**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 828 OF 2007**

**KENYA NUT COMPANY LIMITED…….APPELLANT**

**VERSUS**

**SAMSON OGUTU RACHAR……..RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment and decree of Honourable Esther Boke, Resident Magistrate delivered on 4th September 2007 in Kandara RM CC No. 28 of 2007.
2. The appellant herein Kenya Nut Company Limited was the defendant whereas the respondent Samson Ogutu Rachar was the plaintiff in the suit before the subordinate court. The respondent herein sued the appellant claiming for general damages and special damages of kshs 3,000/-, costs of the suit and interest arising from alleging that on 12th November 2006 while in the course of his employment with the appellant, he was standing on the walls of the water trough cleaning coffee berries when the slippery floor caused him to fall hitting his legs against the hard surface and thereby getting injured. This was by a plaint dated 19th January 2007. The respondent blamed the accident and the resultant injuries he sustained on the negligence and or breach of statutory duty of care of the appellants in that:

    i. It failed to provide protective apparel to the respondent
    ii. Failed to prove a safe place for work.
    iii. Assigning duties to the respondent without any due care and attention.
    iv. Res Ipsa Loquitur.
    v. Failing to provide protective gear e.g. gumboots.
    vi. Failing to fully instruct the respondent as the dangers involved in the said work and precautions to be observed.
    vii. Failing to instruct their workers about safety precautions to be observed with regard to safety of the other workers in the company.

3. The plaintiff alleged that he sustained injuries involving a cut wound on the medial side of the upper part of both legs below the knee.
4. In their statement of defence dated 14th February 2007 and filed on 15th February 2007, the appellant denied all the averments contained in the plaint including denials that the respondent was their employee; that he was injured while engaged upon his employment; that the appellant was negligent or that it breached any statutory duty as alleged in the particulars of negligence or breach of statutory duty. In the alternative, the appellant contended that if at all any accident or injury involving the respondent did occur as pleaded by the respondent, which

was denied, then it was solely caused by and or substantially contributed to by the respondent for:-

i. Exposing himself to risk when he knew or ought to have known to exist.
ii. Being careless and inconsiderate of his own safety and welfare whilst on duty.
iii. Failing to be sober and vigilant and do everything possible to avoid getting into the harm's way.
iv. Failing to pay any proper attention to the surrounding circumstances to avoid being injured.
v. Failing to use protective apparel and safety tools at his disposal
vi. Disregarding safety measures which form part of his contract of employment.
vii. Undertaking unauthorized duties.

5. The appellant also pleaded the doctrine of Volenti non-fit injuria to show that the respondent voluntarily exposed himself to the known hazards of his occupation. Demand and intention to sue was denied.
6. The suit was heard by the Honourable Resident Magistrate who found the appellant liable in negligence to the plaintiff and awarded him general damages of kshs 65,000/- for pain and suffering and specials of kshs 3,000/- together with costs and interest.
7. Being dissatisfied with that judgment and decree of the trial court, the appellant herein lodged this appeal to challenge the decision of the Resident Magistrate setting out six (6) grounds of appeal in its Memorandum of Appeal dated 2nd October 2007 namely:

1. The Learned Magistrate erred in law and in fact by finding that the plaintiff had proved that the defendant was liable for the injuries sustained by the plaintiff, if at all.
2. The Learned Magistrate erred in law and in fact by finding that the plaintiff had proved his case against the defendant on a balance of probabilities.
3. The Learned Magistrate erred in law and in fact by failing to give due consideration of the merits of the defendant's evidence in the suit as to whether the plaintiff was injured whilst in the cause of this duty and within the defendant's premises.
4. The Learned Magistrate erred in law and in fact by ignoring the defence witness's testimony that the accident never occurred.
5. The Learned Magistrate erred in law and in fact by failing to give due consideration to the fact the plaintiff failed to report the alleged accident to the relevant authorities as per the safety regulations.
6. The Learned Magistrate erred in law and in fact in awarding damages that were manifestly excessive in the view of the injuries sustained by the plaintiff.

