REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 93 of 2005

TIMSALES LIMITED……...……APPELLANT

VERSUS

SIMON NJIHIA……..……...RESPONDENT

JUDGMENT

The Respondent, Simon Njihia Wanjiru, filed suit against the appellant, Timsales Ltd seeking to be paid damages on account of injuries he alleged to have sustained while he was on duty, working for the appellant. The respondent averred that on the 25th February, 2002 while he was on duty undertaking his authorized work, a piece of wood seriously injured him. The respondent blamed the said injury on the negligence of the appellant. He averred that the appellant had breached the duty of care owed to him as an employee. He set out the particulars of negligence which included, *inter alia*, that the appellant had exposed him to risk of injury by failing to provide him with safe systems of work. He further averred that the appellant had failed to provide him with protective devices while engaged in his work.

The appellant filed a defence. It denied that the respondent was ever its employee. It denied that it was negligent or that it had failed in the duty of care owed to the respondent. It further averred that, if the respondent was injured, then it was due to his own negligence. The appellant set out the particulars of negligence on the part of the respondent. It averred that the respondent had, *inter alia*, ignored the instructions of his supervisors and undertaken work without due care and attention. The suit was heard by the trial magistrate. In her considered judgment, the trial magistrate apportioned liability at the ratio of 70;30 in favour of the respondent. She awarded the respondent general damages of Ksh.120,000/= and special damages of Ksh.2000/=. After the deduction of 30% contributory negligence, the respondent was awarded Ksh.95,400/=. The respondent was also awarded costs of the suit. The appellant was aggrieved by the said decision of the trial magistrate and appealed to this court.

In its memorandum of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate both on liability and quantum. The appellant was aggrieved that the trial magistrate had failed to consider the totality of the evidence adduced, particularly the evidence adduced on behalf of the appellant, before she reached the said decision in favour of the respondent. The appellant faulted the trial magistrate for finding it liable while the evidence indicated that the claim made by the respondent were fraudulent. It was aggrieved that the trial magistrate had failed to consider the evidence adduced which established that the respondent had been injured due to his own recklessness. It was aggrieved that the trial magistrate had assessed the general damages to be paid to the respondent which was not in consonant with the injuries that the respondent had sustained. The appellant finally faulted the trial magistrate for finding that the respondent had been injured in the absence of medical evidence.

At the hearing of the appeal, Mr. Murimi, counsel for the appellant amplified the grounds of appeal. He submitted that the judgment of the trial magistrate did not accord with the law. *i.e.* **Order XX rule 4 of the Civil Procedure Rules**. He submitted that the evidence adduced by the respondent established that the respondent was reckless. He doubted the respondent was injured in the matter that he (*the respondent*) claimed. He submitted that whereas the pleadings and the evidence adduced in court talked of burns, the injury sustained by the respondent was that of a cut wound. In his view, since there was variance between the evidence adduced in court and the pleadings, the respondent had therefore failed to make out his case.

Mr. Murimi submitted that the circumstances under which the respondent claimed he was injured could not be attributed to the appellant: This was because the respondent had claimed that he was injured while he was feeding firewood in a boiler using his leg. In his view, this was a risky venture by the respondent who knew, or ought to have known that he was required to use his hands to feed the firewood into the boiler. He submitted that the trial magistrate ought to have found that the respondent was solely liable for the injuries he sustained. Mr. Murimi further submitted that the assessment of the damages payable to the respondent for the injuries that he claimed to have sustained was excessive in the circumstances. He urged the court to review the said assessment of damages to accord with the injuries that the respondent had sustained. He urged the court to allow the appeal.

Mr. Rabera for the respondent opposed the appeal. He submitted that the respondent had established he was injured while he was on duty working for the appellant. He submitted that the appellant had not adduced any evidence which challenged the version of what took place on the material day as narrated by the respondent. He maintained that there was no contradiction on the injuries that the respondent had sustained since the medical evidence clearly indicated that the respondent sustained a deep cut wound. He submitted that the respondent had established negligence on the part of the appellant. He explained that the respondent was not supplied with gum boots or any protective gear at the time he was injured. It was his view that the respondent could not be blamed for pushing firewood into the boiler using his foot. This was due to the fact that necessity sometimes demanded it.

Mr. Rabera urged the court to re-evaluate the evidence and find the trial magistrate had properly assessed the evidence and reached the correct finding. He submitted that the trial magistrate had considered the evidence adduced by the witness for the appellant and correctly rejected the said evidence as being unworthy of credit. He finally submitted that this court should not interfere with the assessment of damages by the trial magistrate as the trial magistrate had properly assessed the damages payable after considering the injuries the appellant had sustained. He urged the court to dismiss the appeal with costs.

The duty of this court, as the first appellate court is to re-hear and reconsider the evidence that was adduced by the parties to this appeal before the trial magistrate's court so as to reach an independent determination whether or not to uphold the decision of the trial magistrate. In reaching its finding, this court, will of course, put into consideration the fact that it neither saw nor heard the witnesses as they testified. (See **Selle vs Associated Motor Boat Co. Ltd [1963] E.A. 23).**

In the present appeal, the issues for determination are two fold; whether the respondent established to the required standard of proof on a balance of probabilities that he was injured due to the negligence of the appellant and, secondly, if negligence is established, what quantum of damages should be paid to the respondent, if any. On the first issue, the respondent testified that he was injured as he was feeding firewood into a boiler. He testified that he was injured when he pushed the firewood into the boiler using his foot. At that time, the respondent had not been supplied with any protective gear. The appellant's defence to the respondent's claim was that the respondent could not have been injured at his place of work because at the material time he claimed to have been injured, the respondent was not on duty.

I have re-evaluated the evidence adduced before the trial magistrate. I have also considered the rival arguments made before me by the respective counsel for the appellant and the respondent. The respondent did establish that he was at his place of work when he was injured. He also established that, at the material time, he was employed to work at the boiler section of the factory. The respondent's work entailed him feeding firewood into a boiler. It was evident that the appellant should have supplied the

respondent with protective gear, putting into considering the fact that the respondent was working in an environment that made the said protective gear imperative. The appellant was required to provide the respondent with gumboots and clothes which would have protected the respondent from the effect of the heat from boiler. The trial magistrate properly reached the conclusion that had the appellant provided the respondent with protective gear, in all probability, the respondent could not have sustained the injury that he did. I find no fault with the apportionment of liability by the trial magistrate. The respondent contributed to his injury when he pushed the log into the fire using his foot. The contributing negligence of 30% was a proper assessment of contributory liability by the respondent. I therefore find no merit with the appeal against liability. The appeal against liability is hereby dismissed.

On quantum, the appellant submitted that the general damages awarded to the respondent were excessive in the circumstances, putting into consideration the injuries that the respondent had sustained. The principles to be considered by this court in determining whether or not to interfere with the assessment of damages by the trial magistrate are well settled. In **Ali vs Nyambu t/a Sisera Store [1990] KLR 534,** the Court of Appeal quoted with approval the dictum in **Lukenya Ranching and farming Co-operative Society Ltd vs Kavoloto [1970] E.A 414** where it was held that;

"***The principles which apply under this head are not in doubt. Whether assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at the first instance. Even if the tribunal of first instance was a judge sitting done, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied the wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages (****Flint vs Lovell [1935] 1 KB 354****) approved by the House of Lords in Davies vs Powel Duffryn Associated Collievers [1941] AC601"***

In the present appeal, Dr. Kiamba noted that the respondent sustained deep lacerated wounds on the right 2nd and 3rd toes with avulsion of the nails. In his opinion, as a result of the industrial accident, the respondent had sustained deformity at the distal end of the right 2nd and 3rd toes. The respondent relied on the decision of **Beatrice Naliaka Nalianya vs Micahel Kinuthia Kariuki Nairobi HCCC. No.1251 of 1992 (***unreported***)** in support of submission that he should be paid general damages of Ksh.130,000/=. In the said case, the plaintiff had sustained blunt injuries on his chest and deep cut on the 3rd finger. She was awarded Ksh.80,000/= general damages. In its part, the appellant submitted that the respondent should be paid Ksh.20,000/= general damages. It was clear that the authority relied on by the plaintiff in support of his case was not appropriate in this case. The injuries sustained by the plaintiff in that case were not comparable with the injuries sustained by the respondent in this case. The respondent in this case sustained what can essentially be termed as soft tissue injuries. The injuries that the respondent sustained did not result in incapacitation or permanent disability. It was therefore evident that the assessment of the damages payable to the respondent by the trial magistrate was erroneous. The trial magistrate failed to consider relevant factors when she assessed the said general damages. She failed to consider comparable awards and thus arrived at the erroneous decision in assessing general damages that was inordinately high in the circumstances. This court will interfere with the said assessment of general damages by trial magistrate.

The upshot of the above reasons is that the appeal on quantum succeeds. The general damages assessed by the trial magistrate of Ksh.120,000/= is hereby set aside and substituted by an appropriate award of this court. This court assesses the general damages to be payable to the respondent for pain, suffering and loss of amenities at Ksh.60,000/=. The respondent shall therefore be paid Ksh.42,000/= general damages (*this amount is less 30% contributory negligence*). He is further awarded the proven special damages of Ksh.2000/= less contribution of Ksh.600/= *i.e*. Ksh.1400/=. The respondent is thus awarded Ksh.43,400/= in damages with costs. He shall be paid interest of the said damages award from the date of the judgment by the lower court *i.e.* on the 12th May 2005.

Since the appellant was partially successful on this appeal, it shall be paid ½ (*half*) of the costs on appeal.

It is so ordered.

DATED at NAKURU this 15th day of November, 2007

L. KIMARU

JUDGE