THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 40 OF 2002

BEYENDEZA MARK :::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

RUBARAMIRA KENETH :::::::::::::::::::::::::::::::::::: DEFENDANT
(Appeal from a decree of the Chief Magistrate Court Mengo before Grade I Magistrate Baine Omugisha Catherine)

BEFORE: THE HON. MR. JUSTICE R.O. OKUMU WENGI

JUDGMENT:

This is a civil appeal from the Judgment of the Magistrate Grade I of Mengo dated 21/11/2002. From the Memorandum of appeal filed on 13/12/2002 it is contended that the learned Magistrate erred in fact and law in the following instances namely:-

(a) Failure to find that the Plaintiff was injured in the course of his employment as a turnboy on the defendant's lorry.

(b) Failure to allow an eye witness to testify for the Plaintiff and instead blame the plaintiff for not calling the witness.

(c) Failure to not admission by the defendant that the plaintiff was his employ.

In the course of his appeal the appellant also raised the issue that since the Appellant/Plaintiff has succeeded on some issues framed for the trial it was wrong for the trial court to condemn the defendant to meet the costs of the suit alone. The facts of the case are that the plaintiff who was employed to work on the defendants truck/trailer UXR 298 as a turnboy was on 17/9/1999 pumping pressure into a bad tyre along the Uganda/Rwanda highway. When the tyre blew up seriously injuring the plaintiff. The very issues raised in the appeal were framed as issues for the trial in which the defendant denied negligence pleaded contributory negligence and voluntary assumption of risk. Both Mr Mutabingwa for the appellant and Mr Paul Muhimbura addressed court on the merits of the appeal. For the appellant it was argued that while the events complained of took place inside Rwanda the issue of jurisdiction was not raised in the trial court.

From the record the Plaintiff averred in his plaint (at paragraph 4 & 6) that he was an employee of the defendant as a turnboy and that he was acting in the course of his duties as such when he was injured. For the defendant the WSD denied this employment in general terms.

The evidence on the issue is to be found in the Plaintiffs own testimony:

> "On 17/9/199 I was in Rwanda. I was a turnboy on a trailer and this trailer had gone to Rwanda. The trailer belongs to Keneth Rubaramira. The Reg. No of the trailer is UXR 298. We moved from Malaba Kenya… to Rwanda."

He narrated his ordeal

> "In Rwanda we got a puncture. I removed the tube and sealed the cut area. I then put the tube back into the tyre and moved to another trailer and got a pipe without a gauge and used it to put pressure into the tyre. Because of the absence of a gauge a lot of pressure went into the tyre and it burst and it hit me. I did all this at the revenue station of Rwanda… The trailer from which I got the pressure to put into the affected tyre also belonged to Rubaramira. I did that (putting pressure) in the affected tyre in the presence of Salongo Bugolobi, driver of the trailer on which I was working and the turnboy of the trailer from which I got pressure to put into the affected tyre. That turnboy was called George."

He went on to describe his employment.

> "I was employed by Keneth Rubaramira on the said trailer. I was employed on a monthly basis and u would be paid a mileage whenever we would go on safari. The defendant used to pay me shs 50,000/= per month. Mileage from Kampala to Malaba 20,000 from Kampala to Rwanda 50,000… I was on that day on the instructions of Keneth Rubaramira."

The Plaintiff maintained his case that he was on employment of the defendant in cross examination. He explained his lack of documents to prove such employment as they were lost in the course of his injury and the fact that his employer the defendant kept the master roll.

The defendant testified as DW1. He told the trail Magistrate that he knew the plaintiff as a casual labourer at the William Street. He denied that he employed plaintiff. He only conceded that he owned the lorry named by the plaintiff and that he had a turnboy called George. He suggested that plaintiff was only blackmailing him as he issued employees appointment letters and identify cards. He then stated:-

> "Tyres on my vehicle are repaired by people on the truck. I give enough money to whoever is on the truck to move him to the nearest place where repairs can be made and have repairs done."

In cross examination he stated that he owned 12 trucks and each has a turn boy. He denied having a master pay roll but conceded to having a computer roll on which employees sign out their pay. He also agreed that he sent his said lorry to Rwanda but that it was George who was the turnboy. He said he did give plaintiff some money after the accident. He was unable to produce or say if he had a list of employees for 1999. He stated he had a list of employees for 2000 and 2002. He then stated:

> "I do not have a book where my employees were recorded. I had about 100 employees in 1999. I no longer have the papers on which their names were recorded. I do not know when the 1999 records were destroyed."

In respect of the above evidence the trial Magistrate stated:-

> "Whereas the plaintiff failed to call any other witness who knew him to have been employed by the defendant and failed to produce the identity card which he alleged to have been issued to him by the defendant I noted that he was consistent in his evidence regarding when he started working for the defendant and in what capacity he worked for the defendant. I also note that much as the defendant denied in his evidence having employed the plaintiff as a turn boy, he did not specifically deny such in his written statement of defence.

She then concluded:-

> "What can he drawn from the expectation of the defendant had in the plaintiff… is that the defendant had assigned some duties to the plaintiff while plaintiff was on defendants motor vehicle. …court finds that the plaintiff has on a balance of probabilities proved that he was employed as a turn boy on motor vehicle UXR 298 Benz trailer by the defendant."

I agree and note that the circumstances of the plaintiffs case where he narrated his employment pattern and travel to Rwanda, his injuries and treatment and money plaintiff gave him show that he had indeed been employed and went on the truck getting injured in the course of doing so. The consistency of Plaintiffs testimony was not shaken in cross examination and was explained rather than controverted by the defendant's evidence. The latter was unable to produce the record of his employees to cursorily displace the plaintiff's assertion that he was one of the one hundred employees the defendant had on his pay roll. From this premise

the story of the plaintiff's injury ought to be seen in the context which he described his journey from Malaba to Rwanda and back in an arm shig. Therefore the trial Magistrate arrived at the correct conclusion. It is only when she states that the plaintiff failed to call any other witness to attest to his employment where she could have kept in mind the circumstances why no other witnesses were called. And this brings me to this issue.

Considering the circumstances of this case I am not in agreement with the trial court that the plaintiff failed to call evidence on the issue of the circumstances of how he came to be injured. The rule in order 6 rule 1 notwithstanding the trial court should have allowed the plaintiff to call the driver of the trailer who witnessed the ghastly accident. When the case went for hearing on 26/10/2000 the Plaintiff called a witness as his first witness. This is the very eye witness whose testimony was excluded by court on the ground that his name had not been listed as a plaintiffs witness. The witness was even listed as a second witness for the defendant though when it came to the defendants turn he was not called. The effect was to block his testimony altogether from the court. This is a case where it was possible to discern that the witness, a key witness for the plaintiff was being suppressed and yet his testimony was vital for a just decision of the matter. On 27/02/2002 the Plaintiff again sought permission to call the driver of the trailer. He was again not permitted to do so. Indeed in re-examination the defendant stated to court that his driver at the material time was one Lugoobi who no longer worked for him. He did not call him though such driver was his testimony had been locked out on account of this factor. It is anybody's guess how he lost his job in the meantime.

The principle behind the rules is that as much as possible the list of witnesses should be provided. In this case the defence had offered to call the driver. It was not a fault if the plaintiff in so far he was not fuilty of laches in hesitating to call the defendants driver. It was sufficient for him to produce the key witness and apply for him to testify. His right to produce the witness cannot be taken away simply because he omitted to include his name in his list but was able to produce the witness whom the defendant had himself listed. It was for the courts decision only bearing in mind the need to restrict the number of witnesses to an extent which should cater to the requirement of the case: See **Yashpal Sawhney vs Gandotra Traders** AIR 1995 32; **Lalitha J. Rai vs Aithappa Rai** 1995 SC 1766.

The idea is that evidence of a key witness should not be struck off unless the party calling an unlisted witness is guilty of negligence or lanches. The court would allow the witness to be examined and only give reasons for so allowing an unlisted witness to be examined. In the present case the plaintiff had indeed produced the witness and both parties would examine the witness to elicit the truth. With due respect therefore I would agree that the two trial Magistrates who successively rejected the witness being called by the plaintiff denied not only the plaintiff but the defendant a chance to call its witness. This is because by the time the defendant was due to call the witness he had ceased to be an employee of the defendant. In the result even the court was deprived of an opportunity to go into the details of the accident. The plaintiff was effectively disabled in same way from substantiating his case further. I would therefore agree with Mr Mutabingwa learned counsel for the plaintiff that striking out the evidence of

his witness, a key witness for that matter, could not be said to have been done with judicial discretion in both instances. It would have been quite open to the second trial magistrate to call the witness which court can do so “at any stage” in the proceedings nd that doing so would not be prejudicial to the defendant. In the result I must allow this appeal on this ground. I would also allow it on the other ground that the plaintiff himself and the medical doctor who testified were able to sustain the plaintiffs case beyond a bare balance of probabilities. The excluded evidence would have sealed it to a higher degree. But in the circumstances of this case the review of the evidence justifies a conclusion that the plaintiff proved his case. He did so particularly to the extent that he sustained his assertion that he was injured in the course of his employment with the defendant and that the defendant must be liable, the exclusion of the drivers evidence notwithstanding. Having come to this conclusion I must also say that since costs follow the event the ground of appeal dealing with costs also succeeds. I therefore allow this appeal, set aside the decree of the trial court and allow costs for this appeal and in the trial court to the appellant herein.

On the evidence there is sufficient material for this court to quantify the damages. The plaintiff gave evidence that he earned shs. 50,000 per month. This is a reasonable claim. He states that he would also get 70,000 as allowances each time he traveled between Malaba and Rwanda on defendant’s vehicle. This is consistent with the defendants own statement that he used to give his trailer team shs 300,000 for the trip. I would therefore enter Judgment against the defendant to pay the plaintiff:

(a) Shs 2,490,000 being lost or unpaid salaries to date. i.e. since September 1999. less shs 110,000 advanced to plaintiff.

(b) Shs 600,000 as general damages.

(c) Costs of the suit as stated earlier.

R.O. Okumu Wengi

JUDGE

27/01/2004.

28/01/2004

Mutabingwa for Appellant

Dorothy Kihande for Respondent.

Court:

Judgment read.

Sgd by: G. Namundi

D/REGISTRAR.