

REPUBLIC OF KENYA

IN THE HIGH COURT OF AT KAKAMEGA

CIVIL APPEAL NO. 45 OF 2007

JOSEPH SONGOI MUCHERE APPELLANT

V E R S U S

MUMIAS SUGAR CO. LTD. 1ST RESPONDENT

SEVERIOS KHATSWENI OKUMU 2ND RESPONDENT

(Appeal arising from the decision of [B. OCHIENG, R.M.] in Butere Civil Case No. 70 of 2005

J U D G M E N T

This appeal arises from the judgment of Hon. Bernard Ochieng, Resident Magistrate in Butere SRMCC No. 70 of 2005 delivered on the 30.3.2007. The grounds of appeal are that the judgment was based on wrong principles of the law and hearsay, there was overwhelming evidence that the appellant was one of the passengers in the accident vehicle, medical evidence was adduced to show that the appellant was indeed injured and that the judgment is against the weight of the evidence on record. Parties filed written submissions. Counsel for the appellant submitted that the appellant was one of the passengers in the accident vehicle. The trial magistrate found the respondent 100% liable but dismissed the suit on the allegation that there were only 19 people in the vehicle and the appellant was not one of them. Mr. Mwebi submitted that the police abstract indicated that there were 31 people and not 19. The appellant was one of those in the accident vehicle. Counsel submits that an award of KShs.180,000/= would be sufficient

Counsel for the respondents opposed the appeal and submitted that the appellant did not call any other witness to prove that he was involved in the accident. He did not produce initial treatment notes from the 1st respondent to prove that he was treated at their clinic. There was no proof that the appellant was one of the 19 cane cutters who were passengers in the vehicle.

The record of the trial magistrate shows that the appellant testified that he was employed by the 1st respondent as a cane cutter. On the 6.11.2004 together with other employees at about 6.00 a.m. they were travelling in motor vehicle registration number KZX 331 heading to the field at Musanda when the vehicle had an accident. The vehicle skidded and fell on the right side. It had rained that morning. He was injured and was taken to Mumias Medical Centre and was issued with a sick sheet. He was issued with treatment notes which he produced in court as well as the sick sheet and a copy of his payslip. He blamed the driver of the vehicle for the occurrence of the accident. He sustained blunt injuries to the chest and both knees. **PW2 DR. CHARLES ANDAYI** examined the appellant and assessed his injuries as blunt injuries to the chest and both knees. The respondents relied on the evidence of the 2nd respondent that had been made in a similar suit vide Butere SRMCC 34 of 2005. In that evidence the 2nd respondent testified that he was the driver of the accident vehicle. On the material day the vehicle skidded but did not land in a ditch as alleged. He counted the cane cutters to be 19 and not 31 as alleged and no one was bleeding.

The trial magistrate held that the respondents were 100% liable. The appellant's case was dismissed because he did not produce evidence to show that he was one of the 19 people on board the accident vehicle. It is clear that the appellant was employed by the 1st respondent as a cane cutter. He produced his payslip which showed that he was an employee of the 1st respondent. He also produced a sick sheet

issued by the 2nd respondent dated 8.11.2004. It is indicated in the sick sheet that it was an accident review case. The matter was reported to the police and the appellant was issued with a police abstract. It is also clear from the record that several victims filed suit and a police officer testified to the effect that they had a list of 31 claimants. The appellant's testimony is direct to the effect that the lorry skidded and fell. It was early morning and he was heading to his place of work in the field when the accident occurred. Given the evidence on record I am satisfied that indeed the appellant was one of the accident victims. He was subjected to intensive cross-examination and was able to explain how he met his injuries. The 2nd respondent did not produce a list which showed that he was noting the names of the workers before they boarded the lorry.

The next issue is the amount of quantum payable to the appellant. I do agree with the finding of the trial court on the issue of liability and I will hold the respondents 100% liable. Before the trial magistrate Mr. Mwebi sought damages of KShs.140,000/=. He relied on the cases of **JOEL EDWARD ODHIAMBO V NELSON MBOYA & ANOTHER. Nairobi HCCC No. 3295 of 1987** where KShs.70,000/= was awarded as damages and that of **VINCENT ODUOR V KENYA POWER AND LIGHTING COMPANY LIMITED. Nairobi HCCC No. 2164 of 1993** where a similar amount was awarded. On quantum the respondent offered an award of KShs.40,000/= based on the authority of **JOHN OTIEN OJWOK V SAMUEL ONYANGO ABUNGA & ANOTHER. Nairobi HCCC No. 2001 of 1992.** The medical report produced by Dr. Charles Andayi shows that they injuries sustained were blunt injuries to the chest and both knees. The appellant was expected to fully recover after a period of one year. Mr. Mwebi cited the case of **JOHNSTONE OCHIENG & OTHERS V CCL LIMITED & ANOTHER. Nakuru HCCC No. 309 of 1998** where the 3rd plaintiff was awarded KShs.80,000/= for soft tissue injuries. The injuries sustained by the appellant are minor injuries. The authorities cited by the counsel for the appellant are relevant. However, the appellant did not sustain bruises but only blunt injuries. I do award the appellant a sum of KShs.100,000/= as general damages and KShs.3600/= as special damages for the police abstract and the medical report.

In the end the appeal is hereby allowed. The judgment of the trial magistrate is set aside and replaced with judgment in favour of the appellant for **KShs.100,000/=** as general damages. **KShs.3600/=** as special damages. The appellant shall have costs of this appeal and of the lower court.

DATED AT KAKAMEGA THIS 19TH DAY OF MAY 2014

SAID J. CHITEMBWE

J U D G E