REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 75 OF 2019

HANTEX GARMENTS EPL LTD.....APPELLANT

VERSUS

MARSELINA FURAHA KAZUNGU.....1ST RESPONDENT

KENYA POWER & LIGHTING CO. LIMITED.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Senior Principal Magistrate in Kaloleni Hon. L. N. Wasige delivered on 25th September 2019 in Senior Principal Magistrate Court at Kaloleni Civil Suit No. 26 of 2013)

Coram: Hon. Justice R. Nyakundi

Jengo advocate for appellant

H. N. Njiru advocate for the 1st respondent

Mogaka Omwenga & Mabeya advocates for the 2nd respondent

JUDGMENT

The 1st respondent filed a suit against the appellant and the 2nd respondent vide an amended plaint seeking general and special damages for injuries she suffered following an explosion at the appellant's premises on 18.3.2013.

During the hearing, the appellant and the 2nd respondent opposed the claim of the 1st respondent. In her Judgment, the Learned trial Magistrate found that the appellant was 100% liable and awarded general damages of Kshs.150,000/= and special damages of Kshs.15,000/= plus costs of the suit.

Being aggrieved with the Judgment of the trial Court, the appellant lodged an appeal on the following four grounds:

> ***(1). That the Learned trial Magistrate erred in Law and in fact in holding that the 1st respondent had proved his case on breach of duty of care and or negligence against the appellant to the required standard.***
>
> ***(2). That the Learned trial Magistrate erred in Law and in fact in failing to hold that the parties are bound by their pleadings and in holding that the 1st respondent had proved its case on negligence and or breach of duty to care with the evidence that was contrary to the pleadings.***
>
> ***(3). That the Learned trial Magistrate erred and misdirected herself by properly failing to evaluate and analyse the evidence and compare it with the case as pleaded.***
>
> ***(4). The Learned trial Magistrate erred in Law in failing to appreciate that the employer's duty to care is not absolute but a reasonable to be decided from the facts of the case and approached the case in issue as a strict liability case.***

Background

(PW1) the plaintiff, told the Court that she had been a general worker for the appellant and produced a copy of her work identity card **(Pexhibit 1).** She recalled that on 18th March 2013 in the afternoon while at work, the electrical switch at her section exploded. That the supervisor, **Yego,** directed the employees numbering about 300 outside the premises and they returned after calm was restored.

She stated that there was a second bigger explosion that filled the place with smoke. That as workers ran outside, she fell down the stairs injuring her right hand and chest as other workers stepped on her. That she was dragged outside and rushed to Mariakani Sub-county where she was treated. She produced the treatment notes as **(Pexhibit 2)**, a x-ray report from Jamu Imaging as **(Pexhibit 3)** and a sick sheet from the appellant as **(Pexhibit 4).**

The plaintiff told the Court that she was not well, as she could not carry heavy items and that her chest aches at times and blamed the appellant for failing to employ a person to be in charge of the electrical system.

She also told the Court that they had been trained to ran to the safety assembly point when they heard the appellant's alarm but claimed that they had never been inducted on how to save themselves from a fire outbreak and did know what a fire extinguisher was. Further, she informed the Court that there were two doors at the building but one was locked resulting to a lot of pushing.

She stated that she had sued the 2nd respondent as it was responsible for the supply of power to the appellant and claimed she had never seen its employees check whether the appellant's electricity was in good working condition.

In cross-examination by **Mr. Jengo** Learned counsel of the appellant, the plaintiff stated that she had worked for the appellant for three months and that the place was safe. She also stated that they had been inducted on a fire drill on how to react when there was a fire. She informed the Court that there were frequent power blackouts and that the switchboard exploded though she did not know the cause of explosion.

During cross-examination by **Mr. Kirui** for the 2nd respondent, she stated that the place she worked was four times the size of the Court but only one door was functional as the other had been closed. She claimed that if the room had more doors she would not be injured. She also stated that it was a gas cylinder that exploded.

