



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1620 OF 2014

CHARLES GACHECHE GICHERU.....CLAIMANT

VERSUS

SBI INTERNATIONAL HOLDINGS AG (KENYA).....RESPONDENT

JUDGEMENT

Introduction

1. This is a claim for Kshs 671,709 plus general damages arising from injuries suffered by the claimant while in the course of his employment by the respondent on 14.11.2011. The claim is founded on Work injury Benefits Act, and the common law.
2. The respondent has denied that the claimant was his employee and that he was injured while in the course of his employment. In the alternative, the respondent avers that if the claimant suffered any injuries, the same were not suffered in the course of his employment by her but through his own negligence when he went to dump material at an undersigned site which he knew or ought to have known that it was dangerous to do so.
3. The suit was heard on 19.4.2018 when the claimant testified as CW1 but the respondent called no witnesses to support her defence. After the hearing, it is only the claimant who filed written submissions which I have carefully considered herein together with the evidence tendered.

Claimant's case

4. CW1 testified that he was employed by the respondent in 2010 as a driver. On 15.11.2011, he was based at Kericho where the respondent was constructing a 52 kilometer road. On that day, he was assigned a tipper lorry to transfer waste materials to a dumping site near Chepsion trading Centre. That around 5 pm, he noticed two half naked men approaching the tipper while he was dumping the waste materials and their faces were smeared with white chalk.
5. Sensing danger, CW1 locked the doors of the truck and lifted the window panes before engaging the gear to flee for safety. However, due to the swampy condition of the dumping site, he could not remove the truck in good time. As a result the men broke the right hand side window pane with a club and also hit him on the forehead using the same weapon. That within a short time the attackers bit him unconscious and set the truck on fire while he was still inside. Luckily, he was rescued from the burning truck and taken to Siloam hospital Kericho before being transferred to Kenyatta National Hospital.
6. After the discharge from Kenyatta hospital, he continued with out-patient clinics in various hospitals and he resumed work after 4 months. Thereafter he reported the matter to the labour office to seek compensation and was given forms for assessment of the degree of the injuries he sustained. His doctor at Kenyatta Nation Hospital, doctors assessed his degree of permanent disability as 20% due to the head injury and extensive burns which left him with hitching scars in hot environment or after prolonged sitting or standing under the sun or driving long distance. That based on his salary of Kshs 28,953 per month, the labour officer computed the compensation as Kshs 555,897 for the 20% permanent incapacity plus Kshs 115,812 for 4 months temporary incapacity.
7. However respondent's insurer disputed the assessment of the 20% permanent incapacity and referred the claimant to Dr Wambugu who assessed his permanent incapacity as 0%. The labour officer then referred the claimant to a medical panel for reassessment and the panel confirmed the 20% permanent incapacity as earlier assessed by the Kenyatta National Hospital doctor. He therefore prayed for judgement to be entered for him in terms of the assessment of his compensation done by the Director under the Work Injury Benefit Act being Kshs 671,709.

8. In addition, the claimant prayed for general damages for pain, suffering and loss of amenities because the injuries he sustained allegedly were caused by the negligence on the part of the respondent. CW1 contended that his attack resulted from the decision by the respondent to terminate large number of employees from a local community and replacing them with employees of different ethnicities from other regions especially those who had worked for respondent's sister companies in Meru and Machakos. He further contended that there was looming tribal tension due to the said matters and the respondent's Transport Manager provided security to the newly recruited employees but denied the same protection to him and other older employees. He contended that the respondent's management were aware of the danger and threat of attack of her employees by people from the local community along tribal lines but decided not to provide security. He therefore prayed for general damages plus costs and interest.

9. On cross-examination CW1 contended that his attackers resembled his former workmates but they had smeared their faces with a white substance. He further contended that he was the only person from outside the locality who was assigned a truck and who was attacked. He also contended that he had worked at the Kericho site before but all the new employees from Meru were given security. He admitted that he resumed work after 4 months and he is still working as a driver but contended that he has not fully recovered and he is still attending hospitals.

Analysis and Determination

10. There is no dispute from the evidence laid before me that the claimant was employed by the respondent. There is further no dispute that on 15.11.2011 while in the course of his employment as a tipper driver he was attacked by thugs and as a result of which he suffered serious bodily harm. The issues for determination are:

- a. Whether this court lacks jurisdiction to determine the dispute herein.
- b. Whether the claimant suffered the said injuries due to the negligence by the respondent.
- c. Whether the claimant is entitled to the reliefs sought.

