REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 100 OF 2011

KHETIA GARMENTS LIMITED……APPELLANT

VERSUS

MARK OTUKO MALEKO……..……...RESPONDENT

(Being an appeal from the judgment of Ms Dolphine Alego, Resident Magistrate,

in Eldoret CMCC No.551 of 2009 Delivered on 3rd May, 2011)

JUDGMENT

Background

The instant appeal emerges from a case where the respondent (then plaintiff) sued the appellant (then defendant) for damages following injuries sustained during his duties as an employee at the appellant's company. The respondent who worked as a stacker fell from 8 feet above the ground and sustained injuries to his chest, right arm and right knee.

The learned trial magistrate in her judgment ordered that the defendant(appellant) bear 70%liability while the plaintiff shoulders 30% contribution.

Being dissatisfied with the award, the appellant filed a Memorandum of appeal citing the following grounds of appeal;

1. **That the learned trial magistrate erred in fact in holding the appellant herein 70% liable in negligence without any evidence and /or proof in support of the court's decision.**
2. **That the learned trial magistrate erred in law and in fact in failing to take into account the fact that the respondent failed to report the alleged existence of the hole in the bale of flour therefore the appellant cannot be blamed.**
3. **That the learned trial magistrate erred in law and in fact in failing to take into account that the hole which was alleged to be on the bale of the flour was no man's hole and therefore did not arise from negligence of the appellant.**
4. **That the learned trial magistrate erred in law and in fact in failing to hold that no accident occurred in and/or within the appellant's premises and /or store.**
5. **That the learned trial magistrate erred in law and in fact in failing to deal with and consider all issues raised in the pleadings and the evidence on record and hence an erroneous judgment.**
6. **That the learned trial magistrate erred in law and in fact in contravening the provisions of Order 21 Rule 4 of the Civil Procedure Rules.**
7. **That the learned magistrate erred in law and in failing to hold that if at all there existed a**

hole in the bale of the flour as alleged, the same was not foreseeable, hence an inevitable accident.

8. **That the learned magistrate erred in failing to hold that no accident occurred at the appellant's premises as no report was made of the occurrence of the alleged accident.**
9. **That the learned trial magistrate erred in law and in failing to hold that if at all the respondent got injured as alleged then, he would have not been able to work the whole day.**
10. **That the learned magistrate erred in law and in failing to dismiss the respondent's case for want of proof with costs to the appellants.**
11. **That the learned magistrate erred in law and in fact in failing to hold that the respondent had not proved his case on a balance of probability as expected by law.**
12. **That the learned trial magistrate erred in law and in failing to consider and apply the provisions of the Evidence Act Cap 80 and in particular sections 107,108and 109 thereof.**
13. **That in the alternative and without prejudice to the foregoing, the learned trial magistrate erred in law and fact in failing to hold that the alleged accident if at all it occurred was wholly and/or substantially caused by the respondent's own carelessness and or while carrying out his duties.**

In the instant case, an examination of parties' pleadings shows the facts as aforestated. The Plaintiff attests to having been lawfully engaged in his employment duties as a stacker when due to the negligence of the defendant/agent/servants, the plaintiff fell 8 feet high and sustained chest and knee joint injuries.

The defendant on the other hand denied that an accident occurred on the material date and or any other date as alleged by the plaintiff and denied the particulars of negligence cited against it, putting the plaintiff to strict proof thereof. The defendant blamed the plaintiff for failing to adhere to safety rules and precautions, exposing himself to risk of injury or damages as well as not making proper use of the protective devices.

In the reply to defence, the plaintiff denied the assertions by the defendants and highlighted that the defendants could not rely on the principle *of volenti non injuria*as it was not applicable in the circumstances to cover to defendant in his gross negligence resulting to injuries.

Being the first appeal the court is reminded of its role to re-evaluate, re-asses and re-analyze the evidence on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons for its decision. See **KENYA PORTS AUTHOURITY VERSUS KUSTON (KENYA) LIMITED (2009) 2 EA 212** where the Court of Appeal held inter alia 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters by the parties in the evidence."**

The plaintiff/respondent testified before the court as Pw1. His evidence was that on the material day he found that one of the flour bags had been eaten by rats and he let go leading to his fall. He told the court that he was at the go-down arranging the flour bags with his colleagues. He sustained injuries to his right knee, right hand and chest. The respondent told the court that he went to the district hospital the next day where he was given an attendance card and treatment chits which he produced before the court. He was later referred to the Moi Teaching and Referral Hospital where an x-ray was done and a medical report by one Doctor Aluda was issued. He was later referred to one Doctor Gaya for a further medical report. The respondent testified that he was later dismissed from work. He told the court that he was still on medication at the time he testified. He blamed the appellant for failing to provide him with protective gear.

On cross examination, the respondent stated that the appellant paid his dues after dismissal. He blamed the company for putting a rat poison to kill the rats which ate the bags and reiterated that protective garments were not provided.

On re-examination, he stated that he was never taken to hospital on the material date. He was treated on the following day.

Pw2, Patrick Kiprono was a clinical officer at Uasin Gishu District Hospital in Eldoret. He confirmed that the respondent Mark Otiko was treated on 16th April 2008 at the District hospital. He stated that he gave a history of a fall 8 feet high and he sustained injuries to his chest, right knee and right arm. He produced the treatment records as exhibits.

On cross examination, Pw2 indicated that the respondent was initially treated by one Rose Kandai and on 12th April, 2008 he was treated for respiratory infection which had nothing to do with the instant case. He told the court that in his opinion, the respondent had healed. On re-examination, he reiterated that the Respondent had fallen from a height of 8 feet and could have sustained chest injuries from the fall.

The 1st defence witness, DW1, one Keneddy Oyundu testified that he worked at Kheitia Garments as a supervisor and the respondent was known to him as a stacker, involved in arranging food in the store. He testified that the respondent was at work on the fateful day between 8:00a.m. and 6:00 p.m. where he worked well and never had any complaint from him during the day. He testified that permanent workers like the respondent were paid on monthly basis and was paid on 14th 15th and 16th April 2008. He then came back on the following Monday after working for 3 days. He produced before the court a petty cash voucher dated 19thApril, 2008 marked D exhibit 1, showing the payments made to him (respondent).

In cross examination, he reiterated that he did not have the work register of the material day but added that the respondent did go to hospital. He stated that the respondent worked for 3 days before his mishap. He stated that the respondent never reported to work on 17th April 2008 and he was told that he was unwell.

In her judgment, the learned trial magistrate found that it was not in dispute that the plaintiff/respondent had been injured but added that he ought to have been more careful with the kind of job he was engaged to do. She therefore apportioned liability at 70% on the defendant and 30% on the plaintiff. She gave an award of ksh. 150,000/= noting that it was commensurate with the circumstances and the injuries sustained.

Submissions

On the issues of liability, counsel for the appellant submitted that there was no evidence in the trial court that the Appellant was contractually obligated to provide what the respondent referred to as protective gear and emphasized more specifically that he did not state what protective apparel he wanted to be provided with and was not availed. In addition, the appellant's counsel stated that there was no explanation by the respondent as to how the protective gear would have prevented the accident which the respondent states was caused by a rat.

It was submitted that the respondent had failed in his burden to prove on a balance of probabilities that he was injured on the material date while on duty or at all. In addition, the respondent failed to call a colleague to corroborate his assertions that he was injured on the material date. Counsel cited the case of **EASTERN PRODUCE (K) LTD vs. PATRICK CHEGE MWANGI HCCA NO. 30 OF 2000** which held that an employer is not and insurer of the employee even in injury and a claim for general damages must be accompanied by proof of the employer's negligence. In addition in the case of **KIEMA MUTUKU vs. KENYA CARGO HAULING SERVICES LIMITED** the court stated that there can be no liability without fault and there must be proof of negligence where the claim is based on it; and also **STATPACK INDUSTRIES vs. JAMES MBITHI MUNYAO, NAIROBI HCCA NO. 152 OF 2003** where justice Visram(as he then was) stated that a person making an allegation must prove a causal link between someone's negligence and his injury. He stated that a plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn.

The appellant's counsel submitted that the learned trial magistrate did not consider the testimony of DW1

who testified that the respondent worked on the material date without any incident. Besides, the treatment chits produced by the respondent indicated that he had been treated on 12th April, 2008 which was 3 days before the accident.

The appellants made reference to the case of **NANDI TEA ESTAE LIMITED vs. EUNICE JACKSON WERE [2006] e KLR** where the court held that the existence of an injury and subsequent treatment is not proof that the injury was sustained at the place of work.

On liability, they concluded that there was no proof or evidence that the accident was foreseeable and the respondent did not successfully prove the particulars of breach. On quantum the appellants stated that the award of Ksh. 150,000/= was excessive and an award of Ksh. 20, 000/= would have sufficed.

In response, counsel for the respondent submitted that the fact that the respondent was the appellant's employee was not in dispute and pointed out that DW1 did not produce the Master Roll before the court to support his claim that the respondent was never hurt on the material day. The respondent maintained that the learned trial magistrate was right in holding that due to the appellant's negligence and failure to exercise its statutory duty of care, the respondent had fallen and sustained injuries. They further submitted that the appellants should be held liable under the doctrine of occupier's liability as it was under a duty to eradicate the rats by using rat poison or placing a warning sign or alerting the employees of foreseeable dangers.

On quantum, the respondent's counsel submitted that the learned trial magistrate depended upon the medical treatment chits and reports in arriving at their decision. They submitted that the respondent went for a 2nd medical examination at the Appellant's request and Doctor Z. Gaya echoed the dates of the injuries and nature of the injuries sustained by the respondent. They concluded that the decision by the leaned trial magistrate came after a careful consideration of the provisions of Section 107, 108 and 109 of the Evidence Act.

Evaluation of evidence

In view of the foregoing, it is important to have in mind that an appellate court must be slow to interfere with the decision made in a trial court unless the same is arrived at based on misapprehension of the law or wrong principles. See **SUMARIA & ANOTHER vs. ALLIED INDUSTRIES LIMITED (2007) KLR 1** where the court held as follows:-

> "**Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that the Court of Appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or that the judge was shown demonstrably to have acted on wrong principle in reaching the finding he did."**

In the case of **MUSERA vs. MWECHELESI & ANOTHER (2007) KLR 159** it was held, inter alia, that;

> "**As an appellate court, the court had to be slow to interfere with the trial judge's finding unless it was satisfied that there was absolutely no evidence to support the findings or that the trial judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion."**

The first issue of determination is whether the injuries the respondent sustained were a result of a fall at the appellant's place of work. There is no doubt that the respondent discharged this burden prudently. His oral testimony was corroborated by that of the doctor's, who saw him and the treatment chits he produced in court. It is not true as alleged by the appellant that the cards showed that he was treated on 12/4/2008 which was three days before he fell. The treatment chit which was exhibited had two treatment dates. That of 12/4/2008 was for a different ailment from that of 15/4/2008occasioned by a fall. The fact is that no new treatment card was issued at Uasin Gishu District Hospital when the respondent went for

treatment for the injuries he sustained at work.

The second issue for determination is whether the appellant owed the respondent a duty of care and if the incident at hand met the threshold of imposition of that duty of care. It is trite law, both statutory and in common law that an employer owes a duty of care to his employee. See **Halsbury's Laws of England, 4th Edition volume 15 at paragraph 560**:-

> **"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to an unnecessary risk."**

It is noteworthy however, that the duty of care is within specific confines of the law. It must be reasonable and foreseeable in circumstances and situations in question. See **KREATIVE ROSES LIMITED –VS- OLPHER KERUBO SUMO (2014) e KLR, HC AT NAKURU CIVIL APPEAL NO. 151 OF 2008,** where Hellen Omondi, J while referring to Halsbury's Laws of England stated:-

"The Court of Appeal quoting **Halsbury's Laws of England** in the case of **MWANYALE SAID T/A JOMVU TOTAL SERVICE STATION** stated as follows:-

> **"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment.**
>
> **Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer; merely upon the ground of relation of employer and employee to compensate him for any injury which he may sustain in the work upon which he is engaged. The employer is not liable to the employee for damages suffered outside the employee's working condition nor is he an insurer of his employees 'safety, exercise of due care and skill suffices."**

In the case of **SEGWICK KENYA INSURANCE BROKERS –VS- PRICE WATER HOUSE COOPERS KENYA, HIGH COURT CIVIL APPEAL NO. 720 OF 2006 (NAIROBI)** the learned Lesiit, J cited the case of **CAPRO INDUSTRIES LIMITED PLC –VS- DICKMAN &OTHERS (1990) 1 ALL ER, 658,**where the House of Lords held thus;

> **"The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and reasonableness or otherwise of imposing a duty of care. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered is the kind of damage which the Defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care existed."**

From the foregoing, there was no amount of reasonableness on the part of the appellant that would have enabled it to foresee that a rodent would cause a hole in a bag leading to a fall. The respondent did not show that it was a common occurrence and it is doubtful whether the injuries sustained would have been kept at bay if he had a protective gear.

I accordingly allow the appeal. The learned trial magistrate's judgment is set aside and the respondent's claim in that court is set aside.

DATED and **SIGNED** this 22nd day of June, 2015

G.W. NGENYE – MACHARIA

JUDGE

DELIVERED at **ELDORET** this 6th day of July, 2015.

BY:

G.K.KIMONDO

JUDGE

In the presence of:

1. No appearance for the Appellant
2. No appearance for the Respondent.