



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 591 of 2001**

**DEL MONTE LIMITED..... APPELLANT**

**VERSUS**

**MARY MUKWALA.....RESPONDENT**

**J U D G M E N T**

By an amended plaint filed on the 11<sup>th</sup> September, 2003 Mary Mukwala (hereinafter referred to as the respondent), claimed damages from Del Monte Kenya Limited (hereinafter referred to as the appellant). The suit arose from an accident which the respondent contended arose during the course of her employment with the appellant. The respondent maintained that the accident was caused by the negligence and/or breach of duty or breach of contract of employment on the part of the appellant, as a result of which the respondent suffered personal injuries.

The appellant filed a defence denying the respondent's claim. The appellant denied that the respondent was its employee or that she was injured at their premises. The appellant further denied, being negligent or in breach of statutory duty or contract of employment.

On 22<sup>nd</sup> April, 2004, the respondent's suit came up for hearing before the Resident Magistrate, Gatundu. An application for adjournment was made on behalf of the appellant as the appellant's advocate was said to be held up in another case in Nairobi. The trial magistrate granting the application for adjournment, noted that it was to be the last adjournment. He awarded costs to the respondent and ordered the costs to be paid before the next hearing date. He fixed next hearing date for 24<sup>th</sup> June, 2004. When the suit came up for hearing on the 24<sup>th</sup> June, 2004, the advocate for the respondent drew the court's attention to the fact that the respondent's costs and court's adjournment fees had not been paid as ordered by the court. The respondent was therefore forced to pay the court adjournment fees in order for the matter to be listed for hearing. The advocate who was then appearing for the appellant apologized to the court claiming that he was not aware of the order for payment of adjournment fees. He urged the court to allow him to pay the court adjournment fees before the matter was concluded. This was objected to by the counsel for the respondent. In his ruling the trial magistrate noted that that was the second occasion when court orders for payment of costs were not being complied with. He noted that the suit was an old one and that he had warned that the previous adjournment was to be the last adjournment. He therefore refused the appellant's application. He ruled that the appellant's advocate had no *locus standi*. Hearing of the suit appeared to have proceeded *ex parte*. Only the plaintiff testified in proof of her case. She produced X-rays, treatment notes and a medical report to confirm her injuries. In his judgment, the trial magistrate found that the respondent had proved her case on a balance of probabilities. He gave judgment in her favour awarding her general damages of Kshs.120,000/= and special damages of

Kshs.1000/=.

Being aggrieved by this judgment the appellant has raised four grounds of appeal as follows: -

- (1) The learned magistrate erred in law and in fact in barring the appellant's counsel from participating in the trial of the suit in the lower court.
- (2) The learned magistrate erred in law and in fact in admitting into evidence the plaintiff's various documents without their respective makers being called to give and produce them in evidence.
- (3) The learned magistrate erred in law and in fact in showing open bias in favour of the plaintiff/respondent and against the appellant in the conduct of proceedings in the lower court.
- (4) The learned magistrate erred in law and in fact in awarding damages that were manifestly excessive compared to the soft tissue injuries purportedly sustained by the plaintiff.

In support of the appeal, counsel for the appellant has submitted that the appellant's counsel was not given an opportunity to be heard despite his willingness to comply with the previous court orders. In this regard, counsel relied on *Prime Salt Works Limited vs Kenya Industrial Plastics Limited (2001) 2 EA 528*. Counsel also relied on *Trust Bank Limited vs Amaro Co. Ltd (2002) 2 KLR 627* maintaining that the rules of natural justice were breached.

For the respondent it was submitted that the trial magistrate dealt with the matter according to the law. It was maintained that the appellant having failed to comply with the order of the court the court was right in refusing the appellant audience. It was contended that the *ex parte* hearing and judgment was proper and the award not excessive. The court was referred to *HCCC No.83 of 1987 Mary Odago vs Justus Olang Oraro* where an award of Kshs.200,000/= was made for comparable injuries. The court was urged to dismiss the appeal as having no merit.

I have carefully considered the record of proceedings before the trial magistrate. It is evident that on the 26<sup>th</sup> February, 2004 the hearing of the plaintiff's suit was adjourned at the request of the defence counsel and that the court awarded costs to the plaintiff. It is also true that on the 22<sup>nd</sup> April, 2004, the court again adjourned the hearing of the suit at the request of the defence counsel and awarded costs to the plaintiff. The court also ordered the adjournment fees to be paid before the next hearing date. It is further apparent that when the case next came up for hearing on 24<sup>th</sup> June, 2004, the defence had not paid the court adjournment fees nor had they paid the plaintiff's costs as ordered. The defence counsel sought to be allowed to pay the court adjournment fees before the conclusion of the matter. In rejecting that application the court noted that court orders must be complied with and that the court having warned that the previous adjournment was the last one, it would not adjourn the matter further. The court proceeded to order as follows: -

***"I find no merit in the application by Mr. Musumbi and I therefore dismiss the same with costs and refuse to hereby indulge him as he has no locus standi."***

Thereafter, the court appeared to have proceeded with the plaintiff's case *ex parte* and the appellant was not given an opportunity to be heard. While it is true that the appellant did not pay the court adjournment fees and the respondent's costs as ordered, the question is whether the trial magistrate was right in denying the appellant an opportunity to be heard. The appellant's advocate did not apply for adjournment but only applied for indulgence to be allowed to pay the ordered costs at a later date. In refusing that application the trial magistrate could only insist that the previous orders had to be complied with before the matter could proceed. The issue of *locus standi* did not arise as there was no question about the defence counsel's right to represent the defendant. It is true that the defence counsel appears to have been indolent in failing to comply with the court order. However, refusing the defendant a hearing was a drastic step which denied the defendant his right to be heard for a mistake made by his counsel.

Secondly, it is noted that only the plaintiff testified in proof of her case. The trial magistrate admitted

documents such as the medical report and photocopies of X-ray and treatment notes from hospital without calling the makers. This was not proper. The defendant having denied the plaintiff's claim and put the plaintiff to strict proof, it was necessary for the plaintiff to call all the necessary evidence in support of her case. In particular, it was necessary to call the doctor, so as to establish the plaintiff's injuries and the probable cause of such injuries. For these reasons, I find that it would not be fair nor just to allow the judgment against the appellant to stand.

Accordingly, I allow this appeal, set aside the judgment of the lower court and order that the respondent's suit shall proceed to hearing before another magistrate. Although the appellant has succeeded in this appeal, I do not find it appropriate to make any orders as to costs. Each party shall therefore bear its own costs in this appeal.

Those shall be the orders of this court.

**Dated and delivered this 17<sup>th</sup> day of September, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Miss Muthiga for the appellant

Advocate for the respondent absent