IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 192 OF 2008

(Being an appeal from the Judgment/Decree of Hon. S.M. Soita, Principal Magistrate, Molo delivered on 2nd December, 2008 in Molo PMCC No. 264 of 2003)

TIMSALES LIMITED……..….APPELLANT

VERSUS

PENINA ACHIENG OMONDI…….….RESPONDENT

JUDGMENT

On 21/11/03, Penina Achieng Omondi, the respondent herein filed a suit, PMCC 264/03 in Molo Court. In the plaint the respondent stated that she was an employee of the appellant, Timsales Ltd, as of 9/2/2001 and that it was a term of employment contract between the appellant and the respondent that the appellant had a duty to take all reasonable precautions for the safety of the respondent while engaged at work, would not expose the respondent to risk of danger or injury, and would provide the respondent with a safe and proper system of work. On 9/2/2001 while the plaintiff was lawfully on duty, she was hit and seriously injured by a piece of timber and she blamed the injuries on the negligence of the appellant for breaching the duty of care. In the alternative, it was stated that the appellant was in breach of the contract of employment in that it failed to provide the respondent with safe working system, exposed the respondent to injury, failed to provide the plaintiff with protective devices. As a result she sustained a deep cut wound on the left index finger and severe soft tissue injuries of the left index finger. The trial court apportioned liability at 80% to 20% in favour of the respondent and made an award of Kshs.100,000/-.

Being aggrieved by both the trial court's finding on liability and quantum, the appellant preferred this appeal based on 8 grounds which are set on the memorandum of appeal. Mr. Murimi, counsel for the appellant summarized them into 4 grounds as follows:-

1. **Whether the respondent was an employee at the time of the alleged injury;**

2. **Whether the respondent was injured at her place of work as alleged;**

3. **Whether negligence was proved to required standard;**

4. **Whether quantum was excessive.**

The respondent testified as PW1 and recalled that on 9/2/2001, she was working for Timsales Ltd and was at Cross cutter section marking timber from the cross cutter to the timber yard. She was marking the

timber for the machine and passing the pieces to others. There were two others pushing the timber from the other side to the operator. As she did so, a piece of timber from the operator hit and injured her because he pushed it without her seeing. She was injured on her left index finger, the supervisor was called and she was taken to Elburgon Nyayo Hospital on the same day where the finger was stitched and dressed. She was also examined by Dr. Omuyoma (PW2) who prepared a report. She said she was a casual worker and was not aware of the muster roll or accident register. She said she worked on 9/2/2011 till 8.30 a.m., when she was injured. PW2 got his information from a medical card issued to the respondent by Elburgon Nyayo Hospital which bore OB No.1421.

The appellant called two witnesses, DW1, Nahashon Maina Mwangi, who works for the appellant, confirmed knowing the respondent as her supervisor. His duties were filing the muster roll, the accident register and allocating duties. He denied that the respondent was at work on 9/2/01 when she alleges to have been injured. He also denied that the respondent ever came into contact with timber but worked as a production clerk. According to the muster roll the respondent's last working day was 8/2/01 (DEXH 2) and no accident was reported. DW1 is the one who was to report the injury if there had been any and the personnel would have entered it in the Accident Book.

Although it was denied in the defence that the respondent was an employee of the appellant, DW1 did admit that the respondent worked with the appellant as a clerk and worked upto 8/2/01. A must roll (DEXH 1) was produced in evidence and does contain the respondent's name. DW1 testified that the respondent was not on duty on 9/2/01 the date she claims to have been injured but, it is obvious that the entry of that date has been tampered with. The letter 'A' which is supposed to stand for (Absent) had an overwriting on it. That casts doubts on the authenticity of the record. Besides, PW1 said that on 9/2/2001 she left work at 8.30 a.m. once she was injured. The court was not told at what time the muster roll is filled. I am satisfied that the respondent was an employee of the appellant and was on duty on that date she claims to have been injured but left early.

