



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC APPEAL NO.10 OF 2017**

**(FORMELY HCA NO. 111 OF 2010)**

**JULIA WAIRIMU GAKIRU.....APPELLANT**

**VERSUS**

**TIMSALES LIMITED.....RESPONDENT**

**RULING**

1. This appeal was filed through a Memorandum of Appeal dated 7<sup>th</sup> May, 2010 filed through the firm of Gekong'a & Company Advocates. The appeal is based on the following grounds:-

- 1) That The Learned Magistrate erred in law and in fact in finding that the appellant had not proved her case on a balance of probability contrary to the evidence on record.
- 2) The Learned Magistrate erred in law and in fact in finding that the Appellant had not proved negligence on the part of the Respondent despite the concrete and introverted evidence on record.
- 3) The Learned Magistrate erred in law and in fact in making a finding not based on the evidence on record.
- 4) The Learned Magistrate erred in law and in fact in failing to appreciate and consider medical evidence offered by the Plaintiff.
- 5) The Learned Magistrate erred in law and in fact in failing to set Points for determination and then determine them according to law.
- 6) The Learned Magistrate erred in law and in fact in believing and relying on the Respondent's submissions without any evidential value attached to them.
- 7) The Learned Magistrate applied the wrong principles in law in making her findings.

He prays for Orders That;

- a) This Appeal be allowed and judgement and decree of the Honourable Senior Principal magistrate delivered on 13<sup>th</sup> April, 2010 be set aside.
- b) Judgement be entered in favour of the Appellant against the Respondent.
- c) Damages payable to the Appellant be assessed.
- d) Costs of this Appeal and costs of the suit be borne by the respondent.
- e) Any other relief that this Honourable Court may deem fit to grant.

**Brief facts**

2. On 19<sup>th</sup> September, 2002 through Messrs Gekong'a & Company Advocates, Julia Wairimu Gakuru, the Appellant herein filed a suit against Timsales Limited, the Defendant/Respondent herein in the Chief Magistrate's Court at Nakuru being Nakuru CMCC No. 1772 of 2002. The suit was for an order for special and general damages, costs, and interest of the suit.

3. The said suit arose from allegations of negligence and/or breach of contractual duty, consequent to injuries allegedly sustained by the Plaintiff/ Appellant whilst in the course of employment with the Defendant Company on **11<sup>th</sup> June, 1999**. The Plaintiff/ Appellant proceeded to enumerate the particulars of negligence, which were expressly denied by the Defendant vide its statement of Defence dated 22 October, 2002.

4. The matter proceeded to full hearing before the Honorable H.O. Baraza, Resident Magistrate (as he then was). The Plaintiff/ Appellant in advancing its case called two witnesses, the Plaintiff herself and one more witness, whereas the Defendant/ Respondent called two witnesses to augment its case in Defence of the Plaintiff's/ Appellant's claim.

5. Judgment was entered in favor of the Respondent on **13<sup>th</sup> April, 2010** with the Court dismissing the suit with costs to the Defendant culminating to this appeal.

6. This appeal proceeded by way of written submissions with both parties filing their submissions on 27<sup>th</sup> April, 2016.

#### **Appellant's submissions.**

7. The Appellant submitted that the trial court while delivering its judgment failed to set out the point of determination and determine them in accordance with the law.

8. The appellant submitted that it had proved her case on a balance of probability in that she testified during hearing that, on the fateful day, she was in the button Board section, carrying doors place on their heads to the lorry, without any gumboots and stepped on a stick and fell down, consequently, the door fell on her and she sustained a cut on her tongue and bruises on the head. She testified that if she was given protective gear such as gumboots she could not have fell down as gumboot have a stronger grip.

