WOBURN ESTATE LIMITED.....APPELLANT

VERSUS

SULUBU KALENGA BONGO.....RESPONDENT

REASONS FOR JUDGMENT GIVEN ON 30TH JULY, 2012

1. This appeal arose from the decision of the Hon. Resident Magistrate awarding damages for injuries sustained by the respondent while in the course of his duties as an employee of the appellant.

2. There were four grounds of appeal, the first three related to the question of liability and the fourth, quantum. It was the appellant's argument that the Lower Court erred by disregarding a note signed by the respondent compromising his claim against the appellant upon receipt of Shs. 5000/-. The appellant's counsel contended that the court erred in failing to give effect to the note "which speaks for itself and instead accepting the respondent's oral explanation." In this regard he referred to Section 97 and 100 of the Evidence Act and argued that the issue of liability was closed at the execution of the said note. Counsel further argued that the quantum of damages was not justified.

3. The respondent's counsel in response submitted that the respondent was illiterate and did not understand the importance of the document he signed which was rendered in English language, while the respondent was a Giriama speaker. That the contents did not indicate the purpose of the note which was not signed by the employer. She also defended the quantum of damages as commensurate with injuries.

4. I have considered the arguments of counsel as well as perused the record of appeal. In my view the question whether the issue of liability was closed by the execution of the note must be determined by an examination of the same. In its plain reading, the note which in part takes the form of a letter to the respondent, contains three key elements:

1. The existence of an injury claim by the respondent regarding injury on 18th July, 1997

2. Payment of Shs. 5000/- "being final payment" for the claim.

3. Acknowledgement by the respondent of receipt of the Shs. 5000/- as final payment for the injury and release of the appellants from any further claim in this regard.

Hence this is really a purported agreement between the appellant and the respondent.

What in my opinionis missing and was clearly brought out at the trial, is the signature of the second party to this note (Woburn Estate Ltd/its representative).

5. DW1 freely admitted during cross-examination in the Lower Court that he wrote the document but did not sign it even though he was acting on behalf of the company. He could not explain why he did not reduce it into Kiswahili. Rather that he wrote the note in English and translated it into Giriama for the

respondent. On his part the respondent said he was illiterate. Two things arise out of these matters:

1. Whether there was an agreement in the true sense between the parties.

2. Whether the plain language of the document was understood by the appellant.

6. Evidence on these matters cannot be ignored or precluded on the basis of Section 97 and 100 of the Evidence Act. Because they go to the question whether indeed there was a contract between the two parties and a meeting of the minds. It was the duty of the Lower Court to consider these issues, whether or not the appellant filed submissions. But it would appear that without saying so expressly the Lower Court deemed the note as an acknowledgement of some sort of advance compensation.

7. On this appeal, after careful consideration of the relevant facts surrounding the said note, I am doubtful that indeed it can be firmly stated that the same constitutes a deliberate and conscious agreement between the parties to the effect that upon receipt of Shs. 5000/= the respondent waived all future claims for compensation.

8. Secondly, and I think more importantly, even if the said agreement was signed by both parties, I think that in the circumstances of this case, to give force to such an agreement would be against public policy. Clearly the respondent's injuries were not minor, as clearly documented in the medical report (skeletal and soft tissue injuries to the right foot requiring a cast) and Shs. 5000/- could not suffice as compensation even, if the company had filed his LD104 form with the Labour Office (The appellant apparently did not do so). Hence I do not agree with the appellant's counsel that the issue of the liability was closed upon execution of the note.

9. On the question of quantum, I have noted the injuries sustained by the respondent necessitated the application of POP which he wore almost one month to correct the fractures on the toes of the right foot. These resulted in partial disability according to Dr. Ajoni Adede. I think that in the basis of the legal authorities cited by the respondent in the Lower court the award of Shs. 150,000/- was not excessive as such but in my opinion Shs. 120,000/- would suffice as general damages. To that extent only the appeal succeeds. The costs of the appeal are awarded to the respondent.

Delivered and signed this 10th August, 2011 in the presence of Ms. Oyugi for the appellant. Mrs. Muyare absent.

C. W. Meoli
JUDGE