



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 70 OF 2010

TIMSALES LIMITED.....APPELLANT

VERSUS

JOSEPH NJENGA GITHAIGA.....RESPONDENT

JUDGMENT

(An appeal against the judgment delivered by Hon. SMS SOITA, at the Principal Magistrate's Court, Molo, in Civil Suit PMCC No.199 of 2004 on 9th March, 2010)

FACTS

This appeal arises from the judgment dated 9th March, 2010 of the Principal Magistrate, Molo in CMCC No.199 of 2004.

The respondent herein brought a suit against the appellant due to injuries he sustained while under its employ.

The Honourable Magistrate at trial found that the respondent had proved his case and gave judgment in the following terms:

- a) Liability apportioned at – 80:20
- b) General damages – Kshs.80,000/=
- c) Special damages – Kshs.2,000/=

The appellant being dissatisfied with the trial Court's judgment brought this appeal and listed five (5) grounds of the appeal as are set out in the Memorandum of Appeal filed on 9th May, 2011 which grounds are *inter alia*;

1. THAT the Learned Magistrate erred in law and in fact by failing to give a concise statement of the case, the points of determination, the decision thereon and reasons for his judgment pronounced on 9th of March, 2010.
2. That the Learned Magistrate erred in law and in fact in disregarding and ignoring that the burden of proof lay on the Plaintiff to prove injuries to himself and that the Plaintiff had failed to prove injuries to himself and in particular failed to prove and produce as exhibit the medical treatment

- card which was the primary evidence and which had been marked for identification and erred on relying only on the doctor's report.
3. That the learned magistrate erred in law and in fact in disregarding the evidence of the Health Record and information Officer from Elburgon Hospital.
 4. That the Learned magistrate erred in law and in fact in disregarding and ignoring the defence evidence in its entirety and in particular that the Plaintiff was not employed by the Defendant as at the date of injury and that there was no record of injury.
 5. That the Learned Magistrate failed to appreciate the totality of evidence before him and in not considering and in ignoring the submissions on behalf of the Defendant.

ISSUES FOR DETERMINATION

Upon reading the respective written submissions and upon perusal of the court record the issues framed for determination are;

- i) Whether the respondent proved that he was injured on that material date;
- ii) Whether the medical treatment card was crucial to proving the Respondent/Plaintiff's case;

ANALYSIS

This being the first appellate court it behoves this court to reconsider the evidence on record, re-evaluate it and to arrive at its own independent findings and conclusions always bearing in mind that neither saw nor heard the witnesses. Refer to the case of **Selle and Anor. V. Associated Motor Boat Company Ltd and Others**, (1968) EA 123.

When the matter came up for hearing in the lower Court, the Respondent testified that he was employed by the appellant and on 8th February, 2003, he was injured whilst preparing a waste pit.

He testified that he was treated at Elburgon Hospital. A treatment card was marked for identification, but was never produced. As such it does not form part of the record. This is the basis upon which the appellant contends that the respondent/plaintiff failed to prove his injuries.

In the respondent's submissions to this appeal it is argued that failure to produce a medical treatment card is not fatal. It is the respondent's submissions that the Medical Report is sufficient proof of the injuries sustained by him.

The respondent has relied on the authority of **Timsales Limited V. Harun Thuo Ndungu** wherein Emukule J, held that failure to produce the treatment card does not discredit the medical report. Upon perusal of the said authority, I am persuaded by the learned Judge's holding that the treatment card should have been produced by the respondent herein as the same belonged to him and that failure to produce a treatment card does not rubbish the Medical Report **save where the authenticity of the said card has been brought to question.** (emphasis mine)

The Medical Report in this case was produced by Dr. Omuyoma who examined the respondent about a year after the accident. The good doctor testified that he based his medical report on the treatment card and on the physical examination of the respondent.

The doctor confirmed that the respondent was injured and also confirmed the injuries he suffered. As to when the injuries were inflicted, he relied on the treatment card. The upshot is that the Medical Report can only confirm the injuries the respondent suffered but it cannot confirm that the injuries were indeed inflicted on the date as pleaded by the respondent. The date could only be confirmed by the treatment card as it was filled by the medical personnel who attended to the respondent on the material date.

With regard to the authenticity of the said treatment card, the appellant summoned a Records Officer from

Elburgon Hospital. The said Officer testified that the respondent was not treated at the said hospital on the date in question. The Records Officer testified that the OP Number that was given to the respondent belonged to another patient. Copies of the hospital register were produced as evidence. These records support the Officer's evidence.

The said records are from the date when the respondent was purportedly treated at the said hospital. The respondent's name does not appear therein. Upon further scrutiny, it is clear that the numbers given to the respondent are not random but consecutive.

It is this court's considered view that it would be highly improbable that the respondent would be given number OP 4216, yet the numbers assigned to out patients on 8th February, 2003 ran up to 1481.

I am therefore satisfied that the primary evidence contained in the medical treatment card rebutted the testimony of the respondent and indeed he failed to prove that he was injured and treated on the 8th February, 2003 as pleaded and that the trial magistrate erred in law and fact in relying only on the Doctor's medical report. The respondent also failed to prove the source of his injuries to himself.

To that end, this ground of appeal no.(2) is found to have merit and is hereby allowed..

Due to the foregoing, I will not belabour myself in addressing the issues arising from ground of appeal no. (4) as to whether the respondent was employed by the appellant at the time of accident, attributable negligence, and its statutory duty of care.

At this stage, the above notwithstanding, it is incumbent upon this court to render a finding on the award for general damages it would have made.

In so doing, reference shall be made to the Medical Report prepared by Dr. Omuyoma.

According to the said medical report, the respondent/plaintiff suffered superficial injuries to his anterior chest wall. These are soft tissue injuries. The trial magistrate awarded Kshs.80,000/= as general damages.

For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions. Refer to the case of Josephine Angwenyi V. Samuel Ochillo Civil Appeal No. 125 of 2008 wherein Makhandia , J considered the said principle and stated:

"...an appellate court in deciding whether it is justified in disturbing the quantum awarded by the trial court, it must be satisfied that either the trial court in assessing the damages took into account an irrelevant factor, or left out of account a relevant factor or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages"

Bearing the above principles in mind and having taken into consideration comparable authorities that were considered by the trial court, I am satisfied that the award was neither too high nor too low. The same would not have been interfered with and would have been left to stand.

FINDINGS

This court finds that the respondent indeed failed to prove that he was injured on 8th February, 2003 as pleaded and that the trial magistrate erred in law and fact in relying only on the Doctor's medical report.

DETERMINATION

The appeal is hereby allowed.

The judgment in CMCC No.199 of 2004 is hereby set aside and the suit dismissed.

Each party to bear his/its own costs both in the lower court and on appeal

It is so Ordered.

Dated, Signed and Delivered at Nakuru this 17th day of July, 2015.

A. MSHILA

JUDGE