REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL 161 OF 2011

KIMILILI HAULIERS LIMITED……………………………….…..APPELLANT

VERSUS

MAURICE MSINDANO MUSUNGU……………………………RESPONDENT

Suing as dependant of JACKSON ODHIAMBO OKOTH Deceased)

JUDGMENT

This is an appeal arising from the judgment and decree of the Senior Principal Magistrate Honourable A.ONGINJO delivered and dated on 23rd August 2011 in ELDORET CMCC NO.742 OF 2010.

MR.OMBIMA held brief for MR.NYEKWEI who appeared for the Respondent while MR.SONGOK appeared for the Appellant. Both counsels chose to present this appeal by way of written submissions.

FACTS:

The respondent is the father of the deceased and sued the Appellant claiming damages under the Fatal Accident Act.

On 29th March, 2010, the deceased among others were chosen as casual labourers and boarded the lorry registration number KAU 768 P belonging to the Appellant company and headed for Serem where the deceased and the other casuals were to load poles onto the lorry.

The driver parked the lorry on a slope and a pole that had been loaded on the lorry slid down and fell on the deceased. He was rushed to Kaimosi Hospital but died whilst undergoing treatment.

The Appellant being dissatisfied with the judgment preferred this appeal and listed eight (8) grounds of appeal in its Memorandum of Appeal and the same are as listed hereunder;

1) That the Learned Senior Principal Magistrate erred in law and in fact in arriving at the said decision which was not supported by the sum of evidence adduced in court.

2) That the Learned Senior Principal Magistrate erred in law and in fact in arriving at the said decision

which was based on extraneous factors not supported by either the pleadings filed in court or the evidence adduced by the Respondent.

3) That the Learned Senior Principal Magistrate erred in law and in fact in failing to find that no contract of and/or for employment was proved to have existed between the Appellant and the Respondent.

4) That the Learned Senior Principal Magistrate erred in fact and in law in failing to find that the Respondent had failed to prove that the Appellant owed him a duty of care and that it was consequently, in breach thereof.

5) That the Learned Senior Principal Magistrate erred in fact and in law in failing to consider the weighty evidence adduced in favour of the Appellant to the effect that the Respondent was not an employee of the Appellant but had in fact, been hired by a known third party.

6) Further that the Senior Principal Magistrate erred in fact and in law in failing to consider the fact that the accident was wholly caused by the Respondent's own folly and/or fault and failed to apportion liability accordingly.

7) Submitted that the Senior Principal Magistrate erred in fact and in law in failing to take into consideration that if indeed an accident did occur then the same was substantially contributed to by factors beyond the Appellant's control as it was raining on the material date.

This being the first appeal it is upon this appellate court to re-evaluate, re-assess, re-examine the evidence on record and come to its own independent decision (Refer to **ARROW CAR LTD –VS- BIMOMO & 2 OTHERS C.A 344 OF 2004)**

The court must also take note that it did not have the opportunity of having seen or heard the witnesses.

The aforementioned authority of **ARROW CAR LTD –VS- BIMOMO & 2 OTEHRS (Supra)** also lays down the principles as to when an appellate court can interfere with an award for damages and this is set out hereunder;

".............it must be satisfied that either that the judge in assessing the matters it took into account an irrelevant factor or left out of account a relevant one or that short of this the amount was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages............"

Upon reading both Counsels written submissions and perusing the Record of Appeal the court finds that the issues for determination relate to liability, quantum of damages, and special damages.

LIABILITY

The Appellant's contention is that the Respondent failed to prove that the Appellant owed the deceased a statutory duty of care and that the Appellant was in breach, thereof.

The Appellant argues that a Mr. Ronald Amadi (DW3) had hired its lorry, registration No. KAU 768P to carry the poles and it is the same Mr. Ronald Amadi who had hired the deceased and others as casual labourers.

The Appellant further argues that the deceased was not an employee of the Appellant, there existed no employment contract as between the Appellant and the deceased therefore no common law statutory duty of care arises and there could therefore be no breach of the same.

Therefore the finding of the trial magistrate that the Appellant was the employer of the deceased and was 80% liable was erroneous both in law and fact.

The Respondent in opposing this Ground of Appeal submits that the Appellant was vicariously liable for the negligence of its agent, servants and/or employees in particular the driver of motor vehicle lorry registration No. KAU 768P. The ownership of the motor vehicle was not disputed and Francis Osoro Ondera (DW2) confirmed in evidence that the lorry belonged to the Appellant.

Benson Mwaura (DW1) testified and confirmed that he was the authorised driver of the said lorry on the date of the accident and an employee of the Appellant.

The evidence of Wafula Wekesa (PW2) and Ronald Amadi Ingachi (DW3) confirmed that the lorry had been badly parked thus causing the loaded poles to roll off and fatally injure the deceased.

The negligence was attributed to the driver of the Appellant.

The Respondent submitted that the trial magistrate's finding on liability was well founded on the strength of the evidence.

Going through the evidence on record this court finds that the Respondent's claim cannot succeed on the ground of an Employer/Employee relationship. There was none and therefore the common law statutory duty of care does not arise as laid down in the case of **CLIFFORD –VS- CHARLES & SONS LTD (1958) AU E.R.**

The Appellant tried to pass the issue of employment to Ronald Amadi (DW3) that the said witness was the person who hired the lorry and the casuals. But in his evidence DW3 states that he was not the person who had hired the lorry and the casuals.

His evidence was that he was called by a Mr. Gitonga to examine and ensure that the poles that were being loaded were good.

Not withstanding the above all the Respondent needed to prove was that there was an accident involving the deceased and that the motor vehicle belonged to the Appellant which was proved and that the driver was an employee of the Appellant company and that the driver was negligent. All these elements were proved by the Respondent.

Therefore this court finds that the trial magistrate from the evidence adduced correctly found the Appellant to be vicariously liable for the negligence of its driver.

This court finds no reason to interfere with the trial magistrates finding on the issue of liability and apportionment and the court finds that no irrelevant factors were taken into account or omitted by the trial magistrate when she arrived at the decision.

Quantum:

The Appellants main argument relates to the multiplicand. That no evidence was produced in support of the deceased's monthly salary of Kshs 10,000/=. That the trial court ought to have been guided by law and concrete evidence tendered in court.

The Respondent argued that casuals are paid on a day to day basis and employers never proffer payslips to such casual employees. The Respondent submitted that the minimum wage should be the criteria used for the multiplicand.

The court also concurs with the Respondents submissions that no employer gives casual employees payslips and that the trial magistrate correctly addressed and issue of the multiplicand by finding that in the absence of evidence as proof of income the Government minimum wage guideline for unskilled labourers set by the Ministry of Labour be applied.

The trial magistrate then applied the sum of Kshs 5,000/= as the multiplicand which sum this court

finds to be reasonable.

This court finds that there is no need to interfere with this award as the trial magistrate did not use wrong principles for arriving at the multiplicand and computation of damages.

SPECIAL DAMAGES

The trial magistrate awarded the sum of K shs 39,685/= as special damages. The Appellant was aggrieved with the said sum and argues that the same were not specifically proved.

This court finds that the Respondent specifically proved the special damages by producing ExB1, ExB4 (a) and ExB4(b).

There is therefore no need to interfere with the special damages awarded as the trial magistrate based the same on evidence tendered in court by way of receipts.

CONCLUSION:

The resultant effect is that there is absolutely no merit in the appeal and the same is dismissed with costs to the Respondent.

Dated and delivered at Eldoret this 20th day of April 2012.

A.MSHILA
JUDGE

Coram: Before Hon. Mshila J

CC: Collins

Wanyonyi holding brief for Cheruiyot for Appellant

Ombimba holding brief for Nyekwei for Respondent

A.MSHILA
JUDGE