(DW1) Christopher Njoroge Kinyanjui was the assistant Human Resource (HR) manager for the appellant. It was his evidence that on 18th March 2013 there were frequent power outages and that at around 2.00 p.m. there was a minor explosion at the ground floor of the go-down. That as a result some sparks emanated from the distribution board. He informed that a gas cylinder had never exploded as the only gas cylinder in the premises was in the kitchen which was far away from where the explosion occurred. He blamed the 2nd respondent for the explosion since it supplied electricity to the appellant.

He stated that the go-down where the explosion occurred was 5 times the size of the courtroom and had 150 workers. He stated that there were three doors at the go-down, a big one and two small ones, each door being 6 meters wide. He also stated that there were no stairs only a slope big enough for the workers to exit.

He further informed the Court that the appellant had a fire team at the site that extinguished the fire in two minutes. He denied that there were injuries caused due to failure to control the fire and that the 1st respondent had not notified the appellant of the accident.

In cross-examination by **Mr. Ongiri** counsel for the 1st respondent, **Mr. Kinyanjui** stated that there was no explosion but only sparks. He admitted that workers were injured as they ran outside the go-down though he stated that the slope was not dangerous as the exits were big.

During cross-examination by **Mr. Kirui** counsel for the 2nd respondent he stated that a power surge caused the incident but did not know whether the outrages had been reported on the material day. He further stated that the 1st respondent got injured while running away from the fire.

(DW2) Ruth Kasera was an engineer with the 2nd respondent informed the Court that she went to the appellant's premise on 13th August 2013 after the 2nd respondent received a letter that they were being sued. She spoke to the Human Resource Manager, **Julius Yego** who informed her that some employees saw sparks from the circuit breaker. She informed the Court that any power issues at a premises should be reported to the 2nd respondent's office or through written letters. That the appellant did not report and that when she went to investigate five months later she found nothing useful since the circuit breaker that had exploded had been replaced. She prepared her report and produced it as **Dexhibit1.**

(DW2) told the Court that the 2nd respondent distributed lines to premises and supplied electricity to the main distribution board of its customers but the circuit breaker and wiring was upto the customers as the 2nd respondent did not do wiring.

In cross-examination **Mr. Ongiri, (DW2)** stated that the appellant had failed to report the incident. During cross-examination by **Mr. Jengo** for the appellant, she told the Court that she could not comment on the incident since she visited the appellant's premises after 5 months and that the appellant did not make a report so she was unable to establish the cause of fire conclusively. She stated that if investigations had revealed that the 2nd respondent was culpable, it would have been liable and compensated the affected customers.

Submissions

The appeal was canvassed by way of written submissions by respective counsel. The appellants filed their submission dated 25th June 2020 on 26th June 2020 and the respondents filed their submissions dated 2nd July 2020 on the 7th July 2020.

The Appellant's Submissions

Mr. Jengo counsel for the appellant submitted that the trial Court erred in making a finding of negligence that was contrary to the evidence and holding that the 1st respondent had proved the same on a balance of probability. He stated that the 1st respondent blamed the 2nd respondent for the explosion. That the trial Court's find that the plaintiff had proved her case as pleaded was contrary to the evidence adduced. He cited the case of **Muthoni Nduati v Wanyoike Kamau & 5 others HCCC No. 1661 of 1980; Galaxy Paint Co. Ltd v Falcon Guards Ltd Civil Appeal No. 219 of 1998 and Amalgamated Sawmills Ltd v Andrew Nyamonyo Onyancha {2011} eKLR** and submitted that the trial Court had an obligation to ensure that the case was proved against each party to the extent it was pleaded.

