REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CIVIL APPEAL NO: 96 OF 2015

DAVID KIMITEI CHEROP LTD

t/a DAJEMA INVESTMENTS…….APPELLANT

VERSUS

VICTOR OSINDE BOSIRE ALIAS

JAMES BOSIRE……..…….RESPONDENT

[An appeal from the original decree and judgment of S. N. Telewa, Principal Magistrate, in Eldoret CMCC No. 159 of 2011 delivered on 21st July 2015]

JUDGMENT

1. The Respondent **VICTOR BOSIRE** alias **JAMES BOSIRE** had sued the appellant **(DAVID CHEROP T/A DASEMA INVESTMENTS)** for general and special damages arising from injuries he sustained on **5th January 2010** while working for the Appellant.

He claimed that the appellant was in breach of his statutory duty by failing to ensure a safe working environment.

2. The background to the matter is that the Respondent was loading sacks of wheat into lorry registration No. KAG 248 J, when he slipped and fell on the rear metal door which had been placed as a running to be used to ferry the sacks onto the lorry.

As a result he fractured two upper incissor teeth and also sustained cuts on the upper leg which was swollen.

3. The Appelllant had denied occurrence of the accident, but pleaded in the alternative that if it occurred, the respondent contributed to it.

4. At the hearing, the Respondent who said he worked for the appellant as a loader described how he had been instructed to go and load grains onto the vehicle at **KABIYET.** He was under the instructions of **DANIEL KORIR** (A brother to the appellant) who had improvised the back door for use as a ladder to do the loading. In the process he slipped fell and sustained injury.

5. A report produced by **DR. ALUDA** (PW2) confirmed the injuries – approximately the respondent had to undergo minor surgery for 2 successive days at the Moi Teaching and Referral hospital.

6. The appellant told the trial court that the Respondent was not his employee either he confirmed that he had a lorry which was used for transport and he had employed one **DAVID KIPKORIR**. Further that there was one loader, although he did not know who was the loader on the material day.

7. The driver **DANIEL CHEROP** confirmed he had an assignment to transport wheat and as he did not have loader, he requested the customer to look for people who would help load the wheat. The customer got eight boys to help in loading and they decided to use the ramp to climb the lorry. Then it started drizzling – some took shelter from the rain but the Respondent was among those who continued to work in the rain. He heard that a loader slipped, fell and got injured, but he did not witness that as he was seated inside the vehicle's cabin with his turn-boy Raymond.

8. The trial magistrate noted that no evidence was led to confirm that the lorry had been hired by someone else but that notwithstanding, the owner of the lorry ought to have ensured that it was in good working condition.

9. Further, the turn boy instead of supervising the lorry elected to sit with the driver in the cabin, (whiling) away the hours.

10. The trial magistrate found that the Respondent ought to have known the risk he exposed himself to while working under wet condition and held him liable at 10% and 90% against the appellant.

11. The court awarded the Respondent general damages of Ksh.150,000/- less 10% and specials of Ksh.1500/-, to give general damages Ksh.135,000/- and a net total of Ksh.136,000/-. These findings have been challenged on grounds that the trial magistrate erred in holding that the appellant was vicariously liable yet the whole incident revolved around a contract. Further that there was no evidence to prove that the Respondent had been employed by the appellant – at worst he had been engaged by the driver DANIEL KORIR.

12. The appeal was canvassed through written submissions wherein the appellant's counsel argued that the respondent failed to prove that he was employed by the appellant as no evidence whatsoever was tendered to support this.

That in any event, no evidence was led to show that the appellant was at the scene of accident and the imputed negligence was not corroborated, and the trial magistrate is faulted for relying on the wrong principles in making her decisions.

13. The Respondent's counsel submitted that the appellant breached his duty of care by failing to provide a ladder to be used as a badge to ferrying the sacks. It is contended that this evidence was credible and was not rebutted.

14. That in any event the appellant's own witness confirmed that the Respondent was loading sacks onto the lorry owned by the appellant and his turn-boy who should have been supervising the exercise was whiling his time in the vehicle's cabin.

15. Whereas it is correct that the duty to take reasonable care so as to carry on operations as not to subject persons employed to unnecessary risk, the question that must be addressed is whether the Respondent was employed by the appellant and whether the risk he undertook was foreseeable to the appellant.

It was upto the Respondent to prove that the alleged breach of statutory duty which caused his loss, was as a result of an employment relationship he had with the appellant. With the greatest of respect to the Respondent's counsel, simply claiming that one is an employee without a single thread of evidence to prove that relationship would not suffice. The evidence by the Appellant is that he had a driver and one turnboy named Raymond. Whether Raymond was the person to do the loading was not clear, nor was it established that either Raymond or Daniel Korir had authority from appellant to engage extra hands to help in loading the bags of wheat.

Even if this was an ad hoc arrangement placed on as needs arise basis then it is still not clear at what point the Respondent got engaged by the appellant.

It would appear to me that the Respondent's involvement in the ferrying of the sacks was either an arrangement by the driver, or by the customer. Certainly the driver could not have allowed the Respondent to load bags onto the lorry without the permission of the driver, who was for all intents and purposes agent of the appellant. This is where the issue of vicarious liability fits in. The doctrine of vicarious liability – thus making the appellant liable. There was a duty of care owed to anyone working on that lorry.

16. From the medical report, the nature of the injuries and the current economic trends, I hold and find that the damages awarded of Ksh.450,000/- was reasonable.

17. I therefore decline to interfere with the trial court's finding. The appeal lacks merit and is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at ELDORET this 7th day of February 2019.

H. A. OMONDI

JUDGE