Court, on the basis of *common law principles of liability*. The relevant common law basis of liability would have been the tort of *negligence*; but as I have already held that such liability has not been established, I am unable to allow the proposed claim of general damages. The plaintiff, in this case, only qualifies for *statutory compensation*, by virtue of the Workmen's Compensation Act (Cap.236).

It emerges from the record that the plaintiff was 25 years old when he was retired on medical grounds; and counsel urged that compensation to him should be in respect of a working life of 28 years – on the supposition that he would have been in employment up to the age of *53*. By contrast counsel for the defendant suggests that the plaintiff should be treated as having had the capacity to work upto the age of *45*. I would be in agreement with counsel for the defendant on one point, that it would not have been possible for the plaintiff to work with chemicals up to relatively advanced age; and on that basis I hereby determine the maximum working age appropriate to the plaintiff, in the context of the occupation in which he was involved, as *48 years*. Therefore I will compute compensation for the plaintiff in relation to a period of 23 years — being the period that was yet to elapse in his working life.

I. DECREE

I award judgment in favour of the plaintiff as follows:

(1) Special damages: Kshs.5,000/=.

(2) Compensation by virtue of the Workmen's Compensation Act (Cap.236): Kshs.3030 x 12 x 23 = Kshs.806,280/=.

(3) Interest on item (1) hereinabove at Court rate with effect from the date of filing suit.

(4) Interest on item (2) hereof at Court rate with effect from the date hereof.

(5) 70% of the taxed costs of this suit to be borne by the defendant.

(6) Interest on item (5) with effect from the date of filing suit.

DATED and **DELIVERED** at Nairobi this 22nd day of September, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Mwangi

For Plaintiff: Mr. Owiti, Mr. Kimani – instructed by M/s. Kirundi & Co. Advocates

For Defendant: Mr. Majanja; Mr. Saende – instructed by M/s. Mohammed Muigai & Co. Advocates