



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 198 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

SAMUEL OCHIENG MUGA.....CLAIMANT

- Versus-

TRANSMARA SUGAR COMPANY.....RESPONDENT

J U D G E M E N T

The Claimant, a male adult, was at all times material to this suit employed by the Respondent, a sugar milling company, as a tractor driver. The tractor registration No. KTCB 025J that he was driving had a trailer attached to it that was used for transportation of sugarcane from farms to the factory. On 2nd November 2013 he was hauling cane from a farm in Insampen in Transmara. The route from the farm to the road was uphill so the tractor had to be towed by a winch. While the tractor was being towed the winch cable broke and the tractor started rolling backwards. In the process the Claimant was thrown off the tractor and sustained serious injuries as follows-

- a) Severe damage of the spinal vertebrae and cord which involve: -
 - i. Damage of the nervous system
 - ii. Damage of the lumber sacral spine
 - iii. Paralysis of both lower limbs
 - iv. Sprain of the cervical spine of the neck
 - v. Fracture of the pelvic frame
- b) Complete dislocation and displacement of the hip joint at the acetabulum
- c) Dislocation of the left shoulder joint
- d) Serious abdominal injury which involve: -
 - i. Damage of the urinary system including the bladder, urethra and kidney
 - ii. Damage to the digestive system, which cause faecal incontinence.
- e) Chest injury with damage of the left rib cage
- f) Dislocation of the left knee joint.

He was treated at Ram Memorial Hospital, Kisii, then transferred to Moi Teaching and Referral Hospital, Eldoret where he was admitted for treatment before being discharged to seek further treatment from his nearest local hospital, Homa Bay District Hospital.

The Claimant avers that the Respondent is responsible for the accident. In his Complaint originally filed as **Kisii High Court Civil Suit No. 22 of 2014**, before being transferred to this court by an order made on 9th June 2015, the Claimant lists the particulars of permanent incapacity as follows -

1. He is in a debilitating state of health to an extent that he totally depends on external support for each and every basic and essential need;
2. He is unable to move without support of double crutches;
3. He is unable to dress or undress without external assistance;
4. He suffers from incontinence of both urine and faeces whence has to be draped and napped like a little child;
5. He has lost sexual urge and cannot perform conjugal obligations;
6. He suffers from painful sensations from all over the injured parts of the body;
7. His waist is bound in positions by post-surgical waist braces;
8. He suffers from sleepless nights due to intense painful discomfort;
9. He suffers from permanent chest pain and lower abdominal pains;
10. He has very extensive longitudinal post-operative scar from the coccyx to the upper trunk of the back.

The Claimant prays for the following remedies-

- (a) General damages for pain and suffering, loss of expectation of life, loss of consortium and loss of amenities;
- (b) Damages for loss of future earning and loss of earning capacity;
- (c) Future medical expenses;
- (d) Costs;
- (e) Interests on (a), (b), (c) and (d) above at court rates

The Respondent filed a Defence in which it denies all the averments in the Plaintiff. The Claimant (Plaintiff in Plaintiff) filed a Reply to Defence joining issues with the Respondent (Defendant).

At the hearing of the case, only the Claimant testified while the Respondent opted to rely on the defence and written submissions. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he broke the spinal cord in the accident and currently uses a lumbar corset. He also broke the left hip joint, dislocated the left knee joint, injured his rib cage and broke his pelvic bone. His left leg is disabled and swollen from infection and he is not able to walk. He suffers from incontinence of both urine and stool and is not able to have sex. He is not able to work and has to be fed. He was 41 years at the time of the accident.

Under cross-examination, the Claimant stated that his salary at the time of accident was Kshs. 23,000 with a basic of Kshs.9,000 per month. He attached a copy of the payslip together with other documents filed with the plaintiff. He stated that before going to court he signed instructions notes but did not sign either the verifying affidavit or witness statement.

On re-examination, the Claimant stated that he did not know whose signature was on the verifying affidavit.

In the written submissions filed on behalf of the Claimant, only the issue of quantum has been addressed as liability had been agreed at 65:35 in favour of the Claimant. The Claimant prays for Kshs. 12,000,000 on account of general damages for the injuries sustained, Kshs. 1,000,000 for loss of consortium, Kshs. 2,188,581 on account of loss of future earnings and future earning capacity/Compensation for permanent disablement and Kshs. 300,000 for future medical expenses. The Claimant relied on the following judicial authorities on the quantum for general damages:

1. Nairobi HCC No. 1315 of 2006 Rukia Mugoyia –vs– Johnson Muga Ogotu and another

2. Nairobi HCC No. 531 of 2004 Jackson Wahome Ngatia –vs– Agridutt (K) Limited and 2 others

On the compensation for future earnings, the Claimant relied on section 30 of Work Injury Benefits Act and on future medical expenses, he relied on the doctor's report, which states that the Claimant will require further surgeries by neurologists, urologists and gastroenterologists.

Respondent's Submissions

As I have already stated above the Respondent did not call any witness but relied entirely on its pleadings and written submissions. In the written submissions it is admitted that the issue of liability was agreed at 65:35 as submitted by the Claimant. The Respondent however submits that the entire claim should be dismissed on the grounds that the Claimant admitted not signing the verifying affidavit and witness statement.

The Respondent submitted that Rule 5 of the Industrial Court Rules which is an equivalent of Order 4, Rule 1(2) of the Civil Procedure Rules stipulates that a statement of claim and plaint respectively shall be accompanied by a verifying affidavit confirming the correctness of whatever is pleaded. That the claim was initially filed before the High Court as a civil cause guided by the provisions of the Civil Procedure Act and Rules before it was transferred to this Honourable Court. That stemming from the issue for determination, the Respondent, with adequate grounding buttressed by the Claimant's admission, challenged the competency of the claim pegged on the fact that the Claimant admitted not signing the verifying affidavit and witness statement. The Respondent relied on a family case **Re B 2008 UKHL 35**, in which **Lord Hoffman** addressed the issue using a mathematical analogy thus:

“If a legal rule requires a fact to be proved (a fact in issue’), a Judge or Jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.”

The Respondent submitted that in the present case there was nothing to prove as the Claimant did not sign or swear the verifying affidavit, or the statement as admitted both during cross-examination and re-examination. It is submitted that this is not a case of a defective affidavit but one of fraud and that the Claimant approached the court to pursue another person's Claim.

The Respondent further relied on the judgment in **Nakuru ELRC No. 307 of 2014 Issac Nyamosi Nyangau v Gilani's Supermarket Ltd** in which the learned Judge held as follows -

“The claimant admitted in cross examination that he did not swear or sign the verifying affidavit accompanying the memorandum of claim...

On the basis of the admission by the claimant, the case at hand is not one of a defective verifying affidavit, it is one of a false affidavit, a more serious issue calling for more severe action on those involved apart from striking out the claim.

As the memorandum of claim was predicated upon a false affidavit, the court reaches the conclusion that it ought to be struck out with an order that Mr. Korongo Esq Advocate personally bears the respondent's costs of defending the cause assessed at Kshs.49,000/= (based on amount quantified in the claim)”

The Respondent submitted for that Article 159(2) of the Constitution should in this case be interpreted in a manner that “**advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights**”. The Respondent urged the court to dismiss the claim.

Determination

I have carefully considered the pleadings, evidence and written submissions together with authorities cited. The issues arising for determination are first, whether the suit should be dismissed on the grounds that it is a fraud as submitted by the Respondent and second, whether the Claimant should be awarded damages and compensation as claimed and as submitted in his submissions.

Issue no. 1 must of necessity be dealt with first as the case would be disposed of should the Respondent's submissions on the same be upheld.

Should the case be struck off because of the Claimant's admission that he did not sign or swear either the verifying affidavit or the witness statement?

Both the Employment and Labour Relations Court (Procedure) Rules and the Civil Procedure Rules provide that claims/plaints must be accompanied by an affidavit verifying the facts therein.

Rule 5 of the Employment and Labour Relations Court (Procedure) Rules provides as follows-

5. Verifying Affidavit to accompany a statement of claim.

(1) A statement of claim filed under rule 4 shall be accompanied by an affidavit verifying the facts relied on.

(2) Where a claimant, in the course of hearing seeks to adduce additional evidence, the claimant may, with the leave of the Court, file a further affidavit or adduce oral evidence.

Order 4 Rule 1(2) of the Civil Procedure Rules provides that-

The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.

