IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 47 OF 2011.

KITALE INDUSTRIES LTD. :: APPELLANT.

VERSUS

DANIEL SANDE MUMBAI :: RESPONDENT.

J U D G M E N T.

The appellant, **Kitale Industries Ltd.**, was sued by the respondent, **Daniel Sande Mumbai**, for damages arising from injuries suffered by the respondent on the 20th May, 2009, while in the course of his employment at the appellant's premises. It was averred by the respondent that at the material time he was employed by the appellant as a loader and on the material date he was at the loading section undertaking his normal duties when heavy bundles of flour fell on him thereby occasioning him bodily injuries. He attributed the accident to negligence on the part of the appellant in that it **"inter-alia"** failed to provide a safe working environment and to provide protective devices. He therefore prayed for general and special damages against the appellant.

A statement of defence was filed by the appellant wherein the allegations made by the respondent were denied and in particular that the respondent was an employee of the appellant and was owed a duty of care by the appellant.

The appellant averred in the alternative that the accident was caused wholly and/or substantially contributed to by the respondent's negligence in that, he failed to follow the prescribed work procedure and to take any or reasonable precaution for his own safety, among other things. Further, with full knowledge and understanding of the danger involved, the respondent accepted the risk of injury resulting from the act and/or omission complained of in undertaking his work and was therefore barred from making the claim against the appellant.

The appellant therefore prayed for the dismissal of the claim.

After the hearing of the suit, the learned trial magistrate apportioned liability at 70% against the appellant and 30% against the respondent resulting in judgment for the respondent in the sum of Ksh. 300,000/= general damages less 30% contributory negligence i.e. Ksh. 210,000/= and in the sum of Ksh. 1,500/= special damages.

All in all, the respondent Was awarded a sum of Ksh. 211,500/= together with costs and interest.

Being dissatisfied with the award, the appellant filed the present appeal on quantum only and on the basis of the grounds in the memorandum of appeal dated 20th July, 2011.

The respondent was dissatisfied with the entire decision and judgment of the trial court and filed a cross-

appeal on the basis of the grounds in the memorandum of cross-appeal dated 10th August, 2011.

At the hearing of both appeals, the parties opted to file written submissions and as such the appellant's submissions were filed on 24th January, 2014 while those of the respondent were filed on 12th February, 2014.

The rival submissions have been considered by this court in the light of the grounds for the main appeal and the cross-appeal. It is therefore the duty of this court to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the respondent's case was that on the material date, he was on duty carrying a bundle of flour which snapped and caused him to fall down with the load thereby injuring his neck, back and causing a fracture on his left elbow. He lost consciousness but regained the same while at the Kitale District hospital where he was admitted for a day. He was later examined by Dr. Aluda who prepared a medical report dated 4th June, 2009. He was also examined by Dr. Gaya who prepared a second medical report dated 26th February, 2010. He denied responsibility for the accident and prayed for damages against the appellant.

The appellant did not lead any evidence in support of its defence.

The trial court after considering the foregoing evidence by the respondent concluded that the appellant was largely to blame for the accident for failing to provide a safe working environment in that bales of flour were not properly arranged thereby exposing the respondent to risk of injury.

The trial court also concluded that the respondent partly contributed to the accident by exposing himself to the risk of injury which he knew or ought to have known.

In the opinion of this court, the respondent did not clearly explain how the accident occurred but he appeared to have suggested that a bundle of flour he was carrying got cut and caused him to fall down with the load. However, this court does not think that the mere snapping of a bundle of flour could have caused the respondent to fall unless he did not exercise proper caution or observe prescribed procedure while undertaking his task. It is for that reason that this court agrees with the trial court that the respondent's contribution to the accident could not have been less than 30% against the appellant's 70%.

Therefore, on the question of liability, this court upholds the finding of the learned trial magistrate.

With regard to the quantum of damages and in particular general damages, the principles to be observed by an appellate court are that it must be satisfied that the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant factor or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

Herein, the appellant contends that the award of Ksh. 300,000/=, general damages was excessive owing to the fact that the respondent fully recovered from his injuries.

The respondent on the other hand suggested that the award was inadequate since the trial court did not take into account future medical expenses.

Having considered the two medical reports produced at the trial and the authorities relied upon by the respondent, this court does not think that the appellant has established satisfactory grounds for it to interfere with the award of damages made by the learned trial magistrate.

The award was adequate and reasonable compensation in terms of general damages for pain, suffering and loss of amenities. There was no justification for an award on future medical express.

In the upshot, both the main appeal and the cross-appeal are without merit and are hereby dismissed.

The parties shall bear their own costs of the appeal.

Ordered accordingly.

[Delivered and signed this 1st day of July, 2014.]

J.R. KARANJA.

JUDGE.