IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 111 OF 2011

BETWEEN

TIMSALES LIMITED.....APPELLANT

AND

SAMUEL KAMORE KIHARA.....RESPONDENT

(Being an appeal from the Judgment/Decree of the High Court of Kenya at Nakuru (Emukule, J.) dated 1st April 2011

IN

H.C.C.A. No. 85 OF 2006)

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JUDGMENT OF THE COURT

The respondent **Samuel Kamore Kihara** sued the appellant **TIMSALES LIMITED** in the Chief Magistrate's Court at Nakuru seeking both special and general damages for injuries allegedly suffered by him while in the course of his employment with the appellant. It was the respondent's assertion that the said injuries had been occasioned due to the negligence of or breach of the contract of employment by the appellant whose particulars he gave.

The appellant resisted that claim vide a defence dated the 16th April, 2003, in which the appellant denied responsibility for the alleged negligence or breach of contract and put the respondent to strict proof. In the alternative, the appellant averred that if any injuries were suffered by the respondent, which was denied, then the said injuries were occasioned by the respondent's own negligence whose particulars the appellant gave.

Parties were heard. The evidence for the respondent's case was taken down and concluded on 15th July 2004 by S. Muketi SRM (as she was then). The file then landed before E. Ominde SRM who gave directions on the 2nd day of June 2005 with the consent of both parties that proceedings be typed and parties do proceed from where these had been left. Proceedings were accordingly typed and the file placed before M. Onditi SRM who heard the defence to its finality on the 6th day of April, 2006. The

matter was then reserved for mention on the 20th day of April, 2006 for directions on submissions. Both sides duly filed their respective submissions. The file was then reserved for judgment scheduled for delivery on the 2nd day of June 2006. Instead of delivering a judgment on the said date, the learned magistrate delivered a ruling as follows:-

> ***"This is a ruling in respect of both counsels' prayer to have the court write a judgment in this matter.***
>
> ***Though the court had fixed the matter for judgment on 2.6.2006, but I have found it difficult to write the said judgment because I have read the typed proceedings and I am unable to discern from the proceedings what the learned trial magistrate meant with some abbreviations for example words like the medical report marked exhibit MFI 3 and 4 at page 4 of the typed proceedings because the defence has raised issues in their submissions that the plaintiff did not produce any medical evidence, yet I can see the trial magistrate indicated in her proceedings that the medical report, he produced as exhibit marked MFI 3 and 4 vide page 4 of the typed proceedings. I am personally unable to discern whether the medical report was tendered as exhibit or not due to the abbreviations MFI 3 and 4.***
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> ***It is my considered view that for justice to be attained in this file I shall make direction that this case be heard de novo to give an opportunity to the trial magistrate to follow proceedings and thereafter determine this case on merit as per law provided. Those shall be the orders of this court. Ruling signed, dated at Nakuru this 2.6.2006."***

The appellant was aggrieved and appealed to the High Court raising ten (10) grounds of appeal with two substantive prayers namely:-

> ***"(1) That the ruling and orders of the trial court dated the 2nd day of June 2006 be reviewed and set aside:***
>
> ***(2) The matter be remitted back to the lower court for writing of the judgment and/or such orders as the Honourable court may deem just and expedient to grant."***

Parties were heard on their merits resulting in the judgment of M.J. Anyara Emukule J, dated the 15th day of April 2011 in which the learned judge assumed the role of the trial magistrate and rendered the judgment aforesaid disposing of all the issues that were in controversy as between the parties before the subordinate court.

The appellant is now before us on a second appeal. Nine (9) grounds of appeal were initially set out. Ground 7 was abandoned at the hearing leaving eight (8) grounds. It is contended that the learned judge erred in law and fact:-

- **in holding that the respondent had produced a treatment "chit" at the trial despite the fact no such treatment "chit" had been produced at trial and despite the fact that there was no such a treatment "chit" in the entire court record;**

- **in awarding Kshs. 120,000.00 in general damages to the respondent on account of alleged injuries despite the fact that there was no medical evidence whatsoever produced by the respondent in support of his claim for injuries;**

- **in awarding the respondent Kshs. 120,000.00 in general damages for alleged injuries despite the fact that there was no medical evidence whatsoever before him upon which he could assess the nature of the alleged injuries and proceed to make an award;**

- **in making an award of the respondent despite there being no medical evidence whatsoever before him supporting such an award and supporting the claim for injury;**

