**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NUMBER 84 OF 2011**

**SUNNY AUTO PARTS KENYA (LTD).....APPLICANT**

**VERSUS**

**GERALD ISABWA CHIKALI.....RESPONDENT**

***(An Appeal from the of Judgment of the Honourable Resident Magistrate E. Tanui in Nakuru Civil suit Number 832"B" of 2005 delivered on the 28th April, 2011)***

**JUDGMENT**

1. The appellant Sunny Autoparts Limited was the defendant in the primary suit. The Respondent had sued the appellant for special and general damages arising out of an alleged injury by the Respondent while in the course of his employment with the appellant. After a full hearing, the trial court found the appellant liable in negligence and awarded general damages for pain an suffering in the sum of Kshs.65,000/= and special damages of Kshs.2000/= and costs.

2. In the Respondents statement of claim by his plaint dated 16th May 2005 he stated that he was an employee of the respondent and that on the 2nd April 2004, while in the course of his duties as assigned by the employer he was injured by a faulty machine. He attributed the injury to negligence by the employer and particulars of negligence were tabulated mainly by exposing him to a risk by failing to maintain a safe and proper system of work and failure to provide any protective gear.

3. The defendant denied the claim and specifically that the Respondent was its employee and that he was injured while in course of employment. All particulars of negligence were denied. In the alternative, it was the appellant's statement that the respondent exposed himself to danger by conducting himself without due care, had no regard for his own safety, being reckless and careless and thus was the author of his injuries.

4. In his evidence, the respondent produced documents to prove his employment with the appellant. He testified that on the material date at the maintenance departments workshop, he and his co-workers while dismantling a faulty machine, the the flywheel hit him on the left index finger after which he stated, was taken to Nakuru General hospital for treatment. He produced a treatment card to show that the was treated for the said injury. He the blamed the employer for failure to provide him with gloves and googles which, in cross examination, he stated would have minimized the injury. He denied sustaining an injury on the same figure on the 2nd April 2004.

5. The appellant's witness testified that the Respondent was its employee but denied that an injury was reported on the material date and that the respondent was not working in the maintenance department, and could therefore not have been injured while in the course of this duties, and that the respondent had been

provided with necessary protective gear.

Upon the evidence tendered the trial court framed four issues which it proceeded to determine:

1. whether the plaintiff/Respondent was an employee of the defendant on the 2nd April 2004.

2. whether the plaintiff sustained injuries on the 2nd April 2004, while in the defendant's employment.

3. whether the accident, if it occurred, was caused by the negligence of the defendant.

4. whether the defendant is liable to pay damages to the plaintiff.

Upon analysis of the evidence the trial court made findings in respect of the issues above in the affirmative and this was the basis of the appeal. This court being the first appellate court is under an obligation to re- evaluate the evidence before the trial court and make its own findings and conclusion as stated in **Selle -vs- Associated Motor Boat Co. Ltd (1968) E.A 123.**

6. The appellants submissions are three fold: That the trial court erred in its findings and that the respondent was its employee, that he was injured while in the course of employment and that the said injuries were as a result of the appellants negligence contrary to the evidence. It was its submissions that the respondent failed to discharge its burden of proof by failing to prove that he was injured, the injuries and negligence.

7. The issue as to whether the respondent was an employee of the appellant was resolved when the appellant's production manager confirmed that he was indeed an employee, a fact captured well in the judgment under attack.

8. As to whether the respondent was indeed injured while on duty, all appellants witnesses denied there having been such an injury. The appellants production manager (DW1) testified that no report of injury was made and that according to the employee register, the respondent worked the whole day. This evidence was corroborated by the supervisor who categorically denied that such accident occurred and stated that it could not have occurred as the respondent was assigned duties on the component department and not at the maintenance department where the alleged injury is alleged to have occurred. He also stated that the respondent was provided with gloves, and had signed for them. It was his further evidence that if an employee is injured he is first given first aid at the company's clinic before he is taken to the hospital if injury is serious.

It is therefore submitted that the trial court failed to capture crucial points in the appellants evidence and thus failed to find that no accident occurred on the material date involving the respondent, that there were material contradictions in the evidence by the respondent and his witness, that no weight was placed on the appellants witness evidence as well as failing to consider alleged fake medical records produced in court which were discounted by the medical superintendent in charge of the Nakuru General Hospital.

9. It is the appellants submission that a proper analysis of the evidence would have had a conclusion that no injury occurred to the respondent on the material day while in the cause of his duties at the appellants premises. The appellant relied on several cases **Mwanyule -vs- Said t/a Jomvu Total Petrol Station 2004 (KLR) and Kipkebe Ltd -vs- Dismass Omayio.**

10. The Respondent in opposing the appeal submitted that he proved his case on a balance of probability and his evidence was corroborated by his witnesses and had discharged the burden of proof to the required standards. He submitted that despite its denial in its defence that he was not an employee of the company, the company's witnesses confirmed his employment and the fact that he was on duty on the material date.

