REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 320 OF 2006

KAMINDI LTD (SANDE FARM).....1ST APPELLANT
MARGARET NDUTA.....2ND APPELLANT

Versus

MICHAEL ONDIMU ONYANGO.....RESPONDENT

JUDGMENT

The Respondent claims that at the material time he was an employee of the Appellants. On 12th September 2003 while travelling on the trailer attached to the Defendant's tractor **Registration No. KAQ 151W,** the tractor was involved in an accident in which he was injured. He was later on that day treated at Tigoni District Hospital and discharged. He filed Limuru RMCC No. 497 and sought damages from the Appellants for those injuries. After hearing the case, the trial court held the Defendants 100% liable and awarded the Respondent Kshs.350,000/= general damages. This appeal is against the whole of that judgment.

On liability counsel for the Appellants faulted the trial magistrate for relying only on oral evidence, on the occurrence of the accident and the ownership of the accident tractor. They contended that without a police abstract report the alleged accident was not proved. This being an industrial accident, they further argued, it was also mandatory for the Respondent to produce Form LD 104 duly completed by the Appellants to confirm that the accident actually occurred.

On the ownership of the accident tractor, counsel submitted that the Respondent having failed to produce a copy of the records from the Registrar of Motor Vehicles to prove which of the Appellants owned it, his claim should have failed. As regards quantum they submitted that the sum of Kshs.350,000/= for minor soft tissue injuries was excessive. In their view the Respondent deserved about Kshs.80,000/= for the injuries he suffered.
In response to those submissions counsel for the Respondent submitted that production of Form LD 104 or the Police Abstract report are not mandatory. They said an accident can be proved by oral evidence. Moreover, they further submitted, DW1 and DW2 admitted that the tractor belonged to the Appellant.

I have considered these submissions and read the lower court record. In their joint statement of defence the Appellants conceded that the accident tractor belonged to the second Appellant. In the circumstances I agree with counsel for the Respondent that the Respondent did not need to adduce evidence to prove the

ownership of the tractor. In civil proceedings, parties adduce evidence to prove the disputed facts or issues. In the case of **Thuranira Karuri Vs Agnes Ndeche, Civil Appeal No. 192 of 1996 (CA at Nyeri)** the Court of Appeal said a copy of the records from the Registrar of Motor Vehicles was required because the ownership of the accident vehicle in that case was in dispute. That authority is therefore not relevant in this case.

I know of no legal requirement that a traffic accident can only be proved by a police abstract report. The **Section 73** of the **Traffic Act** obliges all drivers to report accidents they are involved in and that is why evidence in the form of police abstract reports is in most cases readily available. But that is not to say that an accident cannot be proved by oral evidence. In this case there was ample oral evidence to prove the accident. Besides the Respondent's word, the tractor driver, though denying the accident, said the tractor was struck in the mud and was pushed out. That was proof of the accident. In the circumstances I dismiss the contention that a traffic accident can only be proved by a police abstract report.

This holdings also answers counsel's contention that an industrial accident can only be proved by production of Form LD 104. There is no legal requirement for that and counsel did not cite any authority for their assertions.

The Appellants failed to produce employment records to prove that the Respondent was not their employee. It is the employers who kept records of their employees. To ask the appellants who are the employers in this case to produce those records is therefore not shifting the burden of proof.
I cannot appreciate the learned trial magistrate's basis for holding the Respondent 15% liable bearing in mind the fact that he was just a passenger. However as there is no cross-appeal on that I say nothing further. I dismiss the appeal against liability.

On quantum the Appellant's complaint is that the award of Kshs.350,000/= was excessive. Their counsel also argued that the evidence in court contradicted the Respondent's pleadings on the injuries he suffered.

Having perused the Respondent's plaint and the evidence of his doctor, I agree with counsel for the Appellants that the Respondent did not plead the alleged fracture of the left 5th finger interphalant as Dr. Maina said. I therefore hold that the learned trial magistrate erred in taking into account that fracture. Consequently I allow the appeal on the quantum of general damages and reduce the award to Kshs.250,000/=.

The appeal on liability having failed I order that each party bears its own costs of this appeal.

DATED and delivered this 15th day of July 2011

D.K. MARAGA
JUDGE