**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAKURU**
**CIVIL APPEAL NO. 275 OF 2004**
***(Being an appeal from the Judgment/Decree of Hon. A. B. M. Mongare, Resident Magistrate, Nakuru delivered on 18th November, 2004 in Nakuru CMCC No. 2489 of 2003)***
**AMALGAMATED SAWMILLS LIMITED…….....……**
**…….……..APPELLANT VERSUS**
**JOSEPH NJOROGE MATHERI……..**
**….....……RESPONDENT**

**JUDGMENT**

The Respondent was the Plaintiff in Nakuru Chief Magistrate's Court Civil Suit No. 2489 of 2002. In that suit the Respondent sought general and special damages, costs and interest thereon.

The suit went to full trial and at the end thereof the court found the Defendant *(now Appellant)* 100% liable in negligence and awarded the Respondent general damages in the sum of Kshs 60,000/= together with costs and interest.

Aggrieved with the said judgment and orders the Appellant filed a Memorandum of Appeal dated 2nd December 2004 and a Record of Appeal on 13th July 2006. The grounds of appeal are these -

***(1) that the learned Magistrate erred in law and in fact in reaching findings of fact on the place of the alleged accident and other crucial items against the weight of the evidence adduced in court.***

***(2) that the learned trial Magistrate erred in law and in fact in failing to appreciate the fact that the onus of proof was on the Plaintiff and therefore shifted the burden by holding that the Plaintiff had proved her case on the set standard on the basis of scanty evidence despite the fact that the Plaintiff did not produce in evidence the initial evidence of injury and only relied on a medical report which was not more than hearsay evidence having been prepared more than two years from the date of the alleged accident.***

***(3) that the learned trial Magistrate erred in law and in fact in failing to consider the defence submissions and in failing to find that the Plaintiff's evidence was at variance with the pleadings and wholly contradictory.***

***(4) that the learned trial Magistrate erred in law and in fact by finding the Defendant 100% liable for the alleged accident without giving reasons for her finding and without giving reasons for her finding and without analyzing and/or scrutinizing the conduct of both the Plaintiff and the Defendant and coming to a conclusion who was at fault.***

***(5) that the learned trial magistrate erred in law and in fact in denying the Defendant to call a second witness who was outside court and in closing the defence case when the Defendant's Counsel was calling the second witness outside court and thereby occasioning miscarriage of justice.***

***(6) that the trial magistrate failed to critically evaluate the evidence on record and failed to accord the Defendant's evidence and submissions due weight to the extent that it was able to demonstrate that indeed the Plaintiff's claim was fraudulent and blatant abuse of the court process.***

***(7) that the learned Magistrate misapprehended the doctrine of negligence and the respective obligations of parties under the contract of employment and erred in wrongly applying the doctrine and/or appreciating and upholding the parties obligations and thereby failing to apply the same in the case altogether thereby imposing incongruous liability on the Defendant.***

And for those reasons the Appellant prayed that -

***(1) the judgment/decree of the Honourable Court dated 18th November 2004 be revised and/or set aside.***

***(2) The Respondent do bear the costs of this Appeal.***

The appeal was argued before me on 21st July 2010, by Mr. Murimi, learned counsel for the Appellant and was opposed by Miss Nyegei, learned counsel for the respondent. Although both counsel argued for and against the appeal by reference to the grounds, *(as indeed they should),* the appeal herein raises two basic questions for determination by this court, ***firstly,*** whether the Respondent was an employee of the Appellant, ***secondly***whether the Respondent was injured in the course of his employment in the Appellant's premises, and ***thirdly***whether the Respondent led evidence to prove his claim.

As expected, Mr. Murimi learned counsel for the Appellant submitted on the last question by reference to grounds 4, 1, 6 and 2 of the Memorandum of Appeal and submitted at length with authorities that the learned trial magistrate's judgment is not in accord with the requirements of Order XX rule 4 of the Civil Procedure Rules, and asked the court to re-write it in terms of Section 78 of the Civil Procedure Act. Counsel asked the court to be guided by the decision of the court in **NAKURU INDUSTRIES LTD VS. BERNARD LIDORO** *(Nakuru HCCA No. 35 of 2002).*

Mr. Murimi submitted that the trial magistrate failed to evaluate the evidence before it and that the final judgment cannot be justified, that there was for instance no evidence of treatment at Njoro Health Centre where the Respondent testified, he was treated, that he did not produce any evidence of that treatment, that the Respondent's name did not appear on the record produced by the Records Officer from Njoro Health Centre and thus showing the Respondent was not treated at that Centre, and that the judgment of the trial court did not make any reference to that evidence - which was evidence of an independent witness, and ought to have been given due weight.

Counsel submitted that the Respondent's case could not stand for failing to produce material evidence. For instance if a treatment card is a forgery, the case ought to be dismissed. Counsel referred the court to the cases of **AMALGAMATED SAWMILLS LTD VS. TABITHA WANJIKU** *(Nakuru HCCA No. 272 of 2004),* and **TIMSALES LTD vs. WILSON LIBUYWA** *(Nakuru HCCA No. 135 of 2006).*

The evidence of Dr. Omuyoma was not adequate, for failure to produce an original treatment card in a vicarious liability case is fatal except where there is evidence to corroborate the doctor's opinion and that this was not the case here.

Finally counsel submitted that no case was made in negligence against the Appellant, that Respondent's testimony was merely that he slipped and fell into a trench, and did not attribute it to the negligence on the part of the Appellant. Negligence, counsel submitted must be proved, there must be a nexus between the cause and the injury. Counsel relied upon the case of **TIMSALES LIMITED VS. SIMON KINYANJUI NJENGA** *(Nakuru HCCA No. 143 of 2003).*

**On Ground 3** Mr. Murimi submitted that there was a divergence between the Respondent's pleadings and his evidence. Whereas the plaint *(para. 5)* refers to injuries caused by pieces of timber, as a result of which he sustained severe injuries, the Respondent's evidence was that he was cut by a wire. Counsel therefore submitted that to the extent there was inconsistency between the pleadings and the evidence, the claim ought to have been dismissed, as evidence must support the facts pleaded. Counsel relied on the case of **WAREHAM t/a A. F. WAREHAM & 2 OTHERS VS. KENYA POST OFFICE SAVINGS BANK LTD (2004) K.L.R. 91.**

And on **Ground 5** - Denial to call a witness. Mr. Murimi submitted that the trial court denied the Appellant an opportunity to call a second witness. For this reason alone the appeal should be allowed, counsel submitted.

As I have produced the Appellant's counsel arguments in *extenso* I shall do the same to the submissions by Miss Nyegei learned counsel for the Respondent. She opposed the appeal.

On **ground 4** of the Grounds of Appeal Miss Nyegei submitted that the Appellant was 100% liable. The Appellant did not provide protective gear to the Respondent, and that the Appellant did not adduce any evidence to controvert the evidence of the Respondent. Counsel also relied on the case of **AMALGAMATED SAW MILLS LTD vs. TABITHA WANJIKU** *(supra)* and asked this court could re-write the judgment of the lower court.

Miss Nyegei submitted that Ground 1 of the appeal should fail. The evidence was analysed, there was no fraud. DW1 was not working at the Health facility at the time of the Appellant's treatment and besides was not a records officer.

On ground 2 of the appeal, Miss Nyegei submitted that the Respondent did discharge his obligation and gave evidence of treatment at the health facility, and the findings of Dr. Omuyoma. Counsel relied on the case of **Nakuru Industries Ltd vs. Wilson Libuywa** *(supra).*

On **ground 5**, Miss Nyegei submitted that it was the duty of a litigant to call a witness, or apply for a witness summons to issue, and submitted that the cases relied upon by the Appellant were distinguishable in that there was evidence on those cases whereas there was none in this case.

Counsel called for the dismissal of the appeal. Those were the respective counsel's arguments.

**ANALYSIS OF SUBMISSIONS AND EVIDENCE**

To determine the rival claims, I will go back to the primary issues, and those issues are whether the Respondent was an employee of the Appellant and was at work on the material day and whether the Respondent was injured at the Appellant's premises, on that date.

Whether or not he was treated only goes to show the degree of injury or injuries the Respondent may or may not have suffered.

It is clear from paragraph 3 of the Appellant's Defence that the Respondent was an employee of the Appellant even if he was not employed as a machine operator. The Appellant led no evidence at all to disprove the Respondent's claim that he was employed as such machine operator.

In this regard the Appellant's counsel contended that the Appellant was denied an opportunity to call a witness. Mr. Murimi referred the court to p. 22 of the record to show that the Appellant did not close its case.

The closure of a case is a matter of both fact and law. It is a matter of law because Order XVII of the Civil Procedure Rules lays down the procedure for hearing of the suit, the calling of witnesses, and their examination and the rights of the parties inter se as to who should begin giving evidence. The rule is that the Plaintiff usually begins his case, his witnesses are cross-examined by the opposite party or defendant's counsel. Any witness can be recalled for examination if necessary.

When a party closes his case, is a question of fact. He or his Advocates informs the court that the end of the evidence of a particular witness is also the close of his case - Plaintiff or Defendant. It is a fact to be recorded by the court.

In this case, Mr. Murimi referred the court to p. 21 of the Record of Appeal which clearly shows that the Respondent closed its case with the submission of Dr. Omuyoma's Report by consent of the parties' counsel.

What follows at pp. 21-22 is the evidence of DW1, one Dorcas Muthoni Kihoto a Clinical Officer, and not even a Records Officer at Njoro Health Centre at the time when the Respondent was treated at that facility and she testified in re-examination by Mr. Murimi that the patient usually keeps the original out-patient card.

Thereafter there is an order by the court - ***"written submissions, on 12/11/2004".*** There is no indication by Mr. Murimi that he was calling another witness. I would therefore agree with Miss Nyegei's submission that it is the duty of a litigant to call a witness or apply for issue of a witness summons. There is complete silence on the part of the appellant's counsel. I do not think it is open for a party to cry on appeal that it was denied an opportunity to call a witness when counsel failed to state clearly or at all that the party was calling one or more or another witness. This ground of appeal has no basis. I reject it.

I now advert to the all important question whether or not the Respondent discharged the onus placed upon him to prove his case. Indeed this was the bulk of the Appellant's submissions on grounds 4, 1, 6 and 2 of the Memorandum of Appeal.

The Respondent's case was quite simple. There was no denial that he was on the material date an employee of the Appellant. He was on duty. He slipped and plunged his leg into same trench of water. He was injured on his knee. His Plaint stated that he was injured by some plunk of timber. His evidence referred to injury by a wire. That certainly was a contradiction. Mr. Murimi argued that there must be a nexus between the injury and the cause. The question is, what is the cause, of the injury, the plunk of

timber, or the wire or the wood or even a nail? It is neither, the cause of the injury is the plunging down of the leg down an open or unprotected trench on the shop floor premises of the appellant. Whether it is a piece of wood or wire that causes the actual injury below is a minor point of real little consequence to the Appellant's liability.

The lower court found the Appellant 100% liable in negligence. There was no basis for that finding. The Respondent was aware of these premises. He had walked and been on that floor for nearly two years. He cannot claim to have been an invitee, and therefore unaware of them. I would apportion no less than 20% contributory negligence on his part.

On the other submissions by Mr. Murimi relating to the Respondent's treatment at Njoro Health Centre, and purported rejection of Dr. Omuyoma's Report, I am afraid that this is a rather disingenuous argument. Whereas I agree with the authorities cited that it is necessary to produce the primary card evidencing treatment, once a Doctor's Report has been admitted in evidence by consent I think it is not open to a party on appeal to try and repudiate that report or evidence. Failure to produce a treatment card cannot therefore be fatal to an employee's claim.

What I find disappointing in these appeals is the brevity of evidence. There appears to be general unwillingness by management to come and testify, and usually resort to technicalities and try and fault claimants as cheats preying for free awards from their erstwhile employers. Although the awards are generally small amounts, employer companies drag on appeals on the simplest technical excuses. No evidence is led directly that the Respondent was an employee, that he was no duty on the material day, that he was himself careless etc.

Evidence is led to show, he was not treated at this or that facility. His colleagues are scared to testify on his behalf. They might lose their jobs, however humble. These technical objections, do not enhance the cause of justice for labour. In this case I find specifically -

***(1) There was evidence to find the Appellant liable.***

***(2) The liability of the Appellant should have been tampered by the Respondent's own knowledge of the premises, and therefore be reduced by 20% contributory negligence.***

***(3) The lower court failed to analyse and evaluate the evidence so as to find the Respondents own contributory negligence.***

***(4) There was no finding as to special damages. There was no evidence of receipt that respondent paid Shs 2,600/= for Dr. Omuyoma's Report.***

***(5) This long rambling judgment has filled some of the inadequacies of the lower court's judgment and included the points for decision, the decision thereon and reasons therefor.***

For those reasons therefore I would allow the appeal to the extent of 20% contribution negligence on the part of the Respondent and award the Appellant damages as follows -

***(1) General damages for pain and suffering Shs 60,000/=***
***Less 20% contributory negligence. Shs <u>12,000/=</u>***

***48,000/=***

***(2) Special Damages not proved***

***(3) Total sum Shs <u>48,000/=</u>***

I would also award the Respondent interest at court rates from the date of the lower court's judgment, to payment in full. The Respondent would also have the costs of the appeal herein.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 12th day of November 2010**

**M. J. ANYARA EMUKULE**
**<u>JUDGE</u>**