REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.167 OF 2009

TIMSALES KENYA LIMITED………………………..…………………...APPLELLANT

VERSUS

ENOCK KEGO NYAMBUCHI……..............……..…...………………RESPONDENT

[An appeal from the Judgment/Decree in Molo P.M.C.C.NO.192 OF 2003 by Hon. S.M. Soita, Principal Magistrate, Molo dated 30th June, 2003]

JUDGMENT

The respondent in this appeal brought an action against the appellant for breach of contract of employment and negligence claiming that while employed by the latter he suffered soft tissue injuries to his left leg on 15th June 2002. The respondent listed five grounds of negligence and five particulars to show breach of contract. The appellant claimed first and foremost that the respondent was on duty on the date of the alleged accident; that he sustained injuries and that it was negligent or breached any terms of contract of employment. The respondent testified that indeed he was on duty on 15th June 2002. That at about 9pm, while pushing post through the saw, it got stuck, bounced back and injured his

left leg. He blamed the appellant for failing to fix metal guards which would have prevented the post from bouncing back. Present when the accident occurred was one Chege who administered first aid to him, Maina the Supervisor, and another employee by the name Mbogo, who assisted in giving the first aid. The respondent was then treated at Elburgon Nyayo hospital.

Dr. Wellington Kiambaa examined the respondent on 11th August 2003, nearly two years later and

observed scars on the anterior upper part of the left leg. He concluded that the respondent suffered soft tissue injuries and was complaining of residual pain in the affected leg on the main joint.

The appellant called Joseph Mahugu Maina, a supervisor in the company. He was categorical that the respondent was laid off on the 5th May 2002 and re-engaged on 8th July 2002, meaning he was on duty in the month of June 2002 and could not have possibly been injured on 15th June 2002. He also relied on the Masters Roll in which attendance of employee is recorded as well as the accident book where cases of injuries in the company are similarly entered. The appellant called Joseph Gitau Karanja, a records and information officer at the Elburgon Nyayo Hospital whose evidence was to the effect that the respondent was not treated at the hospital as alleged.

After counsel for both parties submitted their submissions, the learned trial magistrate, SMS Soita, Principal Magistrate, in a one page judgment found both the respondent and the appellant liable apportioning liability in the ratio of 20:80% against the appellant and awarding Kshs.80,000/= in general damages and Kshs.2,000/= for special damages. He reduced the figure to Kshs.64,000/= representing the respondent’s contribution.

The finding of liability and the award aggrieved the appellant who has preferred this appeal on five grounds which may be condensed as follows:

i) that the trial court failed to consider that the respondent failed to prove his case by failing to produce treatment card to prove that he was injured;

ii) that the court also erred in apportioning liability;

iii) that the court arrived at a wrong conclusion because it failed to analyse the evidence of the appellant’s witnesses;

iv) that the damages awarded were excessive.

The issues as framed by the appellant’s counsel which ought to have guided the trial court and which indeed are the issues in this appeal are;

i) whether the respondent was in the appellant’s employment on 15th June 2002;

ii) whether the respondent suffered the injuries in question on that date;

iii) whether the appellant was liable and;

iv) what damages would be payable for the injuries.

Of course the answer to (ii), (iii) & (iv) above will depend on the answer to (i) above. Starting with the first question, the respondent relied on his own word and the fact that he was treated at the Elburgon Nyayo Hospital as proof that he was on duty on the day in question. Although he stated that three people witnessed the accident, he did not call them. They were his supervisor, Maina Mbogo (clearly not DWI, Joseph Mahugu Maina), Chege and Odingo, both of whom he alleged to have administered first aid to him.

The appellant having denied in their statement of defence that the respondent was on duty on the day under reference, it was incumbents upon the respondent to call evidence to prove his assertion as envisaged by **section 107** of the **Evidence Act**.

The appellant produced at the trial both the muster roll and the accident book to demonstrate that the respondent was not on duty on 15th June, 2002. The contents of the accident book have not been challenged. In it, the respondent is not named as having been injured on that day. Indeed no injury was reported and/ or recorded on the day in question. The appellant also relied on the muster roll. The extract of the muster roll was, however, not helpful to their case as it related to the period not in dispute.

Regarding the treatment card, it has been held in a long line of cases that where a plaintiff relies only on treatment card to prove initial treatment, it is imperative that the same be produced and evidence led as to its authenticity. It is fatal to fail to produce it in the absence of any other evidence to prove the occurrence of the accident. See **Timesales Ltd** V. **Wilson Libuywa,** Nakuru HCCA No. 135 of 2006, **Amalgamated Saw Mills Ltd** V. **Tabitha Wanjiku,** Nakuru HCCA No. 272 of 2004 and **Blooms Ltd** V **James Sawami Sikinga** Nakuru HCCA No. 126 of 2005.

For instance if the respondent called the evidence of those who were present and witnessed the accident, failure to produce initial treatment card would not be fatal. Dr. Kiamba relied on the card when he examined the respondent one year later and the only thing he observed was the scar on the left leg. That observation cannot be evidence that indeed the respondent was injured on 15th June 2002. According to both the respondent and Dr. Kiamba, the former was treated at Elburgon Nyayo Hospital and issued with Out-Patient (OP) card No. 3366/02.

D.W.2, Joseph Gitau Karanja, the records and information officer at the hospital produced the record of 15th June 2002 in which neither the card number nor the name of the respondent appeared. According to

him, the cards issued on 15th June 2002 were between serial Nos.2350-2354. That evidence too was not challenged apart from suggestions that the procedure for issuance of the card may not have been followed and that the witness was not an employee of the appellant at the time the card is alleged to have been issued. See **section 107** of the **Evidence Act.**

For the reason that the respondent admitted having instituted three previous claims against appellant, it was vital for him to prove that the injury on the left leg did not relate to his previous injuries for which he had claimed. This he failed to do. Without evidence that he was on duty on 15th June 2002, no purpose will be served to consider the other issues raised in this appeal save to observe that the learned trial magistrate completely failed to evaluate the evidence before him and simply hurriedly apportioned liability.

For the reasons stated, this appeal is allowed, the judgment of the court below is set aside and costs of this appeal as well as those in the court below awarded to the appellant.

Dated, Signed and Delivered this 21st day of February, 2012.

W. OUKO

JUDGE