



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 114 OF 2013

(Before Hon. Justice Mathews N. Nduma)

DAVID WAFULA WEPUKHULU.....CLAIMANT

VERSUS

KUNDAN SINGH CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 31st May 2015 vide a memorandum of claim seeking:

(a) General and special damages for the Accident at the Defendant's work premises on 29th April 2011 that resulted to eye injury to the claimant and failure by the respondent to process the claimant's compensation.

(b) The 2nd claim is wrongful and unfair declaration of redundancy of the claimant by the respondent and failure by the respondent to pay the claimant terminal benefits upon termination.

Facts of the case.

2. The claimant called CW1, CW2 and CW3 in support of his case. The facts of the case are that on or about the 29th April 2011, the claimant was in the course of his lawful duties at Kundan Singh workshop while lifting a battery to go to the field for work when the battery suddenly exploded and the contents/chemicals of the battery and acid splashed into the claimant's eyes causing him severe injuries, shock and blackout for which he blames the defendant.

3. The claimant provided the particulars of negligence and breach of statutory duty of care by the defendant to include:

(a) Providing poor working facilities and exposing the claimant to poor working conditions and poor working environment.

(b) Allowing or permitting the accident to occur.

(c) Providing defective and outdated battery to the claimant to work with.

(d) Exposing the claimant to risk they knew or ought to have known.

(e) Failing to provide the claimant with protective gear such as overall, gloves and helmet.

(f) Failing to take any preventive measures to ensure the safety of the claimant and

(g) Poorly maintained battery.

4. The claimant stated the particulars of injury to include:

(a) Injury to the left eye.

(b) Cataract of the left eye.

(c) Visual impairment in the left eye of 30%.

5. The claimant claims:

(a) Special damage in the sum of Kshs. 5,000 being fees for medical report.

(b) Loss of earnings at Kshs. 22,497 per month for 12 months in 27 years in the sum of Kshs. 7,289,028.

(c) Hospital surgery approximated at Kshs. 55,000.

(d) Transport costs for Bungoma, Webuye, Eldoret and Sabatia in the sum of Kshs. 15,000 and

(e) Loss of future earnings that would have been earned after retirement for about 10 years Kshs. 2,699,640.

Dismissal

6. The claimant further claimed general damages for unlawful dismissal in that the respondent simply declared him redundant upon getting injured without following the provisions of *Section 40 of the Employment Act 2007*. The claimant claims:

(a) Arrear salary for the period 29th April to October 2011.

(b) General damages for unlawful dismissal

(c) Severance pay calculated at 15 days salary for each completed year of service for four years in the sum of Kshs. 44,994.

(d) One month salary in lieu of notice Kshs. 22,497.

(e) Accrued leave not taken for four years calculated at 21 days per year Kshs. 89,988.

(f) Maximum compensation of equivalent of 12 months salary.

7. CW1, the claimant testified that he was employed as a mechanic by the respondent and on 29th April 2011, he was instructed by workshop manager to place all tools that were required in the field workshop into the manager's vehicle for use in repairing a Dozer and other machines in the field. While lifting a heavy battery that had come from the charging unit to be used in the field being assisted by the welder named John, the battery exploded and let out acid and other chemicals which spilled into the claimant's eye.

8. The claimant immediately suffered a black out in the eyes and fell down screaming and the eyes could not see. A colleague by the name Pastor Lucas Simiyu helped the claimant by splashing water on the claimant's eyes.

9. That he being a mechanic had no knowledge of the status of the battery. That it was the duty of the manager to ensure the battery was safe to work with before giving the claimant instructions to carry it.

10. That the claimant was rushed to Kimilili hospital in Bungoma. At Kimilili he was referred to Webuye District Hospital where eye irrigation was done and plastered and he was treated for one week as an outpatient. The claimant developed severe headache and was referred to Eldoret Teaching and Referral Hospital where he was treated and recommended for surgery.

11. The claimant was referred to Sabatia Eye Hospital where surgery was done on 10th August 2011. The claimant was given photochrome spectacles to help improve the eye and medication.

12. The injury has impaired the claimant's vision and capacity to work. The claimant resumed work in October 2011. The claimant received half salary while on treatment which money he used to pay for the eye treatment at Sabatia Eye Hospital in the sum of Kshs. 55,000.

13. In January 2012, the respondent dismissed the claimant on allegations of redundancy yet he had continued with his normal duties to the best of his ability given the eye impairment. The respondent did not pay the hospital bills as required by the law. That the respondent dismissed the assistant mechanic with whom the claimant worked. The claimant was also dismissed when he protested the sacking of the assistant who helped him since he had been partially impaired by the eye injury.

14. The claimant claims the reliefs set out in the memorandum of claim.

15. Evidence of CW1 was corroborated by CW2, Lucas Simiyu Wepukhulu that he was at work with the claimant on 29th April 2011 when he heard a loud bang and a man screaming. He saw workers running away and he rushed to the scene to help the screaming person. He recognized the person who was screaming and on the floor to be the claimant. CW2 saw four (4) batteries in total at the scene and two batteries were charging. One had exploded and lying on the side of the claimant. The claimant was covering his eyes and crying in pain. CW1 got water in a jerrican and washed the claimant's eyes. CW2 accompanied the claimant to Kimilili Hospital in Mr. Gorden's pick-up.

The claimant's eye was bandaged at Kimilili and he was referred to Bungoma Hospital. CW1 escorted him to Bungoma hospital. At Bungoma, the claimant was assessed and given drugs. CW2 stated that the respondent did not pay for the medication. CW2 stated that the battery that exploded was not connected to the charging terminals. That CW1 resumed work in October 2011 and in January 2012, his employment was suddenly terminated.

16. CW2 testified that the respondent treated the claimant unfairly and he be awarded the reliefs sought. That the claimant did not have goggles and helmet which could have prevented the injury to his eyes. That the company was to blame for keeping an old, defective battery at work that exploded and caused injury to the claimant.

17. CW3 was Dr. Charles Andai, a medical doctor based at Lubido medical clinic in Mumias. CW3 testified that he examined the claimant on 10th April 2017. That his medical history was that he sustained left eye injury on 29th April 2011 following an exploded battery whilst working at the respondent's premises. Acid had splashed into his left eye. The claimant was treated in several hospitals including Kimilili, Bungoma and Sabatia eye Hospital. At Sabatia, the left eye lense was removed because it had developed a cataract. This was done surgically. The left eye had developed blindness and the claimant had now permanent visibility incapacity of 30%. The left eye can only perceive light. He is partially blind in that eye. CW3 produced a medical report dated 10th April 2017 which he prepared and filed it on 30th May 2017. He charged Kshs. 5,000 medical report fees. CW1, CW2 and CW3 were all cross examined by counsel for the respondent.

18. The respondent did not call any witness to testify in defence of the case. The evidence by CW1, CW2 and CW3 remains uncontroverted. The cross examination by counsel for the respondent did not dent the credibility of the testimony by the three witnesses.

Determination

19. The issues for determination are as follows:

- (a) Whether the respondent is strictly liable for claimant's injuries under the occupier's liability.
- (b) If the answer to (a) is in the affirmative, what reliefs the claimant is entitled to
- (c) Whether the dismissal of the claimant was for a valid reason and done following a fair procedure.
- (d) Whether the claimant is entitled to the reliefs sought in respect of the unlawful dismissal and unpaid terminal benefits.

Issue (a)

20. CW1, CW2 and CW3 testified before court under oath and their testimony which is consistent and credible has not been contradicted by the respondent. The court finds that on 29th April 2011, the claimant suffered left eye injury assessed at 30% partial blindness by CW3 in the cause of employment of the respondent. That the injury was caused by breach of statutory duty by the respondent to provide a safe battery for use by the claimant at the work place and failure by the respondent to provide goggles and helmet to protect the eyes of the claimant in the course of duty. As a result of this breach of statutory duty, the battery that was old, and unserviceable, exploded and acid splashed into the eyes of the claimant causing the aforesaid injuries. The testimony by CW2 corroborated fully the events of 29th April 2011 which resulted in the injury to the left eye of the claimant.

21. *Section 6(2) (b) of occupation safety and Health Act No. 15 of 2007* imposes upon occupiers duty to ensure arrangement for ensuring safety and absence of risk to health in connection with the use, handling, storage and transport of articles and substances.

22. *Section 70(1) (b)* provides that every cylinder for compressed, liquefied and dissolved gases and its fillings shall be of sufficient strength to sustain the internal pressures to which they will normally be subjected.

23. In this regard, a maintenance register of the cylinder must be kept in which is noted all tests, internal and external; cleanings and repairs undertaken on the cylinder and the register be available for inspection by an occupational safety and Health Officer at all times.

24. The respondent did not produce any maintenance register of the batteries charged in their promise. There is no evidence that the battery that exploded was in serviceable condition and had been properly serviced and maintained.

25. The purpose of occupational *Safety and Health Act, Cap 514 Laws of Kenya* is stated under *Section 3* as follows:

The purpose of this Act is to:

- (a) Serve the safety, health and welfare of persons at work and
- (b) Protect persons other than persons at work against risks to safety and health arising out of or in connection with the activities of persons at work.

26. In ***Boniface Muthama Karita vs Carton Manufacturers Ltd CA 670/2003 (2015) Onyancha J.*** held:

“The relationship between the applicant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee to provide an appropriate and safe system of work which

does not expose the employee to an unreasonable risk”

27. ***In Civil Appeal (CA) 151/1987, Mumias Sugar company Ltd vs Charles Namatu***, the Court of Appeal held that:

“An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee”

28. It is clear that an employer has a statutory duty of care. This duty of care is however subject to an employee not being negligent in the cause of duty. Any negligence or gross negligence, proved on the part of an employee shall be deemed, upon prove to be contributory to the accident that arise and causes injury to the employee in the cause of duty.

