REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 26 OF 2011

CARZAN. FLOWERS (K) LTD.....APPELLANT

VERSUS

EDWIN OJIAMBO.....RESPONDENT

(An Appeal from the of Judgment/Decree of Hon. D. Mikoyan, Senior Resident, Nakuru delivered on 7th February 2011 in Nakuru CMCC NO.336 of 2007)

JUDGMENT

1. The appeal arises from the judgment of the trial court in **Nakuru CMCC NO. 336 of 2007** wherein the Appellant was found 90% liable in an industrial accident involving the Respondent at its flower farm at Naivasha on the 14th February 2005.

Being dissatisfied the appellant preferred this appeal on both liability and quantum of damages awarded to the Respondent, upon nine grounds, that shall be summarised into two, on liability and quantum of damages.

2. The appellant's grounds of appeal No. 1, 2, 3, 4, 5, 6, 7 and 8 are on liability, that the trial court considered extraneous facts, that the respondent did not prove his case on a balance of probability, that his evidence was contradictory that the respondent did not produce any treatment card in proof of the alleged injuries, and against the award pf damages.

3. here that the appellant failed to indicate to the court whether the said sum was too high or too low to necessitate this courts interference.

4. This is a first appeal the court is called upto to analyse and re-assess the evidence on record and come up with its own findings, considering that it never saw or heard the witnesses -as held in **Selle -vs- Associated Motor Boat Co.(1968) EA123 and in Kiruga -vs- Kiruga & Another (1988) KLR 348 when the Court of Appeal had this to say:**

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has no jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be executed with caution."***

5. The Respondents case is that at all material times and particularly on the 14th February 2005 he was an employee of the appellant and while in the cause of duty as assigned at the company's workshop he

slid on an oil spill in the workshop that had been left unattended to and fell on a sharp metallic bar sustaining serious injuries. He blamed the employer for not keeping a safe working environment and not providing him with gumboots and gloves that would have minimized the injury. He sought compensation for the injuries treated at Rongai Health Centre where he paid the bill personally. He produced a copy of the treatment card from which Dr. Omuyoma had prepared a medical report that was produced as exhibit in court. In cross examination, the respondent admitted that he had seen and was aware of the oil spill in the workshop.

6. **The appellant** in its defence denied that the respondent was its employee and the injuries, but its only witness, DW1, Daniel Kamaru its Human Resource Manager acknowledge the Respondent as having been its employee and at work on the 14th February 2005, but denied the injury and the company having been negligent. The denial was based on the fact of the respondent's name missing on the accidents register and list of invoiced bills from Rongai Health Centre.

In its judgment, the trial court upon evaluating the evidence made findings that the respondent was employed by the appellant and was injured in course of his duties and that the respondent, having had prior knowledge of the oil spill in the workshop ought to have been more careful. He apportioned liability at 10:90 ratio in favour of the respondent, and proceeded to make an award of Kshs.70,000/= in general damages for pain and suffering.

7. **Evaluation of evidence**

The salient issues that came out in the evidence are that the respondent did not prove any injury as no treatment card was produced in the trial court. In his evidence in chief, the respondent is recorded as stating that:

> ***"I informed Linda the Company Nurse who gave me first Aid and referred me to Rongai Health Centre. The original is not in court – MFI p4 copy of treatment card. ---- my name does not appear in the list of bills to be settled by the defendant. I rely on the medical report. I was given treatment card at Rongai Health Centre but I do not know where it is ----- I did pay my bill and my name is not in the Bill."***

Dr. Omuyoma in his testimony stated that in preparation of the Medical report, he relied on a treatment card dated 14th February 2005 and physical examination of the respondent.

8. The appellants witness, the Human Resource Manager (DW1) in his testimony confirmed that the respondent was its employee and that if he paid his bill, his name could not appear in the invoice from the health centre. He did not contravert the factual evidence on negligence as attributed by the respondent. He did not comment on the oil spill or failure to provide gumboots or gloves to the respondent and for good reason, that at the material time he was not an employee of the appellant. A such, the respondents evidence on negligence then stand unchallenged and uncontroverted.

9. The appellant in its written submissions through its advocates has urged the court to find that the respondent failed to prove his case to the required standards and relied on the case **D.T. Dobie & Co. (K) Ltd v-s- Wanyonyi Wafula Chebukati (2014) KLR,** where the court held

> ***"that decree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say we think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not."***

I fully agree with the above observations, and add that in the present case, no rebuttal evidence was called to challenge the respondents evidence on causation and negligence.

10. A lot of emphasis has been laid on the non-production of the original treatment card by the respondent. Numerous court decisions have been made in this regard.

The appellant submits that failure to produce the original card is fatal to the claim for compensation. He relies on **Timsales Ltd -vs- Wilson Libuywa NKU HCC No. 135 of 2006, Buds & Blooms Ltd -vs- James Sawani Sikinga Nku HCCA No. 126 of 2005 and Eastern Produce (K) Ltd -vs- James Kipketer Ngetich Eldoret HCCA No. 85 of 2002.**

In the above decisions, the courts views are that non production of the treatment cards/notes is fatal to an injury claim.

11. The Respondent submits that failure to produce the original initial treatment chit was not fatal to his case and Dr. Omuyoma's medical report was enough evidence that the respondent was injured. It is alleged that the original treatment card was confiscated by the police - and relied on the case **Timsales Ltd -vs- Moss Muru Nku HCCA 208/2004, Nku HCCA No 148 of 2005 – Timsales Ltd -vs- Stanley Njihia Macharia.**

In both cases, J. Maraga (as he then was) held that:

> "***failure to produce treatment cards however does not always lead to the dismissal of injury claims where a doctor who examines him several days or months later makes reference to the treatment card, unless otherwise proved, that should suffice and the production of the treatment card is not fatal."***
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> Same sediments were expressed in **Nku HCCA No 16 of 2005, Flamingo Bottlers Ltd -vs- Tobias Wanga Yenga.**

12. Each case ought to be determined on its own peculiarity. Evidence tendered points to the accident having taken place in the appellant's workshop due to the oil spill in the premises. The Appellant was under a duty to maintain a safe working environment to its employees in accordance to the provisions of the Employment Act, 2007 and as clearly stated in the case **Flamingo Bottlers Ltd (Supra) where Judge Kimaru** stated:

> ***"---it was the legal duty of the appellant to ensure the area where its employees was free of any oil spillage – that would cause its employees to fall down and injure themselves."***

13. duty to take care of his own safety. See also **NKR HCCA NO. 38/2002 African Highlands & Produce Board** where the same sediments were expressed.

> In the case **Amalgamated Saw Mills Ltd -vs- Stephen Murutinguri HCCA No. 75 of 2005,** the court made the following observations:
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> ***"Revising the more important issue of causation, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and the injury. The plaintiff must adduce evidence from which, on a balance of probability a connection between the two may be drawn---"***
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> Upon the evidence on record I am satisfied that the Respondent has established a connection of his injury to the appellants negligence.

14. Having so found, I am to determine whether the none-production of the original treatment card by the respondent is fatal to his compensation claim, having produced a copy of the same.

I have considered the various authorities submitted by both the appellant and the respondent. There is no doubt that Dr. Omuyoma while preparing the medical report relied on the original treatment card. The Respondent produced a copy of the said card which was marked for identification. It is also not in dispute that the respondents documents were taken by the police to investigate possible fake claim, this having been confirmed by the appellants witness DWI that documents were not returned. I am persuaded that the respondent was treated at the Rongai Health Centre and paid his bills, and that the medical report

produced by Dr. Omuyoma was sufficient to prove the injuries sustained by the respondent, the Doctor having made reference to the treatment card and notes.

With respect to the appellants submissions that without production of the original treatment card, the respondent did not prove the injury, the cases cited, **Buds and Blooms (Supra) and Timsales Ltd HCCC No.135 of 2006** (Supra) are quite distinguishable from the present case. In these cases, the doctors who prepared the medical reports did not have the benefit of referring to the treatment cards or notes. They relied on physical examinations only. No treatment cards or notes were produced to the doctors to facilitate preparation of the medical reports.

In the present case, the original treatment card was availed to the doctor. The copy was availed to court and marked for identification. The parties and the court had the benefit of seeing and referring to the said treatment card. I agree with Justice Maraga (as he then was) In **Timsales Ltd -vs- Stanley Njihia (Supra)** that where a doctor makes reference to a treatment card, unless otherwise proved, the production of the treatment card is not necessary.

15. I am satisfied that, on a balance of probability, the respondent was injured and the injuries are as were captured in the medical report prepared by Dr. Omuyoma dated 28th February 2007. The upshot is that the appeal on the issue of liability is without merit.

16. On quantum of damages, this court will not interfere with a trial courts discretion on the award of damages unless it is satisfied that either the court in assessing damages took into account an irrelevant factor or left out a relevant factor or the amount is so inordinately low or high to be an erroneous estimate of damages -See **Kemfro Africa t/a Meru Express services Ltd & Another -vs- Lubia & Another (1982)-88) L KAR 727.**

The Respondent sustained soft tissue injuries of the right leg as shown in Dr. Omuyoma's report dated 28th February 2007. He had healed and had a scar on the right leg. I have considered authorised tendered by both parties.

17. In **African Highlands Produce Co. Ltd** (Supra) for similar injuries the High court reduced damages of Kshs.100,000/= to Kshs. 40,000/= in December 2005. In **Sokoro Saw Mills Ltd -vs. Grace Nduta NdungU(2006) KLR,** the court reduced an award of Kshs.80,000/= to Kshs.30,000/= for similar injuries in March 2006. I have considered tht the award of the trial court was given in November 2011. Considering the incidence of inflation since the awards referred to above where given in 2006 and 2005, I find that the trial courts award of Kshs.70,000/= general damages as having not been too high to warrant interference by this court. For comparable injuries, in 2012 the High court in **C.A No. 81 of 2005 in Eldoret Steel Mills Ltd -vs- Charles Owino (2012) e KLR**, the court upheld an award of Kshs.80,000/= For those reasons, the appeal against quantum of damages is also disallowed as lacking merit.

18. In its totality and for the above reasons, the court finds the appeal without merit and it is dismissed with costs to the respondent.

Dated, signed and delivered in open court this 17th day of March 2016.

JANET MULWA

JUDGE