



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NYERI
CAUSE NO. 93 OF 2016
(Formerly HCCC No. 84 of 2011 at Meru)

CHARLES MWANIKI MUCHIRI.....PLAINTIFF

VERSUS

COASTAL KENYA ENTERPRISES LTD.....DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday 9th December, 2016)

JUDGMENT

The plaintiff Charles Mwaniki Muchiri filed the plaint on 29.06.2011 through Kivuva Omuga, Waweru & Company Advocates. The plaintiff prayed for judgment against the defendant for:

- a. General damages for pain, suffering and loss of amenities to include lost prospects for career advancement or lost future prospects.
- b. Loss of earning capacity.
- c. Damages for lost years or diminished future earnings prospects.
- d. Special damages Kshs.5,000.00 for medical report.
- e. Costs of the suit and interest thereon.

The defendant Coastal Kenya Enterprises Limited filed the statement of defence on 09.07.2012 through Mungu & Company Advocates. The plaintiff filed the reply to defence on 17.07.2012.

The plaintiff was employed by the defendant on 20.11.2007 as a grader operator. The plaintiff was assigned to operate the grader in the construction of Maua – Kiutine road. During the operation, the plaintiff would be accompanied by a mechanic known as Musyoka because the grader would develop mechanical problems from time to time.

On 01.07.2008 at around 6.00pm the plaintiff was driving the grader back to the defendant's site located at the Meru National Park. The grader got to a descending terrain at whose end there was a corner, and in process, the grader developed a problem manifested as a crashing noise. The mechanic, Musyoka, asked the plaintiff to stop the grader. The mechanic touched something on the grader; the machine went off, but

continued in motion. The grader was in a free acceleration. The plaintiff testified that he pressed the brake pedals but the grader's brakes failed. The plaintiff tried to negotiate the corner at the end of the descent but the steering system also failed so that the grader went on ahead into a farm-land with some strong trees. The grader hit the trees and due to the impact, the plaintiff's head hit the cabin roof and the plaintiff lost consciousness. The plaintiff regained consciousness and senses while at home. It was his testimony that he had lost consciousness for a long time because he did not know that he had been taken to Maua Methodist Hospital and then to Kenyatta Hospital as he was informed of such events later upon regaining consciousness while at home. Musyoka had died as a result of injuries sustained in the accident.

The plaintiff sustained serious injuries on his head and legs. The claimant's witness No. 1 (CW1) Dr. John Kimani Macharia examined the plaintiff on 30.04.2011 and prepared the relevant medical report. He again attended the plaintiff on 07.10.2014. CW1 reported the injuries sustained to include admission in an unconscious state; laceration and contusion over the forehead; a depressed fracture over the left (parietal) side of the skull; multiple basal and calvarial skull fractures; bilateral frontal intra-cerebral hemorrhage (bleeding) and brain oedema; and soft tissue injuries (contusions) over the right wrist and left ankle. CW1 reported that the plaintiff had been admitted from the date of the accident 01.07.2008 to 09.08.2008 when he was discharged from hospital and had been under follow-ups as at 03.05.2011 when CW1 examined him. Before the discharge, CW1 confirmed that the plaintiff had surgery (craniotomy) done with elevation of the depressed fracture piece. Further the plaintiff had been put on antibiotic, anticonvulsants and steroids cover, and underwent nursing and physiotherapy care till discharge on 09.08.2008. As at the time of examination, RW stated that the plaintiff complained of problems with smell and taste perception; occasional tempers or tantrums; pains over the upper limbs; reduced vision; and no convulsions had been reported.

As a result of the accident, CW1's opinion was that the plaintiff had sustained a severe head injury with multiple skull fractures. One of the fractures was depressed and he had undergone a surgery. The plaintiff also had intra – cerebral bleeding which was managed conservatively (meaning active remedy of getting into the brain to clean was riskier and the plaintiff had been put on medication to try and remedy the bleeding). CW1's opinion was that the plaintiff had recovered but had slight psychological deficit and poor vision and had not developed convulsions but stood at a 5% risk of doing so. Soft tissue injuries (contusions) had healed. CW1 assessed the plaintiff's incapacity at about 65% in relation to the head injury and sequel. The claimant (CW3) testified that his left limb was painful and he limbed and that he had poor vision and he must wear spectacles to have some vision. He further testified that he could not stand for a long time.

The plaintiff attributed the injuries he sustained to his employer, the defendant, because the defendant had knowingly assigned to the plaintiff a defective grader. The plaintiff's further attribution factors were that he had not been provided with protective head gear such as the dust masks and helmet. At the time of the accident the plaintiff, CW3, testified that he was wearing the seat belt.

The defendant did not call witnesses and relied on the pleadings and final submissions.

