



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: HANCOX CJ, GACHUHI & KWACH JJ A)

CIVIL APPEAL NO 40 OF 1989

KENYA MEAT COMMISSION..... APPELLANT

VERSUS

RICHARD AMBOGO RADEN RESPONDENT

(From a judgment and decree of the High Court at Mombasa, Bosire J,

dated the 25th November 1988 in High Court Civil Case No 490 of 1984)

JUDGMENTS

Hancox CJ. This appeal arises out of an accident that occurred to the respondent plaintiff while a casual labourer at the Mombasa factory of the Kenya Meat Commission on the 20th July, 1981. Though the plaint was filed some three years later in June, 1984, it did not come to trial until October, 1988, after which Bosire, J in a judgment dated 25th

November, 1988, found for the plaintiff on liability and assessed the damages for the injury to his right thumb at Shs 70,189.00, to include Shs 1,326.50 by way of special damages, but discounting Shs 1,137.25 paid under the Workman's Compensation Act Cap 234. In personal injury cases there is frequently an element of delay in the trial of an action, because it is often not possible for those in medical charge of the case to assess the degree of permanent and/ or residual disability, if it exists, for several months or even years: videlicet for instance the case of *Mohamed Mohamoud Jabane vs Highstone Butty Tongoi Olenja*, Civil Appeal No 2 of 1985, on which this court commented on the delay, and which took eight years from the accident to the final disposal of the appeal. Nevertheless, the effect of so long a delay before the case is concluded on the recovery and morale of an injured plaintiff must in those circumstances be quite serious.

No complaint was made regarding the learned judge's finding as to quantum of the damages, and indeed in the course of his argument Mr Inamdar, for the appellant corporation, said he was confining himself to grounds 1,2 and 3 of the Memorandum of Appeal. As far as I can see the judge did not make the findings of fact complained of in grounds 4,5 and 6(ii) and these need not, therefore, have been included in the Memorandum. To do so merely clutters up the record, and we have said more than once that the inclusion of unnecessary grounds as a makeweight in a petition or Memorandum of Appeal lengthens the appeal and tends to distract the minds of the court from the essential issues. As to 6(i), there was infact no evidence to show how it was ensured that the animal was completely dead before the horn cutting part of the operation commenced and the judge's finding was, therefore, in that aspect, correct.

Nevertheless, it cannot be gainsaid that these were some findings of fact which the judge made in the

course of his otherwise very careful judgment which were not supported by the evidence or even by necessary inference from the primary facts. One such is the reason which the judge gave for the second sprinkling or hosing operation. By whichever name it is called, it denotes the application of water to that which had by then become (or which one hopes had by then become) the carcass of the animal taken to the factory for the purpose of being slaughtered.

The reason for the first hosing operation was perfectly clear. It was to remove dirt and grime from the exterior of the animal and thus presumably prevent contamination or infection of the meat into which the unfortunate beast is, by this series of operations, converted. As to the second, there was a direct conflict of evidence: I will not say a conflict of fact because the defendant's only witness, Munyua, the foreman on the killing floor at the material time, had no knowledge of the accident itself. But whereas the plaintiff had said:

"I was sprinkling water on animal's horns as they were being cut ..."

and

"Yes, I was hosing down horns while they were being removed. This is done simultaneously with the cutting.

You are not right when you say that no hosing was being done at the time of cutting horns. I had not worked long in section but I was assigned duty of hosing horns as they were being cut."

The Foreman said,

"No showering is done at stage of cutting horns, Health Department does not allow it".

And he reiterated this in cross-examination.

However, even on the foreman's evidence, it transpired that there was a second, to use a neutral expression, application of water, in which the plaintiff was engaged, for he said,

"Plaintiff was under my charge. He was supposed to hose carcasses and to clean blood on floor. Hosing carcasses was end of operation.

.....

Plaintiff would only clean along the channels. From there to place where horns were being chopped off was about 10 feet."

