REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CIVIL APPEAL NUMBER 4 OF 2014

[Originally Mombasa High Court Civil Appeal Number 163 of 2008]

BETWEEN

NDORO KAKA KAKONDO …… APPELLANT

VERSUS

SALT MANUFACTURERS [K] LIMITED ……..…… RESPONDENT

[An Appeal from the Judgment and Decree of the Mombasa Acting Principal Magistrate, Honourable B.T. Jaden, delivered on the 28th August 2008 in the Chief Magistrate's Court Civil Case Number 2633 of 2005]

BETWEEN

NDORO KAKA KAKONDO ……PLAINTIFF

VERSUS

SALT MANUFACTURERS [K] LIMITED ……. DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

Mr. Jengo Advocate instructed by Jengo & Associates, Advocates for the Appellant

Mr. Nanji Advocate, instructed by Kishore Nanji Advocates for the Respondent

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JUDGMENT

1. The Appellant was employed by the Respondent Salt Company as a Motor Vehicle Electrician, in 1990. He was injured at the workplace on 17th August 2001, while changing a defective battery from the Respondent's Truck. He left employment on 8th January 2003 owing to his inability to continue working, as a result of the injuries sustained in the workplace accident. In his Amended Plaint dated 28th March 2006, he sought from the Court, against the Respondent, the following remedies:-

a. Special Damages of Kshs. 2,000.
b. General Damages.
c. Loss of future earning capacity and/ or diminished earning capacity.
d. Costs.

2. In its Judgment dated 28th August 2008, the Trial Court granted the Appellant General Damages at Kshs. 800,000; Special Damages at Kshs. 1,500; Costs; and interest. Liability was apportioned at 40% against the Appellant, and 60% against the Respondent.

3. Disaffected, the Appellant filed Civil Appeal Number 163 of 2008 at Mombasa High Court challenging the Trial Court's findings on liability; on general damages for pain, suffering, and loss of amenities; and on diminished and/or loss of future earning capacity.

4. The Appeal was transferred by the High Court to the Employment and Labour Relations Court and given its current registration. Parties filed Submissions which their Representatives, highlighted on the 19th February 2016.

Appellant's Submissions

5. The Appellant joins grounds 1 to 4 of his Memorandum of Appeal, and argues them as a unit. These relate to the issue of negligence and apportionment of liability. He argues the rest of the grounds, 5 to 7, together. These relate to assessment of damages in particular, with regard to loss of earning capacity and/ or diminished earning capacity.

[a]. Negligence and Liability:-

6. The Appellant faults the Trial Court for finding the Respondent to have established contributory negligence on the part of the Appellant. The Respondent did not call any evidence to support the particulars of contributory negligence contained in its Pleadings. The Appellant relies on the ***Court of Appeal Decision in Civil Appeal Number 345 of 2000 between George Ndiritu Kariamburi [Deceased] v. Joseph Kiprono Ropkoi & Another***, where it was held that where both Parties have pleaded particulars of negligence against each other, each Party is under duty to prove its own assertions. The Respondent did not call any evidence to support its assertion that the Appellant was negligent. No evidence was extracted from the Appellant in cross-examination, to establish contributory negligence. Section 107 and 108 of the Evidence Act are clear that he who asserts, must prove.

7. The Trial Court states in its Judgment:

> *''From the Plaintiff's evidence, one cannot discern any precaution that he took in view of the fact that he knew it was rainy and slippery. There is also no indication he requested for any ladder or safety boots before embarking on the job. The Plaintiff's evidence does not show whether the defendant kept any such safety apparels.''*

8. The Appellant submits in making this finding, the Trial Court went beyond the particulars of negligence pleaded by the Parties. The Appellant in his evidence explained the working environment was not good; it was rough and raining; pieces of metal were on the ground; he was careful in the manner he carried out his work; he worked as per his Employer's instructions; and he did not expose himself to danger. This evidence was inconsistent with the conclusion that the Appellant was in part to blame for the accident. Relying on ***Halsbury Laws of England, 4th Edition, Vol.17 page 195, paragraph 278***, the Appellant submits failure to cross-examine a Witness on a material part of evidence, may be treated as an acceptance of the truth of that part, or the whole of his evidence.

9. The Trial Court erred in finding or implying, the Appellant should have proved he was not negligent, or disproved the particulars of contributory negligence pleaded by the Respondent. ***Halsbury Laws of England, 4th Edition Volume 34, page 47-48 paragraph 56,*** states that it is not necessary in the first

place, for the Plaintiff to prove he was not negligent. The burden of proving he was not negligent may subsequently be placed on him, by evidence given on behalf of the Defendant. It was wrong for the Trial Court to find the Appellant should have requested for a ladder or safety apparels.

10. The Appellant lastly submits, on negligence and liability, that the Trial Court erred in finding that the Employee ought to have reminded the Employer, of the Employer's statutory and common law duty of care, in provision of a safe working environment. This duty is not shared with the Employee. In ***High Court at Eldoret Civil Case Number 149 of 2000*** and in ***Mghosi v. Gaya Engineering Works [1981] KLR***, the Courts were clear the Employer is required to provide the Employee a safe system of work, and ensure that the Employee complies with the safe system of work. This involves supervision of the Employee. An Employee would share contributory negligence if he carelessly carries out his work, or ignores instructions on safety, given by the Employer. The supervisory role of the Employer was the focus in the ***High Court Civil Appeal Number 39 of 2005 between Longonot Horticulture Limited v. Issac Oluoch Kichama,*** where it was held the Employer must remember that, *''men doing routine tasks are almost heedless of their own safety and may become careless about taking precaution. The Employer must therefore, by his Foremen, do his best to keep the Employees up the mark, and not to tolerate any slackness. He cannot throw all blame to them, if he has not shown a good example himself.''*

11. The Appellant urges the Court to find the Trial Court erred in its findings on negligence and liability. It is proposed to have liability apportioned at 100% against the Respondent in this Appeal.

[b]. Damages for Loss of Earning Capacity and/ or Diminished Earning Capacity:-

12. The Trial Court failed to take into account relevant factors, in granting damages under this head at Kshs. 300,000. The Trial Court acknowledged the Appellant was 39 years old at the time of the accident, and had 16 years left in service. These years were not reflected in the grant of damages at Kshs. 300,000. The Trial Court plucked the figure of Kshs. 300,000 from the blues. Factors such as the degree of incapacity; that the Plaintiff was still in pain during trial; he could not get permanent employment; he was only 43 years at the time of termination; that he lost salaried employment; and that he earned Kshs. 13,603 per month, were not considered.

13. Retirement age today is 60 years. The Trial Court found the Appellant could have continued working up to the age of 55 years. In ***Court of Appeal Civil Appeal Number 152 of 2001 between Bildad Mwangi Gichuki v. TM-AM Construction Group Limited [Africa],*** it was found the High Court erred in granting damages for loss of future earnings at Kshs. 156,500. The High Court was faulted for failing to consider the Plaintiff was incapacitated to a very large degree; was unable to work after the accident; was not able to find suitable work after the accident; he was still in pain; and enjoyed salaried employment before and up to the time of the accident. The Court of Appeal adopted a multiplier of 7 years, to bring the Appellant's damages for loss of earnings and / or diminished earning capacity at Kshs. 532,000.

14. Considering the imponderables of life, the Appellant urges the Court to apply a multiplier of 12 years to the Claimant's monthly salary of Kshs. 13,603, and allow damages under this head at Kshs. 1,958,832.

[***c] Appellant's Supplementary Submissions***

15. The Appellant filed further Submissions on 8th June 2015, in reaction to the Submissions filed by the Respondent on the 13th May 2015.

16. He emphasizes that his evidence on the occurrence of the accident was not controverted. The statement of the Appellant's intended Witness Mr. Maitha, who passed on before trial, was produced in evidence by the Appellant, and is contained in the Record of Appeal at page 40. The Appellant submits this statement was unsworn, and its probative value is nil. In any event the statement did not discount the Appellant's evidence on the occurrence of the accident. It was not wrong for the Appellant to climb down from the Truck, facing back. It was the only way he could support himself by holding onto the Truck's door handles. Where there is clear evidence of the Employee's income; age; degree of injury; and loss of employment, the Court need not make an impressionistic educated guess, in awarding damages for loss of

earnings/ diminished earning capacity. The award must be based on the evidence before it.

Respondent's Submissions

17. The Respondent submits it paid the entire decretal amount awarded by the Trial Court to the Appellant, on the 2nd October 2008.

18. The facts relating to the Appellant's employment are not in dispute.

[a]. Neligence and Liability

19. The Respondent however urges the Court to uphold the findings of the Trial Court on negligence. The Appellant produced a Statement recorded by his Co-Worker Mr. Maitha, who passed away before he could be called to testify. The deceased stated the Appellant was injured when he took one step backward, accidentally slid and fell on his back. The accident was not caused by the lack of safety boots, ladder or the presence of the rain, as alleged by the Appellant; it was caused by the Appellant himself. The Trial Court cannot be faulted for apportioning liability to the Appellant at 40%.

20. The operation of going up and down the Truck, to replace the faulty battery, was within the power and control of the Appellant. He was responsible for the accident and injuries sustained. He could not blame the Respondent. The Respondent relies on the ***Kericho High Court Civil Appeal Number 15 of 2003, Wilson Nyanyu Musigisi v. Sasini Tea & Coffee Limited***; and ***Kakamega High Court Civil Case Number 58 of 2000 between Mumias Sugar Company Limited v. Samson Muyinda***, where it was held that where an Employee is engaged in manual work that does not require exceptional skill and injures himself, then such an Employee cannot hold his Employer liable under common law or statute. In the latter case, the Plaintiff worked for Sugar Producer Mumias. He injured himself with a panga [machete], while cutting sugar cane. The Court's view was that the task did not require exceptional skill, was too manual, and involved no machinery warranting the holding of the Employer responsible for the injuries sustained by the Plaintiff.

21. It is not true that the Respondent did not give evidence to show contributory negligence. The Respondent called 1 Witness Mr. Mbuku. The Appellant himself produced the Statement of his deceased Witness, which indicated the Appellant was negligent. The Appellant's own letter D. Exhibit 2 corroborated the assertion that the Appellant fell while climbing down the Truck backwards. These pieces of evidence proved the particulars of contributory negligence. The Respondent discharged its duty as required in the decision of ***George Ndiritu Kariamburi***, cited above.

22. The Appellant did not plead non-supply of safety boots, ladder or lack of safe working environment. He waited for the trial to raise this issue. In ***Court of Appeal Civil Appeal Number 219 of 1998 involving Galaxy Paints Co. Limited v. Falcon Guards Limited***, it was ruled that to decide against a Party on matters which do not come within the issues arising from the dispute as pleaded, is an error on the face of the record. The Trial Court was generous in considering this issue at all, it having not been pleaded by the Appellant in the first place.

23. The Trial Court correctly found the Appellant had a duty of taking precaution. In ***Mombasa High Court Civil Appeal Number 91 of 2003 between Tembo Investments Limited v. Joseph Kazungu***, the Court established that if the task performed by the Employee carries an element of risk or danger, the Employer is not fully responsible for taking precautions to ensure the Employee's safety. The Employee ought to share in that duty of taking precaution. The Trial Court correctly found the Appellant ought to have taken precaution. This decision finds support in the ***Court of Appeal Civil Appeal Number 211 of 2002 at Mombasa between Mwanyule v. Said t/a Jomvu Total Service Station***, which held the Employer owes no absolute duty of care to the Employee. The Employer only owes the Employee a duty of reasonable care against risk of injury caused by events reasonably foreseeable, which could be prevented by taking reasonable precautions. ***Halsbury Laws of England 4th Edition, Volume 16 paragraph 562,*** states it is an implied term of the contract of employment at common law, that the Employee takes upon himself risks necessarily incidental to his employment.

