REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL APPEAL NO. 48 OF 2006

- BETWEEN -

A. O. BAYUSUF & SONS LTD……. …… APPELLANT

- AND -

SWALEH THOYA IHA……..……RESPONDENT

(Being an appeal from the Judgment of Resident Magistrate Mr. Gesora, dated 22nd February, 2006 in SRMCC No. 5574 of 2004 at Mombasa Law Courts)

JUDGMENT

The plaintiff (respondent herein) had filed suit on **29th December, 2004** seeking general and special damages for personal injury alleged to have occurred at his place of work; and he alleged that the said injury was occasioned entirely by the employer's negligence. In the final part of the judgment, the trial Court thus found and held:

"When I balance the evidence of the plaintiff and the defendant the scale tips in favour of the plaintiff, and therefore I hold the defendant 100% liable".

In the memorandum of appeal, the defendant/appellant contended as follows:

(i) the trial Court erred in fact and in law in holding the defendant liable without proof;

(ii) the trial Court erred in fact and in law in holding the defendant liable despite failure by the respondent herein to prove that he was an employee of the appellant.

(iii) The trial Court erred both in fact and in law in disregarding the evidence of the appellant's witness;

(iv) The trial Court erred in fact and in law in taking into account hearsay, irrelevant and/or immaterial evidence in holding the appellant liable;

(v) The trial Court erred in fact and in law in awarding the respondent excessive damages in disregard

of the principles for assessing damages.

The appellant asked the Court to vacate the trial Court's Judgment and orders, and to find that the appellant is not liable; and that the appellant be awarded costs of the proceedings at the first instance and on appeal.

In the submissions, learned counsel **Mr. Abubakar** urged that since the employment status of the respondent pleaded in the plaint had been denied in the defence, then by virtue of ss. 107, 108 and 109 of the Evidence Act (Cap. 80, Laws of Kenya), *"the burden of proof is on the respondent"*. Counsel submitted that the respondent failed to prove that he was an employee of the appellant; he had not produced Form LD 104 which, at the material time, was mandatory under the Workmen's Compensation Act (Cap. 236, Laws of Kenya); and he produced no staff identification card or pay-slip, nor did he make an application (in accordance with Order X, rules 2, 4, 10, 11, 15 and 23 (then in force)) for the appellant to produce relevant records bearing on the question.

Counsel submitted that the respondent, in his evidence, had relied on the names of certain persons, in an attempt to validate his claim — such as **Hassan Awadh**; **Ali**; one **Mohamed Swalid** — but he called none of those persons as a witness; and he did not seek Court summons to have those persons attend. The reference to such persons, counsel submitted, remained at the level of hearsay, and lacked evidential value.

Counsel urged that the trial Court had relied on the respondent's uncorroborated evidence without giving any reasons, and without addressing relevant considerations such as the demeanour of witnesses; circumstantial evidence; matters of judicial notice. Counsel submitted that the trial Court did not state why it did not believe the appellant's witness.

It was submitted that the trial Court had shifted the burden of proof from the respondent to the appellant, such as by declaring:

"The plaintiff has already testified that he works for the defendant. It is up to the defendant to come up with evidence to contradict the plaintiff".

Counsel submitted that it was not the legal duty of the appellant's witness to produce the employment record, but it was the respondent's duty; the respondent failed to call in aid the provisions of Order X of the Civil Procedure Rules —and so the burden of proof did not shift to the appellant. Counsel urged that the learned Magistrate had evaluated the evidence not on the basis of proof, but on the basis of conjecture — and that this was an error in law.

Counsel urged that the trial Court had awarded excessive damages: the respondent had suffered only minor soft-tissue injuries — and so the award of Kshs. 90,000/= was inordinately large. It was urged that an award of Kshs. 50,000/= would have been sufficient.

The appellant's case was supported by citing certain authorities. In **Ali Mahdi v. Abdulla Mohamed** [1961] E.A. 83, in a claim based on an alleged employment relationship, the main issues were: *"whether the respondent was an employee or a partner of the appellant and whether the respondent lost his eye by an accident arising out of and in the course of his employment"* (pp. 83-84). The High Court of Tanganyika (**Law, J**.) upheld the trial Magistrate's finding that an employment relationship had existed (p. 85):

"Various cheques were shown to the respondent and admitted to have been received by him from the appellant in 1957 and 1958. The respondent explained that these cheques were partly in respect of salary and partly in settlement of his dues under the dissolved partnership".

Counsel submitted that in the instant matter, no evidence of payment was tendered by the respondent.

The appellant also relied on the High Court's decision in **Hamisi Juma Kidiwa v. National Museums Board of Governors**, Mombasa HCCC NO. 90 of 1999, in which the following relevant paragraph appears (**Onyango Otieno, J**):

"On the ground that there was no evidence to show that the respondent was an employee of the appellant, the respondent [brought before] the Court [the] Workmen's Compensation Form, Form LD 102, which stated that the National Museum of Kenya was his employer according to what was filled in … He did not produce anything else. He said he was being paid a salary, but never produced [a] salary slip, or evidence of the same. The appellant says in its [pleadings] that the respondent was appointed by the community elders as an overseer over a *Kaya,* and that it was a term of [the] agreement between the elders and the appellant that the National Museums of Kenya (Coast Conservation Unit) would make token payments to the plaintiff on behalf of the elders. The respondent never produced any evidence to support its contention. I have on my own perused the Workmen's Compensation Form, which was produced as Exhibit 4. The copies that were produced do not appear to have been signed by the National Museums of Kenya at the place provided for the employer's signature. [Counsel] told me in his submission that the employer named in the Workmen's Compensation Form did pay compensation to the respondent under the Workmen's Compensation [Act]. That was not in [the] evidence before the Court below and it remains, in law, no more than a statement from the Bar. The learned Magistrate does not appear to have given any consideration to this aspect of the case. He preferred to hold that the respondent was an employee of the appellant without carefully analyzing the evidence before him together with pleadings and submissions. *It was the duty of the respondent to prove he was an employee of the appellant, as that aspect of the case was in dispute".*

Learned counsel submitted that the foregoing decision well covered the position in the instant matter: and, unlike in that case, where an attempt was made to produce Form LD 102 even though it was not signed by the alleged employer, in this instance no such attempt was made at all.

The burden of proof in this case, counsel submitted, rested with the respondent, who had laid no basis for an excuse which could have arisen: the relevant authority is the Court of Appeal decision in **Choitram v. Hiranand Ghanshamdas Dadlani** [1958] E.A. 641. In that decision the following passage occurs (**Gould, J.A.** at page 644):

"… the learned Judge treats the absence of the relevant vouchers from the respondent's possession from whatever cause as a defence to the claim for an account. This is not necessarily so, for the mere inability of a party liable to account to produce relevant vouchers does not relieve him of responsibility _ it would be strange if it were so. On the other hand if he is prevented from completing and presenting accounts by the absence of vouchers, and that absence has been occasioned by the wilful removal and suppression or the destruction thereof by the other party or his agent, then that party could not be heard to ask for an order, compliance with which he had by his own act rendered impossible".

Learned counsel submitted that the respondent, in the instant case, was liable to prove employment; and his inability to produce either Form LD 104, or identification card or payslip, or any other proof, does not relieve him of the burden; be could, for instance, have shown any impediment occasioned by the appellant by invoking Order X, but he failed to do so.

Learned Counsel **Ms. Abuodha**, for the respondent, contested the appellant's position regarding employment: she urged that the evidence shows the respondent had been a casual employee of the appellant. Counsel urged that the appellant's one witness *"did not state that he has no direct link with the [casual workers]"*.

Dr. Frank Obwanda (PW 1) had examined the respondent on **28th July, 2004**, finding that the respondent had a history of having fallen while off-loading goods from a lorry; he sustained soft-tissue injuries on the right palm and on the right tibia. The doctor prescribed pain-killers to be taken for three days, and anti-biotics to be taken for five days; the respondent was required to perform only light duty

during the material week. The doctor later examined the plaintiff, and found him to have recovered fully.

The plaintiff, in his evidence, said he had worked on a casual basis for the defendant, over a period of about a dozen years. On **13th July, 2004** he had come to work at 2.00 p.m., and was transferring a 50 kg bag of sorghum from one lorry to another, when the driver of one of these lorries suddenly moved his motor vehicle, as a result of which the respondent fell. The respondent was given first aid by the "storeman", one **Ali**; and the following day he sought medical attention at Coast General Hospital.

On cross-examination by learned counsel, **Mr. Abubakar**, the respondent said he had no identification or proof that, on the material day, he was working as an employee of the appellant; in his words:

"I [do] not have [any] identification or proof that I was working there. We were just [casuals]. I got injured at about 5.00 p.m. I was given first aid to prevent bleeding by *Ali* … I had to wait for money; we are paid daily [and] by the time I was paid it was late. The cashier paid us. Only one person is given the money out of the gang. I was given mine by *Mohammed Swalid*. I asked why they did not take me to hospital but they refused".

In further response to cross-examination, the respondent said he *"did not pursue"* the issue of obtaining a labour form, in this matter. To the question whether he had any entry card to the appellant's premises, the respondent said: "There are no entry cards there".

Faiz Abdalla (DW 1), the appellant's claims manager, testified that it was his responsibility to receive claims in respect of injuries, debt and credit, etc. In injury cases, a designated employee of the company, based at the personnel office, would fill in the LD 104 form; and in the case of suits, it is DW 1 who receives the demands and summonses. In the instant case, DW 1 received a letter of demand on **21st July, 2004**; and it was his responsibility to check whether the subject, **Swaleh Thoya Iha**, was a person appearing on the appellant's records. DW 1 did not find the respondent's name on the company's records; and no report of any injury had been recorded in respect of the respondent. So, by DW 1's testimony, this was *"not a true claim"*.

DW 1 testified that the appellant, who is a transporter, employs drivers, turn-boys and clerks; but **loaders** are employed not by the appellant, but by the appellant's clients who have goods, or who are godown-owners; and there was no record that the respondent was the appellant's employee and was injured while in the appellant's employ.

On cross-examination by learned counsel, **Ms. Odhiang**, DW 1 said that the appellant has a records office, and the keeper of the records is one **James Onduso**; an injured employee would have the record kept by the records office. DW 1 said the respondent was unknown to him; and he had no knowledge of the facts of the material incident. DW 1 did not know Ali, the person said to be a store clerk, and who had dispensed first aid to the respondent on the material day.

After considering the content of the memorandum of appeal, as well as the submissions of counsel and the evidence on record, it has become clear to me that the basis of the respondent's claim, by his suit, was that he was an **employee** of the appellant, and it was owing to the appellant's failure in respect of duty of care, that he suffered injury, and therefore became entitled to general and special damages.

The question whether or not there was a breach of the duty of care, in my opinion, is a secondary consideration to the prior one: was the respondent an **employee** of the appellant?

The learned trial Magistrate had not, with respect, undertaken an assessment of the forgoing question: he readily resolved it, along with other issues, on the basis of the greater-probability scenario which guides findings in civil litigation. But that question was technically more complex, and required focused analysis; and this point, as it is the subject of settled lines of authority, required special judicial determination.

On that point, in the first place, I am in agreement with learned counsel for the appellant, that the trial

Court erroneously reversed the burden of proof. The plaintiff pleads (plaint dated **23rd December, 2004,** paragraph 4) that:

"At all material times [to] this suit the plaintiff was employed by the defendant".

To this, the defendant pleads (statement of defence, dated **18th January, 2005**, paragraph 4) that:

"The defendant denies the allegation made in paragraph 4 of the plaint and puts the plaintiff to strict proof thereof".

Not only has the defendant, by denial, neutralized the plaintiff's affirmation, but, by the pleadings, the onus has been placed on the plaintiff to move beyond the bald claim, and make a positive case that, indeed, he had been in the employ of the appellant at the material time.

The terms of s. 109 of the Evidence Act (Cap. 80) on *"proof of particular fact"* are clear:

"The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence….."

It is not plain to this Court that the plaintiff/respondent did discharge the **legal burden** of proof, on the question of employment status, resting upon him — and therefore no **evidential burden** on that point passed on to the appellant herein.

The foregoing point is clearer still, judging by the position taken by learned counsel, **Ms. Abuodha**: she urged that the appellant's witness *"did not state that he has no direct link with the [casual workers]"*; but, that casual workers might be said to be in the employ of the appellant, was itself calling for proof, and the legal burden rested with the plaintiff/respondent.

What, then, is the state of the evidence, on the **employment relationship?**

Firstly, the plaintiff states that he was a **casual worker**. Secondly, he says that he, along with others in his category, was paid on a **daily** basis. Thirdly, the respondent says that he worked as part of a *"gang"* of daily-wage workers who were not paid in any particular mode, but paid through the hands of any one member. Fourthly, the respondent has testified that persons he knew at the *locus in quo,* would not make it their responsibility to deliver him at the hospital, on the day he was injured. Fifthly, DW 1 testifies that the personnel records of the appellant bear no entry, regarding the respondent as an employee. Sixthly, the respondent was unable to bring before the Court any **document of identification**, or any formal symbol at all, which connected him to the appellant in an employer-employee relationship. Seventhly, the plaintiff, though he mentioned the names of some individuals said to be connected to the appellant company, did not call any of them to show him to be an employee.

As the case, **Ali Mahdi v. Abdulla Mohamed** [1961] E.A. 83 shows, the Court does not prescribe a fixed set of identification documents which a person in the respondent's position would be obliged to produce; but **some indicia** of a valid claim to employment-status should be offered. It was not, moreover, alleged that the appellant herein had obstructed the respondent in his attempts to secure any probative record on employment status; and therefore the task of proof rested wholly with the respondent.

If the respondent was not an employee of the appellant, could he maintain this action? That would not be the case: because the claim was not based on **general duty of care**; it was based on the **employment relationship**. Therefore, the suit could only succeed **if** the respondent was determined to have been an employee of the appellant.

As already remarked, there was **no evidentiary basis** upon which the trial Court could find the respondent to have been an employee of the appellant. Although it is a fact emerging from the evidence, that the respondent was **injured at work** in the appellant's premises, he must be regarded as being on the said premises either as a **volunteer** or a **private contractor**, to whom the law of employment would not

be applicable. There is, indeed, evidence that persons in the respondent's category could well have been engaged, on the material day, by owners of goods who were the clients of the appellant. It is not possible, in these circumstances, to hold that the employer-employee relationship between the respondent and the appellant had been proved. Consequently, the appeal is for allowing, and I will make a decree in the following terms:

(1) This appeal is allowed.

(2) The Judgment and orders of the trial Court dated 29th December, 2004 are set aside.

(3) The respondent shall bear costs at the trial stage and on appeal — and the same shall bear interest at Court rates as from the respective dates of filing.

DATED and **DELIVERED** at **MOMBASA**this **18th** day of **February, 2011.**

J. B. OJWANG
JUDGE

Coram: ***Ojwang, J.***
Court Clerk: ***Ibrahim***
For the Defendant/Appellant: **Mr. Abubakar**
For the Plaintiff/Respondent: ***Ms. Abuodha***