8. The appellant therefore prayed that the appeal be allowed, judgment and decree be set aside/varied and the appellant be awarded costs of the appeal and costs in the subordinate court.
9. The parties' advocates agreed to canvas this appeal by way of written submissions. The appellants dutifully filed and served the respondent who never filed any and submissions and this court is now called upon to consider the submissions and the record to render its verdict. The appellant compiled two records of appeal including a supplementary record filed on 9th November 2015 with leave of court.
10. This being a first appeal, this court is called upon and obliged to apply the principles espoused in Section 78 of the Civil Procedure Act and as set out in various decisions of the Court of Appeal including **Selle V Associated Motor Boat Company Ltd [1968] EA 123,t**hat this court's role is to re-evaluate, re-examine and reassess the extract on record and then determine the appeal on whether the conclusions reached by the trial court are to stand or not and give reasons either way. The cases of **Abok James Odera V John Patrick Machira CA 161 of 1999**; and **KPA V Kuston (K) Ltd [2009] 2 EA ,212** are also relevant. In the latter case the Court of Appeal held that:-

> ***" On a first appeal from the High Court, the Court of Appeal should 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 the respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties I the evidence."***

11. In their submissions dated 20th November 2015 and filed in court on the same day, the appellants in support of the grounds of appeal submitted that the respondent did not discharge the burden of proving that he got injured or proving that he got injured at the appellant's premises which burden was shifted by the trial court to the appellant. Reliance was placed on the case of **KWFT V Isa Adhiambo Okayo CA No. 9 of 2014** where it was held that :

***"As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80 Laws of Kenya, which provides:***

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

12. The appellant also relied on Sections 109 and 112 of the Evidence Act which enact that the evidential burden is cast upon any party the burden of proving and particular fact which he desires the court to believe in its existence as augmented by the Court of Appeal decision in **Jenipher Nyambura Kamau V Humphrey Mbaka Nandi [2013] e KLR.**
13. In this case it was submitted that the trial court relied solely on the respondent's testimony to establish that the injuries sustained on 12th November 2016 were sustained from the premises of the appellant and that the testimonies and documents produced by the appellant's witnesses were completely discredited even though they were sufficient enough to rebut the respondent's oral testimony. That the trial court disregarded the evidence by the supervisor and an employee who were both present on the day and stated on oath that the respondent had not been injured at all, which evidence was not rebutted by the respondent. It was contended that the trial magistrate's reasons that the employee and supervisor still worked for the appellant and thus could lie on its behalf was not only baseless but also unfounded since it was upon the respondent to prove his case and not shift that burden upon the appellant. Reliance was placed on **Maithiya V Housing Finance Corporation of Kenya HCC 1129 of 2002**,where the court held that the burden of proof lay on he who alleges.
14. The appellant also contends that since the medical report of Dr. Ikonya and treatment notes produced by the respondent were not produced by the maker, there was no proof of injuries by the respondent and the trial court therefore erred in awarding damages for injuries which had not been proven. It was further submitted that the respondent having veered away from the procedure laid down by the appellant for its employees to acquire treatment for injuries sustained at work, the medical report and treatment notes issued to the respondent outside the recognized procedure should have been vigilantly verified. The appellant relied on **Ol-Njorowa Ltd V Titus Chemati HCCA 205/2009** where the court cited **Amalgamated Saw Mills Ltd V Stephen Mutuunguru HCA 75 of 2005** where it was held:

***"A plaintiff must prove a causal link between someone's negligence and his injury. He must adduce evidence from which, on a balance of probabilities a connection between the two may be drawn. An injury alone is not proof of negligence."***

