



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 187 OF 2017

LANDMARK HOLDINGS LIMITED..... APPELLANT

VERSUS

NEBART MITARU RIUNGU..... 1ST RESPONDENT

ELIZABETH KAGUNA2ND RESPONDENT

JUDGMENT

1. The 1st and 2nd respondents were the plaintiffs in Milimani CMCC No. 5151 of 2008. They had sued *Landmark Holdings Limited* (the appellant) seeking general and special damages under the *Fatal Accidents Act* and the *Law Reform Act* in their capacity as administrators and legal representatives of the estate of their daughter, the late *Dorian Njeri Mitaru*.

2. In their amended plaint filed on 10th March 2016, the respondents pleaded that the appellant was the owner and/or beneficial owner of a perimeter wall erected on LR No. 209/10323 which was adjacent to Mukuru kwa Reuben in Industrial Area, Nairobi. That on or about 9th June 2007, the deceased was lawfully residing in her house at Mukuru kwa Reuben when the appellant's aforesaid perimeter wall fell and/or caved in on the deceased's temporary shelter and as a result, the deceased sustained fatal injuries; that consequently, her estate and dependents suffered loss for which they were entitled to compensation by way of damages.

3. It was the respondent's case that the wall collapsed and fatally injured the deceased because of the appellant's negligence attributed to, *inter alia*, failing to ensure that the stone wall was safe, strong and properly constructed. The other particulars of the appellant's alleged negligence were pleaded in paragraph 4 of the amended plaint.

4. In its amended defence filed on 28th April 2016, the appellant denied the respondent's claim and put them to strict proof thereof. In the alternative, it averred that if the alleged accident occurred which was denied, it was solely caused by the negligence of the deceased. The particulars of the deceased's alleged negligence were pleaded in paragraph 4 of the amended defence.

5. After a full hearing, the learned trial magistrate entered judgment in favour of the respondents against the appellant on liability at 100%. She also awarded the respondents damages as follows:

i. Pain and suffering	KShs.30,000
ii. Loss of expectation of life	KShs.100,000
iii. Loss of dependency	KShs.1,200,000
iv. Special damages	KShs.15,300
Total	KShs.1,345,300

6. The appellant was dissatisfied with the judgment of the trial court hence this appeal. In its memorandum of appeal filed on 26th April 2017, the appellant advanced eight grounds of appeal in which it principally complained that the learned trial magistrate erred in law and fact by making a decision which was in conflict with the express provisions of the law and was against the weight of the evidence on record; by failing to take into account binding authorities cited before her by the appellant; by finding for the respondents yet they had not proved their claim to the required legal standard. The appellant also faulted the trial court for shifting the burden of proof from the respondents to itself.

7. By consent of the parties, the appeal was prosecuted by way of written submissions. At the hearing, learned counsel appearing for both parties chose not to make any oral highlights and relied entirely on their written submissions.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to revisit, re-evaluate and to reconsider all the evidence tendered before the trial court to arrive at its own independent conclusions. See: ***Selle & Another V Associated Motor Boat Company Limited & Others, [1968] EA 123.***

9. I have carefully considered the grounds of appeal, the parties' rival written submissions and the evidence on record. I have also read the judgment of the trial court. Having done so, I find that what is contested in this appeal is the trial court's finding on liability. The key issue therefore that arises for my determination is whether the learned trial magistrate erred in her finding that the respondents had proved their case against the appellant to the standard required by the law, which is, on a balance of probabilities.

10. In order to resolve the issue I have identified for my determination, it is important to outline the evidence that was presented before the trial court. The court record shows that the respondents called two witnesses in support of their claim while the appellant called one witness.

11. The 1st respondent testified as PW2. He testified that his late daughter had been living in a rented semi-permanent structure made up of iron sheets at Mukuru kwa Reuben. On 10th June 2007, he received a telephone call informing him that a perimeter wall owned by the appellant had collapsed fatally injuring his daughter. He went to the scene and confirmed that information. He also went to the mortuary and identified his daughter's body.

12. In cross examination, PW2 stated that he did not have any evidence to prove that the deceased used to live in Mukuru kwa Reuben. He claimed that the appellant was the owner of the wall because he saw a signboard at the scene with the name "landmark". He admitted that he did not know what caused the perimeter wall to fall.

13. PW1, Dr. Peter Muriuki Ndegwa, a pathologist did not offer any material evidence to support the respondents claim of negligence against the appellant. He only produced a post-mortem form confirming the cause of death of the deceased which was produced as *P exhibit 2*.

14. DW1, Zablon Maziga Amugani, the appellant's Operations Manager testified in support of the appellant's case. He denied that the appellant owned the premises in which the perimeter wall was constructed and that the wall collapsed on 9th June 2007 due to its negligence as alleged. He claimed that the appellant leased the land in the year 2002 from a company known as Pansiba Limited; that at the time the lease was executed, the wall had already been constructed. He blamed residents who had allegedly built illegal structures against the wall for its collapse claiming that they had drilled holes on it to fix water pipes which weakened the wall. He produced the lease agreement executed by the appellant and Pansiba Limited as *D exhibit 1*.

15. Having analysed the pleadings and the evidence on record, I find that since the respondents' claim was based on negligence, in order to succeed in their claim, they were dutybound to prove on a balance of probabilities that the deceased lost her life as a result of the appellant's negligence as pleaded in the amended plaint. I say this because it is a cardinal principle of the law of evidence as encapsulated in *Sections 107 to 109 of the Evidence Act* that he who alleges must prove. See: ***Mbuthia Macharia V Annah Mutua Ndwiga & Another, CA No. 297 of 2015.***

16. In this case, my evaluation of the evidence on record reveals that the evidence adduced by the respondents only proved that the perimeter wall collapsed on the house the deceased was living in causing her fatal injuries. The 1st respondent did not know how or why the wall collapsed. He did not claim that the wall collapsed because of any act or omission done by the appellant or its authorized agents which was negligent.

17. The appellant through DW1 denied having constructed the wall claiming that it found it already in place when it leased the premises from Pansiba Limited in the year 2002. This claim was not denied by the respondents. The appellant denied any liability for the wall's collapse inferring that it was caused by natural factors, that is, heavy downpour and activities by third parties who had built structures against it and drilled holes in it to fix water pipes.

18. In responding to the appellant's submissions that the respondents had not proved their claim because they had not produced an engineer's report to confirm that the wall fell due to its poor construction, the learned trial magistrate stated as follows at page 37 of the record:

"... on this issue my opinion is that facts speak for themselves if the wall fell then it meant it had not been properly constructed and if it had been constructed to the required standards then as DW1 stated that the deceased had together with others drilled holes in the said wall which weakened it, it would not have been difficult for the defendant to bring in an expert witness or report of an engineer to establish that they assessed the wall next to the deceased's house and found that holes had been drilled in that section of the wall and as a result the wall was weakened which led to its collapse, further the defendant did not provide evidence to prove that the deceased's house was an illegal structure, they failed to call a witness from city council to confirm his assertions they also failed to enjoin the alleged owner of the suit property and attempted to introduce him in the proceedings when the matter was well advanced as such on liability I find that the plaintiff has proved the case to the required standards...."

19. Though I agree with the learned trial magistrate in her finding that the collapse of the wall may be evidence that it was not constructed to the required standards, there was no evidence adduced before her to prove that it is the appellant who had constructed the said wall or that it had done or omitted to do anything that would have caused or prevented its collapse.

20. The trial court's finding that the appellant ought to have produced expert evidence to prove its claim that the wall collapsed due to weakness caused by drilling of holes by occupants of houses in the adjacent land amounted to shifting the burden of proof from the

respondents to the appellant which was a fundamental misdirection of the law on the burden of proof. It is the respondents who had the evidential burden of proving that the wall collapsed as a result of the appellant's negligence and before that burden was discharged, the appellant was not under any duty to call any evidence in the suit.

21. It is also my finding that the learned trial magistrate also erred in blaming the appellant for not enjoining the owner of the suit property in the suit. The respondents are the ones who had instituted the suit not the appellant. The appellant as the defendant did not have any obligation to decide who was to be enjoined as a party in the suit except as a third party. It was the duty of the respondents to undertake due diligence to establish the correct party to sue or to enjoin as a co-defendant.

22. As the defendant, the appellant had a choice in deciding whether or not to enjoin Pansiba Limited as a third party in the suit and it cannot be blamed for choosing not to do so. It is apparent from the evidence considered as a whole that the respondents sued the wrong party.

23. Having found as I have above, I find that the learned trial magistrate erred in her finding on liability by misdirecting herself on the law on both the burden and standard of proof and thereby arrived at the erroneous conclusion that the respondents had proved their case against the appellant on a balance of probabilities which they had not. In the premises, though I truly sympathize with the respondents' situation considering that they lost a daughter in the unfortunate incident, I have no option but to find merit in this appeal which I hereby do.

24. Consequently, the appeal is allowed. The judgment of the learned trial magistrate is hereby set aside and is substituted with an order dismissing the respondents' suit with costs.

25. Regarding costs of the appeal, the order that best commends itself to me given the facts and circumstances of this case is that each party shall bear its or their own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of October, 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Mokaya holding brief for Mr. Kabue for the appellant

Mrs. Njiru for the respondents

Ms

Ubah:

Court

Assistant