REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL CAUSE NO. 2 OF 2015

GAMI QUARIES (LTD).....CLAIMANT

VERSUS

ANTHONY NGAITA KAVOI.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a first appeal from the whole Judgment of the subordinate court delivered in Mombasa on 26/9/2014. The appeal prays for the overturning of the whole Judgment on the following grounds:

a. **The learned Senior Principal Magistrate erred in law and fact in holding the Appellant liable for the accident that resulted into the injuries sustained by the Respondent.**

b. **The learned Senior Principal Magistrate erred in law and fact in failing to appreciate and weigh the nature and scope of the entire evidence tendered by both the Respondent and the Appellant.**

c. **The learned Senior Principal Magistrate erred in law and fact in failing to appreciate and apply the facts which were uncontested, admitted and or common in the evidence tendered by the Respondent and the Appellant.**

d. **The learned Senior Principal Magistrate erred in law and fact in failing to appreciate and apply the facts which were contested, admitted and or common in the evidence tendered by the Respondent and the Appellant.**

e. **The learned Senior Principal Magistrate erred in fact and law in failing to appreciate and apply the law and authorities submitted by the Appellant.**

f. **The learned Senior Principal Magistrate erred in law and fact in failing to appreciate the scope and extent to which an employer is liable for the injuries sustained by an employee while on duty.**

g. **The learned Senior Principal Magistrate erred in law and fact in failing to record and or accurately take notes of all the evidence tendered by both the Respondent and the Appellant.**

h. **The learned Senior Principal Magistrate erred in law and fact in basing her judgment**

entirely and exclusively on the evidence tendered by the Respondent.

1. **The learned Senior Principal Magistrate erred in law and fact in excluding in whole the evidence tendered by the Appellant.**

j. **The learned Senior Principal Magistrate erred in law and fact in making an award that was excessive in the circumstances and nature of the injuries sustained by the Respondent.**

BACKGROUND

2. The Respondent was employed by the appellant as a welder. On 31/7/2009, the Respondent was instructed by the Appellant's Senior Supervisor, (Dw2 in the trial court proceedings) to repair the leaking roof of the workshop by putting patches of iron sheets. The Respondent first protested but later complied and climbed on a top of the roof and successfully repaired one side but when he turned to the other side of the roof, he fell though after he stepped on a the timber that broke. The Respondent suffered serious injuries. It turnout that the timber had been rotten and that is why it broke. The accident was reported to the Dw2 who directed that the Respondent be taken to hospital. A medical report was produced by Dr. Ndegwa who confirmed that the Respondent suffered fracture of the distal left radius, fracture of the distal left ulna, posterior dislocation of the left elbow, pelvic girdle fracture of the left superior and Public ramie, and trauma on the left shoulder. The doctor made the opinion that the Respondent suffered severe multiple bone, joint and soft tissue injuries.

3. The Appellant denied liability *vide* her defence filed in court and called two defence witnesses. The gist of the appellant's defence was that the Respondent was the sole and/or substantially contributed to the said accident by his own careless, reckless and/or negligence. It was further defence case that the Respondent was not acting withing the course of his employment, but was in a floric of his own when the accident occurred. After considering the evidence and the submissions filed, the trial court made a finding of fact that the appellant was liable for the accident but also held that the Respondent had contributed to the same by 25%. The court therefore proceeded to award the Respondent general damages kshs.550,000 plus special damages of kshs.2000.

4. The appellant was dissatisfied and brought this appeal which was heard on 6/5/2015.

APPELLANTS CASE

5. Mr. Onyango, the learned counsel for the appellant relied on all the 10 grounds of appeal to urge the court to allow the appeal. He relied on the submissions made before the trial court (page 39 -123 of the record of appeal) to prosecute grounds 1, 2, 3, 4, 5, 6, 8 and 10 of the appeal. He however added that an employer is only liable to the extend that the injury suffered were foreseeable but not when the employee goes on a floric of his own. In that regard the learned counsel submitted that the Respondent though employed as welder, he went to do the work of repairing the workshop roof without any instructions from the employer. In the alternative, the counsel urged that even if the Respondent had been authorised to carry out the roof repairs, the employer would still not have been liable because the injury was not foreseeable since it was not known that the wood supporting the roof was weak. Lastly he submitted that the quantum of damages assessed by the trial court was excessive compared to the precedents cited by the appellant in her submissions in the lower court.

6. With respect to ground 7 and 9 of the appeal, the learned counsel for the appellant submitted that the trial court erred when she shifted the burden from the Respondent to the appellant contrary to Section 107, 108 and 109 of the Evidence Act. On that point, the appellant submitted that it was an error for the trial court to hold that the appellant's witnesses were of a little relevance because they were not eye witnesses to the accident. According to the appellant, it was the Respondent who did not prove that he was instructed to carry out the repairs after Dw2 denied that he had instructed him to repair the roof.

7. Lastly, the appellant submitted that the trial court erred by holding that the Respondent was junior officer who could not do the material work without instructions. In the appellants opinion, the said

finding was not founded on any evidence or pleadings because the Respondent never disputed *vide* his Reply to the defence the appellant: paragraph 3 of the defence which described him as a Senior Supervisor.

RESPONDENT'S CASE.

8. The Respondent opposed the appeal through his counsel Mr. Ngure and prayed for it to be dismissed with costs. He relied *on t*he decision *of the* High Court in ***HCCA 527 of 2010 Isaac Iminya Katambani Versus Firestone E.a. Ltd. [2015] eKLR*** which referred to ***Selle Versus Associated motor boat Co. Ltd. [1968] E.A. P. 123*** where it was held that the appellate court is restrained from interfering with the decision of the trial court which had the benefit of observing the deminour of the witnesses. The Respondent submitted that the trial court was right in her decision because the two defence witnesses admitted that the Respondent fell from the appellants roof he was repairing and got injured. It was further submitted that it was correct for the trial court to hold that the two defence witnesses were never eye witnesses to the accident as they were not at the scene of the accident when it occurred.

9. On the seniority between the Respondent and Dw2, the Respondent's counsel contended the Dw2 was the senior most of the two and the he is one who instructed the Respondent to do the roof repairs. The said view, according to the Respondent, was corroborated by Dw1 in his testimony when he said that Dw2 was the Senior Supervisor and could not lie. The Respondent urged that, the Dw2's Senior rank was confirmed by the fact the Respondent went to report the accident to the Dw2 in the office who then authorised the taking of the Respondent to the hospital.

10. As a consequence of the foregoing seniority, the Respondent submitted that he acted on the instructions from his Senior when he climbed the workshop roof to do repairs. He further urged that an employer owed duty of cause at all material times to ensure that the working condition and work assigned to the Respondent was not harzadous to her employees at any time. He contended that the fact that there was leakage on the roof where the Respondent was assigned to repair exposed him to the danger of falling from rotten timber.

11. With respect to the quantum of damages awarded, the Respondent submitted that the same was even below the sum of kshs,1,000,000, he had suggested to the court. He accused the appellant of not submitting on the quantum of damages and only raising the issue on appeal. He relied on his submissions and authorities cited in the lower court to oppose the appeal.

ANALYSIS AND DETERMINATION

12. This being a first appeal, this court has jurisdiction to evaluate the evidence a fresh. Upon considering the evidence adduced by both the appellant and the Respondent it is common knowledge that the Respondent was involved in an accident while repairing a leaking workshop roof as a result of which he suffered injuries. The issues for determination arising from the 10 grounds of the appeal and the submissions by both sides of the divide are:

a. **Whether the Respondent was acting within the course of his employment when the accident occurred on 31/7/20009.**

b. **Whether the appellant owed any duty of care to the Respondent.**

c. **Whether the appellant breached the duty of care.**

d. **Whether the Respondent caused or contributed to the accident through his own negligence.**

e. **Whether the trial court misinterpreted the relevance and weight of evidence tendered by the Appellant.**

f. **Whether the quantum of damages awarded by the trial court was excessive in the**

circumstances and the nature of the injuries sustained by the Respondent.

Course of employment

13. The appellant has denied that the Respondent was acting within the scope of his employment when he fell from the roof he was repairing. According to the appellant the Respondent was not assigned and had no permission or authority or the skill to carry out the repairs on the roof of the wood workshop. Consequently the appellant maintained that the Respondent injured himself while in a floric of his own. The appellant further denied that the Dw2 was the Supervisor to the Respondent and maintained that Dw2 could not given instructions to the Respondent. In response, the Respondent contended that he was instructed by Dw2 to repair the leaking workshop roof. He maintained that Dw2 was his senior and that is why after the accident he went to report to him and who gave other officers authority to take him to hospital.

14. The lower court believed the evidence by the Respondent and dismissed the appellant's contention that Dw2 was not senior to the Respondent. This court also believes the evidence by Respondent because it has not been rebutted by the inconsistent and sharply contradicting evidence by the two defence witnesses. Dw1 stated in his evidence in Chief that Dw2 was a Senior Supervisor in the Respondents office handling petty cash and receiving Dw1's messages when he (Dw1) was away. Dw1 however changed the story on cross examination to deny that Dw2 was his Personal Assistant and contended that Dw2 was equal in rank with the Respondent because they were both Supervisors. On re-examination Dw1 further changed the description of the Dw2 to that of Clerk whose duties included processing of salaries and checking of mails. He further stated that he is the one who told Dw2 to take the Respondent to hospital.

15. On his part, Dw2 stated that he was employed by the appellant as a Salesman. He further stated that, the Respondent was employed to do general duties at the garage. On cross examination Dw2 confirmed that the Respondent used to do general work including welding. He further stated that after learning about the Respondent's accident, he advised the other offices to take the Respondent to Mewa Hospital. Lastly Dw2 contended that he was junior to the Respondent and could not issue orders to him. The foregoing contradictions between the evidence by Dw1 and Dw2 are material and only renders the defence case unbelievable. Such contradicting evidence cannot rebut the consistent evidence by the Respondent.

16. For the foregoing reasons the court finds on a balance of probability that Dw2 was Senior to the Respondent and he was the Deputy or Personal Assistant to the Dw1 in terms of giving instructions to the other workers whenever Dw1 was away. Dw2 was also Senior because he was not doing general manual duties like the Respondent in the garage but was working from the Dw1's office dealing with petty cash, processing of salaries and deputising Dw1 whenever he was away. Dw2 was therefore empowered to give instructions, and he indeed gave instructions to the Respondent to repair the leaking roof on the material date against his will. Consequently the Respondent was within the scope of his employment as a general worker, when he climbed the roof of the Wood workshop to do repairs as instructed by Dw2. That act of complying with instructions from Dw2, the person who deputised the Managing Director. (Dw1) when he was away, cannot be dismissed as being an engagement by the Respondent in a floric of his own. The correct position is that the respondent fell down while doing repairs of the roof as instructed by Dw2 on behalf of the Appellant.

17. As correctly submitted by the appellant's counsel, the employers liability only extends to the limits where the employer is acting within the scope of his employment and ceases when the employee engages in a floric of his own. At Common Law, (Halbury's Laws of England Fourth Ed. 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 ncludes the obligation to provide competent staff, adequate materials, 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 appellant owed duty of care to the Respondent when he instructed him to carry out repairs on the

leaking roof. This duty included the obligation to provide safety gear, competent staff to assist the Respondent in his duties and above all, supervision to guide him and ensure that he did not step on rotten timber and fall through. In addition Dw2 had a duty to ensure that the leaking roof he was sending the Respondent to repair was strong enough for him to step on. The said duty of care has now been codified in Kenya under Section 6 of the Occupational Safety and Health Act (OSHA) 2007 Subsection 1 states that:

"Every occupier shall ensure the safety, health and welfare at work of all persons working in his work place."

Breach of the duty of care

18. The Respondent contended in evidence that he was forced to climb onto the roof and do repairs. He was not provided with any protective gear like helmet, he lacked the necessary skill and experience in the new task given and there was no one assigned to supervise him. The person who assigned him the work just remained in his office until report of the injury was made to him. The appellant never did any due diligence to ensure that the roof where he was sending the Respondent to repair was strong enough to support him. That failure by Dw2 to ensure that the roof was safe, that protective gear was provided to and used by the Respondent, and that effective supervision was accorded to the Responded constituted a breach of the duty of care both at common law and section 6 of the OSHA. As a result of that breach, the Respondent suffered severe bodily injuries and was hospitalised at the appellant's cost.

Contributory negligence

19. No evidence was adduced by the appellant to prove that the Respondent acted negligently. The trial court apportioned liability at 25:75% in favour of the Respondent without any supporting evidence. The only remark made by the learned trial magistrate was that:

"However the plaintiff cannot totally escape liability as he should have been extra careful on where he was stepping. I now apportion liability as follows..."

That decision to apportion liability was unfounded considering the fact that the trial court had just made a finding of a fact that the appellant had not called any eye witness. Never the less, the court was not invited by the Respondent to overturn that apportionment of liability and it is left as ordered by the lower court.

Misinterpretations and weight evidence

20. The appellant has submitted that the trial court misinterpreted evidence and failed to weigh the relevance of the evidence tendered by the appellant. In particular the appellant blamed the trial court for shifting the burden of proof from the Respondent to the appellant by finding that the appellant did not call eye witnesses; and by finding that the Respondent was a junior officer who could not work without instructions. The court sees no merit in blaming the trial court for making the foregoing finding of facts. The trial court was right in finding that the appellant did not call any eye witnesses and that Dw1 and Dw2 learned of the accident after the fact. That did not shift the burden of proof to the defence in any manner. As regards the finding that the Respondent was junior officer, that was correct from the evidence of Dw2 who stated that the Respondent was doing general manual duties including welding. He (Respondent) had no direct contact with Dw1 (MD) while away even after the injury. He had to go through Dw2 who was deputising the Managing Director.

Excessive quantum of damages.

21. The dispute is about the Kshs.550,000 awarded for general damages. The appellant never suggested any quantum to the trial court. The Respondent proposed kshs.1000,000 but the trial court awarded kshs.550,000. The appellant has now submitted that considering relevant precedents, a sum of kshs.200,000 would be reasonable for the injuries suffered. The trial court made the awarded after

considering the severity of the injuries suffered by the Respondent. The appellant is not disputing the severity of the injuries suffered by the Respondent as a result of the accident.

22. This court has not been shown why the award of damages should be overturned. Such award was done in exercise of discretion by the trial court and the appellant has not met the threshold for overturning such awards by an appellate court. In **Mbogo and another -vs- Shah [1968] EA 93 (CAN)** the Court of Appeal held that:

"... a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

The appellant has not demonstrated that the trial court misdirected herself on some matter or exercised her discretion wrongly. What the entire appellant is saying is that the award is excess but without satisfying the requirements sat by the case of ***Mbogo and another vs Shah.***

Disposition

23. In view of the reasons stated above all the grounds of appeal fails and the appeal is dismissed with costs.

Dated, signed and delivered this 3rd day of July 2015.

O. N. Makau

Judge