REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Appeal 115 of 2006

MITCHELL COTTS FREIGHT (K) LIMITED……APPELLANT

-AND-

SAMUEL OMONDI…….….. RESPONDENT

(Being an appeal from the Judgment of Ms. R. Kithinji, Resident Magistrate, delivered on 14th July, 2006 in RMCC No.5603 of 2004)

JUDGMENT

The respondent, who was the plaintiff, had moved the Resident Magistrate's Court by his plaint of ***28th December, 2004*** pleading that while working as a loader, in the respondent's employ, and while carrying bags of sugar from a container to a godown, he had slid and fallen, on account of unsafe working conditions, and had sustained "serious injuries and…suffered loss and damage"; he sustained soft tissue injuries to the cervical spine and to the front chest wall. The respondent had alleged negligence on the part of the appellant herein, and had claimed general and special damages, as well as costs.

The learned Magistrate after taking evidence, made a final finding as follows:

"Considering the injuries suffered by the plaintiff and the circumstances of the case, and the submissions of counsel, I find that Kshs.60,000/= …would adequately compensate the plaintiff as general damages. On special damages, it is [trite] law that they must be specifically pleaded and proved. The plaintiff pleaded for Kshs.[2,000/=] which I award. I therefore enter judgment for the plaintiff against the defendant for Kshs.60,000 [in general damages] …, Kshs.2,000/= [in] special damages plus cost and interest. This will be subject to 20% contribution by the plaintiff."

The Judgment is contested on appeal, the appellant thus contending:

*(i) there had been no **evidence** before the trial Court that "the plaintiff was employed on a casual basis by the defendant and was injured at the time of the accident";*

(ii)the trial Court wrongly held that the plaintiff's evidence was corroborated by that of the doctor

(PW2), in spite of the fact that the doctor's evidence was not conclusive on the causation of the plaintiff's injuries;

(iii)the trial Court erred in holding that the plaintiff was injured while working, instead of, while fighting;

(iv) the trial Court erred in holding the defendant liable in negligence or breach of contract of employment, as the plaintiff was not the defendant's employee at the material time;

(v)the trial Court misdirected itself in failing to appreciate that the onus was on the plaintiff to prove his case on a balance of probability;

(vi)the trial Court wrongly attributed liability to the appellant on the basis of vicarious liability;

(vii) the trial Court erred in awarding the plaintiff Kshs.60,000/= in general damages and Kshs.2,000/= in special damages – less 20% contributory negligence – when the plaintiff was not employed by the defendant.

M/s. Omondi Waweru & Co., Advocates for the appellant, submitted that while it emerges in the evidence that the appellant was at some stage employed by the appellant, this employment only covered ***4th June, 2004*** when the respondent was engaged as a casual labourer; and at the same time, "there is a glaring inconsistency as to when exactly the alleged injuries were sustained"; in the plaint, the date of injury was stated as ***7th June, 2004*** but later changed, in the amended plaint, to read ***5th June, 2004***. Counsel urged that such evidence was further complicated by the statement in the medical report submitted in evidence, which showed the date of injury as ***8th June, 2004*** – later changed (without counter-signature) to read ***5th June, 2004.*** Counsel contested the propriety of admitting the "medical report" of ***Dr. Frank Obwanda*** who "was in fact not a licensed doctor." The effect, counsel urged, was that it was "not certain when the alleged injuries… were sustained." Counsel submitted that the respondent had been employed by the appellant only in respect of ***4th June, 2004***; and therefore, "if the respondent was injured on any other date as alleged, then such injuries were incontrovertibly suffered elsewhere and not in the course [of employment with the appellant], a fact which ought to have been factored in by the learned Magistrate in her decision."

Counsel submitted that the trial Court had overlooked important evidence emanating from the defence: that the respondent had sustained injury while involved in a fight, during which he had caused a disturbance.

Counsel submitted that on the evidence, the trial Court had no basis for finding ***liability*** to lie with the appellant: for the defence witness had "confirmed in his testimony that on the material day when the respondent was employed by the appellant, the respondent fought and caused disturbance at work and that no other incident occurred". Such evidence, it was urged, was "corroborated by PW2 who confirmed that the injury was caused by a blunt object, possibly a blow during the fight." Counsel urged that if an injury upon the respondent had occurred, this arose from the fight, and "the respondent [was] the author of his own misfortune."

Counsel submitted that the trial Court erred no less, in determining the quantum of damages: "No treatment notes [were either] marked, identified, produced [or] adduced as exhibit before the ….Court, the only document availed being [the] medical report of ***Dr. Frank A. Obwanda*** who as a matter of common knowledge, was not even licensed to practise as a doctor…" Counsel submitted that such a report "is not a credible piece of evidence…" Counsel submitted that the doctor had not himself dispensed any treatment, merely relying on what was presented to him as treatment notes; but the maker of the treatment notes was not called to verify those notes.

Learned counsel submitted that the plaintiff "desperately failed to meet the threshold onus of proof as appertains to injuries alleged …."; and thus the trial Court erred in awarding both general and special damages.

The respondent was represented by learned counsel, ***Ms. Abuodha***, who urged that the appellant had admitted the fact of employment and that of injury, in relation to the respondent. Counsel, further, contended that "the other crucial issue admitted is that indeed, the respondent was lawfully working [for the appellant] when he was injured."

Counsel submitted, in favour of the respondent, as follows: the respondent's treatment notes were from Coast General Hospital; the supervisor [of which establishment?] had dispensed medicine to the respondent, on that occasion; "a medical report is noted… to [have been] produced as [an] exhibit" – "and this is enough proof on a balance of probability…"

Counsel urged that even though the trial Court did ***not*** hold the doctor's evidence to be conclusive, as regards the circumstances of the respondent's injury, such evidence was "a bit [more] reliable than [the position of] the appellant who never called a witness to confirm that the injuries occurred [during a fight.]"

Contesting the appellant's position in this matter, counsel contended that "the appellant had failed to prove [they had instituted] a safe system of work…"

Finally, counsel submitted that "the appellant did not [call] any witness whom they alleged, fought with the respondent"; whereas the respondent's witness "did say he was not aware of the name of the person who fought [the respondent]…"

The destiny of this appeal is squarely dependent on the state of the evidence, in the proceedings before the trial Court: did the plaintiff/respondent make a credible case, on the evidence? did he prove his claim, on a balance of probabilities? how did the appellant respond to such evidence? did the Court judiciously evaluate the evidence? did the Court find a realistic and valid balance in the probabilities of evidence? And did the trial Court arrive at a proper award, in terms of law and evidence?

The plaintiff, who gave evidence as PW1 stated the following as his vital facts: (i) on ***5th June, 2004*** he was working as a loader for the respondent; (ii) while so working, the respondent slid and fell on his chest, being injured on the neck, hand and chest; (iii) following the injury, the respondent was taken to the ***[appellant's?] supervisor***, who gave him medication, and dispatched two people to take the respondent home; (iv) three days later [***8th June, 2004***], the respondent "felt unwell and went to Coast General Hospital", and "was given drugs, [has] healed but still [feels] bad"; (v) on ***8th June, 2004*** the respondent obtained "treatment notes from Coast General Hospital"; (vi) on an *unspecified date*, an Advocate took the respondent "to a doctor [who prepared] a medical report"; (vii) the respondent "[blames] the defendant because the sugar [being loaded on ***5th June, 2004***] was melting and could cause a fall"; "there was sugar spilled all over which made it dangerous to work there"; (viii) the respondent "did not get injured in any fight".

The foregoing evidence is to be seen together with that of the only witness called by the respondent, ***Dr. Frank A. Obwanda, M.B.B.S***. (A.K.U. PKN) (PW2). The vital facts in the evidence of PW2 are as follows: (i) he examined the respondent on ***10th June, 2004*** (five days since the material date); (ii) this was two days since the respondent had been treated at Coast General Hospital; (iii) PW2 says in his report that the respondent had sustained ***soft tissue injuries*** on front chest wall, and that the respondent had been given pain-killers for three days; he says he found the respondent to have "mild pain which…will subside"; (iv) PW2 charged Kshs.2,000/= for the preparation of the medical report; (v) PW2 charged Kshs.2,800/= for Court attendance; (vi) PW2 relied on treatment notes from Coast General Hospital, but he did not treat the respondent; (vii) PW2 found the respondent to have "blunt-object injuries", and in his opinion, "he has fully healed."

The appellant called one witness, ***Gilbert Olumbe Otando*** (DW1), a "gang leader" in the works of Mitchell Cotts Freight (K) Limited. The material points of fact in DW1's evidence are as follows: (i) as "gang leader", he is aware that the respondent was engaged in the appellant's loading work during the night of ***4th June, 2004;*** (ii) the "gang list" held by DW1 would show if any worker is injured; (iii) the

appellant was involved in a fight with another person in the gang, at ***11.00 am***, and on that account, DW1 excluded the two from further work; (iv) the respondent was not injured while performing duty for the appellant; (v) DW1 does not remember the name of the worker who had been involved in the fight with the respondent; (vi) the fight between the respondent and the fellow casual worker took place while they were in the employ of the appellant, "off-loading sugar bags of 50 kg [each]"; (vii) since the incident of fighting, the respondent has not again been engaged in the applicant's employ.

The profile of all the crucial evidence is quite clear; and this Court must now examine the trial Court's findings as based on such evidence.

The first question considered by the learned Magistrate was: "whether the plaintiff was employed by the defendant [at the material time] and if so, whether he was involved in an accident". The trial Court noted that the respondent had given evidence on oath that "he was working for the plaintiff on ***5th June, 2004***"; and for the appellant, "DW1 admitted that the plaintiff was working with the defendant on ***5th June, 2004";*** the Court determined as a fact that "the plaintiff was working with [the] defendants on the material day."

Such, from the foregoing elements of the evidence above-set-out, is a fact; and I hold that the trial Court correctly evaluated the evidence.

The second issue for the trial Court was "whether the plaintiff was injured or not", at the material time. In this regard, the Court had noted from PW1's evidence that: he was carrying bags of sugar from a container to a godown when he slipped and fell; he was treated at Coast General Hospital; he produced treatment notes from that hospital. Weighing this evidence against the appellant's denial that any accident occasioned injury to a person on the material date, the learned Magistrate thus found:

"After hearing both PW1 and DW1, I find that PW1 [was] more truthful than the defence witness. In their cross-examination the defence appeared to appreciate that the plaintiff was injured while working for the defendant on 5th June, 2004."

And the third issue: "who is to blame and to what extent?" The learned Magistrate isolated the core element in the respondent's case: the piles of sugar bags employed as a stair-way were wet and slippery, and this created a risk to the loaders; this evidence was not controverted by the defendant; the defendant, on another plane, made an accusation, "that the plaintiff was injured while fighting, but they did not call any evidence to prove the same." The learned Magistrate resolved the question by restating the trite rule of evidence: "he who asserts must prove."

While, therefore sustaining the plaintiff's case founded on negligence, the Court even went further and found that "the plaintiff cannot escape blame," for by his evidence he had served the defendant previously, in the same task, and he was able to see the spilled sugar that posed the danger. This Court is unable to appreciate the rationale in the learned Magistrate's rider, considering obvious matters of *judicial notice* such as the general dearth of gainful employment in Kenya, and the fact that the work set-up was entirely under the *control and direction of the appellant herein.*

All the same, the trial Court proceeded to attribute blame, to the tune of 20%, to the respondent herein. I note, however, that there has been no cross-appeal in this regard; and so, procedurally, the learned Magistrate's exercise of discretion must stand.

In the consideration of *quantum of damages*, the trial Court took into account that the respondent had suffered soft-tissue injury which had healed. The learned Magistrate considered the propositions of both counsel as to quantum of damages and, after adverting to judicial precedent, awarded Kshs.70,000/= for soft-tissue injury to shoulder and chest, and, with the element of "contribution" taken into account, arrived at the figure of Kshs.60,000/= in general damages, and 2,000/= in special damages, with costs and interest.

From the evidence, the special damages falls in two parts: (i) Kshs.2,000/= for the preparation of

the medical report; and (ii) Kshs.2,800/= for the doctor's appearance in Court as a witness; and the Court, on the basis of judicial notice and broad principle, should provide for the same.

After systematic evaluation of the evidence and the trial Court's assessment of the same, I have come to the conclusion that, in substance, that Court rendered a true professional Judgment, and did justice as required by law. The plaintiff had proved his case on a balance of probabilities, and deserved an award. This Court finds that the defendant/appellant had not discharged the evidential burden momentarily passing on to them, and the defendant had instead raised matters inconclusively pursued: such as the plaintiff having been involved in a fight; or the plaintiff's doctor not being duly qualified.

Consequently, I hereby make specific orders which will also provide more clarity in the disposal of the instant matter:

(1)The appeal herein is dismissed, with costs to the respondent – the costs to bear interest at Court rate as from the date of filing the appeal.

(2)Subject to a 20% deduction, the appellant shall pay to the respondent general damages in the sum of Kshs.70,000/= – the same with interest at Court rate as from the date of the trial Court's Judgment.

(3)The appellant shall pay special damages in the sums of Kshs.2,000/= and 2,800/= respectively, each bearing interest at Court rate as from the date of filing the original suit.

(4)The appellant shall pay the respondent's costs of the original suit, the same to bear interest at Court rate as from the date of filing suit.

A ***decree*** shall be issued accordingly.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 16th day of February, 2012.

…….……
M.A. ODERO
JUDGE