



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 766 OF 1990**

**KHISA..... PLAINTIFF**

**VERSUS**

**RYCE MOTORS LTD..... DEFENDANT**

**JUDGMENT**

On 10.7.89 the plaintiff was working as a watchman in the premises of the defendant when he fell into a ramp and got injured.

He claims that the injury was caused by reason of the breach of the common duty of care of the defendant as occupier of the premises and/or by reason of the negligence on the part of the defendant's servants and or agents. Particulars of the alleged negligence are given in paragraph 7 of the plaint.

The defendant denied liability in a defence filed in court on 18.12.90 in which they averred that such injuries loss and damages, as the plaintiff may prove, were occasioned wholly or in part by the plaintiff's own negligence.

During the trial of this suit each party called only one witness. The plaintiff testified that he used to work at the premises of the defendant as a day watchman or a guard. His duties were to ensure that the motor vehicles in the defendant's yard were safe. To that purpose he used to record in a book the number of motor vehicles in the workshop. He had access to all parts of the workshop and he used to go round the workshop in the mornings (after taking over) and in the evenings (before handing over) to ensure that all was alright.

On the material day, he reported on duty at 6 am and started going round to check whether everything was intact. As he was doing so he slipped and fell into a ramp and got injured.

He attributed the cause of the fall to a patch of grease on the floor of the defendant's workshop which the person who was supposed to clean up the place had failed to remove, on the material day. He said he was careful and had acted in accordance with instructions and that for the patch of grease he would not have slipped.

The witness who was called by the defence Isaac Owichi Odera is the current workshop manager of the workshop where the plaintiff fell. He was employed by the defendant in September 1990 and has no

personal knowledge of the events of 10.7. 89. The only relevant evidence which Mr Odera could give related to what happens at the defendant's premises today. There was therefore no answer to the plaintiff's claim that he suffered and fell into a ramp when he slipped on a patch of grease which was left on the floor by a worker of the defendant who should have cleared it with saw dust on that day. That being the case I find that the defendant as occupier of the premises was in breach of its statutory duty of care to its licensees, one of whom was the plaintiff. I also find that the defendant was negligent in leaving the patch of grease on the floor of the workshop as it exposed people lawfully on the premises to danger of slipping and falling down in the event of stepping on it. For this reason I find the defendant 100% liable to the plaintiff in damages for the injuries he sustained. It is true that section 3 (3) (b) of the Occupiers Liability Act does provide:-

“An occupier may expect that a person in the exercise of his calling will appreciate and guard against any special risks ordinarily incidental to it, so far as the occupier leaves him free to do so”.

But the facts of this case as given by the plaintiff show that what caused the accident was neither a special risk nor a risk ordinarily incident to the functions that were being carried on at the premises.

The crucial fact of the matter is that any grease that used to pour on the premises in the course of the work being carried on therein used to be cleared away by pouring saw dust but on the material day, the worker who was assigned the duty of cleaning up the place, failed to do so; and the accident occurred.

The injuries sustained by the plaintiff have been described by Dr G A Marenya in a report dated 15.10.90 which was admitted in evidence as exhibit I. He sustained:-

1. Fracture of the head of the right radius
2. Dislocation of the right elbow joint

Treatment consisted of manipulation and the application of plaster of paris. The plaster was removed on 11.8.89 when the hand was found to be stiff. No physiotherapy was started. When seen by Dr Marenya on 25.6.90 this 34 years old plaintiff complained of pain and stiffness of the right elbow.

Examination revealed that the right elbow is deformed resulting in an inward bending of the forearm. The elbow joint was stiff and extension was not possible beyond 150°. Flexion was limited to 40°. In the doctor's opinion early osteoarthritis of the affected joint was likely to occur.

In his submissions on quantum of damages Mr Lumatete cited the case of *Mohamed Soma Bwana Shali v Kenya Cargo Handling Services Limited* (Msa HCCC No 22 of 1986) which like the present case involved injuries to an employee in his place of work affecting his right hand. The injuries in the *Shali* case and the residual disabilities were however much more serious.

Mr Musinga for the defendant cited the following cases on the issue of quantum of damages:-

1. *Francis Mungai Thuo vs Moses Gitungo & EPCO Builders Ltd* (NBI HCCC No 3133 of 1987)
2. *Kitheka Mumo vs Narshidas & Co Ltd* (Msa HCCC No 220 of 1984)
3. *Wesley Omenyi Ogali vs Jaqar Singh Vasir* (NBI HCCC No 769 of 1987)

I have read the three cited authorities.

Bearing in mind the injuries sustained by the plaintiff and the disabilities resulting therefrom and also having regard to the decisions of the Courts in similar cases and further doing the best I can in the circumstances, I would assess general damages for pain and suffering and loss of amenities at Shs 360,000/-.

For the above reasons there will be judgment for the plaintiff against the defendant for Shs 360,000/- plus costs and interest.

Dated and Delivered at Mombasa this 19<sup>th</sup> day of November, 1993

**T. MBALUTO**

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**JUDGE**



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