



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 59 of 1996

LABAN BUYOLE MAMBOLEO.....

PLAINTIFF

-versus-

RIFT VALLEY TEXTILES.....

.....DEFENDANT

JUDGMENT

The plaintiff herein filed this case against the defendants who are his former employers seeking damages for injuries sustained by him in the cause of his duty which injuries were allegedly caused due to the negligence of the defendants and or due to their breach of statutory duty towards him whose particulars are given in the plaint. Particulars of injuries are also given.

The defendant filed a defence denying allegations in the plaint and put the plaintiff to strict proof, that if any accident occurred then the same was due to the negligence of the plaintiff and or he substantially contributed to it and gave particulars of negligence and contributory negligence attributed to the plaintiff.

In his reply to defence the plaintiff denied particulars of negligence and contributory negligence attributed to him.

In his testimony he says that on the material date Picanon machine (100m) No.219 was out of order. He switched off the mortar and put a flag on top. The flag was to show that the machine was being repaired. He then lay underneath it to repair the machine using his hands. It was a minor repair and he did not need spanners. He did not have a helmet. A colleague switched on the mortar and the slay sword hit him on another metal injuring him on the head. He was working alone and he does not know where the colleague came from or why he switched on the mortar. The colleague was an employee of the defendant. After he sustained injuries he regained consciousness in hospital. He was treated and later on went back on duty but the head of his department said he was not productive. He appeared before a medical board which recommended his retirement on medical grounds which was done. He was paid workmen's compensation but that does not cover the injuries sustained and his loss of earnings.

When cross-examined he maintained that he had been trained on the job and he had worked in that capacity for 5 years. He conceded that the pay slip shows that he was a beam cutter and not a machine repairer. He was going to remove the jerk stick to take it for welding. He maintained he was employed to repair machines although he has no document to show that. He denied that he was working with Peter Mikiro who switched on the mortar, he denied conspiracy with Mukuru to switch on the machine to injure him in order for him to get money. He maintained Mikiro was at fault and that is why he was fired. He

added that if he had been provided with a helmet he would not have sustained serious injuries on the head which necessitated an operation on the head to remove clotted blood. He maintained that the issue of forgetfulness, ear ache and loss of vision in one eye are all due to the accident.

The defence witness confirmed that the plaintiff had been an employee of the defendant from 1987 to 1995. He was retired on medical grounds on 16/2/96. He recalls on 28/3/95 he was on duty as an assistant foreman in the weaving department. The plaintiff had worked on that machine for long. He saw him with Migiro together. The material was full and on the roller and those who cut materials went to cut it and then put another roller but they did not fix it properly and so the plaintiff went to fix it properly. He went beneath the machine to fix the roller. He does not know what Migiro did. He just saw the plaintiff being carried away. He confirmed that the machine was started when the plaintiff was beneath it and he was hit by the slay and not the slay sword. That the person who started the machine knowing that there was somebody beneath it was the one who was in the wrong. He however said that after the plaintiff switched off the mortar he should have put on the lock and he could have done what he was doing without going beneath the machine. He maintained nobody is usually issued with a helmet as they are not required. That the company did not tell Migiro to switch on the machine and that if the plaintiff had been working alone there would have been no injury.

When cross-examined he said that Peter Mikiro was an employee of the company who was lawfully on duty and he operated the machine which hit the plaintiff. That Migiro should not have switched on the machine knowing that the plaintiff was beneath the machine. He conceded that Migiro was summarily dismissed because he injured the plaintiff. He conceded that the plaintiff was not at fault. The fault lay with Migiro. He confirmed that the plaintiff's services were terminated because he was not productive. He said that the jerk pin is beneath the machine and he could not remove it without lying beneath the machine. He agreed that if a helmet had been issued it could have assisted the injury.

At the close of the entire case both counsels put in written submissions. In his submissions on liability the plaintiff's counsel submitted that:-

1. The evidence of the plaintiff as confirmed by DW1's evidence shows that one Migiro was on duty lawfully, he was an employee of the defendant and that he negligently switched on the machine causing the slay to hit the plaintiff's head on the frame injuring him.
2. That there is no evidence attributing the blame or negligence on to the plaintiff.

On quantum he suggested a figure of Kshs. 1,400,000/= for pain and suffering and loss of amenities and Kshs. 686,880/= for loss of future earnings.

