REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL CASE NO. 122 OF 2002

MAIZE MILLING COMPANY LIMITED.....APPELLANT

VERSUS

HASSAN NAMADZO.....RESPONDENT

AND

RAPHAEL KARANI.....3RD PARTY

(Being an Appeal from the Judgment and Orders of The Honourable Chief Magistrate, Mr. Solomon Wamwayi dated and delivered on the 15th day of October, 2002 in ELDORET CMCC No. 1056 of 2001)

JUDGMENT

1. The plaintiff in the instant case, who is the Respondent herein, filed a plaint on 2nd October 2001, in which he stated that he had been employed by the Defendant as a casual laborer; specifically as a loader. He stated that during the time that the contract existed the defendant owed him a duty of care to take reasonable precautions to ensure his safety. He detailed that on 1st August 2001 in the course of his duties, he was hit by sacks falling from a height of 2 meters thereby causing him severe injuries.

2. The plaintiff listed the particulars of negligence on the defendant's part, concluding that the defendant had exposed him to an unsafe working environment. He prayed for judgment and orders for:

a. General damages

b. Special damages

c. Costs of the suit

d. Interest on the above

3. The defendant denied all the assertions by the plaintiff including the fact that he was an employee at the company, or that there was any existing contract between himself and the plaintiff.

4. In his judgment, the learned trial magistrate found in favour of the plaintiff and awarded him Kshs. 120,000/- as general damages for pain less 10 percent contribution, which came to Kshs. 98,000/- and Ksh. 2,000/- as special damages.

5. The defendant was aggrieved by the above decision and lodged an appeal alleging that the Honorable Magistrate erred in both law and fact:

1. in shifting the burden of proof of the existence of the contract to the Appellant while this was an allegation of the Respondent.

2. in holding that both the Appellant and the 3rd party in the said suit owed a duty of care to the Respondent.

3. in failing to rule conclusively on the existence or otherwise (of a contract) between the Appellant and the Respondent.

4. in finding the appellant liable in spite of an express admission by the third party that he had hired and paid the

Respondent on his own accord.

5. in finding that it was necessary for the Appellant to produce the muster roll while it was evident that no such records were maintained with respect to casual workers.

6. in finding that a cause of action had actually arisen in favor of the Respondent.

6. On the subject of the burden of proof in an action in negligence, **Halsbury's Laws Of England, 4th Edition** at page 476 paragraph 662 states as follows with respect to what is required to be proved in an action such as the one in the instant case:-

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

7. Looking at the evidence adduced in the case, there is no indication that the Respondent had shifted the burden of proof to the Appellant. The learned trial magistrate simply stated in his judgment that following the assertion by the Respondent that he was a casual employee of the company, and that this was in their record, specifically on the muster roll, the Appellant ought to have produced the muster roll which is in the custody of the company to prove otherwise.

8. Worthy of note is the assertion contained in the record of Appeal that the Appellants do not keep a muster roll for casual laborers. This does not release them from the responsibility of producing documentation to show that the Respondent's allegations hold no water.

9. On the question of the scope of duty of care owed, the learned trial magistrate decided that the defendant would bear 90% liability and the plaintiff 10% liability. The 90% of the liability was to be recovered from the third party.

10. In his defense, the third party stated that there was no privity of contract between himself and the Respondent and he did not therefore owe the Respondent a duty of care.

11. On the duty of care, Clerk & Lindsell on Torts, Eighteenth Edition at page 600 paragraph 11-04 states as follows**:**

1. The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss would not have occurred if the defendant had complied with terms of the statute. This rule performs a function similar to that of remoteness of damage.

2. It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.

12. The relevant statute in Kenya when it comes to an employer's statutory obligation to ensure safety at the workplace is the **Occupational Safety and Health Act** (CAP 514 Laws of Kenya). **Section 3** of the **Act** provides as follows:

"(1) This Act shall apply to all workplaces where any person is at work, whether temporarily or permanently.

(2) The purpose of this Act is to—

a. secure the safety, health and welfare of persons at work; and

b. Protect persons other than persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work."

13. According to the provision in **section 3(2)(b)** of the **Act**, the 3rd party on to whose motor vehicle the Respondent was loading the sacks when the incident took place cannot be absolved from responsibility. It is clear that just as mentioned by the learned trial magistrate, both the Appellant and the 3rd party are responsible for compensation of the Respondent's injuries because they both owed him a duty of care. The Respondent was a casual employee of the Appellant and as stated, had only been 'loaned' to the 3rd party. As their designation suggests, casual laborers are often involved in diverse activities within a larger scope of work.

14. The Appellant also states that the learned trial magistrate did not make any decision on the contractual relationship of the Appellant and the Respondent.

15. As discussed above, the Appellant did not rebut the Respondent's assertions that his name was on the muster roll as one of the casual laborers at their work premises. The Appellant did not produce the muster roll to disprove this. On a balance of probability therefore, there was proof that the Respondent was indeed employed by the Appellant as a casual worker. The inference to be drawn from the failure to produce the muster roll is that had it been produced, the contents would have been detrimental to the Appellant.

16. An appellate court will be slow to overturn a decision made by the court of first instance, unless it was founded on a misapprehension of

the law or fact. This can be found in the Court of Appeal decision in **Selle & Another vs. Associated Motor Boat Co. Ltd & Another (1968) EA 123**, where it was stated thus:

> **"The court's duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. The Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law…**
>
> **…A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."**

17. The award by the learned trial magistrate cannot be said to be inordinately high or low, nor is it based on wrong principles. For the afore stated reasons, the Appellant's appeal is therefore found to be unsuccessful. Consequently, the court declines to interfere with the judgment of the trial court on liability or on the award. The appeal is accordingly dismissed with costs to the Respondent.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JUNE 2018

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT ELDORET THIS 5TH DAY OF JULY 2018

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HELLEN OMONDI

HIGH COURT JUDGE