REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 151 OF 2010

CONSOLIDATED WITH:-

CIVIL APPEAL NO. 152 OF 2010

CIVIL APPEAL NO. 153 OF 2010

CIVIL APPEAL NO. 154 OF 2010

BEATRICE NTHENYA SILA ……..…… APPELLANT

V E R S U S

1. RUTH MBITHE KITSISA ……..…….…… 1ST RESPONDENT

2. ESTHER NYAGUTHI KHAMIS ……..…… 2ND RESPONDENT

3. JULIANA MWENDE IDDI ……..…..…. 3RD RESPONDENT

4. TERESIAH KASYOKA ……..……. 4TH RESPONDENT

(Being an appeal from Judgments delivered by Hon. Ogembo D.O, PM on 16th June 2010 in RMCC Nos. 216 of 2009, 171 of 2009, 172 of 2009 and 164 of 2009)

JUDGMENT

1. All the above appeals relate to one and the same accident. All the above Respondents filed separate cases against the Appellant seeking general and special damages in the lower Court. Judgment was entered in favour of all the Respondents and various amounts were awarded to each one of them in general and special damages. The Appellant has filed the above appeals against those judgments.

2. The grounds of appeal are all the same in all the above appeals. Those grounds are as follows-

1. **That the Learned trial Magistrate erred in law and in fact in finding that the Respondent/Plaintiff had proved she had sustained injuries fro the alleged accident despite**

the fact that-

a. **No initial treatment notes were produced to show that the Plaintiff sustained any injuries after being involved in the alleged accident.**

b. **No P3 form was produced which is essential in establishing injuries sustained by a claimant in an alleged accident.**

c. **The Medical Report produced by Dr. S. K. Ndegwa, PW2, was filled three months after the alleged accident, which is on the 3rd day of August 2009.**

d. **The Medical report in (c) above referred to treatment notes from Msambweni District Hospital and a P3 form which documents were not produced.**

2. **That the Learned Magistrate erred in law and in fact in failing to consider the reasoning in HCCA No. 85 of 2002 – Nairobi: Eastern Produce (K) Limited vs James Kipketer Ngetich that the omission to produce dispensary medical notes is fatal for the Plaintiff/Respondent as he is not able to prove his case on a balance of probability.**

3. **That the Learned Magistrate erred in law and in fact in wholly disregarding or failing to accord due and proper consideration upon the defence Counsel's written submissions.**

3. Looking at those grounds it becomes clear that the appeals are limited to the ground that the Respondents' cases should have failed because the Respondents did not prove their injuries by producing P3 forms and initial medical treatment notes. Even the Appellant in her own written submissions limited herself to that one ground.

4. In each of the Respondents cases in the lower Court evidence adduced was that the subject accident occurred on 16th May 2009. All the Respondents initially got treatment after that accident at Msambweni District Hospital and then at Coast General Hospital.

5. Evidence of their injuries was tendered by Dr. Stephen K. Ndegwa. He examined the Respondents on 3rd August 2009 for the purpose of medical report which he submitted in evidence. Appellant submitted that the lower Court ought not to have relied on that medical report which was prepared some months after the accident and which report relied on initial treatment notes and P3 forms which were not produced in evidence in the lower Court. In support of that submission the Appellant relied on the case **EASTERN PRODUCE (K) LIMITED -Vs- JAMES KIPKETER NGETICH [2005]eKLR** where the Court stated-

> **"Having re evaluated the evidence on record I find that the Respondent, did not produce the initial medical chits to show that he had actually been injured and then treated at the appellant's dispensary on the day when he claims to have sustained the injuries. In my mind, lack of such evidence should have raised doubts in the trial Magistrate's mind, who should have found that there was no sufficient proof that the Respondent was injured at work as alleged …. I find that the omission to produce the dispensary medical notes proved fatal for the Respondent as he was not able to prove his case on a balance of probabilities as required."**

6. I find that the above case is distinguishable to our present case. In reading the above case it becomes clear that the Appellant tendered evidence denying that the Respondent was injured at his place of work. In the cases which are the subject of these appeals the Appellant did not give any oral evidence and the defences that were filed in the lower court on her behalf denying that the Respondents were injured remained an allegation since that denial was not proved by any evidence.

7. But perhaps of more importance is that Dr. Ndegwa examined all the Respondents and thereafter prepared a medical report. That medical report was not challenged by the Appellant by production of a contrary report. Further a Police Officer gave evidence and in so doing produced police abstracts which

identified those that were injured and categorized their injuries. For example in the case of the first Respondent her injuries were stated to be grievous harm.

8. Further each Respondent gave evidence and in so doing gave details of their injuries that they had suffered following the accident.

9. In my view all the Respondents well met the burden of proof on a balance of probability as required under Section 107 of the Evidence Act Cap 80.

10. The Respondents relied on the following authorities-

> **"HCCC NO. 4089 OF 1988 STEPHEN KAGOOIVO versus JOSEPH WAITHAKA KABAI & 3 OTHERS, Justice Ringera at page 105 the court said**
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> **'Defendants Counsel submitted that in the absence of admissible and admitted medical evidence, there was no basis on which the court could assess damages. I cannot agree. If the court believes the Plaintiff's evidence as I do, then it must assess damages on the basis of his evidence. Lack of medical evidence is not fatal to a Plaintiff's claim in civil proceedings where proof is on a balance of probability. Needless to state the presence of medical evidence cannot but fortify and clarify the Plaintiff's evidence on the existence nature and effects of the injuries suffered.'**
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> **The Court of Appeal in NAIROBI CIVIL APPEAL NO. 189 OF 1999 CHARLES MARANGA BAGWASI & ANOTHER –VERSUS- SAMUEL KAMONJO MUCHIRI & ANOTHER, considering an appeal where the High Court had dismissed a matter because the medical report and treatment notes had not been produced after an adjournment was refused stated-**
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> **'And in any case, if the Appellants as in this case gave credible and unchallenged evidence, they should have been awarded some general damages for pain and suffering ….'"**

11. It is obvious the Learned Magistrate believed the Respondents when they gave evidence on the injuries they suffered. Further the Learned Magistrate received the doctor's evidence about those injuries. And finally the Learned Magistrate must have considered the P3 Form which identified those injured and categorized their injuries. The Learned Magistrate, in view of that cannot be faulted in her judgment.

12. I find the Appellant's appeal has no merit and accordingly all the appeals are hereby dismissed with costs to the Respondents.

DATED and DELIVERED at MOMBASA this 17TH day of JULY, 2014.

MARY KASANGO

JUDGE