REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 272 of 2004

(Being an appeal from the Judgment/decree of Honourable Hon. A. B. M. Mongare – R.M in Chief Magistrate's Court, Nakuru, CMCC No.900 of 2003 dated the 8th November 2004)

AMALGAMATED SAW MILLS LTD ....……..APPELLANT

VERSUS

TABITHA WANJIKU …….……..…….. RESPONDENT

JUDGMENT

The suit in the lower court that has culminated with the present appeal was instituted by **Tabitha Wanjiku** the respondent in this appeal. She claimed that on the 15th December 2000, she was lawfully carrying out her duties at the defendant's premises of repairing batter boards when one of the batter boards fell on her leg thereby causing her injuries.

The plaintiff contended that the injuries were as a result of negligence, breach of statutory duty of care and/or breach of terms of contract of employment on the part of defendant.

The particulars of the negligence and the breach of statutory duty of care are particularized as follows: -

(a) Failed to provide a safe system of working for the plaintiff while she was engaged in her work.

(b) Exposed the plaintiff to a risk of injury which the defendant knew and/or ought to have known.

(c) Failed to warn the plaintiff of the danger of batter boards falling on her leg.

(d) Failed to provide proper and/or any supervision to the plaintiff while she was engaged in her work.

(e) Failed to provide the plaintiff with proper and/or any protective gear and/or devices in order to avoid the accident.

As a result of the said injuries, the plaintiff said in her evidence that she was treated at Molo Health Centre. She was subsequently seen by Dr. Omuyoma who examined her and prepared a medical report for which she paid Kshs.2,500/-. The injuries suffered by the respondent are classified as harm. The respondent said that her leg dislocated and the injury occurred because there was no plunk placed on the batter boards to secure them from falling. She claimed that she was not provided with protective devices.

On the part of the defendants who are the appellants in the present appeal, they filed a defence whereby they denied liability and in the alternative, they contended that if the respondent suffered any injuries, she precipitated the same or substantially contributed to the negligence due to her carelessness and/or recklessness.

The particulars of her negligence, recklessness was duly particularized in the defence as follows: -

(a) Outright indifference to her own safety and well-being while at work.

(b) Failing to avail herself with the proper and/or protective gear and/or devices provided by the defendant to its workers generally, inclusive of the plaintiff.

(c) Working without the defendant's system of work, which was safe and proper by all standards, and thereby exposing herself to a risk of injury which the plaintiff knew or ought to have known.

(d) Engaging herself in her own frolics while at work thereby derogating from the express and implicit supervision and instructions of the defendant's agents.

(e) Being negligent, reckless or careless generally.

During the hearing, the appellants relied on the evidence of **Dorcas Muthoni Kihoto** (*DW 1*) a clinical officer at Njoro Health Centre. She referred to the Health Centre's record for 15th December 2000 and said that forty four (44) patients were seen as can be seen from serial numbers 10150 to 10220. The card that was produced by the respondent in evidenced although bearing Njoro Health Clinic was serial number 12025 which she contended, was not issued because the records for the year 2000 reached 10744. She said that patients purchase a card and it is possible a patient can purchase a card and walk away without the details being filled by the clerk and doctor. This witness claimed that the outpatient serial number 12045 did not emanate from their records.

Geoffrey Kibubi (*DW 2*) also gave evidence on behalf of the appellants, he said he was an employee charged with the responsibilities of preparing the records of wages. He produced the book where injuries that occur in the factory are recorded. He said that whenever an injury occurred first aid was administered and the employee was taken to the nearest hospital. According to the records, the respondent's injuries were not recorded.

It is on the basis of the above evidence that the trial magistrate found the plaintiff had proved her case to the required standard found the appellants liable at 100% for the injuries sustained by respondent and for failure to give a safe working system and on quantum the respondent was awarded Kshs.40,000/- for general damages and Kshs.2,500/- for special damages.

The appellants being dissatisfied with the above judgment filed this appeal and raised six (6) grounds of appeal.

Mr. Murimi, Counsel for the appellant submitted that the trial court erred by failing to comply with the provisions of **Order 20 Rule 4** of the **Civil Procedure Rules**. The judgment did not contain a concise statement of the case the points for determination and the reasons for the decision. He put forward the case of **Wamutu –Vs- Kiarie [1982] KLR 481** where it was held

"*Judgments in defended suits shall contain a concise statement of the case, points of determination, the decision and the reasons for such a decision as required by* ***Order XX Rule 4*** *of the* ***Civil Procedure Rules****."*

Secondly, it was submitted that the respondent did not prove negligence or simply put, how the fallen batter boards that allegedly injured her can be attributed to the failure by the appellants to provide a safe system of work. Thus the respondent did not demonstrate the causation and the connection of the injuries to the appellants negligence.

On the issue of liability, the trial court erred by holding the appellant liable when the respondent had not proved the negligence and especially the efficacy of the protection she could have derived from the gum boots.

On the part of the respondent, Ms Mathenge, Counsel for the respondent defended the judgment. The trial court properly analysed the evidence and indicated the points for determination. In any event, this court in its appellant jurisdiction can rewrite the judgment.

As regards the issue of liability the employer's liability is strict and the statute requires the factory to ensure a maintenance of a safe system of work. Thus according to Counsel for the respondent, she discharged the burden of prove that the batter boards were disturbed by other workers they fell on her and she was injured. The trial court properly found the appellant 100% liable for the injuries.

This being the first appellate court, it is my duty to re-evaluate the evidence before the lower court while bearing in mind this court neither heard or saw the witnesses and should therefore make due allowance for that.

Having carefully considered the record of the lower court and the rival submissions, what comes across in this appeal for determination is whether the respondent proved her case on

(i) Whether there were injuries at the appellant's premises.

(ii) Whether the injuries were caused by the negligence of the appellant.

(iii) *Whether the blame should have been apportioned*.

As stated above, the issue of the judgment falling short of the provisions of **Order 20 Rule 4** is nor here nor there since this court can rewrite the judgment in accordance with the set principles.

The next issue is whether the respondent established that she was indeed injured at the appellant's premises. The appellant's witnesses; Dorcas Muthoni Kihoto denied that the treatment card emanated from Njoro Health Centre. Geoffrey Kibubi produced the injury record to show that the respondent's injury was not entered in the record. Even though the test of prove is on a balance of probability, I find there is a very strong rebuttal to the extent that if it was possible the respondent's injury was not entered in the injury book of the appellant, what a coincidence that the treatment card that was produced in court by the respondent could also not be traced to the Njoro Health Centre where she alleges she was treated. In view of this, I am of the view the respondent did not prove her case to the required standard.

Assuming that this court would be wrong on the above determination, on the issue of liability did the respondent prove that the injury was as a result of the appellant's negligence. Mr. Murimi relied on the text book **WINFIELD AND JOLOWICZ ON TORT 13 Edition** where the learned authors stated on page 203: -

"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 a failure to provide a reasonable safe system of working, the plaintiff must plead and therefore prove what the proper system was and in what relevant respect it was not observed. It is true that the severity of this

particular burden has been somewhat reduced, but it remains clear that for a workman merely to prove the circumstances of this accident will normally be insufficient …..…"

The particulars of negligence as pleaded by the respondent are not supported by the evidence on record where the respondent states:

"*On 10th December 2000, I was at my place of work batter boards. My work was to repair butter boards. I was doing finishing of batter boards. There was a heap of batter boards. They fell on my knee of the left leg."*

During cross-examination, the respondent said the batter boards were disturbed by other workers which fact was never pleaded. In her brief and scanty evidence the respondent did not prove the particulars of negligence and if the cause of the injury was the fallen batter boards caused by the other workers, this aspect was not pleaded. (*See* the case of **Timsales Ltd –Vs- Stephen Gacie Nakuru C.A No.74 of 2000**) where Musinga J held

"*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 duty if he was under an obligation to prove negligence and/or breach of statutory duty and he failed to do so. An exception may be in a case where the circumstances under which the accident occurred are such that the doctrine of re ipsa coquitor can be drawn on."*

In this present case, the principle of *res ipsa coquitor* was not pleaded and even though the court could have inferred the same from the evidence, there is no such material on record for this court to make such an inference.

For the above reasons, the appeal herein succeeds with costs to the appellant. The judgment and decree of the lower court is set aside and the respondent's case in the lower court is dismissed with costs.

Dated and delivered at NAKURU this 28th July 2006.

MARTHA KOOME

JUDGE