Mr. Murimi submitted that although the respondent claimed to have been treated at Elburgon Nyayo Hospital she did not produce the treatment chit; that Dr. Omuyoma saw the respondent 2½ years after the alleged injury and failure to produce the treatment chit was fatal to the respondent's case. In reply, Mr. Moseti urged that it is the mistake of the respondent's advocate that the treatment chit was not produced in evidence yet it was marked for identification and that in any case failure to produce the treatment card was not fatal to the respondent's case. Reliance was made on **Timsales Ltd V. Stanley Njihia Macharia CA 148/05 (NKU)** and **Timsales Ltd V. Harun Thuo Ndungu CA 102/05 (NKU).** The court found that failure to produce the treatment notes was not fatal to the respondent's case.

There are two positions that have been taken by the courts on whether or not failure to produce the treatment card is fatal to the complaint's case. One position is as stated in the cases – **Timsale Ltd V. Stanley** and **Harun Thuo – 148/05** and **102/05**. The other position is that failure to produce the treatment card is fatal to the complainant's case (see **Eastern Produce (K) Ltd V. James Kipketer Ngetich**). In my view, whether or not failure to produce the treatment card is fatal to the respondent's case depends on the individual case. In this case, the card was marked for identification and reference was made to it in evidence. For some reason the advocate did not have it produced. Further PW2, Dr. Obed Omuyoma in making his report on 8/9/03, referred to the treatment card from Elburgon Nyayo Hospital, OB 1421 and the injuries in the treatment card were consistent with what he found on the respondent upon examination, that she had sustained a deep wound on the left index finger and severe soft tissue injury to that finger. I am satisfied that the respondent was injured in an industrial accident while at work.

The appellant denied that negligence was proved against it. In her testimony the respondent explained how she sustained the injury. She was marking timber and passing it to others and 2 others were pushing timber from the other side. It was pushed without her seeing as a result of which she was injured. She said that had she been issued with gloves she would not have been injured. There is no evidence that she had been issued with gloves. In the plaint, it had been pleaded that the appellant failed to provide working apparel/devices. Failure to provide working apparel attracts strict liability under the **Factories Act**. The respondent said that she did not see when the timber that injured her was pushed which means that she was not very attentive and therefore was partially to blame for the injury to herself. The trial magistrate

apportioned liability at 80% to 20% in favour of the respondent. The respondent has a duty of care owed to herself and I agree with the trial court's finding on liability.

Dr. Omuyoma found that the respondent sustained a deep cut wound on the left index finger and severe soft tissue injuries to the left index finger. The respondent had submitted an award of Kshs.120,000/- and reliance was made on **Beatrice Naliaka Nalianya V. Michael Kinuthia Kariuki HCC 1251/92,** where an award of Kshs.80,000/- was made in March 1994 for a cut wound on the right 3rd finger index and blunt injury to the chest and was left with scars on the chest, right index finger, 3rd finger and blunt injury to her chest leaving scars. On the other hand, the appellant suggested an award of Kshs.30,000/- and relied on **Nakuru Timber V Kephagh Siminwi Njomo NKU HCC28 of 2001** and **Scofinaf Ltd V. Joshua Ngugi Mwaura NRB HCA 742 of 2003,** where an awarded of Kshs.70,000/- was reduced to Kshs.20,000/- where only the right forearm was injured.

The law is settled that an appellate court will not interfere with an award of damages by the trial court unless it is satisfied that the trial court took into account an irrelevant factor of failed to take into account some relevant factor or that the damages are inordinately high or low, that they amount to an erroneous assessment (see **Kemfro Ltd V. AM Lubia & Olive Lubia**).

Having taken into account the comparable decisions and awards made, I find the award made by the trial court to be inordinately high. In my judgment I make an award of Kshs.60,000/-. The respondent will also have special damages of Kshs.2,000/-. In the end the respondent will have judgment of Kshs.62,000/- less contribution of 20%. It works down to Kshs.49,600/-.

The appellant will have half the costs of the appeal having partially succeeded. The respondent will have costs in the lower court. It is so ordered.

DATED and DELIVERED this 11th day of November, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Muchela holding brief for Mr. Murimi for the appellant.

Ms Nasimiyu holding brief for Mr. Gekonga for the respondent.

Kennedy – Court Clerk.