



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1511 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 8th October, 2018)

BONIFACE NZAU MUIA.....CLAIMANT

-VERSUS-

SHENGLI ENGINEERING CONSTRUCTION COMPANY.....1ST RESPONDENT

CANNON ASSURANCE COMPANY LIMITED.....2ND RESPONDENT

JUDGEMENT OF THE COURT

INTRODUCTION

1. The Claimant herein filed his Memorandum of Claim on 29th April 2012 through the firm of Muttisya & Company claiming damages for unfair dismissal and for Injuries sustained while working for the Respondent herein.
2. The Claimant's claim is that he was employed by the Respondent Company earning a gross salary of Kshs.16, 021 per month working as a casual labourer. He annexed to the Memorandum of Claim and marked BNM-I, the DOSH 1 FORM which are records to prove the existence of this relationship. The Claimant testified on 12th July, 2017 and confirmed the above.
3. His testimony is that on or around the 11th October 2011 he was in the course of business performing duties so assigned to him by the 1st defendant at Kahonoki quarry crusher when he was injured He produced his treatment notes from Kenyatta National Hospital and a Medical Report by Dr. Catherine Munanie marked BNM-II . He also testified that the Respondent Company was negligent by allowing him to work in unsafe working conditions.
4. He contends that due to the injuries he suffered he could no longer do any casual jobs and so also seeks damages for future earnings. He testified that the Respondent only paid him kshs51000 as compensation following the injury.
5. The Respondent on their part filed a Response to the Memo of Claim through the firm of Kairu Mbuthia and Kiingati Advocates on the 24th May 2013 denying the claim. They contend that the Claimant through his own negligence caused injury to himself and exposed himself to injury.
6. They also submitted that the claimant made a claim for injuries sustained though the WIBA and therefore cannot be paid again for the said injuries. The Respondent further called one witness Elizabeth Kimanthi who testified on 13th June, 2018 and confirmed that the Claimant worked for them as claimed and after he recovered she had a discussion with him and he stated that he was not willing to come back to work. They contend therefore the claim for wrongful termination cannot therefore stand.
7. In cross-examination, the RW1 stated that the Claimant's thumb was amputated and he could write.
8. The Claimant submitted that he be paid Kshs. 2,000,000 as compensation for pain, suffering and loss of amenities relying on the case of **MILICENT ATIENO OCHUONYO V KATOLA RICHARD [2015] eKLR** in which Kshs.2,000,000 was awarded for almost similar injuries.
9. Pursuant to the injuries the Plaintiff lost his means of income as he was incapacitated. He therefore also seeks to be compensate for loss of future earnings as follows: The Claimant was aged 37 years old at the time of the accident and was earning Kshs.16, 021.He stated that he would have retired at the age of 70 since he was not working with the Government, therefore not limited to the retirement age of 60 for civil

servants. He sought payment on a multiplier of 33 years worked out as follows:-

$$16,021 \times 12 \times 33 \times 20/100 = 1,268,863$$

10. He also sought damages for unlawful termination of employment particularized as follows

i. Pay in lieu of notice = Kshs.16,021/=

ii. Severance pay = Kshs. (17/30 x 16,021x2.3)

Kshs20, 880/=

iii. Annual leave - (16,021x2.3) Kshs 36,848/=

iv. Housing allowance (15,021x27) Kshs.64, 885/=

Total -138,634

11. I have examined all the evidence and submissions of both parties. The employment relationship between the Claimant and the Respondent has been admitted by both parties. It is also true that a claim was made for compensation under WIBA for the claimant as per his appendix1. The Claimant admitted he was paid Kshs 61,404 as compensation which money was deposited in Equity bank but no breakdown was given about the said cash.

12. The Claimant told Court that he was dismissed by the Respondent when he turned back to work after recovering. He however told Court in his oral evidence that he couldn't work due to the injuries he had suffered. His claim therefore for unfair dismissal is disputable and not tenable.

13. On the claim for damages for injuries suffered, the Respondent admitted that the Claimant suffered injuries. They however attribute the same to the Claimants own negligence. The Claimant stated that the machine that injured him was being operated by another employee. It is therefore not clear what the Claimant did or omitted to do to qualify as being negligent.

14. It is my finding that the Claimant was injured at work and suffered 10% permanent disability for which I find the Respondent 100% liable.

15. In terms of damages, I am guided by case law. In cases where the plaintiff suffered more severe injuries ...see **High Court CC No 38 of 2012 Millicent Atieno Ochuonyo versus Katola Richard** the Plaintiff's injuries were assessed at 20% permanent incapacity and she was awarded 2 million for pain and suffering. The Claimant herein having suffered 10% permanent incapacity, I find 1.5 million as enough compensation for pain and suffering bearing in mind inflationary trends.

16. I also award the Claimant Kshs 1 million for loss of future earnings.

17. The Respondent will pay costs of this cause and interest at Court rates with effect from the date of this judgement

Dated and delivered in open Court this 8th day of October, 2018

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okeyo holding brief for Odhiambo for Claimant – present

Kairu holding brief for Kagahi for Respondent