REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 975 OF 1998'

LAWRENCE AMURARU ATUYA……PLAINTIFF

-VERSUS

KENYA POWER & LIGHTING & CO. LTD……..DEFENDANT

JUDGMENT

The Plaintiff is an employee of the Defendant employed as a Clerk.

On 4.10.1993 he was sent by his immediate supervisor to photocopy some documents from the 4th floor to the 3rd floor of the building.

Meeting was to take place at 10 a.m. and he was to photocopy the documents at 9.30 a.m. He slipped on the stairs and fell down. He said the floors had been polished and were therefore slippery as the floor was of timber. There was no warning sign that the floors were polished and therefore slippery. As a result of the fall he received injuries for which he received treatment at the Aga Khan hospital. He produced the medical report.

Mrs. Antonita Muca the Officer in charge of General Office Administration said that the floor between the 3rd and 4th floor is wooden and is polished twice a week. The cleaners normally post a warning sign at a conspicuous place but she could not remember whether the sign was displayed that day.

The 2nd witness for the defence David Waithuku Warigumo who was the Officer in charge of Building and maintenance of defendants buildings said that the wooden floor on the 3rd & 4th floors was replaced with Terrazo in 1993 because of the heavy traffic in those floors. He was however not sure when the change occurred.

The Defendant stand on the Plaintiff's claim is that the Plaintiff was well aquatinted with the stairs and he knew that they used to be polished on regular basis. He was in a hurry when he fell. The accident was therefore as a result of his own negligence. Mr. Dar, The Learned Counsel for the Defendant raised the issue of Limitation urging the court to find that the suit was time barred. He said that the accident occurred on 4.10.93 and the suit was not filed until 29.4.98 four years and six months and 25 days after the cause of action arose. The suit being based on tort ought to have been filed within 3 years after the date of the accident. He further submitted that the plaint was couched in such a way as to make it appear that the claim is based on a breach of contract and not tort and thereby circumvent the limitation problem. Dealing with the objection based on the question of liability I observe that in paragraph 5 of the plaint it is pleaded that the action arose as a result of a breach of the contract between the employer and the plaintiff as an employee of the Defendant that the employer was under a duty to take all reasonable precautions for

the safety of the plaintiff while executing his duties. In its defence the defendant in paragraph 2 of the defence merely denies the contents of paragaph 5. The defendant apart from this general denial did not specifically traverse the allegation of the breach of contract. In paragraph 6 of the plaint the plaintiff avers that:

"6 the said accident was as a result of the negligence and or breach of the contract of employment and their terms thereof on the part of the defendant its agents/servant….."

The plaintiff goes on to give the particulars of the breach in the same paragraph in sub paragraph (1) to (V). Contrary to what the learned counsel for the defence submitted, the plaintiff had pleaded the existence of a contract and its breach. I therefore find that the claim is based on both contract and in torts and that the plaintiff was entitled to base the claim on breach of contract. See Civil Appeal Kenya Cargo Handling Services Ltd. Vs. David Ugwang (1982-1988) 1 KAR 672 where under similar circumstances the Court of Appeal found that the suit was based on contract. I would add the observation that where in a suit the plaintiff is seeking damages arising out of an accident or injuries arising out of employment like the present case, justice will not seem to be done if the claim is refused on technicalities in pleading. So long as the intention of the plaintiff is ascertainable from the pleadings to result to technicalities amounts to denial of access to justice for which the rules were formulated to achieve. The over use of technicalities in our courts is not doing much in sustaining the public confidence in our efforts to make justice more accessible. The Judicature Act provides that justice should be dispensed without undue result to technicalities.

There was a reason why the legislature thought it fit to legislate this law and the courts should not lose sight of its importance. The plaintiff in his evidence stated that he was instructed by his supervisor, Mr. Masibo to make some copies and while rushing down the polished staircases fell down and injured himself. It is the defendants defence that the Defendant was the author of his mischief in that he knew or he ought o have known that the floors were slippery and therefore he should have taken the necessary care which he did not. He was also negligent in that he went about in a hurry and rush. The Defendants witness Mrs. Antonina Muna said that they used to put a warning sign but was not sure whether it was there that day. The plaintiff said the floor had been polished but there was no warning sign. From this evidence I find that the plaintiff was injured while in the cause of his employment and that the fall was due to the slippery floors. The Defendant was under a duty to make these floors safe for walking on. I found no evidence to show that after the floor was polished a sign warning the users of the floor of the danger posed by the slippery floors was displayed so that they can take the extra care necessary.

Failure to fulfil this duty amounts to a breach of contract by the employer to provide a safe working place for the defendant. I therefore find that there was a breach of contract by the Defendant and that the plaintiff has proved his case. For the reason that the plaintiff had been using those stairs before this incident and ought to have known that they were slippery when polished he ought to have taken some care when walking on the floor. For this reason I find that the plaintiff bears some blame and I apportion liability at 90% as to the Defendant and 10% to the Plaintiff. There will be judgment for the plaintiff in that proportion.

Quantum

As a result of the accident the Plaintiff sustained injuries as described in the medical report by Dr. S. Maina Kanyi which was produced. I have considered all the authorities submitted in support of the claim for damages comparing the injuries in those authorities wit the injuries in this claim. Under the circumstances, I award a sum of Shs.400,000/0 for General Damages. The plaintiff will be entitled to a further sum of Shs.2,000/- as special damages. He will have the cost of the suit and interest.

There will therefore be judgment for plaintiff for damages as follows:

(1) General damages Shs. 400,000/-

(2) Special damages Shs. 2,000/-

Shs.402,000/-

Less 10% Shs. 40,200/-

Shs.361,800/-

Delivered and dated at Nairobi this 2nd October, 2000.

KASANGA MULWA

JUDGE