REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 30 of 2007

TIMSALES LIMITED...APPELLANT

VERSUS

ELIJAH MACHARIA...RESPONDENT

(An Appeal from the Judgment/Decree of Hon. H. M. Nyagah, Senior Resident Magistrate, in Nakuru C.M.C.C.No.222 of 2003 dated 13th February, 2007)

JUDGMENT

The Respondent instituted a suit in the lower court seeking both general and special damages for injuries he suffered in the course of his employment with the appellant.

The trial court upon considering the evidence presented before it entered judgment in favour of the respondent and awarded him Kshs.100,000/= in general damages and 2000/= in special damages. The respondent was to bear 30 % contribution.

Being dissatisfied with the entire decision of the trial court, the appellant has filed this appeal challenging it on six (6) grounds but later on abandoned ground six. The remaining grounds can be samarised thus:

1. The judgment does not contain concise statement of the case, the points of determination, the decision thereon and reasons for such decision.

2. The learned magistrate misdirected himself by finding that the respondent had proved his claim as pleaded in the Plaint.

3. The learned magistrate ignored the fact that the respondent did not prove injuries to himself as he failed to produce medical treatment card which was primary evidence and which had been marked for identification *“MFI 1”*.

4. The learned magistrate disregarded the appellant's evidence.

Before considering these grounds, the court must evaluate afresh the evidence on record in order to arrive at its own independent conclusion.

It is also common ground that the respondent was on duty on 21st January, 2003, the date of the

alleged accident, as admitted by the appellant's witness, D.W.1, Nahashon Maina Mwangi. It was the respondent's evidence that on that day, while loading logs of timber onto a lorry, his colleagues released a log without warning him. The log crushed his right fingers. He was given first aid and later on taken to Elburgon Hospital by his superviser, Nahashon Maina, for treatment. He blamed the appellant for failing to provide him with protective gear, namely gloves.

Five (5) months later, the respondent was examined by Dr. Wellington Kiamba who from the history contained in the treatment card from Elburgon Hospital and his own physical examination compiled the medical report in respect of the respondent (PEX 1). He noted a prominent scar on the distal part of the index finger with loss of tissue as well as a prominent scar (5cm in length) and a contracture on the palm aspect of the middle finger. Movements of the finger was restricted. He classified the degree of injury as grevious harm and assessed permanent disability at 8%.

Through its filed statement of defence the appellant denied having being in breach any contract of employment with the respondent or having been negligent or in breach of any term of a contract. It contended that if the respondent suffered any injuries he was either the sole cause of the same or was substantially to blame for its occurrence. D.W.1, Nahashon Maina Mwangi, who testified on behalf of the appellant conceded that the respondent was an employee of the appellant and that he was on duty on the material day. He, however, denied having any knowledge of any injury to him. He produced a muster roll to show that the respondent was on duty from 21st to 24th January, 2012. He denied that the appellant was employed as a loader. He produced an employment card that the showed that the respondent was employed in 2004 (after the incident).

The trial magistrate after considering the foregoing evidence came to the conclusion that the respondent was indeed injured as claimed and that the appellant was to blame for failing to provide him with a safe working environment. He also found that the respondent had no way of knowing the entries in the appellant's records as he did not sign anywhere on the muster roll or accident register. In his opinion the respondent was also to blame for not taking precaution hence the apportionment of liability.

I have already noted that it is common ground that the respondent was an employee of the appellant and that he was on duty on the day of the alleged accident. The only question that fell for consideration before the court below and which is also the crux of this appeal is whether he was injured as alleged.

The respondent testified that he had worked for the appellant for 3 months before the accident; that after the accident he was taken to Elburgon Hospital by his supervisor, Nahashon Maina Mwangi, and that he did not resume work thereafter. This was confirmed by Dr. Kiamba when he examined him five (5) months later. He stated that from the medical notes presented to him and the history given by the respondent, he concluded that the respondent was attended at Elburgon Nyayo Hospital as an Out Patient (OP 636/O3). The treatment chit was marked for identification but was not produced as exhibit.

Taking into account the respondent's own testimony at the trial of how the accident occurred, the evidence of Dr. Kiamba who saw the respondent barely 5 months from the date of the alleged accident and the fact that he saw treatment notes which were also seen by the trial court and marked but not produced, I find that the respondent proved that he was injured on duty.

The trial court disbelieved the appellant's only witness, Nahashon Maina Mwangi. Whereas he denied that the respondent was employed as a loader, he did not tell the court what other duty the respondent was undertaking and in respect of which he supervised him. I also find the contents of the documents that the appellant relied on in its defence incredible. Firstly, the entries in both the muster roll and in the injury book were not signed by the respondent. The omission of the respondent's signature against his name to authenticate the record takes away its integrity. Secondly, D.W.1's allegation that he was at the material time a permanent employee of the appellant was not supported by the employment card he produced in court. His mere denial of the alleged injury and the work the respondent was engaged to undertake, in my view, was and is not enough to controvert the evidence tendered by the respondent.

Even though the respondent presented and the court marked the treatment notes from Elburgon Hospital for identification, it was not produced as an exhibit. It was, as a result argued by the appellant that failure to produce the treatment notes was fatal to the respondent's case.

Opinions of the effect of failure to produce treatment notes are diverse and varied in In **Timsales Limited** V. **Daniel Karanbja Bise**, Civil Appeal No. 111 of 2005, Nakuru, Emukule, J. observed :-

" Being a public document the production of it in evidence does not require certification by the health facility or the testimony of the health facility, as would ordinarily be required under section 82(d) (i) of the Evidence Act. .... by excluding the respondent's attendance and treatment card, could I also say that there was no accident and injury to the respondent? To so conclude would render examination of the respondent by Dr. Kiamba and Dr. Malik an exercise in futility and consign their opinion to the waste paper bin. Their notes about the scar on the respondent's thigh 12cm in length would all evaporate and became a figment of imagination. That would be an absurd conclusion"

Similarly, D. K Maraga, J. (as he then was) in **Comply Industries Limited** V. **Mburu Simon Mburu**, Civil Appeal No.121 of 2005, observed that failure to produce treatment card does not always lead to dismissal of injury claims. He held:-

"Where a doctor who examines him (complainant) several days or months later makes reference to the treatment card, unless otherwise proved, that would suffice and the production of the treatment card is not neceassary. Failure to produce treatment cards is fatal only when the plaintiff fails to prove by other evidence that he was indeed injured and doubt is cast on his injury claim."

The trial court saw and even marked as MFI 1 the treatment notes that Dr. Kiamba relied on in preparing the medical report. The doctor also physically noted the injuries the respondent suffered represented at the time of examination by a scar. The appellant did not allege or prove that the treatment chit to have been a forgery. To dismiss, the respondent's claim on the basis of the failure to produce the treatment chit would, in my view, be against the spirit of **Article 159(2) (d)** of the **Constitution** and **Section 1A** and **1B** of the **Civil Procedure Act**. (see the decision of this court in **Gachagua Sawmills Limited** V. **Ephram M. Omera**, Civil Appeal No. 159 of 2005).

My conclusion is that the respondent was injured in the course of his employment with the appellant. Was the appellant negligent or in breach of the contract of employment? The respondent explained that he sustained the injuries when his colleagues released the log they were carrying without warning him. Was the appellant to blame for this?

The court quoting Halbury's Laws of England in the case of **Mwanyale** V. **Said t/a Jomvu Total Service Station** stated as follows:

"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of relation of employer and employee to compensate him for any injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employees safety; the exercise of due care and skill suffices."

Did the appellant exercise due care? The respondent blamed the appellant for failing to provide him with a safe and proper system of work. He particular blamed it for failing to provide him with protective gloves. The appellant's witness did not address the issue whether the respondent was supplied with protectives gloves or not. He merely denied the respondent's involvement in loading the logs. Having already found that the respondent was injured in the course of his employment, without any proof to the contrary, I find that the appellant was in breach of its duty to provide the respondent with safe system of

work to enable him carry his duties without exposure to the dangers like the one he suffered. For instance the appellant ought to have provided mechanical loading of logs as opposed to manual means.

Though brief in his judgment, upon consideration and re-evaluation of the evidence presented before the lower court, I find that the learned magistrate arrived at the correct decision.

For the foregoing reasons this appeal has no merits. I dismiss it with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 10th day of October, 2012.

W. OUKO
JUDGE