



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Appeal 47 of 2006

GEOFFREY SIMIYU TEMBA :::::::::::::: **APPELLANT**

~VRS~

MAWINDER SINGH :::::::::::::: **RESPONDENT**

JUDGMENT

The Appellant Godfrey Simiyu Temba appeals against the judgment of Bungoma Senior Principal Magistrate for dismissal of his claim for damages for injuries he sustained in a road traffic accident. The grounds of appeal are set out as follows:

- a) **that the magistrate failed to consider the facts of the case and failed to consider the evidence in its entirety;**
- b) **that the magistrate failed to appreciate that the appellant was an employee of the Respondent and that the Respondent was in actual possession of the vehicle reg. KAM 427 E Tractor Ford.**
- c) **that the court failed to consider that the tractor was being driven by the appellant on the express instructions of the respondent and for the Respondents beneficial interest.**

The facts of the case was that on 11/3/2003, the Appellant who was an employee of the respondent Mawinder Singh was driving the Respondent’s vehicle registration number KAM 427 E Ford Tractor from Muhoroni to Kibos. He was transporting the Respondent’s sugar cane from Kibos to Muhoroni. Near river Rusui, the Appellant was going downhill when the steering and the brakes of the tractor failed. The vehicle lost control and crushed into the river. The accident was reported at Kakamega Police Station the following day by the Respondent. As a result of the accident, the Appellant sustained injuries and sought to be compensated in way of damages for the injuries. The Respondent in his written statement of defence denied the claim. He denied that the appellant was his employee, that there was such an accident and that he was the owner of the vehicle. In his evidence, the Respondent said he is a farmer and grows sugarcane which he transports to the factory using tractors. He knew the appellant who used to work for him as a driver up to January 2003. At the time of the accident, the Appellant was not under his employment. On the material day, the Respondent said that he found the tractor in question having crashed into the river. He stopped his car and assisted the owner of the tractor to get it out of the river. The owner requested him to report the accident for him which the Respondent did at Kakamega Police Station.

The magistrate in his judgment found that the Appellant had failed to prove that the Respondent was the owner of the motor vehicle registration number KAM 427 E Ford. That the contract of employment had been established. The magistrate then dismissed the Appellant’s case with costs.

On ownership of the motor vehicle, I find that the Respondent had denied it in his written statement of defence which was filed in court on 9th December, 2003. This denial gave the Appellant notice that he had to prove the ownership as by law required. It was incumbent upon the Appellant to obtain documentary proof including a copy of records from Kenya Revenue Authority to support his case. The case was fixed for hearing on 04/08/2004 about one (1) year later, yet the appellant did not produce such documentary evidence. It is an established principle that ownership of a vehicle can only be proved by producing a copy of records in case of a registered owner. As for a person in actual possession of the vehicle, other evidence may be adduced. The Respondent produced a copy of records showing that the tractor registration number KAM 427 E belonged to one Patrick Wesonga Kundo. This exhibit was obtained by the Respondent about two years after the accident. The Appellant was duty bound to produce his copy of records showing who owned the vehicle as at 11th March, 2003. In the absence of such evidence of ownership, the court could not be expected to make a different finding from what it did. PW2 produced a police abstract showing that the owner was Mawinder Singh of P. O. Box 736, Kisumu. The witness also testified that Mawinder Singh is the one who reported the accident. The Respondent’s name is Mawinder Singh but the mere act of reporting the accident which is admitted is not proof of ownership. The police abstract is also not adequate to proof ownership. The Respondent in cross-examination said he told the police that the tractor was his and that it was being driven by one Godfrey Simiyu the Appellant. This kind of statement would serve as an admission that the Respondent was in actual possession of the tractor. However, ownership must be proved by the Appellant. If ownership had been established to be in the hands of another person other than the Respondent, the Appellant would have sued both the

registered owner and the person in actual possession.

The appellant told the court he was an employee of the respondent on the material day and that he stopped working for him the same day. He further said he had worked for the Respondent since 1998. The contract of employment was denied in the defence. The Appellant did not adduce any evidence to support his claim that he was an employee on the material day or since 1998 to the date of the accident. It was incumbent that that evidence be adduced.

The trial court correctly found that ownership of the vehicle in question and the contract of employment had not been proved. I find no merit in the grounds of appeal.

The magistrate was duty bound to assess damages for the sake of a successful appeal. He was wrong not to do so. Had this appeal been successful, I would have corrected that mistake. As things are now, I find it an exercise in futility to assess the damages at this stage since a second appeal would only deal with matters of law.

I therefore dismiss the appeal and order that each party meets its own costs of the appeal.

F. N. MUCHEMI
JUDGE

Judgment delivered and dated this 6th day of October, 2010 in the presence of Mr. Mukisu for Onchiri for the Appellant.

F. N. MUCHEMI
JUDGE