- **in making a whimsical award in favour of the respondent without any basis for doing so;**

- **in setting a precedent with no legal grounding whose effect is that a claim for injury can be sustained solely on pleadings and oral evidence without medical evidence to support it;**

- **in holding that the respondent had been injured while working with the appellant without any evidence before him to support such a finding; and**

- **in not appreciating the incidence of burden of proof and in not applying the correct standard of proof thereby upholding as proved the issue of liability on the basis of insufficient evidence.**

In his submissions before court, Mr. Terer Kipyegon Lawrence, learned

Counsel for the appellant took the view that the learned Judge fell into error as follows: by taking into consideration alleged medical evidence namely "**medical chit**" when such a medical chit had only been marked for identification and not been tendered in evidence by the respondent; transgressing on the provisions of **section 35** and **48** of the **Evidence Act Cap 80** of the Laws of Kenya which permitted him to rely on expert opinion of persons specified in the said provisions only after such opinions have been procedurally tendered before him as evidence which was not the case herein; and misapprehending the burden of proof in the matter as he failed to note that it was the respondent who was obligated to prove his case to the required threshold first by establishing the facts in support of his claim for damages which according to Mr. Terer he did not.

To buttress his arguments Mr. Terer relied on the case of **Kenneth Nyaga Mwige versus Austine Kiguta & 20 others** [**2015] eKLR**, in which the court relied on **Desras Sahrma versus Regina M [1953] 19 EACA 310** and **Michael Hausa versus The State [1994] 7-8 SCNJ 144** for the principles that a document marked for identification only serves as part of the evidence on the 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 case of **Mohammed Hassan Musa & Another versus Peter M. Mailanyi & Another [2000] eKLR,** was also relied on for the proposition that jurisdiction vests in the court to assess injury based on the contents of medical report(s) where such evidence has been tendered in evidence by their makers under **section 48** of the **Evidence Act** (supra).

In response to the appellant's submissions, Mr. M. Gekong'a learned counsel for the respondent urged us to dismiss the appeal on the ground that there is sufficient proof on the record to demonstrate that the respondent produced the treatment notes as an exhibit without any objection from the appellant and it was therefore the mistake of the court to have recorded them as MFI's when they had in fact been produced as exhibits. The learned Judge rightly referred to them and used them to assess damages in favour of the respondent

With regard to the discharge of the burden of proof, it was Mr. Gekonga's assertion that the respondent satisfied the threshold placed upon him by law when he tendered the evidence to show that he had sustained injuries in the course of duty. The burden of proof therefore shifted to the appellant to dislodge that claim, which the appellant did not dislodge as they produced exhibits D1-3 after the close of the respondent's evidence. The respondent's version was more credible than that of the appellant and was rightly believed and acted upon by the learned Judge.

In reply to the respondent's submissions, Mr. Terer urged that the respondent's failure to file a supplementary record of appeal to include treatment *"chits" "notes"* demonstrates that the appellant's

record as compiled was in fact proper in terms of **rule 72** of the **Rules of the Court.**

This is a second appeal. By dint of **section 72(1)** of the Civil Procedure Act Cap 21 Laws of Kenya, it lies on points of law only.

There is no dispute that the appellant was aggrieved by the learned trial magistrate's conduct to return a ruling instead of a judgment and moved to the High Court to seek its intervention. The appellant was specific in its prayers for intervention as demonstrated above. The appellant simply wanted the High Court to set aside the ruling of the learned trial magistrate declining to render a judgment and revert the matter to the subordinate Court for necessary action. There was however an omnibus prayer couched as follows:-

> *"**and or such other orders as this honourable court may deem just and expedient to grant."***

***T**he learned judge in resolving the issues in controversy before him took into consideration the pleadings, evidence tendered by either side as well as their respective submissions, and faulted the trial magistrate for rendering a ruling instead of a judgment. The learned judge correctly held the view that there was a clear duty and obligation on a trial court under **section 25** of the **Civil Procedure Act,** to write a judgment in accordance with the prescriptions set out in Order xx rules (4) of the Civil Procedure Rules, as it was then. He further held that since the suit had been defended, (a judgment thereon ought to have contained a concise statement of the case, the point(s) for determination, the decision thereon and the reasons for such decision. He then arrived at the following conclusion:-

> "***The ruling by Hon. Onditi was not a judgment in terms of either sections 25 of the Act or Order xx rule 4 of the rules under the Act. In the circumstances, that ruling is set aside, and vacated together with any orders herein. The appeal herein does therefore succeed to that extent."***

