



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Appeal 76 of 2003**

**TIMSALES LTD.....PLAINTIFF**

**VERSUS**

**JOHN MWANIKI MWAURA.....DEFENDANT**

**JUDGMENT**

The respondent, John Mwaniki Mwaura filed suit against the appellant, Timsales Limited seeking to be paid damages on account of injuries he alleges to have sustained while he was working in the premises of the appellants. He pleaded that the appellant had failed to provide him with a safe working environment and further failed to provide him with proper safety apparels so as not to expose him to the possibility of injury. The respondent particularized what he considered to be the acts of negligence on the part of the appellant. The appellant filed a defence and denied that it was negligent or that it had failed to provide the respondent with a safe working environment. The appellant denied that the respondent was injured while working in its premises. It further pleaded that if the plaintiff was injured, then it was due to his own negligence. The appellant denied that it was liable to pay any damages to the respondent. The suit was heard by the Senior Resident Magistrate who after the conclusion of the case, found the appellant solely liable for the injuries that the respondent had sustained. The damages due to the respondent were assessed at Ksh.42,000/=. The appellant was aggrieved by the said decision of the trial magistrate and filed the present appeal to this court.

In its memorandum of appeal, the appellant raised four grounds of appeal challenging the decision of the trial magistrate in finding in favour of the respondent. The appellant was aggrieved that the trial magistrate had not subjected the evidence adduced to exhaustive evaluation. It faulted the trial magistrate for finding the appellant solely liable in negligence in the absence of any proof. The appellant was aggrieved that the trial magistrate had put into consideration irrelevant factors in arriving at her decision in favour of the respondent. The appellant therefore urged this court to have the said judgment of the subordinate court reviewed or set aside.

At the hearing of the appeal, Mr Kisila learned counsel for the appellant submitted that the respondent had not proved to the required standard of proof that he had been exposed to unsafe system of work. He submitted that the respondent had not pleaded in his plaint what he considered to be the unsafe system of work that he was exposed to by the appellant. He stated that the evidence which was adduced by the respondent to the effect that he had been hit by a piece of timber when he inserted it on the planer machine did not connote negligence on the part of the appellant. He submitted that no evidence was adduced by the respondent to suggest that the planing machine had a mechanical fault or that the accident was reasonably foreseeable or preventable. He argued that the registers maintained by the appellant clearly established that the respondent was not injured on the day he claimed to have been injured while working at the appellant's premises. He submitted that the injuries in the medical report which was admitted in evidence was inconsistent with the medical chit which indicated different injury than the one which the respondent pleaded in his plaint. Learned counsel for the appellant argued that the evidence adduced in the case clearly proved that the respondent wanted to defraud the appellant by making a false claim. He submitted that the issue of the lack of gloves could not impute negligence on the part of the appellant. The totality of the evidence adduced suggested, according to the appellant, that if the respondent had indeed been injured, then he was injured elsewhere other than in the premises of the appellant. The appellant urged this court to properly evaluate the evidence on record and considered the submissions made including the authorities supplied and find in favour of the appellant by allowing the

appeal.

Mr Githiru, learned counsel for the respondent opposed the appeal. He submitted that the respondent had proved his case on a balance of probabilities by establishing that he was injured due to the negligence of the appellant who made him work on a defective machine. He submitted that the respondent had proved that he had been made to work in an unsafe working environment that resulting to the injury that he sustained. He denied the suggestion made by the appellant that there were inconsistencies in the medical documents which were produced by the respondent before the trial court. He urged this court to reject the evidence of the muster roll which was produced by the appellant and find that it did not establish as a fact that indeed the respondent was not injured on the material day. He urged this court to re-evaluate the evidence and uphold the decision of the trial magistrate who found that the respondent had proved his case on a balance of probabilities. He therefore urged this court to dismiss the appeal with costs.

This being a first appeal, this court is required in law to re-consider and to re-evaluate the evidence adduced before the trial magistrate and also consider the submissions made in this appeal before reaching its own independent determination whether or not to uphold the decision of the trial magistrate. This court however has to put in mind that it neither saw nor heard the witnesses as they testified. As was held by the Court of Appeal in the case of **Peters vs Sunday Post Ltd [1958] E.A 424** at page 429;

***“It is a strong thing for an appellate court to defer from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”***

In this appeal, the appellant is basically challenging the decision of the trial magistrate in reaching a finding that it was liable in negligence to the respondent. The respondent testified that he was injured when a piece of timber which he had inserted on the planer machine broke and a piece thereof returned and hit him on his left hand. He testified that he was injured when the said piece of timber hit him. The appellant called one witness, DW1 Joel Kamau, a machine operator, who controverted the evidence adduced by the respondent. The said witness denied that the respondent was injured while on duty. He produced a muster roll as proof that the respondent worked for the entire eight hour shift without seeking permission to be attended to medically. He further testified that the injury suffered by respondent was not recorded in the accident book. He denied that the machine which the respondent was working on was defective.

I have re-evaluated the evidence adduced by the respondent and that which was adduced by the witness of the appellant. From the evidence adduced, it is clear that the respondent was injured on the 17<sup>th</sup> of February, 2000. From the medical treatment chit that was recorded when the respondent was attended to at the Elburgon Nyayo Hospital, the respondent gave the history that he had been hit by a flying piece of timber from a machine which he was working on at his place of work. The evidence of the appellant to the effect that the respondent could not have been injured while at work was not therefore supported by cogent evidence. The trial magistrate saw the two witnesses as they testified and arrived at the decision that the respondent had proved his case on a balance of probabilities. Although the trial magistrate did not specifically state her conclusion on the assessment of the demeanour of the witnesses who testified in this case, it is clear that the trial magistrate believed the respondent and conversely disbelieved the witness of the appellant.

Did the evidence adduced by the respondent proof negligence on the part of the appellant? On the re-evaluation of the evidence, it is clear that the respondent was injured by a piece of timber which was ejected by the planer machine. Although the appellant claimed that the said machine was not defective, it is evident that if the machine was in a proper state of repair it could not have ejected the piece of timber which subsequently injured the respondent. It is also plain that the said machine was not properly covered so as to protect the workers who were working on it and prevent them from sustaining injury. The evidence adduced by the appellant that the respondent was not injured on the material day is

controverted by the medical evidence that was adduced by the respondent and produced as the plaintiff's exhibit No.1. The appellant had a duty to provide the respondent with a safe working environment whereby he would not be exposed to a risk of injury. In this case, it was clear that the appellant failed in its duty of care owed to the respondent. This court finds no merit with the submission made by the appellant to the effect that the respondent had not proved his case of negligence against the appellant to the required standard of proof. The appeal against the finding of the trial magistrate on liability is therefore dismissed.

On quantum, according to the medical report prepared by Dr. Omuyoma, the respondent sustained soft tissue injuries on his left hand. When he was examined a month after the accident, the said injury had healed and what had remained were two scars on the dorsal aspect of the left hand. The scars were not fibrotic. The respondent suffered no long term disability as a result of the said injury. The trial magistrate assessed the general damages to be paid to the respondent to be Ksh.40,000/=. In his submission before court, the appellant did not challenge the said assessment of damages by the trial magistrate. The main thrust of the argument advanced by the appellant on this appeal was on the issue of liability. In the circumstances therefore this court having found that the appellant was liable, the assessment of the quantum as to damages by the trial magistrate is upheld.

The sum total of the above reason, is that the appeal filed by the appellant lacks merit and is hereby dismissed with costs to the respondent.

**DATED at Nakuru this 9<sup>th</sup> day of August, 2006**

**L. KIMARU**

**JUDGE**