REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 143 OF 2012

BETWEEN

SINOHYDRO CORPORATION LIMITED …………………………….. APPELLANT

AND

HEZRA ODHIAMBO ……………..…………....…………….……….. RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.C.Owiye, SRM in the

Principal Magistrates Court at Nyando in Civil Case No. 114 of 2012 dated 15th November 2012)

JUDGMENT

1. The respondent, Hezra Odhiambo, filed suit against the appellant, Sinohydro Corporation Limited, seeking an award of damages on account of injuries to his left foot that he allegedly sustained while working in the appellant's construction site.

2. According to the plaint filed in the subordinate court, the respondent held the appellant liable for negligence for failing to provide him with proper working conditions. He averred that the appellant failed to provide him with proper safety gear in that the boots he wore when he sustained the injury were old and worn out. The appellant filed a defence in which he denied liability and averred that the appellant was not its employee. It averred in the alternative that it did not owe the respondent any duty of care and if at all any accident occurred then it was due to the respondent's negligence.

3. The trial court found the appellant fully liable and awarded the respondent Kshs. 5,000/- and Kshs. 50,000/- as special and general damages respectively. The appellant was aggrieved by the said decision and filed an appeal to this court.

4. The gravamen of the appellant's appeal contained in its memorandum of appeal, is that the trial magistrate erred in holding the appellant 100% liable whilst the respondent had contributed to his injury. Mr Wagonda, counsel for the appellant, submitted that the appellant fulfilled its obligation by supplying the respondent with safety boots hence it could not be found 100% liable.

5. Mr Mboga, counsel for the respondent, supported the judgment. He submitted that the respondent was wearing worn out boots and that his testimony was not controverted. Moreover, the place the respondent was working was muddy hence the appellant could not have seen the nail. In the circumstances, counsel submitted that the trial court was justified in its finding.

6. As this is a first appeal from the magistrate's court, I am guided by principle that the duty of the first appellate court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that

it neither heard or saw the witnesses (see ***Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123****)*.

7. The respondent testified that on 15th February 2011, while working at the appellant's construction site as a carpenter moving some working materials, he stepped on a nail and injured his foot as a result. He told the court that he was wearing protective boots but the same were old and worn out and that it was muddy since it had rained on the previous day. He received first aid the appellant's clinic and was then taken to Kusa Health Centre for further treatment. He was examined by Dr Omuyona who prepared a medical report dated 28th February 2012 in which he confirmed that the respondent had sustained soft tissue injury on the leg. The appellant did not call any witnesses.

8. The issue in this appeal is whether the appellant provided a safe working environment for the respondent. The Court of Appeal summarised the nature of the relationship between the employer and employee regarding safety in the workplace in ***Purity Wambui Murithii v Highlands Mineral Water Co. Ltd*** **NYC CA Civil Appeal No. 58 of 2014 [2015] eKLR** as follows:

> *Section 6(1) of the Occupational Safety and Health Act provides:-*
>
> *Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace.*
>
> *It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further Section 13(1)(a) of the Occupational Safety and Health Act provides:-*
>
> *13(1) Every employee shall, while at the workplace –*
>
> > *(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.*
>
> *Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.*

9. The employer's duty to the employee is not absolute and the employer is only liable for what are foreseeable risks. In ***Mwanyule v Said T/A Jomvu Total Service Station,*** **[2004] 1 KLR 47**, the Court of Appeal observed that:

> *[T]he employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution.*

10. The appellant was working at a construction site where the nails and other sharp objects abound hence the employer mitigated the risk by providing safety boots. In this case though, the uncontested evidence of the respondent was that the safety boots he was given had been worn out. Once the respondent established that the working conditions were poor and that he did not have proper gear, the duty fell on the appellant to disapprove such evidence. The appellant did not rebut this evidence.

11. This appeal fails and is dismissed with costs to the respondent.

DATED and **DELIVERED** at **KISUMU** this **30th day of September 2016.**

D.S. MAJANJA

JUDGE

Mr Wagonda instructed by L. G. Menezes and Company Advocates for the appellant.

Mr Mboga instructed by Mboga G. G. and Company Advocates for the respondent.