REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HCA NO 179 OF 2008

TIMSALES LTD .....APPELLANT

VERSUS

WILSON MAKOKHA MUREFU.....RESPONDENT

J U D G E M E N T

The respondent Wilson Makokha Murefu, filed a suit against the appellant, Timsales Ltd, claiming general and special damages on account of injuries that he sustained on 7/10/2002, in an industrial accident that occurred at the Respondent's place of work.
In the plaint, the respondent pleaded that the injuries were caused by the negligence of the appellant who failed to provide him with a safe working system and exposing the respondent to danger.
He further pleaded that the appellant failed to provide him with protective devices while engaged in his work. In the alternative , the respondent blamed the appellant for breach of contract by failing to provide a safe working condition to avert the injuries.

The appellant filed a defence denying that the respondent was ever employed by it as per the terms alleged in the plaint and denied that the respondent was lawfully engaged to work with the appellant and denied that the appellant was in breach of any terms of the contract or that it was negligent .In the alternative the appellant alleged that the respondent solely caused or substantially contributed to the injuries that he suffered. The case was partly heard by Mr Kirui SRM and taken over by Mr Soita PM who completed the case and in his judgement, apportioned liability at 90% to 10% in favour of the Respondent. He assessed the general damages at Ksh120,000/= and special damages of Ksh2,000/= less 10% contribution . The respondent was also awarded costs and interest. The appellant was aggrieved by both findings on liability and quantum and filed this appeal.

The appellant raised 7 grounds of appeal which can be summarized as follows:

1. whether the respondent was in the appellants employment at the time of injury;
2. Whether the claim for injury was proved;
3. Whether the award was justified;
4. Whether the award was excessive.

In support of the grounds of appeal, Mr. Murimi, the appellants counsel submitted that the respondent failed to prove that he was employee of Timsales Ltd on the date he was allegedly injured. He relied on the decisions of ***AMALGAMATED SAW MILLS VRS LUCY WANJIRU NDUNGU NAKURU 28 OF 2001 and THADAYO OBUNGA OKONJO Vrs COMPLY INDUSTRIES NAKURU HCA 64/06***where the courts held that he who alleges that certain facts exist must prove as provided by section 107 of the Evidence Act.

It was also counsel's submission that the treatment card that was produced in evidence by the respondent was not authentic because Pw1 John Kimathi Njoroge, a Health Records and Information Officer at Elburgon Nyayo Hospital denied that the respondent was treated at the hospital and the numbers registered on that day were from No.4114/02 to 4125/07 and that the last OB number for the year 2002 was 5258/02. He explained the procedure of how cards are issued after payment of 20/= and after being seen by a doctor , it is given an O.B number and then one goes for medicine. He denied that the card produced by the respondent being number 5258, was issued by the hospital. It was counsel's submission that the claim is fraudulent and in support of the allegation cited,
AMALGAMATED SAW MILLS VRS JOHN MWANGI HCA 38/2005 and TIMSALES LTD VRS WILSON LIBUYUA MKU HCC 135/06. It was also submitted that the report is fraudulent because the respondent told Dr Dcunha that he was injured on 21/10/03 by a tree branch which fell on his left forearm but in his evidence, he claimed to have been injured on his chest on 7/10/02 by a branch that had already been cut . Counsel also submitted that the injury can not be attributed to the negligence of the appellant because it is the respondent who had cut the branches the day before and that there is therefore no evidence of causation.

For the respondent, Ms Momanyi submitted that the master roll produced by the appellant did confirm that the respondent was an employee of the appellant. As to whether the records were accurate regarding the respondent's presence at work on the date of injury , counsel urged that the records are in custody of the appellant and they were not made available to the respondent at the time he testified . Counsel relied on ***UNIVERSAL PARENTAL LTD VRS FREDRICK MALENYA HCA 825/06,*** where the court found that the respondent would not be held responsible for an omission in the Register . As respects the evidence of Dw1, it was submitted that he did not prove that he worked at Elburgon Nyayo Hospital or that the Respondent's name was not entered in the registers at the hospital . As regards causation it was the respondent's contention that the respondent was cutting a tree, a branch fell on him and he was injured. It was the duty of the appellant to ensure he provided a safe working system that works.

