



**Industrial accident
working environment
effecting health
male adult aged 47 in 1992
Damage to health
sustained**
• **chronic sinusitis**
• **prolapsed inter vertebral disc**
(severe back-ache)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1799 OF 1993

DAVID M. MBUTHIA PLAINTIFF

VERSUS

ALLIED INDUSTRIES LTD. DEFENDANT

JUDGMENT

This case had come up several times for hearing and had never been heard. It is a suit that was filed on the 16th of April 1993.

Between September 1995, and February, 1999 it came up 13 times.

It was therefore not with a surprise that when the hearing dates was taken by the plaintiff and dates confirmed for hearing during the call over for the 16th and 17th of February 2000 that the advocate for the defendant failed to attend court.

According to the affidavit of service Mr. Subhag of M/s Subhag & Shah & Goswani Company advocates was personally served with the hearing notice of this case on the 3.12.99 at 10.000 a.m. The Plaintiffs witness a medical doctor by the name of doctor C.K. Musau was not able to attend court due to the short notice.

I proceeded with the trial under order 9b r3 of the Civil Procedure Rules. This is where only the plaintiff attends court but the defendant fails to attend the hearing may proceed exparte.

I heard the plaintiffs evidence then adjourned the case. This was in order that I may (at the plaintiff request) issue a proclamation to compel a witness to attend court where the said witness had been served with a witness summons (See order XV r.10 CPR).

The witness attended court and gave evidence on the 23.2.2000. He had stated the earlier dates was not convenient to him. As a result the court issued out a notice to this effect to both parties.

It was then the defendants filed a notice of change of advocates. The reasons being that Mr. Subhag declined to appear in court. The other reasons being that the defendant had been insured by Ken India Assurance Company. They were under the impression that they were not covered under this policy. Now that they were covered they were interested in the case.

Miss Muchai of M/s J.W. Muchai & Co. Advocates appeared for them. She was able to cross examine the second plaintiff witness the doctor and call her evidence. This included a director of the defendants company.

There were four agreed issues previously filed by the parties.

These are:-

1. To the plaintiff's disability related to industrial injuries or to common human degenerative condition?.
- 2) If it is related to industrial injuries, was it caused by the work condition in the defendants factory?
- 3) Was the defendant negligent in providing unsafe conditions of work?
- 4) Is the plaintiff entitled to damages as prayed in the Plaintiff?

Before I embark in answering in the above issues, I wish to outline a brief back ground of this case and note a few aspect.

The defendant M/s allied Industries Ltd., is a Limited Liability company. It is not disputed that they carried on a business of making garments. Their factor was situated along Kirinyaga road.

A work force of 60 employees were employed. It is not disputed that David M. Mbuthia (the plaintiff herein) was employed by them for over 15 1/2 years. His duties was that of a garment cutter.

He did this work alone and had infact at times had an assistant.

Later, much later was a second cutter employed.

The other very important fact that came into this case was that the defendant company has since closed down its business as of 1993. The plaintiff filed this suit in April 1993. It came out through the evidence that although the company stopped its operations the Limited Liability Company was still in existence.

The reasons for shutting down the business is that there was too much competition with imported second hand goods known as "mitumbas".

This fact establishes that the defendants have a locus stand to be sued.

From the evidence of the plaintiff, he stated that he joined the defendants company as cutter. This was in the year 1977. The factory was situated in the basement. For all the years between 1977 to 1993 he breathed in the dust cloth. He was sensitive to cloth that contained chemicals. He was not aware of the effect his environment had on him until he went to see the doctors on his sinus. The doctor confirmed that he had the sinus. The doctor further attributed the said causes to the work environmental.

Six years prior to 1992, the plaintiff had been suffering from severe back ache. This was due to standing for long periods of time at his work. (He had been doing this save work for 15 years).

He was admitted to hospital for this injury. In the evidence given by Mr. Shah, a director of the

company, he stated that it was he who personally interviewed the plaintiff for employment. He had personally worked elsewhere. He applied for the job and was accepted. No training was required as the plaintiff was already an expert in his field.

He informed the court that the work done by the plaintiff required that he uses two sets of cutting machines. Cloth would be piled. David would cut the same. In doing so he must stand on his feet. He would have to do the normal bending at his work. The cloth cut would be thick or thin depending on the size the two different machines would be used.

I must state that Mr. Shah admitted to this court that for very many years at least 9 to 8 years David had been doing this work single handily. He was the only cutter in the factory of the garments.

Later Mr. Shah stated a second cutter was employed. For a work force of 60 workers it was not economical to hire more than one cutter.

Mr. David said he would work from 8.00 a.m. to 7.00 p.m every day. Mr. Shah said that he infact would have a lapse of idle time. If he did he would be involved in designing new patterns.

It seems from the evidence before me that Mr. David enjoyed his work tremendously. He worked for 9 years without any complaint - according to Mr. Shah. He worked a total of 15 years dedicatedly.

No one was able to replace him and he seems indispensable to the defendants. Mr. Shah stated that all cutters of garment all over the world would stand to do their work. The machine Mr. David used was light and easy to use.

Mr. David in his plant claimed, the defendants were negligence as they did not take precaution to provide him with a safe place to work and or facilities.

Mr. Shah claimed that they did so. In fact they would not have been allowed to operate their work by factory health inspectors or inspectors.