The defence on the other hand submitted that: -

1. There was no document to show that the plaintiff was qualified to do what he was doing.
2. He also conceded that he switched off the mortar but not the lock and handle and had he done so he could not have been injured.
3. That the plaintiff and his friend Migiro are to blame for the accident as they did not follow the laid down instructions as per evidence of DW1.
4. That helmet are not provided for that job, as the plaintiff is not required to go beneath that machine.
5. That the plaintiff has not proved his case against the defendant as he blames a party who is not a party to the case and the company cannot be blamed for the acts of the employee, as they did not authorize him to operate the machine complained of.
6. That if the court finds that the plaintiff is not to blame then it should hold him to have substantially contributed to the occurrence of the accident.

On quantum counsel suggested Kshs. 300, 000/= for pain and suffering, Kshs. 264, 000/= for loss of earnings. On liability I find that from the evidence of both sides it is clear that there is no dispute that the plaintiff was lawfully on duty. Although he had no basic training he had been trained on the job and he was experienced. He had been assigned that job as per evidence of DW1. He went to fix the roller

properly and remove the lock pin. Although DW1 at first denied he later changed and conceded that in order to remove the lock pin the plaintiff had to go underneath the machine to remove it. Counsel for the defence tended to submit that the plaintiff had no experience over the work he was doing. If that was so then the person to blame was the employer as he was exposing the employee to risk and they would be held liable. The court is however satisfied with the explanation given by DW1 that the plaintiff had trained on the job and qualified.

Another aspect of this case is that there is no dispute as confirmed by DW1 that the plaintiff switched off the mortar and mounted a flag to show that he was repairing the machine. Indeed the plaintiff conceded that he did not remove the handle and put a lock but it is evident that if the fellow employee had not switched on the machine there would have been no injuries. DW1 admitted that Migiro was lawfully on duty and that he is the one who was in the wrong. He was lawfully on the premises. He had not been assigned any duties on the machine as DW1 said that he did not know what he was doing there. The defence counsel submitted that the plaintiff should have filed a case against him. Migiro was an employee of the defendant. It is the defendant who could have claimed indemnity from him. In any case they never raised this issue in their pleadings. There was no contract between the plaintiff and Migiro and so Migiro did not owe the plaintiff any duty of care. It is the defendant who owed him a duty of care and he was rightly sued. Migiro the one who switched on the machine was the defendant's employee who did an unauthorized act while on duty and the employer is therefore liable to compensate the plaintiff for the injuries sustained. The defendant is 100% liable.

Having established liability I now come to assessment of damages. On special damages the plaintiff has claimed Kshs. 6, 500/= for treatment after release from hospital. The receipts produced are exhibit 4 being cost of the medical report of Kshs. 1, 500/= and receipts for medicine exhibit 11 (a)- 11 (f) totaling Kshs. 950/= which I allow making a total of Kshs. 2, 450/=.

On general damages the first medical report is dated 7/8/96. The Doctor's findings are as follows: -

1. The injuries sustained were very severe and have healed fully and left permanent injuries on the body. He has persistent headaches and dizziness, which only subside with use of analgesics.
2. The scars on the parietal region and right temporal region will remain a permanent feature on his scalp.
3. He sustained fractures of the right temporal bone and zygomatic bone leading to a massive epidural subdural haematoma as well as haematoma to the base of the brain which also sustained compound fractures. This has resulted in the paralysis of the 6th and 7th cranial nerves hence paralysis of the left side of the face, which has also affected the left eye as well as generalized weakness on the left side of the boy (hemiparesis). This will remain a permanent disability in him.
4. He has developed loss of memory (amnesia) being the result of the brain concussion he sustained. This also will remain a permanent disability in him.
5. Due to frequent catheterization he sustained a rupture of his urethra and this has led to urine incontinence. This also will remain a permanent disability in him.
6. His present condition is that he will never be able to work any more as a result of all the above mentioned. He should be retired on health grounds and left for convalescence at home.

The same report lists the following injuries: -

1. A deep cut wound on the right temporal region of the head.
2. He sustained a fracture of the right temporal and zygomatic bones.
3. He sustained a fracture of the base of the skull (compound fracture) with a haematoma.
4. He was bleeding from the nose, mouth and left ear.
5. He had an epidural haematoma on the right side.
6. Neumatic injury to the left eye.
7. Paralysis of the 6th and 7th cranial nerves-left side.
8. Severe blunt trauma to the right jaw, which was swollen, and tender.
9. Severe loss of blood.

