REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 103 of 2003

(From the original Civil Suit No.829 of 2002 of Chief Magistrate's Court at Nakuru)

TIMSALES LIMITED ……...……..……. APPELLANT

VERSUS

SIMON KINYANJUI NJENGA …….. RESPONDENT

JUDGMENT

The appellant in this appeal was the defendant in Nakuru CMCC No.829 of 2002. In that suit, the respondent herein had instituted a claim for general damages for an industrial accident which he said he suffered on 7th February, 2000 while in the employment of the appellant.

The respondent blamed the appellant for the negligence and the particulars were stated in the plaint as follows;

(a) Failure to take any adequate precautions for the safety of the plaintiff while engaged in his duty.

(b) Exposing the plaintiff to risk of injury or damage of which they knew or ought to have known.

(c) Failing to provide and maintain a safe and proper system of work and to give proper instructions to its workmen including the plaintiff on how to follow that system.

(d) Failure to observe the term of the contract of employment thereby exposing the plaintiff to a risk of damage of which they knew or ought to have known.

(e) Failure to provide the plaintiff with proper and safety apparel e.g., Gumboots, gloves, Etc.

(f) **Res ipsa loquitur.**

He respondent gave very scanty evidence at the trial and all he said was that on 7th February, 2000 he was working at Amalgamated Saw Mills where he was splitting timber and as he worked on the roller, a piece of timber flew out and injured his chest. He said he reported the mater to the supervisor and was treated at Njoro Health Centre. He was later examined by Dr. Kiamba who classified the degree of injury as Harm and recommended a one week off duty.

The appellants denied liability in their statements of defence as well as the particulars of negligence. During the hearing, **Geoffrey Kibogi [DW1]** gave evidence on their behalf and denied that the respondent was involved in an accident because on the material day he had worked for 8 hours. This witness told the court that the respondent was an employee of Amalgamated saw Mills at the time of the accident and not Timsales which are two different Companies.

It on the basis of the above evidence that the trial court held that the respondent although worked for Amalgamated Saw mills and sued Timsales Limited, the court held that the respondent sued the right party and proceeded to find that the appellant was liable for the accident and apportioned 90% liability to the appellant and 10 % to the respondent. The learned trial magistrate also awarded the respondent kshs.70, 000/- as general damages and kshs.2500/- for the special damages with cost and interest.

The appellant was dissatisfied with that judgment and in the appeal they have raised four grounds of appeal to wit;

1. That the learned trial magistrate erred in law in finding

The defendant's Company liable for the purported negligence of another Company thereby failing to appreciate the distinct legal personalities, between the two companies under the Company Law.

2. That the learned trial magistrate erred in fact and in

Law in disregarding the defendant's evidence and in making findings not tenable by the evidence on record generally.

3. That the learned trial magistrate erred in fact and in

Law in finding liability against the defendant on the basis of inadmissible evidence namely; hearsay evidence of one Dr. D'Cunha.

4. That the learned trial magistrate erred in fact and in

Law in awarding excessive general damages out of consonance and unrelated to the injuries allegedly sustained by the plaintiff.

In further arguments, in support of the above grounds, counsel for the appellant submitted that the court erred by finding that the Amalgamated Saw mills and Timsales are the same entities despite the evidence on record that showed the respondent was working for Amalgamated saw mills which clearly shows the respondent had sued the wrong party.

For this preposition, counsel referred to the case of ***Paul Ogada vs. Kassim Owango and Milligan Co. Ltd. NRB HCCC NO.394 of 2001*** the High Court while restating the case of ***Solomon vs. Solomon & Co. Ltd. (1897) A.C. 22 (H.L)*** held that, the legal entity of a limited liability company was settled in that landmark case settled once and for all, that a limited liability is a legal entity but unlike human beings are invariably represented by its directors.

Secondly counsel for the appellant submitted that the respondent failed to prove the cause of accident to prove the particulars of negligence. Under the evidence Act, Section 107 the burden of proof is on a party who desires a court to give a judgment regarding a right a liability based on the existence of certain facts which that party must prove.

In this case the respondent pleaded in the plaint that he was working for Timsales Limited but in his evidence, he said that he working for Amalagamated saw Mills thus failed to prove the negligence on the part of the appellant. In particular, he failed to show the linkage between the breach of duty on the part of the appellant and the injuries that he sustained.

Lastly, the trial court was faulted for admitting inadmissible evidence of the medical reports. Similarly in the assessment of quantum which was excessive and not tandem with the injuries.

This appeal was opposed by the respondent; counsel for the Respondent Mr. Githiru submitted that the respondent proved his case to the required standard. The suit was instituted against the correct party and was proved from the evidence of the supervisor that Timsales and Amalgamated sawmills are the same. The evidence of negligence was not controverted and it was clear that the respondent was injured while in course of employment. The appellant failed to provide the respondent with a safe working environment which would have protected him from the injuries. Counsel put forward the case of ***Nakuru Civil Appeal No. 76 of 2003 Timsales Limited versus John Mwaniki Mwaura*** in which the court held that it is not normal for a machine to throw a piece of timber which injured the plaintiff on the chest and on the knee.

On the injuries suffered by the respondent counsel argued that the injuries were confirmed by the medical report of Dr. Angelo D'Cunha who is the appellant's company doctor and Dr. Kiamba.

This being a first appeal, this court is mandated by law to re-evaluate the evidence before the trial court as well as the judgment, but to bear in mind that this court never saw, or heard the witnesses as they testified and to give due allowance for that. The principles governing the consideration to be taken into account by the first appellate court, have been set out in various decisions in particular the case **of Kiruga vs. Kiruga & Another (1988 KLR page 348** where the court of Appeal held

"***An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."***

In this appeal the appellant is challenging the decision of the trial court and the issue in controversy is whether the respondent proved his case to the required standard.

Firstly, on the issue of whether the respondent proved that he was injured while working for the appellant, and secondly on whether the appellant was negligent and failed in his duty of care of an employee. It is not disputed that the respondent was working for Amalgamated Sawmills when the accident occurred. The appellant for unknown reasons filed this suit against Timsales Limited and in his evidence, he did not show the connection between this company and the Amalgamated Saw Mill where he said he was working when the accident occurred.

These are two different entities and the respondent bore the burden of proving the connection between working for Amalgamated Saw Mills and why the injuries suffered while working there, should be taken up by the appellant.

On this aspect I totally agree with the principles of Law enunciated in the old case of ***Solomon vs. Solomon*** that a company is a legal entity and it should be sued as such. On the issue of the cause of accident, the respondent did not give evidence to establish the breach of statutory duty of care and the negligence on the part of the appellant which was the alleged cause of the injuries he suffered. In the case of ***Cecilia W. Mwangi & Another vers Ruth Gabriel Mwangi Civil Appeal No.251 of 1996 Nyeri*** the court of Appeal cited with approval the statement by ***Lord Goddord C J in the case of Bonham Carter vs. Hyde park Ltd. (1948) 64 T.L. 177*** where it was held

"**Plaintiff must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of court, saying, "this is what I have lost" I ask you give me these damages."**

It is clear from the records that the trial court did not address the issue of the cause of the accident and what the appellant was supposed to do or the appellant did not do that caused the accident. The respondent had a duty to prove the cause of accident and the failure by the appellant to provide a safe

working environment. That evidence of the cause and breach of duty, on a balance of probability must be connected to the appellant. From the scanty evidence by the respondent, it cannot be said that he discharged that burden. The upshot of the above analysis, this appeal should succeed; the issue of quantum does not arise. However based on the nature of the soft tissue injuries that were suffered by the respondent which were classified as harm and for which he was awarded temporary disability or one week, I would have awarded the respondent kshs.50,000/- for general damages and kshs.2500/- for special damages. However for the reasons I stated above, this appeal is allowed with costs to the appellant and judgment and decree of the lower court is hereby set aside.

Judgment dated and delivered on 23rd March, 2007.

M. KOOME

JUDGE