



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 183 OF 2009

*(Being an appeal from the judgment of Hon. S.M.S Soita [P.M.] delivered on 11th August 2009
in Molo Civil Case No. 301 of 2003)*

TIMSALES LIMITED.....APPELLANT

VERSUS

NOEL AGINA OKELLO.....RESPONDENT

JUDGMENT

1. Noel Agina Okello (*the Respondent herein*) filed suit in the lower court against Timsales Limited (*the Appellant*) seeking general and special damages for injuries sustained by him on 15th July 2003 in the course of his employment with the Respondent. After considering the evidence, the trial court apportioned liability in the ratio of 80:20% and in favour of the Respondent and awarded him Kshs. 100,000/= general damages, Kshs. 2,000/= special damages, costs of the suit and interest.
2. Aggrieved by this judgment, the Appellant has appealed to this court on six grounds in his Memorandum of Appeal dated 26th August 2009, THAT-
 - (a) *the learned magistrate erred in fact and in law when he failed to give a concise statement of the case, the points for determination, the decision thereon and reasons for the judgment pronounced on 11th August 2009;*
 - (b) *the Learned Magistrate erred in fact and in law in disregarding the evidential principle that the burden of proof lay on the Plaintiff to prove the injuries sustained, the particulars of negligence and breach of contract as pleaded;*
 - (c) *the learned magistrate erred in law and in fact in failing to find that the Plaintiff did not prove injuries or that he received any medical treatment as the medical treatment card was only marked for identification (MFI 1);*
 - (d) *the learned magistrate erred in law and in fact in disregarding the defence evidence in its entirety;*
 - (e) *the learned magistrate failed to appreciate the evidence in its totality and in not considering the the submissions filed on behalf of the defendant;*
 - (f) *the damages awarded by the learned magistrate were excessive and unrealistic.*

3. For those reasons, the Appellant sought the following orders-
 - (a) *the Appeal be allowed and judgment against the Appellant be set aside;*
 - (b) *alternatively the damages awarded be reviewed and revised;*
 - (c) *costs of this appeal and costs of the Resident Magistrate's Court be granted to the Appellant; and*
 - (d) *any other order this Honourable Court may deem fit to grant.*
4. Counsel for the parties argued the appeal before the court on 8th July 2013. Counsel for the Appellant argued all the grounds of appeal together. It was his submission that the trial court failed to consider the Appellant's defence or appreciate the entire evidence before it in its judgment. The defence produced the muster roll which proved that the Respondent was not its employee at the time of the accident whereas the Respondent did not produce an employment card or other document to support his claim. Further the accident register showed there was no injury that was reported on that day.
5. Further the medical treatment card was not produced as an exhibit but only marked for identification as MFI 1. Dr. Omuyoma admitted during cross-examination that he never established whether the treatment card was genuine which goes to show that he also doubted the authenticity of this card. Counsel also faulted the judgment of the court for not meeting the statutory requirements and for not making reference to the pleadings.
6. On damages, Counsel faulted the court for failing to consider the authorities to which he had been referred by the defence, thereby awarding an inordinately high figure for general damages.
7. Counsel for the Respondent argued that the Respondent proved his case to the required standard and no evidence was produced to controvert his claims. According to Counsel, the muster roll and accidents register have no validity in law. It was his view that these documents were not genuine but had been prepared for purposes of the defence case. He based his argument on the fact that they were in the custody of the Appellant and were not even signed. The court was asked not to rely on these documents to support the Appellant's case.
8. It was also contended by Counsel that the Respondent's case was that he was supervised by one Kamau and not DW1 as alleged. The Respondent gave evidence that he was not a permanent employee therefore had nothing to prove employment. In preparing his medical report, the doctor stated that he relied on the treatment card. The Appellant should have called someone from the Hospital to show that the Respondent was not treated at that facility. It did not present credible evidence to prove that the document was not genuine. For these reasons, Counsel urged the court to dismiss the appeal with costs.

DETERMINATION

9. I have considered the submissions of Counsel and the Record of Appeal filed in this court. The issues for determination in this appeal are whether the judgment of the lower court met the requirements of Order XX rule 4 of the Civil Procedure Rules, (*as to the contents of a judgment*) and whether the Respondent proved his case against the Appellant and whether the award of damages by the court was excessive.
10. Order XX Rule 4 of the revoked Civil Procedure Rules, which are applicable in this case, provides as follows on the contents of a judgment-

“4. Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

11. Having carefully perused the judgment of the trial court, I find that it accords and is in compliance with the above provision of the law. In it the trial court has stated the case and the evidence presented by the parties. Although not expressly stated it is clear from the judgment that the court considered the issues for determination to be on liability and the amount of damages to be

awarded to the Respondent. The court went ahead to analyse the evidence, made its determination and gave reasons for its findings. In awarding damages, the court stated that it had duly considered the submissions filed by counsel for the parties.

12. The Appellant's contention that the judgment was irregular because the trial court did not make reference to the pleadings has no foundation in law. What is required of him is to state the case as presented and the evidence. As a result, I find no merit in this ground of appeal, and reject it.

WHETHER THE RESPONDENT PROVED HIS CASE TO THE REQUIRED STANDARD

13. Grounds (b), (c), (d) and (e) of the appeal concern the evidence of the Respondent. These grounds essentially relate to whether the Respondent proved liability on the part of the Appellant. I shall therefore consider them together.

14. The Respondent's claim is for compensation for the injuries he sustained while under the employment of the Appellant. Therefore, being the party seeking the orders of the court, the burden is on him to prove, on a balance of probability, the fact of his employment, that he sustained injuries in the course of this employment and that the Respondent, through its negligence caused the accident.

15. The Respondent testified that he was at the material time employed by the Appellant as a casual labourer under its Civil Engineering Department to lay out slabs. At the time of the alleged injury he was carrying slabs into a tractor, when as he was closing its door, the hinges fell off causing this door to slip and injure his right middle finger. He blamed the Respondent for failing to provide him with gloves and also not maintaining its equipment.

16. He conceded when cross-examined that he had not produced any document to prove that he was at the time an employee of the Appellant or that he was on duty on this day but implied that he had an employment card. He however stated that his name was likely to appear in the Appellant's muster record and accident register. He stated that after the accident, he reported the matter to his supervisor, Mr. Ongwenu, who recorded in the accident register after he was given first aid.

17. The Respondent was thereafter treated at Elburgon Nyayo Hospital. He was issued with a treatment card which was not produced in evidence but only marked as MFI 1. He was later examined by PW2, Dr. Obed Omuyoma, who referring to the treatment card, found that the Plaintiff had sustained lacerated wounds and soft tissue injuries on the right middle finger. As at 22/09/2003, when PW2 examined the Appellant his injury had fully healed. He classified the degree of injury as harm.

18. In its defence dated 7th January 2004, the Appellant denied that the Respondent was its employee, that he was on duty on the material day and the particulars of negligence attributed to it. In the alternative, it alleged that if any accident occurred, then it was solely caused or contributed to by the negligence of the Respondent.

19. In support of its claim, the Appellant called two witnesses. DW1, Mr. Clarkson Otieno Ogeto told the court that at the time of the injury he was employed by the Appellant as its supervisor in charge of the Civil Engineering Section. His duty as the supervisor on the material day was to fill in the muster roll. This witness denied that the Respondent was an employee of the Appellant or that he was on duty on this day. He produced the muster roll (*Dexh.1*) in which the Respondent's name did not appear.

20. DW1 did not produce any document to prove that he was employed by the Appellant as its supervisor as alleged but insisted that his name was indicated in the muster roll. He maintained that he prepared the muster roll although he had not appended his signature therein.

21. DW2, the Security Officer at the Appellant's premises claimed that he did not know the Respondent or that he was injured on material day. He is the one in charge of the accident register in which all injuries are recorded. According to the register no injuries were reported on 15/07/2003 or at any time by the Respondent. He produced the register as DEX 2.

22. DW2 explained when cross-examined that his work is to register all injured persons before referring them to their insurers and that although the accident register was not signed, he had recorded the entries in his own hand.

23. After considering this evidence, the trial court held-

"I have carefully appraised the evidence on record. The plaintiff explained how he was injured.

DW1 who alleged that the accused [sic] was not on duty on the material date was not able to demonstrate that he was himself not on duty on the material day. On a balance of probability, I believe the plaintiff was injured whilst at work. I also hold the Defendant liable as there was no evidence to controvert the assertion by the plaintiff that he was now [sic] supplied with gloves. However I will apportion liability at 80:20 in favour of the plaintiff.

24. The Appellant argued that this finding of the trial court was against the evidence produced by the defence. Counsel faulted the court for failing to consider that the fact of employment and injury had been successfully refuted. On his part, the Respondent's Counsel argued that the muster roll and the accident register did not add any value to the Appellant's case as they could not be relied on by the court for the reason that they were prepared by the Appellant and kept in its custody. He doubted their authenticity and argued that they may have been prepared for purposes of this case.
25. Counsel referred the court to a decision by Kimaru, J in **NAKURU TIMBER CASES VS KEPHAGH SIMINWI NJOMO HCCA NO. 28 OF 2001 [U/R]** that-

“The fact that the name of the Respondent did not appear in the muster roll is no proof that the respondent was not an employee of the Appellant when the accident occurred. The appellant, knowing that the respondent was a casual employee, who was paid daily, could have deliberately made a decision not to enter the name of the respondent in the muster roll.”

26. I do not agree that the contents of the muster roll or accident register cannot be taken as conclusive proof of the fact of employment, and these are my reasons. **Firstly** a muster roll by definition is a record of daily attendance by employees in a farm or factory. It is like a clocking register. If an employee claims that he was at work on a particular day, but failed to clock-in his name at the particular time of reporting to work, he must show by other evidence that he was actually present on the particular day, and give reasons why he failed to have his name entered in the muster roll. This is particularly so where an employee is engaged on a daily or casual basis, the terms of whose engagement provide for his payment at the end of each day, and even if such an employee may not have an identification document his name must at least appear in the muster roll. There is no evidence that the Respondent received any wages for the time (*if any*) worked.
27. **Secondly**, a muster roll and an Accident Register are management tools. They are prepared and maintained by management through designated officers at levels established by respective industries. There is no evidence of basis for any suggestion that because they are prepared and kept by management, they are manipulated by such management employees either to protect themselves or to protect their employer from liability to pay wages or claims arising from industrial accidents.
28. When therefore a name of a litigant who claims to have been a casual or even permanent employee, who is required to have his name entered in the Muster Roll, or an Accident Register (in the event of an accident), does not appear in either the Muster Roll or Accident Register, the degree of proof of probability of having worked, or having had an accident on a particular day becomes much higher.
29. The Respondent says that his Supervisor was one Ogwenu who, the Respondent alleges to have entered his name in the Register, and that one Kamau and Omolo, were Respondent's workmates. The Respondent never asked the court's assistance to issue Witness Summons for any of these persons to attend court. The net result of that failure is that the court is left without material upon which to determine whether or not the Respondent was an employee of the Appellant. Having been given notice in the Defence dated 7th January 2004 that the Respondent was not its employee, the onus of proof otherwise, shifted dramatically to the Respondent. That proof cannot be made by the court or the Respondent by way of summations that because both the Muster Roll and the Accident Register are prepared and kept by the Appellant, they must be false or otherwise manipulated. There must be evidential proof or basis for that imputation of “*mala fides*” (*bad faith*).
30. The validity of those documents cannot be washed away merely because the extracts thereof, are not signed and more so because the witnesses who made the material day's entries themselves testified.
31. In this case, having failed to prove that he was an employee of the Appellant, and having also

failed to prove that an accident occurred to him on the material day, there was no basis for finding the Appellant liable.

32. Having come to that conclusion, the considerations of liability do not arise. The appeal herein succeeds. The judgment and orders of the lower court are hereby set aside, and the Respondent's suit in the lower court is dismissed with costs.

33. The Appellant will also have the costs of the appeal

34. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 24th day of October, 2014

M. J. ANYARA EMUKULE

JUDGE