10. Severe pains incurred during and after the injury.

The second medical report exhibit 3 is dated 27/10/97. The findings were that: -

1. Muscle of mastication on the left are atrophied and have no power. Chewing is now impossible and swallowing cannot be coordinated. This may result in suffocation.
2. Facial muscle on the left are weak. This makes it impossible for the left eyelids to close fully. As a result the left eye will inevitably suffer corneal destruction and other injuries. It will be necessary to undergo further treatment and or provide glasses especially contact glasses for the left or both eyes.

In his conclusion the Doctor stated that the head injury has resulted in permanent damage of the 6th, 7th, and 8th cranial nerves on the left side. As a result permanent damage is now as stated above. The consequences are: -

1. The client is unable to engage in profitable undertakings-employment/business.
2. The client requires a heavy medical bill for the rest of his life.
3. The client will have to employ someone to assist him on a day-to-day basis. As a result of the above the Doctor put total disability at sixty percent. (60%).

In his evidence in court the plaintiff complained of the following: -

1. He suffers from forgetfulness.
2. He does not see properly.
3. Left ear does not hear well.
4. Suffers from irritation in the nose.
5. He suffers from frequent headache.
6. The left jaw is paralyzed. He chews on the right side. He cannot change food in the mouth. The mouth is twisted to the right.
7. He cannot control urine.

The plaintiff's counsel referred the court to the case of Jane Elsa Oyoo –v- Lochab Brothers Nairobi HCCC. No. 5733 of 1991 where the plaintiff aged 41 and a businesswoman sustained injuries as a result of a road accident. She suffered a depressed compound fracture of the left frontal bone with pneumocephalus, fracture of the left and right orbits and fracture of the maxillary bones. She was operated on by three specialists. She was found to have a complete loss of sight in both eyes. The eye specialists recommended that she be given 100% compensation for the total loss of sight. She was conscious after the accident for a period of seven days and suffered posttraumatic epilepsy of about 20% for about 2 years. The epilepsy was later controlled with drugs and the surgeon certified that there was no more risk of epilepsy. The plaintiff's total physical invalidity was assessed at 90-95%. The plaintiff was unable to do any manual work. The court awarded the following damages: -

- (a) Pain and suffering and loss of amenities Kshs. 1, 000, 000/=.
- (b) Cost of hiring a domestic helper Kshs. 460,000/=.
- (c) Loss of future earnings Kshs. 1, 880,000/=.

Total Kshs. 3, 340, 000/=

The case of Robinson Ndiri Gachui –v- Kenya Tea Development Authority Nairobi HCCC. No. 1679 of 1992 where the plaintiff sustained injuries in a road accident. He was 27 years and employed as an agricultural officer. The plaintiff sustained a fracture of the skull and resulting into paralysis in the right side of the body. There was also paralysis of the right facial nerve. He was now unable to feed himself and his speech was slurred. He is unable to walk properly and needs support while walking. He was unconscious for 2 days and the final medical report concluded that the plaintiff was unable to retain fully

use of his right side of his body. His right hand could not hold anything and the right leg could not support weight. The court awarded Kshs. 800, 000/= for pain and suffering and loss of amenities.

The case of Margaret Njeri Thigo –v- James Mbogo Karanja and 4 others Nairobi HCCC. No. 2052 of 1990 where the plaintiff aged 45 years sustained injuries in a road accident. She sustained a fracture of the skull with tear of the dural matter. She further sustained a deep laceration on the right shoulder and a blunt injury on right leg. As a result of the injuries suffered plaintiff was left mentally confused, lacked concentration, loss of control of urine flow and loss of memory. She walked with a limp and with the aid of a walking stick. The court awarded Kshs. 500,000/= for pain suffering and loss of amenities and Kshs. 20,000/= for loss of earning capacity.

The defence on the other hand referred the court to the case of Mary Mukiri –v- Njoroge Kania Nairobi HCCC. No. 6 of 1987 where the plaintiff a form 4 student aged 18 years at the time of the accident sustained severe head injury with loss of consciousness for a week, multiple lacerations on the forehead and face, a broken right upper incisor tooth, bleeding from the right ear and nose. She had a complete 6th nerve paralysis and partial facial paralysis of the right side resulting in facial asymmetry. The injuries healed with a very ugly scar on the face and scar on the mid frontal area, recurrent headaches and a poor memory. The scar on the face was a great embarrassment on a young unmarried lady. General damages was assessed at Kshs. 200,000/=.

The case of Maggery Wambugu Namu –v- Mr & Mrs. Nyaga Nairobi HCCC. No. 821/1990 where the plaintiff suffered head injury, bruises on the abdomen, ruptured bladder and urethra, fracture of the pelvis bone, the court awarded general damages of Kshs. 300,000/=, special damages of Kshs. 3,500/=, future medical expenses of Kshs. 190,000/=, loss of earning capacity Kshs. 10,000/= total Kshs. 403, 500/=.

The case of Joseph Were Ouma –v- Peter Sigwili and Another Nairobi HCCC. No. 3628/1989 where the plaintiff suffered facial injuries to his face and mouth involving lacerations on the face, both legs, distortion of upper teeth and chest injury. Hospitalized for 9 days. The plaintiff complained of pains, deformity of teeth, facial disfigurement, pain in the right eye, and inability to do heavy work. The injuries healed with a resultant hypertropic ugly keloid scar on the face, mouth, right lower eye-lid 5” by 5”. The scars formed contractures and re-treated lower eyelid downwards displaced upper incisor teeth which were slightly loose, tender and keloid scars required surgery for the release of contractures. The court awarded Kshs. 180,000/= as general damages and Kshs.28, 000/= for cost of future treatment.

Commenting on the authorities cited for general damages I find that the injuries in the cases cited by the plaintiff’s counsel were more serious and severe and had far reaching effects on the lives of the victims than those of the plaintiff herein while the injuries in the cases cited by the defence were less severe with less severe effects on the lives of the victims than those sustained by the plaintiff herein.

As commented by the defence counsel although the plaintiff complained of loss of memory he narrated the incident well and could also remember dates, he was not under escort and so he can propel himself without any difficulty. As for urine incontinence I did not see him run in and out of the chambers to release himself during the trial although he said that he was controlling fluids intake. No doubt his face is twisted. He underwent an operation and he has lost use of the 6th and 7th cranial nerve resulting in paralysis of the left side of the face, jaw, eye, and ear. As a result of these injuries as noted by both medical reports the plaintiff is unable to do any work and that is why he was laid off on medical grounds.

Considering all the relevant factors to this case, the extent of injuries sustained and their effect on the life of the plaintiff I would assess Kshs. 650,000/= as general damages for pain suffering and loss of amenities less workmen’s compensation paid.

The plaintiff also claimed future medical expenses but as submitted by the defence counsel no estimates were given although the Doctor noted in the report that he will require a heavy medical bill. No evidence was adduced to show that the plaintiff was still attending medical treatment although he said that he has no money to enable him to do that, but attendance at government hospital would have sufficed. However, the court is alive to the fact that the Doctors said he will have to use painkillers to control pain but no

estimates were given. No submission was made on this by the plaintiff's counsel and so no allowance will be made on this head.

As for the loss of future earnings it is evidently clear that the plaintiff lost his job following recommendation of the medical board that he was non-productive. He was born in 1959 as per his Identity Card and was to retire at the age of 55 years. He had 18 years to go. The plaintiff's counsel urged the court to use a multiplier of 18 years while the defence suggested 12 years. When choosing a multiplier the court has to consider death through natural causes and the fact that the plaintiff could have quit the job on his own for greener pastures elsewhere. I will therefore choose a multiplier of 14 years as being reasonable. Loss of future earnings will work out as Kshs. 3, 180 *12 *14 that comes to Kshs. 534,240/=.

Under special damages I will allow cost of medical report for Kshs. 1,500/=. The rest were not proved.

In the premises I enter judgment for the plaintiff on the following terms: -

1. Special damages being cost of medical report of Kshs. 1,500/= with interest at court rates from date of filing until payment in full.
2. General damages for: -

(a) Pain, suffering and loss of amenities Kshs. 650,000/= less amount paid for workmen's compensation of Kshs. 103,410/= leaving a balance of Kshs.546, 590/=.

(b) Loss of future earnings Kshs. 534,240/=

Total Kshs. 1, 080,830/= with interest at court rates from the date of judgment until payment in full.

3. Costs of the suit.

Dated at Eldoret this 26th day of January 1998.

R. NAMBUYE

JUDGE

26.1.98