I have now considered and evaluated the evidence on record as I am expected to do, this being the first appeal. There is no doubt that the respondent was an employee of the appellant as his name appeared in the muster roll that was produced by the appellant in evidence. The appellant's complaint however, is that the defendant was not at work on 7/10/02, the day he claims to have been injured. The respondent is under a duty to prove his claim on a balance of probability . He had to prove that he was injured while engaged as the appellants employee on the date of the alleged incident. Dw2 David Mwangi , the security officer at the appellant company produced the muster roll which showed that the respondent was not present at work on the material date. He also denied that any incident was reported on the day as there was no entry in the incidents register which was also produced in evidence. Though the respondent named one Kumen as his supervisor, the respondent never made any report of injury to anybody . He did not tell the court whether he reported the incident to the supervisor before or after going to the hospital for treatment. The respondent testified that he even worked the next day. But he never made a report of the accident and injury even then. It is no wonder then, that there was no entry in the incident register about the occurrence of any incident on that date.

Regarding evidence of DW1 John Kinuthia the Records Officer at Elburgon Nyayo Hospital, testified that the treatment card produced by the respondent was not issued by that hospital on the said date. I however find that his evidence doubtful because he did not produce any evidence to prove that he was an employee at the said hospital at the time. He did not even produce any evidence to confirm that the cards issued on that date were different numbers.

It is not in doubt that the respondent was injured as confirmed by Doctor Omuyoma in his report and the treatment chit. In my view Doctor D'cunha's report must relate to another incident all

together as the respondent claimed to have other cases with the appellant .

All the above evidence considered, I find that failure to report the incident does raise a doubt in my mind as to whether the Respondent was injured on the said date while in the appellant's employment and I find that the respondent did not prove his case on a balance of probability. The trial court did not consider whether or not the respondent was at work on that material day. The court merely believed that the respondent was injured . I find that the respondent did not prove his case to the required standard.

In the event that the court is wrong at arriving at the said finding, the question is whether the respondent proved that the injury was as a result of the appellants negligence. In his evidence, the respondent said that he blamed the appellant for hurrying him.

In **WINFIELD AND JOLOWICZ on TORT 13TH Edition*At common law the employee's duty is a duty of care and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working, the plaintiff must plead and therefore prove what the proper system was and in what relevant respect it was not observed . It is true that the severity of this particular burden has been somewhat reduced, but it remains clear that for a workman merely to prove the occurence of the accident will normally be insufficient"*** which was relied upon by Mr Murimi, the author states as follows at page 203 "

In the instant case the respondent pleaded that the appellant did not provide a safe working system .The respondent did not state what a safe working system was. In his evidence, he said that he blamed the appellant for hurrying him up. It was left to the court to conclude that either there was shortage of man power or that the respondent was given too much work to do in a shot time that he had to hurry and hence making the working system unsafe. In my view , I would have found the appellant to have been negligent and would apportion liability. The respondent has a duty of care owed to himself. He had cut the branches the previous day and should have been more careful in . I would have apportioned liability at 20% as against the respondent.

With regard to the award on quantum I would agree with Mr Murimi that award of the trial court was excessive in the circumstances given the minor injuries suffered by the respondent. Doctor Omuyoma found that the respondent suffered a deep cut wound on the anterior chest and soft tissue injuries to the chest. He assessed the degree to be harm. In ***SOKORO SAW MILLS LTD vs GRACE NDUTA HCCA 99/2003*** , the respondent suffered soft tissue injuries to the hip joint and the back. On appeal the court awarded Ksh,30,000/= on 24/3/06. In the case of ***FRANCIS MAINA MWANGI vrs SAMSOM KURIA HCC1291/1990*** which was decided in 1991, an award of ksh80,000/= was made but that did not compare well with the respondent's injuries, because the plaintiff in that case suffered more serious injuries. In my view the award made by the magistrate was excessive in the circumstances and I would have made an award of Ksh50,000/= as general damages less contribution of 20%.

For the reasons given in this judgment, the appeal is hereby allowed, the judgement dated 28/10/08 is hereby set aside, with the respondent bearing the costs of the proceedings in the lower court and the appeal.
Orders accordingly .

DATED AND DELIVERED THIS 21st DAY OF JUNE 2011

R.P.V WENDOH
JUDGE

PRESENT
Ms Siko holding brief for Murimi for Appellant
Ms Wanjiku holding brief for Moseti for Respondent

CC: Kennedy Oguma