REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 67 (RD) OF 1999

JOSEPH IBRAHIM ALASAU ………..………………………. PLINTIFF

- VERSUS -

1. STEERING SHIP CONTRACTORS ….………………. DEFENDANT

2. BAMBURI PORTLAND CEMENT LTD. …………. THIRD PARTY

J U D G E M E N T

The Plaintiff was on the 25th May, 1998 at around 5.30 a.m. injured while in the course of his duties with the Defendant Company. He thereafter filed the present claim seeking Damages for injuries suffered as well as loss of earnings. His claim is based on the statutory provisions of Duty of core as well as negligence on the part of the Defendant. The Defendant did file a defence on 6th July, 1999 and on 8th June, 2000 filed an Amended Defence with leave of the Court introducing a claim for Indemnity against a Third party, namely Bamburi Portland Cement Ltd. The Third party proceedings were subsequently filed and the Third party did enter a defence therein on 18th December, 2000.

When the trial commenced on 21.6.2001, the Defence and Third party Counsel's unsuccessfully applied for an adjournment but this was declined and the hearing was set to proceed at 12.00 p.m. However for some strange reasons, both the Defence and Third Party Counsel later informed the court they had heard the court as saying their application for an adjournment had been allowed. This was later corrected and they were allowed to recall the plaintiff for cross examination.

The plaintiff was engaged by the Defendant on casual basis to Load Fluorspar on Motor Vessels at the Third party's silos situated at the Port of Mombasa. He was to do so using a conveyor belt which ran from the silos onto the Motor Vessel. He was also to ensure the product loading was running smoothly by clearing any spill over that interfered with the running of the said belt.

It was his evidence that his supervisor one Bernard Nzivo had instructed him to switch off the conveyor belt and proceed to clear the lower part of it as some fluorspar had stuck on it. He switched it off and while in the process of clearing it someone switched on the Conveyor Belt and his fingers were caught pulling his whole arm inside. This caused the said hand to be crushed, and his scream attracted someone who switched off the machine. He said although he never saw Mr. Nzivo switch on the machine, he was convinced that non – other than Nzivo switched the belt. It was further his evidence that the Belt was owned by the Third Party who had stationed an operator at the main switch point and that each Conveyor Belt had its own switch. According to the plaintiff, there were other second switches apart from the main one which the plaintiff had authority to switch off in case of an emergency such as had occurred on the said date and once the second switch was of, the main switch operated by the Third Party could not be used to switch on the belt. One had to switch on the same second switch to re-start the Belt once more. This he said was a usual mode of operating the Belt and he had performed the said duties for a period of 5 months prior to the incident.

On Cross-examination by Mr. Nyamboye for the Defendant, he said there was no possibility of an employee of the Third party to have switched on the Belt as the Third party's only employee was stationed at the main switch cabin and all other workers were those employed by the defendant. He also denied a suggestion that the said belt was defective. The particulars of negligence attributed to the Defendant are set out in paragraph 6 of the plaint and are into two categories. Paragraphs 6 (a-d) are particulars of negligence attributed to the Defendant. These, the plaintiff has not proved. In the second category are those particulars of negligence attributed to Mr. Bernard Nzivo and for which if proved the Defendant is vicariously liable. I will consider each separately.

> *"6)e) One Benson Nzivo an employee/servant of the defendant, caused the machinery to start or be started when he knew or ought to have known that the plaintiff was removing materials from the conveyor belt."*

In his evidence, the plaintiff said he never saw Bernard Nzivo switch on the Belt nor anyone else. He even gave contradictory versions of where Mr. Bernard Nzivo was at the time. In his evidence in chief he said the Belt was switched on by Mr. Nzivo as they were the only two persons there. However on cross-examination by the court, he said the people present were Mr. Said Abdalla, Mr. Nzivo, Mr. Hassan and the claimant. When Crossexamined by Mr. Kingi for the Third party he said he was with Mr. Abdalla Said, and Mr. Nzivo. Having not seen Mr. Nzivo switch on the machine, there has been no other evidence to show that he, Mr. Nzivo did cause the machine to be switched on. The same result would befall the other two particulars that is:

> "*(f) Benson Nzivo failed to ascertain or ensure that it was safe to start the motor before causing or permitting, it to be started.*
>
> *(g) Benson Nzivo failed to pay any or any sufficient heed to the presence or position of the plaintiff."*

The last of the particulars is that:

> *"(h) In the premises failing to provide and maintain safe plant and equipment or to provide a safe place of work for the plaintiff or to provide a safe system o f working"*

As I had said earlier, the plaintiff's evidence was that the equipment was not defective and he never attributed the accident to any unsafe system of working. The plaintiff's case as state earlier, is based on a statutory Duty of care and negligence and in such a case, the plaintiff has to proof the same for the success of his case. In this case, the plaintiff did not call any other evidence apart from the Doctor and therefore proof of the allegations of negligence is to be weighed against his evidence. From his evidence, he appears to base the blame upon Mr. Nzivo on assumption. He does not show why it can be only Mr. Nzivo and not any of the other workers who could have switched on the machine or why he strongly holds it the Belt could only have been switched on and was not indeed defective.

