REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL 28 OF 2005

AMALGAMATED SAWMILLS LIMITED……...……..……APPELLANT

VERSUS

LUCY WANJIKU NDUNGU……...…….RESPONDENT

JUDGMENT

The appeal herein is against the judgment delivered by the Hon. H. M. Nyaga SRM, Nakuru on 21st January 2005 and the subsequent decree issued on 14th November, 2005. By a plaint dated 21st May, 2001 the respondent sued the appellant claiming damages for a personal injury sustained in an Industrial accident at the respondents' premises. Special damages in the sum of Shs 2,500/= were also sought in addition to costs of the suit and interest on the award. Based on the evidence adduced at the trial the learned trial magistrate found the appellant 100% negligent and entered judgment for the respondent in the sum of Shs 52,000/= being Shs 50,000/= general damages and Shs 2,000/= special damages.

Aggrieved by the findings of the lower court the appellant filed this appeal citing the following grounds:

1. That it was not proved in evidence that the accident in which the respondent was injured occurred at the appellant's premises.

2. That there was no evidence of negligence to warrant the learned trial magistrate to find the appellant 100% liable.

3. That the judgment of the learned trial magistrate was unreasonable, in view of the fact that his findings and conclusions were not supported by evidence.

4. That the learned trial magistrate erred in not deciding matters of fact and/or failing to consider material facts that were central and crucial to the determination of the issue of liability in particular and the entire case in general.

Submitting in support of the appeal, learned counsel for the appellant, Mr. Murimi attacked the judgment on the ground that it was in contravention of **Order XX rule 4** and **Section 78 of the Civil Procedure Act** in that it failed to set out points of determination. Further the learned counsel submitted that no evidence was adduced to prove that the respondent was at the appellant's premises on the date she alleges to have suffered an injury there and despite stating during cross-examination that she would call a witness to prove that fact she did not do so. Counsel requested the court to, note from the documentary evidence

adduced by the appellants' only witness (DW1), that the respondent had left the appellants employment on 31st October, 2000 and did not work during the month of November 2000. She could not therefore have been injured there on 28th November 2000 as claimed in the plaint. Citing the decisions in:

i) AMALGAMATED SAWMILLS LTD –vs- JOHN MWANGI H.C.C.A. NO. 38 OF 2005 and

ii) BUDS & BLOOMS LTD –vs- JAMES SAWAMI SIKINGA H.C.C.A. NO. 126 OF 2005

Counsel submitted that there was no proof of employment as required under **section 107** of the **Evidence Act (Cap 80 of the Laws of Kenya)** which meant that the respondent's claim was not proved to the required standard.

As regards the injury itself counsel submitted that the failure by the respondent to produce initial treatment notes to support her allegation that she was treated at Njoro Health Centre immediately after the accident, choosing instead to rely on the medical examiner's reports compiled seven months after the injury was fatal to her claim. According to counsel, whatever injuries may have been noted on the respondent by the examining doctors might not be related to the alleged accident of 28th November 2005 and could have been sustained in a different situation. He cited the authority of **NGUKU –vs- REP [1985] KLR 412** to support this submission. Finally, counsel argued that by merely stating that she was injured when a piece of plywood fell from a pack that was not properly placed, as she and colleagues were arranging them, the respondent did not discharge her burden of prove in negligence since causation was not established when the issue of who or what triggered the falling of plywood was left unanswered. He submitted therefore that the learned trial magistrate erred in finding the appellant negligent when no fault attached as was held in the cases of **MUTHUKU –vs- KENYA CARGO HANDLING SERVICES LTD [1991] KLR 464, SIADPAK INDUSTRIES –vs- JAMES MBITHI MUNYAO HCCA NO. 153 OF 2002, TIMSALES LTD –vs- STEPHEN GACHIE and AMALGAMATED SAWMILLS LTD –vs- STEPHEN MUTURI NGURU** supra which he said supported the appellant's case on all fours. For the above reasons the appellant prays that the judgment and decree herein be reviewed and/or set aside.

Opposing the appeal, learned counsel Mr. Githiru submitted that the judgment was sound and well reasoned. According to him the learned trial magistrate was right in finding that the respondent's supervisor having not been called to testify in response to the respondent's assertion that she was at work on the material date left that evidence uncontroverted since that was a fact which DW1 could not of his own personal knowledge challenge. He urged the court to disregard the submission regarding the production of initial medical reports as an afterthought since the same had not been raised as a ground in the memorandum of appeal. He argued that the two medical reports, one of which was compiled at the request of the appellants were produced by consent of both parties and they were conclusive as to the nature of the injury and its occurrence at the appellants' premises.

