REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 99 of 1999

SHADRACK ZACHARIA OMAYIO ……..…….. APPELLANT

V E R SU S

ROAN SERVICES LTD. ……..…….. RESPONDENT

JUDGMENT

The Appellant in this Appeal was the Plaintiff in Mombasa CMCC No. 142 of 1998. He had in that case claimed damages for injuries he had suffered on or about 8th October 1997 at Kingorani in Mombasa while repairing his employer's forklift. After hearing the case L. Achode, Senior Resident Magistrate (as she then was) found that the Plaintiff had indeed suffered injuries that she enumerated in her judgment while repairing the forklift. She rejected the evidence of the Respondent's witness who alleged that the Appellant, if he was injured at all, was on a frolic of his own having not been asked by the Respondent's management to go to Kingorani to repair the forklift at night. She, however, found that the Appellant had failed to prove that the respondent was liable as there was no evidence of who started the forklift while he was fitting the lockpin, and dismissed the case. This appeal is against that judgment.

Three grounds of appeal have been listed but they all raise one issue which is that the learned trial magistrate erred in law in holding that the Appellant had not proved that the Respondent was negligent hence liable to him in damages.

Counsel for both the parties opted to rely on written submissions and did not wish to even highlight on those submissions.

In their submissions counsel for the Respondents raised an issue touching on the competency of the appeal which I would like to start with. They submitted that in the subordinate court the Appellant was represented by M/s. B.M. Nyaribo & Co. Advocates. Pursuant to Order 3 Rule 9A, they said M/S. Wameyo & Co. Advocates who drew and filed the memo of appeal, the Appellant himself who prepared and filed the record of appeal and M/s. Mwambi & Co. Advocates who are now on record for the Appellant all required leave of court before they could do anything in this appellant. They contended that this appeal is therefore incompetent and should be struck out on that score.

Counsel for the Respondent also submitted that this appeal is also incompetent for fouling the provisions of Order 41 Rule IA of which require the appellant to file a copy of the decree or order appealed against along with the memorandum of appeal or within such time as the court may order. The Appellant having todate not filed a copy of the decree counsel submitted that this appeal is therefore also incompetent on that score and should be struck out.

Counsel for the Appellant did not address these issues apparently because they had already filed their

submissions and did not see any need to file a reply. I have nonetheless considered them and come to the conclusion that they are both unmeritorious

Order 3 Rule 9A is intended to protect counsel who have acted in a matter from being defrauded of his fees by the client taking over the conduct of a case or instructing another advocate. Where, however, the matter goes to appeal that in my view calls for fresh instructions and a party is entitled to instruct any other advocate and not necessarily the one who appeared for himin the court below.

As regards failure to file a decree, 0I would hold that the same is not fatal as Order 41 Rule 1A does not appear to me to be mandatory. I therefore overrule both of those points and hold hat this appeal is competent.

I would now like to consider the merits of the appeal itself. As I have said the appeal raises only one issue which is whether or not the Respondent should have been held liable to the Appellant for damages.

It is trite law that proof of fault causing damage is the basis of liability in tort and it cannot be stressed too forcefully that the burden of proving that fault is on the plaintiff. The Plaintiff must adduce evidence to prove that it is more likely than not that the wrongful act of the defendant in fact resulted in the damage, which he complains of. He must establish a link or a prima facie connection, between the wrong doing and the damages complained of.

In this case the Appellant testified that there were many people around where he repaired the forklift and that he did not know who started it while he fitted the lockpin. He did not say that it was forklift driver who had called him from his home to go and repair it who started it. The driver was around there and if he even suspected that it was him who started it he could no doubt have said so.

The forklift was not in the Respondent's premises. It had been hired by Kenya Power and Lighting Company Ltd to do some work at Kingorani far away from the Respondents' premises. It cannot therefore be assumed that the many people whom the Appellant said were around there were employees of the Respondent and any of them could have started the forklift. In those circumstances I agree with the learned trial magistrate that there was no basis of holding the Respondent liable. The Appellant needed to show that it was an employee, servant or agent of the Respondent who started the forklift for the Respondent to be held vicariously liable.

Counsel for the Appellant submitted that even though there was no proof of who started the forklift the Respondent should nonetheless have been held liable for failure to provide the Appellant with protective gear such as gloves. That may very well have been so but there must still be proof that it is that failure that caused the injury. In **Bonnington Castings Ltd. –Vs- Wardlaw [1956] AC 613** the English House of Lords held that " the Plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury." In other words the plaintiff must prove the causal link between the wrongdoing and the injury or damage suffered.

In this case the Appellant did not say that he could not have suffered injury had he been provided with gloves or that the injuries he suffered could have been less serious. In the circumstances I find the Appellant did not establish that aspect of his claim either.

For these reasons I find that the Appellant failed to establish liability against the Respondent leaving the trial magistrate with no option but to dismiss his claim. Consequently I also have no choice but to dismiss his appeal with costs.

DATED and delivered this 28th day of May 2007.

D.K. MARAGA

JUDGE

28.5.2007

Before Maraga Judge

Kadima for Mwakireti for Applicant

Court clerk – Mitoto

Court – Judgment delivered in open court.

D.K. MARAGA

JUDGE