REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 111 OF 2005
(Being an appeal from the Judgment/Decree of Hon. A. B. M. Mongare, Resident Magistrate, Nakuru delivered on 2nd June, 2005 in Nakuru CMCC No. 79 of 2003)

TIMSALES LIMITED…….....
……..APPELLANT
VERSUS
DANIEL KARANJA BISE…….....
……RESPONDENT

JUDGMENT

TIMSALES LIMITED *(the Appellant)* was sued by Daniel Karanja Bise (the Respondent) for general and special damages, costs and interest in Nakuru R.M.C.C.C. No. 79 of 2003. At the end of the hearing the trial court found for the Respondent -

(1) General damages Kshs 45,000/=
(2) Special damages Kshs 2,500/=
Sub-total 47,500/=
(3) Less 10% contributory negligence Ksh 4,750/=
(4) Grand Total Kshs 42,750/=

The court also awarded the Respondent costs and interest on the said sum.

Aggrieved with the said judgment and award, the Appellant appealed to this court on four grounds namely -

(1) THAT the learned trial Magistrate erred in law and fact in finding that the plaintiff had proved his case on a balance of probability without dealing with the preliminary issue of whether or not the plaintiff was indeed injured while on duty and by ignoring the defendant's evidence proving the contrary,

(2) THAT the learned trial Magistrate erred in law and fact in holding the case proved in the absence of crucial medical evidence and by denying the defendant the chance to summon the witness who would have testified to the falsity of the plaintiff's treatment card allegedly issued at Elburgon Nyayo Hospital and relied on by the plaintiff's doctor thereby occasioning miscarriage and justice,

(3) THAT the learned trial Magistrate erred in law and fact in failing to properly deal with the evidence adduced in court and thereby reaching findings of fact which were totally unwarranted and unreasonable,

(4) THAT the trial Magistrate erred in law in finding the defendant liable to the extent of 90% without basis in law and fact especially on the basis of negligence.

And on the said grounds, the Appellant prayed that -

(1) the judgment/decree of the Honourable Court dated 2nd June 2005 be reviewed and/or set aside.

(2) the Respondent do bear the costs of the Appeal.

THE ISSUE AND COUNSEL'S ARGUMENTS

The appeal in my humble view raises one basic question or issue, whether there was evidence on the balance of probability for the trial court to come to the conclusion it did. Mr. Murimi who urged the Appeal on behalf of the Appellant argued that there was no such evidence, and if there was the trial court failed to analyse it as required by Order XX rule 4 of the Civil Procedure Rules.

Mr. Gekong'a who appeared for the Respondent held a different view, and prayed that the appeal be dismissed with costs.

Section 78(2) of the Civil Procedure Act *(Cap. 21, Laws of Kenya)* confers upon an appellate court the same jurisdiction as is conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted therein. The appellate court may determine the suit finally, frame issues and refer them for trial, it can also take additional evidence or require evidence to be taken or even order a new trial.

For most appeals, the purpose is to determine the suit finally, subject only to an appeal to a higher court.

The judgment of the lower court is not with respect to the learned Resident Magistrate a paragon of drafting, or analysis of issues as required by Order XX rule 4. It is difficult to discern a concise statement of the case, points for determination, the decision thereon and the reasons for such decision as required by the said order of the Civil Procedure Rules - **WAMUTU vs. KIARIE [1982] KLR 480.**

This being the case, it behoves this court as the first appellate court to examine and re-evaluate the evidence, and make its own findings and draw its own conclusions.

The commencement point is the pleadings of the parties. According to the paragraph 3 of the Plaint dated 3rd January 2003, the Respondent was an authorized employee of the Appellant. Paragraph 3 of the Appellant's defence is a typical tongue in the cheek - defence. **Firstly** it purports to deny that it ever employed the Respondent. **Secondly** it avers that if it did employ the Respondent, it did not employ him on the terms alleged in the plaint and it therefore put the Respondent to strict proof of his claims.

THE EVIDENCE

The Respondent was unemployed when he gave his evidence on 13th August 2003. However at the time material to these proceeding he was working for the Appellant as a casual worker and had been at the job for just over one year. He worked in the Boiler Section feeding waste *(wood!)* into the boiler for steaming trees. He testified that in the course of moving and shoving the waste wood into the fire, he slipped and fell, injuring his leg. He said:-

"My shoes caused injury on right leg."