Having been confirmed that the Respondent was an employee of the appellant and having been on duty

on the said date, then, it behoves this court to re-evaluate the evidence in its entirety to find whether the Respondent was injured and if so, the culpability of the parties.

11. One **Titus Walekeha Mutanyi** (PW3) testified that when the respondent was injured he was the supervisor in the component section and that the respondent was repairing the machine with others when he was injured on his left index finger as a result of mistake of his co-workers, that he did not have gloves as he had not been given any. He did not however tell the court whether the filled the injury in the accident book/forms which he testified and filed by the supervisor. The Respondent did not produce or call for the production of the accident register that would have indicated whether or not the injury was recorded.

12. In his evidence the respondent did not testify whether he reported the accident or whether it was booked in the accident register. All he said was he was taken to hospital immediately. He did not tell the court whether any first aid was given to him at the company clinic and if not, no reason was tendered. His testimony was that he blamed the company for failure to given him gloves and gumboots which he rightly said would have minimized the injuries.

In further proof of the injury, the respondent produced a treatment card from Nakuru Provincial Hospital being serial **No. 3570 of 2004** and dated 2nd April 2004. According to the Records officer who was summoned to produce it (PW4)that card was not given to the respondent.

The authenticity of the said treatment card was thus suspected. It was submitted that the card being **Serial No. 3570 of 2004** was issued to a different patient on the 20th March 2014, and that the casualty cards for the material date had serial numbers 3707-3722. The records officer could not explain the discrepancies in the treatment card.

A treatment card being the primary document to prove injury and treatment is very important. Doubts having been raised as to he genuineness of the same, then, the fact of the injury also remains doubtful.

13. It is this same treatment card that the doctor used to prepare a medical report to assist the court in assessment of damages. To that extent, the medical report prepared by Dr. Obed Omuyoma on the 30th May 2005 in my considered view, also being based on the treatment card that I have stated its genuinety is doubtful can therefore not be the basis of a medical report that the court can rely on.

14. The court has considered authorities filed by the respondent. In support of his submissions, with respect, the said authorities state the principles upon which the court ought to be guided in determining causation, negligence and quantum of damages. The pertinent issue in this matter is whether or not the respondent was injured at the appellants company while in the course of employment and the culpability of the parties. These issues could only be determined on evidence.

**Sacco Stores Ltd -vs- David Mwangi Kimotho (2008) KLR** states the principles of apportionment of blame and court's discretion on interfering with a trial court's findings of fact.

**Mega Spin Limited -vs- Gabriel Otieno No. 101 of 2005** presupposes that an injury has been proved and negligence established on the failure of an employer to provide protective gear; the same as in **Timsales Ltd -vs- Harun Thuo Ndungu (2010) KRL** among others.

The above authorities would have been very useful had there being no dispute as to the alleged injury to the respondent.

15. The trial court in its judgment did not interrogate the disputed facts which form part of the appeal, the contradictory statements by the respondents witnesses and the doubts raised on the genuineness of the treatment card from the Nakuru Provincial Hospital. I do not think the medical superintendent of the hospital would have departed from what he had stated in the letter dated 20th July 2006, that the treatment card was not genuine. In any case the production of the said letter was not objected to and was

thus admitted by the court.

Despite the glaring disparities and contradictions in the evidence the trial court proceeded to find in favour of the respondent in all the issues as had been framed. Parties are bound by their pleadings. Likewise the parties are bound to prove their allegations as asserted in their respective pleadings as stated by **Justice Visram (as he then was) in Associated Electrical Industries Otieno -vs- Otieno (2004) KLR.**

16. From the foregoing it is evident, in my view, that the trial court failed and misdirected itself in law and fact in the analysis of the entire evidence as tendered by both the respondent and by the appellant and thus arrived at a wrong conclusion, that the respondent had proved on a balance of probability, that he was injured while performing duties as assigned by the appellant, and that such injury was as a result of the appellant's negligence and thereby holding the appellant liable in damages wholly.

Had this court found in favour of the respondent, it would have confirmed the damages awarded to the respondent as fair and reasonable.

For the above reasons, the Appellants appeal dated 18th May 2011 is allowed with costs. The trial court's judgment and decree is set aside and the lower court case dismissed with costs.

**Dated, signed and delivered in open court this 10th day of March 2016.**

**JANET MULWA**

**JUDGE**