Regarding causation counsel submitted that a case of negligence was established and proved by uncontroverted evidence leading the learned trial magistrate to find that there existed, within the appellants' operations an unsafe system of work characterized by poorly or haphazardly arranged plywood which fell on the respondent as she picked them. Finally, counsel for the respondent submitted that the learned trial magistrate rightly found that appellants were under a duty to provide a safe environment for work which duty they had breached as towards the respondent. Counsel also submitted that the appellant having failed to dislodge by documentary proof which was in their possession the respondents' contention that she was injured in the course of employment by the appellant, a presumption could only be made that the accident did occur as alleged in the plaint and that the only issue that remained for determination was the extent of the injury. He asked the court to dismiss the appeal with costs and to leave the judgment and decree intact.

In the plaint dated and filed on 13th July 2001 the respondent stated that she was a permanent employee of the appellant when she was injured on or about 28th November 2000 as she performed her duties. She stated in paragraph 5 of the plaint that a plywood board hit and injured her eye, an incident

she blames on the appellant's negligence in failing to provide her with a safe system of work. The appellant's negligence was particularized in the plaint as follows:

a. Failure to take any adequate precautions for the safety of the plaintiff while engaged in his duty.

b. Exposing the plaintiff to risk of injury or damage of which they knew or ought to have known.

c. Failing to provide and maintain a safe and proper system of work and to give proper instructions to its workmen including the plaintiff on how to follow that system.

d. Failure to observe the term of the contract of employment thereby exposing the plaintiff to a risk of damage of which they knew or ought to have known.

e. Failure to provide the plaintiff with proper and safety apparel e.g. gumboots, gloves etc.

f. Res ipsa loquitur

The appellants in their defence dated 24th August 2001 denied the alleged employment of the respondent as a permanent worker, that the respondent was in its employ on the date of the alleged injury or that she was injured as claimed, putting her to strict proof of the allegations. They denied the imputation of negligence on their part and the particulars thereof, pleading in the alternative, that the respondent was herself to blame for any injury that she may have sustained to which she must be held to have contributed either wholly or substantially through her own negligence.

In her evidence in chief the respondent testified that at the material time she was employed by the appellant as a casual labourer. On the 28th November 2000 she stated that she was working in the Batter Board section of the appellant's premises in Njoro. She had been assigned the task of arranging plywood under the supervision of one Maganda. She stated that as she and her colleague picked up plywood one of them fell and hurt her on the right eye inflicting injury on her. She reported the incident to her supervisor who did nothing about it. She testified that she sought treatment at Njoro Health Centre and produced a treatment chit which was marked as MFI. The respondent also produced in evidence two medical reports one by Dr. Kiamba and another by Dr. Malik. The medical reports were produced by consent. He testified further that she had worked for the appellant for two years and that her name appeared in the muster roll which was completed by the supervisor. Under cross-examination the respondent testified that she had not proved that she worked at the appellant's premises but stated that she could call a witness to prove that fact. Narrating the occurrence the respondent testified that she was injured while transferring plywood and that the accident occurred after she had been so engaged for two hours. She admitted that she knew of a record called injury book which was maintained by the appellant.

Restating her claim as appearing in the plaint the appellant in her testimony cast blame on her supervisor and her employer for not ensuring that the plywood they were instructed to carry was properly arranged to avert any accident. The appellant called only one witness Geoffrey Kibobi who stated that he was employed as the appellant's wages clerk and that he was incharge of the workers records. He testified that he knew the respondent and confirmed that she worked for the appellant as a casual worker and denied the respondent's allegation in the plaint that she was permanent worker. DW1 testified that the appellant was not injured at the appellant's premises on 28th November 2000 since according to the records for workers' attendance during the month of November 2000 her name did not appear. He produced the muster roll which was marked as DExh1 and also an injury book for the month of November which showed only 3 people had been injured during the month and the respondent was not one of them. Under cross examination DW1 testified that he was the one who filed the muster rolls restating that had the respondent worked during the month of November she would not have appeared in that month's payroll. According to DW1 if the respondent was injured at all then it was not at the appellant's premises.

The treatment chit marked as MFI was not produced in evidence and no one was called by the respondent to support her claim that she was at work at the appellant's premises on the date of the alleged injury.

Both Dr. Kiamba's and Dr. Malik's reports, compiled on 8th May 2001 and 12th September 2001 respectively indicated that the same were completed based on information furnished by the respondent herself. They appear to have been shown treatment records of Njoro heath centre where the respondent was treated for soft tissue injuries on the right eye and medication in the form of tetanus toxoid, antibiotics and painkillers administered. The two doctors' reports agree on the nature of injury sustained by the respondent. The respondent had a 2cm scar on the right eye after the wound had healed. They both concluded that the respondent had a partial temporary incapacity of one week. Although the two doctors stated that the respondent claims to have been injured at the appellant's premises neither of the reports produced appear to have confirmed whether or not the treatment at Njoro health centre given on that date.

After evaluating the evidence tendered before the trial court the learned trial magistrate proceeded to find in favour of the respondent's contention that the appellant had failed to provide a safe system of work to avoid injuries to the employees while holding that, although it is the duty of the employee to ensure his/her own safety, no evidence had been led to show that the respondent did not take precautions for her own safety while carrying out the task in question. The learned magistrate found as a fact that the plaintiff's evidence that the boards she was carrying, one of which fell on her had been haphazardly placed and that this piece of evidence, having been uncontroverted, the respondent had proved negligence or breach of duty on the part of the appellant, as was alleged in the plaint.

I have examined the entire record of the lower court, analysed and re-evaluated the evidence adduced at the trial. The facts of the case were well captured by the learned magistrate and I find that he did consider the evidence adduced before him. Although the learned magistrate did not follow any sequential order when considering the points for determination and reasons for his judgment my reading of the same reveals that **Order 20 rule 4** has been complied with to a satisfactory extent.

Before proceeding to find on liability the learned magistrate was duty bound to establish whether the respondent was on duty on 28th November, 2000 because it is only in those circumstances that any tortuous duty the appellant may have owed to its employees would attach. I have noted a glaring and serious typographical error and/or mistyping of pages 2 and 3 of the judgment, where the issue of employment is discussed. It is in that portion of the judgment that the learned magistrate records his findings after examining the master roll produced by the defence. The mix up in the typed version of the record appears at page 3 of the judgment beginning from line 3 where it states as follows:

"***It is unlikely that it would be in the injury book. I have also looked at the muster roll for November in respect to casuals. It installs a safe system of work to avoid injuries to the employees. It is also the duty of an employee to ensure that the (sic) also takes precautions to ensure his safety."***

I find it necessary in the circumstances to reproduce what is recorded in the handwritten notes as regards the documentary evidence produced by the defence. The handwritten record reads as follows;

"***The defence called 1 witness Geoffrey Kibobi. He stated that he was the in-charge of workers records. He knew the plaintiff who worked as a casual worker. He stated further that the records reflected that the plaintiff only worked upto 31/10/00. He produced the muster roll and injury book to prove that the plaintiff was not present on the day she alleges that she was injured. This is a typical case one party stating one thing and the other saying the exact opposite. The plaintiff alleges that she was on duty on the date she sustained her injury while the defendant say she was not.***

The court has to find a way amidst this hazy route.

The plaintiff states that when she informed Mr. Maganda of the injury. He did not take any action so she went to Njoro Health Centre for treatment. Mr. Maganda was not called as a witness. Instead Mr. Kibobi who was the records officer came. He states that there was no injury reported in respect to the plaintiff and has brought the injury book/register. If Mr. Maganda did not take any action when informed of the plaintiff's injury. It is unlikely that it would be in the injury book.

I have also looked at the muster roll for November in respect to casuals. It seems incomplete and I am unable to make any conclusive findings as whether or not the plaintiff was not on duty on the material date.

DW1 stated that his name did not appear on the muster roll since he was in management. He was not the plaintiff's supervisor but confirmed Samuel Maganda was."

This court has examined the muster roll for the month of November produced by the defence which lists 15 casual workers. The respondent's name does not appear in the said roll. I am unable to find from the evidence tendered on what basis the learned trial magistrate concluded that the said document was incomplete. I am unable to understand also on what basis the learned trial magistrate formed the view that the evidence of the supervisor would have helped the court in deciding whether or not the respondent was on duty on the day she alleges to have been injured. The records produced before court were compiled by DW1 who stated in his unchallenged evidence that he was incharge of the workers' records and not the supervisor. The appellants have cited the provisions of **section 107 of the Evidence Act** which provides that:

"***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

Subsection 2 of **section 107** provides that:

"***When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

Under **section 108** of the **Evidence Act** the burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.

The defence filed and served on the respondent clearly challenged the respondent's assertion that she was injured while working at the appellant's premises on 28th November 2000. She was put to strict proof of that assertion. If indeed the respondent intended to rely on any documentation that was within the custody of the appellant, to prove that she was infact on duty at the material time and date she ought to have served the appellant with a notice to produce any such document for the purposes of the trial. The record bears no evidence of such notice having ever been served. In the absence of any other documentary evidence in this regard the lower court could only proceed on the documentary evidence laid before it which presented the best evidence available for the determination of the question as to whether the respondent was duty on the 28th November 2000. Had the respondent produced a medical chit showing that she was indeed treated at Njoro Health Centre on the date of the accident the situation would perhaps have been different since the court would then be able to decide that fact on the balance of probabilities.

Taking all the evidence in its totality I am persuaded by the appellants to find that the respondent did not discharge her burden of proof as to whether she was indeed injured at the appellant's premises or in the cause of her employment with the appellant as alleged. That being the case I find that the learned trial magistrate's finding that the respondent had proved her case against the appellant on the balance of probabilities was erroneous. For that reason I have no option but to allow this appeal and to substitute the lower court's judgment with an order for dismissal of the suit. Consequently the judgment and decree of the lower court are hereby set aside and struck out accordingly. Parties will bear their own costs in both proceedings.

Dated signed and delivered at Nakuru this 1st day of October, 2009

M. G. MUGO

JUDGE