The **1st issue** for determination is whether the plaintiff's injuries as sustained in the accident are attributable to the defendant, his employer. There is no doubt that the defendant employed the plaintiff as a grader operator. Further there is no reason to doubt the plaintiff's account of the circumstances and events at the accident. The court finds that the defendant assigned the plaintiff a defective grader and knowingly so especially that the mechanic Musyoka was then made available to deal with those known defects as they occurred from time to time in the course of the claimant's performance of the assigned duties. At the time of the accident, the plaintiff had put on the provided seat belt and no helmet or other protective head gear had been made available. The provided mechanic, Musyoka, invoked his assistance by giving the plaintiff the instructions the mechanic considered best in the circumstances, the plaintiff implemented the instructions but all was in vain. As submitted for the plaintiff, section 6 of the Occupational Safety and Health Act, 2007 provides that every employer shall ensure the safety, health and welfare at work of all persons working in his workplace. The employer is strictly liable for the provision of a safe working environment including providing and maintaining safe plant systems which are safe and without risk to health; maintaining the workplace to ensure safety and no risk to health and

provision of and maintenance of safe access and egress; and providing and maintaining a safe working environment with regard to facilities and arrangements of employee's welfare. In this case, the court returns that the defendant failed on that statutory obligation when first, it provided a defective grader, second, failed to provide protective gear, and third, instituted the defective system in which the plaintiff drove or operated the grader with the mechanic as an irregular passenger giving abrupt maintenance services and operating instructions about the defective grader (instead of the defendant servicing the grader properly and assigning it to the plaintiff in a sound operating status). The court finds that it was a gross failure and breach of that statutory duty for the defendant's instituted system whereby a defective grader was assigned and to be maintained as it was operated.

It was submitted for the respondent that the plaintiff operated the grader in contravention of the operating manual. However, such evidence was not provided at the hearing and the court finds that line of submission to have been baseless. The evidence is that the plaintiff was a qualified operator and duly licensed to operate the grader. Further, the court finds that the defendant provided no evidence to establish that the plaintiff had failed to discharge any of the duties imposed upon an employee under section 13(1) of the Occupational Safety and Health Act, 2007. Even if the cause of the accident is attributable to failures by the mechanic, the mechanic was undisputedly the defendant's employee and the defendant would therefore be held vicariously liable for any such failures by the mechanic. The court finds that the plaintiff's injuries as sustained in the accident are 100% attributable to the defendant, his employer.

The 2nd issue for determination is whether the plaintiff is entitled to the remedies as prayed for. The court makes findings as follows.

First, the plaintiff prayed for general damages for pain, suffering and loss of amenities to include lost prospects for career advancement or lost future prospects. For pain, suffering and loss of amenities it was submitted that the plaintiff be awarded Kshs.5,000,000.00. It was submitted that in Terry Kanyua Marangu –Versus- Wells Fargo Limited HCCC No. 18 of 2013 at Meru (Makau J) on 16.10.2014 awarded Kshs.3,500,000 for pain, suffering and loss of amenities in an injury where the plaintiff sustained a head injury, depressed fracture left frontal region and cut wound right lower limb pre-tibia region. Compensation for pain and suffering is for lost enjoyment of life resulting from the permanent damage. CW1 assessed the incapacity at 65%. Considering that assessment, the cited authority and the plaintiff's deteriorating wellbeing, the court considers that an award of **Kshs. 3,000,000.00** for pain and suffering will meet the ends of justice in this case.

Second, the plaintiff prayed for damages for loss of earning capacity, and diminished future earnings prospects. To succeed on this prayer, it must be shown that the injury had ongoing effect on future earnings.

The court has followed the opinion of the Court of Appeal in Mumias Sugar Company Limited – Versus- Francis Wanalo [2007]eKLR thus, **“From the above analysis of the English case law and the decision in Butler-V- Butler, the following principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employed or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”**

The plaintiff testified that he scored an A at KCSE and held a Bachelor of Science in Clothing, Textile

and Interior Design, Second Class Honours (Upper Division) conferred by the Egerton University on 20.08.2007. The plaintiff, subsequent to the injury, secured a teaching job at a high school but lost the job because he was assessed below capacity. CW2, the plaintiff's father confirmed that after the accident he enrolled the plaintiff for the chartered accountant's examination but he could not cope with the learning due to the injury as per the examination results slips filed in court and showing he failed despite his previous outstanding academic ability. Thus, the plaintiff suffered diminished academic ability and diminished capacity to work or to find alternative job. The court finds that by reason of the injury attributable to the defendant, the plaintiff lost employment and then suffered diminished capacity to ever get alternative or similar employment.

The plaintiff testified that after the accident and some recovery he went for a teaching job but was found to lack capacity to teach as per the documents filed in court terminating his teaching job. He further testified that he expected to get promoted or secure better job especially in view of his university education and he had hoped for a job in interior design. The plaintiff pleaded for the court to note that he had great expectations for a bright future but that had been ruined because he was incapacitated as a result of the accident and the resultant injuries he had sustained. The plaintiff testified that he was completely worse off than he had been before the accident as he was incompetent to get a job. At the time of the hearing, the plaintiff lamented that he was just at home under the assistance of his wife and parents. The claimant testified and demonstrated that he had severally tried to get a job but failed because he was found incompetent to work in view of his incapacity.

