



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 21 OF 2009**

**PECHE FOODS LIMITED .....APPELLANT**

**VERSUS**

**PETER ODHIAMBO KOLA .....RESPONDENT**

**JUDGMENT**

This is an appeal by the Applicant herein **Peché Foods Limited** against the judgment of the learned Senior Resident Magistrate at Maseno delivered on 30<sup>th</sup> January 2009. The Appellant has presented nine (9) grounds of appeal. At the time of hearing of the same the parties agreed to file written submissions which are already on court records.

The accident occurred on 7<sup>th</sup> May 2003 at the appellants premises. The respondent who was allegedly a casual employee sustained the following injuries according to the plaint filed on 15<sup>th</sup> June 2006.

- (a) **Severe injuries on the right leg.**
- (b) **Occasional pain in the affected leg.**

The appellant on 3<sup>rd</sup> July 2006 filed its defence which among others attributed negligence on the respondent. Parties proceeded to hear the matter on various dates and of significance is that the appellant closed its case on 4<sup>th</sup> December 2008 without adducing any evidence.

The respondent evidence was that he was injured while he was pushing a trolley at the appellant's premises. He said that there was water on the floor and he slipped therefore sustaining the injuries shown above. He further alleged that though he had been provided with boots the same were old and torn. On cross examination he said that:-

**“.....They were torn in the soles. I was told they were out of stock. This is what the supervisor told me”.**

He further goes ahead to blame his woes on the boots.

The exhibits were produced by the respondent and of utmost importance is exhibit number PEXH 3. This was the payment voucher. Earlier on the same had been marked but on 25<sup>th</sup> October 2007 the parties recorded the consent admitting that the said voucher (Copy) be produced as an exhibit on behalf of

the respondent. The parties subsequently did file their respective submissions. I have read the judgment delivered by the learned trial magistrate and the reasoning thereof. I am also aware that the mandate of this honourable court to interfere with the said judgment is only where as ably quoted in the case of **KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICE, & GATHOGO KANINI =vs= AM LUBIA & OLIVE LUBIA [1982-88] 1 KAR 727** as *inter alia*.

- (a) **The trial judge has applied a wrong principle for example taking into account an irrelevant factor.**
- (b) **Failing to take into account a relevant factor.**
- (c) **Misapplying or not undertaking the current law.**

On the issue of liability the trial magistrate assessed the same on 15% : 85% in favour of the appellant and respondent respectively. His argument was that though the defendant didn't adduce any evidence, the respondent nevertheless had a duty to ensure his safety by appreciating the environment he worked in and to demand proper boots.

I agree with this finding. It was incumbent upon the appellant to rebut the allegations that the respondent didn't have worn out boots. The respondent said that he did ask for them but the supervisor told him that they were out of stock. The appellants failure to call this supervisor was fatal to their case. The liability ratio stated above is therefore reasonable in all consideration. Perhaps had the appellant's adduced evidence to rebut the same the trial court would have thought otherwise.

On the issue of whether or not the respondent worked for the Appellant, the trial court found as a fact that indeed the respondent worked for the appellant. I have looked at exhibit P3. The Section indicated as Sanitation indicates six (6) names and the first name there is of one **Peter Odhiambo** whom I presumed to be the respondent. The same was admitted by consent although initially it had been marked. By virtue of the said admission therefore it's abundantly clear that the respondent was the appellant's employee. No contrary evidence in any case was called by the appellant. That finding therefore was correct by the trial court.

On quantum, the appellant contents that the sum of Kshs. 85,000 awarded to the respondent is excessive. This court shall only interfere with the awarded damages if they are inordinately high or low. In my opinion the award is reasonable. I have perused the authorities especially the appellants. The same are relatively old and are not in conformity with the current financial inflation of the Kenya currency. As a matter of fact the court takes judicial notice of the fact that from the date when the judgment was delivered on 30<sup>th</sup> January 2009, the value of the shilling has greatly depreciated. The upshot of this therefore is that the quantum arrived at by the trial magistrate of Kshs. 85,000/= after subtracting the 15% liability is in all fairness reasonable.

In the premises, I do therefore dismiss the appellant's appeal with costs to the respondent.

**Dated, signed and delivered this 26<sup>th</sup> day of October 2011.**

**H. K. CHEMITEI**  
**JUDGE**

*HKC/aa0*