REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 96 'B' OF 2016

MOMBASA MAIZE MILLERS LIMITED.....APPELLANT

VERSUS

PETER WEKHOBA OUMA.....RESPONDENT

(An appeal from the judgment and decree of T.M. Olando, (RM)

in Eld CMCC No 58 of 2015 delivered on 18th May, 2016)

JUDGMENT

1. The Respondent **(PETER WEKHOBA OUMA) was awarded court judgment on liability at 100% against the Appellant (MOMBASA MAIZE MILLERS LIMITED) with general damages of K.shs.250,000/- and special damages of K.shs.2,100/= plus costs and interest.** The background to this is that the respondent filed suit against the Appellant in the subordinate court seeking general, special damages, costs and interest as a result of an accident which occurred on 14th January 2015 while he was working for the appellant, offloading 90Kgs bags of maize from lorries and taking them for safe storage in the appellant's store. In the course of movement, a rope which had been left unattended at the doorsteps entangled his legs, causing him to lose balance and he fell on the concrete floor, and sustained injuries.

2. The Respondent blamed the accident on the appellant's negligence and breach of a statutory duty. The appellant denied liability stating that the respondent was not it's employee at any time, and also denying occurrence of the accident. It further pleaded on a without prejudice basis that if the accident occurred then it was as a result of the respondent's sole negligence or contribution. In exposing himself to the risk of injury, and failing to use any protective devices. He was also accused of carrying out his duties negligently.

3. The respondent was on duty at the Appellant's company on 14/1/2015 when he was instructed by his supervisor to offload some maize from the vehicle to the store. It is while carrying the bag to the store that he got entangled by a rope which was being used to tie up the bags and he fell down and was injured on the head. He blamed the appellant for not clearing the path he was using. He denied suggestions that he was the one who carelessly left the rope on the path.

4. **SOPHIA TOROITICH (PW2)** a clinical officer at **UASIN GISHU DISTRICT HOSPITAL** confirmed that the respondent presented himself at the hospital on **14/11/2015** complaining of pain in the forehead and an injury on the right periorbital region and pains in the chest. He had sustained soft tissue injury secondary to trauma. The medical report by **DR S.I.ALUDA** confirmed the injuries which were classified as soft tissue injuries which were continuing to heal, and at the time of examination, the prognosis was excellent with an indication that the pain was subsiding.

5. The Appellant denied the occurrence of the accident and called one witness DW1**, Richard Simiyu** who testified that he was loading and offloading maize into the store together with the Respondent. In the process, the respondent who was carrying a heavy sack of maize slipped and fell, and the sack of maize he was carrying fell on him. He blamed the respondent for the accident, saying there were no ropes in the store

6. Upon cross-examination DW1 confirmed that he was behind the respondent and stated:-

> ***"The bags were more than 90kgs…We were carrying on our back, the same is heavy and dangerous when you carry the load…I could not see what happened to Peter Ouma. It is not possible to see the legs of the one who is ahead…we normally do re-bagging and we remove the ropes. It is possible that rope could be there in the store"***

7. The trial court in making a finding in favour of the respondent pointed out that the appellant's own witness confirmed that the respondent

was working for the appellant on the date task had been performed under the instructions of the appellant). The trial court found that the respondent had discharged the burden of proving that he sustained injuries following the fall, as this was supported by the medical record and reports.

8. The appellant was found to have allowed the respondent to work in an unsafe environment with a slippery floor and a rope carelessly left on the loader's pathway. The trial magistrate pointed out that DW1 admitted he did not see what happened to the respondent before he fell, and he conceded that there was a possibility of ropes being on the floor.

9. The Appellant has appealed against the entire judgment on ten grounds which can be condensed to the issue of liability and quantum. The appellant's counsel submitted that that he who alleges must prove is a legal principle which has its under-pinning on **sections 107 and 108 of the Evidence act , Cap 80** and has been re-emphasised in the case of **Kiema Muthungu -vs- Kenya Cargo Handling Service, Ltd (1991) 2** that:

> ***"…there can be no liability without fault and a plaintiff must prove some negligence on the part of the***
>
> ***Defendant where the claim is based on negligence."***

It is emphasized that this burden cannot be made lighter even where no evidence has been adduced by the Defendant as was held in the case of ***Karugi & Another v. Kabiya & 3 Others [1987] KLR 347*** **that:**

> ***"…the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant.***
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> ***Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim.***

10. Counsel stated that from the evidence on record the accident in question occurred at 12.30pm and before then the Respondent and eighteen of his colleagues were carrying out the work of re-bagging maize into 50 kg gunny sacks and thereafter loading them into trailers. This work was completed without any incident. However, the accident only occurred at 12.30 pm when the Respondent was instructed to do a similar job of off-loading the sack of maize sack from the vehicle into the store, which accident was allegedly caused by a rope that was left unattended and which mysteriously appeared only at 12.30 pm and which was not spotted from 6.30 when the Respondent reported to work and loaded bags on the trailers in the morning. Counsel stresses that it should be noted the accident occurred at the door step of the store.

11. On the other hand, it was DW1's evidence that the Respondent slipped and fell and that there was no rope as alleged by the Respondent.

It is argued that since the trial magistrate was presented with two possible causes of the accident it is highly suspect that a rope would suddenly emerge on a door step which the respondent and his colleagues had since morning used without being spotted by the Respondent. Counsel submits that, the only logical explanation is that either the Respondent was not careful

and ignored the rope or there was no rope at all in the first place. That since the Respondent did not go an extra mile to call any eye witness to corroborate his evidence, it was erroneous for the trail magistrate to hold the Appellant wholly liable based saying the evidence presented by the Respondent was inadequate. The trial court is faulted for acting in total disregard of the evidence adduced by the Appellant which pointed to the fact that the Respondent fell on his own.

12. He urged this court to be guided by the case of **Maji Mazuri Flowers Ltd versus Samuel Momanyi Kioko [2016] eKLR** where Kimondo (J) stated as follows:

> ***"The duty of the employer to ensure the safety of an employee is thus 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 (unreported).***
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> ***"In short, there is no doubt that the accident occurred; or that it occurred in the course of employment. But I cannot say the employer had not taken reasonable precautions to provide a safe working environment in this case. The respondent himself admitted that it was an inevitable accident. Like I stated, it would be unreasonable to expect an employer to be his employee's insurer round the clock. From the evidence and my analysis so far, there was no basis for blaming the employer. It follows as a corollary that the respondent failed to prove negligence against the appellant on a balance of probabilities."***

13. It was also argued that since at the time of the accident the Respondent had worked for the Appellant for about 10 years, he knew the risk of the job he was assigned to do and accepted that risk and the trial court ought to have invoked the doctrine of ***volenti non fit injuria***. That having accepted that risk, it was incumbent upon the Respondent to be cautious and ensure his own safety as is envisaged under **Section 13 (1) (a) of the Occupational Safety and Health Act, 2007** Counsel also cited the case of **PURITY WAMBUI MURITHII VS**

HIGHLANDS MINERAL WATER CO. LTD [2015] eKLR where the Court of Appeal held although as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety, this does not mean that the employer would always be liable in all circumstances regardless of what caused the accident in question. The reason for this being that accidents can occur due to the employees own negligence and it would be unfair to hold the employer liable.

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.

