



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.50 OF 2017

(FORMERLY NKR.HCCA.94/2017)

(Appeal Originating from Nyahururu CM's Court Civ.No.71 of 2008 by: Hon. C.K. Obara– S.R.M.)

BIDCO OIL REFINERIES LTD..... APPELLANT

V E R S U S

PIUS MACHUKI OMBOGA.....1ST RESPONDENT

DAVID RATEMO MORAA.....2ND RESPONDENT

J U D G M E N T

The appellant, Bidco Oil Refineries Ltd is aggrieved by the judgment of C.K. Obara S.R.M. delivered on 2/4/2012 in S.P.M.C.C.No.71/2008.

The grounds of appeal as herein bellow:

- (1) That the learned trial magistrate misdirected herself in holding the appellant liable against the weight of the evidence adduced by the Respondents, which did not discharge the burden of proof as is required in Civil Cases to prove their case on a balance of probabilities;*
- (2) That the learned trial magistrate erred in law and in fact and wholly misapprehended the principles of the law of evidence in her evaluation of the oral, documentary and physical evidence regarding the handling and testing of the allegedly offending oil product and as a result came to erroneous findings on negligence against the appellant;*
- (3) That the learned trial magistrate erred in law and fact in failing to give proper consideration to, and/or in failing to take into account, relevant facts presented in the evidence adduced by the appellant in its defence and as such came to erroneous findings on liability against the appellant;*
- (4) That the learned magistrate erred in law and in fact making findings of what the appellant "ought" to have done, and by doing so, placed onerous requirements on the defence case, thus shifting the burden of proof to the appellant against well established legal principles;*
- (5) That the learned trial magistrate erred in law and fact in failing to give proper consideration to the appellant's submissions and the judicial authorities cited as such came to erroneous findings of liability against the appellant;*
- (6) The learned trial magistrate erred in law and in fact in making an assessment of general damages which was too excessive in the circumstances representing a wholly erroneous estimate of the damage suffered by the respondents in the matter.*

The appellant therefore prays that the appeal against the whole judgment be varied or set aside and the appellant be awarded the costs of this appeal.

A brief background of the case is that by a plaint dated 24/4/2008, the plaintiffs/respondents Pius Machuki Ombogo and David Ratemo Moraa filed this suit before the R.M.'s court where they sought general damages, special damages of Kshs.2,000/= and costs of the suit.

The plaintiffs alleged that on or about 11/7/2017 at about 4.00 p.m. the respondents bought one of the appellant's products, that is edible cooking oil (Ufuta Brand) from Spear Super Market Ltd Nyahururu and while using it to prepare 'binas' for sale locally, the said edible oil burst into flames causing serious bodily injuries to the respondents due to the negligence of the appellant Company, their agents or servants.

They alleged that the appellant was negligent by marketing the said cooking oil against the requirements of the key standard specifications for edible fats and oils. By marketing the said oil without examining or testing the same as to whether the same was good for human consumption and for human use; by not complying with the requirement of the standard in the parameter of matter volatile and by not warning the plaintiff to keep a distance on seeing or detecting certain behaviours of the said oil while in use.

That due to the appellants' negligence, the 1st respondent suffered deep burns, scalding of the right leg and hand; burns to the upper lip and exterior tongue, superficial burns adjacent to the deep burns. On the other hand, the 2nd respondent suffered the following injuries: Multiple burns on the left knee joint area; superficial burns on the lower thigh anteriorly and posteriorly and burns to the right third finger dorsum.

The appellant filed a statement of defence on 11/6/2008 in which it denied all the allegations of negligence attributed to it and pleaded that in the event an accident occurred, it was wholly caused by or substantially contributed to by the negligence of the respondents for using the cooking oil in a negligent manner by exposing it to fire flames; otherwise exposing the oil to extremely high temperatures unnecessarily, negligently conducting themselves needless of reasonable safety precautions; failing to heed their own safety and exposing themselves to unnecessary danger by their conduct. In the alternative, the appellant pleaded *volenti noti fit injuria*.

The respondents (PW1 and 2) testified before the trial court and called a witness (PW3), a laboratory analyst from Kenya Bureau of Standards. PW1 Pius Machuki who owned a food kiosk recalled on 11/7/2007 that him and PW2 David Ratemo Moraa bought 5 litres of Ufuta Oil from Spears Supermarket. He produced the oil and the receipt. When he reached home and wanted to use it, he noticed it was solid yet it was supposed to be liquid. They poured it into the pan after preparing the dough to cook mandazi (binas). He put in the first dough but on putting in the 2nd portion of dough, it was thrown up, hit the roof and it burst into flames. That the 2nd appellant ran away and he was left alone. He was injured on the face, hands and legs, tongue as a result of which he was hospitalized. He contacted his advocate who took the oil to Kenya Bureau of Standards who prepared a report. After a demand was made to the appellant and there was no response, this suit was filed.

PW2 reiterated what PW1 told the court. He sustained injuries to the middle left finger and the knee. Their neighbours took them to hospital where PW1 was admitted but PW2 was not. The remaining oil was taken to their advocate and forwarded to Government Analyst. He said that the pan, the binas all got burnt as he ran away after they burst into flames.

PW3, Isaac Omondi Mugenya, a laboratory analyst for KEBS recalled that oil was taken to the laboratory for analysis. The request was for 8 parameters. Only one did not meet the standards; that matter volatile standard should be 0.2% maximum but the sample had 0.47%; that the matter volatile was high (Ex.16) and therefore the sample failed on matter volatile and that it could be dangerous if exposed to high temperatures.

The defence on their part called DW1, Albert Mwangi the quality assurance officer working with the appellant who testified that the appellant ensures quality compliance of their products; that edible oils are not dangerous and had never heard of any complaint; that in 2007, they were manufacturing Ufuta and complied with standardization mark of 2554 (Ex.3) which had to appear on all products; the permit had been renewed on 10/7/2007 by KEBS and was to expire 24/4/2008.

He said that he could not confirm whether the contents in the exhibit were manufactured by Bidco. He denied having received any information from KEBS. He denied that Bidco was responsible for how customers used their products.

The appellants filed submissions which were highlighted by Ms. Kimunyo who submitted that the respondents failed to discharge the burden of proof and instead the court shifted the burden of proof to the appellant by finding that the appellant should have done tests of the offending products, if they were not the same oil. Counsel also urged that the oil being a perishable product, the contents may have varied once it was unsealed within the two months before the tests.

Counsel also questioned whether the P.Ex.No.2 was a product of the appellant's factory because whereas PW1 said that the serial number was 01181650, DW1 indicated that the serial no was 3554.

Counsel also argued that since the respondents used to use other products like Fahari Cooking Oil, they may have mixed with the subject product thus causing volatility. Counsel added that DW1 testified that if dough or anything else came into contact with oil, it has the effect of changing its composition and rendered it volatile. DW1 further said that cooking oil is not flammable unless exposed to extreme heat; that though it was alleged that an explosion occurred, it was never reported to police and that the doctor found that the injuries were a result of hot oil not a fire.

Counsel also submitted that due process under the standards Act was not followed in that KEBS needed to conduct investigations into the allegations made by the respondents but they did not and DW1 admitted as much.

The trial court was faulted for not considering the case law cited by the appellants, that is, *Kenya Breweries Ltd v Kipsang 2007 eKLR* where the court emphasized the need to test the product around the same time of using it because being perishable goods, they are bound to change. In this case, the incident was on 11/7/2007 and the test by Kenya Bureau of Standards was done late July.

Mr. Omariba, the respondent's counsel in his submissions in reply urged that the oil was tested by Kenya Bureau of Standards and did not meet the required standard; that PW3 blamed the appellant for the substandard product. Counsel urged that the appellant should have requested Kenya Bureau of Standards to do further tests and come up with their own independent reports.

This being a first appeal, it is required of this court to reconsider and re-evaluate the evidence on record and make its own conclusions. In *Kenya Power and Lighting Co. Ltd v E.K. O. & another 2018 eKLR*, the court stated:

“As a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own

conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.”

The respondent produced a receipt issued to them upon the purchase of Ufuta Oil from Spears Supermarket. It is not denied that the Ufuta product was the appellant's.

The appellant complains that the trial court shifted the burden of proof to the appellant, when the the court said that if the appellant was not sure about the contents of the oil, they should have had it tested.

