REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL 148 OF 2000

E.A.T.E.C LIMITED.....APPELLANT

VERSUS

ETUKO ETIR MOKHODI.....RESPONDENT

(Being an Appeal from the Judgment of Ms. Kiptoo, Resident Magistrate in Eldoret SPMCC No. 240 delivered on the 1st November 2000)

JUDGMENT

The Respondent sued the Appellant at the Chief Magistrates Court Eldoret seeking special damages of Kshs. 1,500/= and general damages. The claim was in respect of an accident that took place on 5th December 1995 at the Appellant's place of work. The Respondent averred that he was injured while working for the Appellant and gave particulars of the Appellant's negligence in paragraph 4 of the Plaint. The Appellant filed a defence denying liability and averred that the Respondent was negligent in discharging his duties and exposed himself to injury. The suit was heard before Resident Magistrate J. Kiptoo (Miss) who in a judgment delivered on 1st November 2000 found the Appellant liable 100% and awarded general damages of Kshs. 100,000/=. The Appellant was aggrieved and lodged a Memorandum of appeal on 30th November 2000 contending that:-

1) The learned trial magistrate erred in law and fact in holding the Defendant liable without any or any sufficient evidence in that regard having been adduced.

2) That the learned trial magistrate erred in law and fact in awarding damages to the Respondent against the weight of the evidence adduced.

3) That the learned trial magistrate erred in law and fact in failing to hold that the Respondent sought to prove unpleaded matters.

4) That the learned trial magistrate erred in law and fact in awarding damages that were excessive in the circumstances of the case.

5). That the learned trial magistrate erred in law and fact in failing to dismiss the suit for want of proof.

At the hearing of the appeal, the Appellant was represented by counsel but the Respondent was absent. I allowed the Appellant to proceed ex parte after I was satisfied that the Respondent had been served. Counsel for the Appellant argued grounds 1, 2, 3, 4 and 5 together. He submitted that the Respondent claimed that the Appellant was negligent. The evidence tendered did not tally with the particulars given in

the Plaint. He claimed he was on the - “tractor jumped and threw them off”. He also claimed that the tractor overturned and he fell down. Negligence was not proved. It goes against section 107 of the evidence Act with regard to the burden of proof. There was no accident and the Appellant was pricked by a piece of stick. The Respondent could not tell which tractor caused the accident. The Respondent did not produce any medical chit. No doctor was called to produce the medical report. The Plaint pleaded injury to the right leg but he gave evidence that he was injured on the left leg. There was a departure from the pleadings. It was wrong for the magistrate to shift burden to the defence. The judgment falls short of the requirements of order 22. No reasons given by the court. Counsel urged that the appeal be allowed, judgment be set aside and the Respondents case be dismissed with costs.

I have considered the evidence on record together with submissions of counsel, the question to be resolved is one of fact. It is the duty of this court to re-evaluate the evidence and test the conclusions of the trial magistrate taking into account that this court has not had the advantage of watching the demeanor of the witnesses. Counsel has attacked the case of the Respondent as being inconsistent on how the accident occurred. This is what the Respondent told the trial court:

“On 5.12.95 I was working for EATEC Ngeria estate. I was carrying firewood using a tractor from the farm. I was assigned to load the tractor. On that day after loading the tractor we headed to the place. We were to unload the firewood. On the way the tractor jumped and threw us off the trailer. The trailer disconnected. I was injured on the left leg. I was then brought to the hospital for treatment. I was dumped there by the company. I was at Moi Referral and Teaching Hospital. ..I blame the company for the accident. The tractor belongs to the company. I was also injured while doing company work. The company refused to treat me. My treatment notes were stolen on my way home. I was also examined by Dr. Aluda who prepared a report for me. I have the report. I would like to produce the same as exhibit. Exh 1. I paid Kshs. 1,500/= for the report. Exh 2. I was injured on the left leg and not the right leg. I have recovered. I pray that I be paid damages costs and interest.”

On cross-examination he stated that the tractor overturned and threw them off and they were injured by the logs (firewood). He did not know the registration number of the tractor. He stated that it was not true that he had been pricked by a piece of wood as he was collecting firewood. He stated that the supervisor was not in the tractor. He mentioned two names and stated that the other three were Nandis and in total they were six. He stated that it is not true that he was only injured on the right leg. He did not know if it had been pleaded that he had a septic wound because he did not go for treatment. The company did not give him any money. He reiterated that the medical chits were stolen. He went to the Hospital eight times. The last time he went there was in May 1995. He stated that he was given 15 days off duty. That he had not gone to work since then.