14. It is also submitted that the Respondent despite arguing that the Appellant did not provide him with any protective apparel he did not go a step further to demonstrate that the job he was doing required any protective apparel and more particularly that the protective apparel he mentioned would have aided him, citing the case of **SOUTH NYANZA SUGAR CO. LTD v ENOCK MAUTI NYANDORO [2011] eKLR** the court held as follows:

> ***"Even if it had been proved that the respondent was indeed an employee of the appellant, it is difficult to fathom how the appellant could be held liable for the accident. In his evidence he testified that he slipped and fell as he was climbing the stake. He did not say what caused him to slip and fall. On what basis then should the appellant be held to account for self-inflicted injury by the respondent? The respondent also testified that if he had been issued with gumboots, the accident could well have been avoided. According to the respondent, had he been wearing the gumboots, they would have given him better grip. However, from the manner the alleged accident occurred I doubt very much whether the gumboots would have been of any assistance .He slipped as he climbed the stake. Further the respondent did not adduce any evidence to show that the appellant was under any obligation to provide the said gumboots. He did not say that the appellant had all along provided gumboots to him or other employees save for that day.***
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> ***If the respondent was aware that provision of gumboots was a mandatory requirement, he ought to have proved the same with credible evidence. He did not do so."***

15. In opposing the appeal, the respondent's counsel submitted that the appellant as the occupier of the premises was bound to provide a safe environment to its employees as provided under section 6 of The Occupational Safety and Health Act, 2007. Counsel urged the court to pay regard to the defence witness' own admission that it was possible to find ropes within the premises as the same were being used to re-stitch and tie the sacks after re-bagging. He submitted that the circumstances proved on a balance of balance of probability that the unattended rope left on the appellants premises led to the fall**.**

16. On the issue of liability, the appellant's own witness gave evidence which militated against it and indeed tilted the balance in favour of the respondent by

· conceding that it was likely there were ropes on the floor

· Admitting that he was walking behind the respondent while facing down and did not see what happened to the respondent.

· The situation is easily distinguishable from what was in the **SOUTH NYANZA SUGAR CO. LTD v ENOCK MAUTI NYANDORO [2011] eKLR** as in that case the claimant had failed to wear the protective boots which would have prevented slippage. In the present case boots or no boots, it was not the slippery floor that led to the fall, but the rope entangling both legs-that would not have been prevented by the presence of gum boots, In any event, the appellant did not lead any evidence to confirm having provided the respondent with protective gadgets

Even though DW1 again changed his version upon re-examination, what he ends up achieving is portraying the image of an unreliable witness who does not know where to stand-breathing hot and cold in equal measure. There was nothing to suggest that ropes were ordinarily strewn on the path leading to the store so as to visit the doctrine of ***volenti non fit injuria*** on the respondent. I uphold the trial magistrate's finding on liability as against the appellant.

17. **On quantum, it is contended that since he was injured on his head and chest** it is appellant's submission that the trial magistrate erred in awarding the damages which were excessive in light of the injuries sustained. The basis for this argument is that the Respondent allegedly sustained

· **a** swollen and tender with a cut wound on the right supra-orbital region

· blunt trauma to the chest which was tender

It is submitted that all the injuries had healed and if proved, the Respondent was only entitled to not more than 100,000/= shillings, drawing from the case of **Ndugu Dennis versus Ann Wangari Ndirangu and another**

[2018] eKLR where the court awarded general damages of Kshs. 100,000/= for multiple soft tissues and the case of **Shalimar Flowers Ltd v Noah Muniango Matianyi [2011] eKLR** where the court reduced the award of Kshs. 120,000/= to Kshs. 50,000/= for similar injuries.

18. The respondent's counsel urged the court not to interfere with the damages awarded saying the trial court took into account all the relevant factors and did not make an erroneous estimate.

19. Taking into account the nature of the injuries and the very favourable prognosis by the respondent's doctor, as well as the past decisions cited, I am persuaded that the sum awarded did not take into account these relevant factors and awarded a figure which was inordinately

high. Consequently I find it prudent to set aside the general damages awarded at the trial and substitute the same with a sum of **Ksh 100,000/- (One hundred thousand only).** The special damages were properly awarded and are upheld. The appellant shall bear 2/3 of the costs of this appeal.

Delivered and Dated this 10th day of January 2019 at ELDORET

H. A. OMONDI

JUDGE