REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 203 of 2002
(An appeal from the judgment of Mr. J. Kaburu Senior Principal Magistrate delivered on 15th October 2002 in Nakuru CMCCC No. 2952 of 1999)

PETER MAINA WAIGWA.....APPELLANT

VERSUS

KAMAU THUKU GAKERE.....RESPONDENT

JUDGMENT

This is an appeal against the judgment of the Senior Principal Magistrate delivered on 15th October 2002 in Nakuru CMCC No. 2952 of 1999.

In that case the appellant claimed that he was employed by the respondent at the latter's farm at Marmanet. On or about 3rd April 1998 while the plaintiff was engaged in his duties of cutting nappier grass using a chaff cutter, his left hand was caught by the rotating part of that machine and severed at the wrist. He attributed his injury to the negligence of the defendant who permitted him to use a dangerous machine which was not fenced as required by law.

On his part the respondent denied employing the appellant and the negligence attributed to him. He further averred that the appellant wholly or partly contributed to his own misfortune in that he went using the defendant's chaff cutter machine with the defendant's knowledge or authority and without first being trained to use it. The appellant did not traverse those averments.

After hearing the case the learned trial magistrate dismissed the appellant's claim holding that as a farm hand, the appellant's duties were

cultivating, ploughing and weeding and that he had no business operating a machine which had nothing to do with the farm. He said if he had found for the appellant he would have awarded him Kshs.300,000/- general damages and Kshs.2,500/- special damages. This appeal is against that finding on liability.

It is not in dispute that the appellant did not traverse the respondent's allegations of negligence on his part. Mr. Kurgat for the respondent urged me to deem the appellant as having admitted those allegations and dismiss this appeal. On his part Mr. Ikua for the appellant submitted that **Order 6 Rule 9(1)** of the **Civil Procedure Rules** is not absolute.

I have considered these submissions and read the record of appeal.

Both in his plaint and evidence in court, the plaintiff did not say in what capacity he was employed. He did not say he was employed as a machine operator. As I have said he did not traverse the allegations in the defence. A traverse is a formal denial of a factual allegation made in the opposite party's pleading. In this case the appellant did not deny the respondent's averment in the defence. That he was not authorized to operate the chaff cutter machine. The **Order 6 Rule 10(1)** declares that "If there is no reply to defence, there is a joinder of issue on that defence." But that does not apply where there is a counter claim. **Sub-rule (3)** of **Rule 10** makes that quite clear. "There can be joinder of issue on a plaint or counterclaim." A counterclaim as we know does not on comprise a claim for relief asserted against an opposing party after an original claim has been made but also includes the defendant's claim in opposition to or as a set-off against the plaintiff's claim. **[HERE DEAL WITH**

C.A. DECISION IN MOUNT ELGON HARDWARE LTDF CASE]

The respondent should not even have been allowed to lead that evidence. It is trite law that each party is bound by his pleadings. It is not sufficient for a defendant to generally deny, in his statement of defence, the plaintiffs. He must deal specifically with each allegation of fact of which he does not admit the truth. Every allegation of fact in the plaint will be taken to be admitted if it is not denied specifically or by necessary implication.

[HERE GO 50% AFTER READING FACTORIES ACT AND RELATED MATERIAL] THEN COMPLETE.

DATED and DELIVERED this 20th day of July, 2010.

D. K. MARAGA

JUDGE.