



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Appeal 102 of 2005

TIMSALES LIMITED.....APPELLANT

VERSUS

HARUN THUO NDUNGU.....RESPONDENT

JUDGMENT

EVIDENCE - *the burden of proof - standard of - burden and standard of proof in civil cases - party on whom burden lies - party having special knowledge of issue - party likely to fail if no evidence is given - Evidence Act (Cap. 80, Laws of Kenya) ss 107, 108 & 112*

JUDGMENT

TIMSALES LTD (*the Appellant*) was the Defendant in Nakuru Chief Magistrate's Civil Case No. 425 of 2003, and HARUN THUO NDUNGU (*the Respondent*) was the Plaintiff who won the case and was awarded Kshs 35,000/= in general damages, less 10% contributory negligence, and special damages of Kshs 2,000/= making a total of Kshs 33,500/=. A decree was consequently drawn and issued for Shs 33,300/=. The Defendant now the Appellant being dissatisfied with the said judgment and decree appealed to this court on six grounds -

- (1) *that the learned Magistrate fundamentally erred in law and in fact in finding that the Respondent herein Harun Thuo Ndung'u was on the alleged date injured and at the alleged site especially against the background of the fact that the Appellant denied the occurrence of the accident and adduced evidence excluding the alleged accident at it's premise.*
- (2) *that the learned trial magistrate's above erred in law and in fact in finding that the Respondent had proved his case against the Appellants to the required standards without justifying such findings by factual findings or applying the relevant law in negligence.*
- (3) *that in any event the learned trial magistrate erred in fact in holding that the Respondent had proved negligence against the appellants at 90:10, when the evidence adduced was contrary to such findings.*
- (4) *that the learned trial magistrate erred in law by failing to evaluate the evidence adduced in court thus arriving at findings not consistent with evidence adduced.*
- (5) *that the learned magistrate erred in law by denying the Defendant the opportunity to adduce critical medical evidence, that is to summon the officer from Elburgon Nyayo Hospital to testify on the veracity or otherwise of the Treatment Card whose contents were adduced in the Plaintiff's Doctor's report.*

(6) that the learned trial magistrate thus erred in law and in fact by not giving reason for holding the Appellant liable to the extent decree and in failing to conform with Order XX of the Civil Procedure Rules.

Mr. Murimi learned counsel for the Appellant argued five (5) of the grounds of appeal, namely grounds 6, 4, 2 & 3, and ground 1. He did not argue ground 5 for reasons he did not disclose, but are apparent from his argument on ground 4, (that failure to produce the original treatment card was fatal to the Respondent's claim of injury at work) and grounds 2 & 3 (that there was no causal link in negligence between the Appellant's negligence and the Respondent's negligence and the Respondent's alleged injuries, and ground 1, that the trial magistrate did not consider the evidence of the Appellant's witnesses.

As expected Mr. Bett who argued in opposition to the appeal submitted that the judgment conformed with the requirements of the **Order XX rule 4** of the **Civil Procedure Rules**, and that if it did not this court being the first appellate court was at liberty to re-examine evidence and re-evaluate the judgment in terms of **Section 78** of the **Civil Procedure Act, (Cap. 21, Laws of Kenya)**.

Apart from the purely technical ground whether the trial court's judgment conformed with the requirements of **Order XX rule 4** of the **Civil Procedure Rules**, the appeal herein in my opinion raises one basic question whether there was evidence upon which to found a claim and subsequent judgment and decree in this matter.

The contention of Mr. Murimi learned counsel for the Appellants on grounds 4, 2 & 3 of the Appeal was in essence that there was no evidence upon which to found negligence on the part of the Appellant, that there was no causal link in negligence on the part of the Appellant and the injuries suffered by the Respondent. Counsel laid emphasis on the fact that the Respondent failed to produce the original treatment card, and that the evidence of Dr. Kiamba who examined the Respondent was not conclusive as to the injuries suffered by the Respondent, Mr. Murimi invited the court to take an adverse view of the party who fails to produce such original treatment card. Counsel relied on the case of **NGUKU VS. REPUBLIC [1985] KLR 412**, where the court held:

"that where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony that can also apply to evidence of a tape recording which is withheld."

Counsel also submitted that failure to produce an original medical treatment card was fatal to the Respondent's claim. Counsel relied on a series of decisions of this court and others in which that proposition was upheld -

- (1) **Nakuru Industries Ltd. Vs. Bernard Lidoro**
(Nakuru H.C. Civil Appeal No. 35 of 2002)
- (2) **Timsales Ltd. Vs. Wilson Libuywa**
(Nakuru H. C. Civil Appeal No. 135 of 2006)
- (3) **Buds & Blooms Ltd. Vs. James Sawanii Sikinga**
(Nakuru H.C. Civil Appeal No. 126 of 2005)
- (4) **Eastern Produce (K) Ltd. Vs. James Kipketer Ngetich**
(Eldoret H.C. Civil Appeal No. 85 of 2002)
- (5) **STATPACK INDUSTRIES LTD. Vs. JAMES MBITHI MUNYAO**

(Nairobi H. C. Civil Appeal No. 152 of 2003)

- (6) **Amalgamated Saw Mills Ltd vs. Tabitha Wanjiku**
(Nakuru H.C. Civil Appeal No. 272 of 2004)
- (7) **Timsales Ltd. Vs. Willy Ng'ang'a Wanjohi**
(Nakuru H.C. Civil Appeal No. 230 of 2004)

Mr. Murimi also relied on Winfield and Jolowicz On Tort, 13th Edn. p. 202.

On his part Mr. Kibet learned counsel for the Respondent maintained that the Respondent had proved his case in negligence against the Appellant.

Dr. Kiamba had verified the injuries suffered by the Respondent. He was a professional, and that no evidence had been led to discredit his report. The Appellant had an opportunity to conduct an independent examination of the appellant and submit its own report.

Where the contest is whether or not there was evidence to prove the Respondents claim, the place to begin by an appellate court is itself to consider the evidence before the trial court in order to arrive at its own findings and conclusions - **SELLE & ANOTHER vs. ASSOCIATED MOTOR CO. LTD & OTHERS [1968] E.A. 123.**

It goes without saying, but it is often necessary to say it, as Hon. Mr. Justice Musinga, said in **TIMSALES LTD vs. HARUN WAFULA WAMALWA** (Nakuru HC Civil Appeal No. 95 of 1995) that -

"In our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. The burden of proof is on the Plaintiff and the degree of proof is on the balance of probabilities." (Wareham t/a A. F. Wareham & 2 Others vs. Kenya Post Office Savings Bank [2004] 2KLR 91 CA).

Indeed that is a restatement of **Section 107** of the **Evidence Act** (Cap. 80, Laws of Kenya) -

"107(1) - 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 those facts exist."

Winfield and Jolowicz (*supra*) say at p. 203-

"At common law the employer's duty is a duty of care and it follows that the burden of proving negligence rests with the Plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working the Plaintiff must plead, and therefore prove, what the proper system was and in what relevant respects it was not observed."

The principle stated by **Winfield** on tort is put strictly in **Section 107** of the **Evidence Act** cited above.

In addition **Section 112** of the **Evidence Act** provides that in civil proceedings when any fact is within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon such party (him).

The Respondent was the Plaintiff in the lower court. The question is whether he discharged the burden of proof laid on him by **Section 107** of the **Evidence**, emphasized by the authors of **Winfield** on **Tort**. In determining whether the Respondent discharged that duty, it must be born in mind that the Respondent's duty was to prove his claim against the Appellant, and the Appellant to disprove its liability against the Respondent, not on the basis of proof beyond reasonable doubt **NGUKU vs. REPUBLIC** (*supra*) but rather on the balance of probability - **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD** (*supra*).

It was the evidence of the Respondent that he was asked by "Njenga" one of the supervisors along with one Gitau, to *assist those* arranging the timber -

"which had been arranged badly and they were to correct it. However Gitau held timber before I was ready and the timber fell on my thumb injuring me."

The Respondent testified that he continued to work and went to the hospital the next day and was attended by one Dr. D Gitua and was given a treatment card MFI"1" but never formally produced. A report was later made by Dr. W. Kiamba.

In cross-examination the Respondent also testified that arranging the logs was hard work, they were heavy, although no particular skill was needed to arrange them. He further testified in cross examination that injuries were recorded by personnel officers. Statements of the accident and injuries were also written and given to the personnel officer.

Dr. W. K. Kiamba's report was filed by consent as PExh. "2". The Report gives a concise history, injuries and treatment of the Respondent. The Respondent suffered severe soft tissue injuries of the right thumb, was treated at Elburgon Nyayo Hospital (OP 2147/02) where he was found to have an abscess and subsequent avulsion of the nail. He was given an intramuscular injection of tetanus toxoid 0.5 ml stat., Triplopen Irial and put on amoxicillin and ibuprofen.

The Doctor found that the nail had regrown, but found an haematoma beneath the nail in the distal part. The Doctor's prognosis or opinion was that the Respondent had recovered from severe tissue injuries in the thumb he sustained during this accident but there would still be an haematoma beneath the nail. He classified the injury as "harm", and recommended a temporary disability of two weeks.

Mr. Murimi learned counsel for the Appellant contended in his submissions on grounds 2 & 3 of the Memorandum of Appeal that the claim was not made out in negligence, that there was no causal link and the Defendant's alleged negligence, and that the court should take judicial notice under Section 66(1)(a) of the Evidence Act, of the ordinary course of natural events - the act of holding a log cannot lead to injury, even if not careful he cannot get injured.

This contention cannot hold water in light of the evidence of Respondent and the Report of Dr. K. W. Kiamba, either

on, the basis of causal link, or on the ground that the original treatment card was marked for identification but was not produced.

According to the **New Short Oxford English Dictionary Thumb Index Edn. 1993, "causal" means -**

"of or relating to a cause or causes, acting as a cause of the nature of cause and effect."

The cause of the Respondent's claim is the injury he suffered while in the employment of the Appellant - and for which injury the Appellant is liable in negligence - under the employer's common law duty of care - that duty of care includes not merely providing the employees a safe working environment but also special kit like gloves for farm gripping of logs - rather than using bear hands. If the Appellant had provided such basic working material like gloves, it is entirely possible that Gitau's grip on the log before the Respondent was ready would have been better, and the log would not have rolled onto the Respondent's thumb crushing his nails. The cause was the lack of care by the Appellant, and effect was slippage of the log causing injury to the Respondent. There was thus a direct causal link and the injury of the Respondent.

As to the Respondent's alleged failure to produce the treatment card, I am of the view that this did not tender the evidence in Dr. W. K. Kiamba's Report valueless. Firstly, the treatment card was actually marked for identification for later production. It is not clear from the record who asked that the treatment card be marked for identification. Who was to identify and produce the Respondent's treatment card? It does not belong to the hospital. It belongs to the individual patient, and in any claim for injury; it stands to be produced by that patient, the Plaintiff. The hospital retains the record of the treatment which a subsequent review or report can be made by any other Doctor and from which record, such other Doctor can prepare a Report on the patient and treatment prescribed and given, and a prognosis or opinion on the state of healing of the patient and future needs for treatment or other care.

Is that evidence and opinion to be rubbished as non-consequential, to be ignored, relegated and subordinated to the initial treatment card. In my humble and sincere view, such evidence could only be doubted if there was some material evidence demonstrating differences between the date of the injury and the treatment, and the evidence of the patient like in this case, the Respondent. There is no such evidence of differences here.

The Doctor's report of the date of injury corroborates the evidence of the Respondent. The injuries were suffered on 30th June 2002. Dr. W. K. Kiamba verified the injuries suffered by the Respondent including the nature of the treatment the Respondent received. He was a professional and since his report was admitted by consent, no evidence was led by the Appellant to discredit his Report. The Appellant had opportunity to either summon the Doctor and put questions to him on his Report or seek and obtain an independent examination of the

Respondent and tender its own report to the trial court.

There is therefore no basis for the proposition that because the Respondent's initial treatment card was not produced, the report by the Doctor could refer to an injury suffered by the Respondent on some other day, in some other place other than the Respondent's premises or factory. I am therefore satisfied that the Respondent suffered the injuries described by Dr. W. K. Kiamba in his report dated 5th February 2003. These grounds 1 & 2 of the appeal therefore fail.

On ground 1 of the Memorandum of Appeal the Appellant's counsel contended that the court did not make any reference to the defence evidence in his judgment is not correct. The trial magistrate referred not only to the evidence of the Appellant's witnesses but also to the Appellant's Defence and concluded quite correctly, so, at pp 9-10 of his judgment -

"Defence in any event denied that the Plaintiff was their employee. This is contrary to what the defence witnesses stated and the job card produced by the Plaintiff. The defence witnesses in any event contradicted themselves. They did not produce anything to prove that they were working with the defendant on the material day. The accident happened at night when they did not witness the accident. Nothing would have been easier than producing the supervisor who was on duty one Njenga and the payroll for that month."

Indeed looking again at the evidence of the Appellant's witnesses, it becomes clear that they were talking at cross-purposes to the Appellant's pleadings. Whereas the Defence (para 3) denies employing the Respondent, DW1 in his evidence admits that he not only knew the Respondent but he was his supervisor in June 2000. DW2 too reiterates the story of DW1 and narrates the events of June 2000. The inevitable conclusion must be that the Appellant's witnesses were determined to defeat the Respondent's case that he suffered injury at his place of work on 3rd June 2002 and not on some unknown date in June 2000, two years earlier. Their evidence is though taken into account is simple not credible.

This ground too fails.

The last ground of appeal argued by Mr. Murimi was ground 6 - that the trial court's judgment did not comply with the requirements of Order XX rule 4 - provides for the minimum contents of a judgment - a concise statement of the case, the points for determination the decision arrived and the reasons for such decision.

It is often said that even where the law is clear it is still subject to different interpretation. The rules relating to the contents of a judgment are clear. The rest is a question of style. Some courts are verbose to a point of being pedantic, others are succinct and to the point. The judgment of the trial court may not be in the symmetry of rule 4, Order XX, but it does

certainly cover the essential requirements of that order, there is reference to the plaint, the defence, review of the evidence adduced by the parties, considered liability and awarded damages as per the Respondent's prayers. I think the trial court was generous in allowing 10% contributory negligence on the part of the Respondent for reasons that the Respondent should have been a little more careful. I have no reason in interfering with that finding - which came out in cross-examination. The trial court however erred in adding the special damages and then deducting the 10% contributory negligence. Special damages represent what a party has actually expended - for services rendered like a doctor's bill. That sum is not subject to any deduction by way of contributory negligence.

For those reasons, the Appellant's appeal dated and filed on 8th June, 2005 is dismissed with costs.

Having awarded the Respondent general damages in the sum of Kshs 33,000/= the 10% contributory negligence relates to general damages and is deductible therefrom. Accordingly the total judgment sum due to the Respondent ought to have been computed as follows_

(a)	General damages	Sh 35,000	
	<i>Less 10% contributory negligence</i>	Sh <u>3,500</u>	
			31,500
(b)	Add Special Damages	<u>2,000</u>	
			<u>33,500</u>

In addition, I would also add the Respondent's interest at court rates from the date of judgment till the date of payment.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 21st day of May 2010

M. J. ANYARA EMUKULE

JUDGE