REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 66 of 2001

MASTERMIND TOBACCO (K) LIMITED…..……APPELLANT

VERSUS

JOHN JAMES MUTHEE……..…….……..RESPONDENT

(Appeal against the Judgment and orders of the learned Resident Magistrate (P. K. Sultan) in her Judgment dated 16th May 2001 in the Principal Magistrate's Court at Kerugoya in Civil Case Number 94 of 1998)

J U D G M E N T

Mastermind Tobacco (K) Limited hereinafter referred to as the Appellant is aggrieved by the judgment of the Resident Magistrate Kerugoya in which the magistrate gave judgment in favour of the Respondent John James Muthee *(hereinafter referred to as the Respondent)* for Kshs.22,500/=.

The suit was initiated by the Respondent who claimed general and special damages from the Appellant arising from negligence and or breach of contract of employment. It was common ground that the Respondent was employed by the Appellant as a salesman and that He was assigned a motor-cycle Registration No.KAE 765L for the performance of his duties. On the 13th November 1995 whilst the Respondent was in the course of his duties traveling along Kerugoya Kutus Road He was involved in a head on collision with motor vehicle Registration Number KPM 251. The Respondent suffered injuries and was admitted at Kerugoya District Hospital where He remained for 13 weeks. Thereafter the Respondent had to undergo physiotherapy for a period of about one year.

The Respondent blamed the Appellant for the injuries He suffered because the Appellant only provided him with a helmet, but did not provide him with any boots, gloves or riding clothes. The Appellant on its part denied that it failed to provide safe working conditions or that it was in breach of its contract of employment with the Respondent.

In his plaint the Respondent claimed that the accident was caused due to the negligence and or breach of contract of employment on the part of the Appellant his sevants and or agents. However In his evidence in chief the Respondent did not adduce any evidence regarding the alleged negligence or breach of contract. He simply stated that He was asking for compensation as the accident occurred during the course of his duties. That aside, it is evident that arising from the accident, the Respondent was charged and convicted in Kerugoya Traffic Case Number 2082 of 1996 of the offence of careless driving contrary to section 49(1) of the Traffic Act. The particulars of the charge showed that the Respondent drove the motor-cycle KAE 765L without due care and attention to other road users thereby causing the motor-

cycle to collide with motor vehicle Registration Number KPM 351. The Respondent recognized the fact that He was to blame for the accident. This is apparent from his cross-examination wherein he states as follows: -

"***I was convicted and fined Kshs.5,000/= I did not appeal against the conviction. It showed I admitted having been careless. The motor-cycle was damaged. The company should compensate me. If I had ridden properly I would not have had the accident. However it was the motor-cycle belonging to them that caused the accident and injuries. I should be compensated under the workman's compensation……***

The company gave me a helmet. I was wearing it. They should have given me boots, gloves and ridding clothes. They had not provided them. I had asked for them. I had worked with then from 1992. We had to go through the sales representatives for protective clothing…….. I did not sue the owners of the matatu as I was at fault."

Although the trial magistrate found the Appellants 15% liable for the accident for failing to provide the Respondent with adequate protective clothing, the Respondent did not make any attempt to establish that He was not provided with any protective clothing. Such allegation was only made in cross examination. Even then, it was the word of the Respondent against that of the Appellant's witness as to whether the Respondent was provided with any other protective clothing apart from the Helmet which the Respondent admitted having received. The trial magistrate did not make any specific finding as to who he believed and why.

The relevant portion of the judgment reads as follows: -

"***The important issue he raised however, was the fact that He'd (sic) not have sustained such injury had he been given the adequate protective clothing by the Defendant. He said all he had was a helmet but lacked other important clothing items. He did not however prove that all workers had been insured by the Defendant. I would agree with him to that extent only and would find Defendant to blame for that, however, I would apportion a greater amount of blame on the Plaintiff for having ridden carelessly. I would apportion liability at 15% <u>to the Defendant for failing to provide adequate clothing as they did not prove the contrary</u> and 85% to the Plaintiff himself……."***

(emphasis added)

It is apparent that the trial magistrate misdirected herself. It was not for the Appellant to prove that they had supplied the protective clothing, but it was for the Respondent to prove his case that the Appellant had failed to provide him with the protective clothing and was therefore in breach. The Respondent did not even adduce any evidence to show what demands if any that He had made for the protective clothing before the accident or identify the sales representative to whom the demands were made nor did He serve the Appellants with notice to produce any records of allocation of protective clothing either to him or other employees. Moreover contrary to his pleadings the Respondent conceded that He was issued with a Helmet by the Appellant.

It is clear from the circumstances of the case that the accident was caused solely by the negligence of the Respondent in the management of the motor-cycle. The Respondent's conduct was therefore the effective and proximate cause of his damage. The argument that the Respondent would not have sustained his injuries if He had protective clothing only goes to aggravate the Respondent's negligence in riding the motor-cycle without using protective clothing. The Appellant cannot therefore be blamed for the accident or damage suffered by the Respondent.

It is evident that the Respondent expected compensation from the Appellant simply because the accident occurred during the course of his duties and that it was the motor-cycle belonging to the Appellant that caused the accident. That was evidence which could only have supported a claim for compensation under the Workman's Compensation Act. That however was not the Respondent's claim. His claim was one for damages for negligence and breach of contract, a claim which was clearly

misconceived.

In the case of ***Kiruga v Kiruga & Another [1988] KLR 348***, the Court of appeal held *inter-alia*.

· *"**An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the findings or unless the judge can be said to be plainly wrong.***

· ***An appellant court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this jurisdiction should be exercised with caution."***

In the earlier case of ***Karanja v Malele [1983] KLR 142*** which was cited by the Appellant's counsel, Chesoni Ag J. A. (as He then was) stated as follows: -

*"**I agree with what Law J. A. said in Malde v Angira Civil Appeal No.12 of 1982 (unreported) that apportionment of blame represents an exercise of a discretion with which this court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle……..."***

With the above caution in mind, I come to the conclusion that the finding of the trial magistrate in this case that the Appellant was in breach of contract was wrong as it was against the weight of the evidence which was available before the magistrate. The apportionment of liability against the Appellant must be interfered with as the same is not supported by any evidence.

For the aforestated reasons I allow this appeal set aside the judgment of the lower court and substitute it thereof with an order dismissing the Respondent's suit. I make no orders as the costs.

Dated, signed and delivered this 22nd May of 2006

H. M. OKWENGU

JUDGE