REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 52 OF 2007

CROWN FOODS LIMITED..... APPELLANT

VERSUS

THOMAS MORACHA MONDA..... RESPONDENT

(Being an appeal from the judgment/Decree of Hon. JULIE OSEKO, Senior Principal magistrate, Molo delivered on 16th March, 2007 in Molo RMCC No. 213 of 2006)

JUDGMENT

1. By his plaint dated the 27th November 2006, the plaintiff now the respondent sued the appellant following an alleged industrial injury at the respondent's place of work where he was injured allegedly while in the cause of his employment. He blamed the appellant for breach of its statutory duty and breach of contract and negligence. He sought compensation in damages.

2 . In its defence, the appellant denied all the respondents allegations.

3. Upon conclusion of the case, the trial court found the Respondent to have been an employee of the appellant and that he was injured while in the course of employment with the appellant.

Upon assessment of damages, an award of Kshs.55,000/= in general damages and Kshs.2,000/= in special damages were awarded to the appellant.

4. In its Memorandum of appeal, the appellant raised six grounds. They all challenge the trial court's findings on liability. It is alleged that the trial Magistrate failed to appreciate the evidence tendered that showed that the appellant was not an employee of the respondent a the material date, that he was not injured while in the course of duty at the respondents premises, that the claim was fraudulent and that the claim and that the findings of the trial court were not supported by the evidence on record. In a nutshell, that the respondent did not prove his case to the required standard.

5. During hearing of the appeal, parties filed written submissions.

I shall set out each parties case with a view to re-evaluate the said evidence and come up with my own findings and conclusions as mandated of an appellate court. See **Selle -vs- Associated Motor Boat** bearing in mind that I neither heard or saw the witnesses testify and should make allowance for the same. I must make sure that the findings of facts made by the Learned Magistrate are based on proper evidence before her and that she has not acted on wrong principles in reaching her conclusion.

6. The Respondents case before the trial court was that during the period 2003-2006 he was working for

the respondent as a machine operator, trained on the job.

He stated on the material date the 7th February 2006 while on night shift, the machine he was working on with another employee, a moulding machine, opened and threw out some object that hit him on the forehead where upon he fell, and lost consciousness. He later came on in hospital at Molo General Hospital where he was admitted. He produced the discharge summary (PEx I) and upon discharge he went back to work. Later Dr. Kiamba prepared a medical report on his injuries (PExh2). To prove his employment with crown paints, he produced a letter of recommendation dated 30th September 2006(Exh.4) and a log in card (PExh 5). He stated that he sued the company because he worked for long hours and the machine was not maintained properly, and that had not been given protective gear like a cap and helmet. He stated that the was provided with a cloth cap which cannot protect injuries. He stated that while working, he was very careful not to be involved in any accident.

Upon cross examination, he stated that he had worked for three years and had developed expertise. He stated that maintenance of the machines were done after along time and that there was safe working atmosphere.

He testified that the protective clothing provided was not adequate, that he needed a helmet, gloves and gumboots.

7. The Appellant's case was urged through DW1, Samuel Mong'are who described himself as the Operations Assistant. He stated that his work was to keep records and that he knew the respondent as an employee of the company. He produced a casuals register for the 8th February 2006 with the Respondent's name indicated. He also stated that on the 8th, 9th till 13th the Respondent was not on duty. It was produced as DEx1.

Upon cross examination, it was his testimony that the casual attendance register does not show the time and date. He stated that on 7th February 2006 the appellant was on duty but on 8th February 2006 he was on leave. He stated that it is true the respondent was injured on the 8th February 2006.

8. To prove his injuries, the respondent produced a Discharge summary from Molo Subdistrict Hospital showing admission on the 8th February 2006. Indicated on the Discharge Summary is head injury (shock) at place of work. Dr. Wellington Kiamba prepared a medical report dated 13th October 2006. He referred to the Discharge Summary from Molo District Hospital. It is upon evaluation of the evidence stated that the trial Magistrate made findings that the respondent was at the material times an employee of the Appellant, was injured while in course of his work and that the injury was as a result of negligence and breach of contract and held the appellant wholly liable.

9. Issues that arise from the evidence by both parties are in my view:

1. Whether the respondent was an employee of the appellant during the material times.

2. Whether the respondent was injured while in the course of duties as assigned.

3. Whether there was sufficient evidence to find the appellant liable in negligence.

4. Whether the respondent proved his case on a balance of probabilities.

5. Quantum of damages and costs.

10. **The Appellants submissions**

In its written submissions, the appellant admitted that the respondent was an employee of the appellant despite its denial in its defence. That settles Issue No. 1 above.

The appellant in its lengthy submissions faulted the trial Magistrate when she admitted documents produced by the respondent, instead of by their makers, and in particulars the medical report and treatment discharge Summary from Molo hospital.

Citing Section 35(b) of the Evidence Act, it was submitted. That that the trial Magistrate erred in admitting such documents. Several authorities were cited on subject. The court was urged to expunge the medical records from the record as the makers of the same were not said to have been unavailable to give evidence.

11. The appellant too submitted that the respondent did not discharge his burden of proof as no casual nexus was established between the respondent and the appellants negligence. The case of **StatPack Industries Ltd -vs- James Mbithi Munya Nbi HCCA 152 of 2003** was cited in support.

It was submitted that the respondent failed to prove upon a balance of probability one of the forms of negligence attributable to the appellant and the case of **Kiema Mutuku -vs- Kenya Cargo Handling Services Ltd** was cited.

It was submitted that it was the duty of the Respondent to determine whether the machine was safe to operate or not, that he was the engineer of his own misfortune for making wrong decisions as an experienced worker.

On whether the claim was fraudulent or not, the appellant submits that the respondents evidence was controverted by DW1 who produced a casuals register that indicated absence of the respondent on the 8th February 2006 hence rendering the claim fraudulent.

12. **The Respondent Submissions**

As to whether the respondent was an employee or not of the appellant is settled in the affirmative. It is submitted that the evidence on record is sufficient to find the appellant liable in that that the machine was defective causing a bolt to dislodge itself and hit the respondent on the face, the uncontroverted evidence of the respondent that the machines were not serviced regularly and therefore vulnerable to defects such as loosening of bolts.

His evidence that he was not provided with sufficient protective apparel was not denied.

It is further submitted that the appellant had a duty of care to the respondent and that duty was breached. Citing **Timsales Ltd -vs- John Mwaura (2006) e KLR**, it is submitted that if the machine was in a proper state of repair, it could not have ejected the piece of timber/bolt which subsequently injured the respondent.

It is submitted that the appellant had a duty to provide a safe working environment where he would not be exposed to the risk of injury. All these, it is submitted, the appellant failed to do and as such was in breach of the duty of care and so liable in negligence and subsequent damages.

13. Armed with the above evidence and submissions by the rival parties it is now my duty to evaluate the same and make my own findings on whether or not the respondent proved his case on a balance of probabilities, that being the main and singular issue, the rest having been settled.

There is now no dispute that the respondent was an employee of the appellant. DW1 in this testimony in Chief admitted that the appellant was an employee and was injured on the 8th February 2006. The casuals register produced by DW1 were evident that the respondent was on duty on the 8th February 2006 and from the 9th -13th , he was on leave. This explains his hospitalization after the injury. It is important to note that the respondents evidence was largely controverted. What DW1 did by his testimony was to re affirm and corroborate the respondents testimony.

It is trite that an employer owes a duty of care to its employees, and its under a statutory duty to provide a safe working environment by providing them with sufficient protective gear, to make sure that machines that the employees use are regularly serviced. The appellant could not deny or affirm that the machine that caused injury had been serviced. No records of such service were produced.

14. In the case **Timsales Ltd -vs- Johm Mwania Mwaura (2006)e KLR**, in answer to a question whether the machine that hurt the respondent was defective, the court observed that it was evident that if the machine was in proper state of repair, it could not have ejected the piece of timber which injured the respondent. I am persuaded by the above observation in the circumstances of this mater. A machine that is well serviced cannot just malfunction.

In the case of **Nadwa -vs- Kenya Kazi Ltd (1982-88) I KAR 1178** the court held that it is the duty of an employer to provide a safe working environment to its employees. The same observations were held by Justice Maraga J, as he then was, in **Paul Gakuru Mwinga -vs- Nakuru Industries Ltd HCCC No. 679 of 2004** when he stated that under both common law and statute, an employer is under an obligation to inter *alia* provide a safe system of work.

15. Under the **Factories Act Chapter 514 Laws of Kenya Section 53,** it is provided that employees are to be provided with suitable protective gear like gloves, footwear, goggles and head gear and such gear ought to be maintained for proper use by the worker.

16. Evidence tendered was evidence that the appellant fell short of these statutory and common law obligations of duty to care.

Given the line of evidence by the respondent, it is difficult to agree with the appellant that the respondent did not prove negligence on the appellant. In the case **Statpack Industries** above it is a requirement that a Respondent ought to prove a casual nexus between the Appellant's negligence and his injury.

17. I have stated above that had the machine being regularly maintained, it would not have injured the respondent. That evidence in my view, creates that necessary nexus.

The Kiema Mutuku case (Supra) is right on point. The respondent did proof not one form of negligence against the appellant but several. I am satisfied that the respondent by his evidence proved his case on a balance of probability.

18. It was submitted that the trial Magistrate erred by admitting into evidence the medical report produced by the respondent who was not its maker contrary to provisions of **Section 35 of the Evidence Act.**

I have read the evidence on record. The appellant was duly represented by counsel as well as the respondent. At no one time did the advocate for the appellant object to the production of all the exhibits, including the medical report by the respondent. He cannot raise objections long after the case was determined.

The case **David Ndung'u Macharia -vs- Samuel K. Muturi & Another HCCC No. 125 of 1989** supports the above finding.

Justice Ringera (as he then was) held that the mere exchange of medical reports does not render such reports admissible without calling the makers unless one or both of them have been agreed. In the matter before the trial Magistrate, the medical reports and other documents were all produced without any objection from the rival party. It is therefore assumed that there was agreement by the Advocates of the production of the documents including the appellants documents which was produced by DW1 who was not the maker.

I therefore find that the said medical records were properly produced and rightfully admitted in evidence.

19. In its totality, I find the appeal on the issue of liability lacking merit. It is dismissed for reasons stated

above. There is no serious challenge to the trial courts assessment of the damages. In his Memorandum of Appeal, the appellant did not find fault with the award of damages. The appellants submissions on *quantum* is therefore misplaced. I shall not deal with the said matter as it is not a ground of appeal.

20. All issues framed under Paragraphs 9 above are answered in the affirmative. The courts finds that the Respondent was an employee of the appellant and that he was injured while in the course of such a employment on the material date, the 8th February 2006. Sufficient evidence was sufficiently tendered to place the appellant at the centre of negligence. The machine that injured the respondent was not serviced or regularly maintained, and no evidence of any such service was tendered. That the appellant failed to provide adequate protective clothings to the respondent, besides failing to provide enough personnel to assist the respondent in the operation of the machine that ought to have been operated by more than one person.

The court therefor makes a finding that the respondent had proved his case to the required standards.

It therefore follows that that appellant is liable to damages to the respondent.

The award of damages granted by the trial court is upheld.

21. The upshot is that the appellants appeal is dismissed with costs to the respondent.

Dated, signed and delivered in court this 29th day of September 2016.

JANET MULWA

JUDGE