REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 89 OF 1989

MICAHEL MUTUA KIEMA ……....…… PLAINTIFF

VERSUS

HAGGINSON MALINDI MWANGEMI

GITAL CONSTRUCTION CO LTD ……..... DEFENDANTS

JUDGMENT

By this action the plaintiff seeks to recover from the defendants damages for the personal injuries which he suffered when the upper wall of the pit in which he was working in the course of his employment collapsed on him. At the trial various issues were canvassed and I will deal with them in the order in which they were tackled by the advocates. Where and when did the accident happen?

In 1987 there was a construction site at Moi Airport Mombasa. The plaintiff was one of the labourers hired by the contractors to excavate the pit for an interceptor oil tank. In March, 1987 the pit had become deeper and wider. On the 2nd of March 1987 it may have been 20 feet deep by the reckoning of PW2. At the same time, it was raining very heavily in this area. As a result, the rain water which found its way into the pit had to be pumped out before any excavation could be continued.

It ought to be mentioned here that initially a digging dumper was used for the excavation purpose, but it had to be substituted with human labour when the pit became too deep for the machine.

On the 2nd of March 1987 the plaintiff went to work as usual. On the previous day (or night) it had again rained heavily and the place was wet, the soil was loose and heavily laden with moisture and water had accumulated at the bottom of the pit. The plaintiff and other workers descended into the pit. They went there with their working implements such as pick forks, jembes and shovels. As they worked the soil of upper wall of the pit collapsed and burried these workers. A rescue operation then ensued. All except the plaintiff were safe and unharmed. But the plaintiff had been severely injured on his right leg. He was rushed to the Coast General Hospital to where he was admitted and had to undergo an operation of amputation above the level of the knee joint. He was discharged from the hospital on the 27th April 1987 but continued to receive treatment as an out-patient.

The medical evidence shows that the plaintiff's complaints for which he is justified in seeking compensation are loss of the right leg and the consequential inability to work or use the leg.

The Aspects of Negligence:

In the first place the uncontroverted and credible evidence of a civil engineer who is also the vice chairman of the Institution of Civil Engineers Mombasa branch and who practised his profession for 32 years is that when excavations of the sort described in these proceedings are undertaken there are imperative safety measures which must be done. He said that the walls of the pits must be shored: This means putting shuttering of steel plates or wooden timber and holding them with cross-members or other supports which are pushed deep the soil to hold the shuttering in place.

That process is meant to exclude any possibility of the collapse of the walls of the pit as has been described in this case. It is not in dispute that this safety measure or any other was never fixed to hold the walls of that pit.

The expert evidence also showed that moist and loose soil is prone to collapsing unless it is held by a safety measure. It thus constitutes a risk which is known and foreseable in engineering science and practice. So I find the contractors or employers of the plaintiff to have been culpably negligent when they omitted or failed to put this safety measure in place before the workers were ordered to work in the pit.

In the second place it was in the evidence of Mr Hagginson Malindi Mwangemi (the 1st defendant) that on the fateful morning he visited the site and noticed a pool of water in the pit. He determined the level of the water from the floor of the pit to be 3 feet. He says that he issued a directive that no worker should descend into the pit until the water had been pumped out of it. He then went to fetch a water pump but before he arrived at the pit site he learned that the top of the wall of the pit had collapsed and that workers were thereby burried in the pit. He said that it was the managing director of the 2nd defendant, Mr Gital, who had forced the workers to go into the pit despite its hazardous condition.

There was evidence that the said Managing Director of the 2nd defendant was extraordinarily cantankerous and belligerent towards the workers whom he considered to be malingerers.

In the disclosed circumstances of this case it is clear that the behaviour of that managing director was grossly callous. It did not at all take into account the safety of the workers.

In the final analysis I hold the plaintiff's injuries resulted from the negligence of the contractors (or the plaintiff's employers) who were responsible for the excavation of the pit. They ought to have foreseen the dangerous consequences likely to flow from the failure to prevent in any way the upper wall of the pit from collapsing and from the act of driving the workers into the pit without checking to see if it was in a safe condition at that juncture.

The contractors might have reasonably anticipated that the upper wall whose soil was loose and laden with moisture (as it then was) would collapse and harm the workers who were in the pit. One is thus impelled to conclude that the conduct of the contractors was purposefully negligent or reckless.

The Plaintiff's negligence?

I have to direct myself as to possible contributory negligence on the part of the plaintiff. It may be said that the plaintiff should have at the critical time refused to go into the pit particularly as the 1st defendant had sounded an alarm about its unsafe condition. But the plaintiff was a menial worker who desperately needed money. Also, he was still newly employed. In my view the aggressive manner of the 2nd defendant's Managing Director must have accorded him no opportunity for objectively directing his mind to danger which was glaring at him. So I discount any possible contributory negligence on the part of the plaintiff.

Whose employee was the plaintiff on the fateful date?

This question raised tremendous controversy in the proceedings, and in the process occassioned delay in disposing of the suit. In his own evidence the plaintiff said that on the 25th February, 1987 he was hired as labourer on the site by Mr Gital the Managing Director of the 2nd defendant. His wages were Shs 30/=. At the time of the accident he had worked for 4 days and had earned a total sum of Shs 105/=. The

plaintiff categorically exculpated the 1st defendant when he said (in cross-examination by Mr Gikandi):

> "It is not true that I was employed by the 1st defendant as alleged in paragraph 5 of the plaint. I do not know the 1st defendant. I was employed by Mr Gital the European. It is not true that I was employed by Mr Mwangemi".

The 1st defendant himself who testified twice repeatedly denied to have employed the plaintiff. He denied that the plaintiff had ever worked for him. He said he had been given a sub-contract for the masonry work in an office block that was simultaneously being erected at the site and a gate house. But with regard to the interceptors he said that it was exclusively done by Mr Gital's company ie the 2nd defendant. He said that he did not have any of his labourers working at the site of the interceptor pit. But he admits that apart from his sub-contract (already adverted to) he also worked as general supervisor on the site. In this latter respect he was answerable to Mr Gital. It may be in that connection that he sought to pump the water out of the pit before the excavation could be done on this particular occasion. It may also explain his reason for rushing the injured plaintiff to the hospital. Or he may have done these on humantarian grounds as he said when he was specifically cross-examined on them. It was suggested to him that he showed concern because the injured man was in fact his employee.

The evidence from the Ministry of Labour, Mombasa:

It was given by Mr Francis Gitau who is incharge of workmen's compensation. He said that his department received two Form LD 104/1 in relation to this plaintiff's accident which had happened on the 2nd March, 1987 at 9.30 a.m. He said that the first of the forms was dated 25th March, 1987 and was submitted to him on the 26th of June. It showed that the plaintiff was the employee of Mwangemi General Contractors.

The second form which appeared to have been completed on the 11th of March, 1987 was not submitted to the Labour Department until after more than 6 months had elapsed ie on the 7th October, 1987.

In each form the same injured man is described as the employee of the person who completed it (the form). Although the year (1987) was not indicated on the receipt date, stamp of the Labour office it is clear that it was received in 1987. This is because the notification of the accident to the Headquarters of Labour Department was exhibited (as Exh C) and was dated 15th July, 1987.

The 1st defendant was then recalled as a witness. He admitted that the first form LD 104/1 was completed and signed on his behalf of his own employee called Daniel Mkamba. He also admitted to have been arrested and prosecuted together with another man for offences of forgery in relation to the form which was purportedly completed by Mr Gital's Company (the second defendant).

In cross-examination by Mr Pandya the 1st defendant admitted that the person who completed the first form was his own clerk who was paying wages to his employees, and that although he knew that the clerk had completed this form he did not take any action against him.

It is pertinent to note after the form was completed the doctor had to assess the degree (in percentage expressions) of the injury which had been sustained. So the completion of the form is an elaborate process. Also the details of the injured man had to be available. On this aspect the 1st defendant said:

> "I am the one who had taken the man to the hospital and then took all his details (from the injured man)". There are several questions which have been raised by this evidence and they are:
>
> (a) If the 1st defendant had taken the details of the injured man and if he was not his employee was it not right that he should have passed those details to the employer of the injured man rather than to Daniel Mkamba, his own wages clerk?
>
> (b) Why would Daniel Mkamba, who, as the wages clerk the 1st defendant's maintained the relevant records have mistaken the plaintiff as their employee and completed this form LD 104/1?