In the present case, the plaint was filed together with a verifying affidavit but the Respondent has submitted that the verifying affidavit is a fraud, as it is not signed by the Claimant. The Claimant himself has admitted that the verifying affidavit and witness statement are not signed by him.

The issue therefore is what is the fate of a plaint or claim which is supported by a verifying affidavit that is not signed by the Claimant? Is it a fatal omission that would lead to striking out of the Claim or is it a mere technicality that can be cured?

There are conflicting authorities on this subject as was observed by Radido J in **Nakuru ELRC No. 307 OF 2014 Issac Nyamosi Nyangau v Gilani's Supermarket Ltd**. In that case as in the present one, the Claimant admitted not signing the verifying affidavit and the court struck out the suit on the grounds of a *false* affidavit as opposed to a *defective* affidavit. The authorities I have come across mostly deal with cases where the issue is a defective affidavit and the same has been raised at interlocutory stage either as a preliminary objection or as an application for striking out the claim by way of notice of motion. In all the decisions the plaintiff/deponent was granted leave to file a proper verifying affidavit and/or opportunity to rectify the defect in the contested verifying affidavit.

In the case of **Jefitha Muchai Mwai v Peter Wangio Thuku [2015] eKLR** the court stated as follows in respect of verifying affidavits

...courts of law in the spirit of Article 159 of the Constitution should try as much as possible to sustain causes in court rather than striking out suits for reasons that are merely technical and curable by a simple step that does not prejudice the other party.

In **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001[2001] KLR 470, Ringera J** (as he then was) expressed himself as follows-

Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it.....

These observations were made in circumstances that are not similar to the present. I therefore still have to answer the question whether a false affidavit and a defective affidavit should be treated the same way or whether a false affidavit makes the claim incurably defective while a defective affidavit is curable.

Article 159 of the Constitution enjoins the courts to administer justice without undue regard to procedural technicalities. Section 20(1) of the Employment and Labour Relations Court Act echoes the same. This same position is expressed in most of the decisions that have allowed the litigant to correct the error by filing a fresh verifying affidavit. The general position taken by the courts has been that cases should ordinarily be decided on the merits.

I have mulled over this matter for a considerable period. I saw the Claimant testify. I saw his injuries. I observed his demeanour, which in my view was very honest and sincere, including his response to the question whether he signed the verifying affidavit when asked by counsel for the Respondent. He repeated the same answer with the same honesty when his own counsel asked him whether he signed both the verifying affidavit and witness statement, which he answered in the negative.

This is a case where the Respondent's own medical report confirms that the Claimant was its employee and sustained injuries in the course of employment. I have asked myself this question: should I banish this man from benefitting from compensation for the very serious injuries he sustained in an accident in the course of employment because his advocate faked the signatures on both the verifying affidavit and witness statements? Would this not be punishing an innocent litigant for the crimes of his counsel who in any event was not the one on record at the time of hearing? What is the purpose of a verifying affidavit and how do I treat it under the current constitutional dispensation? I think not. I think a verifying affidavit is a procedural provision that cannot on its own be used to strike out a claim that is otherwise valid.

To my mind, this is not the ordinary case where the veracity of the evidence is contested. This is a case of an employee injured in the course of employment, who was taken to hospital by the employer and who lost his job due to the very serious injuries he suffered in the accident.

In this case, there is another reason why I should not consider striking out the suit. As confirmed by both parties in their written submissions, there was agreement on liability. This means that the Respondent already admitted that there was an accident sustained by the Claimant in the course of employment as alleged in the claim. To my understanding, the necessity for an affidavit to verify these facts was no longer an issue at the time of hearing when the Claimant was testifying. The Respondent acquiesced to the defective/false verifying affidavit and relied on it or overlooked it when it admitted liability for the accident and the Claimant's injuries. The only issue left for the court to determine and for which the case was heard is the assessment of quantum.

