



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 87 OF 2011

(Being an appeal from the Judgment/Decree of Hon. W. Korir, SPM, Nakuru delivered on 17th May, 2011 in Nakuru CMCC No. 1770 of 2002)

TIMSALES LIMITED.....APPELLANT

VERSUS

PATRICK KING'ORI MWANGI.....RESPONDENT

JUDGMENT

1. The Respondent instituted a suit against the Appellant in the lower court and seeking both special and general damages for injuries he sustained in an industrial accident on the 17th January 2002 while in the cause of duty tightening spring nuts of a motor vehicle Registration No. KAL 400F in the Appellant's garage. He was given first aid and proceeded for treatment at Nyayo Ward hospital where he was treated and given a treatment card. Thereafter, his employment was terminated and a termination letter of employment was produced in court.

2. The Respondent's case was that the Appellant was in breach of his contract and terms of employment in that it exposed him to danger by not providing him with protective devices while he was engaged in the work, this did not provide a safe system of work. He holds the employer liable in negligence and breach of contract.

3. On the Appellant's part, it was denied that the Respondent was an employee of the company and that if he was, then no accident occurred, that he was not injured and that he used false documents to fabricate an injury and that the claim was fake. It denied all particulars of negligence or breach of contract attributed to it.

4. The trial court heard witnesses both for the Respondent and the Appellant and found in favour of the Respondent, held the Appellant wholly to blame and awarded him shs. 40,000/= in general damages for pain and suffering and shs. 2,000/= in special damages on the 17/5/2011. This is the Judgment that gave rise to the appeal hereof. The Appellant filed seven grounds of appeal, that appear on the face of the record hereof.

5. In my view, the issues that arise out of the said grounds may be summarized into four (4) as follows:

(1) Whether the Respondent was injured while in the cause of employment with the Appellant on the 17th January 2002 and if so whether the trial court erred in law and fact in holding the Appellant wholly to blame in negligence.

(2) Whether the treatment card outpatient No. 1002/2002 from Elburgon Nyayo Hospital in the name of the Respondent was a genuine card or was falsified and whether the same could be admitted in evidence to support the Respondent's injuries.

(3) Whether failure for the Respondent to produce hospital documents that were in custody of the hospital, being a Public Health Institution was fatal to the Respondent's claim.

(4) Whether the trial magistrate erred in his assessment of damages awardable to the Respondent.

6. Evaluation of Evidence

From the evidence adduced, it is not denied that the Respondent was an employee of the Appellant on the material time when the alleged accident and injury occurred. It was the Respondent's evidence that he was repairing the Appellant's motor vehicle Registration No. KAL 404 F when the jack slipped and a metal pierced him on the right hand. He was then given first aid at the company before proceeding to Nyayo Ward for treatment, and he produced the treatment card that was marked for identification, and later seen by Dr. W. Kiamba who prepared a report for him. It was produced as an exhibit by the said Dr. W. Kiamba. Dr. Kiamba testified that he used the said card and physical examination of the Respondent to prepare their medical report.

7. The Appellant's evidence was however different. That the Respondent was not injured on the material date as no records were produced to support the initial treatment which is prove of an injury, and therefore the accident. The borne of contention in these proceedings is the treatment card issued from the Elburgon Nyayo Ward Hospital and the missing names of the Respondent from the Appellant's accident and injury registers.

8. As submitted by the Respondent, the duty of entering an employees name in the accident and injury register when a report has been made lies squarely on the Appellant's agents/employees. So, was an accident and injury reported to the Appellant's security guard by the Respondent? Evidence was lead that after the said injury, the Respondent was given first aid at the company then proceeded to the hospital. I am satisfied that eh Respondent indeed reported the accident and injury that lead to him being given first aid. As observed by the trial magistrate, the Appellant had denied that the Respondent was its employee. It follows therefore that it could not admit that he was injured and given first aid.

9. The next question that begs is who then was negligent? Was it the Appellant or the Respondent? The Respondent stated that the area he was working from was uneven, and that he had been injured many times. He also testified that while he was putting centre on deep spring, and had lifted the body of the vehicle, the jack slipped and a metal pierced his hand. He blamed the ground that he says was uneven. He further stated that he had not been given gloves.

This piece of evidence was not controverted at all by the Appellant's witnesses. It therefore stands unchallenged.

I agree with the trial court's finding that the gloves if provided would have minimized the injury.

10. The Respondent was in control of his work, the lifting of the vehicle the usage of the jack. This work did not require any supervision. He was employed as a mechanic. He ought to have known how to operate the jack and to safely lift the vehicle. He did not give an explanation on what the Appellant would have done or ought to have done to avoid the jack slipping and hitting him. This is work, he said, had done and was used to doing. This work needed no supervision or exceptional skill. In any event he was a mechanic trained in repairing vehicles. The Respondent did not prove that the Appellant in its negligence, caused the jack to slip. I find that he contributed to his injury by not being keen enough and not using the work implements

properly. I hold him 80% to blame in contributory negligence and the Appellant 20% for not providing protective gloves to the Respondent. That would have minimized the injury. That settles the 1st issue on negligence.

11. I shall address my mind on issues No. 2 and 3 together as they are inter-related.

12. The Respondent produced a treatment card, outpatient No. 1002/2002 issued from Elburgon Nyayo Ward hospital and dated 17/1/2002, and marked for identification. Both the Appellant and the Respondent, Dr. W. Kiamba referred to the said card. The contents of the card and injuries indicated therein are not disputed. The Appellant submits that this document was falsified, and upon it, the trial court assessed and awarded damages to the Respondent. The court has to make a finding on whether this card was genuine or falsified as alleged.

13. DW1 Joseph Gitau Karanja, an Health Records Officer from the said hospital testified that the hospital records did not have the name of the Respondent in its daily outpatient register for the 17th January 2002, and further testified that out-patient card No. 1002/02 was issued on the 4th March, 2002 to a patient named Peter Gitau who was treated for bronchitis, and not an injury. He further stated that cards issued for the 17th January 2002 ranged from No. 237/2002 to No. 247/2002. Dr. W. Kiamba referred to the same card when preparing the medical report he produced in court in support of the Respondent's injury. Is this therefore a matter of a forged treatment card? Could the hospital have issued two outpatient cards for different patients on different dates? On this, the trial magistrate noted that the Respondent was not the keeper of the records for the Defendant and the hospital, that it was not his duty to ensure that the records of the patient were entered in the hospitals register.

14. That as it may be, I am of the view that this cannot be a coincidence that all the Respondent's injury and accident records and documents are unavailable right from the Appellant's premises all the way to the hospital.

15. I find that the Elburgon Nyayo Ward Hospital treatment Card No. 1002/02 has not been authenticated. What follows therefore is that there being no treatment card, and the Dr. W. Kiamba having relied on the said card that I have held to be unauthenticated, then, the injury by the Respondent was not proved. This is my finding on issues No. 3 and 4.

16. Had I found that the Respondent had a genuine treatment card, and the same not produced as an exhibit, but marked for identification, I would have upheld the rulings in various court decisions, notably **Comply Industries Ltd -vs- Mburu Simon C. A. No. 121 of 2005**, that failure to produce treatment card does not lead to dismissal of injury claims, and also in **Timsales Ltd -vs- Stanley Njihia Macharia – CA 148 of 2005** that failure to produce the treatment notes was not fatal to the Respondent's case.

17. The trial court awarded a sum of Kshs. 40,000/= in general damages for pain and suffering to the Respondent.

I have considered the injuries as noted in the medical report and the treatment card. The Appellant has not shown in what manner the trial court applied wrong principles of law in arriving at the said sum. I would have had no reason to interfere with the award had the appeal failed in grounds 2 and 3 as above stated.

18. Having come to the above conclusions in the framed issues, the upshot is that the appeal succeeds.

I will therefore allow the appeal, set aside the trial court's judgment and substitute therefore an order dismissing the Respondent's suit.

The Respondent will bear costs of this appeal as well as costs in the lower court.

Dated, signed and delivered at Nakuru this 13th day of March, 2015

JANET MULWA

JUDGE

Judgment read and signed in open court in the presence of:

No Appearance For Appellant

No Appearance For Respondent

Omondi - Court clerk