REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO 419 OF 1990

JOSEPH ADERO ONIANGO.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

JUDGMENT

Joseph Adero Oniango, the plaintiff herein, instituted this action against the Kenya Ports Authority, the defendant, claiming from it general and special damages for bodily injury suffered by him when he fell from the roof of a building on which he had been working and which building was the property of the defendant. That accident was stated to have taken place on the 26th November, 1988, and according to the plaintiff he was and still is employed by the defendant as a carpenter or artisan. He said he was injured in the course of his employment as such carpenter with the defendant and the plaintiff alleged in his plaint filed in Court on the 26th June, 1990 that the accident in which he was injured was occasioned by the negligence of the defendant. I suppose that before the suit was filed nearly two years from the date of the accident, the plaintiff had sought and obtained leave of the Court to file it outside the statutory period of one year provided for in section 66(b) of the Kenya Ports Authority Act. As no objection to the plaintiff's claim was taken on this score, I shall say no more on the matter and I assume the claim was filed properly before the Court. Order VI rule 4 (1) mandatorily requires that if a party proposes to rely on any statute of limitation, he shall specifically plead such statute. There was no such plea in the defence and as I have said I must hold that the plaintiff's claim was in conformity with the Kenya Ports Authority Act.

The particulars of negligence which the plaintiff alleged against the defendant were that-

> " (a) the defendant failed to have any or any adequate precautions for the safety of the plaintiff while he was engaged upon his work.
>
> (b) the defendant exposed the plaintiff to a risk of damage or injury which they (defendant) knew or ought to have known.
>
> (c) the defendant failed to provide and maintain adequate and suitable plant tackle and appliance to enable the plaintiff to carry out his work in safety.
>
> (d) the defendant provided (sic) the plaintiff to carry out the said work when it was unsafe and dangerous to do so.
>
> (e) the defendant failed to provide any or any adequate supervision whilst the plaintiff was engaged on his said work.

(f) the defendant failed to provide or maintain a safe and proper system of work."

The defendant in its defence filed on the 16th August,1988, denied virtually all the allegations made by the plaintiff. The defendant even denied that the plaintiff was its employee (paragraph 3 of the defence). In paragraph 8 of the defence, the defendant pleaded that –

> "Further and in the alternative and without prejudice to the foregoing the defendant states that the alleged accident was caused or substantially contributed to by the plaintiff."

No particulars of the plaintiff's alleged negligence were given. The parties having thus staked out their position a total of six issues were framed and the trial proceeded. One doctor, Mr Hemant Patel (PW 1) gave evidence for the plaintiff and the plaintiff himself testified. The defendant called no evidence.

What is the plaintiff's case? As stated by the plaintiff in his evidence, he was born in 1945, which would make him 57 years old. He was employed by the defendant in 1977 and in 1978, he was assigned the duty of carpenter/artisan. He has worked with the defendant in that capacity upto the time he gave evidence in Court. His evidence on this point was never challenged or contradicted. Mr Ochuka who appeared for the defendant did not, for example, suggest to the plaintiff that he (plaintiff) was not an employee of the defendant. I find and hold that the plaintiff has been an employee of the defendant since 1977 and that in 1978, the defendant assigned to the plaintiff the duties of a carpenter/artisan. My answer to Issue No 3 in the Statement of Issues is-

> " Yes, the plaintiff was an employee of the defendant."

The plaintiff continued in his evidence that on the 26th November, 1988, he was repairing the roof of *magadi* shed belonging to the defendant. That is the shed where soda ash is removed from the trains and loaded into ships. The roof was over 50 feet high and according to the plaintiff the roof was erected during the colonial times. In other words, the roof is an old one and it is made of asbestos sheets. From the evidence of the plaintiff, it appears that soda ash (dust) would gather on various parts of the roof and plaintiff and his colleagues had first to remove the dust, check for leaks and then seal the same if found. Access to the roof was gained by the use of a ladder permanently affixed to the building. Once on the roof, the worker was to remove his shoes and walk on the roof as best he could. The defendant provided no other implements for the job, apart from the tools of trade which the workmen were supposed to use. The plaintiff and his colleagues had been working on the roof for three weeks, but on the 26th November, 1988 when the plaintiff was walking bare foot on the roof, the sheet under him gave way and the plaintiff fell through the roof straight onto the hard floor, some fifty feet below. The plaintiff says the defendant was negligent in requiring him to work on the roof in this way and I have already set out the particulars of negligence which the plaintiff asserts against the defendant. I have said that the defendant called no evidence, but Mr Ochuka in his cross-examination of the plaintiff suggested to the plaintiff that as an experienced workman, it was his duty to devise some system of working on the roof and that the plaintiff was required to walk only on those parts of the roof supported by rafters underneath. The plaintiff said this was not possible because the roof-leaks which were to be sealed were not always near to, or on the line of rafters. The plaintiff was asked what precautions the defendant was supposed to take as regards the safety of those working on the roof. The plaintiff was not clear on this. I think that at this stage, I must resolve the issue of negligence or no negligence and in the Statement of Issues the relevant ones are issues No 1 and 2.

In his evidence before me, the plaintiff did not say what exactly he expected the defendant to do in order to avoid the kind of accident in which he was involved. The plaintiff appeared to stress that the roof was old, that it was over fifty feet above the ground, and that the only safety precaution that the defendant expected him to take was to remove his shoes before starting to work on the roof. As the defendant did not offer any evidence, I do not know what other precaution it expected the plaintiff to observe in the course of his duty. As I have said, Mr Ochuka in contending that the plaintiff was himself negligent, suggested to the plaintiff in cross-examination that as an experienced workman he should have known what to do in the circumstances. I must confess that I find myself in considerable difficulty in view of the lack of evidence either by the plaintiff or the defendant as to what safety measures ought to have been

devised for this kind of work. Of course, as the Court of Appeal said in the case of *Kiema Muthuku v Kenya Cargo Handling Services Ltd* Civil Appeal No 94 of 1990 (unreported) there is still no liability without fault and a party who alleges negligence must prove it upon a balance of probabilities or else fail in his claim as Kiema Muthuku did. In that case the Court applied the House of Lords decision in *General Cleaning Contractors Ltd v Christmas* [1952] 2 All ER 1110. It had been argued on behalf of Kiema that Mr Justice Bosire who rejected his claim had done so on the basis that Kiema was under a duty to prove

> "as the appellants to devise and take any necessary precautions. That may be so but, in my opinion, it is not a sufficient answer. Where the problem varies from job to job it may be reasonable to leave a great deal to the man in charge, but the danger in this case is one which is constantly found and it calls for a system to meet it. Where a practice of ignoring an obvious danger has grown up I do not think it is reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required. ……...
>
> No doubt, he cannot be certain that his men will do as they are told when they are working alone. But if he does all that is reasonable to ensure that his safety system is operated, he will have done what he is bound to do..."

And Earl Jowitt, said at pg 1114 Letter B:-

> "….. I think that the trial Judge was entitled to find that the appellants were to blame in not taking all reasonable steps to see that the system of work which they required their men to adopt was made as safe as possible……"

The risk involved in the *Christmas* case was that the window cleaner was required to stand on a window sill measuring 61/4 inches wide and some 29 feet above the ground. The only hand-hold available to the worker was keeping the window sash open and then holding on to the bottom thereof. If the window closed the workman was left with nothing to hold onto and the risk of a fall. That was what happened to Christmas. I respectfully agree with the view that it was for the employer to devise a safe system and instruct their employees on what was to be done; it was not for the individual employee to devise a system and operate it.

Walking on a roof may not be as dangerous as standing on a narrow window sill, but I think that the risks in both are obvious, and an employer who requires his employee to work on a roof 50 feet above the ground must-

> "Consider the situation, devise a suitable system, instruct his men what they must do and supply any implements that may be required."

The plaintiff's evidence is that the defendant provided a ladder, permanently affixed to the building for the purpose of climbing onto the roof and once there the only other thing the plaintiff was required to do was to remove his shoes. I agree with the plaintiff that these were wholly inadequate precautions in the circumstances. As I have repeatedly stated, the defendant did not lead any evidence and accordingly there is nothing to show that no other safety measures were feasible in the circumstances. On the material before me, I doubt whether it is right to say that the defendant took any precaution at all for the safety of the plaintiff. Accordingly I find and hold that the plaintiff has fully proved upon a balance of probabilities that the defendant was negligent in that it-

> (a) failed to have any or any adequate precautions for the safety of the plaintiff while he was engaged in his work;
>
> (b) exposed the plaintiff to a risk of damage or injury of which they knew or ought to have known;

(c) failed to provide and maintain adequate and suitable plant tackle and appliance to enable the plaintiff to carry out his work in safety;

(d) required the plaintiff to carry out his work when it was unsafe and dangerous to do so;

(e) failed to provide any or any adequate supervision whilst the plaintiff was engaged in his work;

(f) failed to provide a safe and proper system of work.

The defendant's plea that the plaintiff was either wholly to blame or substantially contributed to the accident is without any basis and I reject it. The defendant was wholly to blame for the accident and it is accordingly liable to the plaintiff in damages. I find it unnecessary to consider the passages from *The Modern Law of Negligence,* by R A Buckley, London Butterworths, 1988 which Mr Pandya cited to me and which cites for its propositions the *Christmas* case. Nor do I find it necessary to deal with the *Building Code of the Republic Kenya* which Mr Pandya also made available to me. My answers to issues Nos1 and 2 are "Yes" but as regards issue No 2 I would add that the accident was not caused or contributed to by the negligence of the plaintiff.

What damages is the plaintiff entitled to? To answer that question, I must first deal with the injuries the plaintiff sustained. A total of four medical reports were produced in evidence, two by a Mr Rasik Patel, FRCS, (Exhs 1 and 2), one by Mr Ambeva, FRCS, (Exhs 3) and the last one by Mr Hemant Patel, FRCS, (Exhs 4). The report of Mr Hermant Patel is the latest, being dated 11th July, 1992 and I think it fairly summarises the previous reports made on the plaintiff. There was actually not much dispute on the injuries suffered by the plaintiff and because of that I shall confine myself to the report of Mr Hemant Patel, of course bearing in mind the other reports as well.

The injuries sustained by the plaintiff were:-

1. Compression fracture of lumbar vertebra (spine) L1.

2. Fracture and dislocation of the pelvis (pubis and right sacroitiac joint).

3. Fracture navicular bone (left foot).

4. Fracture medial malleolus and calcaneum (left ankle).

5. Frature base of 2nd metacarpal bone (right hand).

The plaintiff was admitted to the Mombasa Hospital where he was given routine treatment and was discharged home in February, 1989. The routine treatment consisted of remaining in a hospital bed on traction and treatment for 72 days. When the doctor saw him on 11th July, 1992 the plaintiff's complaints were:-

(1) Back pain.

(2) Limping and pain on left foot.

(3) Loss of libido.

(4) Inability to do heavy work.

A physical examination showed scars on the right hand and thumb with prominence of fracture of the metacarpal (2nd bone). There was a 1" shortening of the right leg and the plaintiff was using a stick as a support and was walking with a limp. These features were noticeable when the plaintiff gave evidence in Court.

According to the doctor the plaintiff's movements of the spine are restrictive and painful in the final range. The plaintiff told the doctor that he gets an erection of penis but cannot sustain this for a long time and the frequency to have sexual intercourse has been reduced to one or two times a month. In Court the plaintiff repeated this in his evidence and when Mr Patel was asked about it, he expressed surprise that the plaintiff was in fact still able to engage in sexual intercourse at all. The loss of the sexual drive, says the doctor, is largely due to the fracture and dislocation of the pelvis and of course, to some extent, to the compression fracture of the lumbar vertebra. Mr Patel was emphatic that the plaintiff's claim to loss of libido is not a pretended or fanciful one. The doctor's final opinion was that the plaintiff has recovered from his injuries but that the symptoms of back pain, loss of libido, limping and so on are due to the after effects of the fracture of the spine and pelvis with upward push of the right side joint giving rise to the shortening of the right leg by one inch. These are, according to the doctor, permanently incapacity and the plaintiff is no longer fit to do heavy work. The plaintiff continues to be an employee of the defendant though he can only do light work. The evidence of Mr Hemant Patel and the plaintiff himself on these points remains entirely uncontradicted and there is no possible reason for disbelieving them on any point. I accept that evidence and I find and hold that the plaintiff suffered the injuries enumerated in Mr Hemant Patel's report and that those injuries resulted in the after-effects set out in the same report.

There is no doubt that the injuries sustained by the plaintiff were grave; they were bound to be, taking into account that the plaintiff fell from a height of 50ft onto a concrete floor. What damages should I award to him?

On special damages, Shs 4,830/- was claimed, in the plaint. Various receipts were produced by the plaintiff and they were all produced without any objection from the counsel for the defendant. According to my calculations all the receipts produced make up a total of Shs 6,330/-, Shs 1,500/- more than the sum claimed as special damages in the plaint. That difference is easily explainable on the ground that by the time the suit was filed Mr Hemant Patel had not seen the plaintiff and when he eventually did so on the 11th July, 1992, he raised a fee note of Shs 1,500/-. That fee note was produced, with no objection being raised about it. I accordingly award to the plaintiff Shs 6,330/- as special damages.

On general damages, I was referred to several cases. The first case Mr Pandya referred me to is that of *Alex Mwai v Kenya Ports Authority*, Msa HCCC No 361 of 1990, (unreported). The plaintiff in that case sustained the following injuries:-

(1) Fracture of the lumbar spine.

(2) Fracture of the pelvis.

(3) Fracture of the right acetabulum.

(4) Fracture of the left tibia.

(5) Fracture of the right colles.

(6) Fracture of the right and left calcaneum.

He was in hospital for nine weeks during which time he was kept on a complete bed rest on a fracture board. There was manipulation of the right wrist and a below-elbow plaster was applied. A below-knee plaster was also applied. Taking into account these injuries and their after-effects, Mr Justice Wambilyangah awarded to the plaintiff Shs 520,000/- as general damages on the 9th July, 1991. There was no allegation of loss of libido as in the present case. I think it is now well settled that proved loss of libido is a serious injury to the victim and must be appropriately compensated.

Mr Ochuka in turn referred me to the case of *Lydia Kimeu v John Wambua*, Msa HCCC No 1124 of 1983, which was decided by Mr Justice Githinji on the 2nd November, 1990. The injury sustained by the plaintiff in that case was a compression fracture of the lumbar spine - L1- with paraplegia. That plaintiff was kept on a traction board, given physiotherapy treatment and discharged from hospital after five

months. She recovered from the paralysis of both lower limbs, but was left with a foot drop on the left leg, a partial foot-drop on the right leg, weak muscle power, diminished sensation and weakness of the bladder. She was awarded Shs 180,000/- as general damages. Apart from the compression fracture of the lumbar spine, there were no other fractures.

Lastly Mr Pandya referred me to the case of *Meshack Evans v Kenneth Kashida Tuva and Mohamed Noordin,* Msa HCCC No 50 of 1988 (unreported) which was decided by Mr Justice Wambilyangah on the 30th December, 1991. The injuries sustained by the plaintiff in that case were:-

1. Head injury (concussion).

2. Laceration on the right frontal – parietal area – 4".

3. Compression fracture of spine (L3).

4. Severe crush injury on the right foot resulting in:-

(i) Compound dislocation of the 1st metarcapophalangeal joint.

(ii) Dislocation fracture of all mp joints.

(iii) Fracture of the tarsal bones.

For all these injuries and their after effect, the plaintiff was awarded Shs 350,000/- as general damages.

It is clear to me that the two cases relied on by Mr Pandya are closer to the present case, than the one relied on by Mr Ochuka. There was only one serious fracture in the case Mr Ochuka relied on. Taking into account the nature of the injuries sustained by the plaintiff, their after-effects, particularly the loss of libido, the damages awarded by Wambilyangah, J in the two cases, and the date when the damages were awarded, I award this plaintiff the sum of Shs 550,000/- as general damages for pain, suffering and loss of amenities. The plaintiff is still in his job, has not lost anything else and will retire in the normal way. I do not think he is entitled to anything else.

Accordingly, I now enter judgment for the plaintiff against the defendant as follows:-

1. Special Damages …….. Shs 6,300/-

2. General Damages ……. Shs 550,000/-

I award to the plaintiff interest on these sums at court rates with effect from the date of this judgment. I also award to the plaintiff the costs of the suit. Those are my orders in the case.

Dated and delivered at Mombasa this 27th day of August 1992.

S.O OMOLO

JUDGE