REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 29 OF 2010

MASINGA NDONGA NDONGE.....APPELLANT

VERSUS

KUALAM LIMITED.....RESPONDENT

(Appeal from the original judgment and decree of Hon. W. Mokaya in Milimani Commercial Court CMCC No. 9066 of 2007 delivered on 18th January, 2010).

JUDGMENT

1. This appeal arises from the judgment and decree of Hon. W. Mokaya in Milimani Commercial Court CMCC No. 9066 of 2007 delivered on 18th January, 2010.
2. The Appellant herein **MASINGA NDONGA NDONGE** was the plaintiff in the lower court. He sued the defendant /respondent herein **KUALAM LIMITED** seeking compensation following an alleged industrial accident that is said to have occurred on 6th September, 2007 involving the appellant while he was engaged upon his work in the casual employment of the respondent.
3. The trial court heard the matter and found that the Appellant was engaged in manual work and did not require any specialised skill other than good sense. Further, that gumboots and gloves could not have prevented the injury sustained by the Appellant. The trial magistrate also found that there was no way the stone could have been carried by four people as suggested by the Appellant and for the said reasons held that the Appellant had not proved negligence against the Respondent on a balance of probabilities. The appellant's suit was then dismissed.
4. Being dissatisfied with the trial court's judgment, the appellant filed this appeal setting out the following grounds in his memorandum of appeal lodged in court on :-

a. *The learned magistrate erred in law and in fact in finding that the nature of work the Appellant was engaged in was manual and did not require any skill as such other than the Appellant's own common sense while doing the work when in the contrary it is a law requirement for some training.*
b. *The learned magistrate erred in law and in fact in finding that gumboots would have not assisted the Appellant in any way, prevented and/or minimized the injuries contrary to known facts of law that the Respondent ought to have provided the Appellant with protective gadgets while engaged in the cause of his employment.*
c. *The learned trial magistrate erred in law and in fact by finding that the Respondent ought to have done nothing to avoid the admitted impossible assignment given to the Appellant when indeed it is a requirement in law that the Respondent ought to have not exposed the Appellant to a risk of danger or injury while in the cause of his employment.*
d. *The learned trial magistrate erred in law and in fact by making a finding that the Appellant performed his duties badly and as a result he was injured, which finding was not supported by any*

defence or otherwise.

e. *The learned trial magistrate erred in law and fact by holding that the Respondent was not to blame for the accident when indeed there was enough evidence to that effect.*
f. *The learned trial magistrate erred in law and fact by making a finding that the Respondent was not under any statutory obligation to provide protective gadgets to the Appellant, contrary to the law.*
g. *The learned trial magistrate erred in law and fact by finding that negligence on the part of the Respondent was not established when indeed the Appellant had proved his case as required in law.*
h. *The learned trial magistrate erred in law and fact by not assessing damages.*

5. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

6. The above decisions followed the principles laid down in **Peters V. The Sunday Post Ltd (1958) EA 424** that;

> ***".....whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the Appellate court will not hesitate so to decide....."*** See also **Mkube V. Nyamuro (1983) KLR 403-415 P. 403** where the court of appeal stated that:
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> "***A court of appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence or on a misapprehension of the evidence, or a Judge is shown to have demonstrably acted on wrong principles in reaching his conclusion."***

7. Circumstances under which an appellate court may interfere with a decision of the trial court were also set out in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, where the court stated as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

8. Evaluating the evidence on record, Dr. Okoth Okere (PW1) who examined the Appellant on 27th September, 2007 testified on oath and confirmed that the Appellant had a crush injury and fracture of his big toe at the time of examination. He produced a medical report (P. Exhibit 1 (a)) to that effect and receipts for the medical report and court attendance for KShs. 1,500/= (P. Exhibit 1 (b) and KShs. 5,000/= (P. Exhibit 1 (c)) respectively.
9. The Appellant (PW2) testified that he was employed as a casual worker and on the material day he

had been assigned the duty of off loading stones from a vehicle by the supervisor, one Timothy. He was in company of a co-worker by the name Musyoka. That as they were removing the stones which were heavy, his colleague let go of the stone due to the weight and it hit his left leg. He stated that the supervisor and the colleague bandaged his leg and thereafter he was taken to Mbagathi Hospital for treatment. He produced a treatment card to that effect as P. Exhibit 3. During cross-examination, he stated that he had no documentation to show that he was the Respondent's employee. The Appellant attributed negligence to the Respondent and stated that the stone was 3 feet long and weighed about 60-70 kg and required four (4) people to carry it and that he was not supplied with gumboots and gloves.

10. It was the Appellant's case as pleaded in his plaint that he was at the material time in employment with the Respondent. That it was a term of the employment that the Respondent would maintain measures to ensure safety of the Appellant. That while in the course of his employment, his foot was hit by a stone as a result of which he sustained a crush injury of the left foot with a fracture of the 1st phalange- proximal end and pains, blood loss and soft tissue injuries. The Respondent filed a defence in which it denied the Appellant's claims and in the alternative pleaded contributory negligence on the part of the appellant, in that the appellant failed to take any adequate elementary precautions for his safety; failed to keep any or any proper lookout; worked without due care and attention; and failed to take evasive action. It also denied that the appellant was injured or at all. Nonetheless, the respondent did not call any evidence and closed its case, opting only to rely on the pleadings, answers in cross examination and their written submissions and authorities without tendering any witness.
11. Submissions to dispose of this appeal were tendered orally in court. Learned Counsel for the Appellant Mr. Nyakiangana took issue with the trial court's finding that there was nothing that the Respondent could have done to prevent the occurence of the accident since it required no specialised skill other than good sense while working and further that the Respondent was not under statutory obligation to issue the Appellant with gumboots or protective gear. Counsel for the appellant also contended that the trial magistrate ought to have assessed damages since it was mandatory to do so even after dismissing a suit and that for that failure the judgment was erroneous. Counsel also pointed out that the Respondent did not rebut the Appellant's case. The Appellant's counsel relied on the cases of **Stephen Iregi Njuguna v. Hon. The Attorney General (1997) eKLR**, **C& P Shoe Industries v. Albert Maina Kalii Nairobi High Court Civil Appeal No. 161 of 2011**, **Mordekai Mwangi Nandwa v. M/s Bhogal Garage Ltd., Kisumu Court of Appeal, Civil Appeal No. 124 of 1993** and **Odunga's Digest pages 2946, 1944** and **1937** and **the Factories Act**.
12. Learned Counsel for the Respondent Mr. Ongoto on the other hand submitted that it was the Appellant's duty to adduce evidence to prove breach of statutory duty owed to him by the Respondent, which duty he did not discharge. Counsel contended that although the respondent had a duty to provide a safe place of work under common law, in the instance case where manual work was involved the Appellant did not need any care from the Respondent. It was argued on behalf of the respondent that it is trite law that not every injury results from negligence and that there cannot be liability without blame and that the Appellant having failed to prove any blame against the Respondent it could not be found negligent. It was further contended that the fact that the Respondent did not tender any evidence did not aid the Appellant's case at all. It was further argued that the Appellant called no witness to corroborate his evidence that the stone was heavy for two people to carry. The Respondent relied on the decisions in **Statpack Industries v. James Mbithi., Nairobi High Court, Civil Appeal No. 152 of 2003**, **Kaboswa Tea Estate v. Alfred Juma Bilauni., Eldoret Court of Appeal, Civil Appeal No. 302 of 2000** and **Wilson Nyanyu Musigisi v. Sasini Tea & Coffee Ltd (2006) eKLR** all which held the opinion that an Appellant must prove breach of statutory duty or negligence.
13. In a rejoinder thereto, Mr. Nyakiangana counsel for the appellant submitted that the burden of proof shifted to the Respondent after the Appellant's testimony on negligence. That the Factories Act does not classify casual workers and non-casual workers when it comes to safety. Counsel for the appellant submitted that all the authorities cited by the Respondent provide that it is the employer's duty under common law to take all reasonable steps to ensure the employee's safety.

