



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 447 OF 2001

JOSEPH WANDO AKECH PLAINTIFF

VERSUS

CORRUGATED SHEET LTD DEFENDANT

JUDGMENT

The Plaintiff in this case Joseph Wando Aketch was employed by the Defendant Company as a casual employee working with Defendants corrugation machine roller. On 22nd December 2000 he was instructed to feed ironsheet in the corrugation machine roller. As he was doing so, his workmate put the machine on without his knowledge and his gloves were trapped resulting in his 2nd, 3rd, 4th and 5th fingers of the right hand being cut off and his right hand thumb being injured severely as well. He filed a plaint in which he is seeking judgment against the Defendant for:

- “(a) General damages.
- (b) Special damages on the sum of KSh.1,500/-.
- (c) Damages for loss of earning capacity
- (d) Costs of this suit
- (e) Interest on (a), (b), (c) and
- (d) Above at court rates.”

The Defendant company Corrugated Sheets Limited filed Defence on 1st November 2001 in which it denied liability and sought dismissal of the Plaintiff’s claim. On 21st March 2002, the parties entered a consent judgment on liability in which it was by consent agreed that liability would be apportioned at 70% against the Defendant and 30% against the Plaintiff.

The question of the quantum of damages was to go for full hearing. The medical reports, and other documents were then by consent produced as exhibits 1, 2(a), 2(b), 3 and 4(a) and 4(b). This judgment is therefore on the quantum of damages only.

The Plaintiff gave evidence and he was the only witness in the entire case as the Defendant did not call any witnesses in the case. He said in evidence that his right hand was injured when he was involved in the accident. He is a right handedman. In the accident four of his fingers were chopped off and the thumb was

injured. He showed the court the injured fingers and thumb. He said he cannot work using his right hand. He had worked for Defendant company for 12 years. He was aged 41 years at the time of accident. As a result of the accident he was dismissed from his employment with the Defendant. After accident he was admitted at Mewa Medical Centre but the Defendant Company paid the hospital bills. At the time of his dismissal he was earning KSh.167/- per day. He identified medical report Exh.1 and he also identified Exh.2 and he identified a receipt showing he was coming from Kano Location in Kisumu District where he is now living i.e. his home. After accident he tried to get another job but he cannot get another job as his right hand cannot work. He has thus not got any other job. He has four children aged 8, 6, 3 ½ and 9 months old. He is only relying on assistance from his brothers. He cannot operate machines now but at the time of accident he was a machine operator with the Defendant company. He was educated upto Std. VII but his certificate of the same got lost. He has not been trained in any job or profession. He was working as casual labourer and was being paid on daily basis. He ended his evidence in chief by saying that he can only do business, and his wife would help him.

In cross examination, he said though he can read but because of accident, he cannot write as he used to write using his right hand but now he has no fingers on that hand and so he cannot write. He has searched for job but in vain. For the last three months he tried to get a job of carrying gunny bags but he has not succeeded because he is also still sick and denied the allegation that he only started searching for a job when this case was coming up for hearing. He can hold things with his right hand but only for a short time. He has tried to work with his left hand but he cannot. He has been at his home in Kisumu District for 1 ½ years. He travelled to Mombasa on his own carrying two shirts and two trousers in a small bag which he could carry. He can take a shower for a short time but he cannot do anything for a long time. His employers gave him KSh.90,000/- as workmen's compensation.

That was the evidence adduced by the Plaintiff in this case and as I have stated hereinabove, the same evidence was only in respect of the question of damages as liability had been entered by consent.

There does not appear to be any dispute as to the claim for KSh.1,500/- which is claimed as (b) in the plaint. That claim is for special damages. It is allowed and is awarded. That leaves only two claims and those are claim for General Damages for pain, suffering and loss of amenities and Damages for loss of future earning capacity.

I will first consider the question of General Damages. It is not in dispute that the Plaintiff's four fingers were chopped off and his thumb was severely injured. He was admitted into a hospital for 7 days immediately after accident. He says the hand cannot do any work and despite vigorous cross examination on this he was adamant that he cannot do any meaningful work with his right hand as the fingers are chopped off and the thumb is also not working. The Medical Report produced by consent Exh. 4(a) says on the nature of injuries as follows:

“NATURE OF INJURES

1. Amputation of 2nd, 3rd, 4th fingers.
2. Severe crush wound on the thumb”.

And the Doctor proceeds as follows in his report:

“EXAMINATION

I examined Mr. John on 8.6.2001, I find complete traumatic amputated 2nd, 3rd, 4th fingers of right hand, further severe loss of tissue of the thumb, all these injuries have healed leaving behind stabs.”

I must state that that report by Dr. Frank A. Obwanda (Exh. 4(a)) differs to an extent from the Medical report dated 19th May 2001 from Mewa Medical Centre Exh. 2(a). That report by Dr. Abdalla Kassim states that 2nd, 3rd, 4th, and 5th digits of the right hand were amputated and calls the injuries permanent. I say the two reports are different because clearly Dr. Obwanda's report does not mention the 5th Digit.

However, the difference can be understood as the Mewa Medical Centre report does not mention the thumb which is mentioned by Dr. Obwanda. I must add that the thumb was indeed injured but it was not amputated. It is clear to me, whatever the medical reports differ on, that the Plaintiff suffered serious injuries on his right hand fingers and almost all of them were amputated. Miss Shah for the Defendant feels KSh.400,000/- should be a fair award in the circumstances.

She arrives at that figure after referring to a number of cases. Miss Abuodha for the Plaintiff feels on the other hand that an award of KSh.900,000/- would be fair. She also arrives at that amount after referring to a number of authorities. I have considered all the authorities to which I was referred.

The case of Swaleh Suleiman Mwabagure vs. Narshidas & Co. Ltd., HCCC No.911 of 1990 at Mombasa was decided on 26.7.93 and is the closest to the case now before me for in that case the plaintiff had his four fingers amputated on his left hand. Mbaluto J, awarded KSh.440,000/- for pain and suffering and loss of amenities. It must be considered that that was left hand and it was in 1993. We are not told whether the Plaintiff there was a left handed person or not. He was however a labourer and was aged 29 years old. In this case, the fingers amputated were fingers of the right arm and the Plaintiff is right handed. I have considered the other authorities. I feel an award of KSh.600,000/- would be fair in respect of general damages for pain suffering and loss of amenities. As liability against the Defendant was entered at 70%, the award of general Damages for pain, suffering and loss of amenities works to KSh.420,000/- which is 70% of KSh.600,000/-.

On the claim of loss of future earning capacity, the Defendant's counsel submits that this claim cannot succeed because it is not specifically pleaded in the plaint. She referred me to three main authorities on the same namely the case of Mbaka Nguru and another vs. James George Rakwar Court of Appeal Civil appeal No.113 of 1998 ; case of David Kiganda vs. Narcol Aluminium Rolling mills Ltd., HCCC No.133 of 1998R , and case of Mwawji Govind & Co. vs. Mung a Nzaka Munga Court of Appeal Civil Appeal No.61 of 1989 . All of these authorities make it clear that loss of earning is a special damage, and it must be specifically pleaded and strictly proved. Miss Shah in her able submission did state that in the plaint all that is stated on this claim is at paragraph 9 of the plaint, where the Plaintiff states and she quotes "he therefore claims for loss of future earning prior to the accident." And says this is not specifically pleaded in law. I have perused carefully the only plaint in this file which was filed on 28th September 2001 and is dated 13th August 2001. My reading of that plaint and particularly paragraph 9 of that plaint shows that more is written than what is quoted by the learned counsel for the Defendant. According to the plaint paragraph 9 states as follows:-

"9. The Plaintiff further states that as a result of the accident he has lost earning capacity and he is unlikely to be engaged in any meaningful employment and he therefore claims for loss of future earning prior to the said accident."

One has to accept that pleading is not evidence. Pleadings would be proved by evidence tendered at the hearing or by way of Affidavit if a case is heard by affidavit evidence. In this case I do find that loss of future earning was pleaded in the plaint. The next question is whether it was proved.

In his evidence the Plaintiff stated inter alia that he was, prior to accident earning KSh.167/- per day as a casual labourer. LD Form dated 19.3.2001 was produced by consent of both parties as Exh.3. That form is the Workmen's Compensation Form. It is in the name of the Plaintiff and it states clearly that the Plaintiff's salary was KSh.167/- per day and it was on that basis that workmen's compensation for the plaintiff was calculated. The Defendant has not disputed the contents of that form. I do find that the Plaintiff's income was KShs.167/- per day. I do not however agree with the submission by the learned counsel for the Plaintiff that plaintiff's salary would be calculated on the basis of 30 days in a month. The Plaintiff was a casual employee. He was therefore being paid only for the days he actually worked and not for those days he did not work. If he ever worked on Saturdays and Sundays and Public Holidays then he should have strictly proved that. He did not do so and hence I do agree with Miss Shah that the Plaintiff salary can only be based on 5 working days per week, which means he was getting KSh.3,340/- per month and not KSh.5,010/- as is proposed by the Plaintiff's counsel. The Plaintiff gave evidence of his effort to get any gainful employment but without any success. In a country where unemployment is now

accepted as a real problem, one cannot be surprised that the plaintiff, with only a functioning left arm cannot get an alternative job. He had been dismissed from his job by the Defendant because of his predicament. The evidence, he gave, which the learned counsel is not reproducing accurately was that he can hold certain things with his right hand but only for a short time and that he did carry only light things on his journey to Mombasa. I did not understand him to have said that he can carry things, and is independent in that he can look after himself without any assistant. He in fact said that even doing business he will rely on his wife for assistance. Mewa Medical doctor's report says he finds it difficult to continue his work because of permanent injury sustained. I do feel the Plaintiff is entitled to loss of future earning. I will now proceed to consider the extent to which the same can be awarded.

The Plaintiff's counsel submits that a multiplier of 10 be considered. She did not support that submission with any reasons and she did not show me any authority for the same. The Defendant's counsel on the other hand proposed a multiplier of 6 on grounds that Plaintiff was 41 years at the time of accident whereas in the case of Coast Bus Services Ltd. Vs. Sico Murunga Ndanyi & Others Court of Appeal Civil Appeal No.192 of 1992 the court had used a multiplier of 10. I have perused many authorities in this claim. Each case must depend on its own circumstances much as unexplained departure should not be made from the other decided cases. In this case I feel that once the Plaintiff settles down in future he will learn to put his left hand which is unscathed to some useful and gainful work as his other parts of the body are not affected apart from the right hand fingers. I do feel therefore that the Plaintiff is likely to improve his earnings sometimes later in his life. Doing the best I can, I do feel a multiplier of 8 would be proper in this case. Thus for loss of future earning, I would award KSh.(3,340 x 12 x 8) = 320,640. 70% of this amount comes to KSh.224,448/-.

The sum total of all the above is that the Plaintiff is awarded damages as follows:

- (a) General Damages KSh. 420,000/-
- (b) Special Damages KSh. 1,500/-
- (c) Damages for loss of earning capacity KSh. 224,448/-
- Total KSh. 645,948/-

Thus judgment is entered for Plaintiff against the Defendant in the sum of KSh.645,948/- plus 70% of the costs of the suit plus interest on the same amount and on costs at court rates. Judgment accordingly.

Dated and delivered at Mombasa this 17th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE