REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL 212 OF 2003

NAKURU WHOLESALERS LIMITED……...……..APPELLANT

VERSUS

GEORGE OTIENO ODERA…….RESPONDENT

(Being an appeal from the judgment/decree of Hon. N. Ateya, SPM – Nakuru dated 28th November 2003 in Nakuru CMCC No. 1586 of 2001)

JUDGMENT

The respondent, George Otieno Odera, filed suit against the appellant, Nakuru Wholesalers Ltd seeking to be paid damages on account of the injuries he alleged to have sustained while he was at his place of work. The respondent averred that while he was on duty at his place of work on the 27th August 1999, he was hit and seriously injured by a falling bag of sugar. The respondent blamed the appellant for the said injuries. He stated that the appellant was negligent in that it made him work in an environment that exposed him to risk of injury and damage by failing to provide the respondent with a safe and proper system of work. The respondent set out the particulars of negligence and breach of the terms of employment on the part of the appellant.

The appellant filed a defence denying the respondent was injured while in its business premises. The appellant further denied that it was negligent or that it had breached the terms of employment by exposing the respondent to risk of injury. In the alternative, the appellant pleaded that if the respondent had been injured in the circumstances averred in his plaint, then it was due to his own negligence. The appellant set out the particulars of negligence on the part of the appellant. The appellant disclaimed any liability in damages to the respondent.

The suit was heard by the then Senior Principal Magistrate, Nicholas Ateya Esq. He found in favour of the respondent. He held that the appellant was solely liable in tort for the injuries that the respondent had sustained. The trial magistrate assessed the general damages to be paid to the respondent at Kshs 90,000/=. The respondent was further awarded special damages of Kshs 2,000/-. The appellant was aggrieved by the decision of the trial magistrate and has appealed to this court.

In its memorandum of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate: The appellant was aggrieved that the trial magistrate had ignored the principles of the law of negligence, the burden and standard of proof in arriving at the decision, which in its view, did

not conform to **Order XX rule 4** of the **Civil Procedure Rules**. The appellant faulted the trial magistrate for making a finding on liability against it which was not supported by evidence. The appellant faulted the trial magistrate for finding for the respondent, after ignoring the evidence adduced in favour of the appellant. The appellant was aggrieved that the trial magistrate had failed to consider the submission and the authorities submitted on its behalf before arriving at the said erroneous decision. The appellant finally faulted the trial magistrate for awarding general damages to the respondent that were not in consonant with the injuries that the respondent allegedly sustained.

At the hearing of the appeal, Mr. Murimi for the appellant reiterated the grounds in the memorandum of appeal. He submitted that the trial magistrate did not deliver a judgment which was in conformity with **Order XX rule 4** of the **Civil Procedure Rules**. He complained that the trial magistrate did not evaluate the evidence adduced during trial as he was required to in law. He submitted that the evidence adduced by the respondent in support of his claim was inconclusive whilst the evidence adduced by the appellant's witnesses was consistent and reliable. The submitted that the evidence adduced by the respondent was contradictory. He stated that the respondent had testified that he was injured when a bag of sugar fell on his back. The respondent later changed his story and claimed that the bag of sugar had fallen on his neck.

Mr. Murimi submitted that there was doubt the respondent was injured on the day he claimed he was so injured. This was due to the fact that the respondent sought medical treatment two days after the event. He maintained that the respondent did not adduce any evidence in support of his allegation that it was due to the negligence of the appellant that the bags of sugar had dislodged from the stack and injured him. He submitted that the testimony of the respondent's witness *i.e.* PW2 had been discredited by the evidence of DW1 (*whom the respondent recognised as his supervisor*), who testified that at the material time the said PW2 had been sent on duty to Narok and was not at Nakuru when the said incident was alleged to have taken place. It was his contention that if this court was to properly evaluate the evidence adduced, it would reach the determination that the claim made by the respondent that he was injured while he was at his place of work was a fabrication. He submitted that even if the court were to find that the respondent was injured at work, there was no basis in law for the trial magistrate to make the award of Kshs 90,000/= in general damages, taking into account the injuries that the respondent had sustained. He urged the court to allow the appeal, set aside the judgment of the subordinate court and substitute it with an appropriate judgment of this court.

Mr. Gekong'a for the respondent opposed the appeal. He submitted that the respondent had established in his evidence that he had been injured when he was at his place of work. He submitted that the injuries that the respondent sustained were confirmed by two doctors *i.e.* Dr. Malik and Dr. Kiamba. He stated that the injuries that the respondent sustained were consistent with being hit by a falling sack of sugar. He urged the court to re-evaluate the evidence adduced and reach the conclusion that the respondent did establish his case on a balance of probabilities. He submitted that his court should ignore the evidence adduced by the witnesses for the appellant. He maintained that the said witnesses of the appellant made claims concerning the absence of the respondent from his place of work which could not be backed by documentary evidence.

