REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 637 of 1990

BROWN M. MULATYA..... PLAINTIFF

VERSUS

PWANI UNITED BUILDERS..... DEFENDANT

JUDGMENT

In 1990 the plaintiff was an employee of Pwani United Builders who were constructing a building at Makupa. On the8th of January 1990 he was assigned to clear the rubbish from the carpenters workshop which was on the 2nd floor of the building. When the plaintiff went to throw away the dirt thewall of the stair case which had only been constructed recently and apparently had not yet fully cured, collapsed and as aresult he fell to the ground and thereby sustained injuries.

By this action he seeks to recover damages from the defendant. In so doing he contends that the real or probable cause of. the accident was their negligent failure to give warning to the workers that certain sections of the buildingwas still under construction and hence dangerous to the workers.

The plaintiff testified that he had worked in the building for 6 months prior to the date when the accident occurred. It was suggested to him that on account of his considerable stay in the premises he was in a position to distinguish the weaksections from the dry and firm ones.

It was also suggested that this particular wall the building had been constructed on the same day. He denied that there was truth in this suggestion. He also denied the fact that the rubbish which he was disposing of had resulted from the construction of the stair case wall which collapsed and injured him.

It is quite pertinent to notice that these suggestions were made by the defendant's advocate during the plaintiff'scross-examination.

But the defendant's evidence which was solely adduced by the man who was the plaintiff's supervisor on the material day contrasted sharply with the advocate's suggestions. The D.W.I said that in fact there did not exist any protecting wall. Hesaid:

"The finishing of the wall had not yet been done.Someone would see that the protecting wall had notbeen put in place".

The question is whether the wall in fact existed but was still weak and collapsed as suggested by the defendant's advocate incross examination of the plaintiff or whether no suchprotecting wall was there as asserted by D.W.I. This illogical discrepancy in the case of the defence is inexplicable. It cannot be rationalized except on the ground that the instructions given to the advocate and upon which he cross-

examined the plaintiff were then deliberately and consciously amended orvaried or abandoned. The evidence of D.W.I. constitutes the latter version.

In my considered opinion this lack of consistency on the part of the defendant as to the factor which caused the accident renders the defence (whichever it is incredible and improbable. It is a story which was fabricated after the event.

In the premises I accept the plaintiff's evidence and I find as a fact that it is the staircase wall which collapsed and thereby caused him to fall to his injury.

Did the plaintiff contribute, to his injury? The doctrine that if the plaintiff's act was the proximate cause of the damage the plaintiff can not recover is well established.Would this accident have not occured but for the negligence of the plaintiff?

In the first place the plaintiff strongly denied that he ought to have known that the wall was weak: he also denied, that he-knew that it was weak. D.W.I said that that day was the plaintiff's first occasion to work in that section of the building. It is not in dispute that there was no warning of any sort as to the weak parts of the building. In these circumstances I hold that there was no way he would have known that the wall would collapse if he exerted his weight to it.

He was admitted to the Coast General. Hospital on the same day and the wounds were treated, a plaster was applied to his right wrist and he was kept under observation for the concusion. On the 29th January he was discharged but attended for Physiotherapy treatment on his right wrist.

When he was examined for the medical report which is dated 6th January 1994 he complained: of pain, stiffness and weakness of the right wrist and as a result he had difficult in using the right hand. He also complained of pain underneath his private part when walking .

The earlier examination had revealed that the right wrist had lost 40 degrees in the range of his movement and that as a result its movement were restricted and the right hand grip was weak.

The doctor's report in part, reads as follows:

"On the 30th November I examined him with the following findings:

(a) The right wrist is still stiff and. painful.

(b) The movement of the right wrist is limited.

(c) The tenderness on the left side of the pubicarch (ischio-pubicramu s).

Conclusion:

(1) The right wrist:

The osteoarthritic changes in the joint will permanently be the cause of pain andincapacity in that joint.

Therefore it will be extremely difficult forhim to carry out any hard work with the righthand.(2) The Pelvis:

The fracture in the pelvis and the delayedunion will constantly give him pain inlongstanding".

I have been referred to two cases for guide as to conventionalawards:

In Willie Muliva v. James Wachira Kuru H.C.C.C. 833 of 1987(Nairobi) the plaintiff sustained a fracture dislocation of the distal end of the radius and ulna involving the wrist joint, acut wound on the back of the

head and a mascular injury to the right buttock. The injury to the head and to the right buttock healed but the right wrist joint suffered from considerablediscription on account of inadequate treatment and an early .onset of osteoarthrites in the joint. As a result the plaintiff suffered from chronic pain in the joint and weakness of the right hand producing permanent incapacity of about 40%.In a judgment which was delivered on the 11th July 1989 Butler-loss J, assesed general damages at Shs. 250,000/=.It is undoubtedly clear that this case has significant comparable features to the present case especially with regard to the wrist injury.

In kazungu Kenga v. Southern Engineering companyLtd.H.C.C.C. 672 of 1987 (Msa) the plaintiff aged 34, suffered a fracture of both ramii of the right pelvis, fractue of the left part, of the sacrum with partial subluxation of the leftsacro-iliac joint of the left half of the pelvis and cuts onthe right arm left cheek and eyebrows. She was kept on afracture board and in dwelling catheter was put in. He was inhospital for 22 days. He resumed light duty after one and halfmonths .and full duty after 3 months. Fractures had now healedfully without deformity but he still suffered from pain and limitation of movement of spine. In a judgment which was delivered on the 14th November 1989 the plaintiff was awarded Shs. 200,000/=; as general damages for pain, suffering and loss of amenities.

This case was of multiple fractures of the pelvis bones and sacrum unlike the present case. Nevertheless, the aspect ofresidual pain described in the present case in considerablysimilar to the cited case.

It is settled law that in a case of this sort generaldamages are awarded for pain and suffering which the plaintiffhas undergone in the past and is likely to undergo in the future. In the present case there is evidence of permanent pain (and hence suffering) in the wrist-joint and in the pelvis.The plaintiff is aged 27 years. He could only work as alabourer. Yet now the onset of osteoarthritis in his right wrist joint and the weak right hand when combined with thepain in pelvis renders life somewhat miserable. This accident has created loss of expectation of happiness. Thus, the plaintiff must be compensated for lost amenities such as being deprived of his full ability to earn his living apart from thefact that he should be compensated for the deprivation of bodily capacity per se.

The other aspect which must be taken into account is the reduced purchasing power of the Kenya Shilling.

I prefer to award a global sum for all the injuries ratherthan allocate specific sum for each separate head of damage.

Doing my very best, I award Shs. 450,000/= on the head ofpain, suffering and loss of amenities.Special damages are allowed at *Kshs.* 3600/=.

Accordingly. judgment for those figures together withinterest and costs is entered for the plaintiff against thedefendants.

Dated and delivered on the 3 0th August, 1994.

I.C.C WAMBILYANGAH

JUDGE