REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 221 OF 2010

MAIZE MILLING CO. LTD ……APPLICANT/APELLANT

VERSUS

JACKTONE O. OTINA …….RESPONDENT

(An Appeal from the Judgment and Decree of the Senior Resident Magistrate Honourable G. A MMASI (SRM), in Eldoret CMCC No. 693 of 2009, dated 4th November 2010)

JUDGMENT

1. Maize Millers Company Limited (the appellant) was sued by *Jacktone O. Otina* (the respondent) for special and general damages in Eldoret CMCC No. 693 of 2009. The respondent also prayed for costs of the suit and interest.

2. It was the respondent's case as pleaded in his plaint dated 28th August, 2009 that he was employed by the appellant as a Mill Cleaner and that on 20th July, 2006 as he was lawfully on duty cleaning pipes, he slipped and fell as a result of which he sustained serious injuries. He blamed the accident on the appellant and or its servant's negligence and or breach of the terms of his contract of employment and or statutory duty.2.

3. The appellant in its statement of defence dated 1st October, 2009 denied the existence of any contract of employment between it and the respondent and that the respondent was injured on the date alleged in the course of his employment. The appellant further denied being negligent or in breach of contract or statutory duty. In essence, the appellant denied the respondent's claim *in toto* and put him to strict proof thereof.

4. In the alternative, and without prejudice to the denial of liability, the appellant pleaded that if the accident occurred on the date and place alleged, that the respondent wholly or substantially contributed to its occurrence in the manner in which he carried out his duties. Lastly, the appellant averred that the respondent's suit was bad in law as it was time barred.

5. During the trial, each of the parties called two witnesses. At the end of the hearing, the learned trial magistrate rendered her decision on 2nd November, 2010. She entered judgment on liability for the respondent against the appellant at a 100%. She also awarded the respondent general damages in the sum of KShs. 250,000 for pain, suffering and loss of amenities and Kshs.300 as special damages. The respondent was also awarded costs of the suit and interest on the sum awarded.

6. Aggrieved by the trial court's findings and award, the appellant appealed to this court relying on eight grounds which can be collapsed into three main grounds as follows;-

(i) *That the learned trial magistrate erred in law and fact by failing to properly evaluate the evidence and consequently arrived at an erroneous finding on liability against the appellant at 100%.*

(2) That the learned trial magistrate erred in law in failing to hold that the respondent's suit was time barred.

(3) That the trial court erred in law and fact in awarding general damages which were excessive in the circumstances of the case.

7. The appeal was prosecuted by way of oral submissions. At the hearing, learned counsel *Mr. Mathai* represented the appellant while learned counsel *Mr. Ombati* appeared for the respondent. Relying on *Section 4(2)* of the *Limitation of Actions Act, Mr. Mathai* submitted that the respondent's suit was founded on the tort of negligence and that since it was filed three years after the cause of action arose on 20th July, 2016, it was statute barred. Counsel further submitted that the trial court erred in finding the appellant 100% liable for the respondent's injuries for two reasons: First, that the respondent had admitted that there was no contract of employment between him and the appellant; secondly, that there was evidence that the respondent was aware of the risks inherent in his job and that he failed to wear protective gear provided by the appellant for use in his work. Counsel urged the court to allow the appeal with costs.

8. On behalf of the respondent, learned counsel *Mr. Ombati* denied the claim that the respondent's suit was time barred. He submitted that the suit was filed within time as the respondent's cause of action was also founded on a claim of breach of statutory duty which was contractual; that the suit was filed about three years after accrual of the cause of action while the limitation period for actions based on contract was six years. He implored the court to uphold the decision of the trial court considering that the appellant's witnesses had admitted that the respondent was its employee and that he was on duty on the date of the alleged accident. Counsel further argued that there was evidence that the respondent had not been provided with a ladder, which was necessary given the tasks involved in his work.

9. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, I am enjoined to re-evaluate all the evidence presented before the trial court to draw my own independent conclusions. In doing so, I should remember that I did not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage – See ***Williamson Diamond Ltd V Brown (1970) EA 1;*** **Peters V Sunday Post (1958) EA 424.**

10. I have considered the grounds of appeal, the evidence on record and the rival submissions made on behalf of both parties. Having done so, I find that it is not disputed that the respondent was employed by the appellant and that he was on duty on the date of the alleged accident. I find that only three key issues emerge for my determination in this appeal which are the following;

(i) Whether the respondent suit was time barred;

(ii) Whether the trial court erred in holding the appellant a 100% liable for the respondent injuries and lastly,

(iii) Whether the award of Kshs. 250,000 as general damages was excessive in the circumstances of the case.

11. Turning to the first issue, I find that though the appellant had pleaded in its defence that the suit was incompetent as it was time barred, this claim was not addressed by the learned trial magistrate in her judgement. It is clear from the plaint that the respondent's cause of action arose on 20th July, 2006. The record of the lower court shows that the suit was filed on 3rd September, 2009 which was about 3 years and two months after the cause of action arose. The law at *Section 4(1) (a)* of the *Limitation of Actions Act* provides a limitation period of six years for actions founded on contract while *Section 4(2)* of the same Act limits the time for filing actions based on tort to three years. In order to determine whether or

not the respondent's suit was time barred, it is important to establish whether it was based on the tort of negligence or contract.

12. A reading of the plaint, specifically paragraph 4,5,and 6 leaves no doubt that the respondent's claim was founded on tort in so far as he pleaded negligence on the part of the appellant and or its servants and also on contract given that breach of contract of employment was also alleged. As stated earlier, it was not disputed that the respondent was an employee of the appellant at the material time. The question that then arises is whether an act or omission by an employer can give rise to an action in both tort and breach of contract. This question was discussed in the case of ***Athi River Marble And Granite Ltd V Patrick Mutuku (2009) eKLR*** where Hon. Okwengu J (as she then was) held as follows;

> ***" From the above it is clear that the respondent's case was grounded on tort in so far as negligence was alleged, and contract in so far as breach of contract was alleged. It was not disputed that the respondent was an employee of the appellant. The question as to whether an act or omission by an employer may support an action both in tort and for breach of contract was considered in Mathius vs Kuwait Bechtel Corporation (1959) 2 all. E.R. 345 wherein it was held that such an action was maintainable at the option of the employee either as an action in tort or as an action in contract, there being an implied term of the contract imposing a duty of care on the employer. In this case, the respondent opted not to pursue his claim in tort…***
>
> ***I therefore find that although the respondent's claim under tort was statute barred, his claim under contract was not, as 6 years had not elapsed. The respondent's suit was therefore, competent under contract".***

13. I wholly associate myself with the above finding. Given that the respondent in this case did not obtain leave from the lower court under *Section 27* of the *Limitation of Actions Act* to extend the limitation period of three years for that part of his cause of action that was based on negligence, I find that his claim under tort was statute barred but the part of his claim that was founded on breach of contract and or breach of statutory duty was competent as six years had not expired by the time suit was filed. I therefore find no merit in the claim that the learned trial magistrate erred in entertaining a suit that was statute barred.

14. Regarding the second issue, it is important to revisit the evidence that was tendered before the trial court. The respondent testified that he had been employed by the appellant as a mill cleaner on a casual basis from February 2002 to 4th August 2009. His work entailed cleaning pipes that were several feet above the floor. He equated the height of the pipes to one that was higher than the roof of the court. According to the respondent, he had requested the appellant through his supervisor to provide him with a ladder to use in his work but his request was declined. On the night of 20th July, 2006 as he cleaned the pipes, he slipped and fell to the floor as a result of which he sustained serious injuries. His witness *Nicholas Otieno Onyango* who was also on duty that night witnessed the fall.

15. The appellant called two witnesses *Michael ochieng Ashioya,* its Assistant administrator (DW1) and *Thomas Wasilwa* who was the respondent's supervisor (DW2). Both witnesses confirmed that the respondent was the appellant's employee and that he was on duty on the night of 20th July, 2006. DW1 claimed that the respondent was supposed to clean the floor not pipes. He confirmed that there were pipes which were mounted high up from the floor. He claimed that the respondent had been provided with protective gear like masks, gloves and overalls but had not been provided with a ladder. Both witnesses however testified that they did not know whether the respondent was injured that night.

16. I have noted that the typed record of the trial court's judgment is not complete but from the hand written record, it is clear that the learned trial magistrate evaluated the evidence before her and in arriving at her findings on liability, she stated inter alia as follows:

> ***" The defendants were required to provide a ladder for the plaintiff to use when cleaning the pipes. They failed to do so following which the plaintiff slipped and fell off and sustained the injuries he sustained. The court therefore observes that the defendant breached their statutory***

duty….it cannot be averred that the plaintiff exposed himself to danger. The defendants were required to ensure that the plaintiff had all the tools required to work and accomplish his duty and to provide a safe working environment for the plaintiff. They failed to do so.

The court herewith observes that the plaintiff has proved his case on a balance of probability and the defendant company is 100% liable for the injuries the plaintiff sustained..".

17. On my own evaluation of the evidence, I find that though DW1 claimed that the appellant's work only involved the cleaning of the floor not pipes, he did not avail any evidence to substantiate his claim. On the other hand, the respondent produced evidence through the testimony of PW2 (though erroneously indicated as PW3 in the record) to support his claim that his work involved the cleaning of pipes which were on a height that would ideally require him to use a ladder to access them. PW2 also corroborated the respondent's claim that on the night in question, while cleaning the said pipes, he slipped and fell sustaining injuries. In view of this evidence and considering the standard of proof in civil cases, I find that the respondent proved his claim that his work involved the cleaning of pipes

18. *Mr. Mathai* submitted that the appellant was not liable for the respondent's injuries as the respondent had stated that he had no contract with the appellant. But the appellant did not dispute the respondent's claim that he was its employee for over seven years and that he was on duty on the material date. This means that the respondent had a contract of service with the appellant. The contract did not need to be in writing. An oral contract such as is found in most casual engagements suffices for purposes of employment. See *Section 2* and *Section 8* of the *Employment Act* of *2007.*

19. It is the respondent's case that the appellant was to blame for his injuries because it failed to provide him with a ladder which he required to safely perform his work despite his request for its provision. The appellant did not in any way controvert this claim. As I observed in the case of ***Paul Oluoch Ominde V Kenya Power & Lighting Co. Ltd Eldoret Civil Appeal No. 100 of 2010***, it is trite law that an employer has a statutory and common law duty to provide is employees with a safe working environment and to take reasonable precautions to mitigate or lessen the risk of any foreseeable injury to its employees. This duty entails not only providing a safe working system but also provision of adequate protective gear and equipment to employees engaged in work that was inherently dangerous.

20. Given the evidence on record, I find that the appellant having assigned the respondent the duty of cleaning pipes on heights should have provided him not only with proper equipment to use in his work like a well serviced ladder but also with protective gear to cushion him from sustaining injuries incase he slipped and fell in the course of his work. Provision of a ladder and protective gear like a helmet were necessary given the nature of work the respondent was engaged in to ensure that he worked in safety.

21. Though the respondent would undoubtedly have required the use of gloves, overalls and a mask in his work, such gear would only have been adequate if his work was limited to the cleaning or sweeping of floors without the added task of cleaning pipes on heights above the floor of the appellant's premises. A ladder was essential for that kind of work to ensure some reasonable measure of safety for the respondent in the performance of his work. A helmet would also have helped to prevent or at the very least minimize the extent of injury sustained in the event of a fall.

22. In view of the foregoing, I am in full agreement with the trial magistrate's finding that the appellant breached its statutory duty of care owed to the respondent as its employee and was therefore 100% liable for his injuries.

23. On quantum of damages, as noted earlier, the respondent was awarded Kshs.250,000 in general damages and special damages in the sum of Kshs.300. It is important to state at the outset that an award of damages is at the discretion of the trial court. As a general rule, an appellate court should not interfere with an award of damages unless the award is either too high or inordinately low as to lead to an inference that it was based on an erroneous estimate of the damage suffered.

An appellate court can also intervene if it was satisfied that the award of damages was premised on wrong

legal principles: See ***Butt V Khan (1982 -88) KAR 1;*** ***Kemfro Africa Ltd & Another V Liobia & Another (NO2) (1987) KLR 30***; ***Arky Industries Limited V Amani (1990) KLR 309.***

24. In this case, the respondent pleaded that as a result of the accident, he suffered soft tissue injuries on the mouth and lost four of his upper teeth. He also sustained soft tissue injuries as his right knee and right side of his chest. To prove these injuries, he produced in evidence treatment notes and a medical report from Uasin Gishu District Hospital. The medical report dated 28th August, 2009 described the injuries sustained by the respondent as severe and indicated that the loss of four upper teeth would leave a permanent gap on his right upper gums which no doubt would negatively affect his physical appearance.

25. In the circumstances, I am not persuaded that an award of Kshs.250,000 for injuries which included the loss of four upper teeth was inordinately high or excessive as to give rise to an inference that it was an erroneous estimate of the damage suffered. The award was based on the evidence on record. There is no indication from the trial court's judgment that the award was based on any wrong legal principle. I thus find no reason to disturb that award. The same is hereby upheld. I cannot however say the same for the award of special damages. Though the sum of Kshs. 300 was pleaded, the same was not proved. The law is that special damages irrespective of the amount involved must be specifically pleaded and proved. As the special damages pleaded in this case were not specifically proved, the learned trial magistrate erred in awarding the same. I therefore set aside the award of special damages in the sum of Kshs.300.

26. The upshot is that the appellant's appeal fails with respect to the trial court's finding on liability and on the award of general damages. It has only succeeded with regard to the award of special damages. I therefore set aside the judgment of the trial court and substitute it with a judgment for the respondent against the appellant in the total sum of Kshs. 250,000. The amount shall attract interest at court rates from today until full payment. The appellant shall bear the respondent's costs both in the lower court and in this appeal. It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 8th day of September, 2016

In the presence of:

Mr. Ombati for the Respondent

Mr. Mathai for the Appellant

Ms. Naomi Chonde – Court clerk