REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 135 of 2006

TIMSALES LTD…….APPELLANT

VERSUS

WILSON LIBUYWA……..…….RESPONDENT

JUDGMENT

This is an appeal from the judgment of the Honourable H. Nyagah, SRM, delivered on the 16th August 2006 in Nakuru CMCC No. 1010 of 2002 in which he held the Appellant 70% liable and awarded the Respondent Kshs.29,400/- net of contribution.

The only point raised in this appeal is the issue of liability, whether or not the Respondent was indeed injured at his place of work on the 6th November 1999. The Appellant contended that on the material date the Respondent was not on duty and was not therefore injured as claimed. Through DW1 it produced a master roll and an injury register both of which showed that the Respondent was not on duty that day and that his name was not in the injury register. The Appellant also called DW2, a Records Officer at Elburgon Nyayo Hospital, who testified that the Out Patient Serial Number for 6th November 1999 ran from No.7684 to 7689 and that serial No.4667 which was on the Respondent's card was for a card issued to one Alice Abisa on 23rd May 1999. On this evidence counsel for the Appellant urged me to allow this appeal.

Counsel for the Respondent contended otherwise. I agree with his contention that an appellate court is not entitled to interfere with the trial court's findings of fact merely because it takes a different view of the evidence. I also agree with him that as was stated by the Court of Appeal in the case of Mwanasokoni Vs Kenya Bus Services Ltd & Others [1982-88] 1 KAR 870, an appellate court should not interfere with the trial court's findings on fact unless it is based on no evidence or on misapprehension of evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching that finding.

It is, however, the law that a first appeal is like a trial and the Appellant is entitled to an exhaustive re-evaluation of the evidence on record to ensure that the trial court acted on settled principles. This is how the Court of Appeal put this point in the case of Selle & Another Vs Associated Motor Boat Co. Ltd. & Others [1968] EA 123 at 126:

"An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's findings of fact if it appears that either he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally. (*Abdul Hameed Saif –Vs- Ali Mohamed Sholani (1955) 22 EACA 270*)"

From these submissions and the evidence on record it is clear to me that the Respondent was not treated at Elburgon Nyayo Hospital on the 6th November 1999. From the evidence of DW2 it abundantly clear that the treatment card bearing serial No.4667 which the Respondent had unsuccessfully attempted to produce

was issued on 23rd May 1999 to one Alice Abisa. That card was therefore a forgery. This being my view of the matter, 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.

For these reasons I find that the Respondent failed to prove that he was indeed injured in the Appellant's premises on 6th November 1999 as he claimed. Consequently, I allow this appeal and set aside the trial magistrate's award. The Appellant shall have the costs of this appeal.

DATED and delivered at Nakuru this 3rd day of November, 2008.

D. K. MARAGA

JUDGE.