



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 48 OF 2009**

**TIMSALES (K) LTD.....APPELLANT**

**VERSUS**

**WILSON MAKHOKA MUREFU.....DEFENDANT**

**JUDGMENT**

This appeal arose from the Judgment of Mr. Soita, Principal Magistrate, Molo, dated 17<sup>th</sup> February 2009, in which an award was made against the Appellant for Kshs.80,000 less 20% contribution, being general damages plus costs and interest. Being aggrieved by the said Judgment, the appellant lodged this appeal.

In the Complaint, the Respondent stated that he was an employee of the Appellant and while on duty on 24/4/2003, he was hit and seriously injured by a falling tree. He attributes the injuries to the negligence of the Appellant for acting in breach of its common law duty of care by failing to provide the Plaintiff with protective devices or a safe working environment. In the alternative, the Appellant was said to be in breach of the contract of employment by failing to provide the Plaintiff with a safe and proper system of work, failing to provide the Respondent with protective devices as a result of which he was injured.

In the statement of defence, the Appellant denied that the Respondent was its employee or that it was negligent as pleaded and neither did it breach the terms of contract. In the alternative, the Appellant stated that if at all the Respondent was injured, he solely or substantially contributed to the injuries sustained. In the memorandum of appeal, the Appellant raised 7 grounds which were condensed into three broad grounds, namely;

- (1) Whether the Respondent was injured at his place of work;**
- (2) Whether negligence was proved;**
- (3) Whether the award was excessive.**

In support of the claim, the Respondent testified that he was an employee of the Appellant as of 21/4/2003. On that date, he was at Mariosihoni Forest where he was assigned to cut trees. He was working as power saw operator cutting trees. As he cut down the tree, another tree followed and fell on him on the wrist thus injuring him. He was treated at Elburgon Nyayo Hospital as per treatment chit produced and was later examined by Dr. Omuyoma, who prepared a report. He blamed the Appellant's supervisor for hurrying him to do the work.

The Appellant called two witnesses in support of the defence, David Mwangi Muigai (**DW1**) who worked for the Appellant as a security officer whose duties include the keeping of all records, that is, the muster roll and accident register. It was his evidence that the accident register for 21/4/2003 did not have any report of an accident and that it is him who prepares the accident register. DW1 denied that the Respondent was injured while at work in the factory. The accident register was produced as **DEx1**. He produced the muster roll for 21/4/2003 which confirms that the Respondent was on duty and that he worked for 10 hours instead of 8. DW1 denied receiving any report of an accident from the Respondent or the Respondent's supervisor, Joshua. Joseph Gitau Karanja (**DW2**) deponed that he works at Nyayo Hospital as a Records Information Officer, keeping the records of the hospital and registration of in and out of patients. He produced the register for the period 21/4/2003 and that the Respondent's name does not appear on that day and that in any event the outpatients cards ranged from 3705/03 to 3727/03 whereas the Respondent's is 1611/03. That the card 1611/03 allegedly issued to the Respondent appears on 11/2/2003 and was issued to Heblem Wairimu. It was his view that the card the Respondent wanted to produce did not belong to him.

In his Judgment, the trial Magistrate observed that the Respondent's supervisor Joshua Kariara was not called as a witness to rebut the Respondent's evidence and believed that the Respondent was injured while on duty and apportioned liability at 80% in favour of the Respondent and made an award of Kshs.80,000 as general damages less contribution of 20%. The Appellant is aggrieved by the trial court's decision on both liability and quantum.

This being the first appellate court, the court is not bound by the findings of fact of the trial court but has a duty to re-evaluate the evidence afresh and arrive at its own conclusions. The court however, bears in mind that it did not have the opportunity to see and hear the witnesses to assess their demeanor.

DW1 did admit that the Respondent was working with the Appellant on 21/4/2003. His name appeared in the muster roll. However, whereas the Respondent claims to have been at work in the forest cutting trees, DW1 said that the Respondent was not injured in the factory. If a tree fell on the Respondent, it cannot have occurred in a factory. Even if the respondent's name was entered in the muster roll for that date, DW1 does not seem to know where the Respondent worked on that material date. DW1 denied that the Respondent's name appeared in the accident register which he keeps. The question is whether the register was for the workers in the factory or in the forest.

Mr. Murimi, counsel for the Appellant submitted that the documents produced by the Respondent were falsified because DW2 could not trace the Respondent's name in the register for 21/4/2003 and the outpatient card 16/1/2003 appears on a different date, 11/2/2003 and the cards of 21/4/2003 were totally different i.e. 3705/02. He even denied that they ever issue treatment chits like the one produced by the Respondent. However, in cross examination, DW2 admitted that he was not working at the said hospital on 21/4/2003. He had started working at the hospital 3 years before 2009. He did not know who made the entries in the register or if mistakes were made in the entries. He agreed that such chits were used by doctors and Clinical Officers. After considering DW2's evidence, I am of the view that he could not confirm with certainty that the medical chit produced by the Respondent was not authentic. I find on a balance of probability that the Respondent was injured while at work and he went to seek medical attention where he was issued with the chit. It bears a hospital number and bears the hospital stamp. The court will find that it is a genuine document issued to the Respondent when he went for treatment.

In the Plaint, the Respondent alleged that the Appellant exposed him to danger and/or injury, failed to provide the Respondent with a safe working system; failed to provide protective devices while engaged at work. In the alternative, the respondent alleged that the Appellant was in breach of terms of the contract by failing to provide a safe working system, exposing the Respondent to injury or damage, failed to provide protective devices and failing to take precautions and to avoid the danger. In his evidence, all the Plaintiff said was that he was being hurried to do the work by the supervisor. The work he was undertaking was dangerous and the Respondent should have provided a conducive environment for the Respondent to work. If hurried, he was likely to make mistakes. The Appellant should have hired more personnel to do the work instead of hiring few and hurry him up in doing the work which may have been

meant for more people to do. The working conditions were not safe or conducive and I do find that the Appellant was in breach of his duty of care and contractual duty to provide a safe working system.

The Respondent admitted that his employer could have done nothing to prevent the accident. What this means is that the Respondent did contribute to the occurrence of the accident since he had said that it happened because he was being hurried to finish the task. I will find like the trial court and apportion liability at 20% as against the Respondent.

It is trite law that an appellate court will not interfere with an award of damages by a trial court unless it is demonstrated that the damages are inordinately high or low or that they amount to an erroneous estimate of the damages or that the trial court applied wrong principles in arriving at the award. An award of damages should also be reasonable and not punitive to the Defendant. See **Kemfro Africa Ltd Vs Lubia & Another (1987) KLR 30**.

The Respondent said that a tree fell on his wrist as a result of which he was injured. Dr. Omuyoma examined him, prepared a medical report (**Exh.DNo.2**) on 17/11/2003. I find that the Respondent had sustained severe soft tissue injury to the left hand and at the time of examination, it had healed. The doctor assessed degree of injury as harm. He was also examined by Dr. Angelo D'cunha on 21/4/2004 but the injuries observed in Dr. D'cunha's report must have related to an injury that occurred on 7/10/2002. Whereas Dr. Omuyoma examined the Respondent on 17/11/2003 for injuries sustained on 21/4/2003. Dr. D'cunha's report was therefore not relevant in this case. The Plaintiff's counsel suggested an award of Kshs.100,000. Reliance was made on the case of **Florence Wairimu Vs Tom Juma Nginya Hcc No. 3644 of 1990**, where the Plaintiff sustained severe soft tissue injuries to the left thigh resulting in damage to the great saphenous vein and lymphatics and an award of Kshs.85,000 was made. The injury in the above cited case were much more serious than what the Respondent herein sustained. The appellant suggested an award of Kshs.40,000 and relied on **Nakuru Timber Cases Vs Kephah Siminwo Hcc No. 28 of 2001**, where an award of Kshs.80,000 was made for severe injuries.

I find the award of Kshs.80,000 was inordinately high and a wrong estimate of the injuries that the Respondent suffered and hereby set it aside. I make an award of Kshs.50,000 as general damages plus proved special damages of Kshs.2000, less contribution of 20%. The Appellant was partially successful and will have half the costs of this appeal. Costs of the Lower Court to the Respondent.

**DATED and DELIVERED** this 14<sup>th</sup> day of October, 2011.

**R. P. V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Njogu holding brief for Mr. Mboga for the Appellant

No appearance for the Respondent

Court Clerk - Kennedy