REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.480 OF 2009

DAVID OMUTELEMA OPONDO.....PLAINTIFF

VERSUS

DELA RUE CURRENCY AND SECURITY PRINT LIMITED.....DEFENDANT

JUDGMENT

1. Vide a plaint dated 9th September 2009 which is 8 years ago, the plaintiff herein **David Omutelewa Opondo** filed this suit against the defendant **De La Rue Currency and Security Print Ltd** seeking for general damages, loss of earnings, costs of the suit, interest on damages and costs at court rates and any other remedy deemed appropriate.

2. The plaintiff's claim against the defendant is that at all material time to this suit, he was employed by the defendant on 17th January 1994 as a packer in the security finishing department after subjecting him to medical tests which found him to be medically fit.

3. That in the course of his employment, the plaintiff was required to lift heavy bank note cases and reams in sheet form weighing between 15 and 85 kilograms and was also required to pack and manually carry bank notes and passport cases weighing over 50 kg for about 8 hours a day and place them on specified trays for onward transfer to the security safes.

4. That in the year 2004 the plaintiff while lifting a case full of bank notes sprained his back and the x-ray showed that he had suffered loss of lumbar lordosis due to muscular spasm.

5. Later, the plaintiff was allegedly required to work while sitting in a chair, while he placed passports into trays and lift the trays to arrange them into pallets.

6. That on or about 3rd November 2008 at about 11.00 a.m. while the plaintiff was working at the defendant's premises placing passports into trays and lifting them so as to arrange them into the pallets, the chair in which he was seated suddenly descended to a depth of 2.5 feet and the impact thereof caused him to suffer severe injuries. He blames the defendant for the said injuries which are said to involve L5-51disc dehydration and post central disc profusion.

7. The plaintiff claims that the defendant through its servants and or agents were negligent for failure to provide a safe working environment for him in that:

1. It failed to adequately and firmly fasten the chair in which the plaintiff used to sit so as to

prevent it from descending below;

2. Failed to warn the plaintiff of the risk of the chair descending below;

3. And failing to provide a cushion, which could prevent or minimize injury to the plaintiff in the event of the chair descending below.

8. The plaintiff claims that as a result of the injury, the plaintiff was retrenched and lost the ability to earn a living.

9. The defendant filed a defence dated 29th October 2009 denying that the plaintiff had been employed as a packer in the defendant's security Finishing Department on 17th January 1994 until 1998. According to the defendant, in 1998 the plaintiff was appointed a cheques operator in the cheques department and in May 1998 he was appointed a CTC Operator and in June 2004 appointed a Kugler operator until termination of his employment in April 2009.

10. According to the defendant, the plaintiff neither reported nor alleged suffering a sprain or injury to his back in 2004 or 2008 in accordance with its rules and procedures. Further, that in any event, the claim for injury in 2004 is statute barred.

11. It maintained that it provided a healthy and safe working environment for all its employees and that the plaintiff's employment was terminated on 6th April 2009 on account of redundancy.

12. The defendant contended that the plaintiff only made claims for work injury related compensation after the termination of his employment on 6th April 2009 and that he claimed he got injured when lifting a book full of passports.

13. All the parties complied with Order 11 of the Civil Procedure Rules by filing statements of witnesses and lists and bundles of documents to be relied on at the hearing.

14. On 17th November 2009 the plaintiff filed a reply to defence dated 11th November 2009 joining issues with the defendant in its defence and asserting that he had complied with the Rules and procedures by making a verbal report to his then supervisor Mr Kennedy Makanga and was treated for the injuries at the defendant's clinic and an xray taken revealed muscle spasm.

15. Further, that he also reported the subsequent injuries to his then supervisor Mr Rodgers Obonyo and he received treatment at the defendant's clinic and was later transferred to Aga Khan Hospital for further treatment.

16. The plaintiff further stated that he sustained injuries on 3rd November 2008 not March 2009 as alleged by the defendant.

17. The court notes that at one point in time from 9th March 2011 to 16th April 2012 when the plaintiff filed an application to reconstruct a new file, the original file had gone missing but the same was traced later and placed before Onyancha J for hearing before I took over the conduct of the matter in October 2014.

18. The hearing commenced before me on 28th October 2014 with the plaintiff testifying on oath and calling 3 witnesses adopting the filed written statements as their evidence in chief.

19. The plaintiff testified that on 3rd November 2008 while he was engaged upon is employment and while working as Kugler 3 machine operator the chair he was sitting on snapped and he fell down as he was carrying passport books. This was 4 years after he had earlier on suffered another injury in 2004 while working for the defendant, which work involved standing for long hours and manually carrying bank notes boxes weighing between 50 and 80kg for 8 hours a day as a result of which he

was diagnosed with lumbar lordosis and muscular spasm.

20. After the alleged injury on 3rd November 2008, the plaintiff stated that he was taken to the defendant's clinic and seen by Nelly Nyamunga the defendant's clinical officer but the pains in the back became intolerable hence he went to Aga Khan Hospital where he was treated and doctors found him to have a disc dehydration and central disc protrusion at L5-S1 which Dr. Henry Wellington Alube (DW3) explained to mean lack of fluid to lubricate joints of the bones, caused by injury, working conditions and old age.

21. According to the plaintiff, the defendant's clinical officer was rude to him after he became immobile hence he had to struggle to reach Aga Khan hospital for proper treatment by his own means and he had to buy his drug on his own. He lodged a formal complaint to the Human Resource Manager concerning refusal to assist him as per his exhibit PEX2.

22. He also briefed his union shop steward to speak to the management who only promised to investigate. He was later retrenched. The plaintiff was seen and examined by Dr Kimani who prepared a medical report dated 30th November 2004 (produced as PEX 1(b). He was later seen by Dr Sande at Aga Khan for diabetes and serious lumber (back) problem as per P exhibit 1(c). He complained that he was declared redundant on 6th April 2009 while he was still admitted in hospital but that before then, he had written to the defendant seeking for compensation for the injuries suffered as shown by his exhibit No. 3 produced in evidence.

23. The plaintiff testified that when he was being recruited, he was subjected to medical examination and found to be medically fit. He denied that he was trained about the seats and or precautions on the dos and don'ts while at work and maintained that there was a similar case pending in court concerning the seat, by an employee who injured himself while lifting a ream of paper. He stated that the average weight of the documents he lifted were 7.15 kilograms. He stated that the seat collapsed because of loose bolts which were not tightened and he maintained that it was the defendant's duty to service those chairs.

24. The plaintiff stated that albeit he was inducted and taught about lifting, there was no warning given and that neither were they trained on environment and health measures, or that the seats they used were likely to descend and injure him. He admitted knowing Elvis Mulama a Safety and Healthy Officer but denied that the latter spoke to him about the safety of the seat. He stated that when he complained to the Ministry of Labour, officials from the Ministry visited the defendant company. He maintained that although the company was insured against work related injuries, it refused to compensate him through UAP Insurance Co. Ltd.

25. The plaintiff stated that Jacinta Mbuthia was his then supervisor in the Division assisting Rogers Obonyo, was still in employment of the defendant but that Rogers Obonyo (finishing supervisor) who supervised him at the material time left employment of the defendant.

26. The plaintiff maintained that he was injured due to the defendant's negligence and that he lost his job after the injury. He stated that he was 42 years when he was retrenched and due to his injury, and since he had been trained on the job as an 'A' level, he could not get such employment anywhere else coupled with is back problems.

27. In cross examination by Mr Muchiri counsel or the defendant, the plaintiff stated that he worked as a packer for about 4 years but was later taken to cheques Department as a CTC Operator (a machine that personalizes cheques) where he worked for another 4 years. He stated that he moved to the passports Department in 2004 and started operating a Kugler machine which is used to assemble passports and that is where he worked until his services were terminated.