Jurisdiction

11. Jurisdiction is everything to a court and when it is disputed that issue should be determined at the earliest opportunity possible. In this case, the jurisdiction of the court was denied by the respondent in her pleadings but she never pursued it as a preliminary point. That does not however mean that jurisdiction can be acquired through omission by the defendant to plead or prosecute objection on the issue of jurisdiction.

12. The issues for determination in this suit relate to compensation for work injury to an employee and payment of general damages for injuries suffered due to the negligence of an employer or supervisor of the employee. The former claim is founded on employment contract and statute law while the latter is a tort founded more on common law. The contractual/statutory claim is already determined by the Director through the County Occupational Safety and Health Officer as Kshs 671,709. The said sum was computed based on 20% permanent physical incapacity plus 4 months temporary incapacity. That assessment was confirmed by a medical advisory panel of 3 doctors.

13. Under the Work Injury Benefits Act, there is no clear procedure through which decisions or awards of the Director or his Assistants can be enforced. It follows therefore that such decisions or awards must be filed in a court of law to be adopted as judgment of the court and executed under the court's procedure rules. In my view this is the proper court for that purpose by dint of section 12 of the ELRC Act because the dispute is between the employer and his employee. The same view applies to the tortious claim under the common law for the same reason because the dispute relates to the breach of the duty owed to the employee by his employer. To hold otherwise would encourage duplicity of suits and wastage of precious judicial time.

Negligence

14. The claimant testified that the employer knew of the danger faced by her employees who hailed from outside Kericho area from the local community which was protesting against the company firing locals and replacing them with people from other regions. That the respondent appreciated the said danger by providing security to the newly recruited employees but neglected to do so to the claimant and other older employees. The claimant contends that as a result of the said failure to provide him with security he was attacked and seriously injured by thugs who he believed to be his former workmates from the local community and who had been terminated.

15. For a claim of tort of negligence to succeed the claimant must prove that the tortfeasor owed him a duty of care, that the duty of care was breached, and that as a result, the claimant suffered injury. In this case, the un rebutted evidence by the claimant is that the respondent's Transport Manager knew of the danger he faced while working in an unfriendly community but failed to provide him with security while providing the same to the other employees who hailed from outside Kericho. As a result of the said default or omission, the claimant was attacked and seriously injured with blunt objects and fire.

16. There cannot be any dispute that the respondent owed duty of care to the claimant, both under the employment contract and common law, to ensure that the claimant was not exposed to dangerous working conditions including protection from the hostile local community. Consequently I return that the claimant has proved on a balance of probability that he suffered the said bodily injury as a result of the respondent's sole negligence. This should serve as a warning to the employers, including Government agencies who recklessly post employees to work in dangerous places while fully aware of the potential risk of their actions

Reliefs

17. For the reason stated herein above that the compensation under the Work Injury Benefits Act has been determined by the County Occupational Safety and Health Officer at Kshs 671,709, I adopt the same as an award of this court. The said award shall attract interest at courts rate from the date of filing this suit.

18. I further award the claimant general damages in the sum of Kshs 1,000,000 for pain, suffering and loss of amenities. In making the said award, I have considered the High Court decision in *Agnes Wanjiku Ndegwa Vs Kenya Power & Lighting Company [2014] eKLR* where the court awarded Kshs 1,300,000. In the said case the plaintiff was injured by an electric pole which fell on her causing burn wounds on her neck, upper trunk posterior, left arm, right lower limb and both feet. Her own doctor assessed her permanent incapacity as 35% while the Doctor for the defence assessed the disability as 30%. The injuries in this case are not as severe as the ones suffered by the claimant in the cited precedent and therefore considering the injuries suffered in this case and the inflationary factors the sum awarded above is reasonable.

Conclusion and Disposition

19. I have found that this court has jurisdiction to adopt as judgement of the court, compensation assessed by the Director of Occupational Safety and Health or his Assistants. I have also held that this court has jurisdiction to determine tortious claims between employees and their employers which arise in the course of the employee's employment and which are enjoined in a suit for pure employment disputes. Consequently, I enter judgement for the claimant in the following terms:

- a. Compensation under Work Injury Benefits Act Kshs 671,709
- b. General damages of Kshs 1,000,000 for pain, suffering and loss of amenities
- c. Interest on (a) at court rates from the date of filing this suit.
- d. Costs and interest from the date hereof.

Dated, Signed and Delivered in Open Court at

Nairobi this 9th day of November, 2018

ONESMUS N. MAKAU

JUDGE