REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 139 OF 2016

RAI PLYWOODS (K) LIMITED….....APPELLANT

VERSUS

FREDREICK TOLE ABURAKA.....RESPONDENT

(Being an appeal from the Judgment of the Hon. C. Obulutsa, Senior Principal Magistrate, delivered on 2 September 2016 in Eldoret CMCC No. 242 of 2015)

JUDGMENT

[1] This is an appeal from the Judgment of the Learned Senior Principal Magistrate, **Hon. C. Obulutsa,** delivered on **2 September 2016** in **Eldoret Chief Magistrates Court Civil Case No. 242 of 2015**. The suit had been filed by the Respondent herein, **Fredrick Tole Aburaka**, against the Appellant, **Rai Plywoods (Kenya) Limited,** for General and Special Damages, as well as costs and interest on account of injuries allegedly sustained by the Respondent while at his workplace on 4 **July 2013** while he was lawfully engaged in his assigned duties as an employee of the Appellant.

[2] It was the contention of the Respondent that the accident occurred solely by reason of breach of the common law and statutory duty of care and/or breach of contract of employment on the part of the Appellant, its servants, agents or employees; and that it was a term of the contract of employment between him and the Appellant that the Appellant would take all reasonable measures to ensure his safety whilst he was engaged upon his work, and not to expose him to risks or damage or injury of which the Appellant knew or ought to have known. It was further the Respondent's contention before the lower court that it was the duty of the Appellant to provide and or maintain adequate and suitable steps to ensure that the place where he carried out his work was safe; and to otherwise provide a safe system of work.

[3] Consequently, the Respondent claimed general and special damages, interest and costs and supplied the particulars of negligence, breach of duty of care and/or breach of contract as well as particulars of injury and special damage at paragraphs 6 and 7 of his Plaint dated **2 April 2016.**

[4] The Appellant denied the claim; and in particular, it denied that an accident occurred on or about **4 July 2013** or any other date as alleged in paragraph 5 of the Plaint. It accordingly denied the particulars of negligence attributed to it, its servants and/or agents and put the Respondent to strict proof thereof. In the alternative, it averred that if at all an accident occurred as alleged, then the same was due to the sole or contributory negligence of the Plaintiff; particulars whereof were furnished at page 5 of the Appellant's Defence dated **15 April 2015**. It was further the averment of the Appellant that, in accepting employment, the Respondent freely accepted to run the risk of all purely accidental harm foreseeable, connected with and/or incidental to such employment in line with the doctrine of *volenti non fit injuria*. Thus, the Appellant had prayed for the dismissal of the suit with costs.

[5] After hearing the parties, the Learned Trial Magistrate found in favour of the Respondent and entered judgment in his favour on liability at 100%. The lower court accordingly awarded Special Damages of **Kshs. 3,000/=** and assessed General Damages due at **Kshs. 300,000/=** along with costs and interest**.** Being aggrieved by the decision, the Appellant filed this appeal on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law in holding the Appellant 100% liable in negligence without considering the evidence and the legal concept of negligence;
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> **[b]** That the Learned Trial Magistrate erred in law and in fact in holding that the Respondent had established a case contrary to the evidence on record;
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> **[c]** That the Learned Trial Magistrate erred in law and in fact in failing to hold that the Respondent did not prove that the Appellant was to blame for the accident;

[d] That the Learned Trial Magistrate erred in law and in fact in awarding damages to the Respondent without any basis and which damages were inordinately high as to amount to a gross overstatement of the loss suffered;

[e] That the Learned Trial Magistrate erred in law and in fact in failing to evaluate, consider and determine all the issues raised in the pleadings and in the evidence especially as to how the accident occurred hence an erroneous judgment;

[f] That the Learned Trial Magistrate erred in law and in fact in failing to give due consideration to the contents of the Appellant's submissions and more specifically the authorities cited;

[g] That the Learned Trial Magistrate erred in law and in fact in failing to consider, evaluate and determine the issues raised in the Defendant's pleadings to wit the Defence and the evidence adduced;

