REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 37 OF 2009

(Being an appeal from the judgment and decree of Hon. Soita Principal Magistrate in Molo PMCC No. 277 of 2003 delivered on 17th February 2009)

AMALGAMATED SAWMILLS LTD……..…….APPELLANT

VERSUS

ANDREW NYAMONYO ONYANCHA…….…….RESPONDENT

JUDGMENT

Andrew Nyamoto Onyancha *(the Respondent)* sued Amalgamated Sawmills Ltd *(the Appellant)* for -

(a) General and Special Damages,
(b) Costs and interest of the suit.

The Respondent alleged that it was the term of his employment with the appellant that it was the duty of the Appellant to take all reasonable precautions for the safety of the Plaintiff while he was engaged upon his work with the Appellant, not to expose him to a risk of damage or injury of which it knew or ought to have known to provide the Respondent a safe system of work.

The Respondent also alleged that on about 7th September 2002 and/or thereabouts, while he was on duty with the Appellant and in the course of duty **some logs of timber fell,** hit and thereby occasioned him severe injuries.

The Respondent attributed all the injuries which he sustained to the negligence on the part of the Appellant, through itself, servants, agents and/or employees and/or breach of contract and terms of employment between the Appellant and the Respondent, and set out the particulars of both negligence and breach of contract, and the injuries he sustained.

The injuries were ***"deep cut wound on the right 2nd finger, and soft tissue injuries on the same right 2nd finger."***

In its Defence, the Appellant denied the Respondent's claims and alleged that injuries *(if any)* were either solely caused and/or substantially contributed to by the Respondent's own negligence, and also set out the particulars of negligence by the Respondent.

On the evidence the lower court found the Appellant 80% liable and 20% to the Respondent, and

awarded the Respondent Ksh 80,000/= general damages, less 20% and also awarded the Respondent Ksh 2,000/= special damages on the evidence of receipts produced in evidence, thus making a total of Kshs 66,000/= general and special damages. The court also allowed costs and interest on the amount.

Aggrieved with the lower court's judgment, the Appellant appealed to this court, and in a Memorandum of Appeal dated 25th February 2009 and filed on 26th February 2009, the Appellant set out ten *(10)* grounds of appeal, namely -

(1) that the learned trial magistrate erred in law and in fact in finding that the plaintiff had proved his case on a balance of probabilities yet the plaintiff led scanty and contradictory evidence,

(2) that the learned trial magistrate erred in entering judgment against the Appellant,

(3) that the learned trial magistrate erred in law and fact in failing to find that the plaintiff's evidence on record was at variance with his pleadings and as such the plaintiff could not prove what was not pleaded,

(4) that the learned trial magistrate erred in law and fact in failing to frame the issues for determination analyzing the evidence on record and ultimately giving his reasons for reaching at a finding against the defendant,

(5) that the learned magistrate erred in law and in fact in finding that the plaintiff had proved his case on a balance of probability yet the plaintiff never adduced any evidence of injury in the initial treatment card thus making the medical report relied on as mere hearsay evidence,

(6) that the learned magistrate erred in law and in fact in failing to consider and analyse the strong rebuttal evidence led by the defence witnesses especially that of the Records Officer from Njoro Health Centre which clearly showed that the plaintiff was not treated at Njoro Health Centre as alleged,

(7) that the learned trial magistrate erred in law and in fact in holding that the Respondent's account of the incident giving rise to this suit made out a case for negligence against the Appellant not withstanding the fact that the plaintiff neither established causation nor did he the aspect that could be attributed to negligence against the appellant.

(8) that the learned trial magistrate failed to appreciate the totality of the evidence before him and the submissions made on behalf of the Appellant.

(9) that the learned trial magistrate erred in applying erroneous standard of proof and failed to appreciate that the Respondent had failed to discharge the burden of proof placed upon him as a matter of law.

(10) that the learned trial magistrate erred in assessing general damages at Kshs 80,000/= and failed to apply the principles applicable in award of damages and comparable awards made for similar injuries.

And by virtue thereof prayed that -

(1) the judgment of Hon. Soita dated 17th February 2009 be reviewed and/or set aside,

(2) the Respondent do bear the costs of the Appeal.

When this matter was urged before me on 13.04.2011, Mr. Murimi, learned counsel for the Appellant reduced the above grounds into four issues -

(1) whether the lower court was justified in finding for the Respondent,

(2) whether from the evidence tendered the claim for injury was proved to the required standard,

(3) whether the finding in negligence against the Appellant was justified, and

(4) whether quantum was justified.

Although Mr. Murimi argued the four grounds separately, in my respectful opinion, the appeal raised only two points for determination, ***firstly*** whether there was evidence to find for the Respondent, and ***secondly*** whether the quantum of damages was justified.

On the first issue, Mr. Murimi learned counsel for the Appellant argued that there was no evidence to justify the finding by the learned trial magistrate that the Appellant was liable. Counsel submitted that the Respondent's claim of injury by *logs of timber* was inconsistent with his evidence that he was injured by a broken timber saw. Mr. Murimi submitted that where evidence is at variance with the facts pleaded, the party with the burden of proof should fail. Counsel relied on the case of **WAREHAM t/a A. F. WAREHAM & 2 OTHERS VS. KENYA POST OFFICE SAVINGS BANK [2004]2 K.L.R. 91.**

Miss Makau, learned counsel for the Respondent in opposition to this ground argued that the Appeal should not be allowed on technicalities, and that the Respondent proved his case before the lower court on the balance of probabilities, the standard in civil claims or disputes.

On this point, I agree with the contention by the Appellant's counsel. Evidence must be in tandem with the pleadings. This principle is founded upon another equally important principle, that the other party *(the accused or defendant)* must know the charge or case against him. This is so because, the Plaintiff or as in this case, the Respondent, cannot in his pleadings, claim *(para. 5 of the plaint)* that he was injured by falling logs of timber, and then in his evidence testify to a different cause of the accident, and therefore his injury of, a broken saw! That would indeed lay an ambush against any Defendant, or as in this case the Appellant. It is not a technicality as Miss Makau, counsel for the Respondent countered. It is a question of law.

The proper step for the Respondent to have taken would have been to immediately seek leave to amend his claim, so that his evidence would have been in tandem with his pleadings, and have reflected to the true cause of his injury. What he, or a party cannot do, is to maintain one pleading for the cause of the injury and testify to a completely different cause.

The Defendant or the Appellant in this case, would not know what case to answer. Because it is the Plaintiff *(the Respondent in this case)* who does not know or appears not to know what his case is, he should indeed fail, and I so find and hold.

Having come to this conclusion, it is strictly unnecessary for me to consider the other grounds, or the ground on quantum, except to say that, although the Respondent was found with scars by both Dr. Omuyoma and Dr. D'cunha, *(for the Respondent and Appellant respectively)*, it is not possible to say, even on the balance of probability whether the injuries were sustained at work place on the material night 7.09.2002 *(or 8.09.2002)* or simply elsewhere.

It is therefore necessary for the stewards in these labour intensive industries to educate workers to insist upon their rights at work, particularly in cases of injury, report to the right official, take a colleague with you, get a written confirmation or some acknowledgement in the register, get the name of the official to whom the accident was reported, and call him in evidence. The lack of such evidence in this, and in many cases that come on appeal, is the cause of failure to uphold the lower court's judgment.

Substantial justice cuts both ways, for the Appellant and the Respondent. In this case, the Respondent's evidence could not justify the conclusion of liability against the appellant.

In the premises, I allow the appeal, set aside the lower court's judgment and decree, and direct that

the Respondent being a jobless Kenyan, he and the Appellant will bear their respective costs.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 24th day of June, 2011

M. J. ANYARA EMUKULE
JUDGE