REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 156 OF 2007

MWANZANI MWAKITU.....APPELLANT

VERSUS

CHANDARIA INDUSTRIES CO. LTD.....RESPONDENT

(Appeal from the original judgment and decree of Hon. K. L. Kandet in Milimani Commercial Courts CMCC No. 7734 of 2004 delivered on 19th February, 2007)

JUDGEMENT

1. The Appellant **MWANZANI MWAKITU** filed this appeal challenging the decision of the trial magistrate Hon. K. L. Kandet in Nairobi Milimani Commercial Courts CMCC No. 7734 of 2004 delivered on 19th February, 2007) on the following grounds:-

i. ***That the learned trial magistrate erred in law and in fact in making lower award that was not in line with the injuries sustained.***
ii. ***That the learned trial magistrate erred in law and fact in not appreciating that there was enough documentary evidence namely medical report and accident form to prove the injury sustained by the Appellant.***
iii. ***That the learned trial magistrate erred in law and fact in subjecting the Appellant to contribution without considering the evidence on record.***
iv. ***That the learned trial magistrate erred in law and fact in not awarding costs to the Appellant since he partially succeeded in his case as per his judgment.***

2. The appellant was the plaintiff in the subordinate court. By his further amended plant on 2nd June, 2006, he alleged that at all material times he was an employee of the defendant as a general worker. That there was an expressed or implied term of the said employment between the appellant and the respondent and it was the duty of the respondent to take all reasonable precautions for the safety of the appellant while he was engaged upon his work, not to expose him to the risk of damages or injury of which the respondent knew or ought to have known to provide and maintain adequate and suitable plant to enable the appellant carry out the said work in safety and to provide a safe and proper system of working.
3. It was alleged that on or about the 9th day of January, 2001 while the appellant was engaged upon his work as assigned to pour dye into the pulpor machine when suddenly the dye splashed and entered into his left eye thus causing severe burns and irritation. As a result the appellant suffered loss and damage.
4. The appellant blamed the respondent employer for the negligence and or breach of contract or

statutory duty for:

a. *Failing to take any or any adequate precautions for the safety of the appellant while engaged upon his work*
b. *Exposing the appellant to the risk of damage and or injury of which the respondent knew or ought to have known*
c. *Failing to provide or maintain a safe and proper system of working*
d. *Failing to provide proper safety wear to enable him carry out his duties in safety contrary to section 53 of the Factories Act*
e. *Failing to supervise and or warn the appellant of the danger involved in the performance of his duties in the circumstances.*

5. The appellant allegedly suffered irritation from the injured left eye and claimed for general damages for pain and suffering as well as damages for diminished earning capacity and loss of future earnings as well as special damages of kshs 1500, costs and interest
6. The respondent filed defence denying all the allegations and claims by the appellant. It specifically denied ever employing the appellant or that he was injured while engaged on his employment or that the respondent was negligent or in breach of any statutory or other duty. In the alternative the respondent averred that if at all there was any accident then it was wholly caused by or substantially contributed to by the appellant and set out particulars of contributory negligence thus:

a. *Failing to heed the defendants' authorised agent's instructions*
b. *Failing to wear protective clothing*
c. *Exposing himself to danger when he knew or ought to have known*
d. *Failing to adhere to the working and safety precautions laid down by the defendant*
e. *Failing to use the implements of work provided to him*

7. Appellant's testimony as PW2 in the subordinate court was that he was employed by the Respondent as a general worker. On 9th January, 2004(2001 in the plaint and cross-examination) he was assigned the duty of pouring dye into the pulpor machine. While doing so, the dye splashed and entered into his left eye occasioning severe burns and irritation. He attributed the injury to the Respondent's negligence for failure to issue him with goggles. He stated that the machine was open and he could not prevent the paint from spilling. He recounted that he informed the Personnel Manager Mr. Mbilika. He was then issued with an accident form (P. Exhibit 2). He was treated at 44 Healthcare Enterprises and at some point attended Baba Dogo Clinic and P.C.E.A. Clinic but for chest ailment not eye problem.
8. Dr. Okoth Okere (PW1) examined the appellant on 13th June, 2004 and confirmed that the Appellant had sustained an irritation on the left eye and complained of hypersensitivity of the affected eye. He produced a medical report (P. Exhibit 1(a))to that effect and receipts for the medical report for KShs. 1,500/= (P. Exhibit 1(b) and for court attendance for KShs. 5,000/= (P. Exhibit 1(c)).
9. The Respondent denied the Appellant's claim. Mr. Charles Wamari (DW1) testified and contended that the Appellant sustained an eye injury in the year 2003 and not 2001 as claimed. He produced a referral letter dated 12th June, 2003 issued by Presbyterian Clinic where the respondent used to send its sick employees for treatment and the year is 2000 as (D. Exhibit 1 (a) and (b). He stated that the employees would also go to Babadogo and Goodwill Clinic.
10. The witness also stated that the issue of protective gear could not arise in this case because the appellant was never injured on the alleged date. He however admitted in cross examination that employees could get injured many times. Further, he also admitted that Respondent kept accident records and that the employee would fill the forms but that not all accidents are recorded in the accident form.
11. The witness further stated that in 2000 the appellant got injured in the eye. He stated that the company had specific clinics where its injured employees would be attended and the company would pay hospital bills when an employee is injured in the course of duty. He acknowledged that the Respondent never used to issue protective gears until the year 2001.

12. In re-examination the witness stated that the respondent did not recognize 44 Healthcare Clinic. He maintained that he was working with the appellant on the 9th January, 2001 and that the appellant was not injured on the material date. He also stated that an accident form must have a rubber stamp.
13. The parties' advocates filed and exchanged written submissions.
14. For the respondent it was submitted that in an injury accident claim, it is necessary not only to prove that an accident occurred but that an injury was sustained as a result of the said accident. Further, that since the appellant was examined by the Doctor Okere 3 years after the accident and use treatment notes in possession of the appellant in reviewing the appellant's medical history, the appellant's allegation that the medical notes were in possession of the respondent was rebutted.
15. It was further submitted that therefore the appellant failed to prove any injury and that the case **of Kiwani Hardware Ltd v Laban Kiilu Muthoka CA 17/2008** the court relied don medical report as well as P3 form. In their view, there was no corroboration of Dr Okere's medical evidence since he did an independent examination. The respondent relied on **CA 91 Chemilil Sugar Co. Ltd V John Ouma** that treatment notes would be the only way of occurrence of accident and link between appellant and respondent.
16. For the appellant it was submitted that he had proved on a balance of probabilities that the accident occurred and that he was injured as a result of the respondent's negligence as shown by the factory accident report, his testimony on oath and Dr Okere's medical report which confirmed the injuries sustained by the appellant and the degree thereof.
17. The appellant took issue with the failure of the respondent to produce the initial treatment notes, which were in its custody and which issue the trial magistrate had found in favour of the appellant so as to confirm that the respondent was indeed injured and treated. He also took issue with the trial magistrate dismissing his suit even after finding that there was an accident involving him while he was at work and in awarding him damages that were inordinately low and in failing to award him costs of the suit since he had succeeded partially. He relied on two case **HCC 125/1989 David Ndungu Macharia v Samuel K Muturi &another** and **HCC4045 OF 1988 Kabugu Mutua v Kenya Bus Service Ltd** that failure to produce treatment notes was not fatal to a party's case. It was also submitted that the appellant had proved his case on liability hence the respondent should have been found to blame 100%.
18. The trial court heard the case but dismissed it on account that the appellant did not produce treatment documents to support his claim. He found that the respondent's witness had conceded that the respondent kept records of accidents in the company and that in the circumstances, it was incumbent upon the respondent as the custodian to demonstrate that no entry as regards the appellant were made. The trial magistrate also found that the appellant had on balance probabilities proved that an accident did occur on the material day as further proved by the accident report form.
19. I have carefully examined the lower court record. The law is clear that the burden of proof lies on he who alleges. See sections 107-109 of the Evidence Act. In civil cases, the standard of proof is on a balance of probabilities, not beyond reasonable doubt.
20. **In my humble view, the issues for determination in this appeal are:**

a. *whether the appellant sustained any injuries as a result of the accident which the trial magistrate found had occurred on the date in question.*
b. *Whether the trial magistrate was correct in apportioning liability between the appellant and respondent.*
c. *Whether this court should interfere with the quantum of damages awarded by the trial magistrate/what is the appropriate quantum of damages awardable to the appellant*
d. *Whether the trial magistrate should have awarded the appellant costs of the suit for partial success*
e. *What order should this court make*
f. *Who should bear the costs*

21. As to whether the appellant sustained any injuries the trial magistrate found that failure to produce treatment notes which the doctor Okere relied on at the time of examination in 2004 was fatal to the appellant's case as the medical report alone could not prove injury sustained on the material

date.

22. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

23. The above decisions followed the principles laid down in **Peter v. Sunday Post (1958) at pg. 429**).

24. Circumstances under which an appellate court may interfere with a decision of the trial court were set out in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, where the court stated as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

25. Evaluating the evidence on record, while the Respondent denied that the Appellant was injured on the material date, the Appellant produced an accident form he alleged to have been issued with by the Respondent. The Respondent did not say that the accident report form was not issued on the date of accident by the respondent, apart from the witness DW1 saying that the form was strange because it had no official rubber stamp. The respondent nonetheless did not produce any other accident report form for comparison to show that all accident report forms issued by the respondent had to bear the official stamp. Further, they did not contest the contents of the said accident report form which gave a description of the reported accident involving the appellant on 9th January, 2001, to whom he reported, those who were present as witnesses when the accident occurred and the nature of the injuries sustained, including whether or not the appellant was taken to hospital for appropriate treatment.

26. The trial magistrate stated that based on the accident form, he believed that the accident occurred on the material date involving the appellant while he was engaged at his work. See page 73 of record of appeal. It therefore follows that in the absence of any cross appeal, the issue of whether or not the accident occurred is spent. However, at page 74 of the record, the trial magistrate found that in the absence of treatment notes which the doctor relied on in 2004 to examine the appellant, the he appellant had not proved that he was injured on the material date.

27. The respondent's witness admitted that the Respondent was the custodian of accident records for its employees who got injured while engaged at work and that the injured employees attended specific clinics upon which the company would pay hospital bills. The trial magistrate also accepted that evidence and submission. In view of the above evidence, would there be the necessity for the appellant availing the record to clear the court's mind that indeed the Appellant's name was not entered as the one who was injured on the material date.

28. In this case, the appellant alleged that he was injured on 9th January, 2001. It therefore follows that first; he had to show that on that day an accident did occur an dthat he was injured. According to the accident form Pex 1 filled on 20/1/2001 after the accident is alleged to have occurred, the appellant was injured on the left eye while pouring green dye in the container. The dye then jummed (sic) into his left eye. The said form was signed by the supervisor, Mr B. Gichuki on

20/1/2001.

29. Further, Pw1 Dr Okere in his testimony in court stated that the appellant had gone to his clinic for medical examination in 2004 with treatment records from Forty Four clinic Enterprises Health Care. The appellant never stated in his testimony where those treatment notes were. He had however issued notice to produce them to his employer the respondent who nonetheless filed notice of non production stating that the documents were not in its custody. It is the same employer's witness DW1 who admitted that the company kept accident employees' records and that the injured employees would also fill the forms. He also confirmed that it was the company that paid for their treatment at selected clinics like Babadogo and Good will. He stated that the company did not recognize 44 healthcare clinic.
30. The respondent produced in court medical documents that had no relation to the accident which the appellant alleged occurred on 9th January, 2001 and therefore those documents were in my view irrelevant, as they related to an accident which allegedly occurred in 2000. TheDW1 produced some "medical report" for the appellant dated 9/11/2000 from Presbyterian Central Mission of Africa showing the injury to have been on the **right eye** due to acidic paint.
31. The Respondent's witness also claimed that he remembered that the appellant was injured in 2003 in the eye. In cross examination he stated that the appellant complained of chest injury in 2003. The respondent's witness also testified that an employee could be injured many times. But he went ahead and produced documents relating to very irrelevant injuries including malaria and typhoid which it was not shown were caused by an industrial accident.
32. This court has held on several occasions that the presumption in law is that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him. There was no evidence from the record to suggest that the appellant had the treatment notes with him which he refused to produce in evidence, which would lead to an inference that had he produced them, they would have been adverse to his case.
33. On the other hand, the respondent admitted that they kept the employees' accident records and the trial magistrate confirmed that issue. Therefore the burden of proof shifted on the respondent to produce those records. The record also shows that the appellant served the respondent employer with notice to produce documents dated 1st March, 2005 which included treatment notes, job identification card and accident claim form. The respondent in a rejoinder filed notice of non production of the said documents saying they were not in their custody hence they could not produce the documents requested.
34. The respondent also send request for particulars to the appellant's counsel and by a response dated 16th December, 2005, they were answered to the satisfaction of the respondent since no issue was raised concerning any of the questions put to the appellant.
35. In view of the said disposition I am inclined to hold that the Respondent withheld documents that could show that the Appellant got injured on the material day pleaded, which was on 9th January, 2001.
36. The initial treatment notes were useful in providing consistency and corroboration to the respondent's evidence. They were also useful in showing the extent of the respondent's injury. Nevertheless, i find that the circumstances of this case, can be distinguished from the **Chemilil sugar Co. Ltd v John Ouma** (supra)in the sense that the record of that case is clear that *the treatment chit was produced but it was shattered by the fact that it was not formally tendered in evidence. It was merely marked for identification so that it could be formally treated as evidence for consideration by the court and to discharge the burden of proof upon the respondent*.
37. Further, in that case, the court found that the treatment chit was the only evidence that would have shown the occurrence of the accident claimed by the respondent and served as a link between the respondent and the appellant. In this case, the DW1 confirmed that the appellant worked for the respondent and that he was with the respondent n the day when it is alleged the accident occurred, only that he did not see any accident occur on that day but on a different date in a different year altogether. It is also instructive to note that the trial magistrate found that there was an accident on the material date involving the appellant, which finding has not been challenged by the respondent on appeal. For the respondent to successfully challenge the findings of fact by the trial magistrate they ought to have filed a cross appeal and not create their own grounds of appeal and sneak them into the appellants' appeal.
38. In my humble view, therefore, the respondent's reliance on the Chemilil Sugar Co case is