It is further my opinion that the testimony of the Claimant on oath was as good or ranks higher than a verifying affidavit and that he verified all the averments in the plaint in his viva voce testimony. The Respondent did not put to the Claimant any questions suggesting that he was either not the Claimant or that he did not suffer the injuries in the accident as alleged in the Claim. No issue of identity of the Claimant was raised during cross-examination of the Claimant. It is for this reason that I find that this case is distinguishable from the case of **Issac Nyamosi Nyangau v Gilanis Supermarket Ltd (supra)** where there was no such admission of liability by the Respondent prior to or at the hearing. Further, the judicial authorities cited in the case were all made prior to the advent of the Constitution of Kenya 2010 and therefore did not take into account the provisions of Article 159(2) (d). Even then, it was recognised that this is a technicality that if curable ought not to lead to the striking out of the suit, as is confirmed by many decisions of the court among them the case of **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another (supra)**.

I have no doubt in my mind that a verifying affidavit is a technicality. It is contained the procedural rules of this court and the Civil Procedure Rules, and not in the substantive law.

Finally, the issue of signature of the verifying affidavit and witness statement was first raised during cross examination and in written

submissions after the close of the Claimant's and Respondent's cases. It was an ambush that was never pleaded by the Respondent so that the Claimant did not have the opportunity to address it before pleadings were closed.

For these reasons I find that the Claimant's admission that he did not sign either the verifying affidavit or the witness statement does not affect the validity of the Claim herein.

Whether the Claimant is entitled to damages and compensation

The Respondent did not adduce any evidence to controvert the testimony of the Claimant. In the Respondent's submissions there is no reference made to the submissions of the Claimant on quantum of damages and compensation. I have considered the very severe injuries suffered by the Claimant which his medical report assesses at 80% disability. I reproduce the professional opinion of Dr. M. S. Maliki who prepared a medical report on behalf of the respondent below-

“Samuel was carried to the Ram Hospital in Kisii where he was examined and admitted. X-rays of his spine were done and he was given painkillers. He could not pass urine and the doctors passed a rubber catheter into his bladder to drain his urine. He was given a lumbar brace and transferred to Moi Teaching and Referral Hospital, Eldoret in an ambulance after two days. More X-rays and scans of his spine were done and he was taken to the operation theatre after a week. His spine was stabilised with metal rods and screws. He recovered well and was subjected to physiotherapy. He was discharged from the hospital after three weeks on a wheel chair. He still had his urinary catheter and did not have any control over his bowel movements. His urinary catheter was removed as an outpatient after about three months but he has not regained full control over the passage of his urine up to now.....

OPINION

*Samuel became paralysed below the waist as a result of a fracture of his second lumbar vertebra **after an accident while on duty**. He lost all motor power and sensory perception in his legs and was unable to pass urine or stools voluntarily. He was admitted to a hospital and underwent a major operation to stabilise his vertebral column. The posterior displacement of his fractured vertebra could not be reduced.*

He has now regained some muscle power and sensation in the legs and can walk with crutches with support.

CONCLUSION

He suffered total incapacity of a temporary nature for a period of one year followed by a partial incapacity of a permanent nature to date. I would be inclined to award him permanent physical disability benefits amounting to about 80%”

Based on the opinion of the Respondent's own Doctor and taking into account the judicial authorities especially the case of **Rukia Mugoyia** and **Jackson Wahome Ngatia (supra)** who suffered almost similar injuries as the Claimant, and was awarded Kshs. 12,462,000 in 2007, it is my view that Kshs.12,000,000 sought by the Claimant will be reasonable compensation

The Claimant's prayers for Kshs. 1,000,000 in respect of loss of consortium, Kshs. 2,188,581 on account of loss of future earnings and future earning capacity/Compensation for permanent disablement and Kshs. 300,000 for future medical expenses are also not contested by the Respondent. I find the same to be reasonable and award the Claimant accordingly.

Conclusion

In conclusion, I enter judgment against the Respondent in favour of the Claimant and award the Claimant the following-

1. **Kshs. 12,000,000** in respect of general damages for the injuries sustained,
2. **Kshs. 1,000,000** for loss of consortium,
3. **Kshs. 2,188,581** on account of loss of future earnings and future earning capacity/Compensation for permanent disablement and
4. **Kshs. 300,000** for future medical expenses

Total: Kshs. 15,488,581

5. The parties having agreed on liability at 65:35 I enter judgment for the Claimant in the sum of **Kshs. 10,067,577.65**
6. The Respondent shall pay the Claimant's costs of this suit
7. The decretal sum shall attract interest at court rates from date of judgment.

Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 20TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 3RD DAY OF MAY 2018

MATHEWS NDERI NDUMA

JUDGE