REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

Civil Appeal 242 of 2002

SOTIK HIGHLANDS TEA ESTATE CO. LTD …… APPELLANT

VERSUS

PHILIP MOMANYI MARIENGA …… RESPONDENT

JUDGMENT

This is an appeal from the judgment of Senior Resident Magistrate Kisii delivered on 25th November 2002.

The Respondent had sued the defendant for damages for breach of statutory duty and negligence. The Respondent was employed by the appellant as a turn boy in tractor Reg. No.KYA 934 which was being driven by ZABLON ONKEWA (DW1). The tractor was pulling a tractor. They had gone to collect said to use in tea nursery. The hook connecting the tractor came and the trailer fell off. The Respondent was injured on the leg and taken to Kaplong Hospital. He later sued the appellant.

The appellant had filed a defence denying liability. They called one witness Zablon Onkewa (DW1) who was driving the tractor at the time. He confirmed the hook came off and the Respondent was injured.

No submissions were made by the parties. The learned magistrate in her judgment concluded that the Respondent had proved his case and the appellant had breached statutory duty. He awarded shs.120, 000/= as general damages and shs.7000/= as special damages.

The appellant preferred five grounds of appeal. Mr. Bosire who argued the appeal the suit was filed out of time. He stated that the claim was based on negligence. Cause of action arose in 1991 but suit was filed in 1996 – five years later. It should have been filed within 3 years.

Another issue raised was that in the plaint the Respondent had stated that he was injured when the hook came off as he was trying to fix the trailer but when giving evidence he said that the tractor was moving at the time of the accident. He therefore did not prove what he pleaded.

It was also submitted that the magistrate erred in awarding shs.7000/= as special damages. The Respondent had not pleaded that amount. He had only pleaded for shs.1500/=.

Appeal was opposed. Court was told that the claim was based on breach of employment contract and therefore was within the 6 years provided for. The appellant had a duty to ensure that his employers are

not injured. DW1 confirmed that the hook was faulty. Court was therefore told to uphold the magistrate's decision but reduce special damages to shs.1500/=.

The pleadings were very clear. In para.4 of the plaint the Respondent clearly stated that the appellant breached his duty to take all reasonable precautions for the safety of the Respondent. Para. 6 of the Plaint states that the accident was occasioned by a breach of statutory duty by the appellant. It goes on to enumerate particulars of the breach. True in Para.7 he stated that the appellant was negligent but the point was that the negligence gave rise to breach of duty. The magistrate in her very short judgment did not specifically address these issues perhaps because they were not raised but she stated that the tractor/trailer had defective hooks. These were replaced with better and stranger ones after the accident.

That was an indication that the appellant had not kept the machinery in good condition which led to the accident. It was the appellants own witness (DW1) the driver who said that. He even stated that appellant was to blame.

Thus I find the cause of action was based on contract and was therefore filed within the prescribed time. Also has stated above the evidence was clear that the appellant breached his duty to the Respondent.

The other issue was what was pleaded and the evidence given. I do concur that there was a discrepancy. In para.7 of the plaint the Respondent stated that he was fixing the trailer when the hook came off but in evidence he said the hook came off when the tractor was in motion. The discrepancy however is minor and not fatal to the respondent's case. There was no dispute that the accident did occur and the Respondent was injured

DW1 the appellant's witness confirmed this. The slight contradiction as to how it happened do not change that fact. The hook came off and was defective.

Ground 4 in the memorandum of appeal appellant raised the issue of apportioning liability. However this point was not argued either before me or in the court below. The appellant did not adduce any evidence to show that the Respondent contributed to the accident.

The Respondent had pleaded for shs.1500/= as special damages. It is trite law that damages should not only be pleaded but proved. The court awarded shs.7000/= special damages on strength of receipt produced by Doctor Owiti. The Respondent himself did not produce any receipt. In his evidence he said he paid shs.1500/=. No receipt for that amount was produced. The shs.1500/= claimed in the plaint was paid to Dr. Owiti. The receipt is dated 7.7.98 almost two years after the suit had been filed claiming shs.1500/=. The plaint was never amended. It is clear therefore no special damages were proved and the learned magistrate therefore erred in awarding the same.

All in all I uphold the magistrate's judgment and dismiss the appeal save that I set aside the award of shs.7000/= special damages. As the appeal succeeded partly I will award the appellant half (½) cost of this appeal.

Dated and delivered on 7th December 2004.

KABURU BAUNI

JUDGE