Determination

14. I have carefully considered the record and evidence by the appellant in the lower court; the submissions and the authorities relied on by both parties' advocates.
15. **The issues for determination are:**

a. **Whether the appellant was employed by the respondent and whether the appellant was injured while he was engaged in his employment**
b. **Whether the respondent owed the appellant any duty of care and whether the respondent breached that duty of care**
c. **Who was liable for the accident and injury to the appellant**
d. **Whether the trial magistrate erred in failing to assess damages and how much damages would the appellant be entitled to**
e. **What orders should this court make and**
f. **Who should bear costs**

16. It is trite law that he who asserts must prove. The trial magistrate in her judgment did not consider the issue of whether or not the appellant was an employee of the respondent at the time of the alleged accident, which issue, determination was critical in determining all other issues. This being the first appellate court, Iam obliged to consider that issue. The respondent contended that the appellant was not its employee at the material time or at any other time. However, the uncontroverted evidence by the appellant was that he had been in the respondent's employment since 2005 until 2007 after the material injury when he could not work that he was chased from casual employment. The appellant also testified that at the time of accident he was with his fellow employee Musyoka and that his supervisor, Timothy was also present and they did apply first aid to him before taking him to Mbagathi Hospital. The appellant further testified that after the accident, the supervisor took from him all his documents, and that he was chased from work after resuming duty as he was unable to perform due to the injury.
17. **Section 107 and 109 of the Evidence Act** places the evidential burden upon the appellant to prove that he was an employee of the respondent. **Section 107 of the Evidence Act** provides that "*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 that those facts exist*." **Section 109** stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. On the other hand, **Section 108 of the Evidence Act** provides, the burden lies on that person who would fail if no evidence at all were given on either side.
18. With such evidence by the appellant which evidence was on oath that his documents were confiscated by the respondent's employee and appellant's supervisor called Timothy, which was not rebutted at all, I find it hard to believe that the appellant made up the story of being an employee of the respondent merely to seek compensation. The respondent did not deny the existence of its supervisor called Timothy and besides the defence, neither did it produce a record of all its employees at the time of accident to rule out the possibility of the appellant having been one of them at the material time.
19. Within such a set up of casual employment, employees are issued with temporary employment passes /documentation that can prove that they were employees. Such employees are normally paid using master rolls for accountability and statutory requirements purposes. It is the employer who is ordinarily the custodian of such records of employees as stipulated under the Factories Act Cap 514 Laws of Kenya. The Act under its long heading is "An ***Act of Parliament to make provision for the health, safety and welfare of persons employed in factories and other places, and for matters incidental thereto and connected therewith***."
20. Section 64 of the said Act, on **returns of persons employed** provides that:

> ***"The occupier of every workplace, to which any of the provisions of this Act apply, shall, if so required, by an order published in the Gazette, send to the Director, at such intervals and on or before such days as may be specified in the order, a correct return showing, with respect to such day or days, or such period, as may be specified in the order, the number of persons employed in the workplace and giving such particulars as to such other matters as the order may require."***

21. The respondent did not show to the court that it was exempt from making such returns of persons in its employment
22. Since the appellant testified that his supervisor confiscated his documents, the burden of proving otherwise shifted to the Respondent and it was therefore prudent for the Respondent to show that the Appellant's name never appeared in their records of casual employees or furnish such other evidence in rebuttal. In such absence, I take the position that the facts as presented by the Appellant concerning his employment with the respondent were unchallenged and therefore, that he was an employee of the Respondent.
23. It was contended that the Appellant did not avail any witness to corroborate his evidence as to negligence. Having found that the appellant was an employee of the respondent, and there being no rebuttal that the said Timothy and Musyoka were the Respondent's employees, it is in my humble view the Respondent who ought to have brought them to court to controvert the Appellant's evidence.
24. The presumption in law is that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him as was enunciated in the case of **Bukenya vs Uganda (1972) EA 549. In Green Palms Investments Ltd vs Kenya Pipeline Company Ltd Mombasa HCC 90/2003** where the court held inter alia, that failure by a party to call as a witness any person (or evidences whom (which) he might reasonably be expected to give evidence favourable to him may prompt a court to infer that the persons' evidence would not have been helpful to the party's case and would have been prejudicial to the case and the witness or evidence may have technically been avoided to escape being embarrassed on cross examination.
25. This court therefore believes that the appellant was injured while engaged upon his said employment with the respondent as that evidence of injury and being escorted to hospital by the respondent/ employer who even took away the initial treatment notes upon the appellant's return from hospital was not controverted.
26. Therefore, on whether the respondent was injured as a result of negligence or breach of duty of care, and as to whether the respondent owed the appellant any duty of care, at Common Law, (Halsbury's Laws of England Fourth Edn. Volume 16 page 358 -662), an employer, is under duty to take reasonable came for the safety of his employees in all the circumstances of the case so as not to expose them to an unnecessary risk. This duty includes the obligation to provide competent staff, adequate materials and proper system and effective supervision. The duty further includes the obligation to provide a reasonably safe place of work and access to it. This duty vicariously remains with the employer even after he delegates to another person. Consequently in this case the respondent owed duty of care to the appellant when he instructed him to carry the stones jointly with Musyoka under the supervision of Timothy. This duty included the obligation to provide safety gear, competent and adequate staff to assist the appellant in his duties and above all, supervision to guide him and ensure that his other colleague did not let go the stone thereby injuring the plaintiff, or that the stones were not too heavy for the two people such as would be risky for them to carry without any other assistance.
27. The said duty of care has now been codified in Kenya under **section 53 of the Factories Act - Protective clothing and appliances.**