The defendant and Third party did not call any evidence having failed to avail the necessary witnesses before the court and therefore non of the particulars of negligence attributed to the plaintiff were proved even through Cross-examination of the plaintiff and neither did the Defendant proof its case as against the Third Party.

The question is therefore whether the plaintiff has proved his case on liability. There is no denial that the plaintiff was injured on the arm on material day when his arm was caught by the conveyor Belt; that he was on duty and that the conveyor Belt was owned by the Third party who had only one employee present and at the main controls. It is also not denied that the plaintiff was at the time working with Mr. Nzivo the supervisor, Mr. Abdalla and Mr. Hassan. The plaintiff has however failed to proof that it was indeed Mr. Nzivo as he has alleged who switched on the conveyor Belt. In the circumstances, the plaintiff's case on liability fails.

I will now look at the Damages I would award if the plaintiff had succeeded on the issue of liability.

The plaintiff did say he was injured on right arm leading to amputation. Dr. Hemant Patel who had examined him for purposes of preparing the medical Report described the injury as loss of right arm- scapula and clavicle following a crush injury. The loss of the arm was from the shoulder level. He also said he had raised an invoice for the said Medical Report for Kshs.2,000/= which he produced in evidence. Counsel for the plaintiff relied on the following case law:

1. NAOMI WANGUI RUMANO -VS- ALICE WANJIKU KIMANI & ANOTHER (NRB) UR HCC 223 OF 1996.

The plaintiff in that case was awarded in the year 2001 Kshs.1,350,000/= under the Head of pain, suffering and loss of amenities for an injury leading to an amputation of her arm above elbow. She also suffered Deep abrasions to the right breast leading to contracted uncosmetic painful scarring which reduced, her chances of marriage.

2. FLORENCE KAITU NYAMAI –VS- COAST BUS COMPAY & ANOTHER HCC 401 OF 1983 MSA (UR) The plaintiff was awarded Kshs,900,000/= in 1995 as Damages for pain & Suffering and loss of amenities for a resultant injury leading to amputation of right arm from the mid-level. She was a young unmarried lady which made it difficult to perform domestic chores.

3. IN FREDRICK OTIENO KOMBO –VS- TANA EXPRESS BUS & 3 OTHERS – HCC 177 IF 1994 MSA (UR) The plaintiff too lost his upper limp at shoulder level and was 1995 awarded Kshs.900,000/=.

Counsel for the plaintiff submitted that an award of Kshs.1,600,000/= under this head would be reasonable while the defence submitted an award of Kshs.600,000/=and the Third party Kshs.700,000/= relying on the same authorities. In this case, the plaintiff is a young man and still has many years ahead. He no doubt suffered untold pain at the time his arm was being crushed and in the circumstances I would assess an award of Kshs.1,300,000/=.

The Plaintiff in his evidence did say he worked as a casual employee for the Defendant earning an amount of Kshs.24/= per hour for a 8 hour per day shift for 7 days a week. He produced a copy of an LD 104 Form duly completed by his employer and Doctor Gathua and it shows his earnings as Kshs.24/= per hour which translates to Kshs.192/= per day and although in cross examination he said he would sometimes earn 37/= per hour, there was no proof of the same.

It was also his evidence that he never worked for 30 continuous days in a month but only when work was available and that the ships would call in to load at intervals of between 3 – 7 days. He never said on average how many days he would work or how long it took to load one ship. He had worked for 5 months before the said incident and being a casual employee there was no guarantee he would be retained for long by the Defendant. The labour laws as regards casual employees provide that one is not to be so engage on a casual basis for more than 6 months. And neither did he tender evidence to show he was going to be engaged on a permanent basis after the expiry of the said 6 months. The said regulation is in the Registration of wages and condition of Employment Act.

In the plaint the plaintiff says he earned Kshs.8,000/= per month but going by his evidence he would earn Kshs.5,760/= if he worked for 30 days a month. However he only worked 7 days a week and as said earlier it is not known on average how many days he would work in a month or how many vessels he would help load. It is reasonable however to assume he perhaps would work on average for 14 days in a month and take an average earning of Kshs.3,000/= per month. He was aged 21 years at the time and I would adopt a multiplier of 20 years taking into account the perils of life. He was also not married and would spend 2/3 on himself (3,000x12x20x2/3) = 480,000/=.

On special Damages, the plaintiff did produce two receipts totaling to Kshs.3,050/= in respect of medical expenses. This I would have allowed. However there was no evidence of payment in respect of Kshs.2,000/= for the invoice by Dr. Hemant Patel. This being a special Damage, it has to be strictly proved and I would have disallowed the same. Therefore had the plaintiff proved his case on negligence I

would have made the following award:

a) Damages for pain and suffering and loss of amenities	- 1,300,000.00
b) Loss of future earnings	- 480,000.00
c) Special Damages	- 3,050.00
Total	- **1,783,050.00**

As the Defendant failed to proof it's case as against the Third Party, I would have held the Defendant 100% to blame if the plaintiff had proved his case as against the Defendant. The upshot is that the plaintiff's suit is dismissed with costs.

Dated and Delivered at Mombasa this 7th day of July, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE