REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 69 OF 2012

MOMBASA MAIZE MILLERS.....APPELLANT

VERSUS

CHARLES OTIENO OWINO.....RESPONDENT

(Being an appeal against the judgment of Hon. Ezra Awino- Senior Principal Magistrate in Kisumu CMCC No. 146 of 2009)

J U D G M E N T

The respondent's case before the trial court was that on 23-7-2008 he was working for the appellant as a casual worker when he tripped and fell as a result of which he was injured on the right leg and head. He blamed the accident on the appellant's breach of statutory duty and/or negligence and sued for compensation in general and special damages. The court found the appellant 90% to blame and the respondent 10% to blame and made an award of Kshs. 279,000/= in general and special damages together with costs and interest. The appellant was aggrieved by the decision and that it what led it to file this appeal. He challenged the findings on liability and quantum.

This court is entitled to reconsider afresh all the evidence adduced before the trial court and come to its own independent conclusions **(Selle & Another -VS- Associated Motor Boat Company Ltd & Others [1968] EA 123).** Where it is apparent that evidence was not properly evaluated by the trial court, or that wrong inferences were drawn from that evidence, it is the duty of this court to evaluate the evidence itself and draw its own conclusions.

The respondent's evidence was that he was a casual worker employed by the appellant's miller at Kisumu. On 23-7-2008 he was carrying a 90 Kg gunny bag of flour from the store to a lorry when he slipped. He slipped while moving on a ladder made of sacks. They had made this ladder. In the plaint the accident was blamed on the appellant's breach of statutory duty and/or negligence. The particulars of the breach of statutory duty were:

a. failing to make or keep safe the respondent's place of work;
b. failing to provide or maintain proper apparatus at the place of work;
c. employing the respondent without instructing him on the dangers likely to arise in connection with the place of work or without providing any or adequate supervision;
d. failing to provide the respondent with proper skills; and
e. failing to provide a safe system of work.

The particulars of negligence alleged were:

a. failing to take any/or adequate precautions for the safety of the respondent while engaged upon his work;
b. exposing the respondent to risk or injury which they knew or ought to have known; and
c. failing to provide or maintain suitable tools to enable the respondent to carry out the work safely.

The defence called John Kangui Musava (DW1) who was the appellant's human resource officer and who produced the daily casual sheet to show that the respondent was not working for them on this day, or at all.

The trial court set out to answer the following issues:

a. whether the respondent was an employee of the appellant and whether he was injured as alleged;
b. who was to blame for the injuries; and
c. how much was to be awarded.

On (a) it was found that the respondent had proved that he was the appellant's employee at the time and that he had been injured while so employed. On (b) it was found that the appellant was liable to compensate for the injuries. On (c) an award of Kshs. 279,000/= with costs and interest was awarded.

The record shows that the respondent produced no documentary evidence to support this testimony that he was at the time in question working for the appellant as a casual worker. He stated that he had worked for the appellant for one year and that he had not been given any employment document. Against that evidence, DW1 stated that they maintained a record of all their casual workers and that the respondent was not one of them. The court was influenced by a waiver application form (exhibit 1) made at New Nyanza Provincial General Hospital to find that the respondent was working for the appellant. The form shows that the hospital was considering the respondent's request to have the payment of treatment costs waived. In the form it appears he told the hospital that he was a mkokoteni loader and then changed to say he was working for the appellant. In my view, that inconsistency regarding he occupation of the respondent should have put the court on caution. What was clear was that he had nothing to show that he worked for the appellant and DW1 produced records to indeed show that he was not employed there. Given this evidence, I find, the court erred when it found that the respondent had proved on balance that that he worked for the appellant. The burden to prove that the respondent was employed by the appellant was entirely upon him. Whether there was a written contract of employment or not, the burden lay squarely on the respondent. It was not discharged.

The next question was that of liability, assuming that it had bee proved that the respondent was the appellant's employee. The record does not show that the respondent testified that the place where he was working was either risky or dangerous. He did not testify that he slipped because, for instance, the floor was wet, or slippery. There was no complaint that he was working in an environment that was not safe. There was no evidence that he had not been instructed on what to do or that thee was no supervisor on duty at the time. The work that he was doing did not require any special skills or expertise. He is the one who made the ladder of bags on which he was walking with the bag when he tripped. There is no indication that his employer was in any way responsible for the circumstances that led to his tripping and getting injured.

In **Kenya Tea Development Authority Ltd -VS- Andrew Mokaya, HCCA No. 174 of 2006** at Kisii Justice Makhandia (as he then was) made reference to what the author in **Winfield & Julowicz in Tort (13th Edition)** has said at page 203:

> **"At common law the employer's duty is a duty of care and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working, the plaintiff must plead and therefore prove what the proper system was and in what relevant aspects it was not observed. It is true that the severity of this particular burden has somewhat been**

reduced but it remains clear that for a workman merely to prove the circumstances of his accident will not normally be sufficient."

While an employer is under a duty to take reasonable care for the safety of his employees so as not to expose them to unnecessary risk, it has to be borne in mind that breach of this duty must be proved by showing that the employer was careless and therefore negligent regard being had to the nature of work **(Williamson Tea (K) Ltd -VS- Raymond Kipkemoi Arap Korir, HCCA No. 33 of 2009** at Kericho). The scope of the duty and the standard to be observed cannot be so wide as to encompass situations that cannot be reasonably foreseen or contemplated.

In short, the respondent did not prove any breach of duty on the part of the appellant, and the circumstances leading to his injury could not be reasonably foreseen or contemplated. The lower court was , again, wrong to find that the appellant was liable to compensate the respondent for the injuries suffered.

I hope I have said enough to show that the appeal has merit. It is allowed with costs. The judgment and decree of the lower court are set aside and in their place there shall be judgment dismissing the respondent's suit against the appellant with costs.

Dated, signed and delivered at Kisumu this 30th day of September, 2013.

A. O. MUCHELULE
JUDGE