REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 108 OF 2012

CHEMELIL SUGAR COMPANY LIMITED

SILAS OMONDI…..... APPELLANT

VERSUS

SILVANUS OLALE …..... RESPONDENT

[Being an appeal from the Judgement and Decree of Senior Principal Magistrate Nyando

Hon. C.O. Owiye dated and delivered on the 2nd August 2012 in Nyando PMCC No. 225 of 2000]

JUDGMENT

The Respondent sued and was awarded damages for injuries he sustained on 11th June 2000 while traveling to work in a tractor belonging to the Appellant. He alleged to have been lawfully traveling in the tractor as an employee of the Appellant.

The Appellant has appealed against the trial magistrate's finding on liability and on the quantum of damages. It is his contention that the Respondent was not involved in the accident and that the sum of Kshs.80,000/= awarded was excessive.

As the first appellate court I have considered and analysed the evidence before the trial court so as to arrive at my own conclusion as to whether the trial court's finding on liability and the quantum of damages should stand.

That a tractor belonging to the Appellant was involved in an accident on the material day was admitted at the trial by the Appellant's witnesses. Silas Omondi Jagongo (DW1) who was driving the tractor on that day testified that he had on board thirty (30) people all of them cane cutters. He stated that only three (3) people sustained injuries. He however stated that he did not have a manifest of the thirty passengers and even for the three who were injured he did not know their full names.

This evidence was reiterated by George Omondi Amieno (DW2) the Security Supervisor who visited the scene after the accident. DW2 testified that the three (3) workers who were injured were taken to the factory's clinic and that the rest continued with their work. He disputed that the respondent was among the casualties. He produced an extract to prove that fact. He did not however have the names of the employees who were not injured. The Respondent tendered evidence that proves on a balance of probabilities that he sustained injuries on the material day and was treated for those injuries. He produced a treatment record and called a doctor who produced a medical report. Miss Aron, Learned Counsel for the Appellant submitted that those documents were forgeries and that the Respondent was charged with a criminal offence in respect thereof. However there is no evidence that the documents are forgeries.

Neither is there evidence that the Respondent was charged with a criminal offence and indeed the issue is raised for the first time in this appeal. The Respondent readily admitted that he neither obtained a P3 form nor a police abstract. That alone is not sufficient to say that he was not involved in the accident. His testimony that he was involved in the accident is not rebutted. Both DW1 and DW2 did not produce a manifest of the workers who were being transported in the tractor and did not even know their names. Neither did they produce cogent evidence that those who were not injured continued working and that therefore only three sustained injuries. They also contended that the Respondent was employed by a contractor but not the Appellant. Nothing would have been easier than to bring records to demonstrate that that indeed was the case. The evidence tendered by the Appellant did not rebut that of the Plaintiff and I am satisfied negligence was proved against the driver of the tractor on a balance of probabilities. Vicarious liability is an issue of law and it need not have been pleaded. The trial magistrate was therefore correct in finding the Appellant vicariously liable.

As regards damages the Respondent sustained soft tissue injuries. He was awarded Kshs.80,000/= as general damages and the proven specials. An appellate

court can only interfere with the quantum of damages awarded by a trial court if it is satisfied that either the court took into account an irrelevant factor or left out of account a relevant one or that the award is so inordinately low or high that it must be an erroneous estimate of the damage – see **Kemfro Africa Limited t/a "Meru Express Services (1976) & Another V. Lubia & Another (NO.2) [1987] KLR 30.** In arriving at the award the trial magistrate took into account the nature of injuries and inflation. I am not persuaded that he took into account an irrelevant fact or that he left out a relevant one. I am also not persuaded that the award was excessive. In the premises this appeal is dismissed in its entirety. The costs of the appeal be to the Respondent. It is so ordered.

Signed, dated and delivered at Kisumu this 3rd day of August 2017

E. N. MAINA

JUDGE

<u>In the presence of</u>:-

Mr. Omondi MM for the Appellant

N/A for the Respondent

Evon - Interpreter