REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 5 OF 2011

PETER MIGIRO.....RESPONDENT

VERSUS

VALLEY BAKERY LIMITED.....APPLICANT

(*Being an appeal from the Judgment/Decree of Hon. NJOROGE, Principal Magistrate, Nakuru delivered on 20th December, 2010 in Nakuru CMCC No. 331 of 2004*)

JUDGMENT

1. The appeal is from the Judgment and decree of the Honourable Senior Resident Magistrate Honourable D.K. Mikoyen then sitting at **Nakuru in CMCC No 331 of 2004**. Judgment was delivered on the 20th December 2010 and the appellant, then defendant preferred this appeal. The Respondent filed the Primary suit claiming damages arising out of an alleged industrial accident said to have occurred on the 27th December 2002 at the appellants premise where he was employed in its production department.

He claimed that while in the performance of duties assigned to him, a loaded trolley he was pushing hit a pothole on the floor, rolled back and injured his left leg. He stated that he had not been given gumboots. He then was given first aid at the workplace and on the following day he went to hospital, was treated and given a treatment card at the St. Peters Clinic(Nakuru) from which records the medical report was prepared by Dr. Obed Omuyoma on the 4th July 2003, seven months after the alleged injury.

2. The Appellant in its defence denied that the Respondent was its employee at the material date and further that he was injured.

After a full trial, the trial court found in favour of the Respondent and awarded him Ksh.60,000/= in general damages for pain and suffering and apportioned liability at the ration 15:85 in favour of the Respondent.

3. In its appeal, the appellant preferred Grounds of Appeal against the whole judgment as hereunder:

1. **That** the learned trial magistrate erred in law and in fact and misdirected himself in finding the appellants liable notwithstanding the evidence on record to the contrary.

2. **That** the learned trial Magistrate erred in law and in fact in failing to appreciate the fact that the onus of proof was on the plaintiff and therefore shifted the burden by holding that the plaintiff had proved his case on the requisite standards on the basis of scanty evidence whereas there was overwhelming rebuttal evidence.

3. **That** the learned magistrate erred in law and in fact by failing to consider the evidence and submissions of the defence and critically analyse the same and accord it due weight to the extent that it was able to prove that the Plaintiff was indeed not injured at work on the material date.

4. **That** the learned magistrate erred in law and in fact in failing to consider that fact that the omission by the Plaintiff to produce initial treatment document is fatal to any claim for compensation on account of personal injury.

5. **That** the learned magistrate erred in law in failing to appreciate and apply the principles applicable in a claim for negligence.

6. **That** the learned trial magistrate erred and misdirected himself as to the exact nature of the Respondent's injuries and therefore erred in law in his assessment of damages awardable to the respondent.

7. **That** the learned trial magistrate erred in law and in fact in finding the appellant liable at all on the face of all available evidence.

The court is urged to set aside the trial courts judgments.

4. This court as the first appellate court is under a duty to re-evaluate the evidence tendered before the trial court in order to determine whether the conclusions reached should stand. Likewise the court will only interfere with the trial courts findings if they are based on no sound evidence or if is shown demonstrably to have dated on wrong principles of law as stated in the case **Kemfro Africa t/a Meru Express Services and Another -vs- Lubia and Another (1982-88) KAR 727.**

5. **Analysis of Respondent's case before the trial court**

Before the trial court, the respondent produced a treatment card from a private clinic namely St. Peters Clinic at Nakuru indicating that he was treated therein one day after the alleged accident on the 28th December 2002. This card was marked for identification but it was never produced. He did not produce any record or at all to confirm his allegation that he was given first aid at the employers clinic. He did not call the nurse who attended to him to produce the register to confirm that he was treated. I have searched for the treatment card from St. Peters Clinic allegedly issued on the 28th December 2002. It is not where in the court records, not even in the Record of Appeal. It was his evidence that at the time of injury he was with other four employees. None of them was called to testify as a witness to the accident. No reason was given as to why the treatment notes were not produced yet it is upon the same treatment notes that Dr. Obed Omuyoma prepared the Medical Report seven months later.

6. **The Appellant's case before the trial court.**

The Appellant's transport and security officer admitted that the Respondent was indeed an employee of the appellant and produced copies of registers to show that on the material date, 27th December 2002, the respondent was not injured as he was not on duty, that no injury was recorded in the injury register, that no treatment or first aid was administered to the respondent, as was the norm, at the companies clinic on the 27th December 2002, hence a conclusion that the respondent was not injured at all.

7. **Appellants Submissions**

The appellant in its written submissions faulted the trial magistrate in his finding that the Respondent had proved his case to the required standard and relied on the evidence tendered by its transport and security officer, the registers referred above where no record of injury or treatment were produced.