Counsel contended that the finding of the trial Magistrate that the testimony of **(DW2)** that the accident was caused by a defective circuit breaker was most probable was a misrepresentation of the evidence of **(DW2)** and was not based on any evidence. He stated that the evidence of **(DW2)** was hearsay and was inadmissible as set out in the case of **Prime Bank Ltd v Josephat Ogora Esuge HCCA No. 812 of 2004.**

Mr. Jengo submitted that the trial Magistrate turned herself into an expert witness on the defectiveness of the circuit breaker and that the circuit breaker could be 100% effective despite the amount of electricity that had been put through it.

Additionally, that the trial Magistrate's finding was contrary to the plaintiff's evidence that the explosion was caused by a gas cylinder and not an electric fault.

Finally, counsel submitted that the plaintiff in her amended plaint never raised a complaint of too many workers working in a small space or their being only one insufficient door for all the employees in her amended plaint and that (DW1) only responded to what was raised in evidence without pleading. That if pleaded, the appellant would have produced the exact measurements of the working space and photographs of the building to show the exits. Counsel urged that what was neither proved nor disapproved is deemed proved and that the Court could not base its decision on an unpleaded issue hence the Magistrate misdirected herself.

Learned counsel urged that the trial Court had fell into error in holding that the appellant breached its duty of care as an employer. He asked the Court to hold that the 1st respondent did not prove her case on negligence and set aside the Magistrate finding and dismiss it with costs.

The 1st Respondent's Submissions

Mr. Kirui for the 1st respondent opposed the appeal in its totality. He submitted that the 1st respondent had discharged her duty of proof raised in her amended plaint and proved her case on a balance of probabilities. That she blamed the appellant for failing to provide and maintain a safe working system and/or maintaining power condition hence exposing her to the sustained injuries which it knew when the supervisor caused and/or made the plaintiff to come back and continue to work under dangerous conditions when it knew or ought to have known that it was unsafe and dangerous for her to do so.

Counsel contended that the Learned Magistrate took into consideration all the evidence of the appellant's witness and was consistent to the estimation of the evidence on record when preparing her Judgment. That the Judgment clearly showed that pursuant to Section 48 of the Evidence Act, the Learned Magistrate took into consideration the evidence of (DW2) as the only expert witness who managed to explain the causation of the explosion. He urged that the consideration of expert testimony was purely the discretion of the trial Court having taken evidence of both parties.

Learned Counsel challenged the appellant's assertion that the testimony of the 1st respondent was contradictory with her pleadings. He stated that the evidence was lucid, unequivocal and coherent on how she was injured on the material day. That she was consistent on the events that led to her injury. That there was a direct link between the explosion and the falling down of the 1st respondent resulting into her injuries.

Determination

The duty of this Court as a first appellant Court is to re-evaluate as well as examine afresh the evidence and to arrive at its own conclusion having regard to the fact that this Court has not seen or heard the witnesses as was stated in the case of **Selle & Another v Associated Motor Boat Company Ltd & Others {1968} EA 123**.

The issue for determination is whether the trial Court erred in finding that the appellant was liable for the injuries suffered by the 1st respondent. The applicable Law as regards an action in negligence it is stated in **Halsbury's Laws of England 4th Edition at paragraph 662 at page 476** as follows with respect to the what is required to be proved in an action such as the appellant's:

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in Law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."***

In the current case, the evidence by the 1st respondent established that she was an employee of the appellant and that on 18th March 2013 she was injured as she tried to run out of the appellant's building. She blamed the appellant for negligence and breach of contract for failing to provide a safe working environment and stated that there was only one door accessible door that 300 workers were using to escape when the explosion occurred.

The appellant on its part contended that the work environment was safe as there were three open doors each being 6 meters wide with no obstructions, there were clearly marked alleys between machines for movement, the floor was tiled and well made and that there were

emergency lights in case of power outages.

The legal principles that regulate the relationship between an employer and employee as regards the duty to provide a safe working environment is described in **Halsbury's Laws of England 4th Edition, Vol. 16 par. 562** as follows:

> ***"It is an implied term of the contract of employment at Common Law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."***

The Court of Appeal in the case of **Makala Mailu Mumende v Nyali Golf County Club {1991} KLR 13** stated thus:

> ***"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."*** *(emphasis mine).*

The Court of Appeal in the case of **Mwanyule v Said t/a Jomvu Total Service Station {2004} 1 KLR 47** also held that the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution.

Section 6 of the Occupational Safety and Health Act provides:-

> ***1. Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.***
>
> ***2. Without prejudice to the generality of an occupier's duty under Subsection (1), the duty of the occupier includes:***
>
> > ***(a). the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;***
> >
> > ***(b). arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;***
> >
> > ***(c). the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;***
> >
> > ***(d). the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;***
> >
> > ***(e). the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;***
> >
> > ***(f). informing all persons employed of:***
> >
> > > ***(i). any risks from new technologies; and***
> > >
> > > ***(ii). imminent danger; and***
> >
> > ***(g). ensuring that every person employed participates in the application and review of safety and health measures.***
>
> ***(3). ……***
>
> ***(4). ……***
>
> ***(5). …….***

There is no dispute that there was an explosion at the appellant's premises on the 18th March 2013, and that its workers were injured as testified by **(DW1).** The main issue for contention was whether the work environment was safe. The 1st respondent placed blamed on the appellant stating that there were only two doors of which one was closed forcing its 300 workers to squeeze through one door. The appellant on its part contended that there was a big door and two small doors each 6 meters wide that were not obstructed and that there were only 150 workers.

In **Garton Limited v Nancy Njeri Nyoike {2016} eKLR, Aburili J** held that:

> ***"In this regard, it is expected that the appellant employer when assigning its employees to work in an environment where there is potential risk of injury…… Then it is prudent for them to provide proper appliances to safeguard the workers. The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention of the employee but the employee failed to adhere and deliberately put himself in harm's way …… In this case I find that the appellant owed a common Law duty of care to ensure the safety of the respondent while she was engaged upon her duties in the appellant's employment ….. For example, had the respondent been provided with a head gear and boots, she could not have injured her head on falling down and or the leg."***

I have considered the evidence; none of the parties gave documentary proof of the number of doors. However, if the appellant was to be believed that there were 3 doors of 6 meters the duty rested with it to prove that there were sufficient door. Moreover, if the doors were as stated by the appellant did not explain how its workers were injured in the process. The 1st respondent's evidence is more plausible that the workers had to squeeze through one door resulting to the injuries to its workers. It is of utmost importance for employers, especially in working environments with machines, to ensure that there are ample alternatives exits, better known as fire escapes, for egress from their premises in case of emergencies. They should ensure that such fire escapes are easily accessible and can be easily opened in times of emergencies. Thus to ensure that its employees do not cause a stampede and end up injury themselves or worse, loss of life. On a balance of probability, I find the 1st respondent proved that work environment was unsafe.

The appellant blamed the trial Magistrate for assigning blame for the explosion to itself in place of the 2nd respondent. The trial Magistrate in her Judgment held that:

> ***"considering the fact that the circuit breaker that exploded was inside the building at the 1st defendant's premises, it is my finding that the 1st defendant is to blame for the explosion that occurred on the material day…… Since DW2 said that the 2nd defendant has nothing to do with the circuit breaker and wiring is upto the consumer, I find that it was incumbent upon the 1st defendant to ensure that the circuit breaker was in good working condition and was working properly at all times. Had the circuit breaker been in a good working condition on the material day, it would not have exploded."***

The appellant through **(DW1)** informed the Court that there were constant blackout on the said day that caused the circuit breaker to explode. **(DW2)** for the 2nd respondent informed the Court that she was unable to carry out investigations on the cause of the explosion since the appellant failed to report the matter. That she only went to the premises five months later by which time she found that the circuit breaker had been replaced.

I am in agreement with the appellant that the trial Magistrate misdirected herself when she held that it was upon the appellant to ensure that the circuit breaker was in good working condition. There was no evidence tendered that the circuit breaker had been defective.

Further, it is quite possible that constant power shortages can cause electric devices to malfunction. This does not necessarily mean that the electronic devices are all defective. Without a proper report on the cause of the explosion it would be difficult to apportion blame to either the appellant or the 1st respondent.

Having found that neither the appellant nor the 2nd respondent are strictly liable for the explosion, the question is whether this affects the appellant's liability.

In **Stapley v Gypsum Mines Ltd, (2) {1953} A.C. 663 Lord Reid** expressed himself as follows:

> ***"To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory or causation it is quite irrelevant in this connection. In a Court of Law this question must be decided as a properly instructed and reasonable jury would decide it ……. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident."***

In the present case, there is no doubt that the explosion resulted to the sudden stampede that led to the 1st respondent injuries. However, the injuries were not necessitated by the explosion but rather by the fact that the workers could not escape safely from the appellant's premises. The explosion was a remote cause. If there were sufficient doors in the appellant's premises, 1st respondent could have escaped safely without injury and this case would never have been filed. In that regard the appellant was liable.

The appellant never challenged the quantum awarded by the trial Magistrate and I shall not comment on the same. On liability, I find that the trial Magistrate misdirected herself when she apportioned 100% liability on the appellant.

Section 13 of the Occupational Safety and Health Act provides:-

> ***"13(1) Every employee shall, while at the workplace-***
>
> ***(a). ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace."***

In the case of **Peter Bernard Makau v Prime Steel Limited {2018} eKLR** stated that:

> ***"It is true that there are two possible ways a Court can apportion liability for negligence. One is on causation, secondly, on blameworthiness. The appellant sued the respondent on negligence acts based on a breach of care owed as a term of employment it is best that a trial Court makes it clear what the appellant negligence entails: Does it involve the events which caused the injury or the severity of the injury? These questions must be answered if no provisions exist in the statute."***

The **Scholarly English Text by Winfield and Johowicz on the 19th Edition Sweet & Maxwell 2014 at 703 paragraph 23-042** states as follows:

> ***"the lack of care that will constitute contributory negligence varies with the circumstances of each case. Thus, the greater the risk of suffering damage the more likely it will be; all other things being equal. That the reasonable person in the claimant's position would have taken precautions in respect of that risk. The reasonable person will be careless and so the claimant who does not anticipate that the defendant might be negligence may be guilty of contributory negligence. However, the Law does not require the claimant to proceed with a timorous fugitive constantly working over his shoulder for the acts from others."***

The apportionment of liability between the appellant and the respondent in the respective ratios should therefore take the form of both causation and capability.

In the current case, the 1st respondent informed the Court that they had been inducted on a fire drill that they should run outside. She also claimed that there were two explosions on the said day and that during the first explosion, they were directed out in an orderly fashion by the supervisor. That is was during the second explosion that they rushed out in a disorderly manner resulting in injuries.

While the appellant was supposed to ensure that the premises was safe, the 1st respondent had a duty on her part to secure her own safety even in the face of danger. Many times during an emergency a situation takes a turn for the worse where the persons caught up in the situation through caution to the wind for the safety of those around them and themselves leading to fatalities. It also puts first responders in danger of being caught up in the chaos putting more lives at risk. Every person has a responsibility to play in securing their own safety especially where you have already been informed of the measure you need to take. In view of the foregoing, I find that the 1st respondent contributed to her injuries and apportion liability to the appellant in the ratio of 80:20 in favour of the 1st respondent.

In the circumstances, the appeal partially succeeds on contributory negligence as follows:

General damages	**Kshs.150,000/=**
Special damages	**Kshs. 15,000/=**
Less contributory negligence @ 20%	**Kshs. 33,000/=**
Total	**Kshs.132,000/=**

The appeal having partially succeeded, the appellant shall pay 80% the cost of this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Kapole advocate for the appellant