



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**CIVIL APPEAL NO. 96 OF 2010**

**(CORAM: NAMBUYE, OKWENGU & KIAGE, JJA)**

**BETWEEN**

**TIMSALES LIMITED..... APPELLANT**

**AND**

**STANLEY NJIHIA MACHARIA..... RESPONDENT**

***(Being an appeal from the Judgment/Decree of the High Court of Kenya at Nakuru (Maraga, J.) dated on 10<sup>th</sup> day of February, 2010***

**IN**

**H.C.C.C. No. 148 OF 2005)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The respondent **Stanley Njihia Zacharia** sued the appellant **Timsales Limited** in the Chief Magistrate's Court at Nakuru seeking both special and general damages arising from injuries he sustained on the 18<sup>th</sup> day of March 2001 when a chisel fell on him and cut him while he was lawfully on duty doing his authorized work with the appellants. He attributed all the injuries he suffered to the negligence of the appellant itself, its servants/or agents and/or on breach of contract and terms of employment between them (appellants/respondent), whose particulars he gave.

The appellant resisted the respondent's claim vide a defence dated the 1<sup>st</sup> day of March 2003, in which it denied ever employing the respondent at all, or upon contractual terms of employment as pleaded. It also denied that the respondent was on the material date lawfully engaged in any work at the appellants' premises and put him to strict proof. In the alternative the appellant averred that if the respondent got injured at the appellants' premises as alleged, then the same was solely caused by his (respondent's) own negligence as particularized in the defence.

**A. B. Mongare**, Resident Magistrate in a judgment dated the 28<sup>th</sup> July 2005 apportioned liability between the parties at 80% against the appellants with 20% contribution against the respondent. General damages were assessed at Kshs 52,000, less 20% contribution leaving a balance of Kshs 41,600/- together

with costs and interest.

The appellant appealed to the High Court against that decision raising various grounds. D. Maraga J. (as he then was) in a judgment dated the 10<sup>th</sup> day of February 2010 dismissed the appeal. The appellant is now before us on a second appeal. It has raised five grounds of appeal. These maybe summarized as follows. The learned judge erred in law:

- **in failing to find that failure by the respondent to produce in evidence his initial treatment card which is the initial evidence of treatment and initial evidence of injury and relying solely on a medical report prepared subsequent and long after the alleged date of injury was fatal to his case from decided authorities, the respondents claim being a disputed industrial injury claim.**
- **in contradicting his earlier two decisions where he had held that failure to produce the initial treatment card in evidence in a disputed industrial injury claim is fatal to a claimants claim.**
- **in holding that 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 without stating what other evidence the respondent adduced to prove his claim and without making a finding on the appellants' evidence, which cast doubt on the respondent's claim of injury.**
- **the learned Judge contradictory decision vis a vis other decisions made by himself is inconsistent and against the principle and doctrine of precedent and inimical to proper administration of justice and consistence in judicial decisions requiring an interference by this Court.**
- **in failing to find that the respondent had not established “causation” and the learned Judge's finding for the respondent in negligence is wholly erroneous.**

Learned counsel **M/s Nasimiyu**, compressed the five grounds of appeal into three (3) by combining grounds 1, & 3 as ground one (1), grounds 2 & 4 as ground two (2) and then ground 5 alone as ground three (3).

In urging us to fault the learned Judge, it was M/s Nasimiyu's argument that the learned Judge should not have allowed the production of the medical report as sole proof of existence of the alleged injuries in the absence of production of the initial treatment card especially when the learned Judge failed to expound on what he meant by other supporting evidence that he took into account when establishing the existence of the respondent's injuries; second, the learned Judge should not have departed from his earlier decisions where he had held that in any industrial claim it was not enough for any employee to just produce a medical report in the absence of an initial treatment card in the absence of any justification to do so; third and lastly that the respondent had failed to prove “causation” for the injuries allegedly suffered as he had failed to give sufficient explanation.