Instead of remitting the matter to the trial court for action as prayed for by the appellant, the learned judge made the following observations on the way forward:-

> ***"Contrary to the prayer in the memorandum of appeal to remit this case to the lower court for hearing** de novo**, Mr. Martin, invited this court to write a judgment pursuant to the provisions of section 78 of the Civil Procedure Act."***

The learned Judge then took note of the provisions of **section 78 (1) (a)** and **2** of the **Civil Procedure Act** and made an observation thus:-

> ***"This case was filed on 11th February, 2003, that is some eight years old. The parties adduced and closed their respective cases. An order for re-trial would be an occasion to allow the parties to fill gaps in their clings of armour, and that would be clearly prejudicial in particular to the appellant which claims that the respondent's suit ought to have been dismissed in the first place. The discretion which easily lends itself for adoption is to determine the suit finally as provided by section 78 (1) (a) of the Act."***

He then assumed the role of the subordinate court, interrogated the issues in controversy as between the parties and then rendered a merit judgment thereon.

The issue for our determination is whether the learned judge properly exercised his jurisdiction under the said provision.

> *"**78 (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power:-***
>
> ***(a) to determine a case finally;***

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

2. ***Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the***

same duties as are conferred and impose by this Act on courts of original jurisdiction in respect of suits

instituted therein."

Mr. Terer took no issue with the learned Judge's decision of assuming the role of the subordinate court to finally determine the issues in controversy as between the parties then litigating before the subordinate court. Mr. Gekong'a similarly avoided the issue and made no mention of it. He submitted that parties have no mandate to confer jurisdiction on any court. It has to be conferred by law.

That is indeed the position as affirmed by this Court in the case of **Owners of the Motor Vessels "Lillians S" versus Caltex Oil (Kenya) Ltd [1989] KLR 1** where the issued jurisdiction was discussed thus:-

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an interior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"***

There is no dispute that the learned Judge had jurisdiction to hear an appeal from the subordinate court as contained in the memorandum of appeal and grant the prayers which simply sought the setting aside of the ruling of Hon. Onditi and refer of the matter back to the subordinate court for the writing of the judgment.

The issue is whether the omnibus prayer: "***such other Order as the court may deem fit to grant"*** provides a basis for the Judge to assume the original jurisdiction of the trial magistrate.

In **Rex Hotel Ltd versus Jubilee Insurance Co. Ltd** [1972] EA 211 the predecessor of this Court was categorical that a relief that qualifies to be awarded under the above prayer is one that is consequential to the main relief sought. In the absence of a judgment there is no way the learned Judge could have become seized of the appeal on the basis of the pleadings and evidence before the subordinate court, let alone have an opportunity to review any assessment done by the trial magistrate to enable him to invoke, reassess and reanalyze both facts and pleadings and arrive at his own conclusion on the matter under **section 78 (1)** and **(2**) of the **Civil Procedure Act**.

With respect to the learned Judge, the enthusiasm for speedy dispensation of justice gave no licence to over step the boundaries delineated by the law and procedure. In our view, the learned Judge's invitation to interfere was limited to setting aside an irregular order as he correctly so found and then remit the matter to the subordinate court to perform the function it had shied away from performing under **section 25** of the **Civil Procedure Act** and O**rder 20 (now 21) rule 4** of the **Civil Procedure Rules** and no more.

The learned Judge could not, in our view, take refuge under the relief ***"such other order as the court may deem fit to grant"*** because as observed by the predecessor of this Court, in the **Rex Hotel Ltd case** (supra) the role of the appellate court assuming the role of the trial court to reassess the pleadings, evidence and submissions of either side and arrive at its own conclusions on the matter was not consequential to the reliefs that the appellant had sought from the appellate Court.

In the result and for the reasons given above we affirm the learned Judge's order setting aside the orders of Hon. Onditi SRM of 2nd June, 2006 as these were irregular. We however set aside the learned Judge's orders that he had jurisdiction to finally determine the issues in controversy as between the parties under **section 78 (1)** and **(2)** of the **Civil Procedure Act** and substitute it with an order that the matter be remitted back to the subordinate court to proceed according to law. Since the appellate proceedings were occasioned by errors on the part of the court, we direct that each party do meet its own costs. The matter shall forthwith be placed before any magistrate other than Hon. Onditi SRM for disposal on priority basis.

Delivered at Nakuru this 16th day of June, 2016.

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR