REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NUMBER 540 OF 2011

GEORGE MORARA MASITSA……..……APPELLANT

VERUS

TEXPLAST INDUSTRIES LIMITED ……..RESPONDENT

JUDGEMENT

The appeal herein arises from the judgment and decree of the Principal Magistrate at Kikuyu delivered on 10th December 2010 in which the Hon. C.A.Otieno Resident Magistrate dismissed the plaintiff/appellant's suit against the defendant with costs.

The plaintiff/appellant's case was heard as a formal proof after interlocutory judgment was entered in default of appearance and defence on 26th April, 2010. It is the order dismissing the plaintiff/appellant's suit that provoked the appeal herein by George Morara Masita who was the plaintiff in the subordinate court.

The appeal sets out the following grounds of appeal:

1. ***That the learned trial magistrate erred in law and fact in finding that the plaintiff had not proved his case as required by law.***
2. ***That the learned magistrate erred in law and fact in failing to appreciate that the judgment had been entered in this matter on 26th April 2010 and that this being a civil case, the standard of proof required was on a balance of probabilities and not beyond any reasonable doubt.***
3. ***That the learned magistrate erred in law and fact in finding that the plaintiff did not proof his case as required by the law in that he did not name the particular chemical which injured him yet the plaintiff, being a lay person would not be expected to have knowledge or name of the chemical substance.***
4. ***That the learned magistrate erred in law and fact by dismissing the evidence on the medical documents produced as not linking the plaintiffs ailment to his working environment.***
5. ***That the learned magistrate erred in law and in fact in dismissing the injuries suffered by the plaintiff as irrelevant.***
6. ***That the learned magistrate erred in law and fact in concluding negatively on injuries suffered by the plaintiff contrary to the Doctor's evidence yet she is not a qualified doctor.***

7. ***That the learned magistrate erred in law and fact in dismissing and criticizing the doctor's view on the injuries suffered by the plaintiff, yet she is not a qualified doctor.***

8. ***That the learned magistrate erred in law and fact in finding that the plaintiff had failed to proof his case as required by the law.***

9. ***That the learned magistrate erred in law and fact in failing to appreciate the oral and testamentary evidence tendered by the plaintiff's case on formal proof.***

10. ***That the learned magistrate erred in law and fact in failing to***

consider the totality of the submissions filed on behalf of the appellant.

The appellant asked this court to allow the appeal and set aside/vary the judgment and decree of the Honourable magistrate and analyze the evidence of the plaintiff and his witnesses tendered on formal proof and give its decision and or judgment thereon, with costs.

The appeal was filed out of time upon leave of court for extension for filing the same being granted vide HCC Misc. Application No. 415 of 2011.

The brief facts of this case as presented in the lower court and as testified by the appellant was that he was an employee of the Defendant/Respondent **Texplast Industries Limited** working as a casual worker and that while he was engaged upon his said casual employment, the Respondent failed to take all reasonable precautions for the safety of the appellant by exposing him to the risk of injury or damage which the respondent knew or ought to have known. That in 2008, while the appellant was at work, he contracted a chest infection which subjected him to severe pains and coughs. The plaintiff /appellant allegedly sustained recurrent chest pains and coughs as a result of allergic rhinitis, headaches and nasal congestion as a consequence of working in an unsafe area full of pollution without any adequate safety gear or clothing which the Respondent was under a duty to provide. That the appellant had to leave the said employment and was now unable to get other useful employment hence; his future earning capacity had been compromised.

The appellant prayed for general damages, special damages of shs.4,000/= for the medical report, costs for the suit and interest and any other further relief the court may deem fit to grant.

The case before the subordinate court proceeded by way of formal proof after interlocutory judgment was entered against the Defendant/Respondent on 26/4/2010 who neither entered appearance nor filed defence despite service of summons to enter appearance being effected upon them.

The parties agreed to have the appeal herein disposed of by way of written submissions.

This being a first appeal, I am mindful of my duty under Section 78 of the Civil Procedure Act to evaluate and consider the evidence and the law, and exercise as nearly as may be, the powers and duties of the court of original jurisdiction and come to my own independent conclusion, but in doing so, I must give an allowance of the fact that I neither saw nor heard the witnesses as they testified. This law was settled in the case of **Selle Vs Associated Motor Boat co. (1968) EA 123.** The same principles were considered in **Ndiritu Vs Ropkoi & another EALR 334 and Mwangi & another Vs Wambugu (1983) 2KCA 100.**

In addition, as an appellate court, I will only interfere with the lower court's findings and conclusions if the same is founded on wrong principles of fact and or law as espoused in the Court of Appeal decision in the case of **Nkube Vs Nyamiro (1983) KLR 403 that:**

"***A court of Appeal will not interfere with the finding of fact by a trial court unless it is based on evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion"*** Per Law JA Kneller & Hannox Ag JJA.

The Court of Appeal in the above decision further held that the appellate court is not bound by the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

The evidence as adduced before the trial court was that of the Dr. Hannington Rogers Kayo who examined the plaintiff and produced his medial report as evidence, and the appellant's own testimony. Dr. Hannington Rogers Kayo is a medical doctor, holder of MBCB degree. He examined the appellant on 27/2/2010 who complained of recurrent chest pains, cough, headache and nasal congestion. He found the appellant with no family history of asthma and neither was he a smoker. At the time of examination, the appellant was in good general condition with a clear chest. From the medical treatment notes, the doctor found that the appellant had suffered chest infection including pneumonia, was placed on anti-biotics and cough syrup. The appellant had the impression of allergic rhinitis and had been advised to change his work place. Dr Kayo concluded that the appellant had suffered an allergy due to inhalation of chemicals although he had since recovered from the ailments following his dismissal from the company. In the Doctor's view, no functional disabilities were expected.

The appellant testified that he was employed by the Respondent Company as a printing feeder which work involved putting labels on sacks for sugar feeds. He produced his employment card since 2006 as an exhibit. He testified that he learnt his duties on the job and got sick with blocked chest and nose and when he explained his sickness to his superiors, they advised him to drink milk which they never provided him with while he was at work so he bought and drank the milk but also sought treatment from hospital. The plaintiff stated that he asked for provision of a mask to prevent chemical inhalation but the same were never provided. He started feeling sick only six months into the job and attended Salama Medical Clinic and Gitaru Medical Clinic where he was treated and x-rays taken at Kikuyu hospital. He was dismissed from the employment by the respondent. He sought compensation by filing suit subject of this appeal.

In her two page judgment delivered on 10/12/2010 the trial magistrate concluded that given the fact that the chemical allegedly inhaled by the plaintiff were not specified, and as the plaintiff's systems were all normal at the time of examination by the doctor, there was no basis for the conclusion reached by the said Doctor Hannington Kayo that the plaintiff had suffered the ailments complained of, which according to the learned trial magistrate, were ***"common ailments suffered by persons who do not necessarily work at the defendant company***." And that it was upon the plaintiff to show clearly what specific chemical was found at the defendant Company that caused the ailments complained of.

It was on the basis of the holding above that she demanded the plaintiff/appellant suit with no orders as to costs, and a proposed shs.30,000/= General damages sh.9,000/= special damages that provoked the 11 grounds of appeal by the appellant herein, challenging that finding and decision thereof.

In his written submissions, the appellant reiterates his grounds of appeal and contended that the trial magistrate erred in law and fact in that he set very high standards in admitting expert evidence than that required by the law and made findings on expert evidence based on her own opinion contrary to law. In his view, the plaintiff/Appellant had discharged the burden of proving that he suffered the allergies while engaged at work and which allergies were caused by inhalation of chemicals since the appellant had not been provided with a mask and an overall for his work. Further, that the work environment was not safe for the appellant and that the employer was therefore culpable for failure to ensure that the employees were safe. The appellant relied on the case of **Mumias Sugar Co. Ltd Vs Charles Namatiti CA 151/1987** where the Court of Appeal held inter alia;-

"An employer is required by law to provide safe conditions of work in a 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."

The appellant contends that the trial magistrate failed and or refused to observe the principles applicable in the determination of the case.

On quantum, the appellant submitted that the trial court erred in awarding damages of Kshs. 30,000/- which award was inordinately low, compared to the injuries sustained by the appellant as per his testimony and the evidence by Dr. Hannington Kayo. Further, the appellant complained that the learned trial magistrate did not take into account relevant factors and principles in arriving at the award and that she applied wrong principles in assessing damages which led to an erroneous estimate of the loss suffered by the appellant. He urged this court to set aside the learned magistrate's award and substitute it with an award of kshs.150,000/= which would adequately compensate the appellant for the injuries suffered.

In response, the respondent who filed its submissions and authorities on 11/12/2014 submitted by raising three issues:

- **Competence of the appeal**
- **Whether the trial court was bound by the expert evidence before it; and**
- **Whether his court should disturb the lower court's assessment of damages.**

On the competence of the appeal herein, it was submitted that there was inordinate delay of 10 months after judgment was delivered in the lower court before leave to appeal out of time was sought and obtained, which delay was inordinate and unexplained. Further, that the respondent by its application dated 5.8.2013 had prayed for striking out of the appeal for being time barred and that albeit the court (Ougo J) in giving directions on 4th March 2014 directed that the appeal proceeds for hearing, the issues raised in that application remain valid grievances by the respondent and must be addressed by this court.

The respondent submitted that despite the appellant being granted leave to file this appeal and serve the same within 14 days from 19/10/2011, the appellant went to sleep and only filed and served the record of appeal on 24th July 2014, thus delaying for 2 years. That no leave was obtained to admit the appeal out of time during the date when directions were given on 4/3/2014 hence, this appeal in incompetent.

On the issue of whether the court below was bound by the expert evidence, the respondent submitted that a court is not bound by the opinion of an expert and can in the right circumstances, such as those obtaining herein, reject the same. The respondent relied on **REPUBLIC VS NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES AND ANOTHER EXPARTE TOWN COUNCIL OF KIKUYU (2014) eKLR** by Hon. G.V. Odunga J where the learned judge commenting on the legal opinion of the Attorney General with regard to the proceedings before court expressed thus:-

"Before I proceed to the merits of the matter, it is important to put the opinion of the Attorney General to its rightful perspective. That opinion is a legal opinion and like any opinion of an expert, it is entitled to the highest possible regard. However the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it but like other expert evidence, the said opinion must not be rejected except on firm grounds. Such opinion evidence, like all opinion evidence will be considered by the court and acted upon if the court is satisfied that it cannot be put true on consideration of the surrounding circumstances, see Juliet Karisa Vs Joseph Barawa & another CA no. 108 of 1988; Maina kama Vs peter Kiawa Mutahi Civ Appl no. Nai 25/2001 Cancio De SA vs Amin (1934) EACA 13 at 15."

In the respondents, view, the legal opinion before the court did not influence the final decision by Hon. Odunga J, which was, in their view, the position taken by the trial court in the instant case.

Further it was submitted by the respondent that since the medical report by Dr. Kayo did not shed light on the nature of the chemicals that are said to have caused harm to the appellant, the plaintiff did not prove his case on a balance of probabilities to warrant judgment in his favour, even if the case had proceeded by way of formal proof.

The respondent also relied on observations by Hon Odunga J in **Martin Idake Vs Wilson Simiyu Siambi (2014)eKLR** where the leaned judge cited with approval the findings of Justice Warsame (as he was) in **Theodore Otieno Kambogo Vs Norwegian People's Aid Nairobi (Milimani) HCC 774 of 2000** in which the learned judge observed:-

"***The fact that the defendant would not get an opportunity to cross-examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross-examination may reduce its relevance or probative value to the person relying on the same."***

The respondent contents that it had no opportunity to cross-examine Dr. Kayo in the lower court, which greatly reduced the probative value of his evidence. In their view, the appellant presented his case with a lot of assumptions simply because the other side was not represented,relying on the cases of **Mohamed Musa & another Vs Peter M. Mailanyi & another CA 243 of 1998 cited with approval in Martin Kidake** (Supra).

The respondent supported the decision of the trial magistrate as the evidence did not prove injuries, even if the liability was proved at 100%.

On whether the trial court's assessment of damages ought to be disturbed, the respondent submitted that the power of the appellate court to disturb an award of damages made by the trial court is limited, citing the cases of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Munyao Kioko (2006 elk (CA); Butt Bottlers Ltd (1985) KLR 470 Kueller JA ; Channan Singh Vs Channan Singh & Handa (1955), 22 EACA 125, 129; Mwanasokoni Vs Kenya Bus Services Ltd (1985)KLR and Peters Vs Sunday Post Ltd (1958) EA 425**.

The above cited authorities are all in agreement that an appellate court shall be slow to disturb an award of damages by the trial court in the exercise of its discretion unless it is established that the trial court proceeded on wrong principles, considered irrelevant factors or did not consider relevant factors. In their view, the award of shs.30,000/= was a correct estimate which cannot be said to be an erroneous estimate since the alleged injuries by the appellant were minimal and that the authority cited by the appellant in the lower court-**Manyi vs Gatheche** related to totally incompatible injuries in the form of fracture of the right hand and right knee and more so, the above authority related to injuries sustained in a road traffic accident and not in an industrial accident.

The respondent urged this court to dismiss the appeal and uphold the judgment of the trial court dismissing the appellant's suit with costs.

I have carefully examined and considered the pleadings, evidence adduced, exhibits produced as well as the submissions by the appellant as filed in the lower court and both parties' written submissions filed in this appeal proposing and opposing the grounds as set out in the memorandum of appeal challenging the findings and decision of the trial court.

In my view, the issues that emerge for determination are:-

i. Whether the appeal herein as filed was/is incompetent
ii. Whether the appellant proved, on a balance of probabilities that the respondent was liable for breach of statutory duty of care for its employees and more so, the appellant while engaged upon his work in the respondent's employment.
iii. Whether the appellant sustained any injuries while at work in employment of the respondent
iv. Whether the appellant is entitled to any damages and if so, how much
v. What orders should this court make
vi. Who should bear the costs of this appeal and the suit in the lower court.

Issue no. 1

On whether the appeal herein as filed is competent, the respondent raised a preliminary objection to the effect that the appeal herein was filed out of time after lapse of 10 months from the date of judgment in the lower court. It avers that albeit the appellant obtained leave of court to file the appeal out of time upon presentation of a certificate of delay explaining the delay thereof, but that, notwithstanding the order of Angawa J made on 19/10/2011 granting the appellant leave to file an appeal out of time and directing

the appellant to file and serve his appeal within 14 days of date of the order for leave, the appellant took two years to file and serve upon the respondent the record of appeal. In the respondents view, the appeal was therefore filed out of time without further leave being sought and obtained hence, it is incompetent and the same should be struck out.

The respondent further urged this court to consider the application it filed before directions were given by Ougo J. in this court, which application was challenging the competence of this appeal. The said application is dated 5th August 2013. It sought to have this appeal struck out on the grounds that the leave to file an appeal out of time was obtained after unexplained delay of 10 months and that the record of appeal was served on 24/7/2013 after unexplained delay of nearly 2 years in contravention of Hon Angawa J's orders of 19/10/2011 which constitutes gross abuse of the court process.

The appellant did not make any submission on this issue as the respondent filed their submissions late after recalling the judgment which had been set for delivery without their submissions.

I have carefully examined the record of appeal as well as the appeal file herein and I have established that on 19th October 2011 Hon. M. A. Angawa J did grant the appellant herein leave to file an appeal out of time and directed that the appellant do file and serve that appeal within 14 days of the ruling. The order for leave was granted pursuant to an application made on 27/9/2011 supported by the affidavit of George Morara Masita, annexing a certificate of delay dated 28th July 2011. The said leave was granted vide NRB HCC Misc Appl No. 415 of 2011. The certificate of delay explained that proceedings and judgment in Kikuyu RMCC 69/20101 were applied for on 15.2.2011 and the same were only ready for collection on 28th July 2011. The record shows that judgment in the said suit in Kikuyu court was delivered on 10th December 2010. The record is also clear that the memorandum of appeal was filed on 24.10.2011 and on the 25th October 2011, the appellant served the same upon the firm of Mucheru/Oyatta & Associates Advocates. Thus, the memorandum of appeal was filed within 5 days of leave obtained and served within 6 days from the date when leave was granted. I do not therefore find any merit in the respondent's submission that the appeal herein was filed and or served out of time without leave of court.

The respondent claims that the record of appeal was filed and served on 24.7.2013 after 10 months of the date or order for leave, and further claims that the delay constitutes gross abuse of the court process.

In my meticulous perusal of the orders of Angawa J. dated 19/10/2011 I have not come across any mention that the record of appeal should have been filed and served within 14 days from the date of the ruling. The appellant, in my view complied with the orders of 19/10/2011 without default hence there would be no expectation or justification for him to seek further leave to file and serve a record of appeal especially where there was clearly no order respecting the timeframe within which a record of appeal should have been filed.

The respondent in my view must be confusing a filing of an appeal and the filling of a record of appeal which are two distinct processes and documents.

A memorandum of appeal originates an appeal pursuant to section 79G of the Civil Procedure Act whereas a record of appeal contains all necessary documents as contemplated in order 42 Rule 13(4) hof the Civil Procedure Rules.

This court also notes that the application dated 5th August 2014 sought to challenge the application for leave and the leave granted by Angawa J to the appellant herein to file this appeal out of time under the provisions of Section 79G of the Civil Procedure Act. However, in their submissions, the respondent alleges that the record of appeal was filed out of time and after 10 months from the date when leave was obtained.

It is important to remind the respondent that the leave obtained to file an appeal out of time pursuant to the enactment of Section 79G of the Civil Procedure Act is not one that would ordinarily be sought and obtained exparte and therefore capable of being challenged at the main hearing of the appeal, unlike the

application for leave to file suit out of time under Section 27 and 28 of the Limitation of Actions Act Cap 22 Laws of Kenya.

In this case, this court has established that the application for leave was duly served upon the respondent who even opposed it and filed a replying affidavit sworn by Linus G. Thuranira on 14/10/2011 and both parties advocates were heard by the Hon. Angawa J inter parties before the final order of 19/10/2011 was made.

That being the case, if the respondent was dissatisfied with that order, it had the opportunity to appeal against the said order of Angawa J and not wait until the appeal is filed then seek to have it struck out on grounds of delay. The respondent having squandered its opportunity to challenge that order by way of an appeal, is was estopped from filing an application in this appeal challenging the said order as the court had no jurisdiction to entertain the same application which was determined on merits by a court of competent jurisdiction. Further, the court would be sitting on an appeal of its own decision if it was to revisit the issue of leave granted to appeal out of time after according parties an opportunity to be heard inter parties before making final orders on 19/10/2011.

In my view, it is the respondent who is abusing the court process and as it has asked this court to revisit the application in this appeal which, apparently, was not heard and determined on merit, I hereby proceed, for reasons given above, to dismiss the application by the respondent dated 5th August 2013. I have accepted to determine that application pursuant to Article 159(2) (d) of the constitution which abhors the application of procedural technicalities at the altar of substantive justice.

Accordingly, I dismiss the respondent's submission that this appeal is incompetent and hold that the appeal as filed and served pursuant to the order to the superior court granting leave to file it out of time is competently before this court.

Issue no. 2

On the issue of whether the appellant established on a balance of probabilities that the respondent breached its statutory duty of care to its employee, the appellant while engaged upon his work, the appellant testified on oath and produced employment card as PExh 4 as evidence of his employment with the respondent. He also produced treatment notes for the ailment that he suffered as PEx 5,6 and 7 showing that the appellant sought medical attention while still in the respondent's employment for persistent coughs, chest pain and was diagnosed with pneumonia. The medical notes show that the doctor who attended to the appellant advised him to change his work place while undergoing medication.

According to the appellant, he worked as a printing feeder and was never provided with any mask or overall. He then got sick with blocked chest and nose and when he explained his problem to his superiors, they advised him to drink milk which they did not provide him so he bought it on his own accord and drank the milk as advised and sought treatment from hospital. That he needed a mask to prevent chemicals from harming him but was not given one and after treatment, he would be fine for a short while but the illness recurred.

The above evidence by the appellant in the lower court was never rebutted. However, in their submissions, the respondents contend that the trial magistrate was correct in finding that there was no evidence of the name of the chemical that harmed the appellant hence the appellant had not proved his claim that he was injured while at the respondent's work place.

It is not disputed that the defendant/respondent is an industry and that the appellant was working as a printing feeder hence, exposed to industrial chemical which are not specified. It is further not disputed that the appellant was a casual worker who only learnt his job while working and that he started experiencing health problems while engaged at the said work place. It is further not disputed that when he complained to his superiors, they advised him to drink milk which they were not providing him with. It is also not disputed that the appellant had only worked for the respondent for about six (6) months when he started experiencing those health complications that necessitated his seeking medical attention.

The plaintiff upon filing of the suit in the lower court served the respondent herein with summons to enter appearance as evidenced by affidavit of service of Kennedy A. Kituzi on 12th March 2010 filed in court on16.4.2010, leading to entry of interlocutory judgment in favour of the appellant on 26/4/2010.

The respondent herein also had the opportunity to defend themselves to oppose this appeal as there is ample evidence that they were served with an application for leave to file appeal out of time and the appeal herein. They instructed an advocate and on 6/8/2013 the said advocate M.s Albert Kamunde & Co advocates filed an application to have this appeal struck out with costs, which application I have already disposed of in issue No. 1.

The respondent did not controvert the appellant's contention and evidence that he worked in an area which had chemicals pollutants and that it was the unnamed pollutant chemicals that caused him the allergies, chest pains, coughs, rhinitis and even pneumonia.

That notwithstanding, the burden of proving the claim as laid, on a balance of probabilities against the respondents lay on the appellant who alleged, even if the suit was not defended and or whether it proceeded by way of formal proof. See Section 107 of the Evidence Act Cap 80 Laws of Kenya thus provides that:

"107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to move the existence of any fact it is said that the burden of proof lies on that person."

In addition, Section 108 of the said Evidence Act is clear that:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

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

The respondents had the opportunity to counter the evidence and pleadings as set out by the appellant to challenge the cause of his ailments but they did not. Consequently, a presumption arises that the evidence, as produced, was unchallenged and therefore there was no need for the appellant to be expected to take samples of the pollutant chemicals for a laboratory testing to determine what chemicals they were, to enable him prove his case, as that would in effect be turning a civil case into a criminal matter where the standard of proof is beyond reasonable doubt.

The other question arising from issue No. 2 is whether the respondents were therefore in breach of statutory duty of care in failing to provide the appellant employee with a safe working environment and protective clothing.

Winfield and Jolowicz at page 203 states that:

"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. If he alleges failure to provide a reasonably safe system of working, the plaintiff must plead, and therefore prove, what the proper

system was and in what relevant respects it was not observed."

In this case, the view of the court is that the clue to unraveling the question of liability is to examine the particulars of negligence and breach of statutory duty as set out in the plaint and the evidence on record.

The appellant pleaded the following in his plaint dated 12th March 2010

"1…

2…

3…

4. It was a term on the contract between the plaintiff and the defendant and I or it was a statutory duty of the defendant to take all reasonable precautions for the safety of the plaintiff which he was engaged upon his work, further not to expose the plaintiff to a risk of injury or damage, which it knew or ought to have known

5. Particulars of negligence/breach of statutory duty on the part of the defendant:-

a. ***Failing to take any or adequate precaution for the safety of the plaintiff while he was engaged in his work.***
b. ***Exposing the plaintiff to a risk of injury, which it kneqw or ought to have known.***
c. ***Causing or permitting the plaintiff to work without any adequate safety gear and/or clothing knowing the same to be dangerous.***

(d) Failing to take any or nay adequate measure to ensure that the environment in which the plaintiff was working was safe and free from pollution.

(e) Failing to provide or maintain a safe and proper system of working and to instruct its workmen including the plaintiff to follow that system."

In his testimony on oath, the appellant stated that he blamed the respondent for failing to provide him with a mask to prevent chemicals from harming him which masks he asked for but was not given and that he started ailing six months into the job. On informing his superiors, they simply advised him to drink milk which they did not provide him with.

The appellant mitigated the suffering by buying the milk for himself and seeking medical attention whereof he was treated and advised to change his work place. At the time of medical examination by Dr. Kayo, the appellant had healed after being dismissed from employment.

This evidence, in this court's view, was sufficient to prove breach of statutory duty of care on the part of the respondent, of ensuring that the appellant worked in a safe environment and was provided with protective clothing to prevent inhalation of the pollutants emanating from theprinting feeder machine.

As I have stated earlier, it was immaterial that the appellant did not know the type of the chemical in question. He pleaded that he was exposed to pollutants while engaged at work, and testified that he inhaled the chemical pollutants. It is not doubtful that the appellant worked in an industry and under the unsafe conditions and that he complained of the problems he was facing to his superiors before he sought medication.

Iam in agreement with the submissions by counsel for the appellant that the trial court erred in law and fact in failing to observe principles espoused in the case of **Mumias Sugar Co. Ltd Vs Charles Namatiti CA 151 of 1987** Nairobi that:

"an employer is required by law to provide safe conditions of work in the factory and if an accident

occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."

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

" Where in any factory workers are employed in any process involving exposure to wet or to any injurious offensive substance, suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, googles and head coverings, shall be provided and maintained for use of such workers."

