REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 191 OF 2011

SUPER FOAM LIMITED.....APPELLANT

VERSUS

DOMINIC NJUGUNA GAITHO.....RESPONDENT

(Appeal from the original judgment and decree of Hon. B.A Owino (SRM) in Milimani Commercial Courts, CMCC No. 54 of 2010, delivered on 4th April , 2011)

JUDGMENT

1. The Respondent, **Dominic Njuguna Gaitho,** sued**, Super foam Limited**, seeking, for workman's compensation following injuries he suffered on 12th May, 2008. He pleaded that he was in the course of employment at the appellant's premises where he was exposed to fumes from hot mattresses that caused him to collapse. The claim is based on an employers' breach of common law contractual duties towards his employee which led to the injuries suffered by the employee while in the course of duty. The dispute was heard by the trial magistrate who found the appellant 100% liable and awarded the respondent general damages of kshs 280,000/= and kshs 2,000/= as special damages.

2. The Appellant, aggrieved by the Trial Court's decision filed this appeal on the following grounds:

1. ***The Learned Magistrate erred in law and in fact in finding that the appellant was 100% liable in negligence when there was evidence to show that the respondent was wholly or substantially contributed to the accident;***
2. ***The Learned Magistrate erred in law and in fact in awarding the sum of kshs 280,000/= in general damages which figure is so ordinately high and excessive and constitutes an erroneous estimate taking into account the minor nature of the injury sustained by the respondent and past awards in comparable cases;***
3. ***The Learned Magistrate erred in law and in fact in reaching a decision on both liability and quantum that is wholly against the weight of the evidence and precedents.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424,** it was held interalia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of

the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

3. The respondent's case was that, on 12th May 2008, he was at work at the appellant's premises in the plastic department, when he was called to assist at the foam section factory in the foam production area. He claims that he was tasked with receiving freshly produced foams that were coming out of the factory steaming hot, in the process he inhaled the fumes that caused him to faint and he was rushed to Ruiru Sub- District hospital. He states that he suffered injuries which included sensitive nostrils, coughs and colds due to the effects of the fumes since the appellant did not provide him with the requisite gas- mask and appropriate protective gear. He claimed that he still experiences a lot of difficulty when performing heavy duties.

4. The appellant's case was offered by its supervisor in the foaming department who testified that he knew the respondent who worked in the plastic section. He averred that on the material day, the respondent was instructed to move the foam blocks to the curing area after production. He added that all the employees in that section were re-issued with gas masks and the respondent must have been reckless for not putting one on or he did not ask for a gas mask.

5. I have re-evaluated the evidence as adduced in the lower court and I have considered the submissions of the parties as filed in this court.

6. The appellant submitted on liability that, evidence was adduced in the trial court which showed that the respondent failed to put on a gas mask contrary to the safety regulations hence contributing to the accident. It argued that the evidence was adduced by its supervisor and was not contradicted. On quantum, the appellant submitted that the damages awarded were excessive since the two doctors, **Doctor Moses Kinuthia** and **Doctor Ashwin Mdhiwala** diagnosed the respondent as having suffered chemical pneumonitis and rhinitis, cute broncho spasm, coughing, sneezing and shortness of breath. It argued that, the **Doctor Ashwin** advised that the respondent was healed and no traces of chemical pneumonitis and rhinitis were found during examination, subsequently the injuries suffered were not severe enough to warrant an award of kshs 280,000/=.

7. The respondent submitted on liability. He stated that the fact that the respondent was not issued with a mask was not controverted since the appellant did not adduce any records to show that the respondent was issued with a gas mask. He urged this court not to interfere with the trial court's finding on facts. On quantum, the respondent submitted that an award is a matter of discretion which the appellate court should not interfere with unless the trial court in addressing the matter took into account irrelevant factors, or the amount was so inordinately high or low. He referred to the report by **Doctor Kinuthia** who said that the respondent will need follow up in the future at n estimated costs of kshs 50,000/= . He argued that the appellant has not shown how this amount is excessive.

8. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. I will first address the first and 3rd grounds of appeal where the appellant claims that the Magistrate erred in finding that the appellant was 100% liable in negligence when there was evidence to show that the respondent was wholly or substantially contributed to the accident and failing to take into consideration the evidence and precedents. I have considered the evidence

tendered by both parties. The respondent claims that he was not given the gas mask while the appellant claims that the respondent was issued with one but he failed to put it on. I note that both parties concur with the fact that the respondent was employed by the appellant and was working in the plastic section. They both admit that, on the day he was injured he had been called to another section, the foam section and assigned a duty that was out of his ordinary line of duty. It is possible then that the appellant may not have been issued with a gas mask. The appellant when tendering its evidence through it supervisor stated that the respondent did not ask for a gas mask and that he was working at the tail- end of the production line after the foam blocks had cooled down hence minimal vapours. It arises from the appellant's evidence that they paid little or no regard to the safety of the respondent since the duties assigned to him were at the tail end of the production line where there was minimal vapours. In anycase, the appellant was the respondent's supervisor and was under an obligation to ensure his safety under section 101 (1) of the Occupational Safety and Health Act. The appellant if it at all issued the respondent with a gas- mask, should have ensured that he put it on before undertaking the duties at the foam production section. In the premise, even with the missing records of issuance of the gas masks which the appellant claims were burnt in the fire, I find the assertions by the respondent genuine. In my view, the trial court was right in holding the appellant 100% liable.

9. In the second ground of appeal, the appellant has complained that learned magistrate erred in awarding the sum of kshs 280,000/= in general damages which figure was so ordinately high and excessive and constitutes an erroneous estimate taking into account the minor nature of the injury sustained by the respondent and past awards in comparable authorities. A closer look at the doctors reports, **Dr. Moses Kinuthia** diagnosed the respondent with chemical pneumonitis and rhinitis. He concluded that the injuries sustained were harm which he referred to as inhational injuries in the respiratory system that caused the coughs and nasal blockage. Dr. **Ashwin Mdhiwala**, diagnosed the respondent with chemical pneumonitis ,rhinitis, acute broncho spasm, coughing and sneezing. He opined that the respondent was in good health and would suffer temporary disability for one week only.

10. The appellant on quantum submitted that a sum of kshs 100,000/= would be adequate. It relied on the case of **George Morara Masitsa vs Texplast Industries Limited [2015] eKLR,** where the plaintiff suffered a chest infection that subjected him to severe pains and coughs, recurrent chest pains and coughs as result of rhinitis, headaches and nasal congestion. The court awarded kshs 100,000/= as general damages for pain and suffering. The respondent on the other submitted that the award was not excessive and that it was infact minimal if the court was to take into consideration that the respondent could not continue to work. He relied on the case of **Paul Gakunu Mwinga vs Nakuru Industries Limited, HCCC No. 679 of 1994 Nakuru**, where the court awarded damages of kshs 750,000/= for the plaintiff who suffered from a congested chest due to exposure to dust in his work premises.

11. I have considered the evidence adduced and the authorities cited.

The Doctors' are in consensus as to the injuries suffered by the respondent. **Doctor Kinuthia** opined that the respondent will require prolonged ENT follow up estimated costs of kshs 50,000/= while Doctor Ashwin opined that the respondent should be well within a span of a week at the time. Given that the doctors did not find any disability that respondent would have to live with, I find that the award of kshs 280,000/= was indeed excessive in the circumstances. I wish to fully rely on the case of **George Morara Masitsa** *supra***,** where the plaintiff suffered similar injuries and was awarded kshs 100,000/=. I also want to appreciate that the respondent will need Kshs 50,000/= for the ENT follow up as opined by **Dr. Kinuthia**. Therefore, I find that a sum of kshs 150,000/= would be an adequate award for general

damages.

12. The special damages of kshs 2,000/= is not in contention and I can see a receipt in the record to that effect.

13. In the end, I hereby set aside the judgement of the trial court on quantum and instead award a sum of Kshs 152,000/= as the sum payable to the respondent which sum will be fully borne by the appellant, having found him 100% liable. The above sum shall attract interest at court rates from the date hereof till payment in full. The respondent shall also have the costs of the appeal and suit.

Dated and delivered in open court this 3rd day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent