



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 208 of 2004

TIMSALES LTD.....APPELLANT

VERSUS

MOSES MBURU.....

.....RESPONDENT

JUDGMENT

This is an appeal against the judgment of Hon. Phyllis Sultan, Senior Resident Magistrate, Nakuru delivered on 2nd July 2004 in Nakuru CMCC No. 796 of 2000 in which she found the Appellant 75% liable and awarded the Respondent as sum of Kshs. 54,375/- being both general and special damages net of contribution plus costs and interest.

Mr. Murimi, Counsel for the Appellant, submitted in effect that the learned trial magistrate's judgment is a nullity as it fouled the provisions of **Order 20 Rule 4** of the **Civil Procedure Rules**. He said that there is nothing in the judgment to show that there was any or any proper analysis of the evidence on record on which the final decision was based. In support of that contention he cited the case of **Wamutu Vs Kiarie [1982] KLR 480**. On the merits of the appeal he submitted that there is no evidence to show that the plaintiff was injured at his place of work. Though the initial treatment card is in the record of appeal, he said that it was not formally produced as an exhibit in court. He therefore urged me to ignore it and once I do that to find that Doctor Umuyoma's report prepared much later does not prove that the plaintiff was injured at his place of work. In support of this contention he relied on the cases of **Nguku Vs R. [1985] KLR 412; East Produce Kenya Ltd Vs James Kipketer Ngetich, Eldoret HCCA No. 85 of 2002; Amalgamated Sawmills Ltd Vs Stephen Muturi Nguru, Nakuru HCCA No. 75 of 2005 and Timsales Ltd Vs Haron Wafula Wamalwa Nakuru HCCA No.95 of 2005** in all of which it was held that failure to produce the initial treatment card is fatal to the plaintiff's case and that a medical report prepared long after the injury cannot be relied upon.

On the allegation that the Appellant was negligent or in breach of its statutory duty of care, counsel for the Appellant contended that the Respondent who, as is stated in **Wilfred & Jolowicz on Torts, 13th edition at page 203** and the case of **Timsales Ltd Vs Stephen Gachie, Nakuru HCCA No. 79 of 2000**, was duty bound to prove a causal link between the Appellant's alleged negligence and his injury but failed to do so. If anything, he said, it was the Respondent who was the author of his own misfortune if he was indeed injured. He said the Respondent was carrying logs of wood from one point to another and had made five trips safely. During the fateful trip it is in his evidence on pages 13 and 14 of the record of appeal that he was looking up as he walked thus causing his fall. He wondered how the appellant could be said to have been negligent in such a situation. He said it is not the duty of an employer to baby sit his employee. According to counsel this claim could have succeeded if it was based on the provisions of the Occupiers Liability Act. He urged me to allow the appeal with costs.

For the Respondent, M/S Njuguna submitted that the trial magistrate's judgment conforms with law. She referred me to page 35 of the record on which the trial magistrate gave the reasons for her finding on the apportionment of liability. She cited the case of **Rift Valley Bakery Vs Patrick Wafula Mdogo, Nakuru HCCA No.113 of 2005** and submitted that if I find the trial magistrate's judgment wanting I can rewrite it.

On failure to produce the initial medical report, counsel submitted that the Appellant cannot be heard to complain when Dr. Omuyoma's report was produced by consent of the parties. Moreover he said the Respondent was examined by the Appellant's doctor who also noted that he was indeed injured. She said the defendant's witness, Nicholas Nyangau, DW1, admitted that some injuries are entered late in the Appellant's injury records. That witness produced only one leaf of that record and it cannot therefore be concluded that there was no other record where the Respondent's name could

appear.

Counsel further submitted that the cause of the Respondent's fall was litter which was strewn all over the place. She said it was the duty of the Appellant to ensure that its employees worked in a safe and clean environment. She dismissed the argument that the Respondent had made five previous trips safely by submitting that he was not using the same route all the time.

Lastly counsel submitted that the Respondent having been an employee of the Appellant, his claim could not succeed under the Occupiers Liability Act. She urged me to dismiss this appeal with costs.

From these submissions it is clear that this appeal is based on three main grounds. They are whether or not the trial magistrate's judgment complied with the provisions of **Order 20 Rule 4** of the **Civil Procedure Rules**, whether or not the Respondent suffered injuries while working for the Appellant and if so whether or not the injuries were as a result of the Appellant's negligence.

I have carefully considered these submissions and read the authorities cited. **Order 20 Rule 4** of the **Civil Procedure Rules** provides that:-

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such a decision.”

Clearly this provision does not provide the format judgments should take. As long as the judgment contains what is stated in the rule there is no reason to upset it. Having read the judgment appealed from I find no warrant for its criticism in this regard. The learned trial magistrate set out a brief statement of the facts in the case and the issues for determination and also gave the reasons for his decision. The judgment therefore complies with this provision and the contention that it did not has no merit. That ground of appeal therefore falls a cropper.

The second ground of appeal is that the Respondent never suffered any injury at the Appellant's premises. Counsel for the Appellant made heavy weather of the fact that the initial treatment record having not been produced Dr. Umuyoma's report, made several years after the alleged accident, cannot be relied upon to prove that the Respondent suffered any injury or if he did that the same was at the Appellant's premises.

I agree with the second part of that contention. Dr. Umuyoma's report and the initial treatment card, even if it was produced, could not have proved that the Respondent suffered the injuries that he alleged he did at the Appellant's premises for the simple reason that Dr. Umuyoma and whoever initially treated the Respondent did not witness the accident leading to the Respondent's injuries. Whatever they stated as to the place of the accident was what the Respondent told them. But I do not agree with the first part of that contention that the Respondent in this case never suffered any injuries. In their medical reports both Dr. Malik, who gave his report at the instance of the Appellant, and Dr. Umuyoma, after examining the Respondent, said he did. Those reports were produced by consent without calling their makers. The Appellant cannot therefore be heard to contend that the reports should be dismissed. If the Appellant wanted to challenge the reports it should have insisted on calling their makers and challenged them on their findings that the Respondent had indeed been injured. All the authorities cited by counsel for the Appellant are distinguishable as no such situation arose in any of them. I therefore dismiss the ground that the Respondent never suffered any injuries at his place of work.

The last ground of appeal is that the Respondent failed to show a causal link between his injury and the Appellant's negligence. I concur with Visram J's holding in **Stapack Industries Vs James Mbithi Munyao, Nairobi HCCA No. 152 of 2003** that an injury *per se* is not sufficient to hold someone liable as not every injury is necessarily as a result of someone's negligence. It is trite law that the burden of proof is on the plaintiff to prove that the employer failed to discharge his common law duty of care and show a causal link between his injury and the employer's negligence. However, as was stated in **Winfield and Jolowicz on Tort, 13th Edition**, “Where a statutory duty applies, ... the employer's duty is often absolute so that no question of negligence arises at all, and even where it is qualified by the words as “*so far as reasonably practicable*” it is for the employer to prove that it was not reasonably practicable to avoid the breach.” This view, however, does not apply to this case as the Respondent's case was based on breach of the contractual duty of care and not on breach of any statutory duty.

The Respondent was injured when he was carrying logs of wood. In his testimony before the trial court, he said it was the litter strewn by the Appellant all over its premises that caused him to slip and fall. The Appellant's witness stirred clear of that allegation and the Respondent's evidence on that remained uncontroverted. In the circumstances the learned trial magistrate cannot be faulted in the apportionment of liability.

In the result I find no merit in this appeal and I accordingly dismiss it with costs.

DATED and delivered at Nakuru this 16th day of October, 2008.

D. K. MARAGA

JUDGE