



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 12 of 2009

MIWA MILLERS LTD. :::::::::::::::::::::::::::::: APPELLANT
V E R S U S
THOMAS DAVID MMBAKA :::::::::::::::::::::::::::::: RESPONDENT

J U D G E M E N T

The respondent filed civil suit No.118 of 2007 before the Butali Court. He was awarded KShs.90,000/= as general damages. The appellant herein was the respondent in the lower court and being dissatisfied with the trial court decision preferred this appeal.

Mr. Nyikuli, counsel for the appellant submitted that the appeal is on liability only and not quantum. Counsel argued all the grounds of Appeal together. The main issues raised by the appellant is that the respondent did not produce documents to prove that he was the appellant's employee, that the alleged accident was not reported at any police station and no P3 form was produced and no eye witnesses were called, that the respondent did not prove that the accident vehicle belonged to the appellant by producing a search certificate from the Registrar of Motor Vehicles as ownership had been denied and finally that the respondent's allegation that the accident vehicle was defective was not proved by way of an inspection report.

Mr. Kiveu, Advocate for the respondent opposed the appeal and submitted that the appellant never called any evidence to controvert the respondent's evidence. The case was proved on a balance of probability. The appellant's defence was mere denial. The respondent was employed by the appellant and it was upon the appellant to give him employment documents. Further, that the case was based on breach of employment contract.

The lower court record shows that two witnesses testified. The plaintiff and Dr. Charles Andati who produced the medical Report for the plaintiff/respondent. The plaintiff testified that he was involved in an accident on 24th January 2005 while working with the appellant. He stated that he worked for four years and on the material day he was on board a tractor along Ingotse/Esumeyia road when the driver lost control and an accident occurred. He gave the name of his supervisor as one Salim. The tractor lost control and entered into a sugarcane plantation. He was examined by Dr. Andati, PW2 who confirmed that allegation and confirmed that the respondent sustained some injuries.

The defence filed denied that the respondent was the appellant's employee and also denied that an accident did occur. It also attributed negligence on the part of the respondent. A reply to the defence was filed reiterating the contention that the respondent was the appellant's employee.

The trial court evaluated that evidence and found the appellant liable. An award of Shs.90,000/= as general damages was made. The appellant is contesting the trial court's finding that it was liable. The respondent stated that he was employed by the appellant and was

involved in an accident while on duty. He stated that he was seated inside a trailer connected to the tractor. He was subjected to cross examination and maintained his allegations that he was involved in an accident. I do find that the trial magistrate was right in holding that indeed the respondent was involved in an accident.

The appellant did not controvert the respondent's contentions. It is not established as to why the respondent would allege to have worked for the appellant and not another employee if it were not a correct allegation. There was no need for the respondent to obtain a police abstract or P3 form. The appellant was bound to keep records of his employees and no record that excluded the respondent was produced in court.

I do further find that on a balance of probability the respondent proved his case against the appellant. The appellant did not adduce any evidence and the respondent's evidence stood unchallenged. The trial court was correct in believing the respondent's evidence and indeed arrived at a correct decision.

In the end, I do not find any merit in the appeal and the same is dismissed with costs to the respondent.

SAID J. CHITEMBWE

J U D G E

Delivered, dated and counter signed at Kakamega this 16th day of March, 2010

ISAAC LENAOLA

J U D G E