REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 184 of 2009

TIMSALES LIMITED.....APPELLANT

VERSUS

ANDREW OMOORI NYANGERI.....RESPONDENT

JUDGMENT

TIMSALES LTD. (the appellant), has filed this appeal against ANDREW OMORI NYANGERI (the respondent) contesting the decision by the Principal Magistrate, Molo, in RMCC No.160 of 2003 where judgment was entered in favour of the Respondent against the appellant on liability at the ratio of 80:20% and general damages awarded at Kshs.200,000/= less the 20% apportionment to give a sum of Kshs.160,000/=. Special damages were awarded at Kshs.2000/= plus costs of the suit and interest.

The background to that decision was a claim filed by the Respondent who stated that he was the appellant's employee and while working for the appellant on 15th April 2003, he was hit by a pulling machine which resulted in him slipping and falling into a ditch thereby sustaining serious injuries.

He attributed the incident to the negligence of the Appellant whom he blamed for:-

1. Exposing him to danger.

2. Failing to provide proper and safe system of work.

3. Failing to provide protective devices while Respondent engaged in his work.

4. Permitting Respondent to fall down.

5. Being in breach of employment contract.

The Appellant was also blamed for failing to take precautions to **"avert the danger of the plaintiff."**

At the hearing, the Respondent testified that he worked for the Appellant, and on the material date while he was carrying rubbish felled from trees, using a hand cart, he slipped and injured his back. He was treated at Elburgon Nyayo Ward and at a private clinic – he produced a receipt for Kshs.2000/= in respect of the treatment and showed the court his medical records and his employment card. He blamed the Appellant for failing to provide him with gumboots which he says would have prevented him from slipping and falling.

On cross-examination he stated he had worked for the Appellant for 3 months and

"There was a hole there, and I fell on stepping it (sic). I saw it after falling down.".

It was his contention that the said hole was not visible.

Dr. Obed Omuyoma (PW2) a medical practitioner in Nakuru confirmed that upon examining the Respondent he established he had sustained soft tissue injuries in the lumbar-sacral to the back. He then prepared the medical report which was produced in court. He confirmed that Respondent had recovered.

The Respondent's treatment records were produced by **EMILY KIPTOO (PW3)** the Records and Information Officer at Elburgon Hospital. The records showed appellant had a pelvic inflammatory disc and the records showed the Respondent was injured on 18/4/2003 and that is the date he sought treatment.

The defence witness **JACKSON SIMIYU WASIKE** (the supervisor at the Appellant Company) told the trial court that on the date in question, according to the Accident Report Record, nobody was injured on 15/04/2002.

He confirmed on cross-examination that he was the Respondent's supervisor and denied suggestions of manufacturing documents to fit their defence after listening to the Respondent's evidence.

The appellant challenged the trial magistrate decision on grounds that:

1. There was no concise statement of the case, the points for determination and the reasons for the decision.

2. The plaintiff did not prove negligence and breach of contract.

3. Due regard was not given to the evidence by defence nor were any reasons for dismissing the defence case especially with regard to the date of injury vis a viz the medical records.

Appellant therefore prays that the appeal be allowed and judgment set aside, alternatively the damages awarded be reviewed and revised.

At the hearing of the appeal, Mr. Mahida on behalf of the appellant submitted that the only evidence of negligence or breach of contract, that was mentioned by the Respondent was his complaint that the Respondent failed to provide him with gumboots yet there was no evidence led to demonstrate that such non provision amounted to negligence or breach of contract. He pointed out that, there was no evidence to prove that the surface was slippery or wet. Counsel's contention is that there must be something within the knowledge of the employer and presented so as to make the employer liable, he urged the court to be guided by the decision in **EASTERN PRODUCE (K) LTD V CHRISTOPHER ATIADO OSIRO** HCCA.NO.43 of 2001 which held that the onus of proof lies on he who alleges negligence, and must demonstrate conduct which involves an unreasonably great risk of causing damage, quoting from SALMOND and HEUSTON ON THELAW OF TORTS 19th Edition where it is described as:-

"Conduct, not a state of mind – conduct which involves an unreasonably great risk of causing damage – negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Certainly the concept of negligence connotes existence of a duty, breach of that duty, and damage suffered by the person to whom the duty was owing – this was appropriately observed by Lord WRIGUR in **LOCHGELLY**, **IRON AND COAL CO. V M'MULLAN** (1934) A.C I; 25. Another decision to support this position is, the case of **MOUNT ELGON HARDWARE V UNITED MILLERS LTD** HCCA.NO.19 of 1996.

On this limb, Mr. Gekonga on behalf of the Respondent argued that the Respondent's case was simple and clear, he was on duty and he slipped and fell after being disturbed and this fall was because the company did not provide him with gumboots which would have prevented the slip. It is his contention that provision of equipment is a requirement under the Workman's Act and since none was provided it constituted negligence.

The evidence is not that Respondent slipped, it is that he stepped into a hole then fell. It was not demonstrated that the Appellant was aware of the existence of that hole, or with it was responsible for it. There was also no evidence to demonstrate the state of the surface which the Respondent was walking on, so as to persuade the court that wearing gumboots would have offered adequate protection. It is not enough to merely say **"I was not provided with gumboots so I fell",** the onus certainly was on the Respondent to prove negligence and this he failed to do. I agree that injury perse is not proof of negligence.

A further limb as argued by Mr. Mahida, is that the defence was dismissed without reason yet there was contradiction regarding the date of injury to the date Respondent went to hospital. This discrepancy, he argues, ought to have been resolved in the Appellant's favour because the appellant's record clearly showed the report of injury was recorded on 15/04/2003, yet the trial magistrate made no mention of the conflicting dates as hospital records were dated 18/04/2003.

On this limb, Mr. Gekonga's response is that at pg 13/14 of the record Respondent clearly consistently stated that he was injured on 15/04/2003 and that he went to hospital after three days, which would fit in with the date 18/04/2003 reflected in the hospital records. He also invites the court to consider the entries in the treatment card which clearly give estimated age of injury as 4/7 meaning about four days old. He was also sceptical about the Appellant's records suggesting that they were doctored so as to fit in with what picture Defendant wanted to paint. His argument is that the muster roll and injury book produced by the Appellant added no value to the defence case because they were never shown to the Respondent during cross-examination and it was not clear when those documents were prepared. From the record of the trial court, Respondent indeed stated that he got injured on 15/04/2003 and on cross-examination he stated:-

"I went to hospital after three days."

I need not delve much on that, I concur with Mr. Gekonga's submissions on this limb, the discrepancy on dates is easily explained – Respondent did not go to hospital on the very day he got injured, he sought medical attention 3 days later.

The trial magistrate judgment is also criticised as not meeting the statutory requirement of what constitutes a judgment.

Section 169(1) Civil Procedure Code is clear that every judgment shall contain the points for determination, the decision thereon and the reasons for the decision.

Admittedly this judgment merely i.e., reproduced the evidence and did not analyse the evidence or give reasons, but that alone would not be a reason to set it aside. The reason why the appeal succeeds is that, although the evidence proved that Respondent was injured while at his place of work, there was no proof of negligence or breach of contract – on the converse , this evidence suggested a lack of attentiveness by the Respondent leading to him stumbling into a hole and falling. I therefore allow the appeal and set aside the judgment.

Costs of this appeal shall be borne by Respondent.

Dated this 10th day of July, 2012 at Nakuru.

H.A. OMONDI
JUDGE

Delivered and dated this 25th day of July, 2012 at Nakuru.

W. OUKO
JUDGE