

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 91 of 1997

EASTERN PRODUCE (K) LIMITED
APPELLANT

VERSUS

ELEMINA IKUNGU ISIECHA
RESPONDENT

JUDGMENT

Elemina Ikungu Isiecha was awarded judgment against Eastern Produce (K) Ltd in the sum of K. Shs. 60,000/- for general damages and a further sum of K. Shs. 1,500/- for special damages on 4/11/1997. She was to bear liability at 40%.

Eastern Produce (K) Ltd, (hereinafter referred to as “the Company”), which felt aggrieved by that decision, has now preferred this appeal which was originally based on eight grounds, but which were reduced to the following seven grounds after its counsel abandoned one of the grounds:

- “1. The learned trial magistrate erred in law and fact in failing to address the defence evidence in his judgment.*
- 2. The learned trial magistrate erred in law and fact in failing to address the question of whether the Plaintiff was on duty on 28/6/1996 and 29/6/1996 despite the same being pivotal to the defence case.*
- 3. The learned trial magistrate erred in law and fact in entering judgment in favour of the plaintiff despite abundant evidence disentitling him from so doing.*
- 4. The learned trial magistrate erred in law and fact in failing to hold that the plaintiff was not injured on duty if at all.*
- 5. The learned trial magistrate erred in law and fact in finding the Appellant Company negligent without there being a basis upon which such finding could be made.*
- 6. The learned trial magistrate erred in law and fact in awarding damages.*
- 7. The learned trial magistrate erred in law and fact, in failing to hold that the respondent duly admitted the particulars of negligence attributed to her pursuant to the provisions of Order VI Rule 9 of the Civil Procedure Rules.”*

I have taken submissions into account and having reviewed the evidence on record, it is apparent that on 29/6/1996, the day when Isiecha who I shall now refer to as ‘the respondent’ claims to have been injured while at work, and though she had attended the clinic, she had however only sought treatment for palpitations and stomach pains. In my humble opinion, had she had been injured on the said date as she claims there was no valid reason why she could not indicate that she had been so injured, and thereby seek treatment for the injuries so sustained. Indeed evidence on record tends to show that she sustained the injuries for which she instituted her suit against the Company 17/7/1996 and not on 29/6/1996, and on that ground alone, I would find that she was not able to prove her case against the Company.

Be that as it may, though the Company had attributed negligence to her in its defence, she did not file a reply thereto which in my mind means that the admitted liability, for “*a party who does not traverse the particulars of negligence alleged in the respondents defence had admitted the negligence alleged in the defence in terms of Order VI rule 9 of the Civil Procedure Rules*” (**Mount Elgon Hardware Ltd v. United Millers CA (Ksm) 19/1996**).

In the circumstances, there was no possibility of her having proved her case against the Company on a balance of probability.

I do in the circumstances allow this appeal, set aside the judgment by the subordinate Court and dismiss her suit with costs.

Each party shall however bear its costs of this appeal.

Dated and delivered at Eldoret this 7th day of March 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of: