REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 421 OF 1998

ASSOCIATED ELECTRICAL INDUSTRIES LTD ………………..… APPELLANT

VERSUS

WILLIAM OTIENO ………………...………………..…………….. RESPONDENT

JUDGMENT

This is an appeal against the Judgment of Mrs. B. Rashid, RM in Nairobi RMCC No 8619 of 1997 delivered on 13th November, 1998.

The Respondent (Plaintiff in the lower court) had sued the Appellant, his employer, for damages arising from injuries sustained by him in the course of his employment with the Appellant. He was employed by the Appellant in September 1991 "as a machine operator" according to the Plaint. He testified that on 12th August, 1994 he was assigned duties to clean bulb stamps with acid, and in the course of his work his finger got burnt by acid. This evidence, that is the nature of the injury, and how it happened, is completely at variance with his pleadings.

In a Plaint dated 20th November, 1997 and filed the following day the Respondent pleaded that he was employed as a machine operator by the Appellant, and that "on the 12th August, 1994 while the Plaintiff was in the cause (sic) of his employment with the Defendant the saw machine broke and injured his fingers." (Paragraph 5, Plaint).

The evidence that he gave at the lower court is completely at variance with his pleadings. He stated under oath, in cross examination, that he was not injured by the saw machine, that it was actually acid that burnt his finger. This is consistent with the Appellant's testimony in the lower court that indeed there was no saw machine in its factory, that it was in the business of making bulbs.

Despite this glaring disparity between the pleading, and the evidence before the court, the trial Magistrate, in a brief, unreasoned and self-contradictory judgment found for the Respondent and awarded him damages of Kshs.26,000/=.

Aggrieved by that decision, the Appellant appealed to this Court, citing the following 3 grounds of appeal in its amended Memorandum of Appeal dated 21st December, 2001, as follows

> ***1. The learned Magistrate having found as a fact that the Plaintiff's (Respondent's) pleadings were at variance with his evidence erred in law in entering Judgment for the Plaintiff/Respondent.***

> ***2. The learned Magistrate erred in law and fact in finding that th e Appellant was liable in negligence and further erred in failing to apportion liability between the Appellant and the Respondent.***
>
> ***3. The learned Magistrate erred in finding that the Respondent had proved his case on a balance of probability.***

Ms Mukuru, Counsel for the Appellant, argued that the Respondent was bound by his pleadings, and had not proved, on a balance of probability, that he had been injured while operating the saw machine. She submitted that the trial magistrate having actually acknowledged that the claim in the Plaint was at variance with the evidence before the court, erred in then proceeding to enter Judgment only on the ground that the Respondent was injured “while on the Defendant’s premises.”

I entirely agree with the Appellant Counsel’s submissions. Parties are bound by their pleadings. The Respondent here pleaded one thing, and sought to prove another. In such a situation the Defendant/Appellant was highly prejudiced. It sought to defend the case against it as stated in the Plaint, and the case stated in the Plaint was never proved. The Respondent having found himself at variance made no application to amend the Plaint. The trial magistrate also noted the disparity between what was pleaded and still went ahead to enter Judgment, which was clearly wrong in law. Phipson on Evidence 13th Edition, at page 40 states:

> ***“In the absence of leave to amend, the parties are bound by their particulars, and the court cannot award more than these disclose…”***

Accordingly, and for reasons outlined, this appeal is allowed with costs, both at appeal and in the lower court.

Dated and delivered at Nairobi this 8th day of December, 2004.

ALNASHIR VISRAM

JUDGE