REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CIVIL APPEAL NO. 112 OF 2012

BETWEEN

PECHE FOODS LIMITED.....APPELLANT

AND

SAMUEL NCHORE CHUMA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. T. Obutu, PM dated 23rd August 2012

at the Chief Magistrates Court at Kisumu in Civil Case No. 49 of 2006)

JUDGMENT

1. In the subordinate court, the respondent claimed that the appellant was guilty of negligence for failing to provide a proper working environment resulting in him sustaining injuries. The appellant filed a defence denying that the respondent was its employee or that he was involved in an accident. In alternative it averred that if the respondent was an employee, he was wholly or substantially liable for the accident. After hearing the matter, the trial court apportioned liability as between the respondent and appellant in the ratio 70:30 against the appellant and awarded the respondent Kshs. 80,000/- and Kshs. 2,000/- general and special damages respectively.

2. The appellant appealed against the decision and in its memorandum of appeal raised the following grounds:

> *1. That the trial magistrate erred in finding that the defendant contributed to the accident when there was no evidence in support of the same.*
>
> *2. That the trial magistrate erred in not taking into consideration the contradictions in plaintiff's evidence, weighing the same and thereafter arriving at a finding on liability and quantum*
>
> *3. That the trial magistrate erred in finding that the Defendant had not denied the negligence attributed to the Defendant.*
>
> *4. That the trial magistrate erred in finding that the defendant had failed to produce a list of all its casual employees and hence the defendant was liable for the accident.*
>
> *5. That the trial magistrate erred in not taking into consideration the entire defence evidence*

weighing the same as against the evidence by the plaintiff and arriving at a finding.

6. That the trial magistrate erred in not taking into consideration the submissions and authorities by the defendant at the time of arriving at a finding on liability and quantum.

7. That there was misdirection on the part of the trial magistrate in awarding damages which were excessive in all circumstances.

3. Counsel for the appellant submitted that the respondent failed to prove that he was its employee and that he was actually at the scene of the accident on the alleged date. She further submitted that the trial court failed to take into consideration the indications necessary to establish an employee/employer relationship. Counsel contended that the trial magistrate erred in holding the appellant liable whereas it was clear that the accident occurred wholly on account of the respondent's act.

4. Counsel for the respondent opposed the appeal and argued that the accident was due to the negligence of the appellant for failure to provide the respondent with the necessary equipment for his job thereby leading to the accident. The respondent contended that there was sufficient proof that the respondent was an employee.

5. The duty of the first appellate court is to reconsider the evidence, evaluate it 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 that respect (see ***Jabane v Olenja*** **[1986] KLR 661,** ***Selle v Associated Motor Boat Company Limited*** **[1968] EA 123** and ***Peters v Sunday Post*** **[1958] EA 424). In order to deal with the issues raised in this appeal it is necessary to outline the evidence before the trial court.**

6. The respondent testified that on 14th July 2002 he was working for the appellant as a casual. On that day he was loading boxes from the appellant's cold room into a truck. While removing a box from one of the stacks, two cartons which weighed around 6 kilograms each fell on him injuring him on the chest and forehead. He testified that he was removing the boxes hastily as he had not been provided with warm clothing suitable to work in a cold room. On cross examination, the respondent stated that he was injured on 14th February 2002. He further stated that he agreed to walk in the cold room without protective clothing even though he knew it was cold because he needed the money.

7. Dr Oluro (PW 2), a medical officer with Aga Khan Hospital, testified that he examined the respondent on 10th August 2005 and prepared a medical report. He testified that the respondent complained of chest pains and that he had mild tenderness on the chest and small forehead scar. He concluded that the suffered soft tissue injury on the chest and a cut on the forehead which would leave a permanent scar.

8. The appellant called Charles Lumadede (DW 1), its records keeper. He produced Petty Cash vouchers and schedules of persons working on 12th, 13th and 15th July 2002 which showed that the respondent did not work on those dates and could not have worked on 14th July 2002 which was a Sunday. According to the schedule for 15th July 2002, only one casual worked on 14th July 2002. Since respondent also stated that he had worked on 14th February 2002, the witness produced payment records for 13th, 14th and 15th February 2002 which did not disclose the name of the respondent.

9. The first issue for consideration is whether there was an employee/employer relationship between the appellant and the respondent. The respondent had the burden of proving that he was a casual employee of the appellant on the balance of probabilities. In this regard, apart from his testimony, he did not produce any documentation. While there may be instances where because person is casual employee, he may not be possible to prove employment by documentation of employment, in this case the appellant discharged its evidential burden of providing documents prepared in the ordinary course of business demonstrating that the respondent could not have been an employee. The respondent did not even produce the initial treatment notes which would show that he worked for the appellant. Although the medical report prepared by Dr Oruro states that the respondent was a loader with the appellant, it was prepared in 2005, two years after the cause of action arose. In the circumstances, I find and hold that the learned magistrate erred in

finding that the respondent was an employee of the appellant.

10. For the sake of completeness, I turn to the issue of liability. The respondent testified that he accepted to work in a cold room. He admitted that he went to work in the cold room without protective clothing because he needed the money and was not forced to work there. He told the court that the boxes were stacked high and that he pulled a box from the middle causing other boxes to fall on him. Had he not pulled the box in the middle the rest would not have fallen on him. The respondent argued that he was not provided with a ladder but there is no evidence that he should have been provided with one. He did not tell the court how high the stack of boxes was. The trial court could not determine whether the height of boxes was reasonable or whether a ladder was actually required. In determining the issue of negligence the court is required to assess the risk which the employer is supposed mitigate. I also hold that the loading of boxes was not a job that required special skill. It was the kind of work that the respondent was in control of. He ought to have exercised due care to avoid hurting himself. I therefore find and hold that the respondent did not establish a case of negligence as against the appellant.

11. As regards quantum of damages, the applicable principle upon which an appellate court will interfere with the trial court decision is where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727).**

12. The respondent submitted before the trial court that a sum of Kshs, 120,000/- was reasonable. Counsel relied on ***Rosemary Wangari v Peter Kagiri Karanja*** **NBI HCCC No, 437 of 1998 (UR)** where the plaintiff sustained a contusion on the right leg, cheek and a strain on the neck and was awarded Kshs. 60,000/- in 1993. The appellant suggested a sum of Kshs. 30,000/- based on ***John Otieno Ojwok v Samuel Onyango Abunga and Another*** **NRB HCCC No. 2001 of 1992 (UR)** where the court awarded Kshs. 30,000 where the plaintiff suffered soft tissue injuries on the chest, back, right hand and left leg. Taking into account the nature of the injuries sustained and the decisions cited I cannot say the award of Kshs. 50,000/- was unreasonable to attract interference by this court.

13. In light of my finding that the respondent was not an employee of the appellant, the suit ought to have been dismissed. The appeal is therefore allowed and consequently the suit in the subordinate court is dismissed. The appellant shall have costs of the suit and this appeal.

DATED and **DELIVERED** at **KISUMU** this **6th day of October 2016.**

D.S. MAJANJA

JUDGE

Ms Pandit instructed by Nishi Pandit and Company Advocates for the appellant.

Ms Omboto instructed by D. A. Associates Advocates for the respondent.