The court has considered the plaintiff's predicament directly flowing from the accident and the injuries he sustained and finds that the plaintiff has established that he is entitled to substantial compensation for the risk that he will not get employed or suitable employment in future. The court has considered that he is still under medical care and his circumstances may deteriorate, he was a young person with high academic potential and qualifications, he had high likelihood to grow in his job of grader operator and also a high likelihood to take on another line of employment and most likely scale up successfully to the top and glory of his employment with all attached benefits. The court is persuaded that the plaintiff's employment expectations have been substantially ruined and the claimant is entitled as claimed for loss of employment capacity and attached loss of future earnings prospects.

The court has followed **Butler –Versus- Butler[1984]KLR** where the Court of Appeal held that a person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. Further, the court has been guided by the holding in that case that loss of earning capacity is a different head of damages from actual loss of future earnings – the difference being that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages. In that case, the court held that loss of earning capacity or earning power can be a claim on its own or may be included as an item in general damages but where it is not so included, it is not improper to award it under its own heading. Further, in that case the court held that the factors to be taken into account in considering damages under the head of loss of earning capacity will vary with circumstances of the case and would include such factors as the age and qualifications of the claimant, the claimant's remaining length of working life, the claimant's disabilities and previous service, if any. It was held that the assessment of damages is more like an exercise of discretion by the trial judge. This court has been guided accordingly.

The plaintiff was born on 13.01.1982 and the accident was on 01.07.2008. The plaintiff had served the 3 months probationary period meaning that he was in permanent employment of the defendant as at the time of the accident and as per the letter of appointment on record. It was submitted that the plaintiff was 27 years of age and would have worked up to 65 years and he earned a basic net pay of 24,000.00 per month or a gross of Kshs.28,000.00 and the Directorate of Occupational Safety and Health Services had assessed the permanent incapacity at 80% as at 14.10.2009. The submissions were that the plaintiff be therefore awarded $80/100 \times 24,000.00 \times 32 \text{ years} \times 12 \text{ months}$ making Kshs.7,372, 800.

The court has taken judicial notice that the prevailing general mandatory retirement age in Kenya is 60 years of age so that the plaintiff would have had 33 years of active service. The claimant had a promising

bright future and by reason of the accident he lost future earnings prospects – the likely increase in his salary; which the court puts at 80% in view of his age and the outstanding capacity prior to the injury as demonstrated by his excellent academic performance which puts the multiplier at 180/100 x Kshs.28,000.00 making Kshs.50,400.00. The latest assessment of incapacity was put at 65% by CW1 on 03.05.2011 and the court takes it as the position on the measure of the incapacity. Thus for loss of earning capacity and loss of earnings prospects the court awards the plaintiff 65/100 x 33 years x 12 months x Kshs.50,400.00 making **Kshs.12,972,960.00**.

Third, the court finds that special damages **Kshs.5, 000.00** paid for the medical report was established and is awarded as prayed for.

Fourth, as the plaintiff has succeeded in his claims he is awarded the costs of the suit.

While making this judgment, the court has reckoned that the plaintiff was awarded compensation for the injuries under the Work Injury Benefits Act, 2007 assessed at Kshs.2,486,000.00 out of which the plaintiff, by consent of the parties, has already been paid Kshs.1,036, 602.00 as at the date of the hearing of the suit. The court has further taken the opinion that the claims as made and the prayers as advanced for the plaintiff were outside the Act so that they were not barred under section 16 of that Act and under which Act the compensation for the injuries sustained were conclusively dealt with. The court considers that claims for loss of income when a plaintiff was unable to work due to injury; loss of future income due to the injury; loss of earning capacity due to injury; pain, suffering, and trauma (the non –economic loss); loss of future earnings prospects relating loss of future increase in income; expenses on treatment incurred or to be incurred in future in view of the injury; loss of amenities such as prospects of marriage; and loss of expectation of life or shortening of life are all claims which when they flow from an injury or disablement, as the case may be, while an employee is at work, are all claims which are beyond the provisions of the Work Injury Benefits Act, 2007 and are capable of being pursued in a suit before the court as they are heads of claims independent of the compensation under the Act. For claims under the Act, an objector to the compensation would be entitled to appeal to the court in accordance with sections 51 and 52 of the Act and the present case was clearly not such an appeal.

In conclusion, judgment is hereby entered for the plaintiff against the defendant for:

- a. The defendant to pay the plaintiff **Kshs.15,977,960.00** by 01.03.2017 failing interest to be payable at court rates from the date of this judgment till full payment.
- b. The defendant to pay the plaintiff's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 9th December, 2016**.

BYRAM ONGAYA

JUDGE