The Appellant on the other hand had a witness called John Nyongera Otionyi. He stated that he knew the Respondent. He worked for the Appellant. He used to carry firewood from the farm to the path. That on 5.12.95 at around 11.00pm the Plaintiff was pricked by a piece of stick on his left leg. The firewood was 8 feet long and had been stripped of the bark. There were several trees and one of the branches pricked his leg. The injury was not serious. The Respondent went on with work until 1.00pm. He told him to come the following morning to the office to see the manager. That he knows the Respondent came and saw the manager. He was given money to go for treatment. That he did not know if the Respondent was treated because he never came, back to work. He stated that there was no tractor on that day and it was not true that the Appellant fell down when the tractor overturned. On cross examination he stated that he did not have the incident report book. He stated that there was a supervisor in charge of tractors. But that that day there was no one since there was no tractor.

The trial magistrate considered the evidence in her judgment stated as follows:

“It is the court’s opinion that indeed it is not disputed that the Plaintiff was injured on that day but I do not believe the views advanced by DW1 being he failed to produce an incident/accident report book in respect of the material date. Further DW1 said that there is always a tractor supervisor but that he was not there that day. He is the only one who could have ruled out that there was no

tractor accident that day. The Plaintiff may have not produced the treatment chits but he did explain how the same were pick-pocketed from him. All the same it has not been claimed (must have meant denied) that he was injured that day. I therefore hold the Defendant 100% liable to compensate the Plaintiff. On the issue of damages as per Dr.Aluda's medical report, the Plaintiff sustained the following injury.

(1) **A large deep lacerated wound on the right leg."**

The court was right that it was not in dispute that the Respondent was injured on the material date. The court was however bound to consider the pleadings put forward by the Respondent. A reference to the Plaint is material. The responded pleaded in paragraph 4 of the Plaint as follows:

"4. THAT the said accident was caused solely by the negligence, carelessness and or inadvertence of the Defendant in failing to provide required working conditions thus exposing the Plaintiff to great dangers and or risks.

Particulars of Defendants negligence

a) Failing to provide adequate working apparel.

b) Neglecting and or refusing to offer, afford and or avail the Plaintiff medical care or attention after the said accident.

c) Dumping the Plaintiff at the District Hospital without due care or attention.

d) Failing to provide safe working conditions.

e) Failing and or refusing to avail to the Plaintiff Kshs. 1,200/= being the Plaintiffs leave allowance which amount the Plaintiff required for his medication.

Particulars of injuries suffered

a) Large septic wound on the right leg

b) **Pains in the right leg when walking."**

The evidence of the Respondent during trial gave an entirely different picture of the cause of action. The Respondent testimony was that he was injured when a tractor he was boarding jumped and he was thrown off and the logs fell on him. That they were about six people. There is no indication in the Plaint at all that the Respondent would put forward a case that he was injured due to the negligence of the driver of a tractor who caused it to "jump" and throw them off. The cardinal rule of pleading is that they serve to tell a party in advance what case they should expect. He Respondent put forward the case that he was injured on the right leg but during trial the case was that he was injured on the left leg. A party is bound to prove the allegations as set out in the Plaint not as given in evidence. Otherwise there is no use of presenting a Plaint if the evidence at trial will not address issues pleaded in the Plaint. There was no evidence to support the particulars of negligence at all. Respondent did not show how working apparel was inadequate. It was also not shown how the working system was unsafe. Paragraphs (b), (c). and (e) touch on post accident conduct and are therefore not relevant in determination of negligence that led to the accident. They are otherwise relevant in assessing damages. But before damages are assessed liability must be established. I am satisfied that the learned trial magistrate misdirected herself on the appraisal of the evidence *vis-a-vis* the pleadings and that had she directed herself to the Plaint filed she would have come to the conclusion that the Plaintiff had not proved his case on a balance of probability.

The finding that the Appellant ought to have called the Supervisor in charge of tractors was also inappropriate. It was not a case that was pleaded that the Respondent was injured when he fell from a tractor. Had it been so pleaded and am sure defence counsel would have been put on the enquiry to find

out which tractor and who was the driver. It was therefore a misdirection to have required the Appellant to anticipate the case of the Respondent and have a witness ready to rebut the case. The testimony of DW1 appears more credible. The evidence of the Respondent was very contradictory. The medical report shows that he was treated at Eldoret District Hospital. He himself gave testimony that he was taken to Moi Teaching and Referral hospital. I am of the view that the appeal should be allowed. I therefore allow the appeal and set aside the judgment and decree of Honourable Miss. J. Kiptoo delivered on 1st November 2000 in Eldoret CMCC No. 240 of 1996 and substitute it with an order dismissing the Respondent's suit with costs. The Appeal is allowed with costs to the Appellant

Dated and delivered at Nairobi on this 22ND day of august 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on THIS 19th Day of SEPTEMBER 2012.

F. AZANGALALA
Judge

In the presence of: Ms Khayo for the Appellant.