REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 6 OF 2010

PECHE FOODS LIMITED……..APPELLANT
VERSUS
FLORA ISAVRI SHISIMBA……RESPONDENT

JUDGEMENT

The Respondent moved to the seat of justice vide a plaint dated 18th day of May 2009 and filed on the 15/5/2009. The salient features of the same are as follows:-

- **That the appellant was at the material time her employer, vide a contract of employment by whose terms it was the duty of the defendant to take all reasonable provision for the safety of the plaintiff while she was engaged upon her work, not to expose her to risk of damage or injury which the defendant knew or ought to have known, to provide and maintain adequate and suitable measures to enable the plaintiff carry out work in safety and /or to provide and maintain a safe and proper system of work.**
- **Vide paragraph 5 that on or about the 27th day of February 2009 the plaintiff was lawfully in the cause of her employment as a filler and cleaner was discharging her duties as such, when due to the negligence and breach of statutory duty on the part of the defendant, the plaintiff scooped and fell down when she sustained severe injury as a result thereof, she suffered pain, loss and damage for which she holds the defendant liable. The particulars of negligence , breach of contract, statutory duty and or common law duty of care on the part of the defendant and or its other employees are particularized as failing to provide and take adequate precaution for the safety of plaintiff while engaged in work , exposing the plaintiff to risk of injury for which they knew or ought to have known, failing to take measures to prevent the accident, causing and permitting the accident to occur, failing to provide the plaintiff with protective gear particularly gum boots, and failing to provide a safe system of work and failing to discharge the common law duty of care in breach of the occupies liability Act.**

Particulars of injury are listed as fracture on the left hand wrist, deep cut on the head, deep cut on the chin, blunt injury on the chest.

In consequences thereof the plaintiff sought general damages, costs of and incidental to the suit plus interest and interest on damages and costs.

The defendant was served, entered appearance and filed a defence dated 24th day of June 2009, and the salient features of the same are as follows:-

- Denied ever employing the plaintiff either as a casual employee or at all, denied any privity with

the plaintiff, denied any contracted, statutory or other legal duty to the plaintiff to take any reasonable care and precaution while engaged in any work, provide or maintain adequate measure towards the plaintiff and put the plaintiff to strict proof.

- Denied on the 27/2/2009 or any other date the plaintiff was engaged in any work in the defendants premises as a filler and cleaner when she slipped and fell down injuring herself and puts the plaintiff to very strict proof thereof.

- Vide paragraph 5, thereof that without prejudice to the foregoing in the alternative, the defendant pleads that if the plaintiff was ever in its employment, which is denied, then the plaintiff was there by reason of having applied to be employed as a casual labourer for the purpose of filleting fish and cleaning and with full knowledge that such work involved slippery surfaces and if handled without care, one is bound to fall. The defendant therefore pleads that the plaintiff volunteered to the injuries complained about and invokes the principles of volenti non fit injuria.

- Vide paragraph 6 that further in the alternative the defendant pleads that if the plaintiff was ever injured as pleaded, then such was a design of her own or outright negligence on her part for which the defendant cannot be held liable.

Particulars of negligence attributed to the plaintiff were given as failing to use the gear provided, and in the prescribed manner failing to adhere to the prescribed instructions while at work, performing her duties without care, or attention, deliberately falling down on a slippery surface with intention to get injured and bring this suit and acting contrary to the represented and expected expertise.

In consequences thereof prayed for the plaintiffs' suit to be dismissed with costs.

The plaintiffs' reply to defence is dated 6th day of July 2009 in which she denied the negligence attributed to her, reiterated the content of the plaint and put the defendant to strict proof.

Parties were heard and judgment dated 17/12/2009 delivered. The salient features of the same as follows:-

- At page 10 line 7 from the top the learned magistrate observed thus:-

"From the foregoing, there is no issue with regard to the employment of the plaintiff not whether she was on duty on 27th February 2009; there is also no dispute as to whether the plaintiff was injured". That what was disputed was whether the defendant was to blame for the injury.

- That it was agreed that the floor was wet.

- The plaintiff denied being provided with gum boots, that the store keeper was absent hence she could not access the gum boots.

- The court made further findings that the floor was slippery due to the business of fish processing.

- The court did not think that the plaintiff was in control of the floor. It was the defendant who was in control of the condition of the floor which was slippery.

At line 5 from the bottom on the same page 10, the learned trial magistrate quoted with approval Nyarangi J as he then was in the case of **MAKALA MAIHU MUMANDE VERSUS NYALI GOLD AND COUNTRY CLUM CA NO. 16 OF 1998** where the learned judge as he then was held and or observed thus:-

"Just because an employee accepts to do a job which happens to be inherently dangerous is in my judgment no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection"

On the basis of that reasoning, the learned trial magistrate made findings that the defendants were liable to the extent of 80% and the plaintiff will contribute 20%. That the medical report of Doctor Okembo shows that the plaintiff sustained fracture of the left ulna bone, scars above the right eye and left side of the chin and tenderness of the chest and considering the injuries sustained, and the authorities cited, the court assessed general damages of Kshs. 180 ,000.00 no special damages were pleaded. The award was subject to 20% discount which brought down the final award to Kshs. 144,000 with costs and interest from the date of the judgment.

The appellant became aggrieved by that judgment and he has appealed to this court citing five grounds of appeal. These are that the learned trial magistrate erred both in law and facts:-

(i) In finding the appellant 80% to blame for the accident when the evidence adduced was to the effect that the appellant has discharged his obligation to the respondent by provisions of safety gear expected.
(ii) In failing to find that the plaintiff having involved herself in the manual work of cleaning the floor was essentially performing manual work without requirement of expertise and the appellant could thus not be held liable.
(iii) The apportionment of liability was arbitrary and contrary to law and evidence adduced.
(iv) In disregarding the appellants evidence without assigning any valid reason thereof.
(v) The judgment and award of damages were thus against the weight of evidence and contrary to the law.

In consequences thereof the appellant urged the court to allow the appeal, dismiss the lower courts' case with costs.

In their written submissions the appellant framed the issues for determination on appeal by this court and then stressed the following:-

The plaintiff said on oath that she was cleaning the floor which became slippery and that she fell by herself.

- There was nothing that the defendant could do to prevent the floor from being wet because the floor had to be wet because it was being cleaned and the plaintiff who made it wet was bound to exercise due care when performing the work.

- That in apportioning liability the trial court also failed to take into consideration the elaborate and documented evidence by the defendant to the effect that indeed safety/protective gear was given to the plaintiff and that the same was duly signed for her.

- The trial court also failed to note that the evidence by the defendant was also uncontroverted.

- The trial magistrate failed to note that case law on the subject was in agreement that where an employee is engaged in manual labour that does not require any exceptional skill and injury himself then such an employee cannot hold the employer liable under statute or common law. By reason of this the Respondent having been employed to work as a filter and a cleaner was essentially performing manual labour and as such did not require any exceptional skills and subsequently cannot hold the appellant liable under statute or common law.

- That it is trite law that when apportioning liability the court ought to consider the evidence adduced. In this case it is contended that the court failed to consider the plaintiff was provided with protective gear which she signed for and for this reason she failed to take precautions to protect herself.

- Contends that the trial magistrate failed to comply with the requirement of the old order XX rule 4 by setting out a conclusive statement of the case, the points for determination, the decision thereon and the reason for such decision and for this reason since the judgment of the lower court did not take into consideration the weight of the evidence adduced and by failing to assign reasons for apportioning the

liability at 80-% as against the appellant without assigning reasons, the same stands faulted and it should be upset as the plaintiff was in control of the situation, she was in and if she was injured then she is solely to blame for the said accident and the appellant ought to be absolved completely.

The plaintiff/Respondents' submissions are dated the 4th day of July 2011 and filed on the 11th day of July 2011. In it, the learned counsel has reviewed the evidence before the lower court, drew out issues for determination and then stressed the following:-

- The plaintiff produced a job identification card to prove that she had been employed by the appellant.
- She produced treatment notes to prove that she was injured on the material day while employed by the appellant.
- She proved that it is the appellant who took care of her treatment after the injury.
- She proved that she sustained the injuries because she was not provided with gum boots and head gear.
- Proved that she fell because of a slippery floor.
- They rely on the decision in the case of **SOKORO SAW MILS LTD VERSUS GRACE NDUTA NGUGI NAKURU HCCC NO. 99 OF 2003** where the court held that "where an employee slipped and fell on a slippery surface then it was the employer who was to blame for failing to provide its employees with a safe working environment".
- The lower court rightly rejected the appellants evidence because the witness failed to prove that he as an agent or authorized representative of the appellant with power to give evidence in court on behalf of the appellant which is a corporate body on the one hand, and on the other hand, failed to prove that he was at any one time employed by the appellant.
- Since DW1 was not an eye witness to the accident, he cannot state conclusively that the plaintiff was negligent.
- The appellant only produced a photocopy of a document.
- The document allegedly vide which the plaintiff signed saying that she has received the protective clothing was never put to her to accept or deny its authenticity.
- This is further fortified by the fact that him appellant failed to produce and show the court a sample of the protective clothing.
- By reason of what has been stated above it is contended by the plaintiff that her evidence stands and remains unchallenged.
- On quantum, the learned counsel submitted that the injuries were proved, the Doctor gave an estimate of future medical care to be to the tune of 350,000.00.
- They still rely on the authority they had relied upon when in the lower court to support the award.

This court has given due consideration to the rival submissions above and the court notes that its jurisdiction has been approached in an appellate capacity. By reason of this, this courts' mandate is as it is spelt out in section 78 (1) of the CPA namely to invoke its appellate power **"to determine a case finally, to remand a case, to frame issues and refer them for trial, to take additional evidence or to require the evidence to be taken, to order a retrial with power to perform as nearly as may be the same duties as are conferred and imposed by this Ac on courts of original jurisdiction in respect of suits instituted therein".**

This being the case the duty of this court is to reevaluate the evidence adduced before the lower court, and then determine whether the conclusions reached by the lower court are to stands or not.

This court has revisited the lower court proceedings. These run from page 40 of the record. PW1 s evidence starts at page 41 and it is very brief and is to the effect that she had been employed by the appellant and produced an employment card, that she was on duty on 27/2/2009 when she was injured, and she was treated after the injuries and the injury were later on medically assessed. When cross examined the responses of the plaintiff were that the accident occurred, she was alone when she fell, she has been working with the appellant since 2005. She was alone when the accident occurred, she had no eye problems, that the store keeper was not present and she was not provided with gum boots. She did not know that she would get injured in the cause of work.

PW2 is the doctor who assessed the injuries and was firm that the plaintiff complained of a facial cut wound cut would on the chin, and injury to the left hand and chest injuries. The X-rays showed injury of the left Ulna bone, lower $^1/_3$ deformity of left wrist joint, scar on the eye brow, scar on the left chin and classified the injury as grievous harm and that costs of treatment would be Kshs. 350, 000.00.

When cross examined, he responded that he used the persons history treatment documents, X-rays and physical findings confirmed that the X-ray revealed a fracture and the radiologists' confirmed the same. There were chest tenderness, meant pain on palpation, that she had not fully healed and needed reconstruction of the scars.

The defence called only one witness whose summary of evidence showed that the plaintiff was on duty on the 27/2/2009. That the plaintiff was issued with boots.

(2) **Uniform.**
(3) Gloves and produced a copy of records in court as exhibit D1. She signed the book that she was issued with the items. Her duty was to wash the processing hall and table. It was wet and she fell. There was nothing more the factory could do.

When cross examined, the witness stated that he had no letter of authority to allow him testify in court. Had no sample of gum boots given. Conceded the floor was slippery. He did not witness the incident. He stamped the book for issue and signed and that the boss knows that he was in court.

The court has reviewed the afore said evidence in totality and the same considered in the light of the rival arguments herein and the court proceeds to make the following findings on the same:-

1. There is no dispute that the Respondent was at the material time an employee of the appellant, that she was on duty on the material day and that she was injured while on duty or in the cause of duty and that the floor was slippery.
2. The injuries narrated by her to have been sustained on this date formed the findings on the entries in the treatment chits and the findings of the Doctor who carried out the medical examination. The court is therefore satisfied that as submitted by the Respondents counsel, the Respondent was indeed injured on the day in question and in the course of duty. The appellant from their submissions do not seem to contest the issue of having been injured in the course of duty but contests liability.
3. It is evident that the respondent is seeking damages relies on the assertion of having been allowed and or permitted to work in a dangerous environment and that the falling was not self inflicted on the one hand . On the other hand she lays blame because of lack of protective clothing like gum boots, head gear and gloves.
4. It was correctly submitted by the Respondents counsel that in order to escape liability on this, it was necessary for the appellant to demonstrate that a slippery floor was a safe working condition on the one hand, and secondly that the Respondent had in fact been issued with protective clothing.
5. It is on record that in response to the Respondents assertion in number 4 above, the appellant fronted DW1 who produced a photocopy of a record to show that protective clothing was issued but as submitted by the Respondents counsel, this could have held water if it had been put to PW1 in cross examination and she confirmed that she signed for those items. In the absence of that, her assertions still stand. With regard to a slippery ground it was necessary for the supervisor to attend court and testify with regard to the precautionary measures put in place by the appellant with regard to shielding the employees from falling on a slippery floor. It was also necessary for them to confirm that even if protective clothing had been provided the plaintiff would have sustained the injuries any way.

The court was invited to be guided by case law on liability. The appellant has asked the court to be guided by the case of **SPIN KNT LIMITED VERSUS ALLOYS ADWERA NAKURU CA NO. 204 OF 2002** decided by Koome J on the 13th day of October 2006. In it the learned Judge quoted with approval the case of **STATPACK INDUSTRY VERSUS JAMES MBITHIN MUNYAO NAIROBI HCCCA NO. 152 OF 2003 .** In which the court had quoted with approval the decision of the house of Lords in the case

of **Wilsher =vs= Essex Area Health Authority 1AEE R 871**. While considering the issue of negligence, causation burden of proof and breach of duty just like in the present case the house of lords held that "**Where a plaintiffs' injury was attributed to a number of possible causes, one of which was the defendants' negligence the contribution of the defendants breach of duty and the plaintiffs injury did not give rise to a presumption that the defendant had caused the injury, instead the burden remained on the plaintiff to prove the causative link between the defendants, negligence and his injury although that link could legitimately be inferred from the evidence since the plaintiff retinal condition could have been caused by anyone of a number of different agents and it had not been proved that it was caused by failure to prevent excess oxygen being given to him, the plaintiff had not discharged the burden of proof as to causality".**

At page 3 of the same judgment line 9 from the bottom the learned judge made observation that in the same Wilshers case it had been emphasized that the plaintiff seeking a relief on account of damages must prove the following

(a) A breach of duty by the employer
(b) That such a breach caused the injury complained of"

At the same page 3 line 7 from the bottom the learned Judge quoted with approval the case of **Cecilia W. Mwangi and Another =vs= Ruth W. Mwangi Court of Appeal No. 251 of 1996 Nyeri** where the Court of Appeal had quoted with approval the statement by Lord Goddard C. J. in the case of **Bonham Carter =vs= Hyde Park Ltd [1948] 64 T. L. R. 1777** thus:- "**Plaintiff understands that if they bring action for damages it is for him to prove damage, it is not enough to write down particulars and so to speak throw them at the head of court saying this is what I have lost, I ask you give me these damages".**

There was also reference to the case of **Wilson Nyangu Musigisi=vs= Sasini Tea and Coffee Ltd Kericho HCCA No. 15 of 2003** decided by Kimaru J on the 10th day of February 2006. At page 4 of the judgment line 9 from the top, the learned Judge quoted with approval the case of **Mumias Sugar Co Ltd =vs= Samson Muyundo Kakamega HCCA No. 58 of 2000 (UR)** where Waweru J made observation therein that "**the respondents work for which he was engaged involved cutting sugarcane in an open field using a sharp panga. No machinery of any type was used in this exercise. He would hold a cane in one hand and cut its lowest point with a panga in the other hand. It was a simple operation which the respondent had full command and control. It was surely his duty to ensure that he did not cut himself with the panga. No evidence was led that in that type of work there was reasonable necessity to ensure that he did not cut himself with the panga. No evidence was led that in that type of work there was reasonable necessity of any type of protective clothing or that same were provided as a matter of cause in similar work elsewhere. There was no proof of hidden inherent danger in the operation of cutting down cane of which the appellant ought to have warned the respondent. To ensure that he did not cut himself with a panga was a matter that was particularly within the power and control of the respondent**". After making the observations the learned Judge Waweru j went on to hold inter alia that**: "Where an employee is engaged in manual labour that does not require any exceptional skills and injurs himself then such an employee cannot hold his employer liable under statute or common law".**

There is also reference to the case of **Godffrey Gatere Kamau =vs= Peter Mwangi Njuguna Nyeri Court Appeal No. 139 of 2003** decided by the Court of Appeal on the 6th day of June 2006. At page 3 of the said judgment, line 10 from the top the law lords of the Court Appeal quoted with approval the case of **B. G. Saint =vs= Kevin Hogan [1953] EACA 89** where it had been held inter alia that:-

"Reasons prepared subsequent to a judgment and not delivered in open court are not part of the judgment on the same". Page 3 the law lords drew inspiration from their own decisions in the case of **Tran South Conveyors Ltd =vs= Kenya Revenue Authority and others Civil Appeal No. 89 of 2007.** Consolidated with **Stuntware Ltd =vs= Kenya Revenue Authority** and two others where it had been held inter alia that:-

" The practice in all Civil Courts in East Africa is that suits commenced by plaint give rise to a judgment while Civil proceedings commenced in any other manner gives rise to a Ruling which is concluded by the making of an order. That would explain why we do not have any definitions in the Civil Procedure Act or Rules made thereunder of the term ruling".

At the same page 3 the law lords quoted with approval the old Order XX Rule 4 & 5 thus:- "**Judgments in defended suits shall contain a concise statement of the case, the points for determination thereof and the reasons for such determination**

(5) In suits in which issues have been framed, the courts shall state its findings or decisions with the reasons therefore upon each separate issue".

At the same page 3 quoted with approval the case of **Wamutu =vs= Kiarie [1982] KLR 480** thus:- **"Judgments in defended suits shall contain a concise statement of the case, points of determination, the decision thereon, and reasons for such a decision as required by Order XX Rule 4 of the Civil Procedure Rule".**

Also at the same page 3 the same law lords of the Court of Appeal drew inspiration from another decision of their own in the case of **J. P. Machira t/a Machira & Co Advocates =vs= Wangethi Mwangi and another Court of Appeal No. 179 of 1997**. It is observed that this was a majority decision where Akiwumi J. A. as he then was now (Retired) had this to say:- **" I think that as is required by Order XX Rule 4 of the Civil Procedure Rules in respect of judgments, a ruling in an application which is opposed such as the one made by the applicant and opposed by the Respondents, must be self contained and should contain a concise statement of the case, the points for determination, the decision there on and the reasons for such decisions. This I fear he did not do. He therefore exercised his discretion improperly……".**

This court has give due consideration to the principles of case law cited to it by both side. as well as taken note of the case law the learned trial magistrate had taken into consideration when passing judgment sought faulted to be granted applied these to the rival facts that were before the lower court, which gave rise to the judgment sought to be upset and also considered the same in the light of the rival submissions made on appeal and this court proceeds to make the following findings on the same.

(i) With regard to the appellants submissions that the judgment of the lower court does not comply with the rules with regard to the drafting of judgments, this court is in agreement with the Court of Appeal decisions on the subject which are binding on this court that the general guiding principle which is now trite and is binding on this court is that a judgment or ruling should state the facts of assertion relied upon by either side, points for determination or a determination by the court on those points and the reasons for determination.

When these prerequisite are applied to the judgment subject of this appeal, this court makes a findings that:-

(a) the facts of both sides have been stated on the record.

(b) Indeed points for determination by the court have not been itemized by the court but a reading of the judgment reveals that these were borne out in the mind of the court evidenced by the following facts:-

(i) There is a high lighting of the fact that the respondent was an employee of the defendant /appellant and that this fact had not been denied by the Respondent / appellant..
(ii) That the plaintiff /respondent had infact reported on duty on that date, had infact been injured while in the course of the duty and that the defendant /appellant had not contested the fact of the plaintiff /respondent having been injured while in the course of duty.
(iii) That the bone of contention was whether the defendant / appellant was liable or not in the circumstances and in the lower courts' opinion the lower court was convinced that the appellant was

liable and gave reasons.
(iv) That in the courts opinion liability should be apportioned at 80% as against the defendant / appellant and 20% as against the plaintiff / respondent.

(2) It is the finding of this court that in alternative to finding in number 1 above, the failure to itemize the points for determination and give reasons for determination on each of them is not fatal to the proceedings because under Section 78 of the Civil Procedure Act which donates the appellate power to this court with regard to appeal arising from the lower court, there is jurisdiction vested in this court to assume the role of the lower court in its original jurisdiction and play the role of the lower court in so far as the drafting of the judgment is concerned This court has duly availed itself of that role and proceeds to itemize the points for determination as follows:-

(i) Was the plaintiff / Respondent an employee of the defendant / appellant.?.
(ii) Was she on duty on the material date?.
(iii) Was she injured in the course of the duty?.
(iv) Who is liable for those injuries if so is liability one sided and or is it apportionable? If apportionable of what percentage is each to bear and why.

This court has considered the afore set out itemized points for determination and its response to each is as follows. The undisputed facts demonstrated herein which are uncontroverted are to the effect that indeed the plaintiff/ respondent was an employee of the defendant/appellant, she was on duty on the material date, she was injured in the course of duty and suffered injuries which were confirmed by her testimony as well as medical evidence a fact not contested by the defendant / appellant.

What was in contest was whether the plaintiff / respondent was to solely blame for the causation of the said injuries either in whole or by way of contribution on the one hand and on the other hand, whether the defendant / appellant who is the employer is solely to blame for the said causation either in whole or by way of contribution.

It is on record that both sides referred the lower court to case law with that of the plaintiff/respondent placing blame on the employer while that of the defendant / appellant placing blame on the employee because the employee was a general labourer performing duties and or chores which do not require skilled labour no machinery and for which it is the employee who has total control over the said execution of the work.

It is also on record that this court has been referred to case law on the subject some decided by the Court of Appeal which are binding on this court and those decided by Courts of concurrent jurisdiction which are not binding on this court but are only of persuasive valve where they are in line with principles of law set by the Court of Appeal there is no justification for departure from them by this court. This court has revisited the same authorities. There is the case of **Spin Knit Limited =vs= Alloys Adwera (**supra) where the claimant was faulted because he failed to specify the protective materials that ought to have been provided to him and how they would have protected the victim from the injury. The claimant also failed to specify the type of warnings he required to have been given to him and how these would have assisted him and the evident. Further that if there were pot holes and oil spills where the claimant was working why didn't he avoid them.

Also the case of **Wilson Nyangu Musigisi =vs= Sasini Tea & Coffee Ltd** (supra)as well as the persuasive authority relied upon namely **Mumias Sugar Co Ltd =vs= Samson Muyundo Kakamega HCC No. 58 of 2000** (supra) the employer liability was faulted because the injuries occurred as a result of one cutting himself while slashing while the other one while cutting sugar cane in both instances the employees were in control of their surroundings.

In contrast with the facts of the subject of this judgment, the victim who is the plaintiff / respondent had no control over the environment she was working under because as a filler she had to work in the employers factory. It was admitted that by reason of the nature of the activity carried on by the employer of fish processing there was no way the factory floor could have avoided being slippery. It

therefore follows that there is no way the plaintiff / respondent could have otherwise avoided to have a wet floor as her working environment.

With regard to the protective material or equipment the plaintiff/respondent stated clearly that these included gum boots which though not elaborated would have assisted the grip of the feet on the slippery floor. Head gear would have assisted in protecting the head from head injury in the event of a fall and gloves for purposes of avoiding the hands from having contact with the food processed.

It is on record that the witness fronted by the defendant / appellant did not dispute that these protective materials were necessary and that is why they purported to prove to the court that indeed these were supplied.

