REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 1436 OF 1998

SALIM KAZUNGU……..…….PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY……DEFENDANT

JUDGMENT

The plaintiff filed this suit on 30th June, 1998 claiming damages and award for future medical expenses.

Liability

In his evidence at the trial, the plaintiff (PW1) stated that he is 26 years old. That at the time of the accident he was a lorry driver carrying goods for Transami. That on the material day he went to the defendant's premises with his employer's motor vehicle for loading. That the loaders went to the vehicle to wait for the bags to load. On cross-examination the plaintiff stated that he was near the lorry so that he may count the bags loaded. The plaintiff further stated that he had worked there for more than 3 years and knew what to do and that he was not under the crane as he could see it. He stated that the bags fell over a wide area showing that the crane was roaming. He also stated that there was no horn to warn the people that the sacks were falling.

The plaintiff stated that he heard noise from the loaders, which indicated danger and tried to run. He was hit down by a bag before more bags came crashing on him. He further stated that the rope with which the bags had been tied was worn out and that employees of the port were disputing between themselves that the crane was not in a good working condition.

Hamisi Charo Chengo (PW2) gave evidence in support of the plaintiff''s. He testified that the driver of the crane did not hoot or warn people of the falling bags, but only heard shouts warning people of falling bags. He like the plaintiff stated that falling bags is a common occurrence at the port.

The defendant brought two witnesses, both employees of the defendant. DW1, Kilonzo Malimu stated that he is a foreman with the Authority. He testified that the plaintiff was sitting at the foyer where nobody is allowed to sit. At this time, he stated, he was in the ship. He further stated that he told the plaintiff to move but the plaintiff refused.

On cross-examination he stated that the owners of vehicles must be there to count. He also stated that he did not call the police to remove him when he refused to move away. He admitted that there was no warning from the driver of the crane and that bags fall occasionally from the crane but denied that warning was shouted. On being examined by the court he stated that the bags are simply tied with a rope.

The 2nd defence witness testimony was similar to that of the 1st defence witness. The only difference he states is that the crane driver hooted and called him and asked him to tell the plaintiff to move away. But generally the defence witnesses did not rebut the plaintiff's evidence. And besides, the defendant is

subject to strict liability under S.3 of the Occupiers Liability Act (Cap. 34). The Section provides that:

> "3(1) an occupier of premises owes the same duty, the common duty of care to all his visitors, except in so far as he is free to and does extend restrict modify or exclude his duty to any visitor or visitors by agreement"

Then sub section (2) defines the common duty of care as a duty

> "to take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there"

They failed to show precautions taken to safeguard the well being of visitors to the Port and are only stating that the plaintiff sat in a dangerous area yet there were other people around who only escaped the injuries suffered by the plaintiff by a whisk. There is therefore only one and inescapable conclusion that the defendant witness's evidence is concorted and untrue only meant to protect their employer and to safeguard their own jobs in turn. It is significant that the bags were tied with ropes. Surely the plaintiff with all the experience they have in this field could have devised a better method like using a strong canvass or container in which the bags are put in and then hooked by the crane thereby minimizing the danger of bags falling between the ropes. Taking into account the duty imposed on the defendant as the owner of the premises by law and the plaintiff's evidence which I accept while rejecting the evidence of the two defence witnesses, I find the defendant wholly liable for the accident.

Quantum

The plaintiff testified that he was 24 years old at the time of the accident and was working as a driver for kshs.6,000/- a month. This sum is shown in the LD104/1 form, which was produced in evidence as exhibit 1. The medical report by Dr. Tanga Audi (exhibit 2) was admitted into evidence by consent. The defendant's submissions that there is no independent medical report adds to or reiterates the fact that the said medical report was unchallenged. The medical report is not precluded from being relied upon by the court and I accept it.

Dr. Tanga Audi's medical report states that the plaintiff is paraplegic at L2 level and is wheelchair bound. That vertebra displacement is significant, long standing and the stretch to spinal nerves are severe and that the plaintiff is rendered impotent. He assessed disability at 70%. The doctor recommends:

(1) A wheelchair for life costing Shs.150,000 every 4 years.

(2) Physiotherapy weekly at kshs.700/-

(3) Nursing care at Kshs.1,200 per month

(4) Special low bed kshs.120,000

(5) Skin care and stool evacuation drugs at Sh.700/- per month.

The defence submit that no evidence to sustain the claim for future medical expenses was led in evidence and that no sum should therefore be awarded. This is not true. Dr. Tanga Audi's medical report which was admitted in evidence by consent as said contains these future medical expenses as assessed by the doctor.

Special Damages

The receipt for special damages claimed was challenged on the ground that it was not issued to the plaintiff. This is the receipt for the wheel chair. The receipt was issued to the plaintiff's advocate on record. The plaintiff was in a wheelchair when he appeared to give his testimony. What other evidence is

required to show that the plaintiff purchased a wheelchair? He is paraplegic and he cannot go shopping on his own for a wheelchair. Somebody had to do it for him. I therefore find that the sum of special damages claimed for Kshs.13,000/- can be accepted as the expenses incurred.

General Damages

I have considered the cases relied on by both parties and find an award of Kshs.2,500,000/- for general damages for pain and suffering and loss of amenities would be sufficient taking into account the inflationary trend.

Loss of Future Earning

The plaintiff was 24 years old at the time of the accident. I take the multiplier of 26 as appropriate relying on the cases cited. This would be: 6,000 x 26 x 12 = Kshs.1,872,000.00

Future Medical Expenses

Under this item I award the following sums as claimed and as supported by the doctors reports. These expenses were not challenged.

(a) Nursing Care (1,200 x 12 x 26)	= Kshs.374,400
(b) Hydraulic Wheel Chair	= Kshs.150,000
(c) Egaton Bed	=Kshs.120,000
(d) Skin Care and stool evacuation drugs (700 x 12x 26 yrs)	=Kshs. 218,400
(e) Physiotherapy 700 x 4 x 12 x 26	= Kshs. 873.600
Total	=Kshs.1,736,400

There will be judgement for the plaintiff as follows:

(1) For General Damages for pain and suffering and loss of amenities	=Kshs.2,500,000
(2) For loss of future earning	=Kshs.1,872,000
(3) For future medical care	=kshs.1,736,400
(4) For special damages	=Kshs. 13,000
Total	=Kshs.6,121,400

The Plaintiff shall have the cost of the suit and interests.

Delivered and dated this 21st day of November, 2000.

KASANGA MULWA

JUDGE