



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL NO: 46 OF 2007

PETER OBANDE NDEKE.....APPELLANTS

VERSUS

MUMIAS SUGAR CO. LTD.....RESPONDENTS

SEVERIOUS KHATSWENI

JUDGEMENT

This is an appeal from the Judgment of Honourable Bernard Ochieng, Resident Magistrate in Butere SPMCC No; 73 of 2005. The grounds of appeal are that the trial court relied on hearsay evidence, the court erred in law in finding that the appellant was not among those injured during the accident, the case was proved on a balance of probabilities, the decision is against the weight of evidence, and the court erred in law by failing to award alternative damages payable.

Parties agreed to determine the appeal by way of written submissions. Mr. Mwebi, counsel for the appellant submitted that the appellant proved his case and called supporting witnesses including a police officer who produced a P3 form and a police abstract. The defence did not produce a list of those involved in the accident and that the court ought to have given the amount of damages it could have awarded.

M/s Owiny & Co. Advocates, counsel for the respondent opposed the appeal. Counsel submitted that the appellant produced a sick sheet that was not duly completed or signed by the 1st respondent's medical officer. No treatment notes were produced, further, it is submitted that the appellant's name was not in the list given by the clinical officer who testified as DW II in Butere SPMCC No. 74 of 2005 whose evidence was adopted by the court.

I have gone through the proceedings of the trial court and the submissions by both counsels. The main issue for determination is whether the appellant was amongst those people who were injured during the accident that occurred on 6/11/2004. I do entirely agree with the findings of the trial court to the effect that indeed an accident did occur on the material day. I do further concur that it does not matter whether the accident motor vehicle got damaged or not as held by the trial court.

The plaintiff's evidence was that he was employed by the 1st respondent in the Seed Cane Development Section.

On 6/11/2004 he went to work at about 6.00 am. The workers were being carried in a lorry registration number KZY 351 when the driver lost control at Muroro area and the lorry fell on its side as it had rained and the road was muddy. Another vehicle went to the scene at about 8.00am and the accident Victims

were carried to hospital. He was treated and was issued with a sick sheet. According to the appellant, he was issued with a sick sheet on 6th November 2004 but it remained with the employer. He was issued with another sick sheet on 8th November 2004 and he made a copy before having it filled by the doctor as the filled sick sheet could not have been released to him. On 11.11.2004 he reported the incident to the police. He was issued with a P.3 form a police abstract .it is his evidence that there were about thirty workers on the lorry.

PW5, Salim Makokha testified that the appellant was his co-worker and they were both involved in the accident on 6/11/2004. PW2 Sergeant Shadrack Same was attached at the Mumias police station traffic base. He issued the appellant with a P3 form and a police abstract. According to him the appellant was included in the list of thirty people who reported to the police.

DW1 SAVERIOUS KHATWENI OKUMU was the driver of the accident vehicle. It is his evidence that it had rained on the material day and the lorry registration number KZY 331 got stuck in the mud. The lorry did not fall on its side. He counted those workers who were in the lorry and they were only 19 people and not 30.no one was injured and the workers came out of the vehicle on their own. He saw no one bleeding. He later learnt that the workers had gone to the clinic. He was later charged for failing to report the accident to the police. Parties agreed to adopt the evidence of DW3,a clinical officer who had testified in civil case No. 74of 2004 relating to the same accident. I have gone through the records of Appeal and the record of the trial court but have not seen the evidence of DW2. I will take it that the witness testified to the effect that the appellant was not in the list given by the witness to the court in Butere SPMCC No. 74 of 2005 as indicated in the submissions by counsel for the respondent.

Turning to the main issue for determination, the trial court held that the police officer who produced the P3 form and police abstract had no other independent evidence to confirm that the appellant was one of the victims. Further, the court was of the view that the photocopy of the sick sheet was not complete.

It is the appellant's evidence that he was involved in the accident. According to him a duly filled sick sheet cannot be released to the worker and that is why he made a copy of the second sick sheet. The driver of the accident vehicle testified that he only saw 19 people. He did not write down their names. It is his evidence that original sick sheets are usually returned to the employer and one cannot get a sick sheet if he is not sick or injured. The driver further testified that he could not tell whether appellant was one of the injured Workers.

From the evidence on record, I am satisfied that the appellant did prove that he was one of the accident victims. Although DW2 produced a list that missed the appellant's name, there is enough evidence that the appellant was one of the accident victims. There is the evidence of Salim Makokha to the effect that the appellant used to work with him in the Seed Cane Section. The witness also testified that he was involved in the accident together with the appellant. The evidence and the appellant in itself is in line with the with the evidence of the DWI as to the events of that day .it is doubtful that the appellant who informed the court that he does not know how to read could have could have included his name in the list of the victims and issued himself with a sick sheet. The defence evidence is that a sick sheet is normally retained by the employer. I do agree with the appellant's evidence that he made a copy of the sick sheet before it was duly completed by the doctor as he knew that it was not going to be released to him.

There is the evidence of the police officer. According to the list of the people who reported the accident, the appellants name is recorded as number two since the driver testified that he could not tell whether the appellant is one of the victims. A logical conclusion is that the driver did not know who were involved in the accident by names and there was no good reason to exclude the appellant. The allegation that there were only 19 accident victims is also not proved as no list of the 19 people was not produced in the court.

In the end, I do find that the appellant was one of the accident victims and the trial court erred in law and fact by holding that he was not involved in the accident.

The next issue is the determination of the amount of damages; Counsel for the appellant urged the trial court to award the appellant Ksh- 130,000 /= as damages. Counsel relied on the case of **VERONICA**

AWET TURWELL –VS- THE A.G NRB HCC 2048 of 1996 and that of **PETER KIMATI KIMAMNI -V- PAUL KAMAU MWANGI : NRB HCC 2919 of 1988 .**

On its part, the defence proposed an award of Ksh- 40,000/=. Counsel relied on the case of **FRANCIS MWAI KATHUTHU & Another –V- DANIEL MUWEWE NJOROGE NRB HCC No. 6 of 1999.**

According to the medical report prepared by Dr. Charles Andai that was produced the appellant suffered blunt injury to the head and blunt injury to the right shoulder. Complete recovery was expected after one year. Currently, in his submission, Counsel for the appellant is urging the court to award ksh- 160,000/= as damages. Counsel is relying on the case of **JOHNSTONE OCHIENG and others -V- C.C.L LTD & Another; NAKURU HCC No 309 of 1998** where ksh- 80,000/= was awarded for similar injuries .counsel for the respondent did not submit on quantum in his submissions.

I have seen the authority relied upon by the Counsel for the appellant. The injuries in that case were more serious as the plaintiff suffered more injuries compared to the appellant.

However I do note that the two parties in both cases suffered soft tissue injuries. Taking the time factor into account, I do award the appellant ksh 90,000/= as general damages; Dr Charles Andai testified in court and indicated that he charged ksh 3500/= for the medical report .I do award that sum plus ksh 100/= being the cost of the police abstract.

In the end, I do find that the respondents were entirely to blame for the occurrence of the accident .the appellant is awarded ksh 90,000/= as general damages plus ksh 3,600/=as special damages. The appellant shall have the list for both the subordinate case and the appeal.

Dated, Signed and Delivered at Kakamega this 26th Day of February 2014.

SAID J. CHITEMBWE

JUDGE