



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 71 OF 2016

PRIMAROSA FLOWERS LIMITED.....APPELLANT

VERSUS

DIANA MWENDE KIMANI.....RESPONDENT

(Being an appeal from the judgement and/or decree of the Honourable Simiyu, SRM delivered on the 24th day of June, 2016 in CMCC No. 913 of 2014 at Machakos)

BETWEEN

DIANA MWENDE KIMANIPLAINTIFF

VERSUS

PRIMAROSA FLOWERS LIMITEDDEFENDANT

JUDGEMENT

1. By a plaint dated 15th October, 2014, the Respondent herein instituted a suit against the Appellant herein claiming General Damages, Special Damages in the sum of Kshs 4,500/- Costs and interests.
2. The Respondent's suit was premised on the fact that the Respondent was an employee of the Appellant and that it was an implied term of the contract of employment between the two and/or it was the duty of the appellant as the respondent's employer to inter alia take all reasonable precautions for the safety of the Respondent while the Respondent was engaged upon his work; not to expose him to risk/damage of injury and or exposure to chemicals which it knew or ought to have known; to provide and maintain adequate and suitable plant tackle and appliances to enable the Respondent carry out her work safely; to take all reasonable measures to ensure that the place where the Respondent carry out the work was safe; to provide and maintain a safe and proper system; and to provide that Respondent with protective gear.
3. It was pleaded that sometimes in 2011 the Respondent while in the course of his employment at the behest of the appellant and/or the appellant's agent/servant and/or employee, she suffered chemical induced chest infection.
4. The Respondent contended that the accident and/or exposure to chemicals was caused by the negligence and/or breach of the legal and/or contractual duty and/or obligation of the appellant and the particulars of the same were pleaded.
5. The Respondent further pleaded that by reason of the foregoing, he suffered loss, damages and injuries and gave the particulars thereof.
6. According to the Respondent, she was employed by the appellant some time in 2009 as a harvester to harvest flowers in the appellant's green houses. However, in the year 2011 she started developing health problems in form of breathing difficulties and headaches every time she entered the green house to carry out her duties. Though she reported this to the appellant, the only treatment she got was from the appellant's dispensary. In October, 2011, her situation worsened forcing her to resign from work. When she attended clinics at Machakos Level 5 she was informed upon examination that she had developed a blockage of her respiratory system due to the inhalation of chemicals at the appellant's work sites. it was her case that as a result she developed allergy to dust.
7. The Respondent blamed the appellant for her predicament since the appellant failed to provide her with adequate or any protective gear

and exposed her to chemicals and a risky working environment but failed to take mitigating steps as regards the effects of the chemicals.

8. In her oral evidence the respondent who testified as PW2, explained that her problems started earlier than 2011 and that at first she got pregnant and as a result of complications, the baby was prematurely born. According to her, at the appellant's premises the flowers were planted in an enclosed green house and her job was to harvest and weed. She testified that the flowers were sprayed daily at 5.00am and they started work at 7.00 am. They were however issued with plastic boots and cloth dust coat. She was however not issued with a mask hence the reason she inhaled the chemicals.

9. While conceding that there were notices at the appellant's premises and that the appellant had safety rules, the respondent testified that upon reporting to work one was asked to enter and harvest flowers at exactly 7.00 am. She also conceded that she was educated on how to weed and harvest the flowers and that there was a supervisor and a foreman. Since she needed the job she did not complain and while there was a group of workers who had masks those who joined the company in November, were not issued with them. It was her evidence that no one was charged with ascertaining that the green houses were safe though there was a supervisor. Asked about one **Peter Muliro**, she denied knowing the person.

10. In support of her case, the respondent called **Dr Judith Kimuyu** a medical doctor holding a degree in surgery from Machakos Level 5 Hospital, who testified as PW1. According to her she examined the respondent in 2011. The respondent's history was chest problem which she developed while working for the appellant and the nature of the injury was chemically induced chest infection. She was treated as an outpatient. Upon examination the doctor formed the opinion that the respondent had developed chest problems due to chemical exposure. She proceeded to produce the medical report and the treatments documents. In her view the said ailment is not likely to completely heal and may worsen on further exposure.

11. In cross examination, it was her evidence that the respondent suffered from respiratory infection caused by allergic reaction which is not a disease but an injury to the respiratory system. In her view allergic reactions do not heal and can be triggered again since it is a reaction by the body to a foreign thing. In her evidence an allergic reaction is only in the presence of allergen. It was therefore her recommendation that the respondent avoid dust which would only reduce further reaction and further injury.

12. On its part, the appellant called **Gladys Okumu**, the appellant's nurse who confirmed that the respondent was an employee with the appellant. According to her she attended to her during her work. Although she relied on her filed statement, the copy of the statement incorporated in the record was a poorly photocopied handwritten statement with some sentences missing. It was therefore not helpful to the court.

13. According to the witness, the respondent claimed to have suffered chemically induced chest infection but according to her on 25th October, 2011, the respondent complained twice and she referred her to be seen for review by the visiting doctor from Athi River Medical and Kitengela Medical but she vanished. However, the respondent's complaint was chest pain. She referred to the respondent's medical records from 17th January, 2009 to 20th October, 2011 which according to her was a continuous record of the respondent made by DW1. She testified that the respondent was seen severally but for several reasons such as UTI, pregnancy, dental problems and headache. However, in the entry of 19th September, 2011, the respondent complained of chest pain, headache and dizziness. In her statement, she stated that the respondent's complaints were general and that at no time did she complain of continuous chest pain while at work that would have necessitated referral or review by the appellant's doctor. She stated that it was the appellant's practice that she handles all the medically related complaints and if serious to refer the same to other hospitals which was not the case in the respondent's circumstances.

14. According to the witness the respondent did not handle chemicals but was doing harvesting and that those who handled chemicals were provided with spray suits, face masks and gloves. According to the witness, since the factory is in chemical polluted area, the respondent cannot blame the appellant. It was her evidence that the respondent had an infection that can be treated in one month and it heals.

15. The witness in cross-examination conceded that she was not a doctor but a Kenya Registered Community Nurse. She reiterated that the respondent though an employee was a harvester, spraying was done before harvesting. She however admitted that she was not a chemical handler in order for her to know if the chemical is insect repellent. According to her masks are only issued to chemical handlers since when the harvesters enter the sheds the potency of the chemicals is expected to have lapsed and that this is ascertained by the spray department. She could not however tell if a tester was used to confirm the absence of chemical which she confirmed were strong scented. She admitted that the respondent was seen on occasions for sharp pain in thoracic cavity, pain in breathing, dizziness, headache and left facial numbness. She however attributed this to stress.

16. In his judgement, the Learned Trial Magistrate found, after considering the medical records of the respondent both from the appellant company and Machakos Level 5 Hospital, that the respondent had chest infection which was found by the doctor at Level 5 to have been secondary to chemical inhaling. The trial court was therefore satisfied that the respondent had proved on a balance of probabilities that she had an infection. The Trial Court therefore found, based on the case of **George Morara Masitsa vs. Texplast Industries Limited NBI HCCA No. 540 of 2011** that the Respondent's case probable on a balance of probabilities.

17. According to the learned trial magistrate, the appellant had not shown that the green house was free from chemicals at all times when the respondent was working and or that she was provided with a mask that would protect her from inhaling the chemicals. Accordingly, the appellant did not perform its duty under the statute as explained by **Denning, LJ in Clifford vs. Charles Challen and Sons Limited [1965] KB 497**. The learned trial magistrate therefore found the appellant 100% liable for the consequences complained of and awarded the respondent Kshs 200,000.00 general damages and special damages in the sum of Kshs 8,000.00 with costs and interests.

18. In this appeal, the Appellant relies on the following grounds:

1. THAT the Learned Magistrate erred in law and fact in holding the Appellants (Defendants) 100% liable in negligence and/or breach of contract on a balance of probabilities.

2. THAT the Learned Magistrate erred in law and fact in holding that the Respondent suffered a Chemical Induced Infection without the name of the alleged chemical being disclosed and/or proven circumstances and treatment thereof.
3. THAT the Learned Magistrate erred in law and fact in basing his findings on irrelevant issues/factors not supported by evidence adduced and/or applicable law.
4. THAT the Learned Magistrate erred in law and fact in assessing general damages at Kshs 200,000.00 for pain, suffering and loss of amenities which amount was/is manifestly excessive in the circumstances.
5. THAT the Learned Magistrate erred in law and fact in failing to take into cognisance the fact that the Kenyan economy cannot sustain such huge awards.