In addition, under section 51 of the said Act***:***

" in every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extend as to be likely to be injurious or offensive to the person employed against inhalation of the dust, fume or other impurity and to prevent its accumulating in any workroom, and in particular where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained as near as possible to the point of origin of the dust or fume or impurity, so as to prevent it entering the air of any workroom and the dust, fumes or impurity shall not be allowed to enter into the atmosphere without undergoing appropriate treatment to prevent air pollution or other ill-effect to life and property."

Section 72 of the Act criminalizes contravention of any of these provisions of the Act. The duty under the Factories Act is owed to persons but only employed by the occupier but also to all persons working in the factory.

The respondent did not deny that the appellant was its employee or that the appellant suffered the ailments complained of while he was engaged upon his work and employment with the respondent. The respondent did not either prove that it had complied with the above stated statutory obligations.

In my view, the trial magistrate erred in law and fact in finding and concluding that the type of ailments suffered by the appellant were common among persons who do not necessarily work at the defendant's company and that it was upon the plaintiff to show clearly what specific chemical found at the defendant's company caused the ailments complained of. The above conclusion by the trial magistrate implied that there was no statutory duty of care imposed on the respondent to ensure the safety of its employees while engaged at work and that an employee was under a duty to know the names of each and every chemical substance, fume or impurity that emanates from the factories processes before they succeed in their claim.

In my view, that conclusion by the trial magistrate was erroneous and self contradictory as well as self defeating by the trial magistrate who became a self made medical doctor, for reasons that having found that the ailments were common among persons who do not necessarily work in the defendant's company, it was superfluous of her to require the appellant to prove what specific chemical was responsible for his ailments.

The respondent has belabored to persuade this court with several authorities which I have referred to and examined in detail including **R. Vs NSSF Board of Trustees and Another exparte Town Council of Kikuyu (Supra).**

I have compared those decisions, with the respondent's submissions which latter submissions discredit Dr. Hannington Kayo's medical report. In the cited case of **Martin Kidake vs Wilson Simiyu Siambi (Supra)** the court was clear when referring to the case of **Mohamed Musa & Another Vs Peter M. Mailany & Another CA 243/1988** that the Court of Appeal allowed an appeal because the respondent failed to call the doctor who wrote/prepared the medical report and therefore did not prove his case. Instead, he presented his case with a lot of assumption simply because the other party was not

represented. The Court of Appeal also warned that "litigants must bear in mind that even in prosecuting cases exparte, the required standards of proof must be observed, particularly where there is denial of material pleadings by any opposing party."

In the **Martin Kidake case (Supra**) the learned Judge cited with approval Ringera J in **David Ndung'u Macharia Vs Samuel K. Muhiu & another NRB HCC 125/89** inter alia:

"The second issue is that only an agreed report can properly be admitted in evidence without calling the maker. The mere exchange of medical reports does not render such report or reports admissible without calling the makers unless one or both of them have been agreed …."

It is clear from the above decisions that they can be distinguished from the instant case which was not defended and furthermore, the appellant did call the doctor who examined him to testify as to the injuries he sustained while at work.

The appellant having duly served the respondent with summons to enter appearance was not bound to compel it to enter appearance, file defence or appear in court to cross-examine the appellant or the doctor on the injuries sustained and on what type of chemical was inhaled by the appellant. It is therefore not correct for the respondent to purport to attack the appellant's evidence on appeal, which evidence was not controverted at the trial by selecting portions of several judgments such as **Martin Kidake (Supra**) where it was held, among others that :.

"The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross-examination may *reduce* its relevance or probative value to the person relying on the same."

That holding by Warsame J (as he then was) in **Theodore Otieno Kambogo Vs Norwegian peoples Aid NRB HCC 774/2000** cannot be applied or relied on blindly without considering the whole circumstances under which the court made such an order which it is not said, were similar to this case.

Furthermore, in the same **Martin Kidake** (supra) case the court cited **Charles Agol Sakwa vs Fanuel Kifuna Angote & Another CA 341/1997** where the Court of Appeal held inter alia that ***"a medical report cannot be impeached by evidence from the bar."*** The respondent is in my view, trying to impeach the medical report by Doctor Hannington Kayo, a qualified doctor whose credentials are not in question, from the bar, which attempt is prohibited. Nothing prevented the respondent from entering an appearance and filing defence and subjecting the appellant's evidence to serious cross examination. There is no evidence that the trial magistrate doubted the credibility of Dr Kayo while he was testifying on behalf of the appellant.

In the instant case, it has not been alleged by the respondent that there were more than one and conflicting medical reports produced and without calling their makers and neither are there any glaring inconsistencies between the treatment notes produced, medical report and the testimony by the appellant. The court was also clear in the Martin Kidake case, unlike what is being propounded by the respondent that while medical evidence is entitled to the highest possible regard, the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, and such evidence like other expert evidence must not be rejected except on firm ground. See **Juliet Karisa Vs Joseph Barawa & Another CA 108/1998.**

With utmost respect to learned counsel for the respondent's noble submissions, the authority cited above does not state that courts are not bound by expert medical evidence or other expert evidence. But that the courts are not bound by it and in rejecting such expert evidence, the court must so reject it on firm grounds. I find no firm ground upon which the trial magistrate rejected the evidence of Dr Kayo.

It is also worth noting that Odunga J nonetheless found that the plaintiff had sustained severe injuries and proceeded to award him damages in the Martin Kidake case.

As I have stated above, the respondent had the opportunity to enter appearance and defend the appellant's claim in the court below and cross-examine the appellant and his witness. The respondent having squandered that opportunity, in my view, cannot expect this court to apply the case of **Theodore Otieno Kambogo Vs Norwegian Peoples Aid (Supra)** in a blind manner, which decision is persuasive and with no binding force on this court-that the fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence.

In my view, there is no evidence that the appellant presented his case with a lot of or an assumption and or casually, simply because the other party was not represented to liken it to the observations made in **Mohamed Musa & Another vs Peter M. Mailanyi case (Supra).**

There was no evidence to controvert the appellant's testimony that he worked in the environment described in his testimony. There was also no evidence or denial that there were chemicals used in the printing process. Neither was there evidence that the appellant was an expert in detecting chemicals used at his workplace.

With that kind of evidence, it was expected that the respondent would make the conditions of employment to his employees safe and not to expose employees in this case, the appellant, to any danger to avoid any harm. This is not to say that the respondent would be responsible for the employees own negligence in execution of such employment, but that there was no evidence that the appellant was the author of his own misfortune.

I therefore find that the appellant did prove on a balance of probabilities, that he was injured while engaged upon his work with the respondent after inhaling the unnamed chemical substances used in the printing feeder. I also find that the respondent failed to excise due care and failed to provide the appellant with protective clothing while he as engaged upon his work as a result he inhaled chemical substances which caused him the enumerated ailments.

I would go further and hold that the respondent /employer was aware or ought to have been aware of the danger that the appellant/employee was subjected to and it failed to do what was required of it and for that reason, it was negligent.

Further, that because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry out its side of the bargain to ensure the existence of minimum reasonable measure of protection. And in measuring such degree of care, the court must balance the risk against the measure necessary to eliminate the risk.

In this case, the medical report and treatment notes are consistent with the appellant's testimony that after leaving employment, the appellant got well, a clear indication that his ailments were caused by the poor work environment that exposed him to pollutants.

For those many reasons, I find that the respondent was liable in negligence and for breach of Statutory and common law duty of care and upset the trial court's finding that the respondent was not liable.

Issue No. 3

On the issue of injuries sustained by the appellant, from the analysis given in issue No. 2 it is trite that the appellant, from the pleadings, testimony in court and the Doctor Kayo's medical report produced in court that the appellant suffered the following ailments:

- Recurrent chest pain and coughs as a result of allergic rhinitis.
- Headaches and nasal congestion.

The appellant would seek medication and recover but the ailments remained on and off. He was treated for pneumonia at Citam Medical clinic and was later dismissed from employment. He produced all his medical treatment notes from the hospitals he attended. Dr. Hannington Kayo testified that after

examining the appellant he concluded that the appellant had suffered allergic rhinitis as a result of inhalation of chemicals which was harm and from which he had since recovered after dismissal from the respondent's employment. That the appellant had no permanent functional disabilities anticipated. With that kind of evidence, it is surprising that the trial court found the medical report by Dr. Kayo valueless.

In my view, that conclusion by the trial court was erroneous. No doubt, there was a causal link between the unsafe working environment under which the appellant worked and the recurrent ailments that occasioned the appellant blocked chest, nose, coughing and pneumonia. The Doctor gave his prognosis or opinion on the state of healing of the appellant and the fact that the appellant had no future needs for treatment or other medical care. In my view, the appellant did not have to wait for debilitating injuries before leaving employment or seeking for medication or compensation. And the fact that he had now recovered from the ailments did not disentitle him from seeking for damages as he had nonetheless suffered pain following the ailments contracted while working for the respondent.

It was therefore, in my view, an error of principle for the trial court to find that the appellant had not proved the injuries he sustained, when the appellant's uncontroverted evidence was clear that he inhaled chemicals at his place of work as a printer feeder. It cannot be expected that the doctor should have tested the type of chemicals inhaled by the appellant before making his conclusions.

Issue no. 4

On quantum, having found that the appeal herein as filed is competent, that the respondent was liable in negligence and breach of statutory and common law duty to care; and having satisfied myself that the appellant was injured or suffered the ailments as a result of inhaling the chemical pollutants at his place of work, the next issue is what is the quantum of damages general and special, payable to the appellant.

The appellant claimed for special damages of Kshs. 4,000, general damages and los of earning capacity and he was unable to get suitable employment. In my view, the latter claim of loss of earning capacity of the appellant is unsustainable as it was not proved and no evidence was led to prove the same. In addition, the appellant was a casual worker and as per Doctor Kayo's medical report he had fully recovered from the ailments after leaving the respondent's employment and that he had suffered no functional disability.

The trial magistrate concluded that had the appellant proved liability against the respondent, she would have awarded him Kshs.30, 000.00 general damages for pain suffering and loss of amenities. The appellants counsel had proposed KshS, 150,000 as adequate compensation which he had maintained on appeal.

The respondent supports the findings of the trial magistrate and warns this court not to interfere with the discretion exercised by the trial court since the authority relied on had more serious injuries, quite unrelated to the ailments suffered by the appellant.

The appellant complains that the trial court did not take into account the relevant factors and principles applicable in making awards of general damages thereby arriving at an erroneous estimate that was inordinately low.

I have examined the judgment in the court below on quantum. The trial magistrate in making an award of kshs.30, 000/= general damages did not allude to any principle, factor or even an authority with similar injuries for comparison purposes. I am in agreement with the respondent's submission that the cited authority of **Manyi vs Gatheche HCC 467/1991 Mombasa** by the appellant was irrelevant but did that exculpate the trial court from identifying a relevant authority?

The Court of Appeal in the case of **Denshire Muteti Wambua Vs KPLC CA 60 of 2004 decided on 21/6/2013 by GBM Kariuki, P. O. Kiage & Murgor K JJA** citing with approval the case of **Kemfro Africa Ltd T/A Meru Express Service & Gathogo Kanini Vs A.M.M. Lubia & Another (1982-988) KAR 777 at P. 730 Keller JA** held that

"The principles to be considered by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Lango vs Manyoka (1961)EA 705, 709, 713, Lukenya Ranching & Farming Co-operative Society Ltd Vs Kavoloto (1970) EA 414, 418, 419."

The Court of Appeal in the above case also quoted with approval the same principles as espoused in the case of **Arrow Car Ltd vs Bimomo & 2 others (2004) 2KLR 101.**

As stated earlier, the trial magistrate did not refer to any principle or authority in making the award of kshs.30, 000/=. She however referred to exhibit 1 the medical report by Dr. Kayo, stating that as the appellant had fully recovered from the injuries as at February 2010, she would have awarded kshs, 30,000/- as general damages considering the ailments complained of and the fact the appellant had fully recovered from the ailments.

No doubt, the trial magistrate failed to appreciate that in assessment of damages for personal injuries, the general method of approach, as espoused in arrow Car Ltd vs Bimomo & 2 others (Supra) is that:

"Comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar awards."

Albeit the award of damages was in the discretion of the trial court, that discretion required to be exercised judicially. Failure to consider any authorities cited by counsel for the appellant or getting her own relevant authorities so as to guide her in the assessment of damages clouded her from seeing that the award she made was not in consonance with other decided cases. In my view, the award ofshs.30, 000 general damages by the learned trial magistrate was a wholly erroneous estimate of the damage compared to the ailments complained of.

In my assessment of damages in this case, regard being had to the nature and extent of the injuries suffered by the appellant as shown by medical notes and the doctor's medical report and evidence and the fact that the appellant had now fully recovered upon leaving his employment, an award of **Ksh.100, 000/=** strikes a cord of fairness and would be sufficient. The authority cited by the appellant's counsel in this appeal, of **Thomas Mothinji Mukhaya vs African Diatomite Industries Ltd HCC no. 10/96 Nakuru** is relevant as cited in NAKURU **HCC No 679 of 1994 Paul Gakunu Mwinga vs Nakuru Industries Ltd.**

In the **Thomas Mothinji case**, the plaintiff after inhaling diatomite dust complained of repeated chest pains and dry cough. He developed early silicosis and a chest x-ray revealed features of early emphysema and chronic extrinsic allergic alveolities. He was awarded Kshs 450,000 general damages for pain and suffering in 1999.

In the Paul Gakunu Mwinga vs Nakuru Industries Ltd (supra) decided in 2009 case the plaintiff who was a weaver in the defendant's industry suffered ***"bysinusis-chronic dysponea"*** which is the chronic chest infection and chronic obstructive airway disease due to inhalation of dust as he was not provided with dust masks and the area was not well ventilated thereby exposing him to dust, the court made provision for an award of Kshs 750,000 general damages for pain and suffering after striking out the suit for being incompetent.

In the in the instant case, however, the appellant had fully healed at the time of hearing of the case in the lower court and examination by Doctor Kayo.

On special damages, the appellant pleaded kshs.4, 000/= for the medical report. At the hearing, he produced a receipt for the same amount together with the Doctor's witness expense of ksh.5000/= which the trial magistrate awarded.

The law regarding special damages is that it must be specifically pleaded and strictly proven. There was no pleading for shs.5000/- as a special damage and neither was the plaint amended at the hearing to change the figures from kshs 4000/= to 9000/- In my view, the appellant only proved Kshs 4000/= cost of medical report. The kshs.5000/- is not a special damage. It is a witness expense and cost of prosecuting the suit. Consequently, I disallow it and uphold only kshs.4000/- pleaded and proved.

In the end, I allow the appellant's appeal, set aside the judgment and decree of the lower court dismissing the appellant's suit, and substitute it with judgment for the appellant against the Respondent as follows:-

a. Liability = 100%
b. General damages Kshs 100,000
c. Special damages Kshs 4000
d. Interest of general damage from date of judgment in the lower court until payment in full, at court rates.
e. Interest on special damages from the date of judgment in the lower court at court rates until payment in full.
f. The appellant shall have costs of both the suit in the lower court and in this appeal.

Dated, signed and delivered in open court at Nairobi this 18th Day of May 2015.

R. E. ABURILI

JUDGE