REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

CRIMINAL APPEAL NO. 11 OF 2008
(Appeal against both conviction and sentence of the Kakamega CM's Court in Criminal Case No. 3026 of 2003 [E. O. OBAGA ESQ., SRM])

MUMIAS SUGAR CO. LTD.)
W. S. M. ADAMBO) ---------- APPELLANTS

VERSUS
REPUBLIC ---------- RESPONDENT

JUDGEMENT

1. The Petition of Appeal dated 1.4.2008 is premised on the following grounds of appeal.

1. That the trial magistrate erred both in law and fact in shifting the burden of proof wholly against the appellants and ignoring completely the actual cause of the accident that precipitated the trial.
2. That the trial magistrate erred in law and fact by basing his conviction of the appellants upon either factors that had nothing to do with the appellants or issues not proved on the evidence on record or not relevant at all to the case and his decision was against the laid down principles of law.
3. That the trial magistrate erred in law and fact in convicting the appellants on the basis that the 1st appellant was the employer of the driver of the tractor that caused the accident giving rise to the case and that the 1st appellant was therefore vicariously liable when the 1st appellant was not infact the said driver's employer, and when in any case the issue of vicarious liability did not arise in the first place the case before the court being a criminal and not a civil case.
4. That the trial magistrate erred in law and fact in convicting the appellants without at all taking into account the correct circumstances surrounding the accident giving rise to the case and the role played in the accident by the deceased whose actions solely contributed to the accident and the Honourable Court's decision was against the weight of the evidence on record, was biased and has resulted in a miscarriage of justice.

2. Mr. Owinyi, Advocate for the Appellants addressed me at length on the circumstances leading to the charges preferred against the Appellants in Kakamega CM's Court Criminal Case No. 3026 in which they were the accused persons. The charges and particulars thereof were the following;

"Count I:
At a factory, failing to provide a safe means of access to every place of work at which any person has at any time to work or pass contrary to Section 34(3), as read with Section 72(1) and 75 of the Factories and other Places of Work Act Chapter 514 as amended by the Factories (Amendment) Act No. 1 of 1990 Laws of Kenya.

Count II:
At a Factory, failing to maintain sufficient and suitable lighting in every part of the Factory which persons are working or passing contrary to Section 16(1) as read with Section 72 (1) and 73 of the Factories and other places of work Act, Cap 514 as amended by the Factories (Amendment) No. 1 of 1990, Laws of Kenya."

3. In a Judgment read on 18.2.2008, The Appellants were found guilty and were each sentenced to a fine of Kshs.5,000/- and in default to serve two [2] months imprisonment in respect of each of the counts. It was unclear whether the sentences would run consecutively or concurrently but I will address that error later.

4. In any event, the circumstance leading to the charges were tragic. On 14.7.2007, PW1, Wilson Mbakaya Barasa reported to work at 4 a.m. He was a tractor driver and his duty was to drive tractor registration number KAH 624R to the weighbridge at Miwa Hauliers before the sugarcane loaded onto it was taken to Mumias Sugar Factory.

5. According to the witness, a supervisor whose name he did not now, told him to enter weighbridge B1. He did so but the supervisor told him to move to B2. He did so but again he was asked to reverse and move to B3. As he was leaving B3, he heard a person crying out and he stopped the tractor. He alighted and found that a man was lying on the ground, injured.

6. Of relevance to the charges was the evidence of PW1 as follows;

"The time of the accident was 6.00 a.m. If the lights were on, one could only see a distance of 10 metres. I could not see the rear as the trailer was much bigger that the tractor------. The tractor had no rear lights."

7. In cross-examination, he stated that;

i) he was an employee of Miwa Hauliers, a different Company from Mumias Sugar Co. Ltd.

ii) He had been charged with the offence of careless driving and was sentenced to a fine of Kshs.30,000/=.

iii) There were lights at the Mumias Sugar Company weighbridge.

8. PW2, Anacletus Osman Shikanda, was the one who directed PW1 to the weighbridge at the material time and his evidence was partly as follows;

"Before the accident I had noted that it was a bit dark at weighbridge 3 and 4…..someone had not switched on the tower lights."

9. He was not at the scene when the accident happened because he was at weighbridges 1 and 2 when he heard screams from weighbridges 3 and 4. He then stated as follows;

"It was still dark. I could not see. I found that my
Manager was screaming in pain."

10. He also repeated his evidence that the tower lights were not working and the weighbridges were on property belonging to Mumias Sugar Company.

11. PW3, Raphael Akama Okello was also on duty as a supervisor on the material morning and directed PW1 to the weighbridge but was not present when the accident occurred. However, PW2 alerted him to it and he helped the injured man at the scene.

12. It was his further evidence that;

"The person in-charge of health and safety at the factory was Mr. Adambo. In his absence we have the unionists who would take care of the sections."

13. He also said something of significance which PW2 also said; that there was a notice warning drivers to drive at a slow pace and not to reverse hence the notice – **"Usirudi nyuma"~ "do not turn back"**.

14. PW4, Alphonce Wanyama Matogo, Health and Safety Officer at the Ministry of Labour investigated the incident leading to the charges that the Appellants faced and this was after the 2nd Appellant, Wenslaus Adambo wrote a letter dated 10.4.2002 reporting the accident to the Provincial Labour Office, Kakamega. PW4 proceeded to the scene, interviewed the witnesses and prepared a Report which formed the basis for the criminal chares. The report was signed by one, Mr. Kangu, one Mr. Pius Mahange and PW4.

15. The report has the following facts of relevance to the Appeal;

i) the cane yard area, which was estimated at 16000 square metres ***"was quite spacious for the tractor to turn since it had no stock of sugar cane on the material day."***

ii) there were four sets of floodlights to serve the weighbridge area. However on the material day investigations revealed that they were not functioning. That ***"the absence of floodlights and effect of dawn may have contributed to poor visibility especially where the driver had to reverse."***

iii) from ***"the position at B4 weighbridge where the victim was allegedly last seen by Mr. Waswa, the tractor driver who then was on weighbridge B3 was out of view as it was obstructed by the building housing the scales (see annex 5 and photograph N.1."***

iv) the noise coming from the factory may have created a significant masking effect hence the victim may not have heard the sound of the tractor that knocked him.

v) Miwa Hauliers was contracted by Mumias Sugar Co. Ltd. to transport sugarcane to its yard. PW1 was an employee of Miwa Hauliers.

vi) Mr. Nyikal, the deceased had walked to weighbridge B1 and B2 after heeding the summons of PW2 and was heading there to meet PW2.

16. The conclusions then reached under the Factories and Other Places of Work Act, Cap 514 were as follows;

"1. The fact that the gates were not opened to provide access for the tractor/trailer assembly and the lack of safe work procedures and communication to drivers constituted a failure to provide a safe means of access for any worker who was required to walk through the yard due to the demands of his or her job. This contravened Section 34 (3) of the Act.

2. The fact that it was at dawn and floodlights in the yard were not operational means that lighting in the yard was not adequate. This was contrary to section 16 (1). In addition, lighting provides conditions that contribute to the safe means of access to working place. The inadequate provision of light therefore seems to contravene section 34(3) of the Act."

17. From the above evidence, the learned trial magistrate found that the Appellants had a case to answer and put them on their respective defences. In his defence, the 2nd Appellant stated that he heard of the incident at 6.30 a.m. on the material day and in his view, there was sufficient access to the weighbridge and neither himself as the Health and Safety Manager nor his employer, the 1st Appellant, had failed to provide a safe means of access. Further, he stated that ***"the artificial flood lights were used"*** to light up the area and ***"they must have been on for the night, and if they were not, there would have been a record so that action could be taken……I have a record for the day, 10th April 2002. It does not show any problem with lighting for the material night."***

18. Frankline Masinde, DW2, was a security guard on the material night and he stated that the floodlights at the diffuser, the gate and the southern end of the weighbridge were all on at the time of the accident.

19. DW3, Dorah Andisi Ondeko, a court clerk at Kakamega Law Courts produced the court record for Kakamega CM's Court, Criminal Case No.1271/2002 in which the accused person was PW1, Wilson Mbakaya Barasa.

20. Having now read the record of proceedings before the trial court and submissions made on appeal, it would seem to me that the first issue to address is the case against the 2nd Appellant, Wenslaus Adambo.

21. It is trite that for a conviction to be lawful, actual evidence must be tendered to show the culpability of an accused person. That is why in **Okethi Olale vs R [1965] EA 555**, it was held that ***"in every criminal trial a conviction can only be based on the weight of the actual evidence adduced".***

22. In the present case, none of the Prosecution Witnesses in any way pointed at the 2nd Appellant as having failed to do anything that amounted to an omission under ***S.34 (3)*** or ***S.15 (1)*** of the relevant Act. *See also* ***Ross vs Associated Portland Cement Manufactures Ltd. [1964] 2 All ER 452 at 455*** on non-delegation of statutory duties.

23. The fact that he was the Health and Safety Manager for the 1st Appellant was not sufficient reason, in my view, to charge him with the twin offences. And even if he were properly charged, where is the evidence to connect him, personally, to the charge? None was offered and in the circumstance, there being no nexus between him and the offence, then no criminal culpability could attach to him.

24. I will quash the conviction, and set aside the sentence meted to him.

25. Turning to the 1st Appellant, only two issues need to be addressed;

i) was there a safe means of access to the weighbridge?

ii) was there sufficient lighting at the weighbridge?

26. The first question is very easy to answer; the evidence of all witnesses, including and crucially that of PW4, was that in fact there was sufficient space at the cane yard area and all witnesses were in agreement that what caused the accident was the fact that PW1 reversed into the path of Albert Nyikal, who had come to see what the problem was with weighbridge B1 and B2 and in his report, PW4 concluded that it was an error for PW1 to do so and that Nyikal may not have heard or seen the tractor, because it was dark and noisy at the time. That is precisely why PW1 was charged and convicted in separate proceedings. He had actually defied a "No reverse" sign that was placed at the weighbridge and

I am certain that had he not done so, the incident would not have occurred.

27. In my view, count one was not proved beyond reasonable doubt and in fact the converse was true.

28. Regarding count two, I am certain that the 1st Appellant was in breach of the statutory duty to maintain sufficient and suitable lighting. All witnesses present at the time and who were called by the prosecution were certain that the area was dark and PW1 particularly was clear in his mind that the lighting was unsuitable as did PW2. In his investigations, PW4 found that in fact the four sets of floodlights were not functioning, let alone able to emit sufficient or suitable light.

29. The defence by the 2nd Appellant on behalf of the 1st Appellant was not credible because in his evidence he was uncertain whether the lights were on and his evidence on the issue could not dislodge that of persons who were actually at the scene at the time of the incident. He came half an hour after the fact and could not testify as to circumstances obtaining in his absence. DW2 was an outright liar as obviously from the prior evidence, while indeed there were four floodlights at the scene, none was functioning properly.

30. As was the case in ***Diger vs Fisher & Ludlow Co. Ltd. [1968] 2 All E.R. 241***, where a defendant was unable to ensure ***"that the lighting was turned on, they had failed to make effective provision for securing and maintaining sufficient lighting in a part of the factory and were thus"*** in breach of the relevant statute. This is true of the 1st Appellant in this case and the conviction and sentence on court two is hereby upheld.

31. In the end, I will allow the Appeal to the extent that the conviction and sentence against the 2nd Appellant, Winslaus Adambo are quashed and set aside respectively. Any fine he may have paid shall be refunded to him.

32. With regard to the 1st Appellant, the conviction and sentence in respect of count one is hereby quashed and set aside respectively. Any fine paid in that regard shall be refunded to it.

33. The conviction and sentence against the 1st Appellant in respect of count two is hereby upheld and the Appeal in that regard is dismissed.

34. Orders accordingly.

Delivered, dated and signed at Kakamega this 4th day of October, 2010.

ISAAC LENAOLA
J U D G E