[h] That the Learned Trial Magistrate erred in law and in fact in failing to consider the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules** and other provisions as required by law;

[i] That the Learned Trial Magistrate erred in law and in fact in failing to dismiss the Respondent's claim with costs for want of proof;

[j] That the Learned Trial Magistrate erred in law and in fact in failing to hold the Respondent wholly liable and/or substantially liable for the accident;

[k] That the Learned Trial Magistrate erred in law and fact in failing to hold that the Respondent did not discharge the burden of proof as to the injuries sustained as envisaged under **Section 107, 108 and 109** of the **Evidence Act, Chapter 80** of the **Laws of Kenya.**

Accordingly, the Appellant prayed that the Judgment of the lower court be set aside and in lieu thereof there be an order dismissing the Respondent's claim with costs.

[6] The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **13 November 2018**. Thus, Learned Counsel for the parties filed their respective written submissions on **26 November 2018** and **28 November 2018**. In her submissions, **Ms. Odwa**, Counsel for the Appellant endeavoured to convince the Court that the Respondent failed to establish the causal link between his injuries and any negligence on the party of the Appellant. She urged the Court to note that the Respondent was doing the work which he was ordinarily employed to do; that he was the one in control of the work that he was doing; and that if there was any accident then he was the sole cause of it.

[7] It was further the submission of Learned Counsel that the Respondent having been supplied with safety apparel, was expected to put them on while doing his work, considering that he was dealing with potentially hazardous material. She therefore faulted the lower court for finding the Appellant wholly liable when it had done all within its means to ensure a safe working environment for the Respondent. Counsel relied on **Maji Mazuri Flowers Ltd vs. Samuel Momanyi Kioko [2016] eKLR; Purity Wambui Muriithi vs. Highlands Mineral Water Co. Ltd [2015] eKLR** and **Gideon K. Kemboi vs. Nyayo Tea Zone [2015] eKLR** to support the argument that the duty of the employer to ensure the safety of an employee is not absolute; and that it is limited to reasonable care.

[8] On whether the Respondent was entitled to the relief awarded by the trial court, it was the submission of Learned Counsel that since the initial treatment notes produced before the lower court did not reveal any sort of injuries that may have been sustained by the Respondent, the trial court erred in awarding him damages, which damages were, in any event excessive. She pointed out that the conclusion made by the initial treating doctor was that the Respondent had no sign of distress and had good air entry; which position was confirmed by **Dr. Paul Rono**. Counsel accordingly urged the Court to note that the particulars of injuries as set out in the Plaint were lifted from the Medical Report by **Dr. Samuel Aluda**, who was not the treating doctor and who confirmed that the Respondent had healed by the time he examined him. She accordingly urged the Court to find that the conclusions of the lower court on quantum were unwarranted; and that had the Respondent proved his case, an award of not more than **Kshs. 150,000/=** would have sufficed. She relied on **George Morara Masitsa vs. Texplast Industries Limited [2015] eKLR** where **Kshs. 100,000/=** was awarded as general damages for inhalation of chemicals; and **Super Foam Limited vs. Dominic Njuguna Gaitho [2016] eKLR** in which **Kshs. 150,000/=** was awarded for similar injuries.

[9] Counsel for the Respondent on his part was of the posturing that the Respondent's case had been proved before the lower court to the requisite standard. He pointed out that the Respondent testified before the lower court and adduced evidence to prove not only that he was an employee of the Appellant; but also, that he was on duty on the date in question and that he suffered the injuries complained of in the course of his work. He pointed out that, in their evidence, the defence witnesses admitted that the chemical was dangerous and explosive; and that the Respondent had not been provided with any protective gear as by law required. Reliance was placed on **Nakuru HCCA No. 38 of 1995: Sokoro Saw Mills Ltd vs. Benard Muthimbi Njenga** for the proposition that it is the duty of the employer to ensure a safe place of work for its servants. Accordingly, Counsel defended the lower court decision on liability.

[10] On quantum of damages, Counsel for the Respondent restated the Respondent's injuries and submitted that the award was commensurate therewith. He cited **Nairobi HCCA No. 791 of 1999: Martin M. Mugi vs. Attorney General** in which the Plaintiff was awarded **Kshs. 300,000/=** for a deep extensive cut on the face, mild concussion and generalized soft tissue injuries; and **Nyeri HCCC No. 320 of 1998: Catherine Wanjiru Kingori vs. Gibson Theuri Gichubi** where general damages were assessed at **Kshs. 300,000** for injuries to the legs and chest.

[11] This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was presented before the lower court and make its own conclusions thereon; a principle that was aptly expressed in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[12] Before the lower court, the Respondent called **Dr. Aluda**, a private medical practitioner in Eldoret Town as **PW1**. It was the testimony of **PW1** that he examined the Respondent and prepared a Medical Report for which he was paid **Kshs. 3,000/=.** He produced both the report and the receipt he issued the Respondent with as the **Plaintiff's Exhibit No. 1 and 2,** respectively. The report shows that the Respondent had difficulties in breathing after inhaling some chemical at his workplace; and that he also had irritation of both eyes, nose and throat, with difficulties in swallowing. He conceded in cross-examination that the Respondent had healed by the time he examined him.

[13] The Respondent testified as **PW2** before the lower court. His evidence was that he was, at the material time, working for the Appellant as Machine Maintenance Technician. He produced a copy of his staff card as his **Exhibit No. 2.** Regarding the incident of **4 February 2013, PW2** testified that he was at the plant at about 3.00 p.m. when he was called to open up a pump; and that while opening the pump, the gate valve busted and hit him on the face, thereby injuring his eyes and chest. He further stated that he accidentally inhaled and swallowed the chemical thereby suffering harm for which he was treated at **Moi Teaching and Referral Hospital**. He exhibited his treatment documents in proof of his assertions. He thus, blamed the Appellant for his injuries contending that the accident occurred only because the gate valve was faulty and that he was only supplied with an old nose mask as opposed to a complete face kit.

[14] Dr. Paul Rono of **Moi Teaching and Referral Hospital** testified as **PW3.** He confirmed that the Respondent was treated at their facility on **4 July 2013**. He produced his treatment notes as the **Plaintiff's Exhibits 4 and 5**. In cross-examination, **PW3** conceded that he did not treat the Respondent; and that the notes did not show that the patient was distressed. To the contrary, he added that it was indicated therein that he had good air entry.

[15] On behalf of the Appellant, two witnesses testified on **18 November 2015**, namely **Edward Ndale (DW1)** and **Akongo Catherine (DW2).** In his evidence **DW1** adopted his witness statement dated **22 April 2015** and told the lower court that he was working for the Appellant as a machine operator at the material time; and that the Respondent was his co-worker. He confirmed that an accident occurred on **4 July 2013** involving the Respondent, and added that the Respondent was to blame for his injuries because he failed to put on a face mask. **DW2,** on her part, produced records as **Defence Exhibit 2** to confirm that the Respondent had been issued with a face mask. She similarly adopted her witness statement dated **22 April 2015**. The last Defence Witness, **Paul Makomere**, testified on **22 June 2016** and adopted his witness statement dated **22 April 2015**. He also produced a copy of the Issuance Register as **Defence Exhibit 3** before the lower court.

[16] From a careful re-evaluation of the evidence adduced before the lower court, there appears to be no dispute that the Respondent was, at all times material to the suit, an employee of the Appellant. He produced his staff card before the lower court, whose copies are at pages 16 and 17 of the Record of Appeal. All the three Defence Witnesses, **DW1, DW2** and **DW3**, confirmed that the Respondent was indeed an employee of the Appellant and that he was on duty on the **4 July 2013**. **DW3** referred to the Responded as an experienced technician, thereby confirming that he had worked for the Appellant for a considerable number of years.

[17] There is similarly no dispute that a mishap occurred on the **4 July 2013** in which the Respondent got injured. His version of the events is that he was on duty at the plant at about 3.00 p.m. when he was called to open a chemical pump; and that while opening the pump, the gate valve busted and hit him on the face, thereby injuring his eyes and chest. He further stated that he accidentally inhaled and swallowed the chemical thereby suffering harm for which he was treated at **Moi Teaching and Referral Hospital. [20]** The Respondent's evidence was in accord with the evidence adduced by the three Defence Witnesses as to the fact that the accident did happen. **DW1,** for instance, stated that on the date in question, he was assigned to work at the *Toluene D1-Isocynate* (TDI) Pump, and that in the course of duty the ball valve failed to open; and so, he reported the matter to his supervisor who called the Respondent to inspect the valve. He added that the Respondent went to the TDI Pump area with a spanner and tried to open the ball valve when it broke. He blamed the Respondent for not wearing his face mask. Likewise, **DW3** confirmed that he was on duty on **4 July 2013**; and that the Plaintiff did not follow the safety rules which were affixed on the wall at the TDI Pump area.

[18] The treatment documents and the medical report of **Dr. Aluda,** all go to show that the Respondent sustained injuries in the accident. The **Plaintiff's Exhibit No. 4,** for instance, shows that it was noted that the Respondent had inhaled *Toluene* chemical and had a sensation of shortness of breath with eye, nasal and throat irritation; though it was noted too that he had no signs of distress and that the air entry was good. Accordingly, the finding by the Learned Trial Magistrate that an accident occurred in the Appellant's plant in which the Respondent was injured cannot be faulted.

[19] In the premises, granted the pleadings, the evidence and the submissions made before the lower court, the issues that presented themselves for determination were;

[a] Whether the Appellant was liable to the Respondent for those injuries;

[b] Whether the Plaintiff was entitled to damages.

[20] These are, in essence, the issues around which the 9 Grounds of Appeal revolve. Hence, as was observed in **Statpack Industries vs. James Mbithi Munyao [2005] eKLR,** the burden was on the Respondent to prove his allegations of negligence/breach of contract and/or statutory duty on a balance of probabilities. Here is what the Court had to say in the **Statpack Industries Case**:

> **"It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury *per se* is not sufficient to hold someone liable."**

[a] <u>On Liability:</u>

[21] It was the contention of the Respondent that the accident was caused solely by reason of breach of the common law and or statutory duty of care and or breach of contract of employment and or terms thereof on the part of the Appellant, its servants, agents and/or employees. Accordingly, at paragraph 6 of the Plaint, the particulars of negligence, breach of duty of care and or contract by the Appellant, were supplied thus:

> **[a]** Failing to provide or avail the Plaintiff with the necessary working apparel or any other protective hear;
>
> **[b]** Failing to provide a proper system of working and or to prevent the said accident;
>
> **[c]** Failing to warn the Plaintiff on the impending danger or to take any measures to prevent the Plaintiff from sustaining the said injuries;
>
> **[d]** Instructing the Plaintiff to work in unsafe conditions or environment;
>
> **[e]** Failing to provide adequate supervisory mechanisms to the Plaintiff;
>
> **[f]** Exposing the Plaintiff to risk of harm or injury;
>
> **[g]** would have been averted had there been adequate knew or ought to have known.

[22] The Appellant however countered the Respondent's arguments by submitting that no causal link was established by the Respondent between his injuries and any negligence on the part of the Appellant. Counsel further pointed out that the Respondent was doing the work which he was ordinarily employed to do; that he was the one in control of the work that he was doing; and that if there was any accident then he was the sole cause of it. The Appellant further contended that, as the Respondent had been supplied with safety apparel, it was his fault that he did not wear the same on the day in question.

[23] The sum total of the evidence of **DW1, DW2 and DW3**, was that the Respondent had been assigned to do the work which he had been employed to do. In particular, it was the evidence of **DW3** that all the Appellant's technicians would be trained before being engaged in employment; and that they were under instructions to dress in protective apparel at al times. In addition, the safety instructions that the Respondent was expected to adhere to were also affixed to the TDI Pump area as a constant reminder. **DW2** and **DW3** also testified that the Respondent had been supplied with protective gear but that he did not wear the same at the material time. Indeed, the Respondent, who admittedly had worked for the Appellant for 27 years, conceded that he was only wearing a nose mask and not a face mask because **"…the equipment I was given was old…"**

[24] In the premises, it cannot be said that the Appellant did not provide the Respondent with protective apparel. Had he been injured while wearing the old face mask, it would have been a different story, with proof that it was not functional. As matters stand, the Respondent admitted that he was wearing no face mask. Accordingly, the remarks of the Learned Trial Magistrate to the effect that **"…If the plaintiff was given the face mask in 2010. It is defendant to imagine how it would function 3 years later. Given the time spent, it may not have been in good working condition…"** are purely speculative in my considered view as they have not support from the evidence presented before the lower court. In the same vein, it cannot be said, in the circumstances revealed by the evidence before the lower court, that the Appellant failed to provide a safe working environment. The Respondent's expertise had been invited for the very reason that the valve was not working. According to **DW1**, he was working on it as part of his routine duties. Accordingly, it cannot be said that the fault in the valve, by that very fact, posed such a danger to the Respondent and other employees, as to be classified as an unsafe working environment. To the contrary, it is manifest that it was the Respondent who went about his work in disregard of the safety instructions in place at the factory.

[25] In **<u>Maji Mazuri Flowers Ltd vs. Samuel Momanyi Kioko [2016] eKLR</u>** it was held that:

> **"The duty of the employer to ensure the safety of an employee is thus not absolute; it is one of reasonable care against 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…"**

[26] Likewise, in **<u>Purity Wambui Muriithi vs. Highlands Mineral Water Co. Ltd [2015] eKLR</u>**, the Court of Appeal took the view that:

> **"…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. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We don not think so. We say so because where an accident happens due to the employee's own negligence it would be unfair to hold the employer liable. Further Section 13(1)(a) of the Occupational Safety and Health Act provides: -**
>
> **"13(1) every employee shall, while at the workplace-**
>
> **Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace."**
>
> **Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."**

[27] In the circumstances, I would agree with the submissions of the Appellant's Counsel that no causal connection had been made by the Respondent between his injuries and the negligence and/or breach of contract or breach of statutory duty on the part of the Appellant; and that, consequently, the Learned Trial Magistrate erred in finding the Appellant liable to the Respondent as he did.

[b] Whether the Plaintiff was entitled to damages as awarded

[28] On quantum, the general principle is as was expressed in **Butt vs. Khan [1981 KLR 349** that:

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."

[29] A perusal of the record of the lower court, and in particular the evidence presented in connection with the Respondent's injuries, that he was not in distress when he visited **Moi Teaching and Referral Hospital** for treatment. The treatment chit marked the **Plaintiff's Exhibit No. 4** shows that he was seen at **Moi Teaching and Referral Hospital** about 30 minutes after the incident. He complained of irritation of the eyes, nose and throat. In **Dr. Aluda's** opinion, these were soft tissue injuries which had fully healed by the time he examined the Respondent on **2 March 2015**. In the premises, I would have considered an award of **Kshs. 100,000/=** reasonable given the comparable awards for similar injuries in George **Morara Masitsa vs. Texplast Industries Limited [2015] eKLR** and **Super Foam Limited vs. Domnic Njuguna Gaitho [2016] eKLR.** However, being of the view, as I am that the Respondent did not prove liability on the part of the part of the Appellant, I would allow the appeal and set aside the Judgment of the lower court in entirety and substitute it with an order dismissing the Respondent's suit. I would order that each party shall bear own costs of both the lower court matter and the appeal given the relationship between the parties.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF JUNE 2019

OLGA SEWE

JUDGE