REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVL APPEAL NO. 227 OF 2005

(Being an appeal from the judgment and decree of the Hon. Mrs. Mwai, the Senior Resident Magistrate, Limuru Law Courts,

in SRMCC No. 188 of 2001 dated 22 March 2005)

BROOKE BOND (K) LTD.....APPELLANT

VERSUS

JOHN MWANGI NG'ANG'A.....RESPONDENT

I. INTRODUCTION

1. The relationship between the appellant M/s Brook Bond (K) Ltd (herein referred to as the appellant) and the respondent John Mwangi Ng'ang'a (herein referred to as the Respondent) is that of employer/employee.

2. The Respondent had been employed as a casual labourer on one of the appellant's farm as turn boy. He would ride at the back of the trailer to the tractor. On the material day of the 4 January 1999 and during the course of his employment, he was at the back of the appellants tractor and was in the process of going to collect coffee. The driver of the said tractor drove at an excessive speed. The weather was wet and raining. The driver hit a pothole on the road causing him to fall off. The wheel ran over his right femur causing him to sustain a fracture.

3. When the respondent sued the appellant, the court, after trial came to the conclusion that the appellants were liable for the accident at 100%. The trial court went ahead and awarded the following in damages.

i. General damages Kshs. 200,000/=

ii. Special damages Kshs. 17,210 /=

iii. Future medical expenses Kshs. 70,000/=

Total **Kshs. 287,210/=**

4. Being dissatisfied with this award, the employer/appellant filed this present appeal. They prayed that this court looks into the following issue and review the same.

i. Liability

ii. Special Damages

iii. Future medical expenses

II. APPEAL

a. Liability

5. The court erred by not awarding contributory liability against the respondent. That some form of negligence should have been attached against the Respondent.

6. The Respondent stated in reply that the mode of transportation was the said tractor. That at all times as a turn boy, he would travel in the tractor whereby he would in effect stand. No other evidence was called by the appellant at the time they had already sold the said farm and had no witness.

7. On re-examining the evidence before the Trial Court, I noted that indeed the respondent mode at the back of the tractor trailer. This was the mode of transportation as being a turn boy he required to be there. He stood as the tractor travelled. The tractor had no goods as they were proceeding to collect coffee. If it had, he would have sat down on the goods. The evidence also showed the tractor speeding, possibly to get out of the rain. The accident occurred when the tractor hit a pot hole in the road. This was a self accident. The impact of this was the respondent falling off the trailer. The appellant owed the tractor, employed the driver and possibly owed the road that they may have been required to maintain? The appellant is vicariously liable for the accident. This they do not dispute. What they dispute is that liability be apportioned between the appellant and respondent. I do not see how this could be so done? Examples of contribution would have been if the respondent had deliberately put his body out of the trailer and hanged on the trailer/tractor with only one hand or foot etc. In this instance, he took precaution, stood and hanged on. The over speeding and pothole caused the accident.

8. I find the trial magistrate came to the correct conclusion. That the said appellants are liable for the accident at 100%.

9. The second issue was on Special damages. This prayer was abandoned at the start of the appeal. The claim for Special Damages as awarded by the Trial Magistrate will not be interfered with by this court.

10. The last issue was that of the claim for future medical expenses. The main grounds is that this was never pleaded. On record is a plaint stating that future medical expenses would be pleaded at a later stage. In the Original file and in a further record of appeal, this is reflected as having been pleaded at Kshs.80,000/=. The trial magistrate awarded Kshs.70,000/=. The respondent was able to show that this was proved through the medical reports that had been put in evidence.

11. I wish to first state that where the plaint pleads a certain claim, as was in this case for future medical

expenses, it must not only be pleaded but particularize it. The appellant herein has accepted this to be the position and as such, I would also not interfere with this claim on grounds that the original plaint filed on 14 September 2001. I am unable to understand where the page 3 of the plaint in the record of appeal came from. None of the parties have given an explanation as to this discrepancy. This page is not on the original file of the trial magistrate.

12. I would not interfere with this award.

13. A question arises as to why the authorities were not considered by the trial magistrate. The explanation provided by the respondent was that the issue on General Damages was never questioned; the Special Damage claim being abandoned, then the need of those authorities do not arise.

14. I would hold that the trial magistrate came to the correct conclusion. The appeal be and is hereby dismissed with costs to the respondent who had been awarded liability at 100% and the decreetal sum of Kshs.287,210/=. The interest on General Damages would run from the date of the trial courts Judgment and the interest on Special Damages from the date of filing suit.

15. The costs of this appeal and the costs in the subordinate court would be borne by the appellant/original defendant.

RULING DATED THIS 20TH DAY OF MAY 2011 AT NAIROBI

M. A. ANG'AWA

JUDGE

Advocates:

1. M/s R. K. Muthiga & Co. Advocates for the Appellant - present

2. J. M Njenga & Co. Advocates for the REspondnet - present