Determination

19. I have considered the submissions of the parties in this appeal.

20. This being a first appellate court, it was held in Selle vs. Associated Motor Boat Co. [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

21. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

22. However, in Peters vs. Sunday Post Limited [1958] EA 424, it was held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

23. However, in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

25. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

26. The two provisions were dealt with in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

27. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the appellant in this appeal depending on the circumstances of the case.

28. In this case, it is not in dispute that the respondent was employed as a harvester by the appellant.

29. the Respondent's evidence was that he was employed by the Appellant. The appellant did not adduce any evidence to controvert this testimony which was made on oath. I agree that the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & another [2014] eKLR espouses the correct legal position that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

30. What then is this “balance of probabilities”? Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

31. As stated in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR (supra) where the evidence adduced by the plaintiff falls far short of what is expected in a civil suit, in that the plaintiff's evidence does not meet the 51% threshold, the Plaintiff's case will fail notwithstanding the failure by the Defendant to adduce evidence. In other words, the failure by the Defendant to adduce evidence cannot be a basis for propping up an otherwise hopeless case by the Plaintiff. However, where there is credible evidence from the Plaintiff, the failure to adduce any evidence by the defence may well mean that the Plaintiff has attained the standard prescribed in civil proceedings.

32. Based on the evidence adduced before the Court, the Learned Trial Magistrate was entitled to make findings of fact based on the material before him. In this case, the respondent's case was that she developed respiratory infection after being exposed to chemical fumes while working in the appellant's premises. It was admitted that the respondent was in actual fact working in the premises that were continually being subjected to chemical spray and while those spraying the same were supplied with masks those who went in to undertake the harvesting were not so provided. There was no evidence from the appellant that by the time the harvesters went in, the effect of the chemicals had dissipated. The appellant's evidence was only to the effect that the respondent's complaints did not relate to the chemical infection. Even if that was true, and the evidence adduced was to the contrary, that would not by itself prove that the respondent did not suffer as a result of the application of the chemicals in her place of work, if there was other evidence to the contrary. In this case, the respondent's evidence supported by the medical evidence clearly showed that the respondent did suffer from the effect of the said chemical application.

33. It was contended that the respondent ought to have pointed out the chemical which led to her injuries. First, the mere fact that those who were spraying the chemical were provided with masks was a clear appreciation that the chemical in question could injure a person when exposed. Secondly, I associate myself with the opinion of Aburili, J in George Morara Masitsa vs. Texplast Industries Limited NRB HCCA No. 540 of 2011 where the learned Judge expressed herself at pages 10 and 11 as hereunder:-

“The Appellant having testified on oath and produced evidence of his employment with the Respondent and his medical treatment notes for the ailments he contracted while on duty, and which evidence was never rebutted or at all, it was, in my view, an error on the part of the trial magistrate to find that the Appellant had not proved his case on a balance of probabilities to the required standard against the Respondent. To expect otherwise would be to raise the standard of proof to that of beyond reasonable doubt, which is outside the purview of civil proceedings and litigation. To demand that a casual worker like the Appellant specify which chemical pollutant was responsible for his ailments was to demand that he proves his

case against the Respondent beyond any cloud of doubt which amounts to misapprehension of the law and which invites interference by this court. The Respondents had the opportunity to counter the evidence and pleadings as set out by the Appellant to challenge the cause of his ailments but they did not. Consequently, a presumption arises that the evidence, as produced, was unchallenged and therefore there was no need for the Appellant to be expected to take samples of the pollutant chemicals for a laboratory testing to determine what chemicals they were, to enable him prove his case, as that would in effect be turning a civil case into a criminal matter where the standard of proof is beyond reasonable doubt”.

34. The learned Judge continued at pages 12 and 13 as follows:-

“As I have stated earlier, it was immaterial that the appellant did not know the type of the chemical in question. He pleaded that he was exposed to pollutants while engaged at work, and testified that he inhaled the chemical pollutants. It is not doubtful that the appellant worked in an industry and under the unsafe conditions and that he complained of the problems he was facing to his superiors before he sought medication. I am in agreement with the submissions by counsel for the appellant that the trial court erred in law and fact in failing to observe principles espoused in the case of Mumias Sugar Co. Ltd Vs Charles Namatiti CA 151 of 1987 Nairobi that:

‘an employer is required by law to provide safe conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee.’

Under both common law and statutory law, employers are obliged to provide their workers with adequate material and a safe system of work. Section 53 of the *Factories Act* Cap 514 Laws of Kenya provides that:

‘Where in any factory workers are employed in any process involving exposure to wet or to any injurious 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.’

In addition, under section 51 of the said Act:

‘in every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the person employed against inhalation of the dust, 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 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.’

Section 72 of the Act criminalizes contravention of any of these provisions of the Act. The duty under the Factories Act is owed to persons but only employed by the occupier but also to all persons working in the factory. The respondent did not deny that the appellant was its employee or that the appellant suffered the ailments complained of while he was engaged upon his work and employment with the respondent. The respondent did not either prove that it had complied with the above stated statutory obligations.”

35. At pages 16 and 17, the learned Judge held that:-

“There was no evidence to controvert the appellant’s testimony that he worked in the environment described in his testimony. There was also no evidence or denial that there were chemicals used in the printing process. Neither was there evidence that the appellant was an expert in detecting chemicals used at his workplace. With that kind of evidence, it was expected that the respondent would make the conditions of employment to his employees safe and not to expose employees in this case, the appellant, to any danger to avoid any harm. This is not to say that the respondent would be responsible for the employees own negligence in execution of such employment, but that there was no evidence that the appellant was the author of his own misfortune. I therefore find that the appellant did prove on a balance of probabilities, that he was injured while engaged upon his work with the respondent after inhaling the unnamed chemical substances used in the printing feeder. I also find that the respondent failed to exercise due care and failed to provide the appellant with protective clothing while he as engaged upon his work as a result he inhaled chemical substances which caused him the enumerated ailments. I would go further and hold that the respondent /employer was aware or ought to have been aware of the danger that the appellant/employee was subjected to and it failed to do what was required of it and for that reason, it was negligent. Further, that because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry out its side of the bargain to ensure the existence of minimum reasonable measure of protection. And in measuring such degree of care, the court must balance the risk against the measure necessary to eliminate the risk. In my view, the appellant did not have to wait for debilitating injuries before leaving employment or seeking for medication or compensation. And the fact that he had now recovered from the ailments did not disentitle him from seeking for damages as he had nonetheless suffered pain following the ailments contracted while working for the respondent. It was therefore, in my view, an error of principle for the trial court to find that the appellant had not proved the injuries he sustained, when the appellant’s uncontroverted evidence was clear that he inhaled chemicals at his place of work as a printer feeder. It cannot be expected that the doctor should have tested the type of chemicals inhaled by the appellant before making his conclusions.”

36. It therefore follows that the submission by the appellant that the respondent ought to have identified the particular chemical that caused injury to her has no merit.

37. While the appellant alluded to the possibility of the respondent having contracted such infection by means other than through her employment with the appellant, there was no such evidence. In any case, it was admitted that at the time of the respondent's employment by the appellant, she was medically examined and she was found medically fit. It therefore follows that the respondent's infection must have arisen subsequent to her employment with the appellant.

38. In the premises the learned trial magistrate's findings cannot be faulted. In Sheldon Shadora vs. Stanley S. Shadora Civil Appeal No. 210 of 1995, the Court of Appeal held that:

“Although in a first appeal the Court is entitled to rehear the dispute, it must be remembered that the trial court had the advantage of hearing and seeing the witnesses testify before him...A Court of Appeal will not normally interfere with the finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did...An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him.”

39. In my view, based on the evidence that was adduced before the Learned Trial Magistrate, he was entitled to arrive at the findings of fact in the manner he did. Nothing has been placed before me in this appeal to convince me that the said findings of fact were based on no evidence or misapprehension of evidence or that the Learned Trial Magistrate demonstrably acted on wrong principles in reaching the findings he did. There is therefore no justification to warrant interfering with the Learned Magistrate's findings on fact and a decline to do so.

40. As was held by the Court of Appeal in Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja Civil Appeal No. 2 of 1986 [1986] KLR 661; Vol. 1 KAR 982; [1986-1989] EA 183:

“Unless it is shown that the learned Judge took into account facts or factors which he should not have taken into account, or that he failed to take into account matters which he should have taken into account, that he misapprehended the effect of the evidence, or that he demonstrably acted on wrong principles in making his findings, the appellate court will not interfere with the findings of facts.”

41. I agree with Koome, J (as she then was) in Samson Emuru vs. Ol Suswa Farm Ltd Nakuru HCCA No. 6 of 2003 that:

“The duty of the employers to provide the servant with a safe place of work not merely to warn against unusual dangers known to them, ... but also to make the place of employment...as safe as the exercise of reasonable skill and care would permit...The duty thus described is a higher... the master is under a duty to make his servants to take reasonable steps to avoid harm arise.”

42. It was upon the Appellant to ensure that the environment in which the Respondent operated was safe for the nature of the work she was supposed to undertake. The Court of Appeal in the case of Makala Mailu Mumende vs. Nyali Golf County Club [1991] KLR 13 stated thus:

“No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees.” [Underlining added].

43. Similarly, in Halsbury's Laws of England, 4th Edition vol. 16 Para 560, it is stated that:

“At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances...So as not to expose them to an unnecessary risk.”

44. In Winfield and Jolowicz on Tort by WVH Rogers, 14th Edition, London Sweet & Maxwell at page 213, it is stated as follows *inter alia*:

“If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety device, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty.”

45. In Garton Limited vs. Nancy Njeri Nyoike [2016] eKLR, Aburili, J held that:

“In this regard, it is expected that the appellant employer when assigning its employees to work in an environment where there is potential risk of injury...then it is prudent for them to provide proper appliances to safeguard the workers. The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention of the employee but the employee failed to adhere and deliberately put himself in harm's way...In this case I find that the appellant owed a common law duty of care to ensure the safety of the respondent while she was engaged upon her duties in the appellant's employment...For example, had the respondent been provided with a head gear and boots, she could not have injured her head on falling down and or the leg.”

46. It was therefore held by the Court of Appeal in Kiema Muthuku vs. Kenya Cargo Handling Services [1991] KLR 464; [1988-92] 2 KAR 258; [1990-1994] EA 427 that:

“Even assuming that other systems of carrying out the work, e.g. by the use of safety belts or ladders, were impracticable, the employer is still under an obligation to ensure that the system that was adopted was a reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents... The law cannot be that even where it is known that a particular system is dangerous yet an employer can get away with it unless the employee can show a safer alternative system. Even where a system is known to be inherently dangerous, and there are no practical alternatives to operating it, yet the employer must still ‘ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents.’”

47. In my view the Appellant failed to show what steps, if any, it took to ensure the environment under which the Respondent worked was safe. There was no evidence that attempts were made by the Appellant to supply the Respondent with any safety devices, in this case gas masks, which would reduce the extent of injuries that the Respondent would be exposed to in the event of exposure to chemicals. To my mind, section 14 of the *Occupational Safety and Health Act, No. 15 of 2007* not only imposes an obligation on the employee but also on the employer not to require the employee to return to a workplace where there is continuing imminent or serious danger to safety or health. In this case, the Respondent testified that he had requested to be supplied with the masks but that request was not complied with. In my view by requesting that he be supplied by the masks the Respondent was raising an issue as to the safety of the premises in question and the Appellant ought to have acted on that request. Failure to do so and assigning the Respondent work at the same place could only mean that the Appellant was liable.

48. It is therefore my view that there is no justifiable reason why I should interfere with the Learned Trial Magistrate’s findings on liability.

49. As regards the quantum of damages, I agree with the position of Court of appeal in Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi [1997] eKLR, as follows:

“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees...we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West (H) & Son Ltd –vs- Shephard [1964] AC 326* at page 345:

‘But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.’

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in *Lim Pho Choo v Camden and Islington Area Heath Authority [1979] 1 ALL ER 332* at page 339 and this approach was also adopted by this court in the case of *Tayab v Kinanu [1982-88] 1 KAR 90*.

Lord Denning MR said:

‘In considering damages in personal injury claims, it is often said: “the defendants are wrongdoers so make them pay in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one may have been due to a pardonable error much as may befall any of us. I stress this so to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.’

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant.”

50. However, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

51. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect... A member

of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”

52. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

53. In this case, the Learned Trial Magistrate set out the basis upon which he arrived at the award. While this Court may well have arrived at a different figure, I am not satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high as to represent an entirely erroneous estimate. In the premises there is no justification why this court should interfere with the said award.

54. In the premises this appeal fails with costs to the respondent.

55. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 25th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Muema for Miss Mutinda for the Respondent

CA Geoffrey