28. He stated that his work involved proper assembling and quality assurance of passports. He admitted knowing Dennis Wanyonyi their shop steward and a Kugler 1 and 3 operator. He stated that the Kugler machine did not produce a final product of a passport. He stated that part of his role was to collect passports. The plaintiff stated that after an accident, one was required to fill a form and given to the

supervisor if the injury was minor and was referred to the company clinic. He maintained that in 2004 he reported the accident to his immediate supervisor and he was send to a medical officer who confirmed after attending to the plaintiff.

29. When shown his medical card, he stated that it showed that he was in the company clinic after the 2004 injury. He denied a suggestion that he could have been injured elsewhere other than at the defendant's premises. He maintained that he suffered the 2008 injury while working at the passports department while verifying the quality of passports.

30. The plaintiff stated that he lifted boxes on his laps and as he sat to check on the quality of passports, weighing about 13 kilograms, the bolts of the chair which were worn out descended. He went down with his legs hanging held by a ring. He stated that after seeing the clinical officer Nelly Nyamunga, he went back to work but was in pain. He stated that the accident occurred between 1030-11a.m. and he went to the clinic at 1.45 pm after experiencing the pain.

31. Further, that on the night of 6th November 2008 he went to hospital after experiencing pain and sneezing and abdominal pain due to the back injury. That after going to hospital he was given a sick off the following Monday but on 10th November 2008 he went to work. He conceded that he send a demand letter to the Human Resource Manager a month after his services were terminated, complaining that he had been threatened for reporting the company to the shop steward. He admitted that he visited the provincial occupational safety and health officer in June 2009 and they accompanied him to the defendant's premises to investigate the accident in company of Mr Waweru & Mr Omoyo. He maintained that he was still in pain and could not perform his conjugal rights due to backache although he also suffers from diabetes. He stated that Jacinta Mbuthia was in charge of quality inspection of passport for all laches (sic) and that apart from insurance, no safety equipment were provided to the workers. He admitted that there was a health and safety booklet and that they were trained on safety hence there were measures to take care of employees' health.

32. In reexamination by Mr Ombete, the plaintiff stated that he fell when the chair descended down while he was carrying passports and that there was no precaution or notice that the chair could descend when sat on with passports. He also stated that he had never witnessed such an incident at work with any other person. He stated that the seat was up and fastened with bolts and that it was his duty, after feeding them into the machine, to collect them, sit down and check on their quality and that is when the chair snapped and went down with him. He stated that albeit the weight was about 13 kilograms, what took him down was the loose nuts but he had no means of knowing the chair was faulty. He reiterated that Rogers left the company's employment. He maintained that Nelly Nyamunga the clinical officer in charge of the company clinic is the one who attended to him on 3rd November 2008. He stated that he continued working even after the injury because he was the senior Kugler operator who trained other Kugler operators and was advised to continue working while using medications given to him by the clinician, albeit he was in pain.

33. He stated that on 7th November 2008 he could no longer endure the pain so he went to Aga Khan Hospital because it was the company's hospital of choice. He stated that he took about 2 hours from 11a.m to 1pm to go to the company clinic after getting injures because when he called the nurse, she told him that she was not in hospital.

34. That when he returned to work on 10th November 2008, he was given light duties. He stated that he wrote to the company on 28th May 2009 asking for workmen's compensation to be processed and paid to him following the same accident of 3rd November 2008. He maintained that he was retrenched after taking the shop steward to the company upon which he was threatened with termination of his employment. He stated that the occupational safety officer came to investigate and he instructed the company to fill an accident form but never made any observations. He stated that although the company had in place safety measures, those measures could not help him and that is why he was injured.

35. The plaintiff also called PW2 Dennis Masinde Wanyonyi, who testified on oath and adopted his witness statement signed on 16th May 2011 as his evidence in chief and stated that he worked at the defendant's company from 2001 to 2009 when he was declared redundant as a Kugler operator at the passport production machines area and knew the plaintiff whom he found already working at De la Rue and continued working with him.

36. PW2 stated that on 3rd November 2008 as he worked with the plaintiff, he heard an unfamiliar noise and on checking behind, he saw the plaintiff fallen on the floor after the chair he was sitting on fell down. He informed Rogers Obonyo their supervisor and the latter organized for the plaintiff to be taken to the company clinic but he first filled a form to show that he was not in the production line, which form was taken by the supervisor to take to the security and the latter would take it to the clinic. He stated that the said form was not returnable to the injured employees.

37. PW2 also added that the matter was reported to Jane Ngethe the Human Resource Officer. PW2 stated that he was the shop steward union leader so he knew of the injury which was reported to the Human Resource Jane Ngethe. He stated that no one had fallen from the chair before. He denied being advised to inform the users of the chair of the risks involved in sitting on the said chair. He stated that Mr Mulama the Health and Safety Manager was supposed to be checking the seats but he did not.

38. In cross examination by Mr Muchiri counsel for the defendant, PW2 stated that he joined the company in 2001 but could not recall the accident in 2004 involving the plaintiff. He stated that they had 4 Kugler machines and that in 2008 he worked besides the plaintiff. He stated that one sits when checking quality of passports by lifting boxes from the checking point to the other section, and that the weights varied. He reiterated that he heard the plaintiff scream but only saw him fallen on the ground and he got concerned about the plaintiff's injury. He stated that in emergency cases a floor supervisor or team leader or manager would be informed to notify the security to get first aiders to take an injured person to the clinic through specific emergency doors.

39. PW2 maintained that a form was filled for the plaintiff immediately after the accident. He stated that both he and the plaintiff were declared redundant at the same time. He stated that he went to see Jane Kangethe because of the injury to the plaintiff and the issue of redundancy. He stated that the plaintiff left for the clinic after the accident but that he never accompanied him.

40. That they worked with Jacinta Mbuthia who was supervisor for Kugler production section checking on quality and that Jacinta had information about the plaintiff's accident and injury. He stated that there were booklets on safety and some people would be taken for training and be issued with the said booklets.

41. In reexamination by Mr Ombete, PW2 stated that when he heard the scream and looked, he saw the plaintiff on the ground and the seat had also gone down. That the plaintiff said that the seat was securely fixed. He stated that the injury report was given to the floor manager and that in this case, he notified Jacinta Mbuthia but never accompanied the plaintiff to the clinic. He denied that he was testifying for the plaintiff because he was also declared redundant and added that him and the plaintiff went to see the Human Resource Officer Jane Kangethe to follow up on further medication for the plaintiff's backache problem.

42. The plaintiff also called PW3 Ms Claris Ayuma Apiyo who adopted her witness statement recorded on 16th May 2011 as her evidence in chief and testified that she joined the defendant company on 1st June 1993 as a personnel officer and was later promoted to Employee Relations Manager, which was a Human Resource function.

43. PW3 confirmed that she was involved in the recruitment exercise of the plaintiff who was employed on 17th January 1994. She stated that she left Dela Rue by resigning. She confirmed that the recruitment involved ensuring that the shortlisted candidates underwent medical checkup and security finger print before being employed and that the plaintiff herein underwent a complete medical examination and security vetting which showed that he was fit for the job before he was given a

letter of appointment and that the witness used to receive and keep medical records in the file.

44. She testified that she was aware of operational functions of the company and that at the time she left employment in 2003, the plaintiff still worked in the packing of products into cartons – bank notes, cheques and passports which finished products were heavy and were carried manually. She also stated that she knew Jacinta Mbuthia who worked in the production unit where passports and cheques were done.

45. In cross examination by Mr Muchiri, PW3 stated that the company had its own doctor and a clinic. She also stated that employees were provided with protective gear but that there was no training on how to lift the products. She stated that the defendant company was a conducive environment to work in. She stated that upon an injury by an employee while at work there was always a superior who would fill a form from the Ministry of labour. She stated that she had already left when the plaintiff got injured. She maintained that products which were heavy (about 50 kilograms) would be carried manually for 3 kilometers away and that during her tenure, the plaintiff sustained an injury on the head and was taken to hospital.

46. In reexamination by Mr Ombete, PW3 stated that the defendant company had a conducive working environment but that accidents used to happen.

47. At the close of the plaintiff's case, all parties agreed to have all the plaintiff's original documents filed in court on 17th May 2011 be admitted in evidence and they were produced as P exhibit 1(a) (b) and (c) by consent without calling their makers and all the defendant's documents as filed in court and served on the plaintiff's counsel were also produced in evidence by consent without calling their makers. They were produced as DEX 1.

48. The defendant De La Rue currency and Security Ltd called 3 witnesses in its defence.DW1 Elvis Mulama a Health and Safety Officer of the defendant company since 2003 testified on oath that he knew about this claim and adopted his witness statement recorded on 9th June 2014 as his evidence in chief.

49. According to DW1, the plaintiff was a former employee of the defendant from 1994-2009 and left employment after being declared redundant at the end of March 2009.

50. DW1 stated that he was aware that the plaintiff fell off the chair on 3rd November 2008 at a time when he worked as Kugler 3 machine operator machine which was used in making passports book. He however testified further that he was on duty on the material day but nothing unusual happened like an accident. He stated that whenever one was injured, there was a procedure followed by notifying a supervisor who would call for first aid and treatment would be administered then injury report forms would be filled depending on the class of injury.

51. DW1 stated that he was made aware of the accident on 15th June 2009 when John Waweru of Ministry of Labour called him seeking to know why the defendant had not reported an accident involving the plaintiff.

52. That when the witness inquired from the company, he was informed that a letter had been received from the plaintiff dated 28th May 2009 claiming injury when lifting boxes full of passports yet in this claim he says he fell when a seat he was using descended suddenly. That the Ministry of Labour asked for a formal report of accident to be made but the witness told the Ministry of Labour that no accident occurred and on 19th June 2009 the Ministry of Labour officials visited the company.

53. DW1 testified that the Labour Ministry officials were taken round the company premises. They spoke to Jacinta Mbuthia the passports Assistant supervisor and Anne Mwadzumbo who worked at the machine together with the plaintiff as Assistant Operator. That the plaintiff told them that he was lifting a box full of passports when he got injured but that when a log on who was doing what on that

date of alleged accident was pulled out, it was discovered that the plaintiff was supposed to be operating Kugler 3 machine not lifting passports.

54. The witness further testified that products were not finished so he could not be expected to lift passports and that he was expected to walk around the machine to ensure that work was flowing and if there was a jam, he could clear it.

55. DW1 insisted that machine operators did not work while seated as their work involved walking around. He denied being aware of any injury form filled by the plaintiff. DW1 stated that the clinical officer would also fill in the form. He stated that there was an entry for 3rd November 2008 concerning package and lifting of some reams of paper earlier on, but not a mention of a chair snapping . DW 1 also stated that there were complaints on the conduct of the plaintiff whenever he needed ambulance services. The witnesses did not believe that the plaintiff sustained injury on 3rd November 2008 since not even his supervisor was aware of it and that the work environment at De La Rue was safe and healthy since they have a well-established safety management system certified by international standards.

56. Further, that the company trained employees on their safety and put in place accident prevention measures.

57. In cross examination by Mr Ombete, DW1 stated that he normally sat in the production area but that on the material day he was not at the plaintiff's place of work which was at the Kugler 3 operator.

58. DWI confirmed that the plaintiff was employed on 17th January 1994 and left employment on 5th April 2009 after working in various departments and that his work did not involve carrying heavy loads. The witness stated that he joined the company (defendant) in 2003 and found the plaintiff working in the cheques department. He denied that workers carried materials since there are trucks and forklifts which are used to carry the materials or loads.

59. The witness maintained that accidents are reported to immediate superiors but that he also used to receive reports after completion of the injury report form.

60. DW1 stated that Rogers Obonyo was the plaintiff's immediate supervisor but that he was no longer an employee of the defendant company. He stated that Rogers would have been the first person to know of the injury then Sammy Likale who was the departmental manager. He stated that the serious injury accidents would be referred to the company clinic as emergencies. He confirmed that the plaintiff's clinic card had an entry on 3rd November 2008 complaining of backache. He stated he had not worked on any of the machines as an operator but maintained that operators did not work while sited.

61. DW1 denied a suggestion that the seat used by the plaintiff was suspended but stated that it was adjustable upwards and downwards, operating on a hydraulic system. DW1 stated that despite the elaborate measures put in place by the company to eliminate risks, accidents still happened. He maintained that on 3rd November 2008 when it was alleged the plaintiff was injured, DW1 was on duty but never received anything unusual happening. He stated that injury forms are filled in parts by the superior and in serious injury cases the Department Manager also fills and the immediate supervisor brings them to him(DW1) being the environment Heath an Safety Advisor for the company.

62. The witness stated that only Rogers could tell whether or not any form was filled regarding the plaintiff's alleged accident while at work which form would not be left with the victim but if the injured wanted to have a copy then the company would provide one.

63. DW1 who had previously worked with the Ministry of Labour, stated that the Ministry of Labour officials went to inquire from the defendant why the work injury form had not been filled.

64. DW1 conceded that the plaintiff was treated by Nelly Nyamunga the clinical officer on 3rd July 2008. He denied that the plaintiff had been denied ambulance services and stated that he would be entitled to, depending on the nature of the illness of which Nelly Nyamunga would collaborate with the insurance company and avail an ambulance if it was needed.

65. He also stated that other people who worked with the plaintiff including Jacinta Mbuthia and Anne Mwazumbo would know if he was injured. He stated that the plaintiff's role was not to check the quality of the products and that in his role as Kugler 3 operator the plaintiff was not required to be seated while working. He denied knowledge of a 2004 injury by the plaintiff. He stated that he did not know if the plaintiff was treated at Aga Khan Hospital and that at Kugler 3 there was only one seat at the end of the line, which was about 2½ feet long which was adjustable hence even if it snapped it would not go down completely.

66. The witness stated that finished passports would be arranged in boxes weighing about 50 kilograms on average, but would never be carried manually and physically unless they were in small quantities of 7.7 kilograms because for heavy ones, vacuum lifters were used.

67. In re-examination by Mr Muchiri counsel for the defendant, DW1 stated that Rogers Obonyo left the employment with the defendant in 2010 and that it is him who would have received a report of injury if any by the plaintiff. He stated that there was no request to fill the injury form and that even after the visit by the Ministry of Labour officials, no form was filled because forms were usually filled for actual accidents so they only wrote a letter to the Ministry of Labour reporting the alleged accident. He stated that no seat was provided for the plaintiff because he was a Kugler operator who moved around the machine.

68. The defendant also called DW 2 Jacinta Mbuthia Gathoni a Human Resource Assistant at the defendant Company. She relied on her witness statement recorded and signed on 9th June 2014 as her evidence in chief. The witness stated that she joined the defendant company in 2001 as a Quantity Assurance Inspector and worked in the cheques Finishing Department. Later in 2003 she joined the passports Finishing Department as operator and in 2004 she worked as a passport assistant team leader until 2009 October when she was moved to the Human Resource Department as a Human Resource Assistant. She was a graduate of BSC in Natural Resource Management and a Higher Diploma in Human Resource Management.

69. The witness recalled that on 3rd November 2008 she worked in the passports finishing department with the plaintiff who worked as a Kugler operator. That she was the assistant team leader and worked at a distance of 3-4 meters to where the Kugler machines were stationed but that the plaintiff was never injured from the alleged fall while working as he would have reported the accident upon which an injury form would have been filled with her assistance and witnessed. Further, that the injury form would be photocopied and the original given to the manager for health, and safety. The witness identified the forms that could be used/filled at the material time in case of an injury incident.

70. DW2 stated that the plaintiff worked as a Kugler 3 machine operator which was used to finish passports and that of the 2 Kugler 3 machines, Dennis Masinde worked on one while the plaintiff operated the other machine and their assistant was Anne Mwadzumbo. He stated that Kugler 3 machine operator would ensure the machine was running as he fed the sheets into the machine to ensure it ran smoothly and that one had to stand to feed it at 4 feet above the ground while the assistant would receive books at the end of the machine, place them on a tray and place them on a pallet and in doing so, had to sit.

71. DW2 maintained that on 3rd November 2008 no incident involving injury to the plaintiff was witnessed or reported. She also stated that the company has a health and safety policy displayed and accessible to the employees but denied that any report was made to him or Rogers Obonyo who were the first points of contact. She stated that no forms of injury were filled and neither did she receive any report of the alleged accident involving the plaintiff on 3rd November 2008. She conceded that

there was a clinic card showing the plaintiff visited the clinic on 3rd November 2008 but stated that the treatment for that day was not for a current incident but for ongoing treatment. She stated that the defendant had in place health and safety measures. She confirmed that the plaintiff left employment on 6th April 2009 after being declared redundant.

72. In cross examination by Mr L.M. Ombete counsel for the plaintiff, DW2 stated that when she joined the defendant's company she found the plaintiff already working for the defendant. She conceded that before being employed, one had to be subjected to mental and physical fitness. She denied ever seeing employees of the defendant carry anything manually. The witness recalled that on 3rd November 2008 her and the plaintiff worked together separated by a distance of only about 4 meters apart, for 8 hours after a 40 minute break for lunch and 10 minutes tea break. She denied that any accident occurred while she worked with the plaintiff and that neither was it reported. She stated that at Kugler 3 machine, the operator had no seat as there was no provision for one since the operator moves around the machine, feeding it and that the feeder was 4 feet above the ground while the machine was mounted on the ground.

73. Dw2 stated that the operator stands throughout for the 8 working hours and incase of any incident, a superior would be advised. She also stated that in this case, Rogers Obonyo was the team leader supervisor at the material time while Anne Mwadzumbo who was the assistant supervisor and that Anne was closer to the operator than DW2. She admitted seeking the plaintiff's letters of complaint on how he was treated when he sought ambulance services from the defendant. She also stated that on 3rd November 2008 the plaintiff visited the company clinic and was treated but that no much details are given on the clinic card.

74. DW2 stated that the plaintiff was also a shop steward. She maintained that if there was any injury while at work it would have been documented by filling the form which would be kept with the Health and Safety supervisor. She further stated that as a Kugler 3 machine operator the plaintiff could not work while seated and that earlier on he had reported the injuries that he had suffered.

75. In reexamination by Mr Muchiri counsel for the defendant, DW2 stated that health checks were done to all employees joining the company to work in the factory. Further, that conveyor belts, trolleys and packing lifters were used to carry items. She asserted that on 3rd November 2008 she worked with the plaintiff but that no incident was reported. She stated that in 2008 the plaintiff was never deployed to any other department apart from the passport finishing department. She stated that the plaintiff never requested for any accident report forms and neither was the request denied.

76. The defendant called their last witness DW3 Wellington Alube who was the visiting Doctor at the defendant's factory staff clinic from 2004, attending to staff who were sick every Tuesdays and Thursdays although the company had a full time clinical officer. That he used to attend to medical cases which the clinical officer could not manage and that the clinic is for general care opening at 8.00am and closing at 5pm daily.

77. The witness stated that he had attended to the plaintiff on many occasions and that in 2004 the plaintiff complained of backache after being seen by the clinical officer and referred to DW3 on 30th November 2004. He examined the plaintiff who was diagnosed to have a PID and referred him for x-ray for lumbar spine from Corner House X-ray and Diagnostic Centre.

78. He stated that the Radiologist had found that there was loss of lumbar lordosis- which is a change in shape of the back due to imbalance in muscles also known as muscular spasm but no injury to the bones of the back and spine was seen.

79. DW3 stated that loss of lumbar lordosis could be due to the injury or sitting posture. He denied being aware of the injury of 3rd November 2008 to the plaintiff but acknowledged that there was an entry by the clinical officer Nelly Nyamunga on the clinic card for the plaintiff on the said date when the plaintiff is said to have complained of backache on and off and sneezing, and having been

treated for the same sometime in 2004; and that the entry also states that the plaintiff developed the pain after lifting some reams of paper earlier on.

80. DW3 stated that the patient (plaintiff) also had other ailments and developed diabetes mellitus. He stated that he was aware that the plaintiff attended Aga Khan Hospital and x-rays taken on 6th April 2009 showed the same results of lumbar of lordosis. He stated that disc dehydration was a common diagnosis caused by injury or age but that it was hard to tell whether the injury in the plaintiff X1 was caused by a fall from a chair. He denied ever hearing of people falling of chairs at the defendant's premises in his 16 years working at the company.

81. In cross examination by Mr L.M. Ombete counsel for the plaintiff, the doctor DW3 stated that he was only a visiting doctor not an employee of the defendant and that he only dealt with cases which the clinical officer could not handle but that sometimes the patients requested to see him and could even access his private clinic and that he also undertakes pre-employment medical examinations for the defendant's prospective employees, examining their physical fitness to undertake the job.

82. The doctor also stated that he was aware that there is a department where workers do heavy manual work of carrying items. He also stated that some injuries according to x-ray scans, could have been caused by a fall and that posture or long working hours or riding in a matatu on a rough road causes muscular spasm while dehydration of disc could be caused by aging for those who are 50 years and above if there is no previous injury such that the disc becomes flat and presses on the spinal code squeezing it thereby causing weakness and pain. He confirmed that a clinical officer is trained in taking history and doing clinical examination to patients. The witness maintained that backache can be caused by injury or sitting for long hours or due to a sleeping mode.

83. In re examination by Mr Muchiri DW3 stated that the x-ray showing central protrusion cannot cause pain.

84. At the close of the defence case both parties' advocates agreed to file and exchange written submissions for mention on 18th April 2016 to confirm compliance but by 18th April 2016 only the plaintiff had just filed his submissions and so the defendant was given 21 days to file submissions for a further mention on 23rd May 2016 by which date the defendant's counsel had not filed their submissions and sought for 21 more days. On that date the court was indisposed so the matter was mentioned by the Deputy Registrar.

85. In the ensuing period I was deployed from the Civil Division to the Judicial Review Division so the file was placed before Honorable Jaden J for directions. The file only reached my desk on 30th January 2017 when both parties' advocates confirmed that they had filed submissions and judgment was slated for 13th March 2017 but on the latter and subsequent dates of 19th April 2017 and 10th May 2017 the court was engaged in urgent judicial review matters and when the judgment was slated for delivery on 24th July 2017 the court was bereaved and on an extended annual leave hence the delay in the delivery of this judgment which was not deliberate.

86. The parties' advocates written submissions as filed have been considered by this court in line with the pleadings and oral testimonies taken in court.

87. The plaintiff filed his statement of issues on 17th May 2011 dated 16th May 2011 whereas the defendant company filed its issues on 12th June 2014. They are dated 11th June 2014.

88. According to the defendant's counsel in his lengthy submissions which basically reproduced the proceedings verbatim before making submissions, it was contended that the plaintiff's allegations that he was injured while at work on 3rd November 2008 are unbelievable became there was no incident form completed or handed over to the plaintiff's supervisor in relation to the alleged injury; that it took long from date of alleged injury to the time the plaintiff first made the claim for compensation for the alleged injury which was long after he had been declared redundant; that none of

the plaintiff's superiors or employees working alongside the plaintiff were aware of the alleged injury or the circumstances thereof and that although the plaintiff visited the defendant's clinic on 3rd November 2008 there is no mention in the hospital records that he sustained the injury from falling off a chair and that this was stated to be a receiving problem. It was also alleged that there was no provision or chair for Kugler operators as their work did not require sitting but standing to ensure smooth work flow.

89. In addition, it was contended that in any event, the plaintiff could not be involved in lifting of passports since they would not yet be finished products at the Kugler 3 machine state and that was the work if the assistants to lift. DW3 of Wellington explained that the back problem from the diagnosis could have been due to injury, working hours or old age.

90. On the part of the plaintiff, he maintained that he was carrying the passport books when he sat in the chair to check the quality thereof and as a result the chair snapped and he fell 2½ feet down. He was attended to at the clinic by Nelly Nyamunga. PW2 was with him and witnessed the fall, and that the fact that the defendant's witnesses did not witness the accident does not mean that he did not fall. He maintained that he reported the accident to Rogers Obonyo his supervisor and that he filled the injury form.

91. The plaintiff in his submissions urged the court to find the defendant liable and award him general damages of Kshs 1,200,000 for pain, suffering and loss of amenities compensation based on the decision of **Messay Jaggery Ltd vs. Maurice Ochieng Maengo CA 46/2001 CA 181/2000** (unreported) where the plaintiff sustained injuries in an industrial accident resulting in amputation of his left hand and arm at the level above the elbow joint. He was awarded kshs 400,000 damages for pain, suffering and loss of amenities.

92. In this case it was submitted that the plaintiff suffered more serious injuries such that he could not secure any other employment since he was retrenched and had developed diabetes and lost his libido with constant backache.

93. The defendant on the other hand contended that the plaintiff had failed to prove that the defendant was negligent or in breach of the common law duty of care. Reliance was placed on several cases namely **Oluoch Eric Gogo v Universal Corporation Ltd [2015] eKLR** on the common law employer's duty; **Halsbury's Laws of England VOL 14 4th Edition Re issue page 34; Masinga Ndonga Ndonge v Kualam Ltd [2016] e KLR** on the burden of proof.

94. The defendant contended in its lengthy submissions that there was no breach of the common law duty of care and that the injury of 2004 was caught up by the Limitation of Actions Act Cap 22 Laws of Kenya.

95. It was submitted relying on **Bukenya v Uganda [1972] EA 549** that the plaintiff failed to call Rogers Obonyo the floor supervisor on the material day of alleged accident to whom he claims that he reported the accident hence it should be inferred that that evidence would have been unfavourable to the plaintiff.

96. In addition, it was submitted that even if the court was to find that the plaintiff fell from the chair, the common law duty of care was not absolute on the part of the defendant employer but that what is required of the employer is to take reasonable care. The case of Hudson **Luvinzu Elanonga v Kenroid Ltd [2016] e KLR** was cited in this regard citing **Mwanyule v Said t/a Jomvu Total Service Station [2004] 1KLR 47.**

97. Accordingly, it was submitted that the risk of falling off the chair was not reasonably a foreseeable risk and that in any event the defendant company had taken reasonable precaution as regards the conduct of employees at the work place.

98. The defendant also submitted that there was no evidence that the plaintiff suffered injury as a

direct result of the defendant's breach of the common law duty of care. Reliance was placed on **Halsbury's Laws of England VOL 33 4th Edition Re issue page 477 paragraph 663.**

99. It was submitted that failure of the plaintiff to call the doctors who attended to him leaves the court with the option of inferring that had the doctors been called they would have given adverse evidence that the injuries were not as a result of falling off the chair but attributable to another cause.

100. Further, that DW3 testified that it was impossible to say that the injuries could have been caused from falling off a chair. In the end, it was submitted that the plaintiff's suit should be dismissed with costs to the defendant.

DETERMINATION

101. From the pleadings, evidence both oral and documentary and the parties' advocates respective submissions supported by authorities cited all considered, the following main issues flow for determination:

i. Whether the plaintiff was injured on 3rd November, 2008 and if so, whether the injury sustained was as a result of negligence or common law duty of care owed to him by the defendant employer.

ii. What damages if any would the plaintiff be entitled to in the circumstances of the case.

iii. What orders should this court make?

iv. Who should bear costs of this suit?

102. On the first issue of whether the plaintiff was injured on 3rd November 2008 and if so, whether the injury can be attributed to the negligence and or breach of common law duty of care owed to him by the defendant, according to the plaintiff's testimony, he was employed by the defendant on 17th January 1994 as a packer in the security finishing department but that before being hired, he was subjected to medical examination by the company doctors, to ensure that he was physically and medically fit to do the job which involved lifting reams of paper and bank notes weighing between 15 kilograms to 85 kilograms. His duties entailed packing and manually carrying bank notes weighing over 50 kilograms and in 2004 while lifting a box of bank notes, in the security finishing department, he sprained his back. An x-ray taken showed that he had suffered loss of lumbar lordosis resulting in muscle spasm.

103. Later on 3rd November 2008 while he worked as a Senior Kugler 3 Machine Operator which work involved feeding the machine with paper and checking its movement of the passports, which work he performed while standing and seated respectively, and while he was checking the quality of passports which were in a box, as he sat on the chair, it snapped and gave way upon which he fell down 2 ½ feet under and he sustained a back injury.

104. That he reported the incident to his floor supervisor Rodgers Obonyo and filled a minor injury form. He went to the company clinic where he was attended to by Nelly Nyamunga who attended to him reluctantly and gave him pain killers and liniment and he returned to work. He blamed the defendant for the back injury for failing to ensure the bolts of the chair were securely fastened.

105. According to the plaintiff, after the said injury, later on 6th November 2008 while he was at his house, he developed severe back pain necessitating him to go to Aga Khan hospital but that when he requested the defendant to send an ambulance to take him to hospital, the request was declined. He found alternative means to hospital on 7th November 2008 and later on 11th November 2008 wrote a letter of complaint to the Human Resource Manager of the defendant company.

106. Three months later on 31st March 2009 – 3rd April 2009 he was admitted in hospital for diabetes and severe back pain. An MR1 scan taken revealed a disc dehydration at L5-S1 and post central disc protrusion. He later reported the matter to the shop steward of their union who promised to investigate. He also wrote to the company asking for compensation for the injury but was declared redundant. He reported to the Ministry of Labour whose officials visited the company.

107. He claimed that he was not trained to use the seat. The plaintiff's witness Dennis Masinde Wanyonyi also testified and stated that on the material day he was at work in the Kugler 3 machine with the plaintiff when at about 11.00am he heard noise and on turning he saw the plaintiff had fallen on the floor. He saw loose bolts. The witness stated that when working on the Kugler machine as an operator, one would sit or stand and would sit when checking on the quality of the passports. He also stated that the plaintiff reported the incident to Rogers Obonyo the floor supervisor. He stated that the defendants never inspected the seats.

108. PW3 Claris Ayuma Apiyo a former Human Resource Manager of the defendant only testified on the employment requirement of medical examination of prospective staff to be employed by the defendant and stated that the plaintiff was, prior to his employment, was examined. She stated that following any injury, the immediate supervisor would be informed and an injury form filled. Severe injury cases would be taken to hospital for admission.

109. The plaintiff produced as exhibits his letter of employment with the defendant, medical treatment notes and records from the company clinic and Aga Khan hospital, his letters of complaint; letter seeking compensation; letter from Ministry of Labour and response by the defendant; notice of redundancy; letter by clinical officer Nelly Nyamunga complaining against the plaintiff.

110. The defendant called 3 witnesses being the Human Resources Manager; the environment, health and safety advisor and a visiting doctor.

111. According to DW1 and DW2, the plaintiff was never injured while at work on 3rd November 2008 as no report was made to the immediate supervisor of such injury and neither was the injury form filled and submitted to the Environment Health and Safety Advisor by the supervisor. DW1 and DW2 maintained that the plaintiff's work did not require him to sit so no chair was provided for him as Kugler operator . Further, that DW2 was in the Kugler machine room where the plaintiff worked on the material date but never witnessed any injury/accident. She only heard about the plaintiff's injury on 19th June 2009 after he had left employment when Ministry of Labour officials visited the company which to her was supervising. They testified that staff were trained on safety measures.

112. DW3 Dr Wellington Alube was a visiting doctor who used to attend to staff of the defendant on appointment in those cases which the clinical officer could not deal. He stated that the plaintiff's condition as diagnosed could have arisen from injury, long working hours, posture or age.

113. Having assessed the pleadings, evidence and submissions of both parties, the key question is proof. Sections 107,108 and 109 of the Evidence Act Cap 80 Laws of Kenya is clear that he who alleges must proof. In this case the plaintiff alleged that he was at the material tine an employee of the defendant. This fact was not in dispute that he was then a Kugler 3 Operator. The only issue in dispute is whether the defendant was negligent or in breach of the common law duty of care for its employees. **Halsburys Laws of England, 4th Edition paragraph 662 page 476** states:

> ***" The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.***

114. In **Boniface Muthama Karita v Carton Manufactures Ltd CA 670/2003 [2015]** Onyancha J held:

" The relationship between the applicant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to an unreasonable risk."

115. **Winfield and folowicz on Tort, 13th Edition page 203** on **"Employer's Liability defined"** states:

" At common law the employer's duty is a duty of care , and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove what the proper system was and what relevant respect it was not observed.

116. In **Peter Ndungu Kinyanjui v EA Sea Food Ltd & Another Nairobi HCC 2905/96** the court (Ang'awa J) held that ***an employer owes an employee a duty of care to provide a safe working environment and mechanism***.

117. In **Civil Appeal (CA 151/1987 Mumias Sugar Company Ltd vs Charles Namatitu** the Court of Appeal held that:

" An employer is required by law to provide a safe working 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."

118. The extent of the employer's duty under common law towards its employees is captured in the **Hasbury's Laws of England, 4th Edition VOL 16 paragraph 562** as follows:

"It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer/employee to compensate him for any injury which he may sustain in the cause of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered in the cause of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages outside the cause of his employment. The employer does not warrant the safety of the employees working conditions, nor is he an insurer of his employee's safety. The exercise of due care and skill suffices. The employer does not owe any general duty to any employee to take reasonable care of the employee's goods; the duty extends only to his person."

119. The above position was adopted as the law applicable in **Kenya in Mwanyule v Said t/a Jomvu Service Station[2004] 1 KLR 47** where the Court of Appeal concluded that " ***the employer owes no absolute duty to the employee and that the only duty owed is that of a reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution."***

120. The same Court of Appeal also held as such in **Makala Mailu Mumende vs Nyali Golf County Club[1991] KLR 13** where it held

" 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."

121. In **Stephen Ondulu Rabatch v Eldoret Steel Mills Ltd [2005] eKLR** the Court held inter alia:

"once it is established that there is a relationship of an employer and employee, the common law duty of care of an employer towards his employee arises."

122. At common law, the employer is not merely required to provide a safe system of work but to ensure that the employees comply with that safe system of work (see **Mighosi V Gaya Engineering Works [1981]KLR 164.** Providing a safe system of work would require supervision by the employer to ensure that no employee is injured on duty and of course, an employee can be found contributory negligent if he carelessly carries out his work or ignores instructions on safety given by the employer.

123. From the above authorities, it is clear that an employer at common law owed to employees a reasonable duty of care to ensure the employee's safety while the latter is engaged at work, and if an employee gets injured at work, he is expected to be compensated where he establishes that the injury was foreseeable by the employer and that the employer failed to provide the employee with reasonable care. In other words, the employee must demonstrate that the employer could have done more to prevent the employee from getting injured while at work.

124. In the instant case, it is not in dispute that the plaintiff was lawfully employed by the defendant and at the material time of the alleged injury, he was to be found at the defendant's premises working as Kugler 3 machine Operator. The plaintiff claims, which is denied by the defendant, that he was injured when he sat in the chair placing passports into trays and lifting them so as to arrange them into pallets when the chair suddenly descended to a depth of 2½ feet and on impact he fell down and sustained a back injury which necessitated him to be attended to at the company clinic and later at the Aga Khan hospital for 4 days.

125. The plaintiff also claimed that the defendant was responsible for the accident and injury for failure to adequately and firmly fasten the chair in which the plaintiff used to sit so as to prevent it from descending below; failed to warn the plaintiff of the risk of the chair descending below and failing to provide a cushion, which could prevent or minimize injury to the plaintiff in the event of the chair descending below.

126. There was denial on the part of the defendant of all the above allegations on oath by the plaintiff with the defendant contending that the plaintiff's work required him to stand throughout for 8 hours and therefore no seat was provided for him as he was expected to move around checking on the process of passports and not the finished product which latter work was undertaken by his assistants not him as a Kugler Operator. Further, that no report of the incident was made and no filing of the injury form was done as required by the company procedures.

127. Going by the above contention by the defendant vis avis the evidence of DW3, it clearly emerges that whether or not the plaintiff fell from the chair, he worked under circumstances which exposed him to risk of having the back problem that he was diagnosed of namely, lumbar lordosis. DW3 a Medical Doctor who used to attend to the plaintiff at the company clinic stated that he had on several occasions attended to the plaintiff who complained of backache. Further that lumbar lordosis could be due to the injury or sitting posture or ***long working hours***. The defendant's witness DW3 also acknowledged the plaintiff's assertion that the plaintiff was attended to at the clinic on 3rd November 2008 by Nelly Nyamunga complaining of backache on and off and that he had developed the pain after lifting some reams of paper earlier on. The medical chits from Aga Khan Hospital also showed lumbar lordosis.

128. Although the defendant's counsel in submissions claims that from DW3's evidence, it was not obvious that the injury or pain could have been caused by a fall from the chair, it is this court's view that a person who is not an eye witness like the doctor only records the history of the patient and proceeds to diagnose the ailment but cannot conclusively be expected to state that the injury or pain was a result of a fall from the chair.

129. It also matters not that the doctor never heard of people falling off chairs at the defendant's premises as that was an answer given directly to the question asked by the defendant's counsel. The

idea of 'hearing' of people falling off chairs" is hearsay evidence which is inadmissible in the circumstances of this case.

130. DW3 as a medical doctor gave different/several scenarios and known causes of PID and lumbar lordosis including old age of above 50 years which the plaintiff was not at the time, sitting posture, or injury and long working hours. Moreso, in cross examination the doctor candidly stated that he was aware that there is a department where workers do heavy manual work of carrying items and that some injuries according to the x-ray scans ***could have been caused by a fall,*** posture or long working hours or even riding in a matatu on a rough road.

131. The plaintiff's injury was described as LS-S1 disc dehydration and post central disc protrusion which DW3 explained that it could be caused by aging for those who are over 50 years if there is no previous injury, such that the disc becomes flat and presses on the spinal code, squeezing it thereby causing weakness and pain. He also maintained that backache can be caused by injury or sitting for long hours or due to a sleeping mode.

132. PW2 clearly stated that he was with the plaintiff and working with him when he heard unfamiliar noise and on checking behind saw the plaintiff had fallen after the chair he was sitting on snapped. It is PW2 who informed Rodgers their supervisor and later organized for the plaintiff to be taken to the company clinic but after he had filled a form to show that he was not in the production line, which form was taken by the supervisor to take to the security office which latter would take it to the clinic. He also stated that the form was not returnable to the injured employees.

133. I had the opportunity to hear and see the evidence of DW2 as she testified. Although DW2 claimed that she was with the plaintiff at work and that no accident occurred or no form was filled, the demeanor of this witness clearly was not impressive. She appeared determined to keep her job by giving evidence in favour of her employer. She was not a forthright witness as far as this court is concerned.

134. On the other hand, I believe the plaintiff's testimony and that of his witness PW2 that they worked together and that indeed it is the seat that the plaintiff was using which snapped when he sat on it carrying heavy box full of passports to check on their quality, thereby causing him pain in the back which worsened necessitating admission at Aga Khan Hospital. The plaintiff and his witness appeared truthful and forthright, from by observation of their demeanor in court.

135. There was no evidence that the plaintiff was given instructions not to sit while working as Kugler 3 operator. In my view sitting in a chair which snaps and falling 2½ feet can injure somebody. Taking into account circumstances of this case and evidence on record, I am satisfied that on a balance of probabilities, the plaintiff proved a case of negligence and breach of the duty of care by the defendant who was his employer.

136. Although the defendant claims in evidence that the plaintiff was not supposed to be carrying the finished passports, the defendant never pleaded that the plaintiff was to be found undertaking unauthorized work or that he was at the wrong place when the accident occurred. Neither did the defendant's witnesses deny that PW2 was at the place of work with the plaintiff when the alleged accident occurred. There was no suggestion by the defendant that PW2 could possibly have lied about what he saw, or heard, being the unusual noise and the plaintiff fallen down. There is also no reason why the plaintiff and his witness PW2 could have been lying that after the fall, they informed Rogers Obonyo who filled the form for injury and took it to security before the plaintiff went to the clinic for medical attention.

137. In my view, that the plaintiff sustained injury on the back when he sat on a chair carrying a box full of passports is clear. Furthermore, no passports production log for 3rd November 2008 was produced to establish where the plaintiff was working on that day and at the material time to rule out the possibility of him having been engaged in the lifting of the finished passports and checking their quality as stated by PW2 who was with the plaintiff at his place of work on the material day.

138. The defendant has not denied that the plaintiff's company clinic medical chit showing that the plaintiff was attended to on 3rd November 2008 for a back injury is genuine. In my humble view, therefore, the defendant was simply going round the circles and looking for every flimsy reason to displace the plaintiff's evidence.

139. From the evidence adduced, it is clear that Nelly Nyamunga the defendant's company clinical officer had a very problematic working relationship with the plaintiff. She accused him of having a negative attitude and being nasty whenever he sought medical attention. The report written by Ms Nyamunga on the conduct of the plaintiff and produced in evidence herein by the defendant is clear testimony of this very poor relations with him. It that was the situation, I have no doubt that that may have been the case and hence the failure by the said clinical officer to provide details of the reported back injury on 3rd November, 2008 sustained by the plaintiff when he visited the clinic the same day of the fall. There can be no other explanation.

140. On the contention that the plaintiff did not produce medical reports or call doctors who attended to him at Aga Khan to confirm his injury, I note that DW3 is the defendant's own part time doctor and he confirmed the injury alleged by the plaintiff. In addition, the parties agreed and produced all the documents as filed by consent without calling their makers. Those documents include medical reports and treatment notes from various hospitals including Aga Khan Hospital. That being the case, the defendant cannot turn around and claim that the plaintiff did not call the makers of documents which were produced by consent.

141. Rogers Obonyo and Nelly Nyamunga were the employees of the defendant. The plaintiff lodged this case after leaving employment on redundancy and the court was not told as to when they left the defendant's employment but clearly, there was no evidence that they left the defendant's employment together with the plaintiff or immediately after the plaintiff's redundancy.

142. In my humble view, on the evidence available, the plaintiff has proved on a balance of probabilities that he was injured while at work on the 3rd November 2008 as he sat on the chair and he fell down 2½ feet when the said chair snapped.

143. In my humble view, the defendant's submissions call for prove of the plaintiff's case beyond reasonable doubt, in civil cases, which standard is too high to bear.

144. The plaintiff was clear on who was to blame for the material accident, that the seat had loose bolts that is why it snapped when he sat on it. Further, that the said seat had not been serviced. There was an unproved allegation that some other persons had fallen while sitting on it. The question is whether the defendant employer reasonably took steps in respect of the employment to lessen the danger of injury to the employee, since it is the employer's responsibility to ensure a safe working place for its employees and in this case, to ensure that the chair which the plaintiff used while engaged upon his work was serviced and not defective or faulty, having regard to the fact that the plaintiff lifted heavy products in excess of 7.5 kilograms while working (See **Makala Mailu Mumende vs Nyali Golf County Club [1991] KLR 13.**

145. The defendant denied that it was negligent or that it breached the reasonable duty of care to the plaintiff. It was contended that it trained its staff on safety measures and provided them with safety manuals. Further, that it had put in place adequate safety precautions to ensure that its employees were safe and secure from any injury while engaged at work. It produced in evidence first aid/minor injury report form; serious incident investigation form, and The Environment, Health and Safety Information Booklet.

146. Among the exhibits produced was a document dated 2nd July 2009 a notice of alleged injury correspondence between Elvis Mulama the Environment, Health and Safety Advisor of the defendant and Ministry of Labour Provincial Occupational Health and Safety Officer, Nairobi. The writer, DW4 records that following the injury allegation, the plaintiff had been interviewed and the information recorded. In the additional information thereto it is recorded that ***" David had been***

provided with the relevant training i.e. safe manual handling training on 28th July 2006."

147. The relevant manual handling is a document produced by the defendant. It is document No. 16 paginated by hand at the bottom right side. There is an acknowledgment in the said manual of the following facts:

> ***"Nearly all of us will suffer from back injuries at some time in our working lives. If you are required to:***
>
> · ***Lift weights in excess of 7.5 kilograms (a box of paper on a regular basis)***
>
> · ***Carry awkward or large loads***
>
> · ***Carry smaller weights on a repetitive basis.***
>
> ***You need to receive training in the correct manual handling techniques. If you are regularly expected to lift and carry items in De La Rue Kenya, these tasks will be risk assessed.***
>
> ***The assessor will specify the training required techniques s to be used to minimize risk or injury. However , when lifting is done occasionally, you may not need formal training. This should be identified in the risk assessment ……safety first -back strain is the most common injury."[emphasis added].***

148. From the above exhibit, it is acknowledged that even when risk is minimized, injury and especially back injury or back strain at some time in working lives of the employees occur.

