REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 44 OF 2011

MAJI MAZURI FLOWERS LTD…..……..APPELLANT

VERSUS

SAMUEL MOMANYI KIOKO……..….....RESPONDENT

(Being an appeal from the original judgment and decree of G. Mmasi, Senior Resident

Magistrate, in Eldoret CMCC No. 435 of 2010 delivered on 17th February 2011)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Senior Resident Magistrates Court dated 17th February 2011. The respondent was injured in the course of employment. He brought a claim in tort. The lower court found the appellant was wholly to blame for the injuries sustained by the respondent. He was awarded Kshs 81,500 in damages together with costs and interest.

2. The appellant has lodged a memorandum of appeal dated 9th March 2011. The appellant contends that the learned trial magistrate fell into error because there was *no* evidence to support the allegations of *negligence*; and, that she relied on extraneous matters. The appellant also takes up cudgels on the award of general damages. The appellant's case is that the award was *exorbitant*. The appellant contends that the learned trial magistrate misapprehended the evidence and applied erroneous principles in his judgment. The appellant relied on written submissions filed on 27th October 2015.

3. The appeal is contested by the respondent. There is *no* cross-appeal. In the written submissions filed on 15th October 2015, the respondent stated that the appellant owed the respondent a duty of care; and, did *not* provide the respondent a *safe* working environment. In a synopsis, the case for the respondent is that the findings on liability were sound; and, that the damages were commensurate with the injuries. I was implored to dismiss the appeal.

4. On 19th January 2016, learned counsel for the appellant addressed the court on the submissions. The respondent's counsel did not appear notwithstanding that the date had been taken in court. I have considered the memorandum of appeal, record of appeal, the pleadings in the lower court, the evidence in the trial court and the written submissions by the appellant and the respondent.

5. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123,

Williamson Diamonds Ltd v Brown [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

6. The respondent filed a plaint in the lower court dated 5th May 2010. The appellant was employed as a general worker at the appellant's Ziwa Farm. He pleaded that on 19th August 2008, he was instructed to lift a heavy polythene roll onto a tractor; his colleague fell down shifting the weight to the respondent. As a result, he was injured on his back and chest. He blamed the respondent for negligence. The particulars of negligence were that the appellant failed to secure the safety of the respondent; exposed him to foreseeable risk or injury; and, failed to use a suitable machine or mechanical system to load the polythene roll. In a word, the respondent contended that the appellant failed to provide a safe system of work.

7. By a defence dated 3rd June 2010, the appellant denied the claim *in toto*. At paragraph 7, the appellant countered that the accident was caused by the negligence of the respondent. It was pleaded that he failed to have sufficient regard for his safety; was inattentive or reckless; and, failed to follow instructions or warnings from his supervisors. In a nutshell, the appellant was saying that the respondent was the author of his misfortune.

8. It is common ground that the respondent was employed by the appellant. He was a *general worker*. On the material date, he was assigned duties to load a polythene roll onto a tractor. He testified as follows-

> *"I do maintenance [work]. I have worked for 10 years. I recall on 19.9.2008; I was on duty at Maji Mazuri Flowers Limited in Moi's Bridge. I was loading the tractor with polythene rolls. We were to lift it [sic] 10 people. Supervisor took us [sic] 4 people to lift the roll. My colleague slipped before we placed the roll aboard the trailer. The weight came to my side; I felt I was weak on my back (spinal cord) I was holding on [to] the roll. The polythene roll is very heavy; the same occasion [sic] the injuries"*

9. Upon cross-examination, he conceded that he needed to be careful; and, that he was largely responsible for his safety. He said as follows-

> *"I know I have to be cautious and careful while on duty. The accident occurred as one worker slipped and the weight came to my side. The worker slipped accidentally. If he could not have slipped [sic] the accident could not have occurred. The accident was unavoidable. In maintenance you do all types of work. I did not have spinal problems ever since. To date I am still working"*.

10. There is then the evidence of the appellant's witness DW2. He testified as follows-

> *"I was with plaintiff aboard the tractor. Those on the ground were other colleagues. I never saw the plaintiff fall due to the weight. The garbage in the polythene was heavy. I was with him on the one side. The management should have provided a fork lift to assist in depositing garbage on the tractor. He never went to hospital. I worked with him until evening. He went to hospital after some days. Later he was given light duties as he complained"*.

11. From that evidence, the appellant was a *general worker*. His duties did not require any specialized training. He was loading a heavy polythene roll onto a tractor. He was not doing it alone. Except that his colleague *accidentally* slipped and fell; the load or weight would *not* have shifted to him. True, the appellant could have installed a machine or mechanical process to load the rolls onto the tractor or trailer. But it was work that could be done *manually* by a number of people. It was precisely why the respondent was employed. The respondent conceded he was working in a team of *four* people.

12. In cross examination he conceded that he had worked for ten years; and, that he needed to be *cautious*. He also conceded that his colleague fell by *accident*; and, that the injuries the respondent suffered could *not* be avoided. In his own words *"the worker slipped accidentally. If he could not have slipped [sic] the accident could not have occurred. The accident was unavoidable"*.

13. Granted that evidence, the lower court erred by blaming the appellant *wholly* for the accident. That point was succinctly captured in *Purity Wambui Murithii v Highlands Mineral Water Company*, Court of Appeal, Nyeri, Civil Appeal 58 of 2014 [2015] eKLR-

> *"It, therefore, follows 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 do not think so. We say so because where an accident happens due to the employees 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-*
>
> *(a) 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".*

14. 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).

15. 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.

16. My findings above are sufficient to dispose of this appeal. But I am still required to comment on the quantum of damages. The appellant contends that the award was *exorbitant*. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

17. From the medical report of Dr. Aluda dated 21st April 2010 (exhibit 5), the respondent suffered *"slight tenderness in the chest"* and complained of *"occasional pains in the chest and back"*. There was no permanent or other serious injury. The doctor opined that the injuries had *healed* and that the pain would *subside* with use of analgesics.

18. The lower court assessed general damages at Kshs 80,000. The respondent suffered minor *soft tissue* injuries. There were *no* permanent injuries. In *Peter Kahugu & another v Ongaro*, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was made. In *Mumias Sugar Company Limited v Julius Shibia*, High Court, Kakamega, Civil Appeal 112 of 2011 [2004] eKLR the court reduced the general damages for multiple soft tissue injuries to Kshs 100,000. I cannot then say that the award in the present case was so high or founded on wrong principles. The claim for special damages had been *specifically* pleaded and proved. But that is now all water under the bridge.

19. The upshot is that the appeal is *allowed*. The judgment and decree of the lower court dated 17th February 2011 is hereby *set aside*. The respondent's suit in the lower court is *dismissed*.

20. Costs are at the discretion of the court. In the interests of justice; and considering the predicament the respondent finds himself in; I order that each party shall bear its own costs in the lower court and in the appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 11th day of February 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance for the appellant.

No appearance for the respondent.

Mr. J. Kemboi, Court clerk.