15. The appellant further submitted that even if the treatment notes and medical report indicated that the respondent had been injured the same cannot be relied on to prove that his injuries were sustained at the appellant's premises. The appellant again maintained that the respondent did not discharge the burden of proof and relied on **Miller V Minister of Pensions [1947]** and implored the court to allow the appeal, set aside the judgment of the lower court and dismiss the respondent's suit with costs.
16. I have carefully considered the record; submissions and the authorities relied on by the appellant. As earlier indicated, this court in making its decision, being the first appellate court, must, nonetheless assess the evidence as adduced in the lower court and arrive at its own

independent conclusion, having regard to the fact that it neither heard nor saw the witnesses as they testified and therefore giving due allowance to that. Re-examining the evidence on record and on determining whether or not the respondent discharged the burden of proof on a balance of probabilities, the respondent Samson Ogutu Rachar testified as PW1. He stated on oath that on 12th December 2006 he was working in the factory washing coffee with Kenya nut Company Ltd at Kiahora. When performing that job, some workers enter into a ditch while others are at the open place. That there are trenches with walls for washing coffee and the workers alternative such that the one in the trench walk out while the ones out go inside. As he was coming out of the trench, he slid and fell hitting his chest on the wall and injuring his leg. He produced his NSSF card to show his employer was the appellant herein. That he reported to Mr Mbugua who was his supervisor, who advised the respondent to attend hospital for treatment. He was treated at Kimuyu Medical Clinic and discharged. He produced treatment notes. The next day he returned to his place of work and continued working. He blamed the appellant company for the accident and injuries because he had no protective gears like gumboots which would have stopped him from sliding or if he slid it would have protected his leg from injury. He later visited a doctor in Ruiru in Plains view Nursing home, who examined him and prepared for him a medical report after he paid shs 3000/-. He produced the medical report in question and receipt as exhibits. He also produced a demand notice done by his advocate and send to the appellant. He prayed for damages, costs plus the expenses he incurred.

17. In cross examination, the respondent stated that they (workers) worked on Sundays when there was a lot of work and that on the material day there was a lot of coffee to be washed as it was harvesting season so that is why he was washing on that day. He also stated that he was a general worker since 2003. That he used to pick coffee, macadamia nuts and even wash coffee. He stated that he required gumboot because he was working inside water and that he had asked for them from the store on 11th but he continued working without them because he had to earn a living and fend for his family. He stated that he was injured on the knee and chest due to the sliding and that if he had gumboots he would not have slid. That he reported the accident to his supervisor as was required. That the company referred injured workers to Naidu Hospital but that the supervisor never referred him there. He denied going to Kimuyu with the intention of making a false report. He denied telling the doctor at Plains view that he was injured by a moulding machine. He stated that he left employment with the appellant after being attacked by thugs and on reporting the incident to the manager he was told with others to record a statement.
18. The respondent admitted that he was facing criminal charges in court but denied that he stole from the appellant and left, making him revenge by suing it. He stated that on that material day he worked with Stephen Wafula among others. Further, that he signed the verifying affidavit witnessed by Stephen Wafula.
19. In re-examination the respondent stated that gumboots would have protected him because they were not slippery. That he explained to the Plains view doctor what he had testified about but he could not tell what the doctor recorded. That he was injured at about 10.30 am albeit he had no watch hence he could not recall the exact time. He also stated that it was not mandatory that one had to go to Naidu Hospital. The plaintiff/respondent had anticipated to call a Mr Wafula who did not attend court so he closed his case.
20. The appellant called three (3) witnesses. DW1 Gerald Mwangi testified on oath that he worked with the appellant at Kiahoha Estate as office clerk in charge of payroll issues and that issues relating to injury while at work fell in his docket since he was the one to issue money for attending hospital and recorded such reports since the victims of injury were paid for the days they got injured while on duty and it was normally indicated in the register.
21. DW1further testified that where a worker fell sick and had to be assisted by the appellant, his name must be in the medical register. He produced as D exhibit 1a and b and D exhibit 2 being Muster roll and medical register respectively.
22. According to DW1, he never received any report concerning the respondent's accident or injury and that in any case, it was on a Sunday. On that day, that there was Boniface a supervisor who would have received the report. That the respondent was paid for having worked full hours and if he was injured the records would have indicated that he was sick. The witness acknowledged that on Sunday persons at work were never recorded in the Muster roll or payroll but on a different