149. In other words, the nature of work at *De La Rue* is such that risk of back injury is reasonably foreseeable by the employer and that is why employees are given manual handling training. There is no evidence that the plaintiff disregarded the safety measures put in place leading to the accident and the back injury that he suffered in the course of his duties. The defendant did not even allege that the plaintiff's injury was *volenti non fit injuria* or contributory negligence or at all.

150. What the defendant put forth is a denial of the occurrence of the accident and or injury on 3rd November 2008 despite the untainted evidence of PW2 who was with the plaintiff at work on that day and who confirmed that the plaintiff fell when the chair snapped.

151. The medical records produced by the plaintiff clearly showed that he had lumbar lordosis from 2004, which fact the defendant knew or had reason to know as the plaintiff was at all times attended to at the company clinic and even referred to the hospitals approved by the Company and the insurance paid. That being the case, it would be outrageous for the defendant to even allege that the plaintiff who was already suffering from lumbar lordosis to be expected to stand for 8 hours each day working. Even if the job required standing, occasional siting would not be in breach of the conditions of work.

152. As was held by the Court of Appeal **in Embu Public Road Service Ltd vs Riimi [1968] EA 22, *"…accidents do not just happen. They are caused***. " This position was confirmed by Dr Wellington who testified that the probable causes for such back injuries are fall, long working hours, , posture, old age among others.

153. Even assuming that the plaintiff never fell when the chair he sat on snapped, it is clear from the evidence of DW3 that standing for long hours could cause the problem experienced by the plaintiff. The defendant has not given in my view, the probable cause of the plaintiff's problem which is working for 8 hours standing on the Kugler 3 machine without sitting!

154. In the **Embu Public Road Services Ltd v Riimi** (supra) the Court of Appeal was clear and I concur that:

" Where the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence."

155. There was no evidence that the chair which the plaintiff asserts snapped when he sat on it was serviced by the defendant. The defendant's witnesses, I observed, gave their evidence in a very carefully couched manner to avoid situations where they would attribute any negligence or breach of duty of care to the defendant/employer. During the defence hearing, the court had to caution the defence counsel Mr Muchiri all the time as he persistently asked his client's witnesses leading questions suggesting specific answers.

156. On the whole, this court finds and holds that the plaintiff has established on a balance of probabilities that he was injured on his back while on duty on 3rd November 2008 and that the injury was caused by a foreseeable risk of the defendant's failure to ensure that the chair which the plaintiff used at that time was securely fixed and or serviced, to avoid snapping.

157. There was nothing to suggest that the plaintiff was an opportunist or was lying to the court to get compensation or unjust enrichment. The plaintiff's claim is that he was injured on 3rd November 2008 and although he alleged that he suffered another injury in 2004 which is beyond the time stipulated for lodging compensation claim, he never said that he was injured in 2009 as suggested by the defendant in their submissions. The plaintiff has proved on a balance of probabilities that he was injured in 2008 and that the defendant was responsible for this foreseeable injury.

158. In my view, the 2004 injury could not lie as at the time of filing this suit but laid a historical basis on his past injury to the back and the plaintiff did not shy away from informing the clinical officer that he had back problems on and off but that when he fell on 3rd November 2008 the back problem worsened and he had to be admitted at the Aga Khan Hospital which evidence is not denied. I would therefore not find liability on the 2004 injury as it is statute barred.

159. The case of **Mumias Sugar Company Ltd v Charles Namatiti CA 151/87** is clear that an employer has a statutory duty of care to provide safe working conditions of work for its employees in factory and if an accident occurs causing injury then the employer is responsible and will be required to compensate the injured employee.

160. There is no evidence that the plaintiff undertook his work carelessly or that he did not take specific instructions of the defendant while engaged at work.

161. That the defendant 's witness asked Nelly Nyamunga the clinical officer whether the plaintiff had reported to her any back injury sustained on 3rd November 2008 and she stated that no injury had been reported to her by the plaintiff, I find this piece of evidence to be an outright lie because it is the same Nelly Nyamunga who treated the plaintiff on 3rd November 2008 for a back problem and gave him medication. Three days later he was asking her for an ambulance to go to Aga Khan and they had bitter exchanges.

162. Ms Anne Mwadzumbo was the Assistant of plaintiff and although she never testified, and neither did Rogers Obonyo testify, there was no evidence that having left the defendant's employment, the two were available for the plaintiff to call as a witness but that he deliberately avoided them for this court to conclude that had the plaintiff called them as witnesses, they would have given adverse evidence to his case.

163. That the plaintiff did not follow the procedure for reporting an accident is a fallacy incapable of belief and in my view, such failure to follow procedure for reporting accidents is not fatal to the plaintiff's case as there is evidence from his witness PW2who was present in the accident area when the accident occurred and the witness confirmed that they reported the matter to the floor manager who even filled an

accident and injury form and submitted it to Security before the plaintiff proceeded to the company clinic for medical attention by My Nelly Nyamunga.

164. In the end, I find and hold that the plaintiff has proved on a balance of probabilities that the defendant is100% liable for the snapping of the chair and the injury caused to the plaintiff's back on 3rd November, 2008.

165. This leads the court to determine what quantum of damages would sufficiently compensate the plaintiff for the injury sustained. Undeniably, the plaintiff had a back injury when the chair that he sat on while carrying passports snapped and he fell down. He had earlier been diagnosed with a disc dehydration and post central disc protrusion, while on duty. He was treated at the defendant's clinic. The condition of his back worsened after the fall and he had to be treated at Aga Khan hospital where he was treated on and off and given sick offs from 3rd April 2009-13th April 2009 before he was given redundancy notice on 6th April 2009.

166. Injury to the back is a serious injury even without any fracture. However, there was no prediction on permanent disability. The plaintiff wholly relied on the medical and x-ray notes. The plaintiff sought damages of Kshs 1,200,000 relying on the case of **Messay Jaggery Ltd v Maurice Ochieng Maengo (supra)** where the Court of Appeal awarded Kshs 400,000 damages for injuries sustained by the plaintiff involving amputation of his left hand and arm at the level above the elbow joint.

167. In **Raphael Oloo v Industrial Plant E.A. Ltd Nairobi HCC 4400/87** the plaintiff sustained injuries on the hand, lower back and lost 6 teeth, had severe low backache and could not lift heavy objects Kshs 1 million was awarded.

168. The plaintiff's counsel urged the court to award him Kshs 1,200,000 because he had developed diabetes which he has to control by regular medications, he lost libido and has constant backache. There was, however, no medical evidence linking loss of libido to the injury in question.

169. The defendant did not propose any figures on quantum of damages.

170. In awarding damages, the principles applicable are now settled. They include fairness, reasonable and moderation and decided cases(stare decisis). Assessment of damages is in the discretion of the court which discretion must be exercised with wise circumspect and upon some defined legal principles (see **Kanga vs Manyoka [1961] EA 705,709; 1013; Lukenya Ranching and Farming Co-operative Society Ltd v Kavololo[1979] EA 414, 418,419.**

171. In this case, the plaintiff complained of persistent backache and DW3 confirmed that indeed from the medical treatment records and x-rays taken that muscle spasm is a muscle sprain due to a fall or posture or working for long hours. He stated that protrusion of the disc can press the spinal code squeezing it thereby causing weakness and pain.

172. In the circumstances I award the plaintiff Kshs 1,200,000 general damages for pain, suffering and loss of amenities, taking into account inflation and time lapse since the **Raphael Oloo** (supra) case was decided. I also award the plaintiff costs of this suit and interest at court rates. Interest to accrue from date of judgment until payment in full.

Dated, signed and delivered in open court at Nairobi this 18th day of September, 2017.

R.E. ABURILI

JUDGE

In the absence of parties

C/A: GEORGE