It is trite law that he who alleges must prove (Section 109 Evidence Act). The respondents having alleged that the contents of the appellant's commodity, 'Ufuta' was substandard and caused them injuries, had the duty to prove that indeed the oil was substandard. The trial court observed as follows: Page 68 of the Record of Appeal line 14:

“The insurance company never called for the sample oil that had caused injuries to the plaintiffs so as to subject the same for analysis and come up with an independent report. They never called for the binas or dough that was being used. They also never called for the pan that was being used and demand to know what kind of fire was being used, that is, whether it was gas, charcoal, electricity, stove or firewood.”

DW1 cannot therefore allege that he is not sure whether the contents in P.Exh.3 are a genuine product of the appellant when there was all the opportunity to have the exhibit tested independently to confirm whether the contents were a genuine product of the appellant. Besides, the appellant did not object to its production. That line of argument does not therefore hold any water.

In Civil cases, the burden of proof is on a balance of probabilities unlike criminal cases where proof by the prosecution is beyond reasonable doubt. In the instant case, to prove that the Ufuta Oil that was sold to the respondents was substandard, the respondents had the oil subjected to analysis by PW3, a laboratory analyst at KEBS. He explained that out of 8 parameters the oil failed one test, on matter volatile.

Whereas the matter volatile standard should have been 0.2 maximum, the sample analyzed by PW3 was 0.47 and hence dangerous if exposed to high temperatures. Having obtained expert evidence from PW3 about the status of the sample that the respondents presented for analysis, that evidence could only be controverted by other independent evidence of an expert. The appellant should have had their own independent analysis of the sample. This is comparable to cases involving bodily injury to victims who obtain medical reports from doctors of choice but to confirm that the victim was injured, the respondent will ordinarily engage another doctor to carry out another independent medical examination on the victim to confirm and ascertain the nature and extent of the injury. Similarly, in this case, the respondent having availed evidence to prove that the sample was volatile and dangerous, it is the appellant who would have to counter PW3's evidence. In my view, the court did not shift the burden of proof to the appellant.

A manufacturer of consumable goods is under a duty to take reasonable care so that the goods meet the standard of goods that was intended. Charles worth and Percy on Negligence at page 478 defined the manufacturer's duty as:

“Any person who produces goods which he intends to be used or consumed by others is under a duty to take reasonable care in their manufacture, so that they can be used or consumed in the manner intended without causing physical damage to person or property.”

DW1 testified that they do analysis of their products at various stages of production. He did not however have the analysis for that period in respect of the subject product. D.Ex.2, a report dated 10/7/2007 and prepared by F.K. Nyakoe, Principal Laboratory Analyst, in which it was indicated that the oils had been tested and results were found to be 0.01% and that the matter volatile is 0.2 maximum. However, the said Nyakoe was never called as a witness to be examined on his report. He did not examine the subject sample from the respondents to confirm whether it was the same product or not. Although the appellant in applying for the permit agreed to comply with standards and regulations by KEBS and a standardization mark was placed on the product but that is not a guarantee that the standard has been met.

The applicants also contend that the sample may have been exposed to other substances that caused the oil to become volatile. However, the respondents purchased the product on 11/7/2007 and used it same day. The same was subjected to analysis on 27/7/2007 – about 2 weeks later. It is distinguishable from the decision of Kenya Breweries Ltd v William Kipsang (2007) eKLR because in that case, because the beer was not tested to confirm that there was a toxic substance and secondly, the beer had been drunk four years prior to the hearing, unlike this case where time lapse was only 2 weeks. I agree with the trial magistrate's finding that the subject oil was analyzed within a reasonable time. What was unknown is the age of the said Ufuta Oil on the shelf.

Having considered the evidence on record, I come to the same conclusion as the trial court did, that there was no other independent evidence to contravene the respondents' evidence. I also agree with the court that the respondents did not demonstrate what steps they took to protect themselves from danger associated with use of hot oil and a fire. The respondents owed themselves a duty of care. They also did not demonstrate that they had any protective gear and in my view, they should have borne the greater responsibility to ensure they were safe when using the oil. I therefore allow the appeal on liability and apportion liability at 60% as against the respondents.

Whether the quantum of damages was excessive:

The 1st respondent sustained the following injuries:

- (i) Deep burn scalds right leg and hand;
- (ii) Burns on the upper lip and anterior tongue;

(iii) *Superficial burns adjacent to the deep burns.*

The court awarded him damages of Kshs.350,000/=.

The 2nd respondent sustained the following injuries:

- (i) *Multiple burns left knee joint area (deep);*
- (ii) *Superficial burns – lower thigh arterially and posteriorly;*
- (iii) *Burns right 3rd finger dorsum side.*

The 1st respondent, complained of photophobia as the eyes were affected by hot fumes, painful tongue on sipping hot tea, or warm fluids and numbness of both hands and has to keep applying oil to avoid dryness. He was admitted for 12 days. The doctor assessed the degree of injury as maim with temporary disability due to hypopigmentation and that pains could be over within 2 years. The respondent's counsel had submitted an award of Kshs.500,000/= and Kshs.450,000/= for each respondent while the appellant counsel suggested an award of Kshs.200,000/= for both plaintiffs.

Courts will always be slow to interfere in the award of damages because it is an exercise of the court's discretion. An appellate court will only interfere with an award of damages if it is demonstrated that the trial court did not exercise its discretion judiciously or failed to observe principles that guide the courts in awarding damages. In *Kipkebe Land v Moses Karauri Masaku HCA.127/2004 (Kisii)*, the court observed: "It is trite law that an award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must, however, be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such facts as previous awards for similar injuries and such other relevant factors."

The court in awarding damages must also take into account the fact that the award of damages can never put the plaintiff back in the shoes he/she was in before the injury but it is just some reasonable compensation for the injuries suffered. In *H. West & Co. Ltd v Shepherd (1964)*, the court held:

"Money cannot renew a physical frame that has been battered and shattered. All that the judges and courts can do is to award sums, which must be regarded as giving reasonable compensation."

In *Kemfro Africa Ltd t/a Meru Express & another v A.M. Lubia & another (No.2) [1984] KLR 199*, the court held:

"The principles to be observed by an appellant cannot in deciding whether it is justified in disturbing the quantum of damages awarded by the trial Judge were held by the former Court of Eastern Africa to be that it must be satisfied that either the Judge, in assessing damages, took into account an irrelevant factor or left out of account a relevant one, or that, short of that, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

The question is then whether the trial court in the instant case observed the principles that were set out in the *Kemfro case*. The appellant relied on the decision of *Yunis Noor Mohamed Mangia v A.G. HCC.3034/1996*, where the award was made in 2000 where the plaintiff suffered more serious burns including 1st degree burns on the right arm, 2nd degree bruises on both feet and the court awarded Kshs.120,000/=. In *Eldoret Steel Mills Ltd v Moenga Obino Josephine (2014) eKLR*, the plaintiffs suffered injuries that were quite similar to the respondent's and an award of Kshs.150,000/=. On the other hand, the respondents had relied on the decision of *Lilian Otieno v Joseph Kimana Nrb.HCC.2670/1986* a case determined in 1990 where the plaintiff sustained bruises on both legs, joint areas, was admitted for three weeks and was left seriously scared and was awarded Kshs.150,000/=. In *Nqala Shedi v Jackson M. Nyambu, MSA.HCC.152/1992*, a case determined in 1993, the plaintiff suffered severe burns on both legs and back, was awarded Kshs.250,000/.

I note that the injuries sustained in the decisions cited by the respondents counsel were comparable with the respondents' injuries though they had been made over 20 years ago. I find that the award of Kshs.350,000/= and Kshs.300,000/= for each respondent respectively was not too high or low as to amount to an erroneous exercise of discretion. Apart from taking into account the comparable authorities, the court has to taken into account the inflationary trends. I find the award quite fair and I find no good reason advanced to warrant this court to interfere. I therefore decline to interfere with the award of Kshs.350,000/= and Kshs.300,000/= respectively. The said sums will be subject to apportionment. Special damages of Kshs.1,000/= each had been proved. In the end, each respondent will have judgment as follows:

1st Respondent general damages	350,000/=
Special damages	1,000/=
(less contribution 60%)	<u>210,600/=</u>
Total.....	<u>140,400/=</u>
2nd Respondent general damages	300,000/=
Special damages	1,000/=

(less contribution 60%) 180,600/=

Total.....120,400/=

The appeal succeeds to that extent and the respondent will have ½ the costs of the appeal.

Dated, Signed and Delivered at NYAHURURU this 27th day of February, 2020.

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Ndegwa holding brief for Omariba for respondents

Eric – Court Assistant