REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 120 OF 2010

(An appeal from the Judgment/Decree of Hon. B. Kituyi Resident Magistrate,

Nakuru delivered on 30/4/2010 in Nakuru CMCC No. 557 of 2007)

MILTON NDALO....................................APPELLANT

VERSUS

TRANSAFRICA TIMBER LIMITED.........RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. B. Kituyi Resident Magistrate sitting at Nakuru in CMCC No. 557 of 2007 and delivered on the 30th April, 2010. The Appellant had sued the Respondent for compensation in damages for an industrial accident that occurred on the 21st October, 2005. In his plaint dated the 20th April 2007, it is stated that the Appellants injury was caused by the negligence and breach of contract by the Respondent and particulars of both negligence and breach of contract are stated.

The Respondent denied the claim and particularly denied any from of negligence or breach of contract that may have caused the Appellants injury.

2. At the hearing, the Appellant testified that on the material day, he was stacking firewood when one of his colleagues threw one of the firewoods at him that hit him on the forehead. He blamed the Respondent for the accident and injury for hiring him to throw and stack the firewood and that the working area was small and the working conditions were not good. On cross-examination he stated that the company had not provided him with an helmet.

The Respondent did not call any evidence.

In his Judgment, the trial court dismissed the Appellants case on the main ground that no case had been established against the Respondent and that no negligence was proved.

3. Being aggrieved by the trial court's decision, the Appellant filed this appeal, and raised three grounds namely -

> 1. That the Honourable trial Magistrate erred in Law and fact in in finding that the Appellant did not establish his case to the required standard when there was ample evidence to that effect.

2. That the learned trial Magistrate erred in Law in failing to assess the amount of general damages that would have been adequate compensation for the appellant's injuries.

3. That the learned trial magistrate erred in Law and fact in relying entirely on an authority which was not relevant to this suit in the circumstances hence arrived at wrong conclusion.

4. It is the Appellant's prayer that the trial court's judgment be set aside and the Respondent be held wholly to blame for the accident and that this court do assess general damages awardable to the Appellant for the injuries sustained.

5. The Appellant and the Respondent through their respective advocates filed written submissions on the appeal and highlighted the same before me. In his submissions, the Appellant faulted the trial court for holding that the Appellant had not proved and established a case against the Respondent in his first ground of appeal, yet he contended, that the Appellant was working in a small area and conditions of work were not good, and had not been provided with a helmet, which if he was, would not have been injured, and hence, the trial court erred in law and fact as the Appellant's case was proved to the required legal standards.

6. This court has considered the Appellants pleadings on record as well as the Respondents' responses. I have also looked at the evidence tendered by the Appellant. As stated earlier, the Respondent did not tender any evidence at the trial.

7. This court as the first appellate court has a duty to re-evaluate the evidence tendered and come up with its own findings and conclusions as held in the case of **Selle Associates -vs- Associated Motor Boat Company Ltd (1968) E.A. 123**. That I have done. It is not in dispute that the Appellant stated, in his pleadings, the particulars of negligence and breach of contract against the Respondent. His evidence in chief as recorded states, and I quote, *(page 4, record of appeal)* -

> ***"... I was stacking firewood at the time. One of my colleagues threw one of the firewoods at me and the wood hit my head. I was injured and bled. …. I blame the company for the accident because we used to be hired to throw and stack the firewood … the area was small … the working conditions were not good. If I had a helmet, then I would not have been injured."***

8. The law is settled that he who alleges negligence upon another must prove and further that the Plaintiff must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability a connection may be drawn. *See* **Amalgamated Saw Mills Ltd -vs- Stephen Muturinguru HCA No. 75 of 2005.**

9. Looking at the evidence in chief and upon cross-examination, the Appellant did not make the slightest attempt to prove any negligence against the Respondent. As has been held in the above case an injury perse is not sufficient to prove negligence or to hold a party liable. That very scanty evidence on record was not sufficient. It was incumbent upon the Appellant to prove that what he stated as a small area contributed to the accident, and further what the Respondent failed to do that actually caused the accident, and thus the injury. Only then, would the employer be held liable. It is also important for a party alleging negligence upon another, and specifically in industrial accidents, to classify the type of work one was doing when the accident occurred, whether such work requires training or very close supervision.

10. In the present case would one be required to have been trained to be able to perform the said duty of stacking firewood? I further ask myself, would this kind of task require close supervision, so that failure by the employer to have trained the employee would result to him being held negligent? I agree with the trial court's analysis and finding that the employer would not have been called to baby sit the employee all through at the work. Common sense would demand that in a manual task as was in this matter, the employee ought to have taken care of his own safety, and further that no formal training and close supervision were necessary.

11. As held in the case **Woods -vs- Durable Suites Ltd (1953) 2AER 391**, an employers duty at

common law is to take all reasonable steps to ensure the employee's safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly. The evidence on record does not link the injury sustained by the Appellant to negligence by the Respondent. 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 the employer's negligence and the injury. The evidence adduced should be able to link the two, on a balance of probability. I have not found any causal link between the alleged negligence and the injury. I need not be-labour this point.

12. I am satisfied that it is upon the same reasoning that the trial court found that no case had been established as against the Respondent as negligence had not been proved.

Accordingly, and based on the evidence, submissions and all relevant authorities, I find no reason at all to set aside the trial court's judgment on liability.

13. In his second ground of appeal the Appellant faults the trial court for not assessing general damages that would have been adequate compensation to the Appellant had he succeeded in the case.

I agree with the Appellant that the trial court ought to have assessed possible award on general damages despite the Respondent's submission that such an exercise would have only been academic, as stated by a three bench of the Court of Appeal in **Mwanyuke vs. Said t/a Joniru Total Petrol Station (2004) 1 KLR.**

14. The Appellant stated that he was hit on his forehead. He produced a treatment sheet and a medical report on the injury by Dr. Obed Omuyoma – that indicated the injury as a cut wound on the forehead. He had a permanent scar on the forehead 2 metres long, and that the Doctor, could not distinguish the scars, there having been two injuries, on the same day.

The Appellants Advocates had submitted a sum of shs. 120,000/= as reasonable while the Respondents Advocates proposed a sum of shs. 20,000/=. Both parties quoted authorities in support of their respective submissions.

15. I have considered the medical report and the authorities. In view of the injuries sustained I would have awarded a sum of shs. 60,000/= in general damages for pain and suffering and Kshs 2,500/= in special damages.

Accordingly and for the above reasons, this appeal fails. The basic principle on the award of costs is that costs follow the event. I have no reason to depart from the said principle. Costs shall therefore be paid to the Respondent both in the lower court and in this court.

Dated, signed and delivered at Nakuru this 28th day of May 2015

JANET MULWA

JUDGE

In the presence:

Morintant holding brief for Mboga - for Appellant

Ms. Gachaya holding brief for Juma - for Respondent

Court clerk - Lina