IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.76 OF 2009

TIMSALES LIMITED.....APPELLANT

VERSUS

DAVID THIGA NJONJO.....RESPONDENT

JUDGMENT

The Respondent, David Thiga Njonjo, instituted a suit in the lower court seeking general and special damages for injuries he allegedly suffered in the course of his employment with the appellant, Timsales Limited.

The trial court upon considering the evidence presented before it entered judgment in favour of the respondent and awarded him Kshs.80,000/= in general damages and Kshs.2,500/= in special damages. The appellant was found to have been 100% liable for the injuries and damage occasioned on the respondent.

Being dissatisfied with the entire decision of the trial court, the appellant has filed this appeal challenging the judgment of the lower on six (6) grounds which can be summarised as follows:-

1. **That the decision was against the weight of evidence adduced at trial (that is to say the case was not sufficiently proved);**
2. **That the learned trial magistrate erred in law by shifting the burden of proof to the defendant;**
3. **That the learned trial magistrate ignored the fact that the plaintiff had failed to prove injuries to himself and in particular failed to produce as an exhibit the medical treatment card which is the primary evidence; and**
4. **That the learned trial magistrate erred in law and in fact by making an award of general damages that was excessive in the circumstances.**

In considering the appeal, this court must evaluate afresh the evidence on record in order to arrive at its own independent conclusion. See **Selle & Another** vs. **Associated Motor Co. Ltd & Others** (1968) E.A. 123.

It was the respondent's evidence that on 1st August, 2001 he was carrying out his assigned duty, splitting timber using a power saw, in the appellant's firm at Elburgon. While undertaking the said duty, the power saw cracked and hit him on the head. The saw also caused the piece of wood that he was splitting to jack and hit him on the chest.

Following the accident, he informed a Mr. Muganda and he was taken to Elburgon Nyayo Hospital for treatment. At the hospital, he obtained a treatment card which he presented in court and was marked for

identification as MFI 2. Later on he was examined by Doctor Kiamba and Doctor Malik both of whom prepared medical reports for him. He produced the reports prepared by the two doctors as PEX 3 and PEX 4 respectively. He also produced a receipt for Kshs.2,500/- (PEX 5) as evidence of the costs incurred in preparation of the medical report.

Maintaining that he was injured in the course of his employment, he blamed the appellant for failing to maintain the power saw despite having informed it and its officer (the saw doctor) that the saw was defective.

Through its filed statement of defence, the appellant denied having been in any contract of employment with the respondent or having been negligent and/or in breach of any terms of the contract. It contended that if the respondent suffered any injuries he was either the sole cause of the same or was substantially to blame for its occurrence.

D.W.1, Joseph Mahingu Maina, who testified on behalf of the appellant conceded that the respondent was an employee of the appellant at the material time. He however, stated that the appellant was not on duty on the material day and that the muster roll which he produced as (DEX 1) indicated that on 1/8/01 to 4/8/01 the respondent was sick. He also produced the injury book (DEX 2) which did not bear the name of the respondent and/or any evidence of the respondent having got injured on the day in question.

He explained that whenever a person got injured, he/she was given first aid by first aiders and thereafter a person went to the supervisor who gave him transport and gate pass for the person to go to hospital.

He stated that he was the senior supervisor in the department of flash door and buffing Board where the respondent used to work and denied having any knowledge of Mugare or Muganda (the supervisor the respondent allegedly reported the accident to). However, he did not rule out the possibility that there was a Mugare in another department of the appellant.

On cross-examination he agreed that after an employee brought a treatment card from a doctor they indicated sick on the muster roll. He also agreed that the sick book he produced had alterations which were not countersigned and that if injuries occurred outside the factory, the injury book would be filled later.

Maintaining that the respondent was not injured that day, he explained that the department where the respondent was working is within the factory and that it would not take long to fill the injury book.

The trial magistrate after considering the foregoing evidence came to the conclusion that the respondent was indeed injured as claimed and that the appellant was to blame for failing to provide him with a safe working environment.

It is common ground that the respondent was an employee of the appellant. The questions that fell for consideration before the court below and which are the crux of this appeal are:-

(i) **whether the respondent was on duty on 1st August, 2001 and if he was;**

(ii) whether he was injured as claimed; and if the answer is in the affirmative;

(iii) whether the appellant was to blame for the occurrence of the accident which occasioned the respondent the injuries; and finally;

(iv) whether the general damages awarded by the trial magistrate were inordinately high to warrant interference of this court.

Whereas the respondent maintained that he was on duty on the material day and that he got injured as claimed, the appellant, maintained he was neither on duty on the material day nor injured.

Despite the appellant's aforementioned contention, the muster roll it produced showed that the respondent was sick. When he was cross-examined on what the remark **"sick"** meant, the appellant's witness (D.W.1) explained that the respondent was sick in the body. However, he adduced no evidence in support of his contention. Instead, he alleged that the respondent had sent his card which together with his medical card the personnel department retained.

Under **Section 107** of the **Evidence Act** the appellant had a duty to prove that the respondent was absent from duty owing to a cause different from that urged by the respondent. With no evidence to prove as much, the trial court was justified in believing the respondent's explanation and rejecting the explanation offered by the appellant.

Taking into account the respondent's own testimony of how the accident occurred, the medical reports prepared by Dr. Kiamba and Dr. Malik in respect of the injuries the respondent sustained and given the fact that the two doctors made reference to the treatment notes which were also seen by the trial court and marked but not produced, I find that the respondent proved that he was injured on duty.

The trial court disbelieved the appellant's only witness, Joseph Mahingu Maina. I too find his evidence to be incapable of controverting the testimony of the respondent. I say this because, the evidence on record does not state that he was the only supervisor to whom the accident could have been reported. Further, he admitted that the injury record book had been tampered with and lastly, the muster roll corroborated the evidence tendered in support of the respondent's case in that the medical report by Dr. M.S Malik confirmed that the respondent was given four days off duty. In my view, the period of four days off duty explains why the muster roll was marked sick from 1st August , 2001 to 4th August, 2001. I also find the exhibits that the appellant is relying on to prove the allegation that the respondent was neither on duty nor injured unreliable because the entries therein were made by the agents of the appellant. The respondent neither had any role to play in filling them nor control of what was recorded therein. He was, for instance, not required to authenticate the record, by signing against his name or otherwise.

Regarding the contention that the respondent failed to produce the primary evidence, concerning his injuries that is the treatment notes from Elburgon Nyayo Hospital, I note that opinions on the effect of failure to produce treatment notes are diverse and varied. In **Timsales Ltd** v. **Karanja Bise** C.A No. 111 of 2005 Emukule, J. observed:-

"Being a public document (treatment chit) the production of it in evidence does not require certification by the health facility or the testimony of the health facility, as would ordinarily be required under section 82(d) (i) of the Evidence Act. ....by excluding the respondent's attendance and treatment card, could I also say that there was no accident and injury to the respondent? To so conclude would render examination of the respondent by Dr. Kiamba and Dr. Malik an exercise in futility and consign there opinion to the waste paper bin. Their notes about the scar on the respondent's thigh 12cm in length would all evaporate and became a figment of imagination. That would be an absurd conclusion"

See also **Comply Industries Limited** v. **Mburu Simon Mburu** C.A No.121 of 2005 in which D. K Maraga, J. (as he then was) observed that failure to produce treatment card does not always lead to dismissal of injury claims.

In the instant case, the trial court saw and even marked as MFI 1 the treatment notes that Dr. Kiamba relied on in preparing the medical report. The doctor also physically noted the injuries the respondent suffered. The appellant did not allege and/or prove the treatment chit to have been a forgery. To dismiss, the respondent's claim on the basis of the failure to produce the treatment chit would, in my view, be against the spirit of **Article 159(2) (d)** of the **Constitution** and **Section 1A** and **1B** of the **Civil Procedure Act**.

My conclusion is that the respondent was injured in the course of his employment with the appellant.

Was the appellant negligent or in breach of the contract of employment?

The respondent explained that he sustained the injuries when the power saw he was using to split timber cracked and caused the timber he was splitting to hit him on the chest. It is his case that the power saw was defective. Allegedly, he had informed the defendant of the defect but no action was taken. Was the appellant to blame for this?

The court of appeal quoting **Halbury's Laws of England** in the case of **Mwanyule** V. **Said t/a Jomvu Total Service Station** (2004)1 KLR 47 stated as follows:-

"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 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 outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employees safety; the exercise of due care and skill suffices."

Did the appellant exercise due care?

The respondent blamed the appellant for failing to provide him with a safe and proper system of work. In particular he blamed it for failing to repair the power saw despite the report he had made to the effect that the saw was defective. I note that the appellant's witness (D.W.1) did not address the allegations by the respondent, instead he merely denied the respondent's involvement in the accident.

Having already found that the respondent was injured while in the course of his employment, and without any proof to the contrary, I find that the appellant was in breach of its duty to provide the respondent with a safe system of work to enable him carry his duties without exposure to the dangers like the one he suffered. For instance the appellant ought to have ensured that the saw was in proper working condition before handing it to the respondent to work with. The respondent owes himself a duty of care also. He did not tell the court what he did to avoid injury to himself having known that the saw aas faulty. For that reason, he must bear some of the liability and in my view I will apportion liability at 90% as against the appellant while the plaintiff/respondent bears 10%.

As regards damages, an appellate court will not normally interfere with damages awarded by a trial court unless it is satisfied that the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or short of this, the amount was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. See **Kemfro Africa Limited t/a "Meru Express services** V. **Lubia & Another (No.2)** (1987) KLR 30.

In deciding on the damages to award, a court must be guided by decided cases on comparable injuries. See the Court of Appeal decision in **Kigaragari** V. **Aya** (1982-1988) 1 KAR 768. In the instant case the respondent had submitted on award of Kshs.250,000/= whereas the appellant had submitted for 20,000/=. The trial court awarded Kshs.80,000/= in general damages.

According to the medical reports produced herein, the respondent sustained soft tissue injuries of the left side of the chest with a 5% permanent disability (according to the medical report prepared by Dr. Kiamba). On her part, Dr. Malik, opined that the respondent sustained a minor abrasion over the left side of his chest. The injury healed without any specialized treatment and has left a scar which is just a patch of discoloured skin. She disagreed with Dr. Kiamba on his assessment to the effect that the respondent suffered a 5% permanent disability. In his assessment no permanent disability ought to have been awarded.

Having considered the peculiar circumstances of this case and the submissions by the respective parties, I am persuaded that the injuries were minor and the award on damages by the trial court were inordinately high and they warrant the interference by this court. Consequently, I set aside the damages awarded by the lower court and substitute therefore an award of Kshs.65,000/= in general damages. The special

damages of Kshs.2,500/- were pleaded and strictly proved as by law required. There is, therefore, no reason for interfering with that award.

In the end the respondent will have judgment as follows:-

$^{90}/_{100}$ x 67500 = 60,750

On costs, as the appellant has partially succeeded in its appeal, it shall have ¼ of the total costs of the appeal.

DATED and DELIVERED this 28th day of March, 2014

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the appellant

Ms Momanyi for the plaintiff/respondent

Lydia – Court Assistant