By that time of course the animal would, one hopes, be dead, but even so it was common ground, on an analysis of the evidence called, that there was a second hosing operation. The only conflict is when this occurred. The plaintiff gave that which in my view was a more comprehensive account even though he was a "simple and apparently, semi-illiterate person", of the progressive stages of the slaughtering of an animal than that of the Foreman. But he did not give the reason on the necessity for hosing the horns during the horn-cutting operation. The Foreman did not do so for the very good reason that he denied that it took place, at least during the horn-cutting. So the learned judge, after giving a very clear summary of the gruesome stages which preceded it, provided his own reason: He said,

"However, it would appear to me that there was and is justification for hosing the head, and particularly the horns.

The cutting of the horns is done by using a saw. In any sawing, particles fall off. I opine that some of those fall on the animal's head and others fall to the ground. These particles, like the dirt on the animal's skin which is showered off, would require to be cleaned off to keep the outer body of the animal clean for the succeeding operations. One may ask why the trickling of water has to be simultaneous with the

cutting operation. From the evidence before me it can be deduced that because of the next operation there would be no opportunity, or better opportunity, to do it thereafter

In the light of the opinion I have come to, I hold that there was in addition to the horn-cutting operation another operation in which a person other than the electric saw operator hoses the horns in the course of the cutting operation.”

The underlining is mine, and it demonstrates the element of speculation and opinion in the judgment on an aspect not covered in the evidence, ie the reason for the hosing down of the horns. We have said before, particularly in relation to criminal appeals, see *Robert Kinuthia Mungai v Republic* [1983] 3 KCA 194 that it is not permissible for a court of first instance to speculate or to insert a finding unless it is supported by evidence or unless it is a necessary, in the sense of inevitable, inference from the primary facts. In a criminal case this may well result in the appeal being allowed.

It is true that in the instant case Mr Inamdar, in his eloquent tearing to shreds of the plaintiff’s advocates pleading, did not regard this aspect of the appeal as material, stating that it was not necessary to his appeal to challenge that finding. But the judge did regard it as material, even crucial, for he said;

“Determination of this case will, therefore, depend mainly on whether or not the plaintiff is to be believed that during the horn-cutting operation some water is spouted on the horns”.

Plainly, the necessity for it would lend credence to the plaintiff’s testimony that water was, in fact, spouted or sprinkled on to the horns at that stage. As we said in *Abbay Abubakar Haji v Marair Freight Agencies Co & Another*, [1984] 4 KCA 53 in which all parties to a motor accident were killed, leaving no witnesses, it is the clear duty of a court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible. But that duty does not extend to supplying a theory as to what happens when the inferences from the primary facts do not inevitably point that way.

Had the appeal been framed, or more importantly, argued on the foreground basis then I for one might have felt some difficulty in resisting that argument. But it was not so framed or argued. The error to which I have drawn attention above, namely that the trial court had invented a reason for the plaintiff’s activity in hosing the animal at the crucial moment when the saw slipped, or was knocked, on to the plaintiff’s right hand appears nowhere in the grounds of appeal. It follows that, even short of the reason for doing so, the plaintiff’s testimony that he was engaged on and was in fact, hosing the horns at the relevant moment there being nothing to set directly against it, remains valid.

The appeal was, however, argued on the technical ground that the way in which the evidence came out at the trial did not match the pleadings. It is a cardinal principle of law and procedure, Mr Inamdar submitted, that a plaint, and especially the particulars of negligence, must be framed with a reasonable degree of precision so as to enable the defendant to know the case he has to meet. I turn, therefore, to examine the plaint and the evidence in support of it. I say at the outset of doing so that although there was a suggestion in one of the medical reports and in a small part of the evidence, that the plaintiff’s injury was caused by a knife, that suggestion was not in my view borne out by any of the evidence, and neither was it put to the plaintiff in cross-examination that the accident occurred in that way. The case has proceeded throughout and this appeal has been heard on the footing that the injury was due to conduct with the electric cutting saw.

Paragraph 4 of the plaint sets out in standard form the duty cast upon an employer to provide and maintain, in effect, a safe system of work and not to expose the plaintiff to a risk of damage or injury of which the defendants knew or ought to have known. Paragraph 5 alleged that while the plaintiff was working on the killing floor, a co-worker “negligently slipped off the saw which cut the right hand of the plaintiff who was standing a few feet away from the said saw”.

For the particulars of negligence we have to drop down to paragraph 8. Paragraphs (a) and (b), (e) and (f) are standard, and can be found in any of the standard text books on pleadings. Paragraphs (c) and (d) however, purport to particularize the general averment in paragraph 5, without, in fact, adding or detailing

anything thereto. Paragraph (g) comes very close to, if it does not actually do so, raising the plea of *res ipsa loquitur*, but again, neither the case nor the appeal proceeded on this footing. The defence, which maintains a general denial, nevertheless, condescends to the particular by denying that the saw slipped from the hand of a coworker to the plaintiff.

The issues having been joined, they were then distilled down into the agreed issues recorded and filed nearly 18 months before the trial. Mr Inamdar took us through these in detail and it cannot be disputed that issue No 2 is an invitation to the court to find, yes or no, whether the accident occurred in the manner described in paragraph 5 of the plaint. The learned judge, however, did not decide this issue directly, (nor could he do so in view of the way in which the evidence had emerged); for he said

“No evidence was tendered to show the saw operator was negligent as a result of which the plaintiff was injured.

.....

Consequently I am unable to find that the slipping of the saw, if indeed it occurred, was due to any negligence on (the saw operator’s) part.” So there, in that passage the learned judge negatives the very issues which had been framed on the pleadings. He, however, went on to say

“I, however, find that the plaintiff was cut by the saw in the course of the horn cutting operation.”

This was, of course, generally, in accordance with the plaintiff’s evidence on this point because he maintained in court that which he had said in this statement to the insurers on 12th August, 1982, namely that the animal, whether stunned or not by the captive bolt, writhed or jerked its head, but anyway moved and hit the circular saw being operated by Peter Nyamai with the result that the plaintiff’s hand was cut.

Though this accident was at variance with paragraph 5, and was commented on by Mr Inamdar in his submissions in the High Court, no attempt was made to amend the plaint, except in another minor and probably irrelevant respect. Did that variance, therefore, preclude the learned judge from reaching a finding based on the plaintiff’s evidence, that the accident occurred due to the defendant’s failure to exercise reasonable care to ensure smooth and safe operations in its factory? Mr Jiwaji, who is in my opinion to be complimented on presenting an argument on behalf of the respondent/ plaintiff at relatively short notice due to the absence of Mr Pandya overseas, stated that there was no dispute, on the pleadings or otherwise, that the injury was caused by the electric saw, and he stated that the judge in his judgment did address his mind to the issues raised.

I come now to the authorities cited by Mr Inamdar in support of his submission that the plaintiff was limited to the particulars given in the plaint and that the judge was not entitled to rely on evidence which went outside those particulars, all the more so since agreed issue No 2 reiterated paragraph 5 of the plaint.

In the early case of *Blay v Pollard & Morris*, [1930] AE Rep 609 the Court of Appeal held that the trial judge was not entitled to make a finding of *non est factum* because, as a matter of law, the plea was not open to a person who was not mistaken as to the nature of the document he had signed, even though he might misapprehend its legal effect. That, of course, was a straight misdirection of law. However, the way in which that case becomes relevant to the instant one was the second contention put forward by Morris, which was that the agreement could be avoided for fraud. Now fraud at common law has always had a special connotation. The allegation being a serious one, it has been rightly held that such an allegation must be strictly pleaded and proved. And this indeed emerges from the following passage in the judgment of Slessor LJ, which to my mind explains the passage from the earlier judgment of Scrutton LJ at page 612 cited to us by Mr Inamdar. Slessor LJ said

“Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

The gravamen of that case was, therefore, that the fraud alleged regarding the agreement to pay the rent

prior to the dissolution of the partnership could not be raised without having been pleaded. For myself, I would hesitate to apply the rigours of the universal rule of pleading regarding fraud to a case of industrial injury which is an action of a wholly different character, involving, as it does, the recollection of witnesses of a rapid series of events in which there is understandably a risk of confusion, especially by the person injured.

Taking the third case next, *Kanti v British Traders Insurance Co* [1965] EA 108. This, though no fraud was alleged, likewise related to a commercial transaction and whether the insurers were liable to indemnify the insured for damage to enamel ware under an All Risks Insurance Policy. Again I would hesitate to apply rules applicable to a commercial contract to a case of personal injury, but before leaving that case I would emphasise the passage from Law JA's judgment in which he said

"When the parties agree an issue, the court should decide the case upon that issue if it is properly framed, and arises out of the pleadings".

To explain that case a little further, the nature of an All Risks Policy, which constituted the contract between the parties was such that once the plaintiff proved that the goods had arrived damaged, having left the port of consignment undamaged, and that the damage was not natural or inevitable, he had discharged the onus upon him. The learned Chief Justice's finding on the first appeal had in effect been that the goods were subject to inherent vice and it was for this reason that Law JA went on to hold that it would be unjust for the plaintiffs to be non-suited for having failed to prove something that was never made an issue between the parties at the trial and which was, in law, incorrect. So that really was the opposite of the present case, the appellate judge, having wrongly inserted a hurdle for the plaintiff to surmount which never arose to be tried in the first place. In the instant case, the issues, whether the plaintiff was injured by the saw and whether that was due to the Commission's breach of duty did arise fairly and squarely on the pleadings, particularly on paragraphs 4 and 8 of the plaint.

I, therefore, turn to Mr Inamdar's second authority, which was the only one relating to personal injury, though not one in the course of employment namely *Plotti v The Acacia Co* [1959] EA 218, in which Law JA as he later became, happened to be the trial judge. There the issues arose as to whether there was any contributory negligence by the plaintiff. But it will be observed that in that case paragraph 7 of the defence stated that the injuries were caused by the plaintiff's own "reckless and insistent attempts" to close the lift gates. In fact the evidence showed that the accident had not happened due to the plaintiff's positive acts, but only that he had failed to notice the chain, which had ridden up on the gates when the button was pressed and caught the plaintiff's hand. In those circumstances it was not surprising in my view that the court absolved the plaintiff of contributory negligence because the effect of the relevant portion of the defence was that the plaintiff injured himself by his own negligence; that his insistent pulling of the gates was the proximate act which had the causative effect of injuring him, whereas when the evidence came out, it transpired that all that he was guilty of was failing to see the chain.

Mr Inamdar quite rightly drew to our attention the passage at the end of page 251 of that report which emphasizes that the object of pleadings is to give to the opponent fair notice of the case he has to meet so that he may direct his evidence to that issue. Indeed the learned judge recognized this principle in the instant case for he stated it in so many words when ruling on the amendment sought by Mr Pandya. The defendant abstained from calling any evidence directed to the issue as to how the accident did occur, but only generally called the Foreman as to the sequence of events that should have occurred. In those circumstances they were not really in a position to refute the evidence that a second Peter Nyamai was working as the saw operator on the killing floor.

In this case I do not think there was any unfairness as regards the defendants knowing what case they had to meet. The plaintiff said straightaway in his evidence that he was injured due to the writhing or jerking of the animal. I think the defendants should thereupon have objected, if they wished to take the point, that the evidence was at variance with the pleaded particulars of negligence. They should not wait until the end of the case, or the appeal, and then, as it were, huff the other side for not having led evidence in accordance with the plaint. I consider it would be most unfortunate, in a case of personal injury, if a plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading.

Having reviewed the authorities and considered the submissions by the appellant's counsel on the appeal, it would be to my mind unjust to hold the plaintiff to be non-suited because, while the general allegation is correct, the particular way in which the accident happened was at variance with paragraph 5, when there are indeed other allegations in paragraphs 4 and 8 which make it perfectly clear that the accident happened at work in circumstances which established on the balance of probabilities that the defendants failed in the duty of care which they owed to the plaintiff.

For these reasons, notwithstanding the judge's unjustified finding as to the reason for the second hosing or watering down taking place, I agree with the finding that the accident occurred in the course of the horn-cutting operation and was due to the defendant's failure to take reasonable care to ensure that this was done safely.

I would, therefore, dismiss the appeal with costs to the respondent.

As Gachuhi and Kwach JJA agree, that is the order of this court.

Kwach JA. I have had the advantage of reading the judgment of Hancox, CJ, in draft and I concur with him. I would, nevertheless, like to add some remarks of my own.

Richard Ambogo Raden, the respondent in this case (hereinafter called the plaintiff) filed proceedings against Kenya Meat Commission (hereinafter called the defendant) claiming damages following an accident which occurred in the defendant's *abattoir* (the premises) at Mombasa on 20th July, 1981, early in the afternoon and as a result of which the plaintiff sustained personal injuries.

The plaintiff's cause of action as pleaded in his plaint was based on negligence and in the alternative on alleged breach of statutory duty on the part of the defendant to provide the plaintiff with a safe place of work. On the material day, the plaintiff, a casual labourer on a daily wage, had been detailed to work in the part of the premises known in the argot of the meat trade as the killing floor. The plaint contained allegations of negligence against a fellow-worker whose name was given as Peter Nyamai. Particulars of the alleged negligence were given. As the trial judge, after trial acquitted Peter Nyamai of negligence, it is not necessary for me to dwell further on this aspect of the case. The judge however went further and found that on the evidence, the allegations of breach of duty against the defendant had been proved on the balance of probabilities and gave judgment for the plaintiff triggering off this appeal.

Paragraph 4 of the plaint which was admitted in the defence filed on behalf of the defendant is in the following terms:

(4) It was a term of the said contract of employment between the defendant(s) and the plaintiff and or it was the duty of the defendants to take all reasonable precautions for the safety of the plaintiff while he was engaged upon his work, not to expose the plaintiff to a risk of damage or injury of which the defendants knew or ought to have known, to provide and maintain adequate and suitable plant, tackle and appliances to enable the plaintiff to carry out his work in safety, to take all reasonable measures to ensure that the place where he carried out his work was safe and provide and maintain a safe and proper system of work.

Particulars of alleged negligence and breach of duty to provide a safe place of work were given under paragraph 8 of the plaint, sub-paragraph (f) of which reads:

(f) Failing to provide or maintain any or any proper system of working.

As part of the preparations for the trial summons for directions was dispensed with and issues were agreed between counsel for both parties in a statement of issues dated 2nd June, 1987, and filed in court on 4th June, 1987, *inter alia* as follows:

(2) If so, did the said accident occur in the circumstances and/or in the manner alleged in paragraph 5 of the plaint?

(3) If so, was the said accident caused by the negligence and/or breach of contract of employment on the part of the defendants, its (sic) servant or agent as alleged in the plaint?

The matter did not come on for trial until 18th October, 1988, and the trial of the action presumably proceeded on the issues as previously framed. The judge assessed damages at Kshs 70,189.25 for which sum he entered judgment for the plaintiff together with interest and costs of the suit.

Although the memorandum of appeal contained some 9 grounds of appeal, Mr Inamdar, learned counsel for the defendant, restricted his assault on the first three grounds namely:

(1) The learned judge erred in holding the defendant liable on the ground that reasonable care was not taken to ensure that the animal was completely dead before carrying out the horn-cutting operation.

(2) The learned judge erred in holding the defendant liable on grounds which fell outside the scope and ambit of the pleadings exchanged in this case as well as of the issues agreed between the parties.

(3) The learned judge erred in failing to hold that, the plaintiff having failed to prove the negligence alleged in the plaint, his suit should be dismissed with costs.

I will deal with these grounds of appeal in their numerical order but before doing that I ought to point out that Mr Inamdar, right from the outset informed us that he was not taking issue with the learned judge's finding that there was, in addition to the horn-cutting operation, another operation in which a person other than the electric saw operator hosed the horns in the course of the cutting operation. I draw attention to this concession because, having regard to the conflict of evidence on this particular point, I would have thought that it would have provided a critical point from which Mr Inamdar could have mounted a successful challenge. I take this view of the matter because, speaking for myself, having read the record very carefully, I could not find any justification for this finding on the evidence.

