



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 541 OF 2009

DAVID NZIOKA NTHENGE.....PLAINTIFF

VERSUS

DE LA RUE CURRENCY & SECURITY PRINT LIMITED.....DEFENDANT

JUDGEMENT

1. David Nzioka Nthenge, the plaintiff herein, was on 12.1.1998 employed by **De La Rue Currency & Security Print Ltd**, the defendant herein. The plaintiff's employment was terminated by the defendant on 8th April 2008 on medical grounds. The plaintiff avers that on 12th October 2006, he was instructed to count papers on the vaccumatic counting machine in the vault when he injured his lower back while putting a lower ream onto a pallet. The plaintiff states that he was never trained on the manual handling as required. Following his termination, the plaintiff instituted this suit against the defendant vide the plaint dated 12th October 2009 in which he sought for judgment as follows:

a) General damages for pain and suffering

b) General damages for los of earning capacity

c) Future medical expenses as follows:

<i>i. Implant</i>	<i>ksh.300,000/=</i>
<i>ii. Hospital admission</i>	<i>ksh. 300,000/=</i>
<i>iii. Homecare service</i>	<i>ksh. 180,000/=</i>
<i>iv. Review per month for</i>	
<i>32 years ksh.10,000x12x32</i>	<i>ksh. 3,840,000/=</i>
<i>v. Inpatient fee</i>	<i>ksh. 2,000,000/=</i>
<i>vi. Surgery fee</i>	<i>ksh. . 256,000/=</i>
TOTAL	<u>ksh. 7,876,000/=</u>

d) Costs

e) Interest

2. The defendant filed a defence to deny the plaintiff's claim.

3. When the suit came up for hearing, the plaintiff testified and summoned one witness in support of his case. David Nzioka Nthenge (PW1) told this court that he worked for the defendant company from 12th January 1998 but was terminated after an accident which happened while

he was working in the defendant's strong room on 12th October 2006. He produced the letter of termination as an exhibit in evidence.

4. PW1 averred that he visited the defendant company's clinic for treatment but the pain persisted and he was eventually referred to Dr. Oluoch Olunya for surgical treatment.

5. The plaintiff further stated that he still feels pain even after the surgical procedure was done since he was incapacitated by the accident. PW1 averred that he was not given any form of training on how to lift reams of printing notes. He stated that the defendant caused to be published the **safety flash** dated 12th October 2006 after he was injured ostensibly for training of other employees, the defendant having learnt from his injury.

6. PW1 also said that the defendant was required to provide load lifters but it did not because the imported lifters had not arrived. He produced a copy of the safety flash in which the defendant acknowledged having ordered logitrans stack lifters before the accident but were due to be delivered in December 2006.

7. The plaintiff further stated that he had no pre-existing back problems at the time of employment. He produced as an exhibit in evidence the pre-employment medical report which show that the plaintiff had no pre-existing condition. PW1 further produced as an exhibit in evidence a copy of the memorandum of agreement which indicated that the defendant was to cover for the plaintiff's medical expenses.

8. The plaintiff averred that at the time of termination he was not given any compensation despite a promise to be given future medical expenses. PW1 also stated that as a result of the accident he was incapacitated and that he could not engage in any physical activity and continues to suffer from the back pain. The plaintiff also said that he was referred to Dr. Mulimba for CT scan and MRI scan which revealed that he had prolapsed disc at level 4/5 after which a surgery was recommended. He stated that after the surgery which was done on 27th November, 2008, he was put on back rest and he did not work nor walk due to the back problem. PW1 also stated that he had no knowledge of any pre-existing medical condition hence the insurance company or the defendant should pay for his medical expenses since he was covered.

9. Prof. David Livingstone Oluoch Olunya (PW2), a consultant neurosurgeon and a professor at the University of Nairobi told this court that he did a surgical procedure on the plaintiff and assessed his condition as 100% incapacity hence he was not able to perform any physical work and that he will require continued pain management. PW2 produced a medical report he prepared dated 2/10/2009 as an exhibit in evidence.

10. PW2 also stated that the plaintiff required further medical interventions accompanied by more implants to continue his medical therapy. Prof. Olunya said that the plaintiff will require a sum of ksh.300,000/= each for implants and hospital admission. He further stated that PW1 will also require ksh.180,000/= for home care, ksh.2,000,000/= for inpatient fee, ksh.265,000/= as surgery fee and ksh.10,000/= per month for review for the rest of his life.

11. In cross-examination Prof. Olunya said that the plaintiff's injuries were caused by lifting of heavy loads. PW2 said that the most common cause of disc dehydration is the lifting of heavy loads.

12. Prof. Olunya further stated that the claim in the report of Dr. Wambugu is misplaced since what was referred to, was a small birth mark incapable of causing the injuries the plaintiff sustained.

13. The defendant summoned four witnesses to testify in support of its case. James Mbugua (DW1), stated that he is the human resource officer by profession confirmed that the plaintiff was an employee of the defendant for eleven (11) years. DW1 stated that the plaintiff was first employed as a general worker but over the years he was promoted and that at the material time to this suit he worked in the security materials department as a vault porter.

14. DW1 said he placed the plaintiff under training by one Everlyn Nasiyo as evidenced by the Training Programme dated 12.9.2000. DW1 further stated that **Charties Insurance** refused to cover the injuries suffered by the plaintiff because it claimed that he had a prior pre-existing medical condition.

15. In cross-examination DW1 claimed that all employees of the defendant were provided with lifting equipment by the defendant. DW1 stated that the plaintiff was injured when working in the defendant's factory on 12.10.2006. In his evidence in cross-examination, DW1 stated that he did not have any document to show that the plaintiff underwent training. He also stated that the plaintiff was in need of further surgeries as indicated by Dr. Alupe.

16. Dr. Nelly Nyamunga (DW2) confirmed that the plaintiff visited her clinic on 12.10.2006 complaining of a lower back pain which occurred when he lifted a load of paper weighing 18kgs and that she then referred him to Dr. Alupe. DW2 stated that the plaintiff suffered from fibromyalgia and disc protrusion.

17. DW2 further stated that a normal health adult can comfortably lift a load of 25kgs in accordance with Health and Safety measures put in place by the Government. She stated that the plaintiff was subjected to X ray and CT scan examination prior to MRI scan being done on the order by Dr. Mulimba. It is DW2's evidence that were it true that the plaintiff got injured at the work place as alleged, the X ray and CT scan would have shown the purported injuries.

10. On cross-examination DW2 stated that she did not have any documents showing that the plaintiff complained of back pains before 12.10.2006. She also confirmed that the safety flash was released after the plaintiff got injured. DW2 further stated that she was in the defendant's health and safety committee, therefore she was aware that there was training of all employees the year the plaintiff got injured and those trainings were ongoing. DW2 was of the opinion that arising from the plaintiff's complaints, that his condition may most likely be

owing to natural causes.

19. She pointed out that the plaintiff suffered dehydration, hemangioma, disc haerniation and central disc organic pain. She said that those conditions are accelerated by aging, lack of exercise and degenerative conditions.

20. DW2 stated that she referred the plaintiff to Dr. Wambugu who in turn examined him and concluded that the condition of the plaintiff had a haemangioma which was hereditary and was not therefore covered by medical insurance. She further stated that the condition was pre-existing as per the MRI scan report.

21. Dr. Peter Wambugu (DW3) stated that the plaintiff suffered from prolapsed intervertebral L4/5 which occurred when the disc slipped and pressed a nerve. DW3 also said that the plaintiff suffered from a pre-existing back lesion. Dr. Wambugu further stated while testifying in cross-examination that the injuries sustained by the plaintiff are consistent with those which may arise when one lifts a heavy load.

22. Dr. Henry Wellington Walube (DW4) stated that he was a general medical practitioner in private practice and a visiting doctor at the defendant's factory since 2004. DW4 said he attended to the plaintiff who complained of severe back pain. He said that the pain was as a result of a problem with the vertebral disc in his lower back at level L4/L5 with a possible pressure on the nerves at the lower end of the spinal cord.

23. DW4 said that owing to his observation he referred the plaintiff to be seen by Dr. Mulimba, an orthopaedic and trauma surgeon who in turn referred the plaintiff to Dr. Olunya a neurosurgeon. DW4 stated that Dr. Olunya pointed out that the plaintiff's pain was because of fibromyalgia whose cause is not particularly known. On cross-examination, DW4 stated that he had no knowledge of a pre-existing condition of the plaintiff. He also said that the injuries may be caused by lifting heavy loads.

24. At the close of evidence learned counsels were invited to file and exchange written submissions which they did. The learned advocates also each identified the issues for determination. Having looked at the issues identified by each side, I think the following are the main issues which this has been invited to determine:

i. Whether the plaintiff was injured on 12.10.2006 while working at the defendant's premises.

ii. Whether the injuries sustained by the plaintiff were as a result of the defendant's negligence and or breach of common law duty of care owed to the plaintiff.

iii. Whether the plaintiff is entitled to damages and the remedies pleaded in the plaint.

25. On the first issue as to whether the plaintiff was injured on 12.10.2006 while working at the defendant's premises, it is the defendant's submission that the plaintiff had a pre-existing condition and therefore he was not injured on the aforesaid date. The defendant further argued that the plaintiff failed to present to this court any credible evidence to prove that he was injured while working at the defendant's factory on 12.10.2006.

26. On the other hand it is the plaintiff's submission that he tendered credible evidence to prove that he was injured while working in the defendant's premises. I have carefully considered the evidence tendered by both sides. I have also taken into account the rival written submissions and the authorities cited. The plaintiff (PW1) testified that he got injured on 12th October 2006 while working in the defendant's factory and that he thereafter visited the defendant's clinic to seek for treatment. The plaintiff's piece of evidence was never controverted by the defence.

27. In fact Dr. Nelly Nyamunga (DW2) confirmed that the plaintiff visited her clinic on 12.10.2006 complaining of a lower back pain which occurred when the plaintiff lifted a load of paper weighing 18kgs. After weighing the competing evidence I am convinced that plaintiff told the truth that he suffered the injuries particularized in the plaint while working at the defendant's factory on 12th October 2006. It is not in dispute that the plaintiff at the material time was instructed by the defendant's agents and or servants to carry out the duty of counting papers in the counting machine in the vault and to put a lower ream onto a pallet and in the process of doing so he got injured.

28. The defendant is categorical that the plaintiff had a pre-existing medical condition. However, the defendant failed to prove that assertion. It is clear from the evidence of Prof. Oluoch (PW2) and from the medical report, PW2 prepared, that the plaintiff was injured while lifting loads which evidence corroborated the plaintiff's assertion that he was injured as a result of lifting and putting a ream of papers weighing 18kgs onto a pallet. Dr. Wambugu (DW1), the defendant's own witness stated in cross-examination that he did not have any medical reports showing that the plaintiff had a pre-existing condition.

29. On the second issue as to whether the injuries sustained by the plaintiff were as a result of defendant's negligence and or breach of common law duty of care, the defendant is of the submission that the plaintiff failed to establish that the defendant was negligent. The defendant further submitted that the plaintiff did not prove that it breached the common law.

30. The defendant admitted that it owed a duty of care to the plaintiff by virtue of employer-employee relationship under **Section 6 of the Occupational Safety and Health Act**. The defendant stated that it took reasonable steps to ensure that the safety and welfare of the plaintiff and all of its employees were protected.

31. The defendant further pointed out that the plaintiff and other employees were trained on safety and that the staff had a health clinic with medical staff to address any arising injuries at the work place.

32. The defendant also argued that Dr. Nelly Nyamunga (DW2) had stated that a normal health adult can comfortably carry a load of 20kgs

therefore the plaintiff's claim that he got injured for carrying 18kgs cannot be true. The defendant averred that it did not breach the duty of care on the maximum weight a person can carry under the **Maximum Weight Convention of 1967** which convention Kenya adopted on 28th June 1967 and commenced its enforcement on 10th March 1970.

33. The defendant further disputed the plaintiff's assertion that the defendant's negligence caused him to sustain a scoliosis injury and averred that the plaintiff had a pre-existing condition which condition would have eventually occurred even in the absence of the defendant.

34. In the end, the defendant submits that there exists no causal link between the plaintiff's alleged injury and the purported negligence on the part of the defendant.

35. The plaintiff is emphatic that he sustained the injuries he complained of as a result of the defendant's breach of duty of care owed to him. He argued that the defendant was under a legal duty to ensure that he was safe thus it ought to have taken reasonable steps to avoid and prevent injury to him. He pointed out that he was never trained.

36. The defendant on its part averred that it actually trained the plaintiff and other employees on safety.

37. I have carefully considered the evidence tendered by the plaintiff and the defendant. The plaintiff stated that he was never trained nor provided with a lifting machine. James Mbugua (DW1) stated that the **safety flash** was sent to the defendant's employees on 12.10.2006 after the plaintiff was injured.

38. The evidence of DW1 therefore supports the plaintiff's assertion that he was not given any training on how to place paper on the vault. It would appear, that the defendant was jolted by the plaintiff's injury to take steps to offer training to its employees. In my view, the defendant ought to have known that lack of training to the plaintiff would lead to injuries as it happened to plaintiff.

39. I am satisfied that on a balance of probabilities, that the plaintiff has established that the defendant breached a duty of care it owed to the plaintiff. Had the plaintiff not sustained the injuries complained of, he would have been physically fit to work upto the age of 60 years all other factors remaining constant.

40. The plaintiff, as a result, has undergone pain and suffering and consequently lost his job and suffered 100% incapacitation. In other words, the defendant's failure to provide training or lifting machines to the plaintiff solely caused the plaintiff to sustained the injuries particularized in the plaint and shown in the medical reports produced in this court.

41. The last and final issue is whether the plaintiff is entitled to the remedies pleaded in the plaint. It is the defendant's submission that since the plaintiff failed to prove that it breached a duty of care to him that led to his injuries, then he is not entitled to the remedies pleaded in the plaint.

42. The defendant therefore did not make any proposals regarding quantum unlike the plaintiff. The plaintiff urged this court to award him the sums he proposed in his submission.

43) Having found the defendant wholly liable, I am convinced that the plaintiff is entitled to be compensated in monetary terms. With respect, I am persuaded by the plaintiff's submission that the common law principles of the employers liability entails that the employer should compensate workmen for the injuries sustained at the place of work and in the course of employment like in this case.

44. **Section 10(1) & (2) of the Work Injury Benefit Act** expressly

provides as follows:

"10 (1) an employee who is involved in an accident resulting in the employee's disablement or death is subject to the provision of this Act entitled to the benefits provided for under this Act.

(2) An employer is liable to pay compensation in accordance with the provisions of this Act to an employee injured while at work."

45. The medical evidence presented shows that the plaintiff suffered injuries and as a consequence he cannot walk and will never work. In fact the plaintiff was subsequently dismissed by the defendant on medical grounds.

46. Prof. Oluoch (PW2) assessed the plaintiff as having suffered 100% incapacity. PW2 observed that the plaintiff will be required to undergo future surgeries and projected future medical costs at kshs.7,620,000/=. The figure proposed by Prof. Oluoch (PW2) is not controverted therefore the plaintiff is entitled to claim.

47. The plaintiff has further beseeched this court to award him ksh.10,000,000/= as general damages for pain and suffering. He relied on the case of **Emmanuel Kombe Nzai aka Kombe Emmanuel =vs= Basari Co. Ltd & Another (2017) eKLR** where the claimant was awarded 6,000,000/= for pain and suffering having suffered 80% incapacitation due to spinal injury.

48. I have however looked at the case of **David Omutelema Opondo =vs= Dela Rue Currency & Security Printing Ltd (2017) eKLR** where the claimant was awarded ksh.1,200,00/= for pain and suffering for lumbar lordosis injury resulting from muscle spasm. The claimant like in this case was later declared redundant.

49. I find the injuries in the case of **David Omutelema Opondo =vs= Dela Rue Currency & Security Printing Ltd (Supra)** to be

comparable to those obtained in this case. I however, find the injuries in this case to be more serious, therefore, I will instead award ksh.1,500,000/= as general damages for pain and suffering.

50. The plaintiff has also asked to be awarded general damages for loss of earning capacity calculated as follows:

$$40,902 \text{ (monthly salary)} \times 22 \text{ (years)} \times 12 = \text{ksh.10,798,128/=}$$

51. It is not in dispute that at the time of the accident, the plaintiff was aged 38 years. Were it not for the injuries he sustained he would have worked upto the age of 60 years. Therefore a multiplier of 22 years is reasonable. At that time, the plaintiff earned a monthly salary of 40,902/=. As a result of the accident, the plaintiff became 100% incapacitated.

52. I am convinced he is entitled to be paid for general damages for loss of earning capacity. Consequently, I award him ksh.10,798,128/= as proposed and tabulated as follows:

$$40,902 \times 22 \times 12 = 10,798,128/=$$

53. The plaintiff claimed for future medical expenses particularized as follows:

Implant	ksh.300,000/=
Admission to hospital	ksh.300,000/=
Home care service	ksh. 180,000/=
Review per month for 32 years	
10,000x12x32	ksh.3,840,000/=
In patient fee	ksh.2,000,000/=
Surgery fee	<u>ksh. 256,000/=</u>
Total	<u>ksh.6,876,000/=</u>

54. In the end, judgment is entered in favour of the plaintiff and against the defendant as follows:

i. General damages for pain and suffering ksh. 1,500,000/=

ii. General damages for loss of earning

capacity ksh.10,798,128/=

iii. Future medical expenses ksh. 6,876,000/=

Total ksh.19,174,128/=

iv. The aforesaid amounts to attract interest at court rates from the date of judgment until full payment.

v. Costs of this suit.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of July, 2020.

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant