REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 230 of 2004

TIMSALES LTD…….....…….APPELLANT

VERSUS

WILLY NGANGA WANJOHI…….....……RESPONDENT

JUDGMENT

The respondent,Willy Nganga Wanjohi filed suit against the appellant, Timsales Ltd seeking to be paid damages on account of injuries that he claimed to have sustained as he was working in the premises owned by the appellant. The respondent pleaded in his plaint that he was injured due to the negligence of the appellant who failed to provide him with a safe and proper system of work that would enable him to work without the risk of suffering injury. He pleaded that due to the appellant's negligence, he was injured and therefore should be compensated in damages. The appellant denied that it was negligent or that it caused the injuries which the respondent sustained. It pleaded in its defence that the respondent was injured as a result of his own negligence. After hearing the evidence adduced by the respondent and the appellant, the trial magistrate found that the respondent had proved his case on a balance of probability and held the appellant solely liable for the injuries that the respondent sustained. The trial magistrate awarded the respondent Ksh.50,000/= general damages and Ksh.2,500/= special damages plus costs and interest. The appellant was aggrieved by the decision of the trial magistrate and filed an appeal in this court.

In his petition of appeal, the appellant raised six grounds of appeal challenging the decision of the trial magistrate in finding in favour of the respondent on liability. The said grounds of appeal may be summarized as hereunder; the appellant faulted the trial magistrate for finding the appellant liable in negligence contrary to the evidence which was adduced in court and contrary to the applicable principles of the law. The appellant was aggrieved that the trial magistrate had not considered the fact that the evidence of the respondent did not establish any negligence on the part of the appellant and further that she had ignored the evidence which was adduced by the witness who was called by the appellant. The appellant was finally aggrieved that the trial magistrate had erred in assessing the general damages payable to the respondent which was not in consonant with the injuries which the respondent had sustained.

At the hearing of the appeal, this court heard the submissions that were made by Mr Kisila on behalf of the appellant and the opposition thereto as submitted by Mr Githiru on behalf of the respondent. This being a first appeal, this court is mandated in law to reconsider and to re-evaluate the evidence adduced by the parties to this appeal before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the decision of the trial magistrate. In reaching its determination, this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified before the trial magistrate's court. As was held by the Court of Appeal in the case of **Selle vs Associated Motor Boat**

Co. [1968] E.A 123 at page 126;

"….. *(the)* ***principles upon which this court acts in such an appeal are well settled. Briefly put they are but this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 demenour of a witness is inconsistent with the evidence in the case generally…"***

In the present case, having re-evaluated the evidence adduced and considered the submissions that were made before this court by the parties to this appeal, the issue for determination by this court is whether the respondent proved to the required standard of proof that he was injured due to the negligence of the appellant on allegation that it failed to provide him with a safe working environment.

Under what circumstances was the respondent injured? I would do no better that to quote what the respondent told the trial court as contained at page 2 of the proceedings;

"*On the 20/8/2002 I was working with Timsales as a casual labourer. I used to carry waste materials and we press to the boiler (sic) I used to carry with a handcart. The cart fell into a ditch. The handle broke. I was injured on the left knee…..I blame the company for improper maintenance of the ground where the handcart was driven. The cart was not properly maintained too that is why the same was broken on exertion of pressure. It was not my duty to maintain the handcarts*."

From the above testimony by the respondent, it is clear that the respondent was injured when the handcart which he was pushing hit a pothole and as a result of which it injured him on the knee. Mr Kisila has submitted that these circumstances do not raise any liability on the part of the appellant. For this proposition, he relied on the decision of Musinga J, in **Timsales Ltd vs Stephen Gachie Nakuru HC Civil Appeal No.79 of 2000** where at page 9 he quoted with approval a passage found at page 203 in the legal treatise "*Winfield and Jolowicz on Tort*" 13th Edition which state as follows:

"***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 his accident will normally be insufficient. Where a statutory duty applies, on the other hand, the employer's duty is often obsolute, so that no question of negligence arises at all, and even where it is qualified by such words as "****so far as reasonably practicable****" it is for the employer to prove that it was not reasonably practicable to avoid the breach. It follows that the existence of a relevant statutory duty will almost invariably ease the task of the workman in establishing his employer's liability***."

In **Statpack Industries vs James Mbithi Munyao Nairobi HC Civil Appeal No.152 of 2003** (*unreported*) Visram J, held at page 7 of his judgment that;

"***Coming now to the more important issue of '****causation'****, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury*** *per se* ***is not sufficient to hold someone liable."***

In the present case, it is the respondent's case that he was injured when the handcart he was pushing within the premises of the appellant hit an ditch thus causing it to injure him on his left knee. He testified that were it not for the fact that the appellant had failed to maintain the grounds upon which he pulled the said handcart, he would not have been injured. He further testified that the appellant failed to maintain

the said handcart in a good state of repair so that it could not have injured him when he pushed it on to the ditch.

Do these circumstances as described by the respondent establish negligence on the part of the appellant? I do not think so. The appellant was employed as a casual labourer to push a handcart from one part of the appellant's premises to the other. The work of pushing a handcart does not entail any exceptional skill that would require expertise or training. It is manual work that does not require any training. The respondent was aware that he was required to push the said handcart on an even surface within the premises of the appellant. The respondent pushed the said handcart into a ditch which resulted in the handcart injuring his knee. This court wonders what the respondent expected the appellant to do in the circumstances to prevent the said accident that resulted in the injury to his knee.

In common law, when a party pleads negligence, he has to prove it. In this case, the respondent has failed to prove the causal link between the injury that he sustained and the duty of care that is placed upon the appellant in negligence. The respondent was injured when he was in control of the handcart. He cannot blame the appellant if he pushed the handcart into a ditch. As was held by this court in the case of **Wilson Nyanyu Musigisi vs Sasini Tea & Coffee Ltd Kericho HC Civil Appeal No.15 of 2003** (*unreported*) at page 5, where the appellant in the case was injured while he was cutting grass with a slasher;

"***The appellant was undertaking manual work. He was not operating a machine. He was cutting grass using a slasher. The swing of the slasher was within his control. He controlled the rate at which he swung the slasher to cut the grass. This court wonders how the respondent can be held liable in the performance of such a manual task. The appellant was given a duty. He performed it badly. He injured himself. He now blames the respondent. In law, the only compensation that can be paid to the appellant (if indeed he was lawfully employed by the respondent) is under the Workmen's Compensation Act. This act mandates an employer to pay the employee in case he is injured while at his place of work. Such compensation is paid on '****no fault'*** **basis. The employee is not supposed to prove any negligence or breach of statutory duty on the part of the employer."***

In the instant case, the respondent had the control of the handcart. He could decide to push it slowly or to push it at a faster speed. He could decide to pull it or to push it depending on how he assessed he could best do the task at hand. The choice of the surface on which he was to push or pull the handcart was his to make. What the appellant was concerned with at the end of the day, is that the defendant undertook the work that he was assigned to the appellant's satisfaction. Now instead of the respondent choosing to push or pull the handcart on an even surface, he chose to push the said handcart into a ditch. He was injured on his knee. He now blames the appellant for not maintaining the surface upon which he was pushing the handcart. If this court were to uphold the proposition advanced by the respondent in support of his claim, then every person who is injured in a road accident would blame the government of Kenya for failing to maintain the roads to the standard where there are no potholes. That cannot be. It would be stretching the principle of causation too far. It is clear from the circumstances of this case that the appellant cannot be blamed at all for the decision made by the respondent to push the handcart into a ditch and thereby injuring himself.

The upshot of the above reasons, is that the appeal filed by the appellant must succeed. The appellant has established that it could not be held liable for the injury that the respondent sustained. The respondent failed to establish his case that he was injured due to the negligence of the appellant. The judgment of the subordinate court delivered on the 13th of August, 2004 is consequently set aside and substituted by the judgment of this court dismissing the respondent's suit with costs. It goes without saying that the appellant shall have the costs of this appeal.

It is so ordered.

DATED at Nakuru this 9th day of August, 2006

L. KIMARU

JUDGE