To buttress her argument, M/s Nasimiyu, cited the case of **ANTHONY FRANCIS WAREHAM T/A WAREHAM & 2 OTHERS VS. KENYA POST SAVINGS BANK [2004] eKLR; KENNETH NYAGA MWIGE VS. AUSTIN KIGUTA & 2 OTHERS [2015] eKLR; SELLE VS. ASSOCIATED MOTOR BOARD CO. LTD [1968] EA 123** and **THUITA MWANGI VS. KENYA AIRWAYS LIMITED [2010] eKLR**, all for the proposition, that (i) if the evidence does not support the fact pleaded, the party with the burden of proof shall fail; (ii) failure to produce a document marked for identification as an exhibit is a fatal error on the part of the party failing to do that; (iii) the Court of Appeal is not bound necessarily to follow the trial Judge's findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances materially to estimate the evidence.

Learned counsel also cited persuasive decisions namely **TIMSALES VS. WILSON LIBUYUA [2008] eKLR; BUDS & BLOOMS LIMITED VS. JAMES SAWAMI SIKINGA [2008] EKLR;**

**AMALGAMATED SAW MILLS LTD VS. TABITHA WANJIKU [2006] eKLR** and **EASTERN PRODUCE (K) LTD VS. JAMES KIPKETER NGETICH [2005] eKLR**; all for the proposition that failure to produce a treatment card is fatal to the case of a person claiming to have suffered injury; second, a medical report without an initial treatment card cannot be sufficient to prove that a person suffered injury; third, a person claiming to have suffered injury has to prove the negligence of the party the claim is coming up against.

In response to the appellants submissions, learned counsel **Oteyo R. Eunice** urged us to dismiss the appeal on the grounds that failure to produce the treatment chit which had been marked for identification was not fatal to the respondent's case because the Doctor who prepared the medical report swore under oath that he had perused the medical chit and reflected its contents in the medical report. Second, the learned Judge should not be faulted for his failure to follow his own previous decisions because each case depends on its own set of circumstances and also these were not binding upon the learned Judge. Third, if the appellant entertained reservations about the medical report tendered in evidence by the respondent they should have caused the respondent to be examined by a doctor of their choice.

To buttress her arguments, learned counsel cited two persuasive authorities namely **TIMSALES LIMITED VS. HARUN THUO NDUNG'U [2010] eKLR** and **TIMSALES LIMITED VS. ELIJAH MACHARIA [2012] eKLR** both for the proposition that failure to produce a medical treatment card/chit is not fatal to a claimant's case in which a medical report based on the treatment chit proving the injuries sustained has been tendered.

In reply to the respondent's submissions, M/s Nasimiyu reiterated her earlier submissions.

This is a second appeal. Our mandate is as was stated in **MAINA VS. MUGIRIA [1993] KLR 79** that on a second appeal only matters of law may be taken. See also **JOHNSTONE BARASA MAKOKHA VS. DANIEL AKWALA [2015] eKLR** wherein the Court differently constituted expressed itself thus:-

***“Being a second appeal our jurisdiction is limited in law. That jurisdiction is donated by Section 72 of the Civil Procedure Act which in relation to second appeals to this Court from the High Court provides that:***

***“(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court on any of the following grounds, namely-***

***(a) the decision being contrary to law or to some usage having the force of law;***

***(b) the decision having failed to determine some material issue of law or usage having the force of law;***

***c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.***

***2. An appeal may lie under this section from an appellate decree passed exparte.”***

We have revisited the record and considered it in the light of the rival arguments set out above as well as principles of law relied upon by either side. In our view, only one issue falls for our determination that is whether the learned Judge fell into error when he declined to fault the respondent's case for failure to produce the medical treatment chit, which had been marked for identification but was never produced as an exhibit.

In resolving the above issue the learned Judge had this to say:-

***“Where injury is disputed, treatment cards become critical to bolster claimant's words.***

***Failure to produce treatment cards, however does not always lead to the dismissal of injury claims. Where a doctor who examined him several days or months later makes reference to the treatment card, unless otherwise proved, that should suffice and the production of the treatment card is not necessary. 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. In this case, I agree with Mr. Gekonga that failure to produce the treatment card was not fatal. Unlike in the case of TIMSALES LTD VS. WILSON LIBUNYA NAKURU HCCC NO. 135/2005 in which the chemical officer disowned the treatment card he allegedly authored, there was nothing of that kind here. Dr. Kiamba saw and relied on the treatment card and even gave its outpatient number/ the appellant having evinced its intention to call someone from the hospital to testify on it but did not is telling. I am satisfied that the respondent was injured as he said and with that I find no merit in the appeal against liability and I hereby accordingly dismiss it.”***

It is not in dispute that the respondent's treatment card/chit was only marked for identification and was never produced as an exhibit. In KENNETH NYAGA MWIGE (supra) when confronted with a similar issue the Court made the following observation:-

***“The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit.***

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***In DES RAJ SHARMA VS. REGINAM [1953] EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of MICHAEL HAUSA VS. THE STATE [1994] 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.***

***Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”***

The Court then delivered itself thus:

***“In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification.”***

In BUDS & BLOOMS LTD (supra) the major reason for rejecting the claimant's claim was because the letter of dismissal was a forgery coupled with the failure to mark for identification or produce the treatment card. Neither was it ever used in the preparation of any medical report. In TIMSALES LTD VS. WILSON LIBUYA, (supra) the claimant lost because the treatment card he attempted to produce in evidence was a forgery. While in AMALGAMATED SAW MILLS LTD VS. TABITHA WANJIKU (supra), the claimant lost because the injury was neither entered in the employer's injury records, nor in the records of the health facility where the claimant alleged she had been treated.

Turning to the authorities cited by the respondent in the TIMSALES LTD VS. HARUN THUO case (supra) the claimant succeeded because the injuries had been verified by the medical doctor who prepared the report. Second, the medical report had been produced by consent. While in the TIMSALES LIMITED VS. MACHARIA case (supra), the claimant succeeded because the court believed the evidence tendered by the claimant as being truthful; second, the fact of the injury sustained by the claimant had been confirmed by the employer who took him to hospital from the place of the accident; and third, the doctor who assessed the injuries and prepared the medical report had verified those injuries; fourth, there was no contrary evidence to the claimant's case.

In the light of the above assessment, the learned Judge cannot be faulted for opining that:-

***“Where injury is disputed, a treatment card becomes critical to bolster the claimant's words. Failure to produce treatment cards, however; does not always lead to the dismissal of injury claims.”***

In the circumstance of this appeal, case law assessed above is clear that such a claimant (Industrial injury claim) will stand non suited where the treatment card is either a photocopy or a forgery, a situation that does not apply to the respondent's case. On the other hand such a claimant stands to succeed in his claim where the original treatment card is marked for identification but not produced, in instances where its contents were verified by the medical officer who prepared the medical report and produced such medical report to court either by consent or after cross-examination as the case may be. The respondent's case falls into the second category. Reason being that first the treatment card was indeed marked for identification but not produced for unknown reasons. It was however original. It was not tainted with allegations of forgery. Its contents had been verified by the medical officer who prepared the said report and tendered it in evidence after cross-examination. The medical report produced by the respondent was also not controverted by any other contrary evidence.

Second, the learned Judge's decision is not contradictory vis a vis his earlier two decisions for the reason that the reasons given for discounting the treatment cards in the said two cases were distinguishable from the facts in this appeal in that the said two cases one involved forgery, while the other involved lack of a record of any injury on the claimant sustained at the place of work.

Third, it is not true as contended by the appellant that the learned Judge failed to justify what he meant by “other evidence”. Existence of other evidence was clearly demonstrated by the testimony of the respondent and production of the medical report filled on the basis of the original treatment card. There is therefore nothing inconsistent or an affront to the principle and doctrine of precedent. The learned Judge was categorical that it is not in all cases that such a treatment card is not produced that a claimant would lose. There is nothing to portray improper administration of justice in the learned Judge's findings. The respondent was right that each case depends on its own facts.

As for the alleged lack of evidence on “causation”, in SOUTH NYANZA SUGAR CO. LTD VS. WILSON ONGUMO NYAKWEMBA [2008] eKLR D. Musinga J. (as he then was) approved the holding in STATPACK INDUSTRIES LIMITED VS. JAMES MBITHI MUNYAO HCCA NO. 152 of 2003 (UR) for the holding that:-

***“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.”***

In line with the above principle, the two courts below pinned responsibility for the respondent's injuries to the appellant. The said findings was well founded as demonstrated above.

In the result and for the reasons given above we find no merit in this appeal. It is accordingly dismissed

with costs to the respondent both on appeal and the High Court.

***Dated and delivered at Nakuru this 12th day of May 2016.***

***R. N. NAMBUYE***

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***JUDGE OF APPEAL***

***H. M. OKWENGU***

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***JUDGE OF APPEAL***

***P. O. KIAGE***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**