register and were paid for overtime. He produced the payroll D exhibit 3 showing that the respondent worked full time with his colleagues and was paid full 6 hours on the fateful day. That he worked with Peter Mutiso on the overtime payroll. That since no accident was reported on that day, the respondent was not injured at the appellant's premises, and that if he had no protective gears the supervisor would not have allowed him to work without them.

23. In cross examination DW1 stated that no accident report was made. He admitted that he was personally not on duty on the material day because it was on a Sunday. That the supervisor was Boniface and still worked with the appellant.
24. In re-examination DW1 stated that when one was injured he was given a sick sheet which he would take to Naidu hospital and that if the respondent was injured he would have been entered in the medical register by his supervisor then given a sick sheet to attend the Naidu Hospital.
25. DW2 Boniface Mboko Kimani testified that he worked with the appellant in the factory department as supervisor. That he knew the respondent who worked under him. That on 12th November 2006 he was on duty at the factory where the respondent was also working and that there was no incident of injury on that day and that if there was any he would have received the report as the supervisor and he would have taken that report to the manager and got some of his co-workers who witnessed the accident to record their statements. That thereafter the victim would have been taken to the office for first aid then taken to hospital.
26. In cross examination DW1 confirmed that the respondent was on duty on that material day but denied that anybody was injured. He also denied receiving any injury report from the respondent and or stating that it was a minor injury which he could not bother with. He named other people who worked with the respondent on that day like Emmanuel Majengo, Gerald Karomi, David Gitahi and Mutiso and the ladies. He also stated that the respondent worked until 3.30 pm as per the overtime payroll. He denied refusing to assist the respondent after receiving the accident report.
27. In re examination, the witness stated that if he had refused to assist the respondent, the latter would have gone directly to the manager who was in the office.
28. The appellant also called DW3 Peter Mutiso Kamuya who testified that he knew the respondent and that he was on duty with him on 12th November 2006 together with many others but that the respondent was never injured as no report was made to the supervisor Boniface Mbugua who would have called the witness and others with the respondent to record statements after which the respondent would have been taken to hospital which was not the case here.
29. The witness maintained that there is no way the respondent could have been injured on that day and failed to notify any of his colleagues since he never worked alone.
30. In her judgment delivered on 4th September 2007, the trial magistrate found the appellant herein liable in negligence/breach of statutory duty of care in that it failed to supply the respondent with gumboots and that on the evidence available the respondent had proved that he was injured on the material day while on duty at about 10.00a.m and went to hospital the same day. Further that the defence used the procedural twist to evade liability. She therefore entered judgment for the respondent on liability in the ratio of 30:70 and quantum of shs 65,000 general damages and kshs 3000 special damages together with costs and interest at court rates.
31. It is that judgment that the appellant herein has challenged by this appeal in its 6 grounds of appeal.
32. From the above reassessment/reconsideration of the evidence and the record of the lower court, and considering the submissions and authorities relied on by the appellant, in my humble view, the following issues arise for determination:

I. Whether the respondent was injured on 12th November 2006 while he was engaged upon his work at the appellant's premises/usual place of work.

