Case Number:	Civil Appeal 98 of 2015
Date Delivered:	21 Dec 2018
Case Class:	Civil
Court:	High Court at Machakos
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Top Tank Company Limited v Amos Ondiek Wandaye [2018] eKLR
Advocates:	Miss Karanja for the Appellant
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. P. M Mr. M.K. Mwangi
County:	Machakos
Docket Number:	-
History Docket Number:	CMCC No. 110 of 2014
Case Outcome:	Appeal dismissed
History County:	Machakos
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 98 OF 2015

TOP TANK COMPANY LIMITED.....APPELLANT

-VERSUS-

AMOS ONDIEK WANDAYE.....RESPONDENT

(Being an appeal from the judgement delivered on the 14th day of May 2015 by Honourable Principal Magistrate Mr. M.K. Mwangi in CMCC No. 110 of 2014 at Machakos)

BETWEEN

AMOS ONDIEK WANDAYE.....PLAINTIFF

-VERSUS-

TOP TANK COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 3rd February, 2014, the Respondent herein instituted a suit against the Appellant herein claiming General Damages, Special Damages in the sum of Kshs 1,500/- and Costs of the suit in the lower Court. .

2. The Respondent's suit was premised on the fact that the Respondent was an employee of the Appellant and that it was an implied term of the contract of employment between the two that the Appellant would take all reasonable precautions for the safety of the Respondent while the Respondent was engaged upon his work not to expose him to risk of injury of which the Appellant knew or ought to have known, to provide and maintain adequate and suitable plant and appliances to enable the Respondent carry out his work in safe conditions and to provide a safe and proper system of work.

3. It was pleaded that on or about the 16th day of July, 2013, the Respondent while was in the course of his employment, and within the scope of his duties, was injured as a result of which he sustained serious injuries. The Respondent contended that the accident occurred due to negligence on the part of the Appellant for which it was vicariously liable.

4. According to the Respondent, he was doing his work as a machine assistant when the forklift who driver was putting mould lid to the mould caused the same to slide and fall on the Respondent's big and second toes.

5. It was the Respondent's case that the Appellant failed to provide a safe working environment as envisaged in the ***Factories Act*** and or was in breach of its contractual duty to the Respondent, particulars whereof the Respondent outlined. The Respondent further pleaded that by reason of the foregoing, he suffered loss, damages and injuries and gave the particulars thereof.

6. In his evidence the Respondent averred that he was a tank maker and that on 16th July, 2013, he was employed by the Appellant

in mould setting. According to him, they were using a forklift when a component slid and hit two of his right toes and as a result he was rushed to Shallom Hospital where he was seen by **Dr Wambugu** and **Dr G K Mwaura** both who prepared a medical report for which he paid Kshs 1,500/=.

7. According to the Respondent, he blamed the Appellant for failing to supply him with gum boots and causing a component from the forklift to fall and hit him. He therefore sought compensation in damages and the costs of the suit.

8. According to the Respondent, he was working for the Appellant as a machine assistant but was assigned that job on that day, though he knew of the dangers involved. It was his evidence that the forklift driver was not experienced because he caused the lid to fall and that the driver, one **Aguta**, was employed as an operator and not as a driver. It was his case that he was wearing second hand normal shoes and he had not been supplied with gum boots though he had asked the manager to supply him with the same.

9. Although the Appellant filed a statement of defence, denying liability, no evidence was called for the defence.

10. In his judgement, the Learned Trial Magistrate found that the Appellant had produced a medical report showing that he was indeed injured and that the Appellant did not produce a list of its employees yet such a list existed. The Trial Court therefore found the Respondent's case probable on a balance of probabilities.

11. According to the Learned Trial Magistrate, by failing to supply the Respondent with boots and causing components to fall from the forklift without notice, the Appellant was negligent. However, it was his finding that the Respondent ought to have exercised grater care than he did in ensuring his safety. He therefore apportioned liability in the ration of 80:20 per cent in favour of the Respondent. As for general damages, considering the injuries sustained, the Learned Trial Magistrate awarded the Respondent Kshs 480,000.00 as general damages for pain suffering and loss of amenities and Kshs 1,500/- as special damages plus costs and interests.

12. In this appeal, the Appellant relies on the following grounds:

1. the Learned Magistrate erred in law and fact by applying an erroneous standard of proof and failed to appreciate that the Respondent had failed to discharge the burden of proof placed upon him as a matter of law;

2. the Learned Magistrate erred in law and in fact by granting the sum of Kshs. 480,000/= in respect of general damages which was inordinately high taking into account the injuries sustained by the Respondent and the judicial authorities submitted by the Appellant;

3. the Learned Magistrate erred in law and in fact in failing to appreciate the evidence before him and the submissions made on behalf of the Appellant;

4. the Learned Magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him.

13. The Appellant therefore sought that this appeal be allowed and the judgement of the subordinate Court be set aside and the suit in the subordinate Court be dismissed with costs. Alternatively it sought that the quantum of damages be varied and reduced to the extent that this Honourable Court deems fit.

14. In its submissions, the Appellant relied on the Court of Appeal's decision in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & another [2014] eKLR** as well as section 3 of the ***Evidence Act (Cap*** 80).

15. According to the Appellant, the Respondent never adduced anything to show that he indeed was employed by the Defendant and was further injured in the course of employment. Having allegedly been employed in 2008, he could have produced a contract of employment or pay slips to ascertain his allegation on employment. In the event he had been a casual worker (which was not claimed) he could have called any of his fellow employees to corroborate his testimony and ascertain that indeed he had been the Appellant's employee and was indeed injured on the said date as claimed, yet nothing was adduced.

16. The Appellant also relied on **Nandi Tea Estates Ltd –vs- Eunice Jackson Were [2006] eKLR**, where **Justice M.K. Ibrahim** remarked that:

"**The burden of proof was on the plaintiff to prove that she was on duty on the material day. It is not enough to prove that she was employed as a casual worker from time to time. If the plaintiff truly worked on the said day, then she ought to have produced evidence that she was paid for her services on the material day. No such evidence was proved. The plaintiff could also have called as a witness any other casual employee, who was on duty on 10th April, 1999. The plaintiff did not produce any evidence documentary or otherwise that she was on duty on 10th April, 1999, did work and was paid for it. Had she done so, she would have proved her case on a balance of probability. The Plaintiff could also have called any eye-witness who saw her fall at the Defendant's plantation on the material day. The existence of the injury and her being attended at Nandi Hills hospital on the said date is not proof that the injuries were sustained at her place of work. I am of the view that the Learned Magistrate erred by not explaining the basis upon which he found that the plaintiff had proved her case on a balance of probability. What evidence led him to decide that the plaintiff was injured while on duty" I see none. I find that the Learned Magistrate made his finding on the basis of no evidence. In effect, the Learned Magistrate shifted the burden of proof to the Defendant. The law is clear in our adversarial system that he who alleges must prove his case. The standard here on is "balance of probability". On the question of having been on duty and that she was injured at her place of work, there was no iota of evidence to tilt the balance of probability in the plaintiff's favour**."

17. According to the Appellant, such is the scenario in the instant case since there was no ounce of evidence to tilt the balance of probability in the Respondent's favour as he failed to discharge his burden of proof.

18. The Appellant however submitted that in the event this Honourable Court is inclined to find that the issue of the Respondent's employment with the Appellant and injury sustained was duly proved, the Respondent still had the burden to prove that the Appellant had been negligent as alleged. In this case it relied on ***Halsbury's Laws of England,*** 4th Edition, Volume 33, paragraph 662 that:

"**The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who to maintain the action must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established. Therefore, it is insufficient for the plaintiff to prove a breach of duty to a third person or a breach of duty without proving injury, or to prove injury without proving a breach of duty or injury which may or may not be caused by a breach of duty**."

19. The Appellant further relied on **Mwanyule –vs- Said t/a Jomvu Total Service Station [2004] 1 KLR 47** in which while citing ***Halsbury's laws of England*** 4th Edition Volume 16, paragraph 562 it was held that:

"It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee to compensate him for any injury, which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working conditions, nor is he an insurer of his employee's safety; the exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take any reasonable care of the employee's goods; the duty extends only to his person."

20. According to the Appellant, though the Respondent's testimony that he was employed as a machine assistant, in the mould setting, he however failed to state in detail what that particular position entailed and whether it was one that for which provision of safety boots and use of forklift was anticipated. It was submitted that in the ***Mwanyule case*** mentioned hereinabove, the Court stated that the Appellant who had been employed as a pump attendant did not require the provision of a helmet and heavy gloves as the said position did not anticipate a situation upon which the said safety wear would be required. Such is the case herein. The respondent failed to provide details that would reasonably ascertain that safety boots and forklift were essential for the type of work he was engaged in. Negligence on the part of Appellant was therefore not proved.

21. It was submitted that in the event this Honourable Court finds that the Appellant was negligent, the Respondent is to blame for the injuries sustained since he took no steps to ensure his own safety. He could have asked for the safety boots and further raised the issue that the forklift driver was inexperienced but he willingly placed himself at risk despite knowing the dangers. In this respect the Appellant relied on section 13 (1) (a) of the ***Occupational Safety and Health Act, No. 15 of 2007*** which according to it makes it mandatory for every employee to ensure his own safety at work while section 14 of the said Act, further imposes a duty on an employee to report any dangerous situation as follows:

"(1) Every employee shall report to the immediate supervisor any situation which the employee has reasonable grounds to believe presents an imminent or serious danger to the safety or health of that employee or of other employees in the same premises, and until the occupier has taken remedial action, if necessary, the occupier shall not require the employee to return to a workplace where there is continuing imminent or serious danger to safety or health.

(2) An employee who has left a work place, which the employee has reasonable justification to believe presents imminent and serious danger to life and health shall not be dismissed, discriminated against or disadvantaged for such action by the employer.

(3) It shall be an offence for a person on whom a duty is imposed under this section to fail to carry out that duty."

22. It was the Appellant's case that the Respondent clearly failed to exercise the ordinary care which he ought to for his own safety. He clearly took a risk which a reasonably prudent man in his position would not have taken thus guilty of contributory negligence. In this regard the Appellant relied on **Mohamed Farrah –vs- Kenya Ports Authority [1988-1992] 2 KAR 283** that a man is not bound to wait until disaster befalls him and then attempt to extricate himself from it. He is entitled, and indeed bound, if he is not to be guilty of any contributory negligence to take reasonable precautions to avoid injury to himself. It was therefore the appellant's view that liability be apportioned equally (50%:50%) between the parties.

23. It was further submitted that the Learned Magistrate erred in law and in fact by granting the sum of Kshs. 480,000/= in respect of general damages which was inordinately high taking into account the injuries sustained by the Respondent and the judicial authorities submitted by the Appellant. In this respect the Appellant relied on **Mohamed Mahmoud Jabane –vs- Highstone Butty Tongoi Olenja [1982-88] 1 KAR 982** that an award is not to be interfered with unless the same is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award. It was submitted that the injuries pleaded and proved by the two medical reports were the amputation of the right big and second toes. Both medical reports further awarded a permanent incapacitation of 6%.

24. The Appellant further relied on the decision of the Court of appeal in **Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi [1997] eKLR** and **Arrow Car Limited –vs- Bimomo & 2 others [2004] 2 KLR 101** where the Court further held that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

25. According to the Appellant, the Learned Magistrate in consideration of the said injuries, authorities cited and rule of inflation awarded the sum of Kshs. 480,000/= as general damages for pain and suffering and loss of amenities which it deem to have been inordinately high in the circumstances. According to it, the authority relied by the Respondent in the subordinate Court was inapplicable since the Plaintiff, in that authority namely, **Kaana Mgao –vs- Andrew Kamau Wokabi & Another, Mombasa HCCC No. 65 of 1990**, had sustained more severe injuries compared to the Respondent herein since the amputation in the said case was of all five toes of the left foot. To the Appellant, the authority relied by the Appellant in the subordinate Court, **Rivatex Limited –vs- Philip Mochache Nyabayo [1999] eKLR** was more relevant. The Appellant therefore proposed that the sum of **Kshs. 300,000.00** was adequate for the injury sustained by the Respondent herein.

Determination

26. I have considered the submissions of the parties in this appeal.

27. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of

Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

28. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

29. However in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

30. However in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

31. It is contended that the Respondent did not prove that he was an employee of the Appellant. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

32. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112

of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

33. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334.** in which the Court of Appeal held that:

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

34. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the appellant in this appeal depending on the circumstances of the case.

35. In this case, the Respondent's evidence was that he was employed by the Appellant. The appellant did not adduce any evidence to controvert this testimony which was made on oath. I agree that the Court of Appeal's position in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & another [2014] eKLR** espouses the correct legal position that:

"**It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side**."

36. However what is this "balance of probabilities"" **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

37. What then is the position where a party testifies on oath and the other party does not adduce any evidence" As stated in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** (supra) where the evidence adduced by the plaintiff falls far short of what is expected in a civil suit, in that the plaintiff's evidence does not meet the 51% threshold, the Plaintiff's case will fail notwithstanding the failure by the Defendant to adduce evidence. In other words the failure by the Defendant to adduce evidence cannot be a basis for propping up an otherwise hopeless case by the Plaintiff. However where there is credible evidence from the Plaintiff, the failure to adduce any evidence by the defence may well mean that the Plaintiff has attained the standard prescribed in civil proceedings. It was therefore held in In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J.** citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

38. In this case though the Respondent was cross-examined, it was not expressly put to him that he was not employed by the Appellant. In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J** (as he then was) held that:

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon".

39. Based on the evidence adduced before the Court the Learned Trial Magistrate was entitled to make findings of fact based on the material before him and his observation of the only witness who testified before him. He in fact made a finding that the Respondent was forthright. In **Sheldon Shadora vs. Stanley S. Shadora Civil Appeal No. 210 of 1995**, the Court of Appeal held that:

"Although in a first appeal the Court is entitled to rehear the dispute, it must be remembered that the trial court had the advantage of hearing and seeing the witnesses testify before him…A Court of Appeal will not normally interfere with the finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did…An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him."

40. In my view, based on the only evidence that was adduced before the Learned Trial Magistrate, he was entitled to arrive at the findings of fact in the manner he did. Nothing has been placed before me in this appeal to convince me that the said findings of fact were based on no evidence or misapprehension of evidence or that the Learned Trial Magistrate demonstrably acted on wrong principles in reaching the findings he did. There is therefore no justification to warrant interfering with the Learned Magistrate's findings on fact and a decline to do so.

41. As was held by the Court of Appeal in **Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja Civil Appeal No. 2 of 1986 [1986] KLR 661; Vol. 1 KAR 982; [1986-1989] EA 183:**

"Unless it is shown that the learned Judge took into account facts or factors which he should not have taken into account, or that he failed to take into account matters which he should have taken into account, that he misapprehended the effect of the evidence, or that he demonstrably acted on wrong principles in making his findings, the appellate court will not interfere with the findings of facts."

42. In this case, the respondent's evidence was that was employed by the Appellant as a machine attendant and that in the course of his duties, due to the negligence of the Appellant's employee who was carrying out the duties of forklift driver, a task he was not ordinarily employed to perform, due to the negligence of the said driver, components from the forklift slid and fell on the Respondent's toes injuring him. I agree with **Koome, J** (as she then was) in **Samson Emuru vs. Ol Suswa Farm Ltd Nakuru HCCA No. 6 of 2003** that:

"The duty of the employers to provide the servant with a safe place of work not merely to warn against unusual dangers known to them, … but also to make the place of employment…as safe as the exercise of reasonable skill and care would permit…The duty thus described is a higher… the master is under a duty to make his servants to take reasonable steps to avoid harm arise."

43. To accept the Appellant's argument that the Respondent knew of the danger and ought to have taken precautionary measures would imply that the defence of *volenti non fit injuria* would have absolved the Appellant from liability. However as is stated in In ***Halsbury's Laws of England* 3rd Edition Vol 28 Paragraph 28**:

"where the relationship of master and servant exists, the defence of *volenti non fit injuria* is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employer."

44. If the Respondent was instructed to work where he had been assigned by the Appellant, it was upon the Appellant to ensure that the environment in which the Respondent operated was safe for the nature of the work he was supposed to undertake. The Court of Appeal in the case of **Makala Mailu Mumende vs. Nyali Golf County Club [1991] KLR 13** stated thus:

"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees." [Underlining added].

45. Similarly, in ***Halsbury's Laws of England*, 4th Edition vol. 16 Para 560,** it is stated that:

"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances....So as not to expose them to an unnecessary risk."

46. In ***Winfield and Jolowicz on Tort*** **by WVH Rogers, 14th Edition, London Sweet & Maxwell at page 213**, it is stated as follows *inter alia*:

"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty."

47. In **Garton Limited vs. Nancy Njeri Nyoike [2016] eKLR**, **Aburili, J** held that:

"In this regard, it is expected that the appellant employer when assigning its employees to work in an environment where there is potential risk of injury…then it is prudent for them to provide proper appliances to safeguard the workers. The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention of the employee but the employee failed to adhere and deliberately put himself in harm's way…In this case I find that the appellant owed a common law duty of care to ensure the safety of the respondent while she was engaged upon her duties in the appellant's employment…For example, had the respondent been provided with a head gear and boots, she could not have injured her head on falling down and or the leg."

48. It was therefore held by the Court of Appeal in **Kiema Muthuku vs. Kenya Cargo Handling Services [1991] KLR 464; [1988-92] 2 KAR 258; [1990-1994] EA 427** that:

"Even assuming that other systems of carrying out the work, e.g. by the use of safety belts or ladders, were impracticable, the employer is still under an obligation to ensure that the system that was adopted was a reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents… The law cannot be that even where it is known that a particular system is dangerous yet an employer can get away with it unless the employee can show a safer alternative system. Even where a system is known to be inherently dangerous, and there are no practical alternatives to operating it, yet the employer must still 'ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents."

49. In my view the Appellant failed to show what steps, if any, it took to ensure the environment under which the Respondent worked was safe. There was no evidence that attempts were made by the Appellant to supply the Respondent with any safety devices which would reduce the extent of injuries that the Respondent would be exposed to in the event of an accident. To my mind, section 14 of the ***Occupational Safety and Health Act, No. 15 of 2007*** not only imposes an obligation on the employee but also on the employer not to require the employee to return to a workplace where there is continuing imminent or serious danger to safety or health. In this case, the Respondent testified that he had requested to be supplied with the gum boots but that request was not complied with. In my view by requesting that he be supplied by the gum boots the Respondent was raising an issue as to the safety of the premises in question and the Appellant ought to have acted on that request. Failure to do so and assigning the Respondent work at the same place could only mean that the Appellant was liable. It is therefore no wonder that the Learned Trial Magistrate apportioned liability in the manner he did.

50. It is therefore my view that there is no justifiable reason why I should interfere with the Learned Trial Magistrate's findings on

liability.

51. As regards the quantum of damages, I agree with the position of Court of appeal in **Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi [1997] eKLR**, as follows:

"**It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees……we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd –vs-Shephard [1964] AC 326 at page 345**:

'But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.'

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in Lim Pho Choo v Camden and Islington Area Heath Authority [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of Tayab v Kinanu [1982-88] 1 KAR 90.

Lord Denning MR said:

'In considering damages in personal injury claims, it is often said: "the defendants are wrongdoers so make them pay in full. They do not deserve any consideration." That is a tedious way of putting the case. The accident, like this one may have been due to a pardonable error much as may befall any of us. I stress this so to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.'

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant."

52. However, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

53. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect… A member of an appellate court when naturally and reasonably says to himself "what figure would I have made'" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are

entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

54. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated…The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

55. In this case, the Learned Trial Magistrate did not indicate any basis for awarding Kshs 480,000.00 since no authority was cited in his judgement. That however is not fatal in light of this Court's duty, sitting as the first appellate court to re-evaluate the evidence and arrive at its own decision. In this case the Respondent sustained injuries to his right big and second toes both of which were amputated. The Appellant relied on the case of **Rivatex Limited –vs- Philip Mochache Nyabayo [1999] eKLR**, where an award of Kshs 240,000.00 was awarded. In that case the Plaintiff sustained bruises on the right leg and a fracture of the first metatarsal bone. It is clear that the Respondent suffered more severe injuries than the plaintiff in the ***Rivatex Case***. The Respondent, on the other hand relied on **Kaana Mgao –vs- Andrew Kamau Wokabi & Another, Mombasa HCCC No. 65 of 1990**, where the Plaintiff sustained crush injury to all the five toes of the left foot and he underwent surgical amputations of the metatarsi-phalangeal levels of all the toes. On 28th September, 1993, he was awarded Kshs 300,000.00. Clearly the injuries sustained by the Plaintiff in ***Kaana Mgao Case*** were more serious than those of the Respondent herein. However, that decision was made 12 years before the instant decisions was made.

56. In my view an amount of Kshs 350,000.00 would have adequately compensated the Respondent. In the premises, this appeal succeeds only on quantum. The award of Kshs 480,000.00 made to the Respondent is hereby set aside and substituted with an award of Kshs 350,000.00.

57. Save for that the appeal fails. As the Respondent did not comply with this Court's directions to furnish soft copies of the submissions, there will be no order as to costs.

58. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 21st day of December, 2018

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Karanja for the Appellant

CA Geoffrey