



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT**  
**NAKURU**  
**APPEAL NO.40 OF 2017**

**[formerly Naivasha High Court Appeal No.88 of 2015]**

**HAMWE LIMITED .....APPELLANT**

**VERSUS**

**ISAAC NYAACHA BWEKERIA .....RESPONDENT**

**[being an appeal from the judgement and decree of Hon. Gesora Chief Magistrate, Naivasha  
delivered on 3<sup>rd</sup> September, 2015 in Naivasha CMCC No.183 of 2013]**

**JUDGEMENT**

The facts leading to the appeal herein are that the respondent, Isaac Nyaacha Bwerekia was an employee of the appellant and on 22<sup>nd</sup> December, 2012 while on duty he was assigned to the spraying department by the respondent. in the course of the spraying duties the hose pipe containing chemical solution burst and sprayed his face and as a result he suffered loss and damage.

The respondent filed plaint before the trial court on the grounds that the accident and injury to his face arose out of negligence and breach of statutory duty of the appellant for failing to ensure a safe and secure work place. The respondent thus suffered chemical burns to the face and neck and claimed for general and special damages.

The appellant being the defendant filed a defence and denied the claims made by the respondent herein and further gave a defence that on 22<sup>nd</sup> December, 2012 there was no work allocation to the respondent in the spraying department as alleged and no industrial accident happened and where there was such an accident and the respondent injured the same resulted out of his own negligence for failing to take work precautions and the claims made are a fraud as there was no injury to the respondent within the respondent's premises.

The trial court heard the parties and in judgement delivered on 3<sup>rd</sup> September, 2015 made a finding that the appellant failed in its statutory duty where the respondent was not issued with protective gear and thus wholly liable for the injuries suffered. Quantum was assessed and awarded together with special damages and costs.

Aggrieved, the appellant filed the appeal on 11 grounds which can be summarised that the trial magistrate erred in law and in fact in making a finding that the respondent had proved his case, by admitting a purported treatment note dated 12<sup>th</sup> February, 2013 alleged to be from Naivasha district hospital and

report of Dr Wellington Kiamba dated 26<sup>th</sup> February, 2013 was without compliance to section 35 of the Evidence Act which requires documents be produced by the maker and thus denied the appellant a chance to cross-examine the maker.

Other grounds of appeal are that the trial magistrate erred in law and in fact in failing to note that the alleged injury on 22<sup>nd</sup> December, 2012 was not proved as there was no medical evidence or treatment or injury on the alleged date. The disputed industrial injury can only be proved by adducing initial treatment cards showing treatment on the date of the alleged accident. The respondent left the appellant's employment on 23<sup>rd</sup> January, 2013 and the alleged treatment at Naivasha district hospital on 12<sup>th</sup> February, 2013 was for injury sustained outside the employment period with the appellant.

The respondent signed a discharge voucher on 30<sup>th</sup> January, 2013 to the effect that he had not sustained any injury while at work with the appellant and having so discharged the appellant the suit before court was in abuse of the court process and should be dismissed.

There was no negligence proved to justify the finding of 100% liability against the weight of the evidence at hand and the judgement of the trial court should be set aside and or be reviewed

The parties addressed the appeal by way of written submissions.

The appellant submitted that the trial court in admitting purported treatment notes dated 12<sup>th</sup> February, 2013 and medical report dated 26<sup>th</sup> February, 2013 failed to comply with the law under section 35 of the Evidence Act as the makers of such documents were never called to be cross-examined. Such documents were inadmissible. These documents were contested by the appellant and the trial magistrate erred in admitting them as proof of injury to the respondent as held in **Kenneth Nyaga Mwige versus Austin Kiguta & 2 others [2015] eKLR**.

Without calling the makers of the documents relied upon to support evidence that there was injury to the respondent, there was no proof of the same.

The respondent did not prove he was injured while at work with the appellant as alleged. The appellant's witness Dorcas Kihoto testified that the respondent was not treated at Njoro Health Centre. The injury record produced did not bear the respondent's name or details.

Without the injury having been reported to the respondent, the trial court erred in finding there was negligence and statutory duty and thus liable at 100%.

The treatment note upon which the respondent relied upon was acquired long after he left the employment of the appellant and may have been based on a different accident.

The appellant relied on the case of **Timsales Limited versus Wilson Libuywa Nakuru HCCA No.135 of 2006**.

The appellant also submitted that the trial court erred in failing to hold and find that there was no proof of negligence. The respondent had the burden of proof of the alleged accident, injury and loss but on the challenged documents submitted, this burden was not discharged. There was no liability and damages should not have been awarded as held in **Amalgamated Saw Mills Limited versus Tabitha Wanjiku Nakuru HCCA No.272 of 2004**.

The finding on liability was without evidence, the award of damages was erroneous and without good foundation and The appeal should be allowed and the judgement of the trial court set aside and or reviewed.

The respondent in response submitted that the documents relied upon in evidence before the trial court were not challenged. These were produced by consent. No objection was raised. With regard to the

challenged medical report of Dr Kiamba the respondents first witness testified on 27<sup>th</sup> November, 2014 and produced the medical report. Reference was made to the treatment notes from Naivasha district hospital. The documents produced are genuine and correctly put into account by the trial court.

There was good basis on the finding that there was negligence on the part of the appellant by failing to provide a safe work environment for the respondent and on this basis the appellant did not prove that there was provision of work apparel to keep the respondent from harm and injury while at work.

The appeal with regard to a disclaimer is misconceived. There was no discharge which was produced during the trial. Such evidence was not before the trial court.

The respondent also submitted that he suffered injury while at work and the judgement of the trial court should be upheld with costs.

This being a first appeal this court has a duty of re-evaluating the evidence before the trial court and arrive at its own independent decision on whether to uphold the judgement of the trial court while bearing in mind that his court never heard the parties or saw the witnesses as they testified and thus give due allowance for that as held in **Amalgamated Saw Mills Limited versus John Mwangi Nakuru HCCA No.38 of 2005**.

Before the trial court, evidence for the respondent was given by Dr Wellington Kiamba, a medical doctor based at Nakuru and who examined the respondent on

26<sup>th</sup> February, 2013 following a history of injury on 22<sup>nd</sup> December, 2012 while on duty with the appellant where he was sprayed with chemicals when a pipe burst.

The respondent was thus examined 3 months after the fact of the alleged accident.

The respondent also testified that he was employed by the appellant from February, 2008 to January, 2013 but on 22<sup>nd</sup> December, 2012 while on duty he got injured when a pipe with chemicals burst and sprayed his face. He got first aid and referred to hospital

The appellant produced the sick sheet as exhibit 4, treatment notes dated 22<sup>nd</sup> December, 2012.

A close look at exhibit 4 as produced before the trial court does not bear the respondent's name, details or the alleged injury/injuries.

The register starts on 22<sup>nd</sup> December, 2012 with Banice Wambui, and ends with Nelly Njeri.

Overleaf on the same date has Alice and ends with Gikunda and on 24<sup>th</sup> December, 2012 the records ends with Geoffrey Nero.

The record has no details with regard to the respondent.

The respondent then testified that he was issued with a hospital card and produced as exhibit 5. Upon examination of this document, the same is issued by Naivasha District Hospital on 12<sup>th</sup> February, 2013.

With regard to the alleged injury to the respondent the only records that exists are the two documents.

There is nothing to show injury to the respondent on 22<sup>nd</sup> December, 2012.

In defence, the appellant called Damaris Ngina Musa the human resource officer and who confirmed the respondent was an employee and was issued with apparel to protect him while at work. He was cleared from his employment, the muster roll does not contain injury on the 22<sup>nd</sup> December, 2012 as well as the

accident register.

Without a record of injury to the respondent on the material date of 22<sup>nd</sup> December, 2012 the trial court in finding the exhibits produced were carefully assessed and thus the appellant was negligent was erroneous. This is not supported by any evidence. the record(s) relied upon as noted above have no record of the respondent's injury. The medical history relied upon by the medical doctor is not supported by any primary records of injury to the respondent. in **East produce (K) Limited versus Christopher Astiado Osiro Civil Appeal No. 43 of 2001** where it was held that;

*It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.*

In the case of **Nickson Muthoka Mutavi versus Kenya Agricultural Research Institute [2016] eKLR** the court held that;

*... 2. It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.*

*3. As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused his loss, which he will fail to do if the damage would have occurred in any event.*

*4. Finally, there is the question whether there are any defences available to the action.*

Without a casuistic link with the alleged injury to the respondent while at work with the appellant on 22<sup>nd</sup> December, 2012 the burden of proof as set out above was on him and which he failed to discharge.

On this basis the trial court in making the finding that there was negligence on the part of the appellant erred in law and in fact. The suit should have been dismissed at that instance.

Further to the above, the Work Injury Benefits Act, 2007 defines itself as an Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes. Any claims with regard to work injury arising as of the date the statute came into effect, the 27<sup>th</sup> December, 2007 are to be reported to the Director as defined under the Act. see **Supreme Court Petition No.4 of 2019 Law Society of Kenya versus the AG & COTU**. under section Sections 52 (1) and (2) of Work Injury Benefits Act, 2007 it provides that;

***52.(1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.***

***(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.***

The matter before the trial court was that the respondent was injured while at work on 22<sup>nd</sup> December, 2012 and therefrom suffered loss and damage. The court reading of the Work Injury Benefits Act, 2007 the respondent ought to have addressed his claims with the director.

**Accordingly, and for the reasons above set out, the appeal is hereby allowed, the judgement in Naivasha CMCC No.183 of 2013 is hereby set aside. Each party shall bear own costs.**

Delivered at Nakuru this 23<sup>rd</sup> day of January, 2020.

**M. MBARU**

**JUDGE**

In the presence of: .....