REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 468 of 2001

DENNIS O. NYANGILO ALIAS OTIENO…….PLAINTIFF

VERSUS

AFRICAN MARINE & GENERAL

ENGINEERING COMPANY LIMITED……..……DEFENDANT

JUDGEMENT

Dennis Omondi Nyangilo Alias Otieno, the plaintiff in this case claims both special and general damages from the defendant for injuries he suffered on the 6th January 2000 at his place of work. He claims in his plaint that he was at the material time employed by the defendant as a casual cook earning Sh. 3,100/- a month. He avers that on 6th January 2000 while engaged in his said employment when carrying a sufuria of hot oil after making mandazi he slipped and the hot oil splashed on him causing him serious burns.

The plaintiff attributes his fall to negligence of the defendant in that the defendant exposed him to risk of injury which it knew or ought to have known; that defendant failed to provide him "with safe working conditions;" that the defendant failed to train him on how to handle hot oil; that the defendant failed to provide him with safety devises, protective clothing and or apparel, that the defendant failed to take adequate precautions for his safety while engaged in his said employment and that the plaintiff instructed him to work on a slippery floor.

The plaintiff claims that he suffered second degree burns on his right upper limb and trunk as a result of which he is now incapable of engaging in any gainful employment. He therefore claims, in addition to general and special damages, general damages for loss of future earning capacity and Sh. 450,000/- for reconstructive surgery.

In its written statement of defence the defendant denied liability and stated that it did not employ the plaintiff. The plaintiff, it said, was employed by a third party who was operating a canteen upon the defendant's premises. Later the defendant obtained leave and served a third party notice to the four third parties named herein above claiming indemnity and or contribution.

The plaintiff testified and called one witness, Dr. Patrick Odede, who examined him and prepared a medical report.

In his testimony the plaintiff stated that for six years he was employed by the defendant as a casual cook earning Sh. 3,100/- a month with at times, some overtime payment in addition. He denied knowing the first third party, Mwangaza Canteen Management. He said he did not know if the defendant had given the running of the canteen to Mwangaza Canteen Management. He denied that the 2nd, 3rd and 4th third parties used to run the canteen even though he used to work with them at the canteen.

It was the plaintiff's further testimony that employees of the defendant used to eat at the canteen. A daily record was kept of the employees who ate at the canteen which was sent to the defendant and the defendant used to pay at the end of the month for meals.

Safe for the letter dated 17th July 2000, **Exhibit 4** the plaintiff admitted in cross-examination that he had no other document to prove that he was employed by the defendant.

On 6th January 2000 he reported on duty as usual at 6.30 a.m. After cooking mandazi while carrying the sufuria he was using which had hot oil he slipped and the hot oil splashed all over his body causing him serious burns. He said he slipped because the floor was wet with a mixture of water from a leaking tap and oil which had been sizzling from the mandazi cooking sufuria. He attributed that to negligence of the defendant who failed to repair the leaking tap. He said the defendant had failed to supply him with gumboots or an apron.

After injury the plaintiff said he was taken to Makupa Nursing Home where he was admitted for a month. When he was going for an operation, he said, the defendant wrote the letter dated 17th July 2000 – Exhibit 4 to Makupa Hospital to treat him and send the bill to it (the defendant).

After the plaintiff closed his case the defendant called one witness its personnel officer Mr. Cyprian Kobia Mberia. He testified that in 1997, after a competitive tendering process a group of the defendant's employees operating under the name of Mwangaza Canteen Management won the tender to run the canteen and has been running it since then. This, he said, was a commercial venture as the group was required to raise its own working capital. The group was required to hire its own employees to work at the canteen. He denied that the plaintiff was an employee of the defendant. After injury the plaintiff did not lodge any workmen compensation claims with the defendant. He said that even though the defendant wrote the letter Exhibit 4 stating that the plaintiff was its employee the plaintiff was actually an employee of the first third party. The defendant wrote that letter at the request of the first third party to facilitate the treatment of the plaintiff. After treatment the defendant settled the plaintiff's medical bill and recovered the amount from the first third party. He produced statements showing that.