Mr. Gekong'a submitted that the respondent had established that he was injured due to the negligence of the appellant who had carelessly stacked the bags of sugar to the extent that the said bags lacked adequate support. He submitted that the respondent was treated continuously from the day he was injured, including two days after the said incident. He gave the example of the respondent being x-rayed two weeks after the incident. He submitted that the damages awarded by the trial magistrate were not manifestly excessive as to attract interference by this court. He urged this court to dismiss the appeal with costs.

This being a first appeal, this court is required to re-evaluate the evidence adduced before the trial magistrate's court, in light of the submissions made on this appeal, and reach its own independent determination. The appellate court however has to be cautious so that it does not substitute its finding with that of the trial magistrate. This is in view of the fact that the trial magistrate had the advantage of seeing and hearing the witnesses and therefore assess their respective demeanours. (*See* **Selle –vs-**

Associated Motor Boat Co. Ltd. [1968] E.A. 123 at page 126).

In the present appeal, the appellant challenged the decision of the trial magistrate both on liability and quantum. On the issue of quantum, Mr. Murimi submitted that the respondent had not established negligence on the part of the appellant. He argued that the respondent had not established that the appellant was responsible for the fall of the bags of sugar. On his part, the respondent submitted that it was the duty of the appellant to ensure that the bags of sugar were properly stacked. This court has re-evaluated the evidence adduced, in light of the submission made on the issue of liability. The plaintiff testified that he was hit by a bag of sugar which had been improperly stacked. The appellant did not deny the possibility that bags of sugar which were wrongly or improperly stalked, could have fallen down and injured the respondent. The appellant's defence was that the respondent was not on duty on the day that he alleged that he was injured. The appellant did not however produce any official records to establish that indeed the respondent was absent from his place of work on that material day. Instead, the appellant sought to rely on the diary of one of its employees in his bid to establish that the respondent was absent from work. It is evident from the testimony of the respondent and his witness that he was at his place of work at the appellant's business premises on the material day.

Having re-evaluated the evidence adduced, I do hold that the appellant established on a balance of probabilities that he was at his place of work and was injured when a bag of sugar fell on him at the appellant's premises.

The respondent established that he was injured due to the negligence of the appellant. It was the duty of the appellant to ensure that the bags of sugar were properly stalked so as not to pose a danger to its employees who worked in the said storage area. The respondent did establish, on a balance of probabilities, that the appellant owed him a duty of care as its employee. The appellant was required in law to provide the respondent with a safe working environment where he would not be exposed to risk of injury. It was the appellant's duty to ensure that the bags of sugar were properly stalked so that it does not pose danger to its employees. I do therefore hold that the trial magistrate correctly reached the determination that the appellant was solely liable in tort to the respondent. No evidence was adduced by the appellant to suggest that the respondent had acted in a negligent manner as to cause the said bags of sugar to be dislodged and injure him. The appeal on liability is therefore dismissed as it lacks any merit.

On quantum, the Court of Appeal in **Ali vs Nyambu t/a Sisera Store [1990] E. A. 534** held at page 538:

"***We apply the principles laid down by the Privy Council in Nance v British Coloumbia Electric Railways Co. Ltd. (1951) AC 601 at page 613 and applied by this court in the case of Henry Hidaya Ilanga v. Manyema Manyoka (1961)EA 705 and in Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1970) EA 414 which:***

"*The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (**Flint v Lovell [1935]1KB 354**) approved by the House Lords in **Davies v Powell Duffryn Associated Collievers Ltd. 1941 AC 601."***

In the present appeal, the respondent was seen by two doctors who confirmed that the respondent had sustained injuries that were consistent to being hit by a falling bag of sugar. The two doctors who saw the respondent testified that the appellant had sustained soft tissue injuries on his back and chest. The trial magistrate awarded the respondent Kshs 90,000/= general damages for the injuries that he had sustained. The appellant has not established that the said assessment of damages by the trial magistrate was inordinately or excessively high as to amount to an abuse of judicial discretion or erroneous assessment

by the trial magistrate. This court is of the opinion that the trial magistrate properly exercised his discretion when he assessed the general damages to be paid to the respondent.

The upshot of the above reasons is that the appeal against liability and quantum fails. The appeal is hereby dismissed with costs to the respondent

DATED at NAKURU this 24th day of October 2007

L. KIMARU

JUDGE