



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 61 OF 2010

ISAIAH MUKHWANA JACOB APPELLANT

VERSUS

WEST KENYA SUGAR COMPANY RESPONDENT

(Being an appeal from the decision of Hon. H.I Ongudi, Chief Magistrate in Kakamega Chief Magistrate Civil Case No. 371 of 2004)

(Before B. Thurania Jaden J)

J U D G M E N T

The Appellant, **Isaiah Mukhwana Jacob** had filed this suit before the subordinate court claiming general and special damages. The appellant's case was that he was working as an employee of the company at the respondent's sugar factory on or about the 23rd October 2003 when he was involved in an accident and sustained injuries on his right leg and chest.

The appellant's claim was denied by the respondent company. The company blamed the accident on the appellant's negligence.

In a reply to the defence, the appellant denied having caused or contributed to the accident.

During the hearing of the case before the subordinate court, the appellant testified that he was on duty working for the appellant when a tractor registration No. KAM 422B pulling trailer No. ZA 7939 when the trailer rolled and injured him on the leg and chest. The respondent was treated and admitted in hospital for three days. The respondent produced his outpatient card and the medical report as exhibits. The appellant blamed the accident on the trailer not having a stand to lift it when it was being connected to the tractor but they were instead using pieces of wood.

The appellant closed his defence case without calling any witnesses.

The trial magistrate in her judgment found the appellant's case was not proved on a balance of probabilities. The trial magistrate pointed out that the other people the respondent was working with were not called to testify and that the respondent only produced his outpatient card and the discharge summary was not produced. The appellant's case was dismissed with costs.

The appellant was aggrieved by the judgment and appealed to this court on the following grounds.

1. **THAT the trial magistrate erred in law and fact in finding that the appellant did not prove his case against the respondent when there was sufficient evidence by the appellant casting negligence upon the respondent.**
2. **THAT the trial magistrate erred in law and fact in failing to determine the suit based on the standard of proof required in law regarding proceedings of this nature.**
3. **THAT the trial magistrate erred in law by applying the wrong principles of law and facts as to occasion a serious travesty of justice.**
4. **THAT the trial magistrate occasioned a travesty of justice by misapprehending the law.**

The firm of **Odhiambo Ouma & Company** advocates appeared for the appellant while the firm of **E.K. Owinyi & Company Advocates** appeared for the respondent. The appeal proceeded by way of written submissions. The submissions by the appellant's counsel essentially reiterated the grounds of appeal.

The submissions filed by the respondent's counsel asserted that no primary documents were produced to support the alleged injuries nor was it proved that the appellant worked for the respondent or a link proved between the tractor and the trailer and the respondent.

As an appellant court, I have borne in mind the principles applied by the Court of Appeal in the case of **Selle & Another vs Associate Motor Boat Co. Ltd. & Others (1968) EA** where it was stated as follows:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

The appellant in his evidence narrated to the court how the accident occurred. The appellant's evidence was not controverted by any other evidence. The respondent did not call any witnesses to testify. The appellant's outpatient card and the medical report were produced as exhibits in court by the consent of the parties on 12/8/2009. The trial magistrate failed to take the medical report into account when she observed that only the card was produced. The medical report clearly shows that the appellant's injuries include blunt soft tissue injuries to the right leg and to the chest. The issue of the discharge summary would come in to prove admission in hospital and for what period. That would count on the issue of award of general damages.

On the submissions by the counsel for the respondent that there was no proof that the appellant worked for the respondent, it is clear from the appellant's evidence that he worked for the respondent as a casual labour. There is no evidence in rebuttal.

The respondent as the appellants employee was under duty at common law to provide a reasonably safe work environment. The respondent was in breach of his duty of care by not providing a safe and proper system of work in the method of connecting the trailer to the tractor.

The appellant's evidence links the tractor and the trailer to the respondent company as they were loading the sugarcane onto the trailer.

With the foregoing, I allow the appeal. No issues were raised concerning the assessment of general

damages by the trial magistrate at Kshs.150,000/=.

Consequently, I enter judgment to the appellant for Kshs.150,000/= plus costs and interests.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Kakamega this 18th day of April 2013.

SAID J. CHITEMWE

JUDGE