REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 69 of 2004

(Appeal from the Judgement of the Chief Magistrate's Court at Kakamega, in CMCC No. 575 of 2003 delivered on 3rd December, 2004 (S. M. KIBUNJA ESQ., PM)

RICHARD ANDANJE ABWALABA…….. APPELLANT

V E R S U S

FARM INDUSTRIES LTD. ……..…….. RESPONDENT

J U D G E M E N T

The Appellant, Richard Abwalaba seeks in his appeal herein to reverse the Judgement of S. M. Kibunja Esq., Principal Magistrate, made in Kakamega CMCC No.575 of 2003 on 03-12-04 in which the latter dismissed the appellant's claim for damages for injuries alleged to have been sustained while working for the Respondent, Farm Industries Ltd., as a loader when he fell off a tractor No. KAC 026.

The appellant alleged that he was an employee of the Respondent. He alleged the tractor from which he fell was owned by the Respondent. He alleged he suffered bodily injuries. He attributed the accident to negligence on the part of the Respondent.

During the hearing of the suit, the Plaintiff/Appellant gave evidence and called one witness, to wit, Anthony Mubisi to testify and produced the Medical report. The Defendant offered no evidence.

It was on the plaintiff that the burden reposed of proving the claim on the balance of probabilities. The trial magistrate did not find such burden discharged and consequently dismissed the suit with costs. The trial magistrate attached a lot of importance to the discrepancy between the date when the accident was alleged to have occurred on 17-10-03 as stated in the plaint and 18.10.03 as stated in evidence. In his view, as the medical report referred to injuries sustained on 18.10.03, it was valueless as the evidence of the Appellant referred to 18.10.03 as the date injuries were sustained.

Aggrieved by the judgement of the learned trial magistrate, the Appellant lodged the appeal herein in which he put forward four grounds of appeal. He stated in the four grounds thus:-

1) That the trial Magistrate erred in Law and in fact in failing to appreciate that the suit herein was premised on a breach of contract of employment.

2) That the trial magistrate erred in law and in fact by failing to appreciate that the standards of proof in civil cases are on a balance of probabilities.

3) That the trial magistrate erred in land and in fact by dismissing the appellant's suit when there was

no contravening evidence being offered by the Respondent.

4) That while dismissing the appellant's claim the trial Magistrate in his reasoning wondered in the realm of conjecture and speculation not backed up by any evidence.

It was up to the Appellant to prove that he was employed by the Respondent as a loader. His evidence in this regard was not controverted. Although the Respondent had denied being the Appellant's employer, it did not rebut the Appellant's evidence in this regard. The Appellant testified that he fell off the tractor No. KAC 026. He should have gone further to prove that it belonged to the Respondent. However, he failed to produce a certificate from the registrar of motor vehicles to show that it was registered in the name of the Respondent. Nor did he adduce other evidence to show that the Respondent had its possession and used it on its sugar plantations. The evidence on this aspect fell short of the standard on the balance of probabilities.

On the injuries sustained, the medical report was compiled by PW2 in June 2004. PW2 compiled the medical report after viewing the Appellant. He did not treat him. Neither the Appellant nor PW2 produced the treatment notes from Nala Hospital. The accident was not reported to the Police and so there was no police abstract. No one from the Defendant's Company gave evidence. Unless the ownership of the tractor was proved to be the Respondent's, the injuries could not be said to have been caused by the latter and the fact that PW2 saw the Appellant about 8 months after the accident must reduce the weight of evidence especially as he did not produce the treatment notes from Nala Hospital where the Appellant said he had been treated. Apart from the workmen's compensation Form, and his allegation that he was employed by the Respondent, the Appellant had nothing else to link the Respondent to the accident.

On the basis of that Form alone and his own evidence, can it be said that the Appellant was not only an employee of the Respondent, but was also injured either on 17th or 18th October, 2003 by tractor KAC 026 or KAC 026R and that the tractor belonged to the Respondent and that he suffered the alleged injuries due to the Respondent's negligence? In his evidence, the Appellant did not adduce any evidence to show where the accident occurred, what time of the day, and the name of the driver of the tractor if he knew him. He did not explain why such a serious accident in which the tractor overturned was not reported to the police.

After a careful evaluation of the evidence, it is my finding, and I have come to the conclusion, that the Appellant did not discharge the burden of proving the claim on the balance of probabilities. I find no merit in the appeal and I dismiss it with costs.

If the Appellant had succeeded in the appeal, he would have been entitled to general and special damages. The specials would have been Shs.4000/= for the medical report which PW2 testified he had charged and received. As regards general damages, the injuries alleged were exaggerated. The Appellant, according to Exhibit No.2, told PW2 that the tractor overturned and run over him. If this had happened, this would have resulted in grave injuries or death. But the doctor recorded the injuries as "bruises and blunt soft tissue injuries on the right knee". The doctor neither did medical investigation test nor treated the Appellant. In his assessment, the injuries were of "moderate nature" and the pain the Appellant suffered was likely to subside gradually and might last 6 to 9 months from 26/6/04 when he saw him. As I have said, the report was exaggerated and I reject the opinion by the Doctor (PW2) that the soft tissue injury on the knee which was of moderate nature would take between 14 months and 17 months to heal completely. On the basis of case law on soft tissue injuries including:

(i) NBI HCCC No.3789 of 1986 (Erica Kahi v. G.K. Wahinya & Another) in which Shs.220,000/= was awarded for more serious soft tissue injuries and

(ii) NBI HCCC No.1303 of 1987 Wangari Kariuki v. M. N. Wambiri and Another where the court awarded Shs.40,725/= for soft tissue injuries on hand, face and leg and

(iii) NBI HCCC No.647 of 1987 Luas Ndwiga v. Musa Ali in which the court awarded Shs.20,000/= and

Shs.15,000/= to the 1st and 2nd plaintiffs respectively for soft tissue injuries,

I would assess the general damages at Shs.50,000/=. I would therefore award the plaintiff Shs.54,000/= towards special and general damages and costs of the suit.

Dated at Kakamega this 29th day of November, 2006.

G. B. M. KARIUKI

J U D G E