



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIV CASE 1901 OF 97

JOSEPH MASO KILLU PLAINTIFF

VERSUS

KINGSWAY TYRES & AUTO MART LTD. DEFENDANT

JUDGMENT

The Plaintiff in this case is Joseph Maso Kiilu. He was employed by the defendants, M/s Kingsways Tyres & Auto Mart Limited as a manual worker.

His main task was that of a tyre fitter in the defendants Workshop at industrial area. On the 13th of October 1992, whilst at the workshop, the plaintiff was filling with air, a tractor tyre. The tyre burst and the rim broke the plaintiffs elbow.

He sustained injuries on the mid-shaft radius & ulna.

He was rushed to the Nairobi West hospital for treatment. It seems that the treatment he obtained there was not satisfactory. His bones had a malunion, 3 months later. Further he had an infection as a result he was admitted to the Avenue Nursing home. Another operationn was done to remove the implants. He was then treated in July 1994 for the infection. Then a new implant was done in September 1995. This time the bones reunited well. By March 1996, the implants were removed at the Guru Nanak Hospital.

Due to the number of operations repeated on the forearm and infections the plaintiffs formed fibrosis of the muscles of the forearm. Wasting of the muscles was due to atrophy of disuse.

The plaintiff sued his employers on the 10.8.97. He claimed that under the implied contract of employment that they had, his employer owed him a duty of care. He prayed that this court finds that there was a breach of contract. Further that the defendants are liable to compensate him for General Damages. He wishes to be compensated for loss of future earnings. This is because he now is unable to effectively use his left forearm. The defendants entered appearance on 29.8.97 through M/s D.S Kitaa & Co. advocates. Later M/s Akide & Co. advocates entered appearance on 26.9.97 . What M/s Akinde & Co. Advocates should have filed was a notice of change of advocates. Nonetheless a defence was filed whereby the defendants admitted the accident having occurred but that it was substantially contributed by the plaintiff himself. He failed to follow laid down instructions.

The parties agreed on issues and dispensed with summons for directions.

When they came to trial they entered into a consent on the issue of liability.

Namely, that the defendants is to bear 65% liability on negligence and the plaintiff to bear 35% liability.

As a result of this consent judgement the agreed issues of 3.6.96 has been disposed of. No.1(a) (b)(c), 2 and 3.

What is left for determination is issue No.4 and 5 namely:-

“4. what is the nature, amount, degree and extent of damages payable by the defendant to the plaintiff if any? 5. who is to bear the costs and interests of this suit if any?”

The plaintiff gave evidence that he sustained injuries on his forearm. He was able to show to this court his forearm which was badly scared and had fibroids on the skin.

He produced the agreed medical reports to this court. The first is by Dr. B.O. Mutuli a medical practitioner. He was not a medical consultant. His report was prepared in 1996.

The second report was by M/s Harshad Patel a consultant Surgeon. His report is signed and dated the 26.1.98.

Both reports confirm the injuries sustained.

(I wish to just add that medical legal reports should be submitted by consultants and not practitioner. That the reports should be the latest report of the examination of the victim)

I also noted that the plaintiff had not pleaded particulars of injuries. This is essential, as provided by order 1 of the CPR.

I nonetheless see that the Plaintiff, para 5, states that the particulars of injuries is per the said medical report attached of Dr. Mutuli. A medical report was attached to the plaintiff. I believe this was a system evolved sometime back, where medical reports are attached to the Plaintiff. There should never be any annexure to the Plaintiff. The particulars of injuries should be specifically pleaded. I hope in future that the practice of attaching medical reports or annexures to the plaintiff would be discouraged. Instead order 10 r 11a CPR should have been complied with.

From the medical report produced by consent the injuries sustained by the plaintiff was established.

What then should be quantum?

The advocate for the plaintiff prays that I award Ksh.900,000/- for General Damages of pain suffering and loss of amenities. He based his award on a past decisions of :-

Dr. Wolfgang Farrugia V Hon. Attorney General & Another

Hccc 472 of 1988 & 473 of 1988

A consolidated case.

This is a decision of Mwera, J. at Nairobi.

The 1st plaintiff was awarded Ksh.500,000/- for elbow injury.

The 2nd plaintiff was awarded Ksh.400,000/- for a fracture elbow.

This is under the heading of damages for Pain and suffering.

The advocate for the defendants stated that the difference between the authorities and the plaintiff is that the plaintiffs in the authority was a doctor whilst the plaintiff in this case was an unskilled worker.

This line of reasoning is not quite correct. In fact the unskilled worker requires his arm more as that is his only livelihood.

The plaintiff informed the court that as he was unable to use his left hand due to the injuries, his employers relieved him of his duties.

His right arm is all right.

What I find is that the plaintiff sustained a fracture of the left radius and ulna. This fracture is now healed.

His left elbow joint according to Mr. H. Patel is normal and painless.

His left wrist joints; thumb; meta-carpo-phalangeal joints; proximal and distal interphalangeal joints are painless but limited.

This therefore means that the injuries described in the authorities is different from the injuries sustained by the plaintiff. His major injury is that he is unable to grip with the left hand due to the fibrosis of tissue and adhesion of the skin. As such I would compute and assess damages for pain suffering and loss of amenities at Ksh.250,000/-.

As to loss of earning this was never pleaded but it was prayed for as:-

“Loss of earnings at ksh.2640/- per month.”

When the plaintiff gave evidence he did not produce any pay slip as proof of salary that he earned. The defendants nonetheless do not deny that he is their employee. I shall hold and take it that he is an employee.

The advocate for the plaintiff asked I take a multiplier of 34 years. This is because the plaintiff was aged 30 years at the time of the accident. He would have worked up to the age of 65 years old.

Therefore he prayed I award loss of earning at Ksh.1,203,840/- (2640/- x 38 years x 12).

The defendants said that a multiplier of 20 years should be adopted. Retirement age being 55 years. That a sum of Ksh.633,600/- (20 x 12 x 2,640/-) be awarded.

I would not make award under this head of damages as it has not been pleaded. Further it is described as loss of earning. The plaintiffs stated that he had been paid his salary by the employer up to and including May 1997. He was then informed that he was no longer required.

He filed suit on 10.8.,97. He is therefore entitled to loss of earnings up to the date of filing suit. In this case one month.

What should have been pleaded was loss of future earning.

This means if the plaintiff had not had this accident he would have worked for another 20 to 38 years. The amount of salary he now earns, he would have earned for that period. As such this is how the two advocates would come up with the figures of Ksh.1,203,840/- and Ksh.633,600/-. These figures refer to the future.

As this was never pleaded I would decline to make an award under this head of damages.

The law requires that I give my figure if in the event that the plaintiff had pleaded loss of future earning. This would be Ksh.480,000/- (made up of 2000/- as the minimum average (The actual salary had not been proved) x 20 years - (taking 55 years as retirement age) x 12). Loss of earning is pleaded would have amounted to Ksh.8,000/- (Ksh.2,000/- x 2 = 4,000/-).

I have nonetheless dismissed this heads of damages.

In conclusion

Liability

Judgement by consent entered on liability at a ratio of 65%:35% against the defendants.

Injuries

Fracture of the left mid-shaft radius and ulna malunion of the fracture and infection.

2nd internal fixation and removal.

2nd healing and union of bones healed well.

Fibroids on left arm due to frequent operation.

Quantum

Special Damages

Pain suffering and loss of amenities Ksh.250,000/-

Loss of earnings Nil

Ksh.250,000/-

Less 35% Ksh. 75,000 Total Ksh.175,000

I award costs of this suit to the plaintiff.

I award interest on General damages from the date of this suit.

Workman's Compensation if paid should be deducted from the above sum awarded.

Dated this 30th day of March 2000 at Nairobi.

M.A. ANG'AWA

JUDGE

Judgment to be delivered under Order XX r2 (2) and 3(2) Civil

Procedure Rules

M.A. ANG'AWA

JUDGE

8.3.2000