***"Where in any factory workers are employed in any process involving exposure to wet or <u>to any injurious</u> or offensive <u>substance</u>, suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings, shall be provided and maintained for the use of such workers*.**

28. In addition section 6 of the Occupational Safety and Health Act, 2007 provides that ***"Every occupier shall ensure the safety, health and welfare at work of all persons working in his work place." And proceeds to provide for the specific duties of the employer towards employees which include 2(b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances***; among others.
29. The appellant contended in evidence that he was asked to lift a 3 foot 60-70 kilogram stone with

his colleague Musyoka. According to the appellant, that stone was so heavy that Musyoka let go thereby causing it to fall on him and injuring him seriously .He was not provided with any protective gear like gumboot as or gloves. That failure to provide the appellant with those protective gear and to assign more people to remove the heavy stones from the truck constituted a breach of the duty of care both at common law and the Factories Act. As a result of that breach, the Respondent suffered severe bodily injuries. No evidence was adduced by the Respondent to prove that the appellant acted negligently. I therefore fault the trial court for holding that no statutory duty was owed to the appellant when the statutes are clear as to what the duties of an employer towards an employee are.

30. In this case, it is clear that this being a civil case, the appellant was expected to prove his case against the respondents on a balance of probabilities not beyond reasonable doubt. In the absence of such an explanation on the part of the respondents that what the appellant testified to on oath was not true, it is my view that the Respondent bore liability and that the Respondent tried to conceal the fact that the Appellant indeed sustained injury at work. The Respondent did not even bother to tender evidence to rebut evidence as to the weight of the stones for this court to assess whether or not it was reasonable for two people to carry those stones.

31. I do not agree with the Respondent's position that it was not under any common law duty to issue protective gear. Considering that the Appellant was carrying stones it was necessary to be issued with gloves and also gumboots to protect him from the injuries that would have arisen there from. Saying that protective gears were unnecessary is in itself negligence and a demonstration of a reckless attitude towards employees' safety because the bottom line is that the Appellant required to be secured. Had the Appellant been issued with gumboots the injuries would not be as severe as it were. I therefore fault the trial magistrate for holding that the gumboots or gloves were unnecessary in the circumstances of the case.

32. The court in **African Highlands & Produce Co. Ltd v. Collins Moseti Ontekwa Kericho HCCA No. 38 of 2002(UR)** while dealing with similar facts held as follows:-

> ***"I do hold that the appellant was solely liable for the injuries sustained by the respondent due to the fact that under the Factories Act the failure of an employer to provide protective gear to an employee, especially when he is working in a dangerous environment means that, in the event such an employee is injured, then an employer shall be guilty of breach of a statutory duty. Liability in such event is strict."***

33. The learned authors of **Winfield and Jolowicz on Tort by WVH Rogers 14th Edition, London Sweet and Maxwell at page 213** it is state as follows:-

> ***"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty."***

34. In the case of **Mumias Sugar Co. Ltd Vs Charles Namatiti CA 151 of 1987** Nairobi the Court of Appeal held that:

> ***"an employer is required by law to provide safe 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."***

35. Section 72 of the Factories Act criminalizes contravention of any of the provisions of the Act. The duty under the Factories Act is owed to persons not only employed by the occupier but also to all persons working therein.

36. Even if I were to be found wrong on my above analysis on liability, the consequences for failure to adduce evidence has been vastly considered by this court. In **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** where Makhandia J (as he then was) held that:

> ***"The plaintiff proved on a balance of probability that she was entitled to the orders***

sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence on oath remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

37. In ***Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007***, Ali-Aroni j, stated:-

> ***"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."***

38. In **HALSBURY'S LAWS OF ENGLAND 3RD EDITION VOL 28 PARA 88.** It was stated that:

> ***"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 employer.(***emphasis added).

39. **Nyarangi JA** echoing the above words in **MAKALA MAILU MUMENDE VSNYALI GOLF COUNTRY CLUB (1991) KLR 13** had this to say:

> ***"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."*** (emphasis added).

40. In my view, from the evidence on record and the circumstances of this case, I find that the appellant did prove his case against the respondent on a balance of probabilities, which evidence was never rebutted by the respondent. I therefore find that the respondent was 100 liable for the accident. It is for the above reasons that I wholly agree with the appellant's grounds of appeal No. (a) to (g).

16. **On what damages are payable to the appellant**. I note that the trial court did not assess any damages that would have been payable had she found that the appellant proved his case on liability. The appellant contended that failure to assess damages was fatal. I agree that the trial magistrate was in error in failing to assess damages that she would have awarded th appellant had she found in his favour on liability. Iam fortified by the decision in the case of **GLADYS WANJIRU NJARAMBA –Vs- GLOBE PHARMACY & ANOTHER [2014]eKLR** the Court stated-

> "It is trite law that the trial Court was under duty to assess the general damages payable to the Plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of **MORDEKAI MWANGI NANDWA v BHOGALS GARAGE LTD CA NO. 124 OF 1993** [**1993]KLR 4448** where the Court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment and in the case of **MATIYA BYABALOMA & OTHERS v UGANDA TRANSPORT CO. LTD UGANDA SUPREME COURT CIVIL APPEAL NO. 10 OF 1993 IV KALR 138** where the Court held

that the Judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim.

41. From the above authorities it is clear that the trial Court fell into error by not assessing the award of general damages he would have awarded to the Appellant had she been successful in proving her case. I would therefore proceed to assess damages for the appellant
42. The principles of awarding damages in cases such as the instant case were laid down in **Rahima Tayab & Others v. Anna Mary Kinanu., Civil Appeal No. 29 of 1982 (1983) KLR; 1KAR 90** where the Court of Appeal held that:-

> ***"whereas in awarding damages, the general picture, the whole circumstances, and the effect of injuries on the particular person concern must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect."***

43. I have considered the reasoning above and among others the cases of **Simon Muchemi Atako & another v. Gordon Osore (2013) eKLR** and **Francis Muiruri v. Samuel Njoroge Kamingi & another HCCC No. 1313 of 1987** where the plaintiffs suffered similar injuries. The respondent proposed a sum of shs 60, 000 as being adequate compensation for the injury sustained by the appellant whereas the appellant proposed shs 395,000 relying on the cases **Mwaikwe Kwaka Chindoro v Dhanjal brothers Limited MBSA HCC442 of 1991**-Mabaluto J.
44. Considering the injuries sustained by the appellant as confirmed by Dr Okere, I am of the considered view that an award of KShs. 150,000/- would suffices. As for special damages KShs. 1,500/- was pleaded and proved. The claim for shs 5,000 being the doctor's attendance fees is not a special damage and neither was it pleaded. It is a cost of the suit being a witness expense. I decline to grant it.
45. In the end, I allow this appeal, set aside the judgment and decree of the trial magistrate dismissing the appellant's suit and substitute it with judgment for the appellant against the respondent on liability at 100%. I award the appellant general damages of kshs 150,000 for pain and suffering and special damages of kshs 1,500.
46. I also award the appellant costs of the suit in the subordinate court as well as costs of this appeal.
47. The awards will carry interest as follows:

a. On general damages, at court rates from date of judgment in the lower court until payment in full.
b. On special damages, at court rates from the date of filing suit until payment in full.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 4th day of November, 2015

R.E.ABURILI

JUDGE