



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1115 of 2012

JOHN BARASA WASIKE and

KENNETH MASIKA BARASA

(Suing on their own behalf and as the

Administrators of the estate of the late

EDWARD NEKONO BARASA, deceased)CLAIMANTS

VERSUS

DEVKI STEEL MILL LTDRESPONDENT

JUDGEMENT

This claim commenced by civil suit No. 93 of 2004 filed at Machakos High Court through a plaint by the Claimants/Plaintiffs (herein referred to as the Claimants) as the legal representatives of the deceased/employee, Mr. Edward Nekono Barasa (deceased) through a plaint dated 15th July 2004 and file in court on 20th August 2004. A defence dated 4th October 2004. Through Court ruling, directions were issued allowing the Claimants to amend the Plaint. An Amended Plaint was therefore filed and dated 1st April 2009.

It was stated that the Deceased Edward Nekono Barasa was employed by the Defendant/Respondent (herein referred to as the Respondent) as a casual Igot Processor. That while the deceased was at work on 16th August 2003, when oiling the moulds, due to negligence, carelessness or recklessness on the part of the respondents, its employees or servants, the chain attached to the crane broke while lifting some moulds thereby causing the moulds to fall on the deceased and as a result he suffered fatal injuries.

That the accident was occasioned to the deceased by reason of negligence on the part of the defendant, its servants, agents or employee by;

1. Failing to take any adequate precautions for the safety of the deceased while he was engaged in his work
2. Exposing the deceased to a risk of damage or injury which they knew or ought to have known
3. Causing or permitting the deceased to work at the Igot plant when they knew or ought to have known that it was unsafe and dangerous for him to do so

4. Failing to take any adequate measures to ensure that the place where the deceased carried out his work was safe
5. Failing to provide suitable or sufficient protection while the deceased was engaged in his work
6. Failing to provide and maintain a safe and proper system of work or to instruct their workmen including the deceased to follow that system.

That at the time of death the deceased was a young man of robust health aged 25 years and had a promising future ahead of him and while working as a casual laborer earning an income of Kshs.310.00 per day, he supported his father and siblings and as a result of his death they have suffered loss and damage for which they seek damages. That the deceased's life was considerably shortened by his early death and his estate has suffered loss from his contribution and the plaintiffs claim damages under the Law Reform Act and that before his death the deceased suffered pain for which the plaintiffs claim damages for pain and suffering.

That under the Fatal Accidents Act the deceased was survived by the following

(names withheld)

The plaintiffs claim general damages for lost earnings and dependency. Loss of expectation of life and the damages for pain and suffering before death. They further relied on the doctrine of *res ipsa loquitur*.

That the plaintiff incurred special damages amounting to Kshs.1, 375.00 and claims these expenses.

In evidence the 1st claimant testified that the deceased was his son who worked for the respondent as an Igot Processor based at Arthi River in Mavoko. That on 16th August 2003 at 6.00am, he was called by one Mutuku Stephen the assistant Personnel of the respondent informing him that his son was in an accident and had been taken to Kenyatta National Hospital where the witness went and found his son admitted. He was told that while his son was working at the Igot he was hit at his waist downwards and injured severely, and was in a lot of pain and passed away on 18th August 2003. He took letters of limited grant of administration, Death Certificate for purposes of this case.

He further stated that at the time of his son's death he was 25 years old and being his eldest child he used to help him with educating his siblings from his daily earnings of Kshs.310. That he received Kshs.301, 080.00 under the Work Injury Benefit Act.

Patrick Nzioki also gave evidence that he worked for the respondent as Furnace Changer and knew the deceased well while working as an Igot Processor with the respondent. That on the material date, the 16th of August 2003, he reported to work at 7.00am and left at 7.00pm but his reliever failed to turn up and therefore remained at work that night. The deceased was also on the night shift of 16th August 2003 and also the night of 15th August 2003. His reliever was Titus Nzomo and he signed on his behalf. That they worked in an open area and the furnaces areas were raised while the people at the Igot were below by about 2 meters. That from where he was working he could see the deceased clearly who was oiling the moulds using a cloth attached to the steel which were then tied to the chain and to the crane. That while the deceased was carrying out this task the chain broke and suddenly lifted the deceased meters high but the weight of the mould was about 920 kilograms and he was injured severely. The witness attributed the accident to the fact that the particular machine under use by the deceased was poorly maintained and if it had been properly maintained it would not have malfunctioned and hence cause the accident that injured the deceased causing him fatal injuries.

That he witnessed the accident, he was on night shift with the deceased as the respondent employees worked in shifts of 12 hours and earned Kshs.310.00 per day. That there were two furnaces A and B about 10 meters apart, and from where he was placed there was a platform and could see the deceased at the Igot which was down. That after the accident, people were screaming which was around 3.00am and had the deceased been issued with protective gear, it would have averted the fatal accident.

In defence, the Defendants deny liability for any loss, damage or pain and stated that in their employment of the deceased, they had complied with their contractual and statutory duty of care and had taken precautions and had provided and maintained adequate and suitable plant, tackle and appliances and had provided a safe and proper system of working for the deceased and all its employees so as not to expose the deceased or any of its employees to any unnecessary and foreseeable risk of damage or injury in compliance with its statutory and contractual duty of care.

The respondent further denied that there was no accident at their work place as alleged by the claimants or that a crane hit one of the moulds which fell on the deceased occasioning him fatal injuries or that it was due to their negligence or breach of duty as they observed and complied with all their contractual and statutory duty of care to the deceased. That the respondent had no knowledge that the deceased was supporting his father and siblings and therefore has no responsibility to pay any damages. That the deceased was not earning daily wages of Kshs.310 and had no known dependants and therefore the claimants are not entitled to claim damages under the Law Reform Act or Fatal Injuries Act or under any other law. That the entire claim should be dismissed with costs.

The respondent also pleaded the doctrine of *volenti non fit injuria*, in that the deceased voluntarily placed himself in such a position so as to have caused himself the alleged injury.

It was therefore the respondents case that they bore no duty to the deceased as they had provided a safe working environment by providing the necessary protective equipment and that the deceased had himself to blame for his own misfortune as he entered into the trench where the moulds were kept whilst his work entailed hooking the moulds onto an overhead crane, work which would be done from the side trench. The respondent deny occurrence of the alleged accident at their premises and pleaded in the alternative that the deceased voluntarily placed himself in such a position that harm was inevitable. That the only witness called by the claimants was not truthful and could not have witnessed the accident from where he was working 10 meters away from the scene.

I note the respondent did not call any evidence and opted to file written submissions. The Court received both parties' submissions on 15th March 2013 and 24th April 2013 for the claimant and the respondents respectively.

ASSESSMENT

1. Was the deceased employed by the respondents?
2. What were his conditions of work?
3. Was he working under safe condition with protective gear to prevent injuries?
4. Is the respondent liable for letting the deceased work under these conditions?
5. Did the deceased cause or contribute to himself the fatal injuries suffered at work?

I find this matter was filed before the High Court Machakos where the hearing took place before Justice Isaac Lenaola and when the hearing for defence came before Justice Makhandia the matter was referred to the industrial Court in Nairobi. Parties took directions before this Court and agreed to file their written submissions.

The evidence on record from the 1st Claimant is that he was called at 6.00am by Stephen Mutuku from the respondent's personnel office that his son had been taken to Kenyatta National Hospital, where he found his son in critical condition. He took limited letters of administration ad litem and filed this case together with his other son the 2nd claimant. That from the deceased daily wage of Ksh.310.00 he would get support from him which support was no longer possible due to his death and claims damages.

This evidence is supported by the deceased workmate Patrick Nzioki who stated that he was on the same shift as the deceased. That he witnessed the accident from where he was working at the furnaces while the deceased was at the Igot. That he had been on the day shift but his reliever failed to report and therefore

signed for him and proceeded to work for the night shift where he was with the deceased.

There was no evidence from the respondent to contradict this evidence that the deceased was physically present at the respondent premises at the time of the accident and that he was their employee. I therefore find that indeed the deceased was employed by the respondent at the time of the accident at their premises.

Apart from the contradictory hours of work, I find the deceased was at the respondent's premises and his work place at the time of the accident. The respondent was therefore under a duty to give protection to all those under their employment at all material times.

From the proceedings and the evidence on record the cause of action, the accident and the subsequent death of the deceased subject of this claim arose in 2003 while the deceased was employed by the respondents. This is important to note as in 2003, any claim that related to an employer/employee was governed by the applicable law then, the Employment Act, chapter 226 Laws of Kenya (now repealed) and Workman's Compensation Act Chapter 236 Laws of Kenya (now repealed), which provided for compensation for employees injured or suffering fatal injuries while at work. Under this law, any compensation given to an employee or to the estate of a deceased employee did not prevent such beneficiary from claiming in damages under Common Law or under any other written law.

I find that the claimants have already received compensation under the Workman's Compensation Act. The sum of Kshs. 301,080.00 has been paid. I will therefore not dwell on this issue.

Employers have a duty under both common law and statutory law to provide safe working conditions and to take reasonable care to ensure the health and safety of employees. Under the Factories Act, Cap 514, the duty rests on the employer to observe the health and safety of all persons within a factory area or work area that is within a factory premises. Any injury arising from such an environment that is established to be caused due to failure on the part of an employer to take safety precautions or arising out of negligence that should have been foreseen and not prevented is payable as under common law in damages and under statute as under Workman's Compensation Act. This relate to all employees injured within the work environment without distinction of being either on permanent terms or casual/temporary basis.

Where there are fatal injuries, compensation is payable to the dependants. This compensation is due under both statutory provisions and at Common Law where the Law Reform Act and the Fatal Injuries Act become applicable.

At common law it imposes a duty of care on an employer to see that those under their employ do not suffer injury as a consequence of negligence. The deceased who was employed as an Igot Processor is stated to have been oiling moulds which would be tied to the crane but was suddenly lifted meters high as the moulds were 920 kilograms and therefore he had been exposed to conditions dangerous to him in the course of his duties. Even if the deceased had protective gear as alleged by the respondent, it emerges from the claimant's evidence and the evidence of the workmate that the machines that the deceased was using were not well maintained and due to the heavy weight of the mould being 920 kilograms he suffered injuries from his waist downwards. A persons aged 25 years would probably be around 80 to 90 kilograms at most and even if very heavy not beyond 100 kilograms which would be overweight and therefore placed on a balance of a mould of 920 kilograms would inevitably be severely injured.

What then were the working conditions under which the deceased was placed?

It is not enough for an employer to provide safe working systems or appliances or wearing gears for employees, the employer is also required to ensure that the systems or appliances are followed and the proper gear worn or made available to the employees under their care and supervision.

It was the evidence of the claimant's witness, Patrick Nzioki that the deceased was oiling the moulds using a cloth tied to the steel which was then tied to the chain and crane. That the chain broke suddenly lifted the deceased meters high and since the weight was about 920 kilograms, this caused injury to him

from the waist downwards. The respondent submitted that they had taken all reasonable steps and precautions to provide safe and proper systems of work for all employees in the company including the deceased. That the deceased was the one who was negligent in discharging his duties. No evidence was given on what 'systems' were put in place by the respondent and despite the averment that the deceased placed himself in the trench where he got the fatal injuries, the Court had no benefit of appreciating the circumstances under which the deceased removed himself from where he was supposed to be placed and was at the 'trench' where he got injured.

What was important to note from Patrick Nzioki is that his evidence that the machine being operated by the deceased were faulty and if they had been well maintained would not have malfunctioned. This evidence was not challenged in any material way to remove the respondent from the duty of ensuring that they placed all their employees in a safe environment. Not every industrial accident or injury is caused by negligence of an employer and unless there is a strict liability on the part of the employer, a claimant must plead their cases properly and prove negligence and or breach of a statutory duty on the part of the employer sufficiently. The only exception may be in a case where the circumstances under which the accident occurred are such that the doctrine of *res ipsa loquitur* can be drawn. However in this case, the respondent was under a duty to ensure that the appliances/machines under use by their employees were maintained to avoid malfunction and a possibility of causing accidents, which I find they failed to do in this case.

The respondent blamed the deceased for 'entering into the trench where the moulds were kept' whilst his work entailed hooking the moulds onto an overhead crane, work which would be done from the side of the trench. In that case, if the deceased was working from the side of the trench which the respondent was aware of and was required to oil the moulds by hooking them onto an overhead crane, then it goes that it was reasonably expected that one would accidentally get into the trench which was at the side or that the crane overhead if not well maintained would cause damage. There was no evidence to the effect that the respondent took any reasonable measures to ensure that its employees never got into the trench while working from its side or that their machines were well maintained to prevent accidents like what happened to the deceased.

As held in the case of *Eaves versus Morris Motors [1961] 2 Q.B. 384 to 386*,

...that the requirement that the fencing be secure does not mean that it must protect the workman against every injury as there is a duty to guard against an unforeseeable danger such as might be caused by a machine going in a wrong way which could be reasonably anticipated.

Therefore when an employer direct their employees to work in an environment where reasonably there is potential for injury, the employer must provide proper appliances to safeguard them. There must be set in force a proper system by which the employees are able to use these appliances and take the necessary precautions and do their best to ensure that employee adhere to these precautions. Employers must remember that employees doing a routine task are often heedless of their own safety and may become careless about taking precautions. Employers must by periodic supervision, do their best to keep the mark and not tolerate any slackness. An employer cannot put the blame on employees that they simply did not take the required precautions. The duty rests with the employer to prove that there were these precautions brought to the attention of the employees and they failed to adhere and deliberately put themselves in harm's way.

I find the deceased was injured while on duty and the respondent was negligent in the circumstances of this case. Indeed I believe the evidence of Patrick Nzioki, in the absence of any evidence from the respondent to negate his it. It was not challenged that the fatal injuries occasioned to the deceased happened while he was at his place of work and that this was due to the faulty machines at the respondents firm. Indeed from the accident, the respondent officer Stephen Mutuku called the 1st claimant to go and see the deceased who was at Kenyatta National Hospital admitted in great pain. . It was not clear why the respondent did not call Stephen Mutuku to shed light on the circumstance of the accident or call any other evidence as to the safety precautions put in place at their firm to ensure employees were under safe conditions of work.

I therefore find that the respondent was negligent and in breach of the statutory duty assigned to them in this case. The respondents were in breach of their statutory duty under the Employment Act, Cap 226 Laws of Kenya (now repealed) and the Factories Act, in that they failed to take precautions against injury of the deceased while in their premises and at his place of work. They had a duty of care towards the deceased, who was within the range of foreseeable danger of physical harm and the breach occurred when the respondent failed to provide precautionary measures and accordingly the claimants are entitled to damages against the respondent in respect of the fatal injuries suffered by the deceased under the Law Reform Act, and under the Fatal Accidents Act for pain and suffering.

Upon considering the evidence and the submissions of both parties, and by the operative jurisdiction granted to this Court under the Industrial Court Act, Section 12 I find the respondent was wholly liable for the accident and liable to pay damages to the claimants.

In assessing the damages payable, I note the claimants have relied on the Law Reform Act and the Fatal Accidents Act and limited letters of administration *ad litem* were issued to them. The death certificate was issued indicate the deceased was 25 years employed as a casual laborer on a daily wage of kshs.310. He died two days after the accident. In that case I award the sum of Kshs. 30,000.00 for pain and suffering. On special damages the 1st claimant stated that they spent kshs.1, 375.00 for the limited grant and death certificate, which I will grant.

The claimants stated that the deceased earned Kshs.310.00 per day and that he had dependants that he was supporting and listed in the claim. it is however not stated as a casual laborer how many days in a month he would report to work and equally the claimants failed to indicate how much of the earnings of the claimants were allocated to them either on a daily basis or on a monthly basis. Doing the best I can in the circumstances of this case, I take the daily income of the deceased at 310.00 x 25 work days this adds to 7,750.00 and taking it that he used 2/3 of this on his dependants monthly, the loss of dependency would therefore amount to per month for 12 months. I take a multiplier of 20 years and the loss of dependency would amount to 7750 x 12 x 20 x 2/3 amounting to Kshs. 1,240,000 which is awarded.

Loss of expectation of life is awarded at kshs.75, 000.00

Total damages

Special damages at kshs.1, 375.00

Loss of dependency at Kshs.1, 240.00.00

Pain and suffering at kshs.50, 000.00

Loss of expectation of life at Kshs.75, 000.00

Total Kshs. 1,366.375.00

Less amount paid under Workman's Compensation Act amounting to Kshs. 301,080.00

Total dues is Kshs. 1,065,282.00

Judgement is hereby entered for the claimants in the sum of Kshs.1,065,282.00. The claimants shall have costs and interest at Court rates.

Delivered in open Court this 8th day of May the year 2013.

M. Mbaru
Judge
In the presence of:

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Court Clerk: