REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 2 OF 2000

BIASHARA MASTER SAW MILLS……..…….APPELLANT

VERSUS

STEPHEN WEKESA…….……RESPONDENT

JUDGMENT

The respondent averred in his plaint that he was employed by the appellant as a casual worker and stated that on or about 23rd July, 1996 he was lawfully acting in the course of his employment and in obedience to the instructions of his employer when he was trapped between the hands of a caterpillar tractor that he was chaining, seriously injuring him. He blamed the appellant for the occurrence of the incident and claimed special and general damages.

The appellant, in its defence, denied that the respondent was its employee and further denied that he was ever on duty on the material day as alleged. However, without prejudice to the above denial, the appellant averred that if any accident did take place as claimed, then the same was caused by or substantially contributed to by the negligence of the respondent. The appellant then set out particulars of negligence on the part of the respondent.

The matter was fully heard and the trial court found the appellant 100% liable and awarded the respondent general damages of Kshs.110,000/-. The appellant was aggrieved by the above findings and filed this appeal.

I have carefully considered the pleadings, the proceedings, the submissions and the judgment. The appellant's first ground of appeal was that the learned magistrate erred in fact and in law in holding that the appellant's defence was mischievous and an embarrassment when the appellant's evidence was that at the time of the alleged accident the respondent was not on duty and that had been pleaded in the defence. The appellant was stopped from leading its witnesses and in particular DW1 to give evidence which would have disapproved the respondent's evidence; it was claimed.

The record shows that Mr. Muthanwa who was acting for the respondent during the trial alleged that the appellant was departing from its pleadings when the first defence witness started giving evidence regarding the respondent's movements on the alleged date of the accident. The trial magistrate upheld the objection saying that the parties were bound by their pleadings.

Paragraph 5 of the plaint read as follows:- www.kenyalawreports.or.ke "5. On or about the 23rd July, 1996 the Plaintiff herein was lawfully acting in the course of his employment and in obedience to the instructions of the employer when he was trapped between the hands of the caterpillar tractor that he was chaining seriously injuring his foot."

That specific allegation was denied by the appellant in its defence in the following manner:-

5. *"The Defendant denies that the Plaintiff was ever on du ty on 23 rd July 1996 as alleged in paragraph 5 and will be put to strict proof thereof."*

Order VI rule 9 of the Civil Procedure Rules provides that any allegation of fact made by a party in his pleadings shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading. In the present matter, there was an express denial of the respondent's averments in his paragraph 5 of the plaint. It was therefore perfectly in order for the appellant to lead evidence to challenge the respondent's contention as hereinabove stated.

It was not proper for the trial magistrate to block the appellant from adducing evidence in support of its defence as long as the respondent was going to get an opportunity to cross examine the appellant's witness. A court of law should reach a finding after hearing presentations from all the sides to a matter.

In ***MUCHUNGU VS MUCHUNGU [1984] K.L.R. 202*** , when the Court of Appeal found that the matter was not properly tried, it allowed the appeal, set aside the judgment of the High Court and in the interest of justice remitted the case back to the High Court for retrial.

Likewise, I allow this appeal, set aside the judgment and decree and direct that a new trial be conducted by any magistrate with appropriate pecuniary jurisdiction in this station. This is pursuant to the provisions of Order XLI Rule 21 of the Civil Procedure Rules. The new trial should be given priority so that it is finalised within the next three months from the date hereof.

The costs of this appeal shall abide the outcome of the retrial.

DATED, SIGNED & DELIVERED at Nakuru this 17th day of May, 2004.

DANIEL MUSINGA

AG. JUDGE

17/5/2004

Judgment delivered in the presence of Mr. Ndolo for the respondent. No appearance for

DANIEL MUSINGA

AG. JUDGE

17/5/2004