REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO.22 OF 2002

MUMIAS SUGAR CO LTD .....APPELLANT

VERSUS

WILFRED WAKHU.....RESPONDENT

J U D G M E N T

The Appellant Mumias Sugar Co Ltd appeals against the judgment of Senior Resident Magistrate Mumias in SRMCC No.595 of 1999. The Respondent herein Wilfred Wesonga Wakhu was the plaintiff in that case. The plaintiff successfully sued the Appellant for damages for injuries sustained in the course of his duties as a cane cutter. Liability was apportioned between the parties with the plaintiff bearing 10%. He was awarded Kshs.250,000/- general damages, special damages of Sh.4000/- and costs of the suit.

In his petition of appeal, the Appellant contends that the plaintiff did not prove his case to the balance of probabilities given the strong defence tendered by the appellant. The Respondent on the other hand argues that the plaintiff's evidence was cogent and the court was correct to apportion liability at the ratio of 90:10 in favour of the plaintiff.

Parties agreed by consent to have the appeal heard by way of submissions which both parties filed dutifully. It was the Respondent's case that on the 14/04/99 he was aboard the Appellants vehicle registration number KZX 304 Isuzu going to cut cane at Lukongo. He was with other cane cutters in the rear of the truck. Some people were sitted while others including the plaintiff were standing because the vehicle was full beyond capacity. The door of the vehicle was supposed to be locked from outside by the driver who failed to do so. At Koyonzo, the driver applied brakes suddenly. The plaintiff was thrown outside the vehicle. The matter was reported to his immediate senior the Field Assistant. He was issued with a sick sheet and went for treatment. The plaintiff blames the driver for careless driving and driving at an excessive speed.

The defendant called four witnesses. DW1, the driver of the vehicle reg no.KZX 304 testified that the Respondent was not his passenger when he was taking the cane cutters to the farm. It was on his way back that he was stopped by other workers who told him that the Respondent had been injured in a bicycle accident. He assisted to take the plaintiff to hospital.

DW 2 told the court that he was cane cutter on the material day. As he traveled to the farm in the company vehicle, the Respondent was not with him. DW 2 saw Respondent injured and he explained to DW 2 that he had slid and fallen from his bicycle. He sustained injuries on the legs and elbow joints.

DW 3 was the Field Assistant in-charge of the cane cutters. He said he found the Respondent sitted in the farm having been injured after falling with his bicycle. The Respondent was given first aid and then went to hospital for treatment.

DW 4 is an employee of the Appellant. He admitted first aid to the Respondent and recommended to DW 3 that the Respondent be taken to hospital. DW 4 found the Respondent already injures having fallen from a bicycle.

The magistrate did not give reasons for his finding. He summarized the evidence of the witnesses and then made a finding.

"After the plaintiff's evidence and that of the defence, I now find the defendant 90% liable in damages for the plaintiff. The plaintiff is also found 10% liable as quantum".

It is the duty of this court to evaluate and analyze the evidence and reach its own finding. The Respondent blamed the Appellant's driver for careless driving which led to the accident. He said the driver vehicle was overloaded in that some passengers had no seats and were forced to hold on to the vehicle for support. DW III the Field Assistant in cross-examination said that the Appellant's vehicles sometimes carry excess passengers but that is by mistake. DW 1 the driver said he was carrying many passengers. He could not tell who they were since he had no record of the people who boarded the vehicle. DW III also failed to produce any list of the passengers aboard the vehicle on that day. In the absence of any controverting evidence, the court believed the plaintiff on the allegation of overloading.

The Appellant argued that the Respondent ought to have produced a police abstract to prove that an accident occurred. The Respondent claims for damages for injuries he suffered in the course of his work as an employee of the defendant. In this regard, he needed no P3 form or police abstract. From the evidence of both parties, it was not in dispute that the plaintiff was an employee of the defendant as a cane cutter. He also produced two pay slips for the month of March and April 1999. The only dispute was that the plaintiff was a passenger in the appellant's vehicle reg. no.KZX 304 Isuzu lorry. The defendant called four witnesses. DW 1 was the driver who said he never saw the plaintiff in the vehicle and that there was no accident. DW 1 could not tell who were passengers in his vehicle. On cross-examination he said:

" **I can't know who boarded where".**

If the driver could not know who boarded the vehicle and at what point, then he could neither know whether the Respondent was a passenger or not.

DW 2 said he was a cane cutter and was on duty on that day. He said the Respondent on the material day used a bicycle to go to work just as the witness did. He said that the plaintiff was injured on the way to the farm after sliding and falling from his bicycle.

DW 2 said:

" I didn't see but I asked him. I was with him I saw him slide".

The two statements cannot be reconciled that DW 2 did not see the Respondent being injured and that he also saw him slide. This makes the evidence of DW 2 incredible. In cross-examination DW 2 said

" I didn't see how he got hurt"

Yet he said in his evidence in chief that he saw the Respondent slide. The only logical conclusion that can be made from DW 2's evidence is that he never saw the Respondent being hurt. If that was the case, then the evidence of the witness has no probative value in his case.

DW 3 and DW 4 were not present in the vehicle or during the time the plaintiff was injured. The two witnesses cannot therefore help the court as to whether the plaintiff was a passenger in the vehicle or not, or whether he was hurt by a bicycle or fell down from the moving vehicle. DW 3 on cross-examination said he did not have a list of the passengers on board.

DW 4 gave first aid to the Respondent before he was taken to hospital but did not witness the vehicle or the bicycle accident.

The plaintiff explained that the driver failed to lock the rear door which is normally locked from the outside. The vehicle was full and some passengers were standing, the Respondent being one of them. The plaintiff's evidence is that the driver suddenly braked causing the Respondent to fall out through the open door. The driver denied that there was such an accident. His (DW 1) evidence portrayed him as a driver who did not care about what was happening in his vehicle or around him. He could not tell how many passengers he had on board and at what point they boarded. The court believed the plaintiff's story as to how he sustained injuries. None of the four defence witnesses was a passenger in the vehicle or even saw DW 1. It follows that none of the witnesses can controvert the plaintiff's evidence as to the occurrence of the accident. DW 3 admitted issuing a sick sheet to the plaintiff to go to hospital and DW 4 administered first aid. The plaintiff was blamed at the ratio of 10% for the probable reason that he boarded an overloaded vehicle of his employer and standing near the open door which was risky. I find the apportionment of liability reasonable since the Appellant's driver was more to blame for careless driving and overloading. If the plaintiff was seated, he would not have fallen outside when brakes were applied.

I find that the Respondent proved his case against the Appellant and that liability was apportioned correctly.

The plaintiff sustained a fracture of the right fibula and bruises on the legs and hands. He was admitted in hospital for nine days. The award of Sh.250,000/- for loss of amenities was reasonable and ought not to be disturbed. The special damages of Sh.4000/- was proved per se.

I find that the appeal has no merit and I dismiss it accordingly. The Appellant to meet costs of this appeal and those of the lower court. I hereby so order.

F.N.MUCHEMI

JUDGE

Judgment dated and delivered on the 8th day of March 2011 in the absence of the parties.

Order
The Deputy Registrar to notify parties of the delivery of the judgment.

F.N.MUCHEMI

JUDGE