9. She submitted that, the respondent herein was negligent in that it failed to offer the appellant a safe working environment, such as trolleys for carrying the said load, as mandated by law resulting to the said injuries which the respondent has refused to compensate her. She cited the case of **John Barasa Wasike & another versus Devki Steel Mill Ltd [2013] eKlr** where the court held that;

**“Employers have a duty under both common law and statutory law to provide safe working conditions and to take reasonable care to ensure the health and safety of employees. Under the Factories Act, Cap 514, the duty rests on the employer to observe the health and safety of all persons within a factory area or work area that is within a factory premises. Any injury arising from such an environment that is established to be caused due to failure on the part of an employer to take safety precautions or arising out of negligence that should have been foreseen and not prevented is payable as under common law in damages and under statute as under Workman's Compensation Act. This relate to all employees injured within the work environment without distinction of being either on permanent terms or casual/temporary basis.”**

10. The appellant further submitted that, the respondent did not furnish the trial court with any evidence to contravene the appellant facts that she was not given any protective gear such as gumboots and that such a failure by the respondent attract strict liability on the respondent as was held in the case of **Timsales Limited –versus- Penina Achieng Omondi [2011] eKlr**.

11. Accordingly, the appellant submitted that all the issue raised by the appellant here were not controverted by the Respondent therefore the trial court ought to have found the Respondent liable and ordered it to compensate her.

12. It is the Appellants submissions that, the trial court failed to consider the appellant evidence when it was clear from her testimony and pleading that she sustained injuries on 11<sup>th</sup> June, 1999 while working at the respondent's company and received treatment at Njoro Health center.

13. The appellant submitted that the trial court ought not to have relied on the respondents' masters roll and the accident book since the said documents are prepared by the respondents and are likely to be made in favour of the respondent's Defence. Further that the appellant was not privy to what was in the said books. she relied on the case of **Sokoro Saw Mills ltd –versus- Grace Nduta Ndung'u [2006] eKlr** which Court held that;

**“The evidence of the master roll and the accident book which were produced as exhibits by the appellant were documents which were prepared by the appellant itself with no input by the respondent. The evidence of the said records therefore cannot be considered to be the factual in the face of the evidence which was adduced by the respondent and her witness. I therefore dismiss the appellant's appeal on liability.”**

14. The Appellant took issue with the trial court's findings that there was doubt as to where the appellant was treated or whether the appellant was treated at Njoro Health center as alleged. It was submitted that in as much as **DW-1** produced out patient records and the O.P given during the said month, to challenge the appellant evidence, the said evidence failed to challenge the occurrence of the accident.

15. The appellant submits that, **DW-1** was not the one who prepared the said records neither was he at the employ of Njoro health center in the year 1999 when the Appellant was treated at the health center but the trial court proceeded to consider the same as concrete evidence. The appellant submitted that the trial court rejected the appellant treatment card and O.P produced and marked as **MF-1** on the sole ground

that it was marked and not produced contrary to law as held in the case of **Timsales Limited –versus- Penina Achineng Omondi [2011] eklr** which Justice Wendoh held that;

**“There are two positions that have been taken by the courts on whether or not failure to produce the treatment card is fatal to the complaint’s case. One position is as stated in the cases – Timsale Ltd V. Stanley and Harun Thuo – 148/05 and 102/05. The other position is that failure to produce the treatment card is fatal to the complainant’s case (see Eastern Produce (K) Ltd V. James Kipkeeter Ngetich). In my view, whether or not failure to produce the treatment card is fatal to the respondent’s case depends on the individual case. In this case, the card was marked for identification and reference was made to it in evidence. For some reason the advocate did not have it produced. Further PW2, Dr. Obed Omuyoma in making his report on 8/9/03, referred to the treatment card from Elburgon Nyayo Hospital, OB 1421 and the injuries in the treatment card were consistent with what he found on the respondent upon examination, that she had sustained a deep wound on the left index finger and severe soft tissue injury to that finger. I am satisfied that the respondent was injured in an industrial accident while at work.”**

16. It was thus submitted that the learned trial court erred in failing to consider the medical card and the O.P issue at Njoro Health Center when the mistake of failing to produce the same was on the part of the appellant’s counsel and argues that failure by the counsel to produce the same should not be visited upon the appellant.

17. The appellant in conclusion submitted that, the Appellant according to her testimony and the document produced proved her case on a balance of probability which the trial ought to have allowed her claim and thus urged this court to overturn the trial court’s decision and allow this Appeal as prayed.

### **Respondent’s Submissions**

18. The respondent submitted with regard to ground 1 to 3 of the Memorandum of Appeal that, the appellant alleged injuries were not possibly sustained at the respondent’s employ since the Respondent’ witness **DW-2** testified and confirmed by evidence that the appellant worked for 8 hours on the fateful day therefore it is not possible that she sustained any injuries at the respondent premises as alleged. Consequently, it was submitted that the appellant has failed to prove that she was injured during the course of her duty as was held in the case of **Amalgamated saw mills ltd –versus- Tabitha Wanjiku [2006] eklr** that;

**“The next issue is whether the respondent established that she was indeed injured at the appellant’s premises. The appellant’s witnesses; Dorcas Muthoni Kihoto denied that the treatment card emanated from Njoro Health Centre. Geoffrey Kibubi produced the injury record to show that the respondent’s injury was not entered in the record. Even though the test of prove is on a balance of probability, I find there is a very strong rebuttal to the extent that if it was possible the respondent’s injury was not entered in the injury book of the appellant, what a coincidence that the treatment card that was produced in court by the respondent could also not be traced to the Njoro Health Centre where she alleges she was treated. In view of this, I am of the view the respondent did not prove her case to the required standard.”**

19. The respondent further submitted and disputed any injuries sustained by the appellant in that the medical report marked as **MF-1** by the Appellant witness was prepared 3 years and 3 months after the alleged injuries. In addition, **DW- 1** a clinical officer at Njoro Health center, where the appellant alleged to have gone for treatment, testified that the appellants alleged medical card does not appear in their register on the stated date of **11<sup>th</sup> June, 1999** and the Outpatient number 3002 purported to have been issued to the appellant does not appear anywhere in the records save for 3009/99 which was issued to one **Merod Busa** on 23<sup>rd</sup> February, 1999.

20. According to the respondent, production of medical cards in evidence without support of treatment notes is fatal to a claimants case as was held in **Timsales Limited –versus- Patrick Kingori Mwani [ 2015] eklr** that;

**“The Respondent produced a treatment card, outpatient No. 1002/2002 issued from Elburgon Nyayo Ward hospital and dated 17/1/2002, and marked for identification. Both the Appellant and the Respondent, Dr. W. Kiamba referred to the said card. The contents of the card and injuries indicated therein are not disputed. The Appellant submits that this document was falsified, and upon it, the trial court assessed and awarded damages to the Respondent. The court h as to make a finding on whether this card was genuine or falsified as alleged.**

13. DW1 Joseph Gitau Karanja, an Health Records Officer from the said hospital testified that the hospital records did not have the name of the Respondent in its daily outpatient register for the 17th January 2002, and further testified that outpatient card No. 1002/02 was issued on the 4th March, 2002 to a patient named Peter Gitau who was treated for bronchitis, and not an injury. He further stated that cards issued for the 17th January 2002 ranged from No. 237/2002 to No. 247/2002. Dr. W. Kiamba referred to the same card when preparing the medical report he produced in court in support of the Respondent’s injury. Is this therefore a matter of a forged treatment card? Could the hospital have issued two outpatient cards for different patients on different dates? On this, the trial magistrate noted that the Respondent was not the keeper of the records for the Defendant and the hospital, that it was not his duty to ensure that the records of the patient were entered in the hospitals register.

14. That as it may be, I am of the view that this cannot be a coincidence that all the Respondent’s injury and accident records and documents are unavailable right from the Appellant’s premises all the way to the hospital.

15. I find that the Elburgon Nyayo Ward Hospital treatment Card No. 1002/02 has not been authenticated. What follows therefore is that there being no treatment card, and the Dr. W. Kiamba having relied on the said card that I have held to be unauthenticated, then, the injury by the Respondent was not proved.”

21. The respondent submitted that the trial court decision of disregarding the medical card marked for Identification was sound as the same was not proved as required in law and cited the case of **Kenneth Nyaga Mwige –versus- Austin Kiguta & 2 others [2015] eklr.**

22. It is the respondent submissions that failure by the appellant to produce the initial treatment notes fatally affected her case as was held in the cases of **Timsales ltd –versus Wilson Libuya [2008] eklr** and **the case of Eastern produce(k) limited –versus- Jamaes Kipketer Ngetich [2005] eklr.**

23. The respondent thus submits that the appellant herein, following the evidence as adduced at trial could not have been injured at the respondents premises. Further that the appellant has failed to show any causal link between the respondent negligence and her injury as was held in **Statpack industries –versus- james mbithi munyao HCCA No. 152 of 2003.** Additionally, that the mere fact that the appellant allegedly was injured at the respondent’s premises does not automatically make the respondent liable rather that the appellant ought to have proved on a balance of probability that the injuries sustained was a result of the respondent negligence. They buttress this argument by citing the case of **South Nyanza Suga Co. –versus- Jared Bisera Ositu [2010] eklr** where Asike KMakhandia J observed that;

**“Even if it had been proved that the respondent was indeed an employee of the appellant, it is difficult to fathom how the appellant could be held liable for the accident. In his evidence he testified that he slipped and fell as he was staking the cane. That the ground was wet and slippery and they were required to stop work when it rained. He opted not to abide by the instructions and in the processes he injured himself. How then should the appellant be held to account for self inflicted injury by the respondent. The respondent also testified that if he had been issued with gumboots, the accident could well have been avoided. According to the respondent, had he been wearing the gumboots, they would have resisted the slip. However, from the manner the alleged accident occurred I doubt very much whether the gumboots would have been of any assistance. He slipped as he came across a steep slope. Further the respondent did not adduce any evidence to show that the appellant was under any obligation to provide the said gumboots. He did not say that the appellant had all along provided gumboots to him or other employees save for that day. Section 107(1) of the evidence act provides interlia:**

**“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.....”.**

**If the respondent was aware that provision of gumboots was a mandatory requirement, he ought to have proved the same with credible evidence. He did not do so.**

**What the respondent was involved in was manual work that did not require specialized training or instructions or close supervision. He was in control of his situation. No amount of training, supervision or instructions would have prevented him from slipping and falling. He had a duty to take care of his own safety. If at all he was injured as a result of the fall he was the author of his own misfortune.”**

24. It is the respondent’s position that the trial court set down the points for determination being;

**‘whether the plaintiff was injured on the suit date and yes, was the accident as a result of negligence on t part of the defendant?’**

25. The Trial Court as per the judgment proceeded to analyze the said issue and rendered itself on the same, therefore the ground that the court failed to lay out point for determination ought to be disregarded.

26. The respondent in conclusion, urged this court to disallow the Appeal with costs to them.

27. I have considered the records of appeal and submissions raised by the parties herein. This being a first appeal from the lower court, this court is obliged to reevaluate the evidence submitted before making its findings.

28. From the evidence on record however, I find that the evidence of the plaintiff in this case was taken before myself Hellen Wasilwa, PM (as I then was).

29. It would therefore be unprocedural for me to sit on an appeal arising from a matter partly handled by me when I served in the lower court.

30. I therefore decline to proceed at this point and refer this file to the Principal Judge Nairobi for further directions.

Ruling delivered virtually this 4<sup>TH</sup> day of MAY, 2021.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Getenga holding brief for Opondo for respondent – present

Appellant – absent

