**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAKURU**

# CIVIL APPEAL 18 OF 2006

**GACHAGUA SAW MILLS..…….. APPELLANT**
**VERSUS**
**JOHN MUKABI……...……..…...RESPONDENT**

***(An appeal from the Ruling in Nakuru C.M.C.C.NO.1328 of 2002***
***by Hon. Emily Ominde, Senior Resident Magistrate, Nakuru dated 19th January, 2006)***
**JUDGMENT**

This is an appeal from the decision of Ms. E. Ominde, Senior Resident Magistrate in the Nakuru C.M.C.C.C.No.1328 of 2002 delivered on 19th January, 2006 in which in a half page judgment, she found the appellant liable for the injuries allegedly sustained by the respondent while working for the appellant and awarded him Kshs.120,000.00 in general damages and Kshs.2,000.00 in special damages.

The above findings have been challenged in this appeal on ten (10) grounds, which may be summarized and condensed into two (2) as follows:

i) that the learned magistrate erred in finding that the respondent had proved his case against the appellant and,

ii) That the magistrate misdirected herself in awarding special damages when the same was not pleaded.

Both counsel for the appellant and the respondent have filed written submissions together with authorities which I have carefully considered.

Briefly, it is the appellant's case that the learned trial magistrate failed to make a finding whether the driver of the lorry in question was an agent or employee of the appellant; that there was no evidence that the respondent was on duty on the day the alleged accident is supposed to have occurred; that there was no evidence of an accident as alleged; that there was no evidence of contract of employment between the appellant and the respondent; that there was no evidence of negligence; that the judgment did not comply with the provisions of Order 20 Rule 4 of the Civil Procedure Rules.

For the respondent, it has been submitted that the respondent was able to prove that he was employed by the appellant and also that he was on duty on the fateful day; that documents produced by the appellant at the trial to prove that the respondent was not on duty on the fateful day were not properly produced; that special damages was specifically pleaded in the plaint; that vicarious liability was proved.

On the issue of employment of the respondent by the appellant, the simple answer was provided by the appellant's first witness – Paul Obara Obilo, a supervisor with the appellant, when he stated the following:

"I know almost all the workers. I know John Mukabi. He was an employee of the defendant as an operator"

In cross examination he explained in reference to the respondent that:

"He was a permanent employee."

With that express admission from a witness at the level of a supervisor, the appellant cannot be heard to deny that the respondent was not its employee.

I turn to consider the crux of this appeal, that is, whether or not the appellant was negligent. The respondent in his plaint stated specifically that the accident in which he sustained the injuries, the subject of this appeal, occurred on 16th June, 2001. He was equally emphatic in his evidence that the accident was on 16th June, 2001 and denied a suggestion that it was on 30th May, 2002 (1 guess, 2001). It was therefore incumbent upon the respondent to prove that indeed he was on duty on 16th June, 2001 and that while on duty he was injured by a log which was dropped by a lorry. It must be remembered that the appellant insisted that the respondent was injured on 30th May, 2001 and was granted a sick off for the entire

month of June, 2001. When did the accident, subject of this dispute occur? Was it on 16th June, 2001 or 30th May, 2001?

The appellant's contention that the respondent was not on duty on the 16th June, 2001 when he claimed he sustained the injuries in question is based on staff attendance report produced at the trial. The respondent challenged the attendance report as being capable of manipulation as the entries were made in pencil. That contention is speculative and does not, *per se*, make the report incredible. Indeed the respondent has not specified any entry which was erased and altered. The reports show that for the month of June, 2001, the respondent was on paid off duty. The respondent in his own testimony gave evidence and stated that:

> "I stayed home for one and a half months due to the injury. I was paid for that period. Discharge summary dated 30th May, 2001."

It is trite learning that parties are bound by their pleadings and equally by their oral evidence.

From the evidence on record, I come to the conclusion that the respondent failed to prove, first, that he was on duty on 16th June, 2001 and secondly, that he sustained the injuries in question on that day.

As a matter of fact, I am persuaded that he was off duty when the alleged accident is supposed to have occurred. This is supported both by the respondent's own testimony and the documents produced by the appellant. Those documents were produced without any objection by learned counsel for the respondent and cannot be challenged at all.

Regarding the judgment of the learned trial magistrate, I have already observed that it comprised one page. It has been attacked by counsel for the appellant as being below the standard requirement of Order 20 rule 4 of the Civil Procedure Rules. There is no requirement that a judgment must comprise several pages, so long as it contains a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

I have looked at the learned trial magistrate's judgment and it is clear that she made conclusions without analyzing the evidence or giving reasons. The judgment, I find was not in conformity with Order 20 rule 4 aforesaid.

For all these reasons, this appeal is allowed and the judgment is set aside with costs to the appellant.

Dated, Signed and Delivered at Nakuru this 29th day of January, 2010.

**W. OUKO**
**JUDGE**