The Respondent was treated at Elburgon Nyayo Hospital as Out-patient No. 2633 of 2001, as follows -

(1) given an intramuscular injection of tetanus toxiod (0.5 ml stat procaine penicillin).

(2) Wound cleaned and sterilized.

(3) Put on ibruprofen (brufen)

(4) stitches removed after one week.

This information was contained in the Respondent's Treatment Card called **"HISTORY AND PHYSICAL EXAMINATION AND TREATMENT"** marked for identification as "DKB1" in the Respondent's evidence. I shall return to this card later in the course of this judgment.

The Respondent testified that he was with workmates, Awilo and Muganda, the Supervisor. The Respondent also testified that he had not recovered fully and still experienced pain in his leg. He blames the Appellant for failing to provide him with aprons and gum boots, and further stated that he would not have fallen and injured himself if he had been provided with those items.

When cross-examined by Mr. Kisilah learned counsel whether he had any hospital attendance card, the respondent testified that he had one Hospital Attendance Card which he had obtained from Nyayo Hospital, and had entries from previous and subsequent attendances for other ailments such as coughs, flu's etc. All that he remembers on the day of the accident, he fell unconscious and was rushed to hospital by the supervisor in the Appellant's motor vehicle.

PW2 was Dr. Wellington Kiamba. He examined the Respondent on or about 2nd December 2002, that is about 1 year and 9 months after the accident of 7th April 2001. He made his report both upon physical examination of the Respondent and from the history and treatment card from Elburgon Nyayo Hospital. He found the Respondent had a 12cm scar on his posterior aspect *(right leg),* but that the Respondent was in a good stead of health. His prognosis or opinion was that the Respondent had recovered from the deep cut wound he sustained during the accident, the wound had healed well but with a permanent scar. He described the injury as **"harm"** and awarded him a temporary degree of disability of one week. PW2 charged the Respondent Shs 2,000/= through his Advocates, and issued a receipt for the said amount. PW2 told the lower court he had charged the Respondent Kshs 5,000/= for coming to testify. No receipt was produced to evidence such payment.

The Respondent closed his case with the Doctor's testimony.

The Appellant called one witness, DW1 - Nicholas Nyangau a Supervisor. DW1 confirmed that the Respondent was an employee of the Appellant and worked under DW1 for one year. The Accident Book *(Register)* shows the Respondent was injured on 19th September 2001 and not 7th April 2001 and stated that the workers - *(sweepers)* are issued with brooms, aprons and over-rolls.

When cross-examined by Mr. Gekonga for the Respondent, DW1 stated -

"… David had worked for almost one (1) year. He was authorized to work. If anyone says that Bise was not a worker at Timsales he is a liar."

In addition to the evidence of DW1, there was also filed as part of discovery, a report by Dr. M. S. Malik, a Consultant Surgeon dated 30th April 2003. This was his prognosis -

OPINION

David sustained a cut over the back of his right thigh as a result of an accident at his place of work on 7th April 2001. He suffered pain and lost some blood. He was seen and treated as an out-patient at a hospital where his cut was sutured under local anaesthesia. He was discharged home on some medicines and his stitches were removed after a week. His cut healed without any complications and has left a scar which will be permanent.

CONCLUSION

He suffered TOTAL incapacity of a TEMPORARY nature for a period of ONE WEEK followed by PARTIAL INCAPACITY of TEMPORARY nature for a further period of ONE WEEK. He has suffered no permanent physical disability.

ANALYSIS OF EVIDENCE

Several conclusions may be drawn from the evidence given by the Respondent and the Appellant's representative -

(1) The Respondent was an employer of the Appellant.

(2) The Respondent was injured while in the course of his duties as an employee of the Appellant.

(3) The accident and injury occurred on 7th April 2001 as pleaded by the Respondent. If the accident occurred on 19th September 2001, DW did not disclose the nature of injury of that date.

(4) The Appellant's Doctor confirmed in his report that the accident occurred on 7th April 2001.

THE HOSPITAL TREATMENT/ATTENDANCE CARD

Considerable time and effort was placed by Mr. Murimi learned counsel for the Appellant to persuade the court to exclude the evidence of the Respondent's treatment at Elburgon Nyayo Hospital as shown in the Respondent's **"History and Physical Examination and Treatment Card"** *(the Attendance/Treatment Card)* which was "marked for identification" presumably by the hospital staff of

the said hospital.

The lack of production of this Attendance/Treatment Card by the proper officer of the Health Facility has been held to be fatal to the plaintiff's or as in this case, the Respondent's case. For instance in **TIMSALES LTD vs. WILSON LIBUYWA** *(Nakuru HCCA No. 135 of 2006)* Maraga J said:-

"Dr. Kiamba's report does not help the Respondent. In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the Plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examines him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether."

This was the position taken by the court in the cases of **AMALGAMATED SAW MILLS LTD VS. STEPHEN MUTURI** *(Nakuru HCCA 75 of 2005),* **and TIMSALES LTD vs. HARUN WAFULA WAMALWA** *(Nakuru HCCA No. 95 of 1995).*

These positions were elaborated by reference to SS 107 and 112 of the Evidence Act, *(Cap. 80, Laws of Kenya),* in the case of **EASTERN PRODUCE (K) LTD VS. JAMES KIPKETER NGETICH [2006]eKLR** where the court in reference to S.112 of the Evidence Act said -

"In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him."

And to Section 107(1) of the Evidence Act says-

"Who ever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."

In **NGUKU vs. REPUBLIC [1985] KLR** - the court held that

"where a party fails to produce certain evidence ..a presumption arises the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony, but can also apply to evidence of a tape recording which is withheld."

This was a decision on a criminal matter, and I doubt its application here.

In **KINATU MBUVI t/a KINATU MBUVI & BROS VS. AUGUSTINE MUNYAO KIOKO [2000]eKLR,** the Court of Appeal referred to its observation on the opinion of experts in the case **NDOLO VS. NDOLO [1995] LLR 390** (CAK) on the opinion of experts where it said -

*"The evidence of PW1 and the report of MUNGA, were, we agree, entitled to proper and careful consideration, the evidence being that of experts, but as has been repeatedly held the evidence of experts must be considered along will all other available evidence and it is still the duty of the trial court to decide whether or not it believes the experts and give reasons for its decisions. A court cannot simply say - "**Because this is the evidence of an expert, I believe it."***

The cases of **NAIROBI CITY COUNCIL vs. THABITI ENTERPRISES LIMITED (Civil Appeal No. 264 of 1996) -** concerned grounds for review and the decision has no application to the discussion in this matter.

And so was the case of **MOUNT ELGON HARDWARE vs. UNITED MILLERS (Civil Appeal No. 19 of 1996)** where a defendant fails to traverse particulars of negligence alleged in the defence, the court was entitled to conclude that the Defendant had admitted those particulars in terms of Order VI rule 9(1).

In this case the Appellant's plea in paragraph 5 of its defence of contributory negligence was not a counter-claim which required the Respondent to reply to it. It was merely a joinder of issues as is envisaged by Order VI rule 10 of the Civil Procedure Rules. It cannot be construed as an admission of contributory negligence on the part of the Respondent. The pleading puts the Appellant in the same position as the Respondent to prove that the Respondent was on his part negligent, hence the accident.

All the above cases were cited to prove or support the proposition that unless a representative of the Health Facility comes to court and produces the Patient's Treatment Card, the Plaintiff's claim, or as in this case, the Respondent's case cannot indeed, or, again, as in this case, the Appellant's Appeal, must succeed.

The view is based upon the perceived wisdom that the Treatment Card and Attendance Card both belong to the Health Facility. In a sense they do, but not quite so. An attendance card is of no evidential value. It will usually consist of the Health Facility's name, the patient's particulars, and attendance number. Its value lies in the fact that if the patient went for repeat treatment, it will be easy to access his treatment record. This is the universal practice in both private and public health facilities.

However in many rural Health Facilities, the Health Facility's Treatment Card is also the patient's attendance card, and is retained by the patient, to be produced each time he seeks repeat or treatment in a different facility whether for an accident or other ailments.

That was the Respondent's evidence. So when he produced a copy of that treatment card it was his Attendance and Treatment Card at not only at Elburgon Nyayo Hospital, but any such or even referral hospital he may attend. It will be the primary document for his physical examination and diagnosis and eventual treatment. Being a public document the production of it in evidence does not require certification by the Health Facility or the testimony of the Health Facility, as would ordinarily be required under Section 82(d)(i) of the Evidence Act.

However if I am wrong in this summation and were for the moment to agree with the Appellant's Counsel's submission that there was no evidence of treatment by excluding the Respondent's Attendance and Treatment Card, could I also say that there was no accident and injury to the Respondent? To so conclude would render the examination of the Respondent by Dr. Kiamba and Dr. Malik an exercise in futility, and consign their opinions to a waste paper bin. Their notes about the scar on the Respondents' thigh 12cm in length would all evaporate and become a figment of imagination. That would be an absurd conclusion.

Other evidence comes into play. Evidence of all surrounding circumstances. In criminal law it is called circumstantial evidence which would go to prove a fact with the accuracy of mathematics.

The Respondent was an employee of the Appellant. He had an accident and was injured while on duty in the course of his employment with the Appellant. He suffered injury to his right thigh. He was rushed to hospital in the Appellant's vehicle. He was treated as per the notes shown to Doctor Kiamba who saw him after about 21 months. He saw him not for treatment but to obtain an opinion of his state of health and in light of his injury. The Appellant does the same with Dr. Malik. Could the Appellant stand up with a straight face and say there was no accident? Again that would fly in the face of the evidence without the **"almighty"** treatment card.

My finding is that there was an accident, the Respondent suffered injury, he was treated, and he recovered well, except for the 12 cm scar. He attributes the accident to the negligence of the Appellant. Was the Appellant negligent?

In the case of **STATPACK INDUSTRIES VS. JAMES MBITHI MUNYAO (Nairobi HCCA No. 152 of 2003)** Visram J. *(as he then was)* said:-

"an Employer's duty at common law is to take all reasonable steps to ensure employees' safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly." (WOODS VS. DURABLE SOLUTIONS [1953]2 ALL ER 391).

Coming now to the more important issue of causation it is trite law that-

"the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is a result of someone's negligence. An injury per se is not enough to hold someone liable for the same."

And in **AMALGAMATED SAW MILLS LTD vs. TABITHA WANJIKU** *(NAKURU HCCA NO. 272 OF 2004),* and **TIMSALES LTD VS. STEPHEN GACIE** *(Nakuru HCCA No. 74 of 2000)* the courts said:-

"A court of law will not just award damages to a litigant because it is sympathetic to him due to an injury which he may have received in his place of work and in the course of his duty if he was under the obligation to prove negligence and breach of statutory duty and he failed to do so. An exception may be made where in the circumstances under which the accident occurred the doctrine of "res ipsa loquitor" applies."

According to **WINFIELD and JOLOWICZ** on **TORT 13th Edn. p. 203**, **- "Employers Liability"**

"At common law the employer'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 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 respects it was not observed."

From the above review of the evidence and discussion, the answer to the basic question whether the Respondent proved its case on the balance of probability, is yes. The accident occurred and he suffered injury as a result of the Appellant's failure to provide extra wear, a non-slip gumboots in addition to the brooms and aprons provided to the workers. DW1 the supervisor testified that the Appellant provides its workers with brooms and aprons. This is no doubt commendable. What would go well with brooms and aprons would be necessary soaps, detergents, and non-slip gumboots! There is every likelihood that if the Respondent had been better equipped, the accident may still have happened but perhaps the Respondent may not have suffered the injuries he did suffer.

The trial court found the Appellant 90% liable for the accident, and apportioned 10% contributory negligence on the part of the Respondent. In the circumstances of this case, I would not find fault with that apportionment. It is not the duty of an employer to baby-sit its employees. It is with respect the primary duty of the factory owner to provide extra safe environment for its workers. They are the creators at an affordable cost of the increase of the venturer's capital and profits.

Lastly, the ultimate question, what should be the proper measure of damages in these circumstances. The Respondent claimed general and special damages. The damages sought by the Respondent herein is for compensation for injury for his pain and suffering. The trial court gave him Shs 47,500/=. He did not cross-appeal. I see no reason for interfering with that award. Special damages must be proved. The Respondent produced a receipt for Shs 2,000/= consultation fee. Dr. Kiamba testified that he charged the Respondent Shs 5,000/= for coming to testify. There was no objection from the Appellant's counsel to that figure as it was testimony from directly from PW2 - the Doctor. In the circumstances I would award the Respondent special damages in the sum of Kshs 7,000/= and summarize the award as follows-

(1) General damages for pain and suffering Shs 45,000/=
(2) Special Damages
Doctor's fees and witness expenses Shs 7,000/=
(3) Sub-total Shs 52,000/=
(4) Less 10% contributory negligence by Respondent 5,200/=
(5) Grand Total Shs 46,200/=

I would therefore award the Respondent the said sum of Ksh 46,200/= and dismiss the appeal herein with costs to the Respondent both in this court and the lower court.

There shall be orders accordingly.

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

M. J. ANYARA EMUKULE
JUDGE