The appellant submitted that the trial court erred in shifting the burden of proof to the appellant when he stated that the appellant failed to call the nurse who alleged treated the respondent to confirm whether or

not she teated him. It was further submitted that the trial court should not have relied on Dr. Obed Umuyoma Medical report to ascertain the respondent's injuries as they were based on treatment notes that were not produced in court. To that extent, the appellant submits that the respondent failed totally to discharge the burden of proof as he is called upon to do as to the occurrence of the accident, the injury and the treatment. It relied on the case **D.T.Dobie and Co. Ltd -vs- Wanyonyi Wafula Chebukati (2014) KLR.**

8. On the treatment notes that were not produced, it was the appellants submission that without such primary document to prove injury and treatment, the court should not have relied on them and by extension the medical report by Dr. Obed **Omuyoma** to award damages for the injury. The case **Eastern Produce K. Ltd -vs- James Kipketer Ngetali (2005) KLR** was relied on where the court stated that lack of such evidence (treatment notes) should heave raised doubts in the trial magistrate's mind who should have found that there was no sufficient evidence to prove that the respondent was inured, and that the omission to produce the medical chit proved fatal to his case, and not able to prove the case on a balance of probability as required.

Several other cases were also relied on, notably **Amalgamated Sawmills Limited vs Tabitha Wanjiku HCCCA No 272 of 2004**

and **Timsales Ltd -vs- Stephen Gacie Nakuru CA No. 74 of 2000**.

The court was urged to allow the appeal in its entirety.

9. The Respondents submissions are that the trial courts judgment was sound and based on correct findings from the evidence of Dr. Obed Omuyoma who produced the medical report on his injuries, that he stated his opinion was not purely based on the treatment notes as he also examined him.

It was submitted that the appellant's failure to produce the 2nd medical report on the respondents injuries would only be construed that it was not favourable to it. The court was urged to find that indeed the respondent was an employee of the Appellant, was injured in the cause of his duty and proceed to confirm the trial courts judgment on liability and *quantum.*

10. **Findings and conclusion**

In the court's view, there are only three issues for determination. They are intertwined and will be addressed together.

1. Whether the Respondent was an employee of the appellant and if so, whether he was inured while on duty on the 25th December 2002 and if so, whether he was given first aid in the appellants clinic.

2. Whether the Respondents treatment notes issued at St. Peters clinic on 25th December 2002 could form the basis of the medical report prepared by Dr. Obed Omuyoma on the 4th July 2003.

3. *Quantum* of damages.

11. It is not in doubt that the respondent was an employee of the appellant at the material time of the accident. Both parties have admitted that fact though denied in the statement of defence. As to the alleged injury, the court has carefully analysed the evidence and the trial court's finding on the same. This court is not convinced that the respondent was injured on the 27th December 2002 as no proof of whatever nature was produced. The respondent failed to call witnesses to confirm the same yet he stated that he was working with other employees. He too failed to discharge his burden to prove that he was treated at the companie's clinic on the day of the alleged injury before going to St. Peters Clinic next day. Even then, he failed to produce the treatment notes from the said clinic. As I have stated above, the alleged treatment notes were marked for identification and are not filed in the court record. I have not

seen them at all. These are the same notes that informed the preparation of the Medical Report by Dr. Obed Omuyoma, and upon which the trial court based its assessment of damages. It has been held in different courts that initial treatment notes are so important that without their production, it would be difficult for a court to ascertain if indeed a claimant was indeed injured.

In the case **Amalgamated Saw Mills Ltd -vs- Stephen Muturi Nguru Nakuru HCCA NO. 75 OF 2005,** it was observed:

> ***"The treatment card was marked for identification as MFI but was not produced. It was the duty of the Respondent to prove his case to the required standard. He should have called the relevant person to produce the said card if the same was generally issued to him ---. The respondent alleged that he was seen by Dr. Omuyoma after more than three years – from the date of the alleged accident --- the evidential value of the medical report is minimal if* any."**

The same sediments were also expressed in **Timsales Ltd -vs- Harun Wafula HCCC 95 of 2005- (Supra.**

12. I concur with the Learned Judges' sediments in the above cases.

I find that the trial magistrate failed to address his mind to the fact that without production of the initial treatment notes, the fact of an injury, and without any other corroboration by way of witnesses, could not be proved.

I need not go further as the issue has been extensively discussed above. To that end, the appellants grounds of appeal Nos.1, 2, 3, 4, 5 together with the issues No. 1 and 2 as framed are answered in the affirmative. The respondent failed to prove that he was injured in the cause of his duties with the Appellant on the material date. The alleged treatment notes having not been produced, and being the basis of the medical report, by Dr. Obed Omuyoma dated 4th July 2003 are of no probative value.

13. The trial court considered the injuries as stated in Dr. Obed Omuyoma's medical report that has been found to be of no probative value, and awarded Kshs.60,000/= in general damages for pain and suffering. If I had found that the respondent was indeed injured and that the Appellant was liable in negligence, I would have had no reason to interfere with the award of damages in the sum of Kshs.60,000/=.

14. The upshot of the above is that the appeal must succeed.

The trial court's judgment dated 20th December 2010 is set aside and the suit dismissed with costs.

The appellant shall have costs of this appeal and the court below.

Dated, signed and delivered in open court this 12th day of November 2015.

JANET MULWA

JUDGE