With regard to proof of supply of these protective material to the plaintiff / respondent, it is on record that supply of the alleged material was not put to the plaintiff either in her evidence in chief or cross –examination for her to accept the signature attributed to her or not. Neither was the original documents produced but a photocopy. No basis was laid by the defence as to why the original stores records was not available. This piece of evidence was received without due regard to the provisions of the Evidence Act Cap 80 Laws of Kenya with regard to proof of contents of documentary exhibits. Section 64 of the evidence Act requires that contents of a document be proved by primary evidence vide Section 65 of the same evidence Act Cap 80 Laws of Kenya primary evidence, means the document itself. Vide Section 68 secondary evidence as a proof of contents as a document is only permitted in law where the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or is in possession of a person out of reach or not subject to the process of the court. Notice of such production must have been issued to the person holding the original alerting that person that if he/she does not avail the original then copies of the same will be tendered in evidence. Other instances also covered are where the content of the original is shown to have been admitted by the person or a representative in interest of a person against whom the documents is sought to be provided against other instances are those where these is proof that the original has been lost or destroyed or that it is one which cannot be easily moved, it is a public document easily accessible by any interested part. It is a set of numerous accounts which have to be produced as a whole.

There is also requirement of compliance with the provisions of Section 69 where by notice to produce is mandatory. The requirement of issuance of the notice is excused only in instances specified in the said Section namely that the document itself is a notice, the adverse party has notice that he/she is required to produce the said document, where there is proof that the adverse party obtained the original by fraud or force, where there is proof that the adverse party or his agent has the document in court, where there is admission from the adverse party and or his agent that the original in lost, or that the person in possession of the document is outside the jurisdiction of the court or alternatively in any other instance where the court agrees to dispense with the production of the original.

Another prerequisite to have been complied with is the requirement of Section 70 of the same evidence Act. It reads:- : "**If a document is alleged to be signed or to have been within wholly or inpart by any person, the signature or the hand writing of so much of the document as is alleged to be in that persons hand writing must be proved to be in his hand writing".**

This court has duly construed the afore set out Sections of the Evidence Act and applied them to the evidence relied upon by the defendant / appellant in so far as documentary proof of issuance of protective material is concerned and the court makes a finding that the said evidence does not hold because of the following reasons:-

(i) The document was not put to PW1, the plaintiff / respondent in either evidence in chief or cross –examination for her to deny signing for the same
(ii) DW1 is not the one who was the stores clerk and is not the one who issued the said protective equipment or material to the plaintiff / respondent: - This being the case it was necessary for the concerned stores clerk to come to court to confirm that he/she issued the same.
(iii) No basis was laid by the defence in accordance with the relevant provisions of the law to lay a

basis as to why the original was not available in court
(iv) Proof of DW1 having been authorized to attend court and give evidence on behalf of the defendant was not proved.
For the above reasons the defence evidence in so far as it relates to production of documents to prove that the plaintiff / respondent had been issued with protective equipment stands.

Faulted issue was also raised about DW1's locus standi to testify on behalf of the defendant / appellant. This arose from the fact that DW1 had no employment card or a document to show that he was in the employment of the defendant / appellant and that the defendant / appellant had authorized him to give evidence on their behalf. Despite these pertinent issues being raised during cross – examination and before the close of the defence case, the defendant took no steps to confirm that the witness DW1 was their employee and that he had in fact been authorized to testify on their behalf. In the absence of such confirmation DW1's authority to testify is faulted and so was his evidence.

Once the evidence of DW1 is faulted as well as the secondary documentary exhibits, then the plaintiff's case stand unchallenged as the defence pleading though on record cannot be taken as evidence as the same was not testified upon and tested on cross –examination. Once DW1's entire evidence is removed what the court is left with is the unchallenged testimony of the plaintiff that:-

(a) She was an employee of the defendant.
(b) She was on duty on the material date.
(c) She was injured while on duty
(d) The injury arose as a result of a slippery floor.
(e) That it was the duty of the defendant to ensure that the floor is not slippery. This could have been avoided by the defendant providing gum boots which could have assisted the grip of the plaintiff /respondents feet on the ground and reduced slipperiness. Arrangement of out look of the work environment is the business of the employer and the fact that an employee chooses to work despite knowledge of the risk does not absolve the employer of his obligation to make the working environment safe for his employees . The acceptance of risk in itself does not result in a total absolution of the employers blame worthiness but may give rise to an element of contribution. Herein this may be minimal.

