**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NUMBER 157 OF 2012**

**SINOHYDRO CORPORATION. ……. APPELLANT**

**VERSUS**

**JOEL ODHIAMBO OBONYO. ……. RESPONDENT**

***(An appeal from the judgment and decree in original Nyando SRMCC No. 12 of 2012 Delivered on 6/12/2012 by C. Owiye – Senior Resident Magistrate)***

**J U D G M E N T**

In the lower court, Respondent Joel Odhiambo Oboyo as Plaintiff sued the Appellant Sinohydro Corporation seeking general damages for pain and suffering from injuries sustained in the course of his employment by the Appellant. He also sought for specific damages and costs of the suit and interest. His claim was that he was employed by the Appellant as a general worker on 18th day of July, 2011 while he was lawfully performing his official duties due to the Appellant's employee or agents' negligence, an accident occurred whereupon he sustained injuries. The occurrence of the accident was due to negligence and breach of statutory duty on the part of the Appellant.

The Respondent denied the claim and any negligence and/or breach of statutory duty. They without prejudice averred that if an accident occurred the same as due to the sole and/or contributory negligence on the part of the Respondent. In paragraph 13 of their defence they enumerated the particulars of negligence on the part of the Appellant. During the hearing the Plaintiff gave evidence and the Defendant did not call any evidence but produced documents that the defence were relying on. By judgment dated 6th December, 2012 the trial magistrate found the Appellants 100% and assessed general damages at Ksh.100,000/- liable and special damages of Ksh.5,000/-.

Aggrieved by the judgment, the Appellant preferred this appeal faulting the trial magistrate for failing to consider the demand for contributory negligence on the part of the Respondent; failed to consider the evidence tendered on behalf of the Appellant; that he failed and/or misdirected himself in finding liability against the Appellant and finally that he ignored the Appellants submissions on quantum.

Mr. Nyamweya for the Appellant in support of the appeal submitted that the trial magistrate should have found that the Respondent had contributed to the occurrence of the accident. He submitted that on his own evidence the Respondent had been trained and therefore, knew that it was wrong for his helper to insert chemicals when they were working. That he knew the procedures operating at the workplace and therefore would have avoided the accident. Counsel further submitted that although the Appellant did not call any witness the evidence of the Respondent was sufficient to find contribution to the accident.

Mr. Morara for the Respondent opposed the appeal. He smutted that there was evidence that an accident

occurred; that the Respondent was injured and that there is evidence that the Appellant did not provide the safety equipment and protective gear which would have prevented or reduced the injuries sustained. On the issue of contributory negligence, he submitted that though it was alleged in the plaint, the appellant did not call any evidence to prove it.

This is the first appeal. They duty of the first Appellant court is to: -

> ***"Examine and evaluate the evidence and finding of fact of the trial court in order to determine whether the conclusions reached on the evidence should stand. (see Peters Vs Sunday Post 1968 EA 424)"***
>
> ***"More recently this court has held that it is not likely to differ from the finding of fact of the trial judge who had the benefit of seeing and hearing the witnesses and will only interfere with them if they are based on no evidence or the judge is shown demonstrably to have ached on wrong principles in reaching the finding he did. (See Jabuna Vs Olenja [1986] KLR 66)"***

The main issue raised in this appeal by the Appellant is that the trial magistrate did not find that the respondent's contributed to the occurrence of the accident. Counsel for the Appellant admitted that they did not call any witness in support of the allegations but stated that from the evidence this was apparent. The trial magistrate on this issue expressed himself thus in the judgment.

> ***"The Plaintiff blamed the Defendant for failing to provide him with protective devices such as goggles, masks and gloves which would have prevented and/or reduced the chances of injury. I note the defence did not call any witness to controvert the plaintiff's case. I, therefore, find the Defendant 100% liable."***

The Appellants in paragraph 13 of their defence averred:-

> ***"13. Absolutely without prejudice to the foregoing and in the alternative, the defendant avers that if an accident occurred (which is denied) the same was due to the sole and/or contributory negligence of the Plaintiff.***
>
> ***The particulars of sole and/or contributory negligence on the part of the Plaintiff: -***
>
> ***a) Working while intoxicated.***
>
> ***b) Failing to wear protective clothing and/or equipment provided.***
>
> ***c) Carelessly and recklessly going about his duties.***
>
> ***d) Acting uniterally without specific orders.***
>
> ***e) Exposing himself to danger which he knew or ought to have known based on his experience and previous instructions.***
>
> ***f) Volenti non fit injuria.***

Having made these averments in its statement of defence, on 8th November, 2012, Mr. Nyamweya advocate for the Appellant informed the court: -

> ***"Nyamweya Advocate: I am for the defendant. I wish to close the defence."***

The counsel did not call any witnesses for the defence. Section 107 of Evidence Act provides: -

> ***"107(1) Whoever desires any count to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***2) Where the person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

***108. The burden of proof in a suit or proceedings lies in the person who would fail if no evidence at all were given in either side.***

This provision of the Evidence Act lays the burden of proof of the existence of a fact on the person who alleges. The burden of prove the existence of contributory negligence in the suit, therefore lay on the Appellant. This issue has been canvassed in various decisions including **Janet Kalphine O and Another Vs Maoke Stores International** NBI HCC 68/07, and **Philis Wairimu Chacharia Vs Kim Tea Factory (2016) eKLR**. Failure for a party to prove averments in their statement of defence with no evidence of support remains mere statements. Whereas in this case the evidence of the Respondent was not controverted, it bears weight and the trial court will not be at fault when it relies on the same.

In the present appeal, the Appellant did not controvert the evidence of the Respondent, and did not call any witness to prove the allegations of contributory negligence and therefore, did not prove any contribution. I, therefore, do not find any merits in this appeal which is hereby dismissed with costs.

Dated, signed and delivered at Kisumu this 5th day of April 2017.

**…….**

**S N RIECHI**

**JUDGE**