33. it must first be emphasized that there is no dispute that the respondent was an employee of the appellant and further, there is no contest that on the material day when he alleges that he was on duty, the respondent and the appellant's own records showed that the respondent was indeed on duty on that material day which was a Sunday. Nonetheless, the appellant contends that the respondent never reported any injury on that day; that none of his workmates including DW3 saw him injured at the premises and that the respondent never told anyone of

his injury and neither did he follow the procedures laid down by the appellant's establishment whenever one was injured while on duty. Reliance was placed on Sections 107, 109 and 112 of the Evidence Act Cap 80 Laws of Kenya which are clear that whoever asserts must prove those assertions. They also relied on the cases of **Kenya Women Finance Trust V Isca Adhiambo Okayo** (supra) and **Jenipher Nyambura Kamau V Humprey Mbaka Nandi** (supra). The appellant's counsel strongly submitted that the evidence of the respondent was discredited by the defence witnesses and rebutted and that therefore the trial magistrate erred in law and fact in disbelieving the appellant's evidence.

34. Albeit the respondent has not filed any submissions in opposing this appeal, I have had the opportunity to reassess and reevaluate the evidence on record and considered the analysis by the trial court. The respondent in his evidence maintained that he was injured while at work and while he was coming from the trench, he slid and fell hitting his chest on the wall and injured his leg. He reported to his supervisor Mr Mbugua who advised him to go to hospital and he went for treatment at Kimuyu Medical Clinic and was discharged. He reported back to work and continued as usual.
35. On the other hand, the appellant's witnesses maintained that the respondent did not get injured while at work since there is no record of a report of injury made by the respondent to his supervisor who would have given him a sick sheet before going to hospital which was Naidu Hospital. That the injured personnel were usually recorded in the medical register. DW3 who worked with the respondent on the material Sunday did not witness any injury accident involving the respondent. The trial magistrate believed the respondent and discarded the defence evidence on the ground that the documents produced ( Master roll) were doctored. She also found that the pay roll produced as D exhibit 3 had alterations against the respondent's name on the amount paid to him in the total dues column and the total hours column using white wash and written afresh. Further, that the amounts due and hours worked were altered and no explanation was offered to court for such alterations. She also found that the accidents register was not conclusive and disbelieved the defence/ appellant's witnesses who were still employees of the appellant.
36. From the defence exhibit accidents register produced in evidence, indeed there is no indication that any accident ever occurred on 12th November 2006 involving any person leave alone the respondent. However, it is indeed disturbing that in the Muster roll at page 86, the name of the respondent is deleted in original hand by crossing it out completely, which also had the effect of altering the total dues and total hours worked on that material day. Similarly on page 87 of the Muster roll, the respondent's name is No. 3 from the top and surprisingly, his total hours is charged from 6.5 to 8.5. It is also indicated that on 13th November 2006 he worked for 2 hours only whereas on 12th November 2006 he worked for 6.5 hours. The total dues are also altered from 270 to 370 using wite out erasure. Whereas this court would accept as inadvertent errors in the entries regarding rates falling under Nos. 318,372,165,282 and 360, since the figure 276 was inadvertently written under **"rate"** instead of **"total dues,"** I refuse to be persuaded that the erasures and insertions under the respondent's name were in any way inadvertent. Furthermore, the appellant has not given any explanation for such erasures.
37. Further, no explanation was offered by the appellant's witnesses as to why there were such alterations on a carbon copy paper by original hand. For that reason, I am in agreement with the trial magistrate that in the absence of any explanation as to the obvious alterations specifically targeting the respondent, the exhibit pages create serious doubts in the mind of the court as to the genuineness of the entries, and given that the appellant is/was the custodian of those exhibits, there was a high possibility that its officials doctored their documents to disadvantage the respondent. In addition, this court finds that the trial court had the opportunity to see and hear the witnesses as they testified and she believed the evidence of the respondent that he did inform Mr Mbugua the supervisor of the accident injury and the supervisor told him to go to hospital which he did and he produced treatment notes to that effect. The respondent also did by a Notice to Produce dated 1st March 2007 seek for production of among others, LD No. 104 filled in respect of the incident (Workmen Compensation Forms) but the appellant never produced and no reasons were given for non production thereof. P exhibit 2 is clear that it was issued on 15th November 2006 indicating trauma while on duty the same day at 10.000a.m. The appellant's witnesses did not deny that the respondent was on duty on 12th November 2006 at

10.00a.m. They however deny that he was injured, or that he reported to the supervisor and moreso, they insist that without following the laid down procedure for reporting an accident and attending at unauthorized Naidu Hospital then the respondent was not injured while at work. I beg to disagree with the appellant on that point and concur with the trial magistrate who believed the respondent's evidence that the respondent reported to his supervisor who advised him to go to hospital. With the clear evidence of tampering with records without any explanation, it is also possible that the appellant's supervisor did not want that accident recorded and that is why he simply told the respondent to go to hospital without any written referral as to which specific hospital.

38. Further, there was no evidence tending to prove that the respondent could have been injured at any other place or premises other than the appellant's premises. In cross examination, the appellant's counsel tended to suggest to the respondent that the respondent had told the doctor that he was injured by a moulding machine. However, no evidence was tendered by the appellant to demonstrate that the respondent had lied to the doctor or that he was injured while outside the appellant's place of work. There was also no evidence that the respondent was such a dishonest person that he could not be believed by the court in his evidence. Albeit the line of cross examination was tilted towards painting him as a criminal, this court has not found any evidence linking the respondent to dishonesty.
39. In my humble view, the respondent did prove on a balance of probabilities that he was injured while at work and at the appellant's premises. There is no justification placed before this court to warrant the court to interfere with the trial magistrate's findings of fact on the occurrence of the accident. On the contrary, the appellant's own evidence was wanting in credibility and hence its probative value was seriously watered down by the alterations on documents without counter signatures and or explanations leaving an inference that the documents were altered to the detriment of the respondent.
40. In addition, it cannot be an absolute truth and it was not proved on a balance of probabilities that failure to follow the laid down procedure in reporting an accident perse is prima facie evidence of no accident or injury having occurred at the appellant's premises involving the respondent. From the verifying affidavit which was only thump printed by the respondent this court takes judicial notice that the respondent was illiterate and not well informed hence being advised to go to hospital without any reference document and or in the absence of any evidence that he deliberately refused to go to Naidu hospital, this court is unable to find any evidence that the respondent was lying on the occurrence of the accident.
41. In addition, this court is curious that the appellant did not produce the workmen's compensation form L.D. No. 104 in respect of the accident and neither did they write to the respondent's counsels to explain why they could not produce it. Neither did the appellant in their defence produce any record showing the time when the respondent left the premises to rule out the possibility that he could have left work immediately upon being injured and not worked for 8.5 hours recorded after erasing 6.5 hours from the register. That conduct on the part of the appellant casts doubt as to the credibility of its evidence by its witnesses and leaves this court making an inference that the appellant was hell bent to obstruct the course of justice for the respondent by interfering with records and deliberately failing to record the occurrence of accident and injury sustained by the respondent while at work on the material day and refusing to refer him to the hospital where employees ordinarily received treatment for injuries while at work.
42. The second issue then would be who was to blame for the material accident and resultant injury sustained by the respondent? The respondent testified on oath that he was not provided with gumboots. That the trench where he worked washing coffee was slippery and that he blamed the defendant/appellant company because it never provided him with protective gears like gumboots. He testified that gumboots would have stopped him from sliding or if he slid the said gumboots would have protected his leg from being injured.
43. In defence, DW1 Gerald Mwangi the office clerk employed by the appellant insisted in his testimony that no accident occurred to the plaintiff and when asked concerning provision of protective clothing, he responded that " ***it is not true that plaintiff was not given any protective gears, because the supervisor would not have allowed him to work without protective gears. The gears are available in the store and if one does not have any or his has a***

***problem can go to the store and get them."***

The supervisor named by DW1 was Mr Boniface Mbogo Kimani who testified as DW2 and confirmed distributing work on the material accident day and that the respondent worked under him. The said supervisor Mr Boniface Mbogo never testified that the respondent was ever provided with any protective gears while he worked in the trenches washing coffee. Neither was any record produced to show that all the other workers or the respondent were issued with the gumboots or any other protective gears to protect them from any foreseeable injury while they were engaged upon their work. In this case, therefore, the respondent's evidence that he was injured because he worked without any protective gears/gumboots was not rebutted, and or challenged in any way. In **Halsbury's Laws of England 4th Edition paragraph 662 page 476**, it is stated that:

> ***" 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 convention must be established."***

44. In **Boniface Muthama Kavita V Carton Manufactures Ltd [2015] e KLR** Onyancha J observed that

> ***"The relationship between the appellant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to an unreasonable risk."***

45. **Winfield and Jolowicz on Tort, 13th Edition at page 2013** defines employer's liability as:

> ***"At common law, the employer's duty is a duty of care and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working, the plaintiff must plead, and therefore prove what the proper system was and in what relevant respect it was not observed."***

46. In this case the respondent pleaded and testified that he was not provided with protective gear e.g. gumboots. The appellant pleaded contribution and or negligence on the part of the respondent. However, it never led any evidence to prove any of the particulars of contributory negligence. Its witnesses only maintained that no accident took place on that day and that no injury was suffered by the respondent simply because that accident and injury were never recorded in the books kept by the supervisor, which this court has dismissed on several grounds including a finding that there was doctoring of records by the appellant's staff as produced with a view to obstructing the course of justice for the respondent which has the effect of discrediting the witnesses and evidence by the appellant.
47. There was no evidence led to the effect that the respondent failed to use the protective apparel if any had been provided or that he disregarded the safety measures which formed part of his contract of employment. That contract of employment was never produced in evidence. There was also no evidence that the respondent undertook unauthorized duties and hence, exposed himself to injury, to attract invocation of the doctrine of ***volenti-non fit injuria***. There was also no evidence adduced that the respondent was careless, inconsiderate of his own safety and welfare while on duty or that he was not sober and vigilant and that he failed to do all that was possible to avoid getting into harm's way; or that he failed to pay proper attention to the surrounding circumstances to avoid being injured. With persuasion that the respondent sustained his injury while in the course of his employment following admission by the appellant's witnesses that indeed the respondent was on duty on the material date of accident, and in the absence of any rebuttal of the manner in which the accident occurred injuring the

respondent, and this court being persuaded that the respondent's injury could not have been sustained elsewhere other than in the appellant's premises and while the respondent was engaged upon his work, it is unbelievable that such injury could be mysterious or solely caused by respondent.

48. The Court of Appeal in the case of **Embu Public Road Services Limited V Riimi [1968] EA 22** stated as follows:

> ***" where the circumstances of the accident give rise to the inference then he defendants, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence."***

49. In **Mumias Sugar Company Ltd V Charles Namatiti CA 151/87** the Court of Appeal held that:

> ***" An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."***

50. On the basis of the sufficiency of evidence adduced by the respondent, and applying the legal principles s espoused in the authorities that I have cited, I find and hold that the appellant had a statutory and common law duty of care to provide a safe working environment and protective gears/gumboots to the respondent while engaged upon his duties. I also find that the appellant failed in that duty to observe the common law duty of care by an employer of ensuring that the respondent was safe at work. The appellant did not provide any protective gears to the respondent employee while he was engaged upon his work. The appellant was therefore to blame for the occurrence of the accident wherein the respondent slipped and fell in the trench.

51. The ancillary question that the court must pose and ask at this point is whether the respondent in the circumstances of this case could have contributed to the occurrence of the accident or whether he exposed himself to the risk of injury. From the manner of signing of the verifying affidavit by the respondent, this court can infer that the respondent was an illiterate person. In **Halsbury's Laws of England 3rd Edition VOL 28 Paragraph 28** it is stated thus:-

> ***" where the relationship of master and servant exists, the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employee."***

52. The Court of Appeal in the case of **Makala Mailu Mumende Vs Nyali Golf County Club [1991] KLR 13** stated thus:

> ***" No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."***

53. In other words, in as much as the employer's duty of care towards its employees is not absolute and neither are employers expected to baby sit their employees, (see **Stat Pack Industries V James Mbithi Munyao Nairobi HCC 152/2005),** and whereas the respondent may have taken upon himself the risks incidental to his employment, this was subject to the employer's duty to take reasonable care of him.

54. In the instant case, the reasonable care was not too much. It was the provision of protective gears to wit gumboots which I agree with the respondent's evidence that the boots would

have prevented him sliding on the slippery ground and if he slid, he would mitigate the injury.

55. Accordingly, I dismiss the assertions by the appellant that the respondent failed to prove that the appellant was liable for the injuries he sustained and or that the trial magistrate erred in finding that the respondent had proved his case against the appellant on a balance of probabilities. The evidence by the respondent overwhelmingly pointed to the fault by the appellant.

56. However, as the respondent did not challenge the apportionment of liability in the ratio of 30:70, in favour of the respondent, I would not interfere with the trial magistrate's finding that the respondent should shoulder some liability because he was expected to see well the environment under which he was working.

57. On the issue of whether the general damages of shs 65,000 and specials of shs 3,000/- as awarded to the respondent was manifestly excessive in view of the injuries sustained by the respondent, the court observes that the respondent pleaded that he sustained injuries involving cut wound on the medial side of the upper part of both legs below the knee, which was as per doctor Ikonya's medical report dated 1st December 2006 produced as P exhibit 3. The respondent's initial treatment notes dated 12th December 2006 show that the respondent sustained double cut wound lower limbs. He had not fracture or sprain. He was treated for soft tissue injuries which had healed leaving residual pain but no permanent incapacity anticipated. The pain, according to Doctor Ikonya, would subside. The respondent's counsel submitted proposing an award of shs 120,000 to the trial magistrate while the appellant's counsel did not file any submissions proposing any figure. The trial magistrate considered the nature of injuries sustained by the respondent and the inflation factor and awarded him shs 65,000/- general damages. The trial magistrate considered that the authorities relied on by the respondent's counsel were not comparable as the claimants therein sustained more serious injuries.

58. In the present appeal, the appellant asserted in its ground of appeal No. 6, that the award of damages was manifestly excessive in view of the injuries sustained by the plaintiff. However, there was no mention or submission regarding that ground challenging the award of damages and what it considered to be appropriate damages in the circumstances having regard to the injuries sustained by the respondent. The Court of Appeal in **Butt v Khan (1982-1988) KAR 1** Claw JA laid down principles which have settled the law 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……"***

59. As stated earlier, the trial magistrate in the lower court took into account several factors before arriving at shs 65,000/- general damages. It has not been demonstrated that he proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high. Accordingly, I find no justifiable basis to warrant this court to interfere with the said award of general damages. I uphold the award of shs 65,000/- general damages and shs 3,000 special as proven and dismiss the appellant's ground No. 6 of the appeal.

60. The upshot of all the above is that I find no merit in the appellant's grounds of appeal as contained in the Memorandum of Appeal dated 2nd October 2007. I dismiss the appeal in its entirety both on liability and quantum and uphold the trial magistrate's findings and decision.

61. On costs, I note that the respondent did not participate in the final hearing of this appeal. He never filed any submissions/arguments against the appeal. That being the case, I order that the appeal is dismissed with each party to bear their own costs of the appeal.

62. I further order that the decretal sums of money deposited in court on 22nd October 2007 in the sum of kshs 70,000/- by the appellant as security for due performance of decree, which sums of money as deposited do not earn any interest, be released to the respondent forthwith.

**Dated, signed and delivered in open court at Nairobi this 8th day of March 201**6.

**R.E. ABURILI**

**JUDGE**