REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 32 OF 2012

JOSHUA SHITAWA……..….....APPELLANT

VERSUS

KISHAN BUILDERS LIMITED…….....RESPONDENT

(Being an appeal from the original judgment and decree of J. A. Owiti,Resident Magistrate in Eldoret CMCC No. 178 of 2011 delivered on 8th March 2012)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Resident Magistrates Court dated 8th March 2012. The appellant had brought a suit against the respondent for the tort of negligence. The learned trial magistrate found that the appellant failed to prove liability. The suit was dismissed with costs.
2. By a plaint dated 6th April 2011, the appellant pleaded that on 21st January 2011 he was mopping up the floor at *Kenyatta* University Plaza. The evidence at the trial indicated that the premises were those of *Mount Kenya* University Plaza. The floor was flooded. He touched a live electric cable; he fell down and suffered severe injuries. He blamed the respondent for failure to provide a safe working environment. In particular, failing to provide him with safety gear, compelling him to work on a slippery floor and exposing him to injury. In a defence dated 29th April 2011, the defendant denied the claim *in toto*.
3. At the hearing, the plaintiff testified he had not been provided with a helmet, gum boots or gloves. Since the floor had a lot of water, he said he could not put on gum boots. When he touched the electric cable, he suffered shock; was thrown up and fell down. He said the cable had not been insulated and he could not see it. He blamed the plumber. He opined that if he had been wearing gloves, he would not have suffered electric sock; and, that a helmet would have prevented injuries to his head.
4. The appellant suffered burns on his right thumb. He was treated on 21st January 2011. He was given a tetanus injection. The wound was stitched up and he was given antibiotics and analgesics. The injuries were confirmed by PW2 and PW3, a clinical officer and medical practitioner respectively. They both confirmed the injuries were of soft tissue nature.
5. The respondent called one witness, Simon Ndiego. He was a foreman. He is the one who assigned duties to the appellant. He confirmed he had not given the appellant gum boots or gloves. He said four employees were working on the flooded section. In his view, the appellant must have touched the live cable at source; otherwise all the other employees would have suffered electric shock.
6. The appellant claimed general damages; special damages of Kshs 4,700; and, costs of the suit. The lower court opined that general damages of Kshs 120,000 would have been sufficient. The court also found that only special damages of Kshs 1,500 were proved. As I have stated, the court found that liability was not established. The suit was accordingly dismissed with costs.

7. The appellant has challenged those findings through a memorandum of appeal dated 24th February 2011. The appeal was lodged out of time pursuant to leave of the court granted on 26th March 2012. The appellant contends that the learned trial magistrate erred by failing to find a nexus between the negligence of the respondent and the injuries to the appellant; that the learned trial magistrate failed to appreciate that there was no privity of contract between the appellant and the proprietors of the building; and, that it was the duty of the respondent to enjoin the owners into the suit. He also contended that the trial court disregarded his submissions and list of authorities.
8. The appeal is contested by the respondent. The respondent submitted that negligence or fault was not proved. The respondent contended that the burden of proof was always on the plaintiff; and, that the appellant sued the wrong party. I was implored to dismiss the appeal.
9. The appellant has filed submissions dated 20th February 2015 with authorities annexed. The respondent's submissions were filed on 7th July 2015. On 29th September 2015, I heard learned counsel for both parties. I have considered the appeal, the record of appeal, the pleadings in the lower court, the evidence and the rival submissions.
10. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
11. I will deal first with the element of negligence. It was common ground that the appellant was employed by the respondent on the material day. The accident occurred in the course of his *employment*. The key question is whether the employer was negligent by failing to provide a safe working environment. Paraphrased, whether the accident was the result of either failing to provide him with a helmet, gloves or gum boots; or exposing him to the risk of electric shock. The respondent was a contractor. Its foreman, DW1, assigned the appellant to mop up the water on the floor. It was the first time that the appellant was cleaning the section.
12. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR.
13. The legal burden of proof that the employer had not provided a safe working environment was entirely on the shoulders of the appellant. See *Winfield and Jolowicz on Tort*, Sweet & Maxwell, London, 13th edition at page 23. True, the respondent did not call any evidence in rebuttal. That did not mean that the plaintiff's evidence *proved* negligence. It is a cardinal precept of the law of evidence that he who alleges must prove. See sections 107 and 109 of the Evidence Act. The point is that the respondent had by its *amended defence* dated 20th December 2006 denied the claim *in toto*.
14. From the evidence, the floor was waterlogged. The electric cable was submerged in the water. The appellant conceded he could not see it. If he could not see it, it would be unreasonable to say that the respondent or its supervisor saw it. When cross-examined, the appellant conceded that the foreman had not seen the wire before he assigned him duties. There were other employees cleaning the floor or draining the water. I have reached the inescapable conclusion that the accident happened when the appellant touched the live wire; most probably at the source. I say so because the shock would otherwise have affected the other employees. I would then not agree with the plaintiff *"that the defendant ought to have known that the electric wire was on the floor where [he] mopped water"*. Upon cross-examination (page 34 of the record) the appellant answered: *"I do not know who was in charge of the electrical wire in the plaza"*. The respondent's witness, DW1, told the court that the contract for electrical works was executed by a different party. That contractor was *not* enjoined as a tortfeasor. The trial court thus arrived at the *correct* conclusion that the culpability of the respondent for negligence was moot.
15. The appellant contends that his submissions and authorities were disregarded by the trial court. That is not true. At page 16 of the typed record, the learned trial magistrate considered *two* of the cases relied upon by the plaintiff. Submissions are only for the guidance of the court: they are

unlike pleadings. There is no requirement that each and every submission or authority tendered be revisited by the trial court in its judgment.

16. The task given to the appellant was to mop up a waterlogged floor. It was a simple task requiring no specialized training or equipment. I would not say there was a foreseeable risk of *electrocution* by a cable. The cable was not visible to either party. The water was knee deep. This was an unfortunate *accident*. Like I stated, the duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions.
17. Considering that the floor had over flooded, having gloves may not have prevented electric shock. A helmet would have obviously prevented injuries to the appellant's *head*. But from the medical report of Dr. S. Aluda (exhibit 2A), the injuries were aseptic wound and tenderness or swelling to the right *thumb*. Again, by his own admission, the appellant said the water was *knee-high*. Accordingly, gum boots would not have been useful. In a synopsis, from my re-evaluation of the evidence, the appellant failed to establish negligence. The appeal on liability is thus devoid of merit and is dismissed.
18. I concur with the learned trial magistrate that the injuries to the appellant's thumb were serious. The general damages proposed of Kshs 120,000 would have been reasonable. These were soft tissue injuries that would all eventually heal. The appellant specifically pleaded for special damages of Kshs 4,700. He was only able to *prove* Kshs 1,500 as costs of the medical report as per exhibit 2B. There was no concrete or documentary evidence tendered on medical expenses. But that is now all water under the bridge.
19. The upshot is that the entire appeal lacks merit. It is dismissed. Costs are at the discretion of the court. The respondent was granted costs in the lower court. The appellant suffered serious injuries. Considering the predicament he now finds himself in; and, in the interests of justice, I order that each party shall bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 12th day of November 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance by counsel for the appellant.

Mr. Okara for Mrs. Khayo for the respondent instructed by Nyairo & Company Advocates.

Mr. J. Kemboi, Court clerk.