On contribution or apportionment of liability indeed no reasons were given by the learned trial magistrate as to why the apportionment was done in the manner done. This court however has judicial notice of the fact that this has to be governed by principles of law governing the granting and or with holding of an award of damages to or from a litigant. Those that this court has judicial notice of are the following:-

(a) The primary consideration of a court of law is that an award of damages is not meant to enrich a party but to compensate the victim for the injuries suffered and restore the victim to the state he/she was in before suffering the injury.
(b) The award should not be inordinate too high or too low.
(c) Past awards if taken into account, these should be taken as mere guides and where taken into consideration then there should be an element of inflation and the value of the Kenya Shilling taken into consideration as at the time of the award.
(d) When blame worthiness is to be shared between the plaintiff and the defendant or between defendants in favour of the plaintiff reasons have to be given for the courts exercise of its discretion in apportioning the blame worthiness and their respective percentages.

On the courts exercise at its discretion, it is now trite and the law on this has been crystallized by the Court of Appeal case on and as dutifully followed by the Superior Court, that the exercise of the Judicial discretion is unfettered with the only fetter attendant to it being that it has to be exercised judiciously, not capriciously and with a reason.

With regard to interference of the lower courts exercise of judicial discretion on an award of damages by an appellate court the correct position in law as per principles of case law that this court has Judicial Notice of is that appellate interference of such exercise can only be permitted where there is demonstration that:-

(i) **The award is either in ordinately too low or too high.**
(ii) The assessment is either erroneous or that the same was based on a wrong principle.

When the principles above are applied to the lower court assessment on apportionment of the award, the court is satisfied that failure to give reasons by the lower court is not fatal to the assessment. This appellate court has jurisdiction under Section 78 (2) of the Civil Procedure Act to ensure that role and either confirm the award and the apportionment and or pay or set aside the same.
In the circumstance, of this case and on the basis of the facts

before the lower court and this appeal, the court is satisfied that the injuries were not grievous .The award was within the range of awards for similar injuries. The plaintiffs counsel had asked for a higher figure but the lower side was awarded.The award is therefore defendable and the same is confirmed.

For the reasons given in the assessment the appellants appeal herein stands faulted and dismissed for the following reasons amongst others assessed.

(1) **The lower court judgment thought it did not draw out points for determinations and itemized them and made findings on each and gave reasons for the said findings, this is not fatal because**
(i) A reading of the lower court judgment reveals that the learned trial magistrate made findings on specific aspects of the case such as whether plaintiff / respondent was an employee of the appellant, the whether she was on duty, on that date, whether she was injured on duty whether she had been issued with protective equipment, the nature of injury and whether both were to blame for the causation of the injury.
(2) There was consensus both sides that protective material was necessary and that is why there was assertion on the part of the appellant that these had been issued.
(3) The alleged issuance of the protective material stands faulted because DW1 is not the one who issued them, the document allegedly signed by the plaintiff /respondent was not put to her in cross –examination for her to confirm her signature neither was that signature proved otherwise to be that of the plaintiff / respondent. The copies produced cure produced in contravention of the provision of the evidence Act asset out herein and for this reason they stand faulted, once faulted the plaintiffs' evidence that no protective material was issued stand. The evidence documentary proof was faulted because no basis was laid for the production of copies.
(4) In the absence of proof that DW1 was an employee of the appellant and had been authorized to give evidence as such his evidence cannot hold. Once DW1's evidence is faulted, it leaves the plaintiffs' evidence unchallenged.
(5) Failure to give reasons on apportionment of blame worthiness is not fatal to the apportionment so long as the same can be supported by facts on the record. Herein the apportionment is supported because it was the duty of the employer to make the working environment safe and that is why he took greater blame.
(6) The plaintiff / respondent will have costs of the dismissed appeal and the proceedings in the lower court.

Dated, signed and delivered at Kisumu this 29th day off September 2011

R. N. NAMBUYE
JUDGE
RNN/aao