**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 407 OF 1989**

**EPHRAIM KIVIHI ..........................................................PLAINTIFF**

**VERSUS**

**KENYA ENGINEERING INDUSTRIES LTD.................DEFENDANT**

**JUDGMENT**

The plaintiff herein filed a suit on 27/1/1989 querying that at all material times he was an employee of the defendant whose business involves the manufacture of matchets, shovels, screwdrivers, locks and padlocks and by its very nature the working environment is very noisy. In 1979 he developed ear problem due to the noise he was exposed to and from the doctor's report his hearing had been reduced by 20%. He was advised to change working place to avoid complete deafness. The defendant, their agents and or servants were informed of this but they negligently failed, ignored and or refused to effect the change. Thus occasioning the plaintiff more injury.

The particulars of negligence were given as:-

1. Exposed the plaintiff to an excessively noisy environment.

2. Failed to comply with the doctor's recommendation.

3. Failed to adjust the plaintiff's working condition by providing him with the necessary ear defenders.

4. Caused the plaintiff's hearing to deteriorate to 30%.

The particulars of injury was stated as 30% deterioration of his hearing and sought relief for special damages to be supplied, general damages and costs of this suit.

The defendant put in a defence to the effect that it is true the plaintiff istheir employee that it deals in the type of business specified by the plaintiff but denied that the working environment is noisy. The defendant conceded that the plaintiff developed ear problems in 1979 but denied that this was due to negligence on their part. Further averred that the action was time barred as it was not instituted within 3 years of its having arisen and prayed for the suit to be dismissed.

In the alternative stated that the plaintiff was paid in full and final settlement for the injuries he had sustained about 13th October, 1980 and the plaintiff has not suffered any further injuries since the said payment and further denies that the plaintiff has suffered any injury to his right ear nor has he suffered any loss and damage. They denied the particulars of injuries as set out in the plaint and prayed for the suit to be dismissed with costs.

Seven issues were framed and filed namely whether the working environment of the plaintiff was noisy, whether defendants were negligent, whether cause of action is time barred, whether plaintiff suffered any injury, question of damages, payable, whether payment in 1980 was in full and final settlement, and who shall pay costs of the suit.

The suit was set down for hearing but on the appointment day the defendant did not turn up, there was no explanation for their absence and the Court directed the suit to proceed by way of formal proof.

Plaintiff gave evidence briefly that in 1979 he was working with the defendant in the grinding section where there was a lot of noise. His ears suffered injury as he can not hear properly. He went to hospital where he was examined and the doctor recomended that he be transferred to a less noisy section and he was paid workman's compensation as per exhibit 3a, b, and c. He worked hard and then in 1987 he was transferred from the section where he was working in 1988 from tool section to the machinery room where there was alot of noise. He was transferred as per exhibit 1. He complained but this was not heeded. The noise here increased his deafness and he had to go to Kenyatta National Hospital for treatment and a report was made exhibit 3. The report stated that he had lost his hearing ability up to 30% and too much noise in his place of work. That his employers did not give him hearing aids neither did they heed the advise of the doctor of deploying him in a lesser or noisy section. That the compensation he was paid as per exhibit 3a, b, c, was for the injuries he suffered in 1979. On receipt of the medical report exhibit 2 he sued the company for damages for injury suffered. He worked with them up to January, 1991, when he was sacked for refusing to withdraw this case against his employers. Headded that at present his hearing impairment is more than 30%. After the plaintiff concluded the evidence the counsel for plaintiff put in written submission but before the judgment was delivered the defendant requested to have the case re-opened. The case was re-opened and they were given a hearing. The plaintiff was recalled for cross examination. When cross examined the plaintiff conceded that in 1986 he was paid compensation for the injuries he suffered as per exhibit 3a,b and c.

He conceded that in 1988 he was examined at Kenyatta National Hospital and given exhibit 2 and in October of the same year 1988 he was taken to Aga Khan Hospital where he was examined by the same doctor who had examined him in 1979 and he assessed a hearing disability of 15% as per exhibit D2. He conceded that the deafness started in 1976.

The plaintiff was firm that following the 1979 report he was transferred to the tool room where there is no noise. In 1987 he was transferred to the machinery section where there is a lot of noise. That next to the machinery section there is a section for making *pangas* and this also makes a lot of noise. He added that the tool room is separated from the machinery section and *panga* section by iron sheets and wire mesh.

He was firm he was sacked because he refused to withdraw this case. That in 1980 he did not file the case because he had been transferred by the personnel officer. He conceded the suggestion that there is a doctor who used to visit the premises every day and he is the one who referred him to Kenyatta National Hospital because he was not hearing. He conceded the defendants followed the doctor's advice and that is why they transferred him to the tool section. He asserted that the 1980 compensation was not sufficient.

In re-examination, he stated that he was transferred from the tool room to the machinery section in 1987 and this sparked off the problem which gave rise to the report in exhibit 2 and then he filed this case in 1989. The defendant's evidence was given by their personnel officer who had been in their employment since 1977.

The witness stated that the plaintiff problem started in 1976 when the plaintiff was working in the grinding section where there was a lot of noise. The doctor who examined the plaintiff assessed a hearing disability of 20% and he was compensated. The plaintiff was even transferred to tool room section where there was no noise. From here in 1987 he was transferred to pm section which is the machinery section because there was no work in the tool room section.

DW1 conceded that they transferred him to the tool room section because of his hearing problem but the doctor had not recommended that he be transferred to a lesser noisy section. He was transferred because

of his workmanship. He was firm the sections are separated by wire mesh only and there is no barrier. He denied threatening the plaintiff with dismissal if he filed any action against the defendant as the plaintiff is a union employee. He denied exposing the plaintiff to a noisy section.

When cross examined he stated that the offices where he works are far from the work shop and he rarely goes to those places and all complaints from this area should be referred to him and he acts on reports.

That they referred him to the doctor for a second opinion when they received exhibit 2.

He added that inspectors from the Ministry of Labour went to that section and classified it as a less noisy section. He conceded none of the workers wear hearing gadgets. At the close of the whole case both counsels put in written submissions. The plaintiff's counsel submitted as follows:

1. That the plaintiff's employment involved the manufacture of matchets, shovels, screwdrivers, locks padlocks and by its nature the working environment was noisy.
2. In 1979 he suffered a hearing disability of 20% and he was compensated.
3. In 1979 acting on doctor's advise the plaintiff was transferred to the tool section but in 1987 contrary to the doctor's advise he was transferred to the pm section where there is a lot of noise and the plaintiff started experiencing hearing problems again.
4. That the plaintiff was examined at Kenyatta in 1979 and he went back in 1980 for a further examination. The plaintiff experienced this problem only a year after he had been transferred from the tool room section.
5. That the defendant's action of having the doctors report exhibit D2 can only be explained that they wanted to play down the findings in exhibit 2 in order to escape responsibility.
6. That the transfer of the plaintiff from the tool room section in 1987 and failure to provide him with hearing aids is an act of negligence.
7. That the cause of action complained of arose in 1988 and as such it is not time barred.

The defence also put in written submissions as follows:-

1. That the plaintiff's suit is time barred and in the alternative the defendant was not negligent as alleged. The suit is time barred because the cause of action arose in 1979 and as per s 4(2) of the Limitation of ActionsAct (cap 21) laws of Kenya an action for tort may not be brought after three years have elapsed. Since the plaintiff alleges that he had developed ear problems in 1979 it means that time start running from 1979 which expired in 1982 while the present suit was filed in 1989 seven years later. The allegation of the plaintiff that he was threatened holds no water as he could have sought an extension of time within which to file his action.

2. That should the Court find that the suit is not time barred then negligence is denied as there is no evidence that the doctor recommended the plaintiff to be transferred to a lesser noisy section more so when the plaintiff did not know why he was transferred to a lesser noisy section.

3. It is not true that the defendant failed to effect change as the plaintiff conceded there was change after the 1979 assessment and this was also confirmed by DW1 and as such the plaintiff was not exposed to the same environment throughout.

4. That exhibit 2 is not conclusive as the doctor said the cause could be due to the noise if the plaintiff has been working in the same environment.

5. That from the plaintiff's behaviour in Court his hearing problem was very selective and chose to hear when he wanted to and chose not to hear when he wanted to.

6. Reasons for his dismissal are irrelevant to the present case.

7. It is surprising that the plaintiff has not claimed through the workmens compensation for the injuries complained of.

8. That if the Court is inclined to award compensation then this should be for the 10% increase only.

As stated earlier on in this judgment 7 issues were framed. The defence counsel has raised another one to the effect that the plaintiff should have claimed through workman's compensation as he did before instead of filing this action.

Section 5 of the Law Reform Act (cap 26) is very clear on this. Under this section the workman has an option to proceed under the workman's compensation or file an action for assessment of damages by the Court. Even after compensation is paid under the workman's compensation and the employee is not satisfied he is at liberty to refer the matter to Court for assessment of damages and if the amount awarded by the Court is larger than what he was awarded under the workman's compensation, then the figure awarded under the workman's compensation if paid will be reduced from the figure awarded by the Court. In the premises the action is properly brought.

I will now proceed to deal with the issues framed. As regards issue No 1 we have evidence from PW1 that the surrounding circumstances of his working place was very noisy and caused him the problem in 1979 and upon the doctor's recommendation he was moved to a lesser noisy section but in 1987 he was moved to a noisy section. There is no letter of transfer to this effect but DW1 who gave evidence in respect of the defendant conceded that the plaintiff developed hearing problems in 1976 and he was transferred to the tool room section. The plaintiff said he does not know why he was transferred in cross examination but in re-examination he said it was because of the doctor's recommendation. DW1 at one time conceded in his examination in chief that the plaintiff was transferred following the doctor's recommendation but later on changed and said that the transfer was normal and that the plaintiff worked very well and as a result of this he was transferred to the tool section where they staff skilled workers and as such the transfer to the tools section was a result of the plaintiff's workmanship.

It was however conceded by DW1 that there was a lot of noise in the grinding section and the machinery section has some noise but not much and that the tool section has no noise at all. DW1 further conceded that they received complaint from the plaintiff concerning noise from the doctor who used to visit the premises on daily basis and that is why he was referred to Kenyatta National Hospital in 1979. A report was made and on the basis of that report the plaintiff was paid under workman's compensation for the injuries suffered. The transfer came soon after the compensation was paid and if the defendants acted on the doctor's advise to send plaintiff for the examination at Kenyatta National Hospital and on the basis of the doctor's findings the plaintiff was paid compensation, I doubt if the defendant could ignore that report at the risk of paying further compensation and therefore the only inference that can be drawn from the above is that the plaintiff was transferred from the grinding section to a lesser noisy section following the doctor's report.

From the proceedings and evidence so far adduced there was no problem from 1979 up to 1988. This was because the plaintiff was working in the tool room section. The plaintiff stated there was no noise in the tool room section and this was also confirmed by DW1 and for all this period until 1988 there was no complaint. The plaintiff stated the trouble started again when he was transferred from the tool room section to the pm section or machinery section which is noisy.

DW1 attempted to say that there is no barrier in between the two sections and these were classified as less noisy section by factory inspectors. The classification was not produced in evidence and in the plaintiff's case since he was having problems it was up to the defendant to provide him with hearing gadgets or hearing aid. Much noise was injurious and offensive to his hearing and he should have been protected against that.

Having found that the plaintiff was transferred from the noisy section to a lesser noise section following the doctor's recommendation and also having found that during the continuance of the plaintiff's working in the tools section from 1979 to 1988 he had no problem then his transfer to a noisy section amounts to negligence. DW1 stated that they transferred the plaintiff from the tool section to pm section because there was no work in the tool section.

The plaintiff had history of hearing when it comes to much noise exposed to him. DW1 did not at least tell if there was no way the plaintiff could have been left in the tool section and nobody else could be transferred from this section in the place of the plaintiff. The defendant's action of transfering the plaintiff to a noisy section when he had his history of deafness without providing him in view of the fact that DW1s offices are far away, that he rarely visits these premises and that he acts on reports it is possible he knows very little about the noise produced by each section. At least he was sure of the tool section. The Court is satisfied that if the area has similar noise then there was no need for him to single out the tool section and this means the other sections are noisy.

The 2nd issue is whether the defendant was negligent. The plaintiff stated that he was not provided with hearing aids or gadgets. DW1 also confirmed none of the employees has been provided with hearing gadgets. Section 53 of the Factories Act cap 514 of the Laws of Kenya states *inter alia* that where in any factory workmen are employed in any process involving exposure …… to any injurious or offensive substance suitable protective clothing and appliances ……..shall be provided and maintained for the use of such workmen. Protective clothing amounts to negligence and are in breach of a statutory duty towards him.

The 3rd issue is whether the action is time barred. We have evidence on record that the plaintiff had a similar problem in 1979. He said so and this has been confirmed by DW1 who said the problem starts as far back as 1976. It is confirmed by both parties that following the doctor's assessment the plaintiff was paid compensation as per exhibit 3a, b and c. According to the plaintiff that payment was in full and final settlement of the earlier claim in respect of the assessment of 20% hearing disability. The stand of the defence is that it is the same problem which started in 1979 that has culminated in the current action and as such it is time barred.

The plaintiff states that the current claim arose when he was transferred from the tool section where there was no noise to the pm section where there was a lot of noise this was in 1987 as per exhibit 1. By 1988 he suffered deafness which prompted him to go for medical examination as per exhibit 2 dated 20/7/1988. The plaint is filed on 27/1/1989. The defence through DW1 stated that in 1988 October they sent the plaintiff for further medical examination to the doctor who examined him in 1979 following receipt of the doctor's report exhibit 2. There is exhibit D2 par 6 of the plaint gives particulars of injury as 30% deterioration of his hearing. This 30% was assessed in 1988 as per exhibit 2. It is evident that in the particulars of injury in the plaint there is no mention of the 20% injury assessed earlier on. From the foregoing factors it is clear that the cause of action arose from the time the plaintiff was exposed to a noisy environment without being provided with hearing aid this is in 1987 when the plaintiff was transferred from the tool section to the pm section. In 1988 is when the injury was assessed and in 1989 is when the action was filed. From 1987 and 1989 is 2 years and as such three years had not elapsed and as such the action is not time barred.

The present action is not a continuation of the earlier action which arose in 1979 and the mention in para 5 of the matter having started way back in 1979 is just to lay the background of the circumstances giving rise to the present action. The earlier action was settled through workman's compensation and as pointed out earlier the plaintiff has a choice of action to go through workman's compensation or come to Court for assessment of damages.

Issue No 4 deals with the questions as to whether the plaintiff has suffered any injury at all. In support of the plaintiff's case we have exhibit 2 which shows that the hearing disability has risen to 30% more than it was in 1979 which was 20%. According to the plaintiff he has suffered injury. According to the defendant as per evidence of DW1 when they received the letter exhibit 2 from Kenyatta National Hospital they decided to send the plaintiff to the doctor who had examined him in 1979 for a re-assessment and as per exhibit D2 he placed the % to 15%.

From 1979 to 1988 there was no follow - up report at all and the Court is not in a position to say for sure that the injury remained permanent or not. But one thing which is clear from the evidence of both parties is that between 1979 and 1988 there was no complaint at all from the plaintiff concerning his hearing ability and the only possible conclusion from the complaint of 1988 is that it is as a result of the injury he

had suffered later on. There is nothing to show that the plaintiff was malingering or that he was pend on creating complaint with a view to seeking compensation.

There is the issue of the % given by the two doctors 30% in July and 15% in October. We do not know what was happening in between. The plaintiff has asserted that exhibit 2 was an independent report but exhibit D2 was meant to play down the issue. The defence on the other hand states that exhibit 2 is not conclusive as it states that the injury could have arisen if the plaintiff had continued working in the same noisy environment when there is evidence that the plaintiff did not continue working in the same environment. Also that exhibit 2 stated that, that could have caused the damage meaning that the report was not conclusive.

As for exhibit D2 that it shows that the hearing ability was imposed as it was 15% when questioned about this DW1 said that they called for a second opinion as they just wanted to confirm the contents of exhibit 2. Exhibit 2 the doctor said he had checked records held at the hospital and she had examined him afresh. Exhibit 2 indicates that hearing tests were carried out at this department. There is a mention that the 1979 report had recommended that he be deployed in a lesser noisy section and if he had been working in the same environment then the deafness could be due to the same excessive noise and fixed the % at 30% hearing handicap. The defence counsel took issue with that report to the effect that it is not conclusive. The reading of that report shows that the doctor was just asked to examine the patient. These is no indication he was given the history to show whether there has been change of environment and is why she used the word in the same environment meaning not necessarily in the same place but in a noisy environment.

Exhibit D2 indicates the plaintiff had normal eardrums there was revelation of bilateral sensory nerve deafness more marked in the left ear than the right ear. The hearing loss so assessed is permanent and irreversible and he assessed the % at 15% disability. That report also does not indicate whether this was on improvement on the earlier report, or whether it is the same handicap he had developed earlier on or it was developed after that. We have two conflicting reports one made in July and another 3 months later. There is no mention of any steps taken on circumstances that could have drastically reduced the hearing handicap by hearing in three months time.

It is the contention of the defence that the hearing was imposed and that in Court the plaintiff chose what to hear and what not to hear. The Court observed the plaintiff in Court when giving evidence earlier on and when he came to be cross examined. The behaviour was the same. At times he answered questions promptly and other times he has to change hearing positions, stretch his head, change ears and often the interpreter had to shout. Since the same behaviour was shown on both occasions the Court finds that the same was not calculated or fake.

The two reports exhibit D2 and exhibit 2 are expert opinions and what the Court is to decide is the credibility of that evidence. See the case of *Muzeyi Vs Uganda* [1972] EA 225.

Apart from the reports there is nothing to show that the doctors had something else behind their reports. However, it is worth to note that while the plaintiff's doctor was a Government doctor the defendant's doctor is a company doctor and definitely he had the interest of the company at heart. Despite the % that have been offered by each doctor what is clear is that there is partial deafness it has not been shown that this is what subsisted in 1979 and not that subsisted in 1987 when the complaint arose. In the premises I am going to assess the damages on the basis of partial disability irrespective of the % given by the two doctors. Issue No 7 deals with the question of costs and these follow the event.

Issue No 6 deals with the question as to whether the compensation paid *vide* exhibit 3a, b and c was in full and final settlement. This is tied up with the question of whether the action is time barred. This has already been disposed of as the Court has made a finding that the two are distinct although the later action shares the same background as the earlier one and the payment in respect of the earlier claim does not cover the cause of action which arose in 1987.

Issue No 5 deals with the question of damages. We have conflicting assessment from two doctors. In a

span of 3 months apart one 30% and another 15%. In assessing damages the Court has to bear in mind the surrounding circumstances of the case, bear in mind awards in similar circumstances which are merely to be used as a guide, the Court has to bear in mind the fact that damages are not meant to enrich the party but to compensate him adequately for the injuries he has suffered.

I will begin by looking at award in respect of the similar injuries. In the case of *Martin Thomas Kemple v Cyrus Ngure Ikamba* HCCC 3084 of 1984 (No 1) where the plaintiff suffered complete loss of hearing in the left ear he was awarded Kshs 80,000/-.

In the case of *Geoffrey Muturi Joseph v Oshan Enterprises Ltd and another* HCCC 790 of 1985 (Mombasa) the plaintiff suffered injury to the left ear with 50% loss was awarded Kshs 40,000/=.

In the case of *Akwiri v Kilembe Mines* [1970] EA 498 in which the plaintiff suffered deafness to the left ear and paralysis of the left side of the ear, general damages were awarded at Kshs 50,000/=.

In the case of *Nsubuga v Attorney General* [1974] EA where the plaintiff suffered loss of hearing of 35% were in the left ear then the right ear the Court awarded Kshs 80,000/=. The plaintiff’s counsel invited the Court to take into account the fact that the awards in the cited cases were made many years back and to take into account the inflationary trend prevailing at the time.

The Court also takes into account the fact as per exhibit D2 that the hearing loss revealed by a bilateral sensory neural deafness were marked in the left than in the right ear is permanent and irreversible.

Bearing in mind the circumstance of this case and the nature of the injuries sustained as noted and using the cases cited as a guide while taking into account the fact that these awards were made more than 7 years ago. In my own assessment I would award a figure of Shs 100,000/- as being an adequate recompose for the injuries suffered.

Therefore I enter judgment for the plaintiff on the following terms.

1. General damages to the tune of Shs 100,000/=.

2. Interest on general damages from the date of judgment.

3. Cost of the suit

4. There will be no award on special damages as no evidence was adduced in Court.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of July 1992.

**R.N NAMBUYE**

**JUDGE**