IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 159 OF 2008

(Appeal from the Judgment of the Senior Principal Magistrate dated 7th October, 2008 in Molo Senior Principal Magistrate's Court Civil Case No. 43 of 2008)

TIMSALES (K) LTD..APPELLANT

VERSUS

GRACE BOSIBORI..RESPONDENT

JUDGMENT

This is an appeal arising from the judgment and decree of the lower court in which the court awarded the plaintiff herein general and special damages of Kshs.880,000/- on 7/10/08. The defendant was aggrieved with the lower court's decision and preferred this appeal citing 9 grounds. The appeal was opposed.

Grace Bosibori Rioba brought the suit in the lower court, as the legal representative of the estate of Thomas Mongare Magoma who was an employee of the defendant as a timber jack driver. The deceased met his death while on duty at Kipchoma Tea Estate on 25/6/07 when a tree or branch fell on him as a result of which he sustained fatal injuries. The plaintiff attributed the injuries to the negligence of the defendant. The particulars were pleaded at paragraph 7 as follows:-

(a) Failing to take adequate precaution for the safety of the plaintiff;

(b) Exposing the plaintiff to a risk and injury, which the defendant knew or ought to have known;

(c) Failure to take any adequate measures to ensure the deceased was not injured;

(d) Failure to provide a safe working system for the deceased;

(e) Failure to warn the deceased about the dangers before hand;

(f) Failure to train the plaintiff about the risks involved in his place of work;

(g) Failure to provide quick first aid and medical attention.

The plaintiff was not present when the tree allegedly fell on the deceased. She only received information of the incident. DW1 who was with the deceased at the time of the incident testified that he went to the forest in company of the deceased. The deceased asked him to tie a tree and he alighted from the timber jack to survey where the tractor could pass. That the deceased then asked the man with the power saw to cut for him a tree that was obstructing him. As the tree was giving way the wind blew it and pushed it to another direction and it fell on him. According to DW1, they usually tie a rope on the tree being felled to ensure the tree falls in a particular direction but in this day, the tree was not tied as the wire was short and the wind was heavy. He admitted that the tree was not tied as the wire was shot. He denied that they were trained in tree felling and that on this date, the vehicle that takes the injured to hospital was not available and they used the tractor to take the deceased to hospital.

In its defence, the defendant denied all the particulars of negligence attributed to it and pleaded that the accident that occurred was due to an act of God which could not be reasonably anticipated and denied that it was liable to pay for any of the claims sought.

The first ground of appeal that Mr. Mahida urged is that the magistrate failed to comply with **Order 20 Rule 4** of the **Civil Procedure Rules.** Mr. Magata counsel for the respondent urged that by the magistrate stating that he had carefully considered the evidence, he had complied with Order 20 Rule 4. Order 20 Rule 4 requires that a judgment in a defended suit should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. In my considered view, the magistrate never analysed the evidence laid before it but only summarized the case for the case for the plaintiff and defence and made a determination for which he did not give reasons. I find that the court failed to comply with **Order 20 Rule 4** of the **Civil Procedure Rules.** However, this court being the first appellate court has the jurisdiction to evaluate the evidence afresh and make its own findings and draw its own conclusions. The decision of the magistrate cannot be vitiated just because there was no analysis of the evidence by the trial court.

The appellant further contended that the plaintiff failed to comply with terms of the contract which were alluded to at paragraph 4 to 7 of the plaint. At paragraph 4 of the defence, the defendant denied each and every allegation of negligence or that it was in breach of the contract of employment. Mr. Mahida urged that there was no shred of evidence in support of the above mentioned allegations. It is true that PW1 was not at the scene of the incident save for the defendant's witness, DW1 who explained what happened. He did agree that they were cutting a tree to make way for the tractor when a strong wind came and blew it. He further agreed that they would normally use a rope to tie the tree to help guide a tree where it would fall. In the instant case, the tree was never tied because the wire was too short. Even when there is no wind the defendant's employees used a wire/rope to help the tree fall in a particular direction. Had the defendant availed the necessary length of wire to tie the tree, the wind may have never blown the tree in the direction of the deceased. Had the defendant tied the tree with the wire and a wind came and blew it in the deceased's direction, the defendant would have done all it could in its powers to ensure the tree fell in a different direction but the wind blew it to the direction where the deceased was. That is when the defendant could plead an act of God. In my view, the defendant was in breach of the contract of employer by not providing a safe working environment for the deceased and the other employees. The deceased could only perform his duties once the tree was removed from the way. Had a long wire been supplied by the defendant, the incident may never have occurred. In **RYDE V BUSHELL & ANOTHER (1967) EA 817** the East African Court of Appeal held as follows:-

> **"(i) The plea of Act of God is available to relieve a defendant from liability for damages suffered following the performance of part of his obligation and not merely to absolve the person from the performance of an obligation;**
>
> **(ii) Noting can be said to be an act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence."**

In the instant case, the appellant cannot avail itself the defence of an act of God because the falling tree was not exclusively due to natural causes. It was being cut by the defendant's employees who did not have a rope or wire to help direct it to fall in a safe direction. Besides a blowing wind was not exactly unforeseeable in the circumstances. It was the defendant who raised the defence of an act of God and should have proved it. The defendant failed in its obligation of not providing a rope/wire to tie the tree. I find that it was not proved.

As to whether the accident occurred in the course of the deceased's employment, the tree was being cut so that he could access the forest. With the tree in his way he could not have performed his duty. It is my view that the accident occurred while the deceased was in the

course of the his employment and he was not in breach of his contract of employment.

DW1 also admitted in his evidence that the deceased was taken to hospital on the tractor instead of the vehicle that normally did that. That evidence supported the plaintiff's allegation that the defendant did not provide a quick first aid and medical attention. No explanation was given as to why the vehicle was not immediately available.

The court apportioned liability at 90% to 10% in favour of the plaintiff. It did not give reasons for that. The defendant has not pleaded contributory negligence on the part of the plaintiff and the magistrate had no jurisdiction to apportion liability without being moved to do so. In **MAINA KANIARU & ANOTHER V. JOSEPHAT MURIUKI WANGONDU, CA 14/1989** the court held that it is wrong for the court to make a finding of contributory negligence when contributory negligence is not specifically pleaded. The defendant had blamed the accident on an Act of God and in my view it was erroneous for the magistrate to find that the deceased was partially to blame putting his contribution at 10%.

The plaintiff was awarded damages both under the Law Reform Act and Fatal Accidents Act. The plaintiff was awarded Kshs.90,000/- for loss of life and Kshs.9,000/- for pain and suffering under the Law Reform Act. The defendant contends that the said sum of Kshs.99,000/- should be deducted from the total award. The court in **MAINA KANIARU** (supra) held that if damages recovered under the Law Reform Act devolved on the dependants of the deceased, the same must be taken into account by reduction from the damages recovered under the Fatal Accidents Act. The Court of Appeal adopted a House of Lords decision in **DAVIES AND ANOR V POWELL DUFFROY ASSOCIATED COLLIERIES LTD (1942) ALL ER 657.** The plaintiff's counsel did not specifically respond to this submission. The issue of whether or not the damages under Law Reform Act should be deducted is still a grey area with different opinions from different courts. In this case, based on the Court of Appeal decision, I will agree with the defendant's submission that the damages awarded under the Law Reform Act should have been deducted from the award.

The defendant objects to Kshs.25,500/- paid to the firm of Onkoba Omariba & Co. Advocates as advocates fees for purposes of obtaining grant of letters of administration from being recovered as damages. There is no basis for the award of Kshs.25,500/- paid to the advocates as fees to counsel to obtain letters of administration. Section 6 of the Fatal Accidents Act only allows recovery of funeral expenses. Payment of fees to an advocate to file succession proceedings is not a funeral expense.

In ascertaining dependency the lower court used the gross salary of the deceased which was Kshs.10,500/-. The defendant objects to the use of this figure and I do agree that the figure that should have been used to determine dependecy was the basic salary. Items like house allowance are not reckoned because they only become due after they earned. For that reason, the loss of dependency should have been calculated as follows:-

8,700 x 12 x 10 x $^{2}/_{3}$ = 696,000.00

Pain and suffering - 9,000.00

Loss of life - 90,000.00

- 795,000.00

Loss damages under Law Reform Act - 99,000.00

= 696,000.00

In sum, I would find that the plaintiff was only entitled to Kshs.696,000/- damages for loss of dependency. There was only proof of Kshs.50/- special damages. The appeal succeeds in part and the plaintiff's total entitlement will be Kshs.696,050/- plus ¾ of the costs and interest at court rates.

DATED and DELIVERED this 26th day of November, 2010.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Magata for the respondent

Mr. Nyambane for the appellant

Kennedy – Court Clerk