



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 111 OF 2012**

**JARED ORIA OKECH ..... APPELLANT**

**VERSUS**

**KUNDAN SINGH CONSTRUCTION CO. LTD. ....RESPONDENT**

**(Being an appeal from the ruling and decision of the Lower Court of S.O. Atonga (PM) dated**

**9th August 2012 in the original KISUMU CMCC No. 568 of 2009**

**JARED ORIA OKECH ODADA vs. KUNDAN SINGH CONSTRUCTION CO. LTD)**

**JUDGMENT**

The Appellant herein sued his employer the Respondent for compensation for injuries sustained in the course of his employment. He blamed the respondent for negligence and/or breach of statutory duty. After hearing evidence from both sides the trial magistrate awarded the appellant general damages in the sum of Kshs.400,000/=, specials of Kshs.1,500/=, costs and interest but found him liable for contributory negligence to the extent of 40%. The appellant has appealed against the apportionment of liability.

The appeal was canvassed through written submissions. As the first appellate court I have reconsidered and evaluated the evidence in the lower court so as to arrive at my own conclusion all the while bearing in mind that I did not have the benefit of observing the demeanour of the witnesses. It is my finding that the appeal has merit. The appellant's case as averred in the plaint and his testimony in court was that on the material day he together with three other employees, were instructed to roll and then lift a 150 litres drum of bitumen in order to pour it into the boiler. Because of its heavy weight he sustained an injury on his spine. He blamed the Respondent for failing to make or keep his place of work safe, for providing poor working conditions thereby exposing him to risk of injury. The injury was confirmed by a doctor who also produced a medical report.

In its written statement of defence the defendant denied that the appellant was its employee and put him to strict proof. It also denied the fact of injury and averred that if at all he was injured it was because he did not take all the necessary precautions expected of a reasonable person; that he carried out duties that he had not been assigned; that he was drunk and that he willingly exposed himself to the risk. All these averments were negated by the Respondent's witness (DW1) when he testified that the appellant was his boss at the company and that the appellant was indeed injured as they were pushing a drum. He also denied that the appellant was drunk and that they rolled the drum as they had been instructed. This supported the evidence of the appellant in all material particulars – and clearly negated all the particulars of contributory negligence alleged. The appellant himself did not give evidence that pointed to negligence on his part. The mere fact that the appellant worked as an Assistant Boiler Operator with two years experience does not prove negligence. The respondent ought to have provided a safer means of

moving the heavy bitumen to the boiler and by not doing so it exposed the appellant to a risk which it could have reasonably foreseen. It also breached its duty to provide better working conditions. The trial magistrate erred in principle in finding the appellant guilty of contributory negligence. Accordingly the finding for contributory negligence is set aside and judgment is entered for the appellant against the Respondent in the following terms:-

1. Liability 100%
2. General damages Kshs.400,000/=
3. Special damages Kshs.1,500/=
4. Costs of the suit and of this appeal
5. Interest at court rates.

It is so ordered.

**Signed, dated and delivered at Kisumu this 29th day of June 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Yogo for the Appellant

Ongira for the Respondent

Court Assistant – Serah Sidera