REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 53 OF 2021

(Formally Nakuru ELRC Appeal No. 10 of 2017)

Before Hon. Lady Justice Maureen Onyango

JULIA WAIRIMU GAKIRU.....APPELLANT

VERSUS

TIMSALES LIMITED.....RESPONDENT

(Being an appeal arising from the Judgment and Decree of Hon. H. O. Baraza, Resident Magistrate which was delivered on 13th April 2010 in Nakuru CMCC No. 1772 of 2002)

JUDGMENT

1. The Appellant filed this appeal vide a Memorandum of Appeal dated 7th May, 2010 which 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.

2. He prays for orders that;

    a. This Appeal be allowed and judgement and decree of the Honourable Senior Principal Magistrate delivered on 13th 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.

3. The file was transferred to this Court by Wasilwa J. after recusing herself on grounds that she took part of the evidence in the lower Court while she was a Magistrate in Nakuru.

Brief Facts

4. The Appellant filed a suit against the Respondents in the Chief Magistrates Court at Nakuru being CMCC No. 1772 of 2002 which suit arose from allegations of negligence, breach of contractual duty, injuries sustained by the plaintiff/Appellant while in the course of employment in the Defendant/Respondents company on 11th June 1999. The plaintiff prayed for Special and General damages, costs and interest of the suit.

5. The Appellant proceeded to enumerated the particulars of negligence which were expressly denied by the Respondent vide its statement of defence dated 22nd October 2002. The suit proceeded for hearing and a judgment was delivered on 13th April 2010 with the court dismissing the suit with costs giving rise to the Appeal before this court for determination.

6. Parties took directions to have the appeal dispensed with by way of written submissions.

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 she 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 placed on her head to a lorry, without any gumboots and stepped on a stick and fell down, upon which the door fell on her. That she sustained a cut on her tongue and bruises on the head. She further testified that had she been issued with protective gear such as gumboots she would not have fallen. She submitted that the Respondent 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. She cited the case of **John Barasa Wasike & Another v 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."

9. The Appellant further submitted that, the Respondent did not furnish the Trial Court with any evidence to rebut the fact that she was not given any protective gear such as gumboots and that such a failure by the Respondent attracted strict liability on the Respondent as was held in the case of **Timsales Limited v Penina Achieng Omondi [2011] eKLR.**

10. Accordingly, the Appellant, all the issues raised by the Appellant were not controverted by the Respondent therefore the Trial Court ought to have found the Respondent liable and ordered for her compensation.

11. The Appellant has submitted that the Trial Court failed to consider the Appellant's evidence when it was clear from her testimony and pleading that she sustained injuries on 11th June, 1999 while working at the Respondent's company and received treatment at Njoro Health Center.

12. The Appellant submitted that the Trial Court ought not to have relied on the Respondent's master roll and the accident book since the said documents are prepared by the Respondent 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 v 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."

13. The Appellant took issue with the Trial Court's findings that there was doubt as to whether 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.

14. The Appellant submits that DW-1 was not the one who prepared the said records as he was not an employee 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 v Penina Achieng Omondi [2011] eKLR** which Wendoh J. 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 Kipketer 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 8th September 2003, 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."

15. It was thus submitted that the Trial Court erred in failing to consider the medical card and the O.P issued 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.

16. 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

17. The Respondent submitted with regard to ground 1 to 3 of the Memorandum of Appeal that, the Appellant's 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. It is not therefore possible that she sustained any injuries at the Respondent premises as alleged. 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 v 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."

18. The Respondent further disputed that any injuries were sustained by the Appellant as the medical report marked as MF-1 by the Appellant's 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 Appellant's alleged medical card does not appear in theregister on the stated date of 11th June, 1999 and the Outpatient number 3002 purported to have been issued to the Appellant does not appear anywhere in the records for that daate. That OP No. 3009/99 which was issued to one Merod Busa on 23rd February, 1999.

19. According to the Respondent, production of medical cards in evidence without support of treatment notes was fatal to the Appellant's case as was held in **Timsales Limited v 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.
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> ……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."

20. It is the Respondent's submission that failure by the Appellant to produce the initial treatment notes fatally affected her case as was held in the cases of **Timsales Ltd v Wilson Libuya [2008] eKLR** and the case of **Eastern Produce (K) Limited v James Kipketer Ngetich [2005] eKLR.**

21. The Respondent submitted that the Trial Court's decision disregarding the medical card marked for identification was sound as the same was not proved as required in law. It relied on the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR**.

22. The Respondent thus submits that the Appellant has failed to show any causal link between the Respondent's negligence and her injury as was held in **Statpack Industries v James Mbithi Munyao HCCA No. 152 of 2003**. Additionally, that the mere fact that the Appellant was allegedly injured at the Respondent's premises does not automatically make the Respondent liable. That the Appellant ought to have proved on a balance of probability that the injuries sustained were as a result of the Respondent's negligence. To buttress this argument the Respondent relied on the case of **South Nyanza Sugar Co. Ltd v Jared Bisera Ositu [2010] eKLR** where Makhandia 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, she opted not to abide by the instructions and in the processes she injured herself. How then the Appellant should be held to account for self-inflicted injury by the Respondent. The Respondent also testified that if she had been issued with gumboots, the accident could not have been avoided. According to the Respondent, had she 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. She slipped as she 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 her 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, she ought to have proved the same with credible evidence. She did not do so.

What the Respondent was involved in was manual work that did not require specialized training or instructions or close supervision. The Respondent submitted that she was in control of her situation and no amount of training, supervision or instructions would have prevented her from slipping and falling. Further it submitted that the appellant had a duty to take care for her own safety and if she was injured as a result of the fall she was the author of her own misfortune."

23. 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."

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

25. The Respondent urged the court to disallow the Appeal with costs to them.

Analysis and determination

26. The duty of the Court on a first appeal was stated by the Court of Appeal in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** as follows –

> "I accept Counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**)"

27. In the instant case, the Appellant's evidence at the Trial Court was that she was injured on 11th June 1999 when she fell while carrying a door at the Respondent's premises where she was working as a causal employee. That as a result she was hit by the door and sustained injuries on her head and a cut on her tongue. That she was treated at Njoro Health Centre. She produced Card No. 3002/00 as her treatment card. She also produced a medical report by **Dr. Wellington K. Kiamba, PW2** who testified that he relied on the treatment card and a physical examination of the Appellant to prepare a medical report on 11th September 2002, three years after the alleged accident.

28. For the Respondent, **DW1, Jacob Chelimo**, a Clinical Officer at Njoro Health Centre testified that the name of the Appellant does not appear in the records of 11th June 1999. Further, that the outpatient (O.P.) number 3002/99 was not issued that day. He had the original hospital records of the day which he invited the Court to peruse. He testified that Card No. 3002 was issued on 23rd February 1999 to Merod Busa. He referred the Court to a copy of the records for the said date.

29. DW2 Geoffrey Kabubi Kiniti, a Wages Clerk at Amalgamated Saw Mills testified that he had worked for the Respondent since 1982 and was the custodian of the Muster Roll and Injury Book which is a record of accidents. He testified that on 11th June 1999 the Appellant was on duty for 8 hours which is the normal working day. He testified that the Appellant's name does not appear in the Injury Book for the material day. That on that day there was no accident recorded. He produced a copy of the Muster Roll and Injury Book as Exhibits D Exhibit 3 and D Exhibit 4 respectively.

30. It is on the basis of the evidence of the Respondent that the Learned Magistrate concluded that the Appellant had failed to prove her case on a balance of probabilities and proceeded to dismiss the sit with costs.

31. The Learned Magistrate framed the issues for determination being whether the Plaintiff (Appellant herein) was injured while on duty on 11th June 1999, and so if yes, whether the said accident was a result of negligence on the part of the Defendant (Respondent herein).

32. The Learned Magistrate found that the defence had presented documents and called evidence to demonstrate that the accident alleged by the Appellant never took place. The Learned Magistrate further concluded that the Appellant did not produce evidence of the initial treatment

notes to support her allegation that she was involved in an accident on 11th June 1999 and actually sustained injuries following the accident. Further, that the medical legal report prepared by Dr. Wellington Kiamba three years after the alleged accident was based on a treatment card whose authenticity was in doubt.

33. From the foregoing, I find that the Learned Trial Magistrate properly considered the evidence on record, appreciated the same and made a finding consistent with the evidence and the relevant law. I find no error of law or fact as alleged by the Appellant.

34. It is for these reasons that I find no merit in the appeal and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE