



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL 79 OF 2009

ZABLON AGUFA LUMIRE.....APPELLANT

~VRS~

IMA HAULIERS LIMITED.....RESPONDENT

(Appeal arising from Senior Resident Magistrate G. Sogomo in Bungoma court in civil case no.370 of 2005)

JUDGMENT

The evidence tendered by the Appellant in the trial court was that on 10/7/2004 he was harvesting sugarcane in his farm next to Makunga-Kakamega Road. The sugarcane was being collected by tractors belonging to Ima Hauliers. After the harvest he begun looking for the driver of the firm to issue him with delivery receipts. At that point he met with a tractor registration number KAN 731K (or KAL 731K). The driver was looking for land Block/106 Sumeiya from which he was to collect sugarcane. He wanted the Appellant to go and show him the land. The Appellant declined. The driver drove off without warning and in the process hit him on the hip by the tractor's rear tyre. The Appellant fell beside the road and the tractor ran over his legs. Out of pain he became unconscious and was taken to St. Mary's Hospital where he was admitted for three days. He was injured all over the legs. He was discharged to continue outpatient treatment at Eshisiru Maternity Home. He was later examined by Dr. Mulyanga Ekesa who prepared a medical report. He called Alphonse Harambee Ondeny (PW2) to say he witnessed the accident.

The Appellant blamed the Respondent in negligence and sued him for general and special damages for the injuries suffered, and for pain and suffering. His case was that the driver of the tractor was an employee and/or agents of the Respondent who owned the tractor and therefore that the latter was vicariously liable to him. The Respondent denied the fact of accident. It denied that the tractor that knocked the Appellant belonged to it, and also denied that it was negligent, or that the Appellant suffered any injuries. The defence did not call any evidence but its counsel Mr. Karanja cross-examined the Appellant and his witnesses. The trial court considered all the evidence and dismissed the Appellant's case with costs on the basis that the case had not been proved on the balance of probabilities. The Appellant was aggrieved by the decision and preferred this appeal. In the Memorandum of Appeal and in

the written submissions by Mrs. Chungu on his behalf, the contention was that the trial court wrongly dismissed the case as the evidence called proved it on the balance of probabilities. It was submitted that the trial court had by the decision wrongly raised the standard of proof to beyond all reasonable doubt. Mr. Karanja's submission was that the Appellant had failed to prove his case.

I have considered the evidence as recorded. It was clear that the Appellant did not know the name of the driver of the tractor and he did not give any evidence to show that the driver was working for the Respondent, or that he was otherwise its servant/or agent. He called P.C. Michael Njochi (PW3) of Mumias Police Station who produced a police abstract in regard to the accident. At the time of the accident the officer was based at Kimilili Police Station. He was not therefore the officer who attended to the accident or investigated the case. The abstract (exhibit 5) gave the name of the driver as Pengius Otieno Mado. It was not indicated from whom the name was got, and there was no evidence that he was in the employment of the Respondent. It meant that the claim in the plaint that the driver was the Respondent's driver, servant and/or agent was not backed by evidence. What was consequently not proved was the plea that the Respondent was vicariously responsible for the accident (**Sumer Singh Bachu v. Nicholas Wainaina & Another, Civil Appeal no.14 of 1976 at Nairobi**).

Mr. Karanja submitted that the Appellant had not proved that the tractor in question belonged to the Respondent as he had not produced a search certificate from the registrar of motor vehicles to show ownership. He relied on the Court of Appeal decision in **Thuranira Karauri v. Agnes Ncheche, Civil Appeal no.192 of 1996 at Nyeri** in which it was observed as follows:

“The Plaintiff did not prove that the vehicle which was involved in the accident was owned by the Defendant. As the Defendant denied ownership, it was incumbent on the Plaintiff to place before the judge a certificate of search signed by the registrar of motor vehicles showing the registered owner of the lorry. Mr. Kimathi for the plaintiff submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.”

In the instant case it was not known from whom the Appellant or PW3 got the information that the Respondent owned the tractor. Infact, the police abstract showed that the tractor belonged to Ima Transporters. The Defendant herein is Ima Hauliers Ltd. There was no evidence that the two entities are the same. The Appellant's evidence was that he was harvesting cane in his farm and that the cane was being collected by tractors belonging to Ima Hauliers. When he went to look for the clerk of this firm to give him a receipt for the deliveries he met with the offending tractor which belonged to the same firm and that the firm was the Respondent. He did not do a search to find out who owned the tractor, and whether that owner was the Respondent.

In short, the Appellant did not prove his case on balance. The trial court was correct to dismiss the suit with costs. I confirm that finding. The result is that the appeal is dismissed with costs.

Dated, signed and delivered at Bungoma this 10th day of July 2012.

A. O. MUCHELULE
JUDGE