I believe that Mr. Shah is right in speaking of the method of work. A cutter of garments has to stand to cut cloth.

He must also occasionally bend to do this. What the defendants should have noted is the length of period this cutter had been doing the same work day in and day out. It most certainly would effect his health. Mr. David's fault was to enjoy his work and being satisfied with the satisfaction it gave.

Mr. Shah has said that they had in 1992 moved away from the premises they had to industrial area. I would find that the plaintiff has proved his case on negligence on the part of the defendants.

I hold that they failed to provide he plaintiff with an adequate working environment.

This is exposing the plaintiff to a risk of danger and or injury which the defendant ought to know. Namely subjecting only one worker to do one type of job for 15 years without any change.

This has caused the plaintiff injury to his back.

The plaintiff mentioned "sinus" but the medical doctor who examined him made no mention of this.

The doctor confirmed that he attended to the plaintiff. That the plaintiff was later admitted with his back injury. On cross examination by the advocate for the plaintiff, he stated that such cause of injuries is attributed to his employment. The doctor said he has had many similar cases. Especially for those who work in employment such as nurses; the Kenya Post & Telecommunication, the Kenya Bus Services.

It is their nature of work that attributes to such condition. I hereby hold that the plaintiff are liable in

negligence at 100%.

That now cares issues 1,2 and 3. What remains now is issue No.4 ie. is the plaintiff entitled to damages.

The advocate for the plaintiff stated that the plaintiff is entitled to damages. These are under two heads of

1. Terminal dues

2 ie. Loss of earnings

3. Loss of future earning

4. General Damages for Pain, suffering and

Loss of amenities.

1 Terminal Dues

From the submission the advocate for the plaintiff stated on Terminal dues that the plaintiff earning Ksh.2,966/= as basic pay. House allowances Ksh.350/-. This gives a total of Ksh.2966/-. For 15 years the plaintiff should be paid Ksh.26,203/-. Although this aspect of terminal dues was prayed for it was not pleaded.

The advocate for the defendant stated that there was nothing to show that the plaintiff earned the said amount or proof of the same.

One aspect that came out clearly is that the plaintiff produced no documentary evidence to prove that he is entitled to the said amount. If he had known he would have been free to call his work mates to testify as to his mode of payments. He would have given notice to the defendants to admit and or produce evidence on the amount due.

It is the plaintiff who asked for this prayer. He should prove it.

It is not enough to say from the bar that the defendants had failed to rebut it.

3. Loss of Future earning

The advocate stated that the plaintiff was 47 years old when he was asked to stop working. he would have worked for another 8 years.

There would have been an increment in salary by now of Ksh.5000/-.

What the plaintiff was there first paying was Ksh.480,000 as loss of future earning (ie 5,000 x 47 x 12).

What he did not inform the court is that the defendant had since ceased their operation had not been injured he would have been laid off for lack of employment. This was on the part of the defendant who faced steep competition within the same industries on imported second hand clothes.

I again hold that the plaintiff has failed to pursue this head of damage. He filed this suit the same year the company ceased operation. I decline to make any award.

4. General Damages

As to General damages for pain suffering and loss of amenities. I noted that the plaintiff proved that

he sustained the said back injury. He called or written medical evidence as to this. I am satisfied that the injuries was caused due to the course of his employment accumulating for the last 15 years. I do not believe that this was attributed to his previous employment.

I was taken aback when the plaintiff's advocate prayed for Ksh.1 million to be paid on this head. I believe the court of appeal have stated that in order to come up with the assessment of damages comparable of past and similar cases should be taken up.

The authorities submitted by the advocate for the defendant see the case of Mary Muthoni Mwangi v Kinyuru & Another Hccc 346/95 and case of Mary Nyambura v. Kenya Tea Development Authority Hccc No.1532/95 was the range. Ksh.220,000/- to 300,000 was asked for.

The advocate for the plaintiff still insisted this be Ksh.1 million. It is trite law that huge awards would effect society at large by way of increase insurance premium (see the case of i.e. Cecilia Mwangi & Another v. Ruth Mwangi CA251/96 at Nyeri).

I find that an award which is fair and reasonable to be Ksh.220,000/-.

There was also a bill by a doctor provided for Ksh.13,200/-.This seems to have been duly paid for on 11.1.93 and was referred to, inter alia as consulting fee. If the plaintiff wished to claim this he must in all circumstances plead Special Damages. There is no where that this had been pleaded. There is also no where in Plaintiff that Special had been prayed for.

It is trite law that Special Damages must not only be pleaded but must not only be pleaded but must be proved. The plaintiff proved this damage but had failed to pleaded it. I decline to make any award on it. In conclusion

a) Liability

Judgement be and is hereby entered at 100% against the defendant.

b) Injuries

i) Chronic Sinusitics (no medical report)

ii) Paralysed inter verterbral disc leading to severe back ache.

c) Quantum

i) General Damages

On pain suffering and loss of amenities Ksh.220,000/-.

ii) Terminal Dues Nil

iii) Loss of future earning Nil

iv) Special Damages Nil

(The latter three had not been proved) _____

Total Ksh.220,000/-

I hereby enter judgement accordingly. I award costs of this suit to the plaintiff. Interest is awarded from the date of this judgement.

Dated this 28th day of February, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE