



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1721 OF 1993

JOSEPH MWANGI NJOROGE PLAINTIFF
VERSUS
INTEX CONSTRUCTION COMPANY LIMITED..... DEFENDANT

J U D G E M E N T

The Plaintiff in this suit is claiming special damages in the sum of Kshs 26,450/=, general damages, any other relief the Court may deem fit and just to grant, costs of this suit and interest, from the Defendant who was the Plaintiff's employer at the time the Plaintiff sustained the injuries which have prompted the Plaintiff file the suit.

From the evidence before me, the Defendant, a limited liability company engaged in construction work, had employed the Plaintiff as a Mechanic dealing with machines which included tractors used by the Defendant in various construction works. Employed in 1988 the Plaintiff was by the time of the accident which injured him on 24th June 1991 on duty supervising fellow workers under him doing mechanical work on machines at the Defendant's work site at Kibera.

That morning of 24th June 1991, among the workers the Plaintiff was supervising were those who were repairing a puncture on a tractor tyre tube which, for some reason, had gone flat. The puncture having been repaired and the tube returned into its tyre, the workers embarked upon filling the tube with pressure using a familiar pressure gage or gauge. They thought air was not getting into the tube. One of the workers reported the matter to their Supervisor – the Plaintiff – who responded by going where the tyre was to see what was happening. The Plaintiff started manipulating the tyre's connection to the Pressure Gauge and as he was noticing that it was the Pressure Gauge which was defective because its needle indicator was not moving to show the pressure in the tyre tube, the tyre suddenly and violently burst thereby badly injuring the Plaintiff who as a result was rushed to hospital where he was admitted for eight days. He was first taken to Kenyatta national Hospital before being transferred to M.P. Shah hospital.

Hospital costs were met by the Defendant. However, the Plaintiff is claiming special damages resulting from medical treatment and costs incurred after he had stopped working for the Defendant.

He was discharged from the hospital on 1st July 1991 and thereafter remained an employee of the Defendant until April 1993. Both parties have kept away documentary and better evidence showing the circumstances under which the Plaintiff stopped working for the Defendant and what I have on record looks very suspicious with the Plaintiff claiming that the Defendant decided that the Plaintiff should leave because the Plaintiff was unable to work.

Another point of interest in this case is that although the tyre got burst, parties would keep on saying that air was not getting into the tyre because the pressure Gauge needle was not moving. Was it possible for air to pass from the pressure gauge into the tube without the gauge needle moving because the pressure gauge was defective? An affirmative answer would be given to that question only to be contradicted a short while after yet the Plaintiff says that it was the pressure Gauge which was defective. Air had not passed through into the previously flat tube which subsequently caused the tyre to burst.

Whatever may have been the position, clear evidence is that the tractor wheel was given to the Plaintiff and the workers under him because there was no pressure in the tyre-tube. It was given to them as machine mechanics to do the necessary repairs and fill it with the required pressure for work. The pressure Gauge was one of the machines the Plaintiff and workers under him maintained even if it was kept in a store by somebody else a non-mechanic. There was no evidence that someone else had the duty of putting the Pressure Gauge in a good working condition before the Plaintiff and workers under him could use it. Evidence is that it was the Plaintiff and workers under him who had that duty. Evidence is that this was a Pressure Gauge they had been maintaining and using and that, that morning they had not had prior information that the machine was defective. Evidence is that it was the Plaintiff's duty to see that the Pressure Gauge was in good working condition by checking it, testing it and, if necessary, repairing it before it is put into use. The Plaintiff could only go to his superior if the Plaintiff felt he needed the Superior's assistance. I have been given no evidence that the Plaintiff needed such assistance, tried to get it, but it was denied him. On the contrary evidence is that all was within the power and professional know-how of the Plaintiff to effectively and correctly manage and control. Yet there was a tyre burst and human injury. Could that not have been avoided and prevented by the Plaintiff himself? Who else had that duty in the circumstances of this case? Is the Plaintiff not to blame for this accident?

He told the Court that there was no other way he could have used to find out the condition of the Pressure Gauge. He said there was no way of checking that Pressure Gauge without using a tyre the way he tested the machine.

But from his professional knowledge, he must have known that at that time he was not telling me the truth because evidence is that the needle in the Pressure Gauge may not move either because there is no pressure passing through or because, although pressure is passing through to the tube, the Pressure Gauge is defective. From his professional knowledge, therefore, the Plaintiff must have known that it was dangerous testing the condition of the Pressure Gauge – to see whether pressure is passing – using a tube in a tyre especially a Caterpillar tractor wheel tyre which from the evidence, cannot be carried by up to six strong men and its burst, as the Plaintiff himself put it, can blow up the ceiling of my Chambers Number 34 on the ground floor of this huge and strong court-house. He must have known that you do not have to connect a pressure gauge to a tube in a tyre on a wheel in order to check or test whether pressure is passing through the pressure gauge. You only need for example, to press the knob or work the gauge and release the air pass out. There must be other methods of safely checking or testing the pressure gauge to detect defects in the movement of the needle indicator for the purpose of repairs – and the Plaintiff as a machine mechanic knows them.

The above being the position therefore, although I agree that the Defendant had a statutory duty of care to ensure that the Plaintiff's working environment was absolutely safe and that it did not put his life or limb at risk of injury, I am of the humble view that the Defendant did not breach that duty and is not, therefore, liable to the Plaintiff in this suit as the allegations and particulars given in paragraphs 5 and 6 of the Amended Plaint dated 28th June 2001 have not been proved.

On the other hand, if the above conclusion is held to be wrong, I would have awarded the Plaintiff the following:-

- (i) Special damages in the sum of Kshs 26,450/=.
- (ii) General damages in the sum of Kshs 100,000/=.
- (iii) Costs of this suit.
- (iv) Interest on the above at court rate from the date of this judgment.

However, following on my conclusion as earlier on stated, the Plaintiff's suit herein is dismissed in its entirety. Each party to bear its own costs of the suit because of the injuries and pain suffered by the Plaintiff.

Dated this 6th day of November 2001.

J.M. KHAMONI

JUDGE