misconceived.

39. Had I found that the Respondent had a genuine treatment card, and the same was not produced as an exhibit, but marked for identification, I would have upheld the rulings in various court decisions, notably **Comply Industries Ltd –vs- Mburu Simon C. A. No. 121 of 2005,** that failure to produce treatment cards does not lead to dismissal of injury claims, and also in **Timsales Ltd –vs- Stanley Njihia Macharia – CA 148 of 2005** that failure to produce the treatment notes was not fatal to the Respondent's case. See also Mulwa J in **Timsales Limited v Patrick King'ori Mwangi [2015] eKLR.**
40. I also find that while the court is not bound to accept and follow medical evidence and that it must form its own independent opinion based on the entire evidence before it, such evidence like other expert evidence must not be rejected except on firm grounds. See **Juliet Karisa Vs Joseph Barawa & Another CA 108/1998 and REPUBLIC VS NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES AND ANOTHER EXPARTE TOWN COUNCIL OF KIKUYU (2014) eKLR** *and* ***Civ Appl no. Nai 25/2001 Cancio De SA v Amin (1934) EACA 13 at 15***.
41. I am satisfied therefore that the respondent was injured in an industrial accident while at work. absence of the treatment notes was not fatal to the appellant's case and that there was no firm ground upon which the trial magistrate dismissed the Dr Okere's medical examination report on the appellant which confirmed the appellant's injuries and which injuries were consistent with what was recorded in the accident report form filled by the respondent and produced in evidence. In my view, whether or not failure to produce the treatment card is fatal to a party's case depends on the individual case and there are many schools of thought on this aspect which the trial court did not consider.
42. It was not shown that the appellant appeared an unreliable witness and or that from his appearance in court, he could not have been injured. He called the doctor who examined him and confirmed the injury which was in the left eye.
43. I have also noted that although DW1 stated that the documents he produced were issued in the year 2003, D. Exhibit 1(a) was not issued in the year 2003 as alleged but on 9/11/2000 from Presbyterian Central Mission of Africa. The said document is addressed to Personnel Officer of the respondent and also refers to an attached invoice of Ksh 700 being consultation fees which was not produced in evidence. There is no evidence of when that fee was paid. The invoice was also not attached to the exhibit produced in court.
44. DEx 1b is said to be a "medical report" and there is no indication that the author thereof who was also the one signing invoices DEx 1c and 1d was a doctor or medical officer. In addition, i have examined DEx 1b and in my view, it has nothing to do with the accident and injury of the appellant which in my view, the accident referred to in 2003 by the respondent must have been a totally different accident from the appellant's claimed accident which occurred on 9th January, 2001.
45. The appellant, who was the victim and primary source of information, testified on oath on how he was injured. He was never discredited by the court. I find that the evidence before the trial magistrate was sufficient to prove on a balance of probability that the respondent was injured during the course of his employment. In the circumstances, I find that the Appellant proved that he was injured on the material day in 2001.
46. **On the issue of contribution and damages**, this court has to determine whether the appellant proved his case on a balance of probabilities and if so, was he contributorily negligent as pleaded by the respondent. However, since the trial magistrate established that the respondent was liable for the accident in the proportion of 80:20 save for the injury and the level of contribution being contested, I will only examine the issue of contribution.
47. In **HALSBURY'S, LAWS OF ENGLAND, 4TH Edition i**t is stated at paragraph 662 (p. 476) as follows:-