With regard to the first ground of appeal, Mr Inamdar's complaint was that the learned judge erred in holding the defendant liable on the ground that reasonable care was not taken to ensure that the animal was completely dead before carrying out the horn-cutting operation. Evidence was given by the plaintiff concerning the process in the slaughter house which begins with the animal being given a shower to remove any dirt on its body. It is then led into a knocking box where it is stunned with a captive bolt pistol.

This procedure renders the animal unconscious and it then slides to the next gate where its throat is cut. It is then shackled and hoisted on a bleeding rail. From here the animal is moved to the killing floor section. When the animal gets to that stage it is supposed to be dead. Evidence was not led to explain how the fact of death is confirmed. The next procedure is the dehorning of the animal using an electric saw with a weight balance suspended from the ceiling. It is operated with a hand-switch and moves only vertically but not horizontally. When the switch is released it stops. According to the plaintiff's evidence during the process of dehorning, water is again trickled on the horns and that was the specific task he was engaged in when the accident occurred. On this point, the evidence was given on behalf of the defendant by Peter Njoroge Munyua, who was at the material time a foreman on the killing floor, was that no showering is done at the stage of cutting horns because; according to him, the Health Department does not allow it. He did not elaborate. He was not pressed either.

Commenting on the evidence of these two witnesses on the necessity or otherwise of showering of the horns, the learned judge said: The reason for spouting or trickling water on the horns was not given by the plaintiff. The question that immediately comes to the fore of the mind is why was trickling of water on the horns necessary ... Why then would it require a hosing with water as soon as it reaches the killing floor? The defendant's contention is that no such hosing is necessary. However, it would appear to me that there was and is justification for hosing the head, and particularly the horns.

The cutting of the horns, is done using a saw. In any sawing some particles fall off. I opine some of those fall on the animal's head, around the horns and others fall to the ground. These particles, like the dirt on

the animal's skin which is showered off, would require to be cleaned off to keep the outer body of the animal clean for the succeeding operations ... In the light of the opinion I have come to, I hold that there was, in addition to the horn cutting operation, another operation in which a person other than the electric saw operator hosed the horns in the course of cutting operation. It is obvious from the foregoing passage that the learned judge's conclusion as regards hosing during the process of dehorning is only a matter of opinion not based on any evidence.

As to whether the particular animal was dead or not when it reached the dehorning stage, the only evidence there is on this point is the undisputed and unchallenged evidence of the plaintiff who testified that a cow was brought onto a roller before it had died. That the man who had been assigned the duty of cutting off horns started doing so. Due to pain, the animal jerked its head. The horn hit the electric saw which in turn cut the plaintiff's right hand. The evidence of Peter Munyua was that by the time an animal is hoisted to the killing floor it is dead but he admitted that he was not present when the plaintiff was injured. The only other person who could have given direct evidence on the occurrence of the accident was Peter Nyamai, the electric saw operator, but the defendant chose not to call him. As a result, the only eye witness account was that given by the plaintiff which the learned judge accepted and, in my view, rightly so. The first ground of appeal accordingly fails.

Mr Inamdar's complaint in the second ground of appeal was that the judge's determination of liability fell outside the scope of the pleadings and the issues agreed between the parties. I have already set out the paragraphs in the plaint which I consider germane to this particular issue and while I am prepared to accept that the pleading in relation to breach of statutory duty could have been drawn better or improved upon, it nevertheless covered the basic essential ingredients of the particular cause of action involved. In this respect the defence is no better.

As to whether the allegation of breach of statutory duty formed part of the issues agreed between the parties, one only needs to look at issue number 3 to answer that question in the affirmative. Mr Inamdar referred us to three cases but they were only of marginal, if any assistance, in this appeal. The first is the case of *Blay v Pollard & Morris* [1930] ALL ER Rep 609. In that case, Pollard and Morris, who had carried on the business of garage proprietors, orally agreed to dissolve the partnership as from March 4, 1929, on the terms that Morris should take over the liabilities of the partnership as from that date. Pollard notified his father, who was a solicitor of the dissolution of the partnership, and the latter then prepared a written agreement to carry it into effect. By that agreement, Morris undertook to indemnify Pollard in respect of past rent. The agreement was signed by Morris who said he could not understand it. Judgment in respect of arrears of rent was obtained against Pollard and Morris, and the former claimed to be indemnified by Morris in respect of rent due before the dissolution of the partnership. Morris delivered a defence in which he pleaded that the written agreement was signed by him in the belief that it embodied the previous oral agreement, and that it was drawn up and signed under a mutual mistake of fact, and that he never agreed to indemnify Pollard for rent before the dissolution. There was no allegation of fraud, nor was rectification claimed in the pleadings. At the trial, it was found that Morris signed the document with practically no consideration of its terms, or that new liabilities had been imposed which Morris had not orally agreed to, and the judge, accordingly, rectified the agreement signed by limiting the liability to rent accruing after March 4.

On appeal by Pollard to the Court of Appeal, it was held that the appeal would be allowed because it was not open to Morris to raise the plea of *non est factum* (it is not his deed) in the absence of fraud or misrepresentation since he knew that the agreement he signed was for the dissolution of the partnership; there was no allegation of fraud or conduct amounting to fraud and no claim for rectification, and, therefore, it was not open to the judge to rectify the written agreement; and that there was no evidence of mutual mistake.

In the instant case, the alleged failure by the defendant to provide a safe place of work was not only pleaded but also particularized. It was also made an issue at the trial before the judge.

Mr Inamdar also referred to the case of *Kanti & Co Ltd v British Traders' Insurance Co Ltd* [1965] EA 108. That was an insurance claim and among the complaints raised was that the trial judge had decided

the case on an issue not agreed between counsel. Law, JA at p 117 c said: Where the parties agree an issue, the court should decide the case upon that issue, if it is properly framed and arises out of the pleadings, as was the case here.

As I have already pointed out, there was no transgression of that rule in the present case.

The last case *Plotti v Acacia Co Ltd* [1959] EA 248, concerned a claim for damages for personal injuries sustained by the appellant in a defective lift in the respondent's hotel. The trial judge gave judgment for the appellant but found him guilty of contributory negligence to the extent of 50%. It was contended on behalf of the appellant that this finding was based on particulars of negligence wholly different from those alleged against the appellant in the written statement of defence and that the contributory negligence found was at no time alleged against the appellant, who consequently had no opportunity of denying the same. The Court of

Appeal for East Africa found this complaint to be well founded on the evidence and allowed the appellant's appeal restoring to him the full award of Kshs 18,000/= general damages.

Mr Inamdar referred us to a passage in the judgment of Forbes, VP, at p 215 D where the importance of particulars in pleading was emphasized: The importance of particulars in pleadings was clearly demonstrated in *Esso Petroleum Co Ltd v Southport corporation* [1956] AC 218.

... In the course of his judgment Lord Normand said (at page 238):

... The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

I am in complete agreement with what Forbes, V P said in this passage. All I need to add is that the defendant in this case had more than fair, indeed abundant, notice of what the plaintiff's case was. The second ground of appeal accordingly fails.

I can dispose very briefly of the last ground of appeal. Having got the allegation of negligence out of the way, there was still the alternative limb of the plaintiff's case which the defendant ought to have met, but for some reason did not meet. And looking at the pleadings and evidence in the case as a whole, I have no doubt in my own mind that the judge was perfectly justified in arriving at the conclusion he did. This ground also fails.

For these reasons, I would dismiss this appeal with costs.

Gachuhi JA. I have had the advantage of reading the draft judgments of Hancox CJ and Kwach JA both of which I entirely agree with. I have nothing useful to add.

Dated and Delivered at Mombasa this 26th Day of February, 1990

A.R.W. HANCOX

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CHIEF JUSTICE

J.M. GACHUHI

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL