IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.5 OF 2007

TIMSALES LIMITED…………….......................……………….APPELLANT

VERSUS

JOHN KARIUKI CHEGE……….........................………………RESPONDENT

[An Appeal from the Judgment/Decree of Hon. E. Ominde, Principal Magistrate, in Nakuru C.M.C.C.No.1924 of 2003 dated 13th February, 2008]

JUDGMENT

The appellant, Timsales Limited was sued in the court below by the respondent, John Kariuki Chege for the injury he alleged to have suffered while working for the appellant. He blamed the appellant for being negligent by failing to take adequate precautions to ensure the safety of the plaintiff while on duty; exposing him to risk of injury or damage, failing to provide and maintain a safe and proper system of work and failing to provide the respondent with proper and safe apparel. As a result, the respondent averred he suffered a cut wound on the left knuckle and another cut wound on the left thumb with loss of a nail. As a consequence thereof, he has spent Kshs.2,500/= for medical examination.

The appellant on the other hand denied that the respondent was on duty on the date of the alleged accident; that it was negligent that the respondent was injured as alleged. Instead, and without prejudice, the appellant blamed the accident on the respondent for failing to have due regard to his own safety, working without due care or attention, exposing himself to obvious peril.

At the hearing, the respondent explained how on 4th September, 2001, while working for the appellant as a casual worker, feeding a log into the main peeler machine, a timber hit his finger thereby inflicting the injuries in question.

Dr. Omuyoma examined the respondent nearly two years after the alleged accident and noted that the injuries to the knuckle and the thumb from where the nail had come off had healed. The nail too had regenerated.

On behalf of the appellant, Geoffrey Kamau Githua, a supervisor in the Peeler Section confirmed that the respondent was an employee of the appellant. However, he clarified that the respondent was employed in October, 2001 and therefore was not an employee in September, 2001 when the accident is alleged to have occurred. He relied on a muster roll and an accident record in both of which the respondent’s name is not listed. It was also his evidence that the respondent was not deployed in the Peeler Section but in Clipper Section; that the logs are carried by a hoist machine and not manually as claimed by the respondent.

The learned trial magistrate considered this evidence as well as submissions by both counsel and found the appellant 95% liable and the respondent 5% liable, thereby entering judgment in the sum of Kshs.142,500/= and special damages in the sum of Kshs.2,500/= plus costs and interest.

This finding aggrieved the appellant who has brought the present appeal challenging the decision in question on seven grounds, condensed and argued as four (4) as follows:

1) that there was no evidence that the respondent was an employee of the appellant at the time of the alleged accident;
2) that there was no medical evidence that the respondent indeed suffered injury on the day in question
3) that the appellant's 95% liability was neither based on the pleadings nor evidence
4) that the award of Kshs. Kshs.142,500/= for soft tissue injuries was excessive.

For his part, learned counsel for the respondent maintained that:

1) the award was commensurate with the injuries suffered;
2) the respondent proved that he was an employee of the appellant;
3) there was evidence of negligence on the part of the appellant;
4) the injuries suffered by the respondent were confirmed by medical evidence.

I have considered these arguments and the long line of authorities cited by both sides. Two broad issues arise; whether the respondent was employed by the appellant at the time of the accident and whether he sustained any injuries while on duty. Depending on the finding on the two questions, the next issue is that of quantum. In considering the two main questions in this dispute, it must be borne in mind that the respondent's burden was to show on a balance of probability that he was on duty in the appellant's premises on the day in question and that he suffered the injuries to his fingers in the course of his employment by the appellant. It is a question of burden of proof since it is the appellant's word that the respondent had not been employed at the time of the alleged accident against the respondent's word that he was on duty on 4th September, 2001, the date of the alleged accident. The burden was on the respondent to prove his claim and not on the appellant to disprove it.

Section 107 (1) of the **Evidence Act** provides that:

"107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

It was incumbent upon the respondent to prove, on a balance of probabilities:

i) that he was already working for the appellant on 4th September, 2001

ii) that as he was working on that day, he sustained injuries to his fingers

iii) that he suffered those injuries as a result of the appellant's negligence.

The respondent did not tender any documentary evidence of his employment by the appellant. His testimony as to the date of his employment with the appellant was confused. In cross-examination, he said that he had worked for the appellant for two years; that he was employed in October, 2001 yet the accident is said to have been on 4th September, 2001. He said also that:

"I was employed in 2001. I cannot remember the month but as at June of 2001, I was already there."

When shown the Muster Roll he said:

"This is the muster roll for July, 2001 – October, 2001. Yes my name appeared for the month of

October, 2001……….. Yes these entries are correct. Yes. No, my name does not appear in September, 2001 in this muster roll"

In re-examination, he went on to say:

"In August, 2001 I confirm I was employed by Timsales and I got injured on 4th.."

Similarly, in paragraph 5 of the plaint, it is averred that:-

"5. On or about the 4th September, 2001 whilst the plaintiff was lawfully engaged in his work….."

The respondent further stated that when he was injured, there was a second person with whom he was lifting the log he alleged to have injured him. The name of that person was not supplied and he was also not called to confirm the respondent's contention. He further testified that after he was injured, he went to Elburgon Hospital where he was treated for the injuries to his fingers. He relied on a book in which the injuries were purportedly noted and the treatment administered recorded. That book was discounted by Dr. Omuyoma, who doubted its authenticity on the basis that Elburgon Nyayo Hospital issues to patients treatment cards with out-patient numbers and not an exercise book in the form presented by the respondent. That exercise book was not admitted in evidence.

Dr. Omuyoma, as I have noted earlier examined the respondent nearly two years after the date of the alleged accident. All these lead to my conclusion that the respondent did not prove the basis of his claim, namely that he was on duty at the appellant's premises when the accident occurred. Having so failed, the other two questions require no consideration. The learned trial magistrate was in error in failing to evaluate the evidence concerning this aspect of the claim.

The appeal succeeds and is allowed with costs. Judgment of the lower court is set aside with costs to the appellant.

Dated, Delivered and Signed at Nakuru this 13th day of April, 2011.

W. OUKO
JUDGE