[b] Damages

24. The Respondent relies on ***Mombasa High Court Civil Appeal Number 436 of 1995 between Henry Moriasi Osiemo v. Quid J. Mohammed & Another,*** in submitting that damages under loss of earning capacity, can be classified as general damages. The Court does not adopt a multiplier approach, but makes an educated impressionistic guess at the overall loss of prospective earnings. Loss of earning capacity or diminished earning capacity is distinguishable from loss of earnings, the latter which falls in the category of special damages, which must be specifically pleaded and strictly proved.

25. The Appellant pleaded for damages for loss of earning capacity and/ or diminished earning capacity. His evidence was on these. He pursued general damages under this head, not special damages. The Trial Court directed itself properly by granting him general damages of Kshs. 300,000 based on an educated impressionistic guess, rather than adopt a specific multiplier.

26. The accident occurred on 17th August 2001. The Appellant continued to work up to 8th January 2003. He could not continue to work because of his residual back pains. The Respondent terminated his contract of employment. He conceded on cross-examination that he continued to work even after termination. He earned Kshs. 300 per day, which translated to about Kshs. 9,000 per month. Medical evidence also, was that the Appellant continued to work, even after leaving the Respondent. The amount of Kshs. 300,000 was not inordinately low or high, to warrant interference on appeal.

27. The Respondent submits the Appeal lacks merit, and should be rejected with costs to the Respondent.

The Court Finds:-

28. There are two issues to this Appeal- whether the Trial Court erred in its findings on negligence and apportionment of liability; and whether damages of Kshs. 300,000 in loss of future earning capacity and/or diminished earning capacity, was adequate and properly granted. The grant of general damages for pain and suffering at Kshs. 800,000 appears to be uncontested.

29. Other facts that are uncontested and need be mentioned here, are that: the Appellant was employed by the Respondent as an Auto-Electrician; he worked between 1st May 1990 and 8th January 2003; he was involved in a workplace accident while changing a faulty battery in the Respondent's Truck on the 17th August 2001; he left employment at the instigation of the Respondent, owing to his inability to continue working, as a result of back pains associated with the accident of 17th August 2001; he left employment on 8th January 2003, 2 years after the accident; and he was paid general and special damages and costs, as awarded by the Trial Court.

[a].Negligence and Liability.

30. The Appellant was instructed by his Supervisor Mr. Sukesh, to start a Truck which had stalled. The battery was faulty, requiring he changes the battery. The slot for the battery was high up in the Driver's cabin. The Appellant had to mount the cabin while holding onto the Truck's door handles. The cabin was 5 feet from the ground. It was raining and slippery. According to the Appellant, in his evidence at page 77 of the Record, he was not provided with a ladder and safety boots by the Respondent to accomplish the task. He had to step on the Truck's tyre while dismounting. It was slippery. He slid, lost grip of the door handles, and fell down backwards. There was an iron bar on the ground. The ground itself was rough. He also suggests in his evidence he was holding spanners on his hands as he dismounted. He was injured on his back.

31. This version of the actual occurrence was not in material departure with the version contained in the statement made by the Appellant's intended Witness, who unfortunately passed on before the trial, contained at page 40 of the Record. The statement in the view of the Court was part of the Appellant's evidence, produced by him, and having equal weight in evidence, as his own statement before the Court. Mr. Maitha stated the Appellant took a step backwards, accidentally slipped and fell. It is not in doubt that

the Appellant dismounted the Truck backwards. The evidence by the Appellant and the Statement of Maitha agree the Appellant climbed down backwards. The Appellant testified he fell on his back, and sustained back injuries which eventually culminated in his departure from employment. The question is whether the Appellant's version and that of Mr. Maitha demonstrate the Appellant was negligent in climbing down?

32. The Respondent did not show how the act of the Appellant dismounting backwards, would result in contributory negligence. No evidence was called by the Respondent to show the Appellant should have dismounted otherwise. In the mind of the Court the dismounting exercise would entail a reversal of the climbing up exercise. The Appellant, in the absence of a ladder, held on to the door, stepped on the tyre while climbing down and slipped falling backwards. It was illogical as submitted by the Appellant, for the Respondent to expect him to come down while facing the front. He would not have sufficient grip of the door handles, if he was facing away from those handles.

33. The Appellant pleaded in his Amended Plaint, that the Respondent failed to provide and maintain proper and adequate plant tackle and appliances to enable the Appellant carry out his work safely. He similarly stated he was not provided safety apparels. The Court is satisfied the Appellant was not under any obligation to specifically plead he was denied a ladder and safety boots. These were adequately covered under the pleadings on lack of adequate plant tackle, appliances and safety apparels. The specifics were given in the evidence of the Appellant. If the Respondent needed further details of its failure in providing the Appellant with a safe working environment, it should have requested for further details before the trial commenced.

34. It is well settled that at common law, an Employer is not merely required to provide a safe system of work, but must ensure Employees comply with that safe system of work, as held in ***Mghosi v. Gaya Engineering Works Limited, [1981] KLR.*** This duty of care involves adequate supervision by the Employer. The record indicates the Respondent's Supervisor merely instructed the Appellant to start the stalled vehicle. No supervisory input is shown while the Appellant climbed up and down the Truck to change the battery, under rainy slippery conditions, and with a rough ground with metal objects beneath. The Court adopts the ***Mghosi*** decision and ***Longonot Horticulture Limited v. Isaac Oluoch Kichama*** that Employers must ensure there is safe system of work, and ensure Employees follow that system.

35. It is the responsibility of the Employer to supply the safety system and safety equipment to the Employee. There is no law which requires the Employee to make request for such system and equipment as suggested by the Trial Court. It is not in the Factories and Other Places of Work Act, or in its repealing law, the Occupational Safety and Health Act of 2007. It is not in the common law.

36. Similarly the law does not distinguish between skilled and unskilled labour, or what is sometimes pejoratively characterized as manual labour, in attaching the duty of care to Employers. The decisions of the High Court in the cases of **Wilson** ***Nyanyu Musigisi*** and ***Mumias Sugar Limited*** cited by the Respondent are not persuasive. The duty of care is not only owed to Employees with exceptional skills. It extends to all Employees under the law. Indeed unskilled Labourers such as those cutting cane in Sugar Plantations need supervision and instruction from their Employers on safety at work, and are entitled to pursue compensation for work injury against their Employers, if their Employers fall short in securing safe systems of work. The Appellant was an Auto Electrician and it is even doubtful that his role could be characterized as manual, if the High Court decisions above are to be taken as having any persuasive value. He held a Grade 1 Trade Certificate in his field, and he was therefore not unskilled, carrying out manual tasks.

37. Duty owed to Employees by their Employer however, is not without qualification. The Parties agree on this, following the High Court Appeal decision in ***Tembo Investments Limited v. Joseph Kazungu***. The duty of care goes as far as it is reasonable, and practical to the extent of taking precaution.

38. The Appellant's assertion that: the Respondent ought to have provided him with a ladder to climb up the Driver's cabin; and that he ought to have been provided with safety boots, was not unreasonable or impracticable. The Truck Cabin was 5 feet above the ground. The ladder would have afforded the

Appellant the elevation, and the boots supplied the Appellant with adequate grip of the tyres. Given the weather conditions and the general landscape, it was not unforeseeable from the point of view of the Respondent that the Appellant could slide and fall, thereby injuring himself. The risk in climbing up the Driver's cabin was entirely avoidable if there was a ladder, and the Appellant's dismounting would have been aided by the provision of suitable footwear. The Respondent did not show what reasonable duty of care it exercised with respect to the Appellant. The risk of falling and getting injured in rainy and slippery conditions cannot be said to have been necessarily incidental to the Appellant's employment. It was avoidable had there been a safe system of work, and proper working tools. The Respondent needed to show what the Appellant could have done differently to avoid the accident. This, together with the Respondent's own evidence on its fulfillment of statutory and common law obligations, is lacking.

39. The Court is satisfied the Appellant has shown the Trial Court misdirected itself on the question of negligence and liability. The Respondent did not show what system of safety and safety tools, it provided to the Appellant in undertaking his task. The evidence provided by the Appellant and Mr. Maitha, as well as the evidence of the Respondent's sole Witness, did not point to any degree of contributory negligence on the part of the Appellant. It was not for the Appellant to request for a safe system of work and safety tools of work. The Respondent did not support any of its assertions on contributory negligence. The Court is satisfied apportionment of liability on the Appellant at 40%, almost half the blameworthiness, was unsupported by evidence. ***Appeal on the grounds of negligence and apportionment of liability is allowed. There shall be an order placing liability at 100% on the Respondent***.

[b]. Damages:-

40. Damages for loss of earnings, loss of future earning capacity and/or diminished earning capacity is a remedy which was well explained by his Lordship Justice Phillip Waki, in the case of ***Henry Moriasi Osiemo v. Quid Mohammed & Another***, supplied to the Court by the Respondent.

41. Loss of earnings is claimed as special damages. It must be specifically pleaded and strictly proved. The Court understands this to comprise lost wages. It is a specific figure, based on the Claimant's rate of monthly salary, and the years expected to continue working.

42. Damages for loss of future earning capacity and /or diminished earning capacity, unlike damages for loss of earnings, is a type of remedy based on the Claimant's potential earning power. It focuses on the Claimant's ability to earn income. The remedy is granted based on the difference in potential earning power, not on what the Claimant actually earned in the past. Even if a person is unemployed at the time the injury occurs, he would be entitled to pursue damages for loss of future earning capacity or diminished earning capacity. This item is therefore treated as general damages, which though not required to be specifically proved, must be proved on the balance of probability.

43. The Appellant pleaded for loss of future earning capacity and/ or diminished future earning capacity. His claim fell within the class of general damages. It was in the discretion of the Trial Court to assess damages under this head. There was evidence adduced by the Appellant that he continued to work for the Respondent for almost 2 years after the accident, leaving only after his back pains persisted. After termination he continued to work, earning about Kshs. 300 daily. Cross-examined, he conceded he continued to work after termination, his only problem being that he could not work for long. His submission that the Trial Court should have granted him damages using a multiplier of 12 years has no justification. He submits that retirement age is 60 years. It is not. There is no law setting retirement age at 60 years, the retirement age in the private sector being left to the Parties to set, in their workplace labour contracts. If there is a law in the public sector setting retirement age for Public Servants, it must not be taken as applying across the entire labour market. It was the duty of the Appellant to justify his multiplier principle. He did not. The Trial Court took the correct approach in adopting an educated impressionistic award, as guided by the Authority of ***Henry Moriasi Osiemo. Appeal on the order for damages granted at Kshs. 300,000 is declined.***

44. Lastly, the Court shall order that Parties bear their costs of the Appeal. Costs in the Trial Court shall remain as granted, and satisfied. The Court does not think the costs in the Trial Court should be affected

by the additional general damages granted on Appeal. The trial and appellate processes are distinctive. Costs are at the discretion of the respective Courts. IN SUM, IT IS ORDERED:-

a. ***Appeal on negligence and apportionment of liability is allowed.***

b. ***Liability shall be borne by the Respondent at 100%, with the effect that the Respondent pays to the Appellant 40% of Kshs. 800,000, at Kshs. 320,000, being the balance of general damages.***

c. ***Appeal on assessment of damages for loss of future earning capacity and/or diminished earning capacity is rejected.***

d. ***Parties to bear their costs of the Appeal.***

e. ***Costs in the Trial Court shall remain as granted in that Court.***

Dated and delivered at Mombasa this 8th day of July, 2016

James Rika

Judge