Mr. Mberia further testified that Mr. Kaseke whom the plaintiff said paid his salary was a technical assistant in the defendant and a member of the Mwangaza Canteen Management committee which operated the canteen. He also said that George Mwashambe, the second third party, was an official of Mwangaza Canteen Management at the time the plaintiff suffered an accident. In cross examination by counsel for the plaintiff he was firm that the records in the personnel department of the defendant where he worked did not have the name of the plaintiff as one of its employees, not even as a casual employee.

Mr. Mberia further stated that the prices charged at the canteen were jointly structured by the defendant and the third parties to take into account the subsidies in the form of non-payment of rent and water as well as electricity charges that were extended to the third parties. The defendant agreed and does deduct by check-off system the cost of the meals each employee consumes at the canteen and pays to the first third party at the end of each month.

On behalf of the third parties only Fredrick Ouma Akhaenda, the third party testified. His testimony was that the canteen in the defendant's premises is operated by a group of the defendant's employees operating under the name of Mwangaza Canteen Management. That group, he said, was, with the blessing of the defendant, formed in 1997 for the sole purpose of operating the canteen and it has been operating it since then. He said that the group does not earn anything. The defendant controls the prices charged at the canteen and pays them all the meals consumed by its employees. He further stated that the defendant maintains and repairs any structural defects in the canteen but the cleaning of the canteen itself is done by the canteen workers. If any one is injured as a result of disrepair the defendant is liable to him for damages.

In cross-examination by counsel for the defence Mr. Akhaenda grudgingly conceded that Mwangaza Canteen Management has its own employees who work in the canteen and that the plaintiff was one of them. He also confirmed that George Mwashumbe and Simon Mutua, the second and fourth third parties

are members of the canteen management group.

That was the evidence tendered in this case. The main issue for determination is of course liability. Whether or not the defendant was the plaintiff's employer at the material time and whether it is liable to him for damages. If the defendant is liable I have also to determine whether or not it is entitled to indemnity from the third parties and if so to what extent.

It is the plaintiff's case that he was, at the material time, employed by the defendant earning a salary of Sh. 3,100/- per month. Save for the letter **Exhibit 4** he has no letter of appointment or anything from the defendant showing that he was its employee. He said he knew he was employed by the defendant as he was always paid by Mr. Kaseke, an employee of the defendant. He denied knowledge of the first third party.

Having observed the demeanor of the plaintiff I have no doubt in my mind that he was not a truthful witness. When being cross-examined by the counsel for the defendant he said he did not know how to read. But when it came to the turn of counsel for the third parties to cross-examine him, he was given a document written in English and he read it. Whereas he was hesitant in answering questions put to him by counsel for the defendant, he readily answered those asked by counsel for the third parties.

The plaintiff's evidence that he was employed by the defendant was contradicted by that of the Fredrick Akhaenda, who as I have said grudgingly conceded that the plaintiff was an employee of the third parties.

It is incredible that the third parties could go into a competitive tendering process, raise working capital and operate the canteen for now close to ten years as philanthropists. I am satisfied after perusing Exhibit D1 and D2 that the third run the canteen as a commercial venture and that they employ their own workers the plaintiff having been one of them. As to the letter Exhibit 4 I am satisfied and I hold that it was written by the defendant to facilitate further treatment of the plaintiff. The plaintiff himself said it was written when he was going for an operation.

Having considered all the evidence tendered in this case I have come to the conclusion that the plaintiff was at all material times an employee of the third parties and not the defendant. The defendant did not owe him any duty of care. Though sympathetic to him for the serious injuries he suffered, the plaintiff has himself to blame for flogging a wrong horse. I dismiss with costs his claim against the defendant.

Having dismissed the suit against the defendant the issue of the third parties liability to indemnify the defendant does not arise. I therefore dismiss the defendant's claim against the third party.

As to the costs of the third party proceedings I hold that each party bears its own costs. The third parties knowing very well that they were the employers of the plaintiff studiously and apparently in collusion with the plaintiff attempted to deflect liability to the defendant. In the circumstances they are not deserving of any order for their costs.

As advised by the Court of Appeal in **Selle-Vs-Associated Motor Boat Company and Another (1968) EA 123** at page 131: -

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

It is not in dispute that on 6th January 2000 when working in a canteen situated in the defendant's premises the plaintiff suffered an accident resulting in serious burns. PW1, Dr. Patrice Odede a consultant surgeon who operated on the plaintiff testified that the plaintiff suffered second degree burns over his abdomen and the right upper limb and trunk. He was treated at Makupa Nursing Home for eight months. The treatment conservative initially but later on he had surgery for skin grafting and release of

contractures which had developed on the right elbow. When he examined him on 5th September 2001 the plaintiff, despite the operation, had keloids on over 40% of the surface area of the right limb and there was evidence of early contracture formations. The keloins require further reconstructive surgery which Dr. Aref, a plastic surgeon who saw the plaintiff, estimated will cost about Sh. 450,000/-. He produced his report – Ex.1 and the receipt Ex.2 for the Sh. 1,500/- he charged for the report.

The plaintiff said that as a result of the injuries he suffered his right hand is weak and he is now not able to do anything. At the time of injuries he used to earn Sh. 3,100/- which together with overtime averaged at Sh. 5,000/- per month. In addition to the sum of Sh. 450,000/- required for reconstructive surgery the plaintiff's advocate, Mr. Tarus, recommended an award of Sh. 800,000/- for pain and suffering and loss of amenities and cited the cases of **Boniface Musyoka Ndolo –Vs – Pauline Katonge Musau Naironi Civil Appeal No. 34 f 1996 (CA)** in which an award of Sh. 600,000/- was made in 1997 and **Nzilani Ndari – Vs – Boniface Musyoka Ndolo and Another, Nairobi HCCC No. 954 of 2000** in which Visram J. awarded Sh. 500,000/- on 1st February 2001.

In the first case the plaintiff suffered severe burns over his face, neck, trunk, arms and abdomen covering 25% of the total body suffice with concussion of the brain. The injuries healed leaving severe hyper tropical scars all over the body, severe contractures of the left side neck severing limiting the neck movements and severe contractures of the right elbow severely limiting it. Those were more serious injuries than the ones suffered by the plaintiff in this case. The injuries in the second case of **Nzilani Ndari** are more comparable to those suffered by the plaintiff in this case in which the burnt area presented disfigurement assessed at 20% to 25%. Considering that the award of Sh. 500,000/- was made in 2001 I consider a sum of Sh. 600,000/- a reasonable award for pain and suffering and loss of amenities in this case.

The plaintiff also claims damages for loss of earning capacity. In **Kenya Bus Services Limited – Vs – Samuel Wanguru Njoroge, Civil Appeal No. 133 of 2001 Nairobi** in which the plaintiff, a hawker aged 26 years suffered injuries to the right shoulder, hip and right leg which was amputated below knee level a multiplier of 20 was applied.

The plaintiff in this case was 30 years old in the year 2000. He is now 35. Taking into account the fact that the plaintiff will be paid in lump sum what he would otherwise have earned over a period of several years, I consider a multiplier of 15 appropriate and award him Sh. 558,000/- (3,100 x 12 x 15) under this head.

The plaintiff also claims Sh. 450,000/- being the amount the doctors estimated it will cost him for reconstructive surgery. I award him that sum as well as the proven specials of Sh. 1,500/-. I would have awarded the plaintiff a total of Sh. 1,609,500/- had I found for him. This sum is made out as follows:-

General damages for pain and suffering	
and loss of amenities	Sh. 600,000.00
General damages for loss of earning	
capacity	Sh. 558,000.00
Cost of reconstructive surgery	Sh. 450,000.00
Special damages	Sh. 1,500.00
Total	**Sh.1,609,500.00**

However, for the reasons already stated the plaintiff's claim against the defendant is dismissed with costs to the defendant and the defendant's claim against the third parties is dismissed with each party bearing its own costs.

DATED and delivered this 30th day of September 2005.

D. K. MARAGA

JUDGE