**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 156 of 2011**

**JOSEPHAT AOKO ODONGO ….....APPELLANT**

**=VERSUS=**

**ELDORET STEEL MILLS LTD ….....RESPONDENT**

***[Being an Appeal from the Judgment of the Hon. NATHAN SHIUNDU (Senior Resident Magistrate)***

***dated 22md August, 2011 at the Chief Magistrate's Court -Eldoret in CMCC NO. 346 OF 2010].***

**JUDGMENT**

The Appellant, **JOSEPHAT AOKO ODONGO,** was the Plaintiff in the Civil Case which he had brought against the Respondent, **ELDORET STEEL MILLS LIMITED.**

In the Plaint, he asserted that the Defendant had failed to take all reasonable measures to ensure that he was safe while engaged in his work. The Plaintiff used to work as a machine operator at the Defendant's melting department.

Whilst the Plaintiff was carrying on his duties, a scrap nail is said to have pierced through his old boots, pricking his right foot.

The accident giving rise to the injuries sustained by the Plaintiff were attributed, by him, to the negligence on the part of the Defendant, or on the Defendant's breach of the terms of the contract between the two parties.

One of the terms of the contract which the Defendant is said to have breached is the one requiring it to provide the Plaintiff with protective gear, such as gloves, overalls and boots.

In its defence, the Respondent herein denied that the Plaintiff was its employee. The Defendant also denied that an accident occurred at the place or on the date cited by the Plaintiff.

However, if any such an accident took place, the Defendant attributed it to the negligence of the Plaintiff.

It was the Defendant's assertion that the Plaintiff was negligent, by exposing himself to the risk of injury. The Plaintiff was also said to have failed to make proper use of the protective devices.

The other alternative line of defence was that by accepting the job, the Plaintiff accepted to run the risk of all purely accidental harm, as the one that took place.

After the trial, the learned trial magistrate dismissed the Plaintiff's case. The Court found that the Plaintiff was an employee of the Defendant. However, the court was not satisfied that the Plaintiff was injured whilst he was on duty. As far as the trial court was concerned, the Plaintiff may have been injured elsewhere.

Being dissatisfied with the decision of the trial court, the Plaintiff filed an appeal before the High Court.

When canvassing the appeal, MR. OMBATI, the learned advocate for the Appellant, submitted that the evidence on record had established that the Plaintiff suffered the injuries when he was at his place of work, at about 1.00 p.m.

The Appellant emphasized that, contrary to the finding by the trial court, he did not have any protective devices at the material time. The Appellant also said that his Supervisor, who testified on behalf of the Defendant, had confirmed that he (the Plaintiff) was injured whilst he was on duty.

And although the said Supervisor testified that the Plaintiff had been provided with protective devices, the Plaintiff said that no such evidence of protective cover was made available to the court.

The Supervisor was not the right witness, to prove that protective devices were given,; that is a role which only the Personnel Manager could play, said the Appellant. That contention is founded upon the Appellant's assertion that it is the Personnel Manager who would have issued the protective devices, if any.

The Appellant also submitted that even though his Supervisor testified that he did not witness the incident in which the appellant was injured, that did not imply that the Appellant was not injured at his place of work. I was told that the task of Supervision was done at three different parts within the factory. Therefore, it was possible that at the time of the incident which caused injuries to the appellant, the Supervisor could have been at either of the two other stations which he used to supervise.

Ms Khayo, the learned advocate for the Respondent, submitted that the Appellant failed to discharge the burden of proof pursuant to section 107 of the Evidence Act.

In particular, the Appellant is said to have not proved that any such injury as he suffered, was due to lack of protective apparel, being boots, in particular.

The respondent submitted that the basis of the injury, if any, was not due to the lack of boots. As the Appellant was wearing shoes at the material time, yet he was allegedly pricked on the foot, the Respondent submitted that the injury could have happened even if the appellant had been wearing boots.

This court was also told that the Plaintiff did not demonstrate how the Defendant could have done anything about protecting him from a nail, which the Plaintiff failed to see before he was injured.

Furthermore, as the Plaintiff had worked for over 17 years, without being injured, the Defendant submitted that in those circumstances, the Plaintiff failed to prove any negligence on the part of the Defendant.

Having given due consideration to the rival submissions advanced before this court, I have placed the same within the context of the evidence that was tendered at the trial.

The evidence of the Plaintiff was that he was at his place of work when he suffered injuries to his foot. The Plaintiff also added that the furnace used to produce a lot of smoke, thus making it impossible for the Plaintiff to see the nail before it injured him.

During cross-examination, the Plaintiff reiterated that the nail which injured him was put on the

platform by the magnet. He also said that although he had severally asked for protective wear, none was provided.

P.W.2 was a Clinical Officer. He said that the Plaintiff was treated for an injury to his right foot. The said injury was caused by a nail prick.

On its part, the Defendant called one witness. He was one of its Supervisors. He was on duty on the material day. He said that if an accident had occurred at the factory, it would have been reported to him. As he did not receive any report of the alleged accident, or incident from the Plaintiff, the same did not take place.

The Supervisor also said that the Plaintiff had overalls and gum boots. During cross-examination, the Supervisor said that if he was not present when an incident took place, the same would have been reported to the Personnel Manager. But, as he was on duty on the material day, the Supervisor said that the report would have been made to him.

The Supervisor also said that he was in-charge of supervising three (3) sections within the factory. Therefore, he conceded that he could not be at all the 3 sections at any given time.

Thirdly, the Supervisor confirmed that scrap metal was carried by magnets, and that sometimes, the scrap metals fall down.

It strikes me that whilst the defence denied the Plaintiff's assertion that he was an employee of the Defendant, the only witness who testified for the Defendant confirmed that the Plaintiff was smelting iron.

The Supervisor also confirmed that scrap metals are carried by magnets, and that sometimes scrap metals do fall down. In effect, he confirmed that the Plaintiff's version of the events leading to his injury were entirely probable.

And as the Supervisor's duties covered 3 different sections, he readily conceded that he could not have been at all the said sections at any given time. That implies that if he was not at the smelting section when the Plaintiff got injured, the Supervisor could not have seen it.

Therefore, the fact that the Supervisor did not see the incident in which the Plaintiff was injured cannot mean that the said incident did not take place.

At no time did the Defendant assert that the Plaintiff was injured elsewhere other than at his place of work. The defendant denied the Plaintiff's contention that he was injured. In the alternative, the Defendant said that, if the Plaintiff was injured, it was due to his own negligence.

The Particulars of the Plaintiff's alleged negligence were that he failed to adhere to set safety rules and precaution; that he negligently exposed himself to risk of injury which he knew or ought to have known; that he did not make use of the protective devices; that he carried out his duties recklessly and negligently; and that he inflicted the injury upon himself.

In the circumstances, the submission that the injury sustained by the Plaintiff may have been inflicted upon him at a place other than at the factory, is neither in line with the Defendant's defence nor is it in line with the evidence tendered by the Defendant. I therefore come to the conclusion that the learned trial magistrate erred by holding that:

**“ It is possible that the Plaintiff may have been injured elsewhere”.**

I find that the Plaintiff was injured whilst he was at his place of work. The injuries he sustained were proved through the medical records produced by the Clinical Officer.

There is no proof that the Defendant provided gumboots to the Plaintiff. I find that none was provided. But therein lies the sting in the tail! If the Plaintiff had severally asked the Defendant to provide him with protective devices, he must be presumed to have appreciated the need to wear the same. As he was not provided with the gum boots, yet the Plaintiff continued to carry out his duties, he must be presumed to have accepted some element of risk.

Of course, I am fully aware that persons employed in unskilled or semi-skilled undertakings, are unlikely to down their tools just because their places or circumstances of work are less than ideal.

But just because they take the risk of continuing to work in such situations cannot be a basis for the argument that they willingly made a choice to expose themselves to risk. In other words, the doctrine of ***Volenti non fit injuria*** is not applicable to such a situation.

In the result, I find that the trial court erred by dismissing the Plaintiff's claim. I therefore allow the appeal, set aside the order dismissing the suit, and replace it with a finding that the Plaintiff proved that he was injured whilst working for the Defendant. I also find that the injury was largely attributable to the Defendant's failure to provide the Plaintiff with gum boots.

However, I am alive to the fact that the injury was inflicted on the Plaintiff's foot. The Plaintiff concedes that he was wearing shoes at the material time. In those circumstances, the Defendant was right to have alluded to the possibility that even if the Plaintiff had been wearing gumboots, he may still have suffered the injuries to his foot.

That notwithstanding, the Defendant's Supervisor said that the Plaintiff ought to have been supplied with gum boots. As no gum boots were provided, the Defendant must bear some responsibility. The only question is the degree of responsibility to be borne by either party.

Doing the best I can, in the circumstances, I find that the Defendant bears 70% responsibility, whilst the Plaintiff bears 30% responsibility.

Finally, I uphold the calculations by the trial court on the quantum of general damages. The costs of the appeal, together with the costs of the case before the trial court, are awarded to the Appellant.

**DATED, SIGNED AND DELIVERED AT ELDORET,**

**THIS 9TH DAY OF MAY, 2013.**

**….....**

**FRED A. OCHIENG**

**JUDGE.**