Case Number:	Civil Case 679 of 1994
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Case Class:	Civil
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	David Kenani Maraga
Citation:	PAUL GAKUNU MWINGA v NAKURU INDUSTRIES LTD [2009] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 679 of 1994

PAUL GAKUNU MWINGA……PLAINTIFF

VERSUS

NAKURU INDUSTRIES LTD……DEFENDANT

JUDGMENT

The hearing of this old case started before the retired Justice Rimita who took the evidence in support of the plaintiff's case. A skeleton file was opened and somehow a copy of that evidence was obtained and is now part of the record. Justice Musinga who took over the hearing could not complete taking the evidence of the first defence witness as the original court file had disappeared with the exhibits. Counsel have since provided copies of the exhibits. I took the evidence of the last defence witness.

The plaintiff was employed by the defendant from 1961 to 1993, a period of about 33 years as a weaver and later as a supervisor. He claims that during that period, due to the negligence of the defendant in failing to provide him with any protective gear, he inhaled harmful dust in the defendant's premises as a result of which he developed a chronic chest infection and chronic obstructive airway disease described in medical parlance as *"byssinusis- chronic dysponea."* He therefore claims general damages costs and interest.

In his testimony, he claimed that in the weaving department where he worked, although the thread material the defendant used to weave blankets produced dust, the defendant did not provide the employees including him with any dust masks and the room in which weaving was done was not well ventilated. The plaintiff was thus exposed to dust.

He started having problems with his chest in 1976 but his condition worsened in 1984. He was all along treated at the defendant's clinic and at the Provincial General Hospital but it was not until 1993 that Dr. Mwaura, PW2, diagnosed the cause of his problems as dust related. Dr. Mwaniki, PW3, who at the request of the defendant examined the plaintiff in the presence of another doctor concurred with Dr. Mwaura's opinion that the cause of the plaintiff's chest infection was dust.

On the basis of this evidence counsel for the plaintiff submitted that the defendant breached the employer's statutory duty of care thus violating Sections 51 and 53 as well as Rule 58 of the Factories Act, Cap 514 of the Laws of Kenya (the Act). Arguing that the tort in this case continued as provided in Section 36 of the Act up to the date of the medical certificate in 1993 that the plaintiff was suffering from a scheduled disease causing the infection, they dismissed the defendant's defence that the plaintiff's claim was statute barred under the Limitation of Actions Act and urged me to find the defendant liable to the plaintiff for damages.

On the quantum of damages, they cited the cases of Thomas Mothinji Mukhaya Vs African Diatomite Industries Ltd, Nakuru HCCC No. 90 of 1996 and Simon Kinyua Vs Eveready Batteries (K) Ltd, Nakuru

HCCC No. 98 of 2002 and recommended an award of Kshs. 5,000,000/=.

Besides denying that the plaintiff's sickness resulted from dust in its premises, the defendant also averred in its defence that the plaint does not disclose any or any reasonable cause of action. The Defendant called two witnesses whose evidence I will refer to later in this judgment.

In their submissions, counsel for the defendant started by challenging the competence of the suit on the ground that the plaint lacked particulars of the defendant's alleged breach of the statutory duty of care. Citing the decision of the New South Wales Supreme Court in Youkhana Vs Di Veroli [2009] NSWSC 942 and Mukasa Vs Singh & Others [1969] EA 442 and Order 6 Rule 8(1) of the Civil Procedure Rules, they argued that particulars of negligence as pleaded in the plaint are too general and therefore ambiguous.

Even if the plaintiff had pleaded the particulars of negligence, counsel contended that the plaintiff's illness having started in 1984, his claim is statute barred both under negligence and contract.

If they are overruled on the competence of the case, counsel submitted that the plaintiff's claim must nonetheless still fail. While admitting that at common law an employer is under duty to take reasonable steps to ensure the employee's safety, counsel referred me to Section 107 of the Evidence Act and submitted that it is axiomatic that whoever alleges a fact must prove it. They cited the case of Statpack Industries Vs James Mbithi Munyao, Civil Appeal No. 152 of 2003/ [2005] eKLR and submitted that the plaintiff is required to prove the causal link between his sickness and the defendant's negligence. To discharge that burden, the plaintiff was required to prove, first, that the cause of his sickness was the inhalation of dust at the defendant's premises where he worked and, secondly, that the defendant had failed to discharge its common law duty to provide appropriate apparel, in this case gas masks. They said that if there was any dust in the weaving department, it was minimal and invisible and that is why the Occupational Health Officer required the defendant to only provide overalls and not dust masks.

Counsel contended that from the evidence on record in this case the plaintiff has failed to prove both and his claim must fail. Besides failure to plead dust as the cause of his sickness, they said the plaintiff has failed to prove that there was dust at the defendant's premises and if there was that it was the cause of his sickness. He has not called evidence to prove the nature of his sickness and the type of dust that could cause it. They dismissed Dr. Mwaura's report as based only on the plaintiff's story and not on inspection of the defendant's premises as required by Section 45A of the Factories Act. As Dr. Mwaura, admitted that the plaintiff's illness could have been caused by other factors, they argued that it could have even been caused by common dust which is found everywhere. They said Dr. Mwaniki's opinion does not assist as he merely concurred with Dr. Mwaura.

If I find the defendant liable, counsel for the defendant urged me to bear in mind the fact that money cannot repair a tissue and award a reasonable sum. In their view, a sum of Kshs. 200,000/= would be reasonable compensation. They said the claim for special damages should be dismissed as the particulars thereof have not been pleaded leave alone proved.

I have considered these submissions and the evidence on record. I agree with counsel for the plaintiff that the plaintiff's claim is not statute barred under the Limitation of Actions Act. This is because the plaintiff was in the defendant's continuous employment from 1961 to 1993 when the problem was diagnosed. Sections 35 and 37(1) of the Workmen Compensation Act cover such situations.

Section 35 of that Act provides that:-

"Where a medical practitioner grants a certificate –

(a) that a workman is suffering from a scheduled disease causing disablement or that the death of a workman was caused by any scheduled disease and

(b) that such disease was due to the nature of the workman's employment and was contracted within the twenty-four months previous to the date of such disablement or death, the workman or, if he is deceased, his dependants shall be entitled to claim compensation under this Act as if such disablement or death had been caused by an accident, and the provisions of this Act shall, subject to this part, *mutatis mutandis*, apply unless at the time of entering into the employment the workman willfully and falsely represented in writing to the employer in reply to a specific question that he had not previously suffered from the disease."

On its part Section 37(1) provides that:-

"In the application of this Act to disablement or death caused by a scheduled disease, references to the date of the occurrence of the accident shall be construed as meaning—

(a) in the case of a disease causing disablement, the date of the certificate referred to in Section 35."

As I have stated the Plaintiff's problem was diagnosed in 1993. On limitation, the plaintiff's claim is therefore competently before court.

On the issue of the pleadings, I think the defendant is on firm ground. Contrary to Order 6 Rule 8(1) of the Civil Procedure Rules, the plaint in this case expresses the particulars of the defendant's negligence in such wide and general terms that they cannot support the plaintiff's claim in negligence or breach of contract. It is trite law that particulars of negligence or breach of contract must be pleaded in clear and unambiguous terms. Stating clearly what was expected of the defendant, the particulars must be framed in such way as to enable the defendant to know the exact breach of contract or statutory duty of care or the negligence that he occasioned to the plaintiff. I concur with the decision of the New South Wales Supreme Court in Youkhana Vs Di Veroli [2009] NSWSC 942 and Mukasa Vs Singh & Others [1969] EA 442 that particulars of negligence that are so wide are ambiguous and unacceptable in law.

In this case the plaint does not make mention of the word "dust." It has not stated what equipment the defendant was supposed to provide him that it did not. Chronic obstructive airway disease or byssinusis- chronic dysponea could not be caused by any other substance like inhalation of fumes.

For these reasons I find that the plaint in this case does not disclose any or any reasonable cause of action and I accordingly strike it out and dismiss this case with costs.

In spite of my above finding, the law obliges to assess the damages that I would have awarded to the plaintiff had the suit been competent.

Under both common law and statute, employers are obliged to inter alia provide a safe system of

work. Under common law this was clearly stated in the old English case of Wilson & Clyde Coal Co. Vs English [1938] AC 579 where it was held that employers are under duty to provide adequate material and a safe system of work. Under statute, Section 53 of the Factories Act Cap 514 of the Laws of Kenya legislates on the kind of materials required for work. It provides:-

"Where in any factory workers are employed in any process involving exposure to wet or to any injurious or offensive substance, suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings, shall be provided and maintained for use of such workers."

With regard to dust, which is our concern in this case, Section 51 and Rule 58 of the Rules and Regulations under the Act state thus:-

Section 51:

"In every factory in which, in connexion with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extend as to be likely to be injurious or offensive to the person employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom and the dust, fumes or impurity shall not be allowed to enter into the atmosphere without undergoing appropriate treatment to prevent air pollution or other ill-effect to life and property."

Rule 58:

"Where the processes give rise to any substantial quantity of dust of any kind or to dust of such a character and to such extent as to be likely to be injurious to the persons employed, all practicable measures shall be taken to protect the persons employed against the inhalation of such dust, and, if necessary, suitable masks or respirators shall be provided and maintained for the use of persons employed who are exposed to such dust."

Charlesworth on Negligence reiterates this duty at page 887 thus:-

"Subject to any provision to the contrary in any particular section, the duty under the Factories Act is owed not only to persons employed by the occupier of the factory but to all persons working in the factory."

Section 72 of the Act criminalizes contravention of any of these provisions. It states:-

"(1) In the event of any contravention in or in connexion with or in relation to a factory of the provisions of this Act, the occupier, or (if the contravention is one in respect of which the owner is by or under this Act made responsible) the owner of the factory shall, subject as hereafter in this Act provided, be guilty of an offence."

In this case, it is clear from the District Occupational & Health Officer's letter dated 21st July, 1993, that the plaintiff was among the defendant's employees who were examined by Occupational Health

Doctors from the Medical Division on 30th October, 1985. As there is no record of those doctors' findings, in his said letter the District Occupational & Health Officer Nakuru referred the plaintiff to the Directorate of Occupational Health & Safety Services, Nairobi for examination. In his letter of 11th August, 1993, Dr. Mwaura of the Work Environment Research Division, which I believe is in the Directorate of Occupational Health & Safety Services, after "Clinical examination and Lung function tests (FEV, FVC and FEV/FVC)" whatever that means, diagnosed the plaintiff's problem as "chronic dysponea and easy fatigability…indicative of a progressive respiratory disability." With that diagnosis, he recommended that the plaintiff "be re-deployed to an area which is not dusty and be given light duties since the disease condition is occupational in origin."

At the request of the defendant's advocates, the plaintiff was again examined by Dr. Nelson Kiama Mwaniki, Occupational Health Specialist and Head of the Occupational Health and Research Division of the Directorate of Occupational Health & Safety Services, in the presence of Dr Kahenya. In his report dated 23rd February, 1996, Dr. Mwaniki stated that he, as well as Dr. Kahenya concurred with the opinion of Dr. Mwaura. He also stated that Dr. Sakari W.D.O., had visited the defendant's premises on 8th February, 1996, and confirmed that there was dust in the weaving department where the plaintiff had worked for over 30 years.

The defendant did not dispute that finding of dust in its premises. Instead, following that report, the defendant wrote to the plaintiff that there was no other suitable place he could be re-deployed to. Consequently, it terminated his services on medical grounds. The first defence witness whose evidence, as I have pointed out, was not completed because of the disappearance of the original court file with the exhibits, said in examination in chief that masks were not provided to employees in the weaving department as there was no dust in the weaving room. The other defence witness called contradicted that evidence by stating that although there was minimal dust in that department, dust masks were nonetheless provided to all employees in that department including the plaintiff and that except the plaintiff none of the other 40 employees has complained. In the circumstances I find that there was dust in the defendant's weaving department and the defendant did not provide any dust masks. That failure led to the plaintiff contracting, as Dr. Mwaura put it, "chronic dysponea and easy fatigability…indicative of a progressive respiratory disability" for which I find the defendant 100% liable to the plaintiff for damages.

On quantum I would like to start with the plaintiff's claim for special damages. It is a legal requirement that special damages should not only be specifically pleaded but they should also be strictly proved- Herbert Hahn –vs- Amrik Singh (1982 –88)1 KAR 738; Corporate Insurance Co. Ltd. –Vs- Loice Wanjiru Wachira C.A. No.151 of 1995 C.A and Sande Vs Kenya Co-operative Creameries Ltd,[1992] LLR 314 (CAK). Having not been specifically pleaded in this case or proved at all, I agree with counsel for the defendant that they cannot be awarded. I therefore dismiss the Plaintiff's claim for special damages

Counsel for the plaintiff relied on the cases of Thomas Mothinji Mukhaya Vs African Diatomite Industries Ltd, Nakuru HCCC No. 90 of 1996 and Simon Kinyua Vs Eveready Batteries (K) Ltd, Nakuru HCCC No. 98 of 2002 and recommended an award of Kshs.5,000,000/=.

I have read those authorities. In the case of Kinyua, besides the fact that the 39 year old plaintiff suffered inflamed upper respiratory system leading to obstructive lung disease as a result of exposure to irritant fumes from Zinc Chloride, Manganese and other chemicals as opposed to exposure to dust in this case, the bulk of the award he secured of Kshs.4,327,872/= related to loss of future earnings. For pain and suffering and loss of amenities, he was awarded Kshs.600,000/= in April 2004. In the Mothonji case, for exposure to diatomite dust, the plaintiff was awarded Kshs.450,000/= over ten years ago.

In this case there is no claim for loss of earnings. Taking into account the inflationary rates in our country since the two cases were decided, I would have awarded the plaintiff a sum of Kshs.750,000/= plus costs and interest at court rates. However, in view of my earlier finding that this suit is incompetent, the final order that I make in this case is that the plaint in this suit is hereby struck out with costs.

DATED and delivered this 17th day of December, 2009.

D. K. MARAGA

JUDGE.