> ***"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."

48. In **BONIFACE MUTHAMA KAVITA V CARTON MANUFACTURERS LIMITED CIVILAPPEAL NO. 670 OF 2003[2015]eKLR Onyancha J** observed that:

> ***"The relationship between the Appellant 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 to expose the employee to an unreasonable risk.***

According to **Winfield and Jolowicz on Tort 13th Edn.p.203 …Employers liability is defined: -.**

> ***"At common law the employers 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 even 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 in what relevant respect it was not observed."***

49. The principle of law emerging from the above cases is also applicable to the facts of this case and I shall apply accordingly.
50. The appellant pleaded that he sustained injuries due to the negligence of the respondent and stated the particulars of breach of statutory duty which I have reproduced hereinabove.
51. With a clear admission by the respondent's witness DW1 that the company did not provide any protective gears in 2001 at the time of the alleged accident, and that it now provides workers with protective gears, I find no basis upon which the trial magistrate apportioned liability in the ratio of 80:20 in favour of the appellant against the respondent. In **Winfield and Jolowicz on Tort by WVH Rogers 14tnh edition, London Sweet and Maxwell p 213** it is stated that:

> ***"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty."***

In this case, the respondent could not escape liability. It did not show how the appellant contributed to the material accident as pleaded in paragraph 5 of its defence. The Court of Appeal in ***EMBU PUBLIC ROAD SERVICES LTD VS RIIMI(1968)EA 22 stated that:***

" where the circumstances of the accident give rise to the inference of negligence then the defendants, 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."

In addition, it was erroneous for the trial magistrate to find that since the appellant had worked for 5 years without incident and that as the machine was not faulty, nothing unusual happened in the manner the appellant performed his work on the material date. In **HALSBURY'S LAWS OF ENGLAND 3RD EDITION VOL 28 PARA 88.** It was stated that:

" where the relationship of master and servant exists, the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employer.(emphasis added).

Nyarangi JA echoing the above words in **MAKALA MAILU MUMENDE VSNYALI GOLF COUNTRY CLUB (1991) KLR 13** had this to say:

"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." (emphasis added).

52. It was clear from DW1 that the respondent did not provide any protective gear such as goggles to the employee. It did not do anything to lessen that injury to the appellant while he was engaged upon his work. The respondent did not say what the appellant was expected to do that he did not do thereby risking his life or exposing himself to that risk of injury. It did not require the appellant to be injured before such protective gears are provided. It is a statutory duty for every employer to provide such protective devices to its employees while engaged upon their work which was risky.
53. 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, goggles and head coverings, shall be provided and maintained for use of such workers."***

54. The respondent's witness admitted that in 2001 no goggles were provided but the situation had since changed. It is for that reason that I fault the trial magistrate for apportioning liability between the appellant and respondent, when it was apparent that the employer did not provide any protective devices to its employees, thereby exposing them to a risk of injury, having regard to the nature of the work that they were engaged upon.
55. On quantum, the appellant complained that the trial magistrate erred in law and fact in awarding damages that were inordinately low considering the injuries sustained by the appellant. In deciding whether it is justified to disturb the quantum of damages awarded by the trial court, an appellate court must be guided by some principles.
56. In **Kemfro Africa Ltd T/A Meru Express Services Gathogo Kanini vs A.M. Lubia & Olive Lubia (1982-1988) 1 KAR 727,** Kuella JA at page 730 stated that:-

> ***" The principles to be observed by an appellate court in deciding whether it is justified in distributing 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 that the judge in assessing the damages, took into account an irrelevant factor or left out of account of relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage(citing with approval Ilango vs Manyoka (1961) EA 705,709,713; and Lukenya Ranching and Farming Co-operatives Society Ltd vs Kavoloto (1970) EA 414, 418,419). This court follows the same principles."***

57. The same principles were upheld in ***Loice Wanjiku Kagunda v Julius Gachau Mwangi are instructive CA 142 of 2003, t***he court of Appeal held that:

> ***" we appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles(see Mariga V Musila (1984)KLR 257."***

58. The trial magistrate stated in his judgement that he had considered the authorities submitted albeit he did not specify which authorities. Nonetheless, the record shows that only the appellant's

counsel submitted on the question of quantum. The respondent's counsel only urged the court to dismiss the suit. the appellant had submitted the case of **Nairobi HCC 2149 of 1988 Peter Munyao v Mbithero General Store decided in 1994** wherein the plaintiff lost his left eye resulting in total loss of sight. He was awarded kshs 150,000 general damages.

59. In this case, albeit the appellant claims that the award was inordinately low, I disagree. The authority relied on had more serious injuries of total loss of sight unlike in the instant case where the appellant suffered only irritation of the eye and complained of photophobia. The doctor Okere who examined him did not say that the appellant risked losing the use of the injured eye. I therefore find that the trial magistrate correctly exercised his discretion in awarding shs 90,000.00 and I will not interfere with that award by the trial court for that reason. The award on damages was reasonable bearing in mind the extent of injuries sustained by the Appellant.
60. **On the issue of costs of the suit in the court** below, the appellant complained that since he had succeeded partially, he should have been awarded costs. **Under section 27 of the Civil Procedure Act, costs follow the event and, unless for good reason given, to the successful litigant.** In **R. V SPM Mombasa & Others Exparte Nicholas Katumo Peter** Mombasa **Misc. CA CJR 65/2013** the court held:

> ***"The court must consider that litigation as with other legal business is costly in terms of time, Money, inconveniences and the opportunity cost while attending to the court matter, and a party who by conduct causes another to seek relief in court or who seeks court's intervention upon grounds that the court ultimately dismisses as unmeritorious must be ready to meet the costs incurred by the other party in seeking the court's intervention or in defending himself or protecting his interests in the subject matter. The successful party is entitled to the costs in accordance with the principle that costs follow the event. The law as set out in Section 27 of the Civil Procedure Act requires good reasons for departing from the said principle."***

61. Further, in **Singh V Gurbanlite Ltd (1985) KLR 920** the Court of Appeal held that the discretion of the court is to be exercised as the basis of the extent of success of the case.
62. In this case, it is clear that the trial magistrate had found that although there was proof of an accident involving the appellant while engaged upon his work on the material date, the appellant did not prove injury hence dismissed his case. That being the case, it is frivolous for the appellant to assume that he was entitled to costs of partial success of his suit that was in essence dismissed for want of proof of injury. In any event, the trial magistrate must have acted out of sympathy in failing to penalize the appellant to pay costs of the suit to the respondent employer. But since the respondent did not file any cross appeal, I will not belabour that point.
63. However, following my re evaluation of evidence and determination above and upon my finding that the appellant was injured due to the respondents' sole negligence and or breach of statutory duty, there is no reason why I would deny him as a successful litigant costs of the suit in the court below. I further award him special damages as pleaded and proved in the sum of kshs 1500. There was no proof of loss of earnings and or earning capacity. The doctor's court attendance fees cannot be a special damage. It is a cost of the suit. I decline to grant it as it was not even pleaded.
64. In the end, I allow this appeal to the extend specified herein. I set aside the findings of the trial magistrate on contributory negligence, and find the respondent wholly liable for breach of statutory duty of care.
65. I further set aside the finding of no injury to the appellant and find that the appellant was injured on his left eye following the industrial accident on 9th January, 2001. I dismiss the appeal on quantum and sustain the award of shs 90,000 made by the trial magistrate. The appellant shall have costs of the suit in the court below and costs of this appeal.
66. The general damages shall bear interest at court rates from date of judgement in the lower court until payment in full. Special damages bear interest at court rates from date of filing suit until payment in full

Dated, signed and delivered in open court at Nairobi this 27th day of October, 2015.

R.E.ABURILI

JUDGE