(c) Why did the 1st defendant not take any legal action against Daniel Mkamba if he had falsely made out the document of such far-reaching implications to him? On this point it is relevant to notice the following answers which were given by the 1st defendant when he was corss-examined by Mr Gikandi;

lt (the document) is in the signature of Daniel Mkamba. I have never complained against Daniel Mkamba to the labour office. I have never asked the labour office to ignore this form".

This is all despite the fact that he was prosecuted in connection with the form which purportedly emanated from Mr Gital's company. That was the occasion when he should have endeavoured to annul the document on the ground that, it too, was a forgery.

My conclusions on this issue:

I am satisfied on the basis of the evidence that the plaintiff must have been engineered and coached to give the evidence intended to exculpate the 1st defendant. The truth of the matter is that he had been employed by the 1st defendant.

Is this a case of two masters?

This is a question of law. On this point I have derived substantial benefit from two books titled "*The Law of Master and Servant" by Francis Raleigh Batt* 4th Edition by George J Webber and "T*he Employers Liability*" *at Common Law*" by John Munkman: The principles which are relevant to the present case can be summarised as follows.

(a) In law a man may have two masters although only one master may be entitled to give him orders as to the particular work upon which he is engaged.

(b) The primary test is which of them controls him.

When these principles are applied to the instant case it is clear that both the defendants contolled the plaintiff. The 1st defendant was his actual employer and the supervisor of the construction. No attempt has been to delink this role from that of the sub-contractor.

The plaintiff thus directly worked under him. He had been able to order the workers not to go into the pit until he had pumped out the water. But then Mr Gital arrived at the site before the 1st defendant had returned from where he had gone to fetch a water pump, ordered the workers to go into the pit. The 1st defendant should not have assigned the plaintiff to do the risky job when no safety precautions had been put in place. I hold that in so assigning him to do that job he also showed a callous disregard for the safety of his worker. On the clear facts of this case I find both defendants jointly and severally liable to the plaintiff for the injuries.

Issue of the quantum of damages:

The plaintiff was aged 28 years at the time of the injury. He was a robust man and that is the reason why he was selected for this particularly hazardous work. The injury itself was undoubtedly severe. He was initially in pain and shock. The leg had to be amputated above the knee.

The plaintiff therefore suffers the loss of the right leg.

According to Arnold Mann in his book "*Medical Assessment of Injuries for Legal Purposes*" 4th Edn at p 276:

"Above-knee amputation represents a loss of 90 per cent of the function of the leg. The loss is total if the stump is too short to permit the use of any posthesis other than a tilting table type which, basically, is a posthesis fitted to the pelvis".

The present case is that of an-above-knee amputation. Also, at p 274 of the same book it shows that a patient can be psychologically disturbed by his amputation and can have phantom pain which could be exceedingly difficult to treat. Although there is no evidence of phantom pain in the present case it is a general aspect to consider in a case of this sort. For all the reasons considered above I award a sum of Shs 590,000/= for the head of pain, suffering and loss of amenity on the basis of *Mohamed Awadh vs simon Njenga Rurigi & another* HCCC No 665 of 1989 which was decided on the 14th of May, 1993, and which was an amputation of below-the-knee.

The plaintiff's residual disability when combined with the fact that he is illiterate render him totally unfit for any gainful employment. Even when he was able-bodied he could only be employed to do the very ardous task. What can he do now? Obviously nothing.

He is entitled to compensation in that regard. His wages of Shs 30/= per day would add up to Shs 900/= per month. I give him multiplier of 20 years from the date of the accident. The result is Shs 168,000/=.

I also award a sum of Shs 70,000/= as the cost for the posthesis and Shs 1,100/= for the medical report.

Ultimately, the figures which I have awarded are as follows:

Pain, suffering and loss of amenity ……..Shs 590,000/=

Cost of the artificial limb …….....……..Shs 70,000/=

Cost of the medical report …….....……Shs 1,000/=

Loss of earnings . …….....Shs168,000/=

Total Shs 829,100/=

Accordingly, judgment is entered for the plaintiff against the defendants jointly and severally for that figure of Shs 829,000/= with costs and interest

Dated and Delivered at Mombasa this 25th day of October, 1993

I.C.C. WAMBILYANGAH

…….

JUDGE