REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

APPELLATE SIDE

Civil Appeal 16 of 2001

(From Original decision in Eldoret S P M C C No. 925 of 1998 dated 28/1/2001 by J. M. Kiptoo (Mrs.) R.M.

UNGA MAIZE MILLERS LTD……. APPELLANT

V E R S U S

JAMES MUNENE KAMAU …….RESPONDENT

JUDGMENT

This appeal emanates from the decision of the Resident Magistrate, Eldoret in which she held that **UNGA MAIZE MILLERS LTD,** were negligent in not providing **JAMES MUNENE KAMAU** with protective gloves as he worked for it as a cleaner, and that it was therefore liable to him in damages, after which she proceeded to award him Shs. 75,000/- and Shs. 1000/- for general and special damages respectively.

Being aggrieved by the said judgment, **UNGA MAIZE MILLERS LTD** (which I shall now refer to as 'the appellant'), has preferred this appeal against **JAMES MUNENE KAMAU** (hereinafter called 'the respondent').

It bases its appeal on the grounds that:

> *"1 THAT the Honorable trial Magistrate erred in law and fact in holding that the Respondent had been injured while on duty on the 29th September 1995 contrary to the evidence adduced before her.*
>
> *2. THAT the Honorable trial Magistrate erred in law and fact in holding that the Respondent had proved his case against the Appellant on 100% liability and in awarding damages to him on that basis.*
>
> *3. THAT the learned trial Magistrate erred in law and fact in awarding the Respondent Kshs. 75,000/- in general damages which award is inordinately high in view of the injuries suffered.*
>
> *4. THAT the trial Magistrate erred in law and fact in failing to consider all the issues and the Appellant's submissions put before her.*
>
> *5. THAT the learned trial Magistrate erred in law and fact in relying on the Respondent's submission and awarding judgment for the Respondent against the weight of evidence adduced before her."*

Mr. Kuloba, learned counsel for the appellant chose to combine grounds 1, 2, 4 and 5 of the appeal, and to urge them as one. He however abandoned the third ground. Briefly, the respondent's case against the appellant was that he was employed by the appellant at the material time as a cleaner, and that though it was a term of his contract of employment that the appellant would provide a safe working environment for him, the appellant failed to provide him with protective clothing, and as a result of which, on 29/5/1995, he sustained injuries to his index finger, which was hit by a door to a room which he was then cleaning, after it the door was 'banged' by the wind.

The respondent had denied the claims and though it alleged negligence on the appellants part and thereby gave particulars of the same, there was however no reply to that defence. I shall come back to that issue at a later stage.

The respondent's evidence was that he had been employed by the appellant as a packer; that on the material day he was assigned with a duty to clean a room; that as he dusted off some cobwebs, there was a sudden rush of wind, which caused the door to move and to injure him on his finger. It was also his evidence that he initially administered first aid to his finger, and went to the clinic on 3/10/2000. He attributed the blame for his injuries to the appellant for assigning him with a task, which he was not conversant with.

The appellant called its Human Resources Officer, who confirmed that the appellant was their employee, but that he was working as a packer on the material day. He however denied that the respondent was injured while at work at the material time or day.

Coupled with the above line of evidence it was for the learned trial Magistrate to establish whether the respondent had proved his case on a balance of probability, a standard required in cases of a civil nature. She had to bear in mind the requirement that the onus of proof was on the respondent, who had alleged.

It was also apparent that even if he could have been injured on the material day as alleged, the injuries could not have been as severe as per the description in the plaint, for when he attended the clinic, which was on 3/10/1995, and though he was referred to the District Hospital, he had only been allowed a day off duty.

I find that the respondent was not able to prove that he was working as a general cleaner, and not as a packer at the material time, neither was he able to prove that he was had actually sustained the said injuries on 29/9/1995 as alleged, for it was clear that his medical chits (exhibits P 1 and 2) clearly indicated that he was injured on 3/10/1995. It was also clear from his medical evidence that he had informed Dr. Aluda, whom he consulted on 17/6/1998, that he had been injured by a packer saw mill on 3/10/1995, but he never mentioned the door or the fact that he had sustained the injuries as he carried out general cleaning duties.

Be that as it may the respondent, who alleged in his plaint that the appellant had failed to provide him with protective clothing, never alluded to the fact in his evidence at all.

I need not reemphasize the legal position that parties are bound by their pleadings.

After reevaluating the evidence on record, I form the opinion that the respondent was not able to prove his case to the required standard, and in the circumstances, he was not able to prove that the respondent was negligent, as alleged, and on that ground alone this appeal is bound to succeed.

But that was not all, for as aforementioned, there was no reply to the appellant's claim that the respondent acted negligently and he was thus to blame. It is trite law that he who does not file a reply to such a defence is deemed to have admitted the said allegations.

I have in mind the decision in **Mount Elgon Hardware v. United Millers Ltd CA (Ksm) 19/1996** in which the Court of Appeal found that a plaintiff who does not traverse the particulars of negligence as alleged by a defendant, admits the negligence as alleged in the defence.

The respondent conceded that he did not filed a reply to the defence, and the learned trial magistrate therefore erred when she proceeded on the premise that the respondent had proved his case on a balance of probability, for he could not have done so, as having failed to file his reply to the defence, the assumption was that he had already admitted the negligence as alleged by the appellant.

I therefore allow this appeal, set aside the judgment, and instead dismiss the respondent suit.

Each party shall however bear its own costs of the suit and this appeal.

Dated and delivered at Eldoret this 5th day of July 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of: Mr. Chemoyai for the respondent

No appearance for the appellant