REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 69 OF 2010

MOHINDER SINGH BRAH ……APPELLANT

VERSUS

ERICK WAFULA WANYONYI …….RESPONDENT

JUDGMENT

The appellant brought this appeal pursuant after being dissatisfied with the judgment of the learned Senior Resident Magistrate delivered on 16th April 2009 vide Winam SRMCC NO. 484 of 2005. The Memorandum of Appeal has seven (7) grounds. The same can actually be split into two (2) major grounds namely:-

(i) Whether the said learned Magistrate erred in law and fact in finding that the Respondent was an employee of the appellant and thus liable in law to compensate him.

(ii) Whether there was any negligence attributed to the appellant and simultaneously with this whether the doctrine of *volenti-no-fit-injuria* applies.

Both counsels for the appellant earlier put a spirited fight to support the end of their bargain.

The facts briefly of this matter are that the respondent while being the employee of the appellant was on 16th May 2005 attacked by three (3) assailants. According to his evidence, he was with his two (2) other colleagues Mr. Odewa and Abisa. He was cut on his left index finger which was later amputated. They were guarding a sugarcane farm. He had apparently worked for one (1) year for the appellant. The respondent blamed the appellant for not providing him with the tools of trade. The thieves were never arrested.

The Respondent called two (2) witnesses one **Jared Obiero Obongo** a clinical officer and **one Dr. Olima**, a surgeon. The Appellant didn't call any witnesses save that he produced a medical report of one **Dr. Raburu** which was done by consent.

At the end of the trial, the trial magistrate in his judgment found in favour of the respondent and awarded him the sum of Kshs. 150,000/= less contributory negligence of 30%. It's worthy to note that I cannot find the basis of the learned trial magistrate apportioning liability of 30% as against the respondent. The major ground for this appeal is whether indeed the respondent was able to established the connection between him and the appellant. The respondent in cross examination by the appellant advocate failed to produce any identification document linking him to the appellant. Though he had

worked for one (1) year he failed to produce any employment card, any statutory documents like N.H.I.F. or N. S. S. F card. He didn't produce any pay slip. Further he failed to call any eye witness to collaborate his evidence.

Earlier own in his evidence in Chief he said that his other colleagues were **Mr. Abisa** and **Odewa**. It would have been prudent to have called the two or at least one of them to corroborate what he was saying.

Further the respondent admitted during cross examined that though he was guarding the respondent sugar cane farm, there were other similar farms around. He never produced any documentary evidence showing that indeed he was guarding the appellant's farm.

As to whether he was given tools of trade, this is indeed arguable. It's however inconceivable that three (3) watchmen will not have any panga, rungu, or any other crude weapons for one year and yet they are calling themselves watchmen. Had he nevertheless called one of his colleagues as earlier alluded perhaps more light would have been shone on this point.

He further told the medical officer who filled the P3 that he was assaulted by people known to him. This was in the evidence of PW2. If indeed the assailants were known to him, he would have reported to the relevant police station and at least an O. B. opened and action be taken. It's interesting also that PW2 was unable to identify himself during cross examination.

The upshot of it is that the respondent was unable to establish that he was an employee of the Appellant and event so unable to establish that he was working in the appellant's farm. After listening to the counsels for both the appellant and respondent submission it's my humble view that in the light of the facts adduced at the trial it was incumbent upon the respondent to comply with Section 107 and 108 of the Evidence Act Chapter 80 laws of Kenya which states:-

"S. 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.
107 (2) When a person is bound to prove the existence of any fact it is that the burden of proof his on that person.
(108): The burden of proof in a suit or proceedings his on that person who would fail if no evidence at all were given on either side".

The respondent failed to discharge. It was his case and any efforts including demanding for the employment records from the appellant was necessary.

Having said this, the other limb of the appeal dealing with the principle of ***volenti-no-fit-injuria*** shall not be necessary for me to dwell on. Had I establish that the respondent was indeed employed by the appellant then it would have been necessary for me to go through the evidence adduced to establish the above legal maxim. Nevertheless had the respondent established that he was employed by the appellant then I believe that the principle would have applied in his favour. It's incumbent upon the employer to provide reasonable tools of trade upon their employer at all times.

In the case of **Dave =vs= Businesses Machines Ltd 1974 E. A. Page 69 and quoting the judgment of Windham J in Eksteen =vs= Kutosi [1951], 24 (2) K. L. R. 90**, the learned Judges stated:-

"Non if an appearance had been entered and a defence filed and if the only failure on defendant's part had been a failure to appear either personally or through his advocates on the day when the suit was called on for hearing then I think the plaintiff ought properly to have been called upon formerly to prove his claim that is to say, to prove everything the burden of which on the pleadings lay on him in order to establish his claim".

In the current case the appellant defence in the lower court denied the existence of any working relationship with the respondent. It was therefore incumbent upon the respondent to establish such vexus. Justice **J. V. Juma in the case of Susan Mumbi Waititu =vs= Kefala Greedhin NRB HCC 3321 of**

1993 stated that:-

"The question of the court presuming adverse evidence does not arise in civil cases. The position in Civil cases is that he who alleges has to prove. It's for the plaintiff to prove her case on the balance of probability and the fact that the defendant doesn't adduce any evidence is immaterial".

The upshot therefore is that the appeal succeed. The judgment of the lower court is set aside with all the attendant consequences. The appellant shall have the costs of this appeal.

Orders accordingly.

Dated, signed and delivered this 26th day of October 2011.

H. K. CHEMITEI
JUDGE

HKC/aao