29. In ***Purity Wambui Murithii vs Highlands Mineral water Company Ltd (2015) eKLR***, the court cited section 6(1) of the occupational safety and health Act which provides:

“Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace”.

The court then said:

“As a general rule, the employer is liable for any injury or loss that occurs to his employees at the work place as a result of the employer’s failure to ensure the safety. Does that mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so because where an accident happens due to the employee’s own negligence, it would be unfair to hold the employer liable”

30. In the present case, the overwhelming and uncontradicted evidence is that the employer provided the claimant with an old and defective battery that exploded splashing acid into the claimant’s eyes. As a result, the left eye suffered 30% blindness. The claimant did not contribute at all to the accident. No negligence on the part of the claimant has been established. The court holds the respondent 100% liable for the accident and therefore the injury to the left eye of the claimant.

Quantum

31. With regard to the issue of quantum the claimant proved special damages for medical report in the sum of Kshs. 5,000. The claimant has equally proved that he spent Kshs. 55,000 towards the eye surgery at Sabatia which money was not reimbursed by the respondent despite the statutory duty for the employer to foot the medical bill for an employee who suffers injury in the cause of employment.

32. ***In David Omuteleva Opon vs Dela Rue Currency and Security Print Ltd. (2017) eKLR***, Aburil J. held the respondent 100% liable for the injury suffered by the employee in the cause of duty.

33. The injury was not permanent in nature. The injury in the present case to the eye was assessed at 30%. The claimant continued to work until his employment was terminated. CW3 termed the incapacity of the claimant to be partial.

34. The court awards the claimant general damages for the injury suffered in the sum of Kshs. 1,200,000 (One Million two hundred thousand).

35. The claimant has not proved that he would be unable to work in future as a result of the partial blindness. Indeed he has lodged a claim for wrongful dismissal asserting his ability to work. The court dismisses the claim for loss of future earnings until and/or after date of retirement as bet out in the memorandum of claim.

Dismissal and Terminal benefits

36. With regard to the claim that the respondent in January 2012, suddenly and without notice, notice to show cause or any disciplinary hearing terminated the employment of the claimant, the court finds that the testimony by CW1 and CW2 remains uncontroverted that the termination of the employment of the claimant happened in this manner.

37. The claimant testified that he worked with an assistant whose employment was terminated. That the claimant protested the termination of employment of his assistant especially because he was now partially blind. This resulted in his immediate dismissal.

38. The claimant was not paid in lieu of notice. The claimant was not paid arrear salary and the claimant was not paid any gratuity or compensation for the loss of the employment.

39. The court finds that the termination of the employment of the claimant amounted to a summary dismissal for no valid reason and without following a fair procedure. The respondent violated *Sections 36, 41 43, 45 and 46 of the Employment Act* in this regard. The dismissal was substantively unlawful and procedurally unfair.

40. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*. The claimant had served faithfully as a mechanic for four years until he suffered injury in 2011. The claimant resumed work after recovery and was dismissed without notice nor payment in lieu of notice. He was not paid for days worked and was not paid any terminal benefits.

41. The claimant wished to continue working. His ability to work has been diminished by injury suffered at his work place. The fact that the injury contributed to the dismissal is an aggravating circumstance.

42. The court takes into account the case of *George Wakwaika Munyila and 4 others vs The Principal Friends School Kamusinga Bungoma ELRC No. 181 of 2014* in which the court awarded equivalent of 12 months salary as compensation for unlawful dismissal and the factors above in awarding the claimant the equivalent of ten (10) months salary in compensation for the unlawful dismissal in the sum of KShs. (22,497x10) 224,490.

43. The court also awards the claimant one month salary in lieu of notice in the sum of KShs. 22,497.

44. The claim for arrear salary not paid has not been properly established and is dismissed. The claimant has equally not proved that he did not take leave for four years and the claim is also dismissed.

45. In the final analysis, judgment is entered in favour of claimant as against the respondent as follows:

- (a) General damages and for injury suffered at work in the sum of KShs. 1,200,000.
- (b) Equivalent of ten (10) months salary in compensation for the unlawful termination of employment in the sum of KShs. 224,970.
- (c) One month salary in lieu of notice KShs. 22,497.
- (d) KShs. 5,000 being medical report fees
- (e) KShs. 55,000 being medical expenses
- (f) Interest at court rates from date of judgment till payment in full.
- (g) Costs of the suit.

Judgment Dated, Signed and delivered this 18th day of July, 2019

Mathews N. Nduma

Judge

Appearances

M/S Kaboa for claimant

Mr. Ojulo for Respondent.

Chrispo – Court Clerk