REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT MERU

CIVIL APPEAL NO. 6 OF 2018

(Formerly Meru High Court Civil Appeal 62 of 2017)

NELSON KAIMENYI MBAYA.....APPELLANT

VERSUS

PATRICK NDEREVA.....RESPONDENT

JUDGMENT

1. The Appeal was transferred to this court by order of the High Court on 30th July 2018 as the High Court was of the considered view that the Supreme Court decision in **Republic *v* Karisa Chengo & 2 Others [2017] eKLR** where the Learned Judges of the Supreme Court firmly held that a Judge of the Environment and Land Court cannot properly hear and determine a matter falling within the exclusive jurisdiction of the High Court and *vice versa*, the High Court was of the view that since the matter subject of the appeal falls within the jurisdiction of the Employment & Labour Relations Court, the High Court lacks jurisdiction to deal with the appeal in anyway whatsoever. The appeal was consequently brought before me for directions on 3rd October 2018 and the parties indicated that they would abide the determination of the appeal by this court as directed by Mrima J. of the High Court. Judgment was accordingly set for delivery today.

2. The appeal is from a decision of the learned trial Senior Principal Magistrate S. Abuya Esq. in Meru Chief Magistrate's Civil Case No. 2 of 2016 on the judgment delivered on 6th July 2017. The grounds of appeal were 5 in total and for ease of reference are reproduced below.

> 1. THAT the learned trial Magistrate erred in law and facts in holding that the appellant is the owner of the Tractor Registration No. KEB 996 make Ford 4000 against the evidence adduced.
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> 2. THAT the learned trial Magistrate erred in law and facts in shifting the burden of proof of ownership of tractor Registration No. KEB 996, make Ford 4000 on the appellant.
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> 3. THAT the learned trial Magistrate erred in law and facts in in failing to find that on a balance of probabilities, no negligence was proved against the appellant.
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> 4. THAT the learned trial Magistrate erred in law and facts by relying on conjecture and speculation in her (sic) findings.
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> 5. THAT the learned trial Magistrate findings are against the weight of evidence and the law.

The appellant thus prayed that the appeal be allowed and the suit before the lower court be dismissed with costs. The suit before the lower court was that on 24th October 2013 while at Timau in the Ol Donyo Farm, the plaintiff in the company of 4 other employees performing duties assigned to him by the defendant was involved in an accident and suffered serious injuries to his body and as a consequence suffered loss and damage. He gave particulars of the injury which was the loss of both lower limbs and the loss of the left hand. The particulars of negligence of the defendant was also given which involved failing to provide the plaintiff a safe working environment, failing and/or neglecting to provide the plaintiff with protective gear, knowingly and/or negligently exposing the plaintiff to the risk of danger. The particulars of breach of statutory duty were provided as well. The plaintiff thus sought judgment against the defendant for special damages of Kshs. 10,000/- and general damages for pain, suffering, loss of amenities and loss of future earning; an order for future medical expenses/treatment and change of the prosthesis and costs of the suit. The defendant filed a defence in which he denied assigning the plaintiff and 3 others any duties at Ol Donyo Farm and denied that the plaintiff had suffered any injuries and averred that if any injuries were suffered by the plaintiff then the same were as a s result of his own negligence. By way of alternative defence, the defendant denied any negligence on his part as he was not the beneficial or owner in possession of the Tractor No. KEB 996 Ford 4000 and averred that he was never in control of the tractor and was never at Ol Donyo Farm. He denied the particulars of negligence and breach of statutory duty and invoked the doctrine of *volenti non-fit injuria* and denied any vicarious liability since no strict liability had been pleaded or attributed to anyone else. He denied that the plaintiff had any claim against him for general damages for pain suffering and loss of amenities. He thus sought the dismissal of the plaintiff's suit with costs. The plaintiff testified and called a Dr. Koome Guantai. The defendant testified and called no witness. The evidence recorded by the learned trial Magistrate is that the defendant assisted the plaintiff as a Good Samaritan with medical expenses to the tune of Kshs. 700,000/-. In his judgment, the learned trial Magistrate blamed both the plaintiff and defendant for the accident. The learned trial Magistrate found in favour of the plaintiff having held that the defendant was the owner of the tractor. The learned trial Magistrate awarded the plaintiff Kshs. 5,000,000/- as general damages, special damages of Kshs. 10,000/- and future medical expenses of Kshs. 60,000/- and assigned liability in the ratio 70:30% in favour of the plaintiff. The plaintiff was also awarded costs of the suit and interest on the sum of Kshs. 3,549,000/-. It is against this decision that the appeal is preferred.

3. My mandate as the first appellate court is as was restated by the Court of Appeal in **PIL Kenya Ltd *v*. Oppong [2009] KLR 442. The Court held** as follows:-

> ***"It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that."***

4. I confess that I did not have the benefit of the demeanour of witnesses who testified in the case. In evaluating the evidence taken by Hon. Abuya the trial Magistrate, I note that the Respondent herein gave cogent testimony. The tractor was stored at the Appellant's petrol station and was known to be the Appellant's tractor. The Respondent also testified that the wife of the Appellant who was a nurse at the hospital he was being attended at tried to hide the Respondent's medical file. He was operating the saw which was splitting timber and his apron was caught in the conveyor belt and he was pulled to the saw and suffered gross bodily injury to the extent that those who saw him after the accident thought he was dead. The others ran away and it was only his cries for help that caused them to return and take him to hospital. He lost his limbs and is now incapacitated. The finding of the learned magistrate cannot be faulted on the assignment of liability as the Respondent was partly to blame for the accident. The judgment of the court was for a sum of 5,000,000/- and there was no grant of the prayer for loss of future earnings and future medical expenses were capped at Kshs. 60,000/- while prosthesis would be at a cost of Kshs. 85,000/-. The court below in my view, considered the evidence and evaluated the rival positions. I have done the same and do not see any error worth a reversal on appeal. Though the quantum on future medical is low, the general damages for the injury suffered was sufficient to cover his medical expenses and militates against the low award on the future medical expenses. There was no reverse burden of proof applied by the learned trial Magistrate and the attack on this front fails. I uphold the decision of the learned trial Magistrate. Appeal is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Meru this 6th day of November 2018

Nzioki wa Makau

JUDGE