REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 53 of 2002 (1)

JOHN CHARO …….....…… PLAINTIFF

- Versus –

CHRISTOPHER NJAO ……..…….....…… DEFENDANT

JUDGMENT

This case was partly heard by the late G. A. Omwitsa Commissioner of Azzise. The plaintiff and his only witness. Dr. Frank Obwana, testified before him and closed his. Under the Provisions of Order 17 Rule 10 and with the consent of the parties I was called upon to hear the case from where it had reached.

This is a claim for damages for the injuries the plaintiff suffered while digging a pit latrine or soak pit for the defendant. The plaintiff's case is that on or about the 27th June 2001 the defendant employed him as a casual labourer to dig a pit latrine for him. He claims that it was a term of the contract of employment that the defendant would take reasonable care to ensure that he provided him with a safe place of work and that he did not expose him to risk or injury. That in breach of that term and his common law duty of care the defendant provided him with a weak rope which got cut as the plaintiff was climbing out of the pit causing him to fall back into the pit as a result of which he suffered a fracture of the right leg leading to its amputation above the knee. He therefore claims damages.

In his defence the defendant denied employing the plaintiff and stated that the plaintiff suffered injuries as a result of his own negligence.

This in my view is a simple claim that raises two main issues for determination. First, whether or not the defendant is liable to the plaintiff and secondly, the quantum of damages payable to the defendant if the defendant is liable.

On the issue of liability two things need to be determined. The first one is whether or not the plaintiff was an employee of the defendant or an independent contractor. The second point is whether or not the defendant provided the plaintiff with the tools or implements for the work including the rope which got cut.

On the issue of liability, other than his own testimony the plaintiff did not call any other evidence. He testified that the defendant engaged him as a casual labourer to complete digging for him a pit latrine which had been dug by someone else up to a depth of 47 feet and abandoned. He said the defendant agreed to pay him Sh. 300/- per week and also engage a help for him whom he would pay Sh. 200/- per week. He further stated that the defendant provided all the tools or implements including a rope for climbing into and out the pit. On the 26th June 2001 at about 10.00 a.m. after he had worked for about 2 hours as he was climbing out of the pit using the rope which the defendant had provided for the work got it cut and he fell back into the pit thereby fracturing his right leg.

On his part the defendant testified and called his wife and another person as defence witnesses. In his testimony the defendant said he knew nothing and had never dug a pit latrine. The person who had dug the pit up to a depth of 47 feet and abandoned it had used his own implements. He said even the other *fundis* on the site like masons, carpenters and plumber were all using their own tools. He said that he

discussed with the plaintiff and agreed to pay him Sh. 500/- per foot and that the plaintiff was to use his own implements. He denied providing the plaintiff with a rope or any other implement or tool for the work. He said the plaintiff was to work independently. The evidence of his wife and that of his other witness corroborated his.

I have considered all this evidence. Though the plaintiff did not testify before me and I have warned myself of the fact that I did not observe his demeanour, I am satisfied and I find that the plaintiff did not tell the truth. In cross examination he said he had been doing that type of work of digging pit latrines and wells for 13 years and he was experienced. He did not say that wherever he worked for those years he was provided with implements. He said that to do that type of work one needs a hammer, chisel, bucket and a rope. If indeed the defendant provided him with these implements as the defendant had not done this type of work before one would have expected the defendant to provide new implements in which case the issue of a new rope getting cut would not have arisen. The defendant and his witnesses, one of whom was an independent witness, were firm on the fact that the plaintiff used his own implements and that the defendant did not provide them.

Much as I sympathise with the plaintiff who suffered serious fractures leading to the amputation of his right leg, on the evidence on record, I am nonetheless satisfied that the plaintiff was not an employee of the defendant but an independent contractor who used his own implements. He was therefore the author of his own misfortune in that he used his own old and weak rope which got cut causing him to fall back into the pit. In the circumstances, I dismiss his entire claim with costs.

In **Selle – vs – Associated Motor Boat Company and Another (1968) EA 123** at page 131 the Court of Appeal advised that:-

> **"It is always desirable, in a suit for damages, for the trial judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful even though he gives judgment for the defendant. Much time and expense can be avoided if this course is followed."**

I would like therefore to assess the damages I would have awarded the plaintiff had I found for him.

It is not in dispute that the plaintiff suffered a comminuted fracture of the right tibia/fibula and was rushed by the defendant's wife to Coast General Hospital where he was admitted for one month. Initial treatment consisted of the application of a plaster of paris, antibiotics and painkillers. After 10 days the fracture had no signs of healing and instead it formed sepsis. An emergency amputation had to be carried out. Dr. Frank Obwanda PW1 classified this injury as a permanent incapacity and recommended a prosthesis which he said would cost about Sh. 250,000. For pain and suffering counsel for the plaintiff recommended an award of Sh. 1,000,000/- while counsel for the defendant recommended Sh. 500,000/-. In **Apollo Mariika – Vs – Kenya Railways Corporation, Nairobi HCCC NO.** and **Peter Mativo Mwania – Vs – Michael Wambua Ndambuki and Another, Mombasa HCCC NO. 86 of 1991** Sh. 380,000/- and Sh. 550,000/- were awarded on 23rd October 1987 and 14th May 1993 respectively. Considering that those authorities are over 10 years old, I would have awarded the plaintiff in this case Sh. 750,000/- for pain and suffering.

The plaintiff claimed that he used to earn Sh. 15,000/- a month from digging pits and related work. He however did not produce any evidence to support that. If I had found for him I would have considered him as a casual worker earning Sh. 5,000/- a month and awarded him Sh. 600,000/- for loss of earning capacity after applying a multiplier of 10 years. I would have also awarded the plaintiff Sh. 250,000/- for an artificial leg and special damages of Sh. 1,500/-.

DATED and delivered this 25th day of August 2005.

D. K. MARAGA

JUDGE