



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 465 OF 2012

BERNARD MOMITA. APPELLANT

VERSUS

CRISPIN OTIONO WALALA (*Suing as Personal Representative of*

***Walter Sharbovic Walala, Deceased*). RESPONDENT**

(From the Judgment and decree of R. A. Oganyo, Principal Magistrate in Nairobi CMCC No. 1487 of 2009)

J U D G M E N T

The facts and evidence from which this appeal arose are as follows: -

The Appellant/Defendant was the landlord of the Respondent/Plaintiff. The Respondent rented one room in a compound of several rooms also let to different persons. The Appellant himself lived in a bigger house next to the let rooms in one compound. The Respondent's room opened directly to the same compound of his Landlord, the Appellant.

It is common fact that when it rained, where these houses are situated would flood and the flood water would remain on the ground for days. Sometimes the Appellant who owned the whole compound and the houses or rooms would find it necessary to dig a trench or trenches to release flood water or to make the rain water move away from the compound which was apparently a notorious place for flooding and which sometimes attracted the National Media.

On the 8th April, 2008, the appellant and the Respondent were both at home at about 6 p.m. to 6.30 p.m. the Appellant moved to nearby church to worship or have some meeting. The Respondent was watching television in his house in the common compound with the Appellant and his wife and very young child, Sharbovic Walala, were outside the house. The wife was washing things while Skarbovic 1½-2 years old, and a toddler, was loose and walking about near his mother.

That is when the Respondent's wife looked around her and could not see the toddler. The Respondent heard her inquire from the neighbours whether they had seen Skarbovic and there was no clear answer. That caused the Respondent to move out of the room and join his wife to find where the child was.

It was the Respondent's evidence before the trial Magistrate, that a neighbours child called Rambo who was about 15-16 years and who had joined the inquiring group of neighbours, moved to the right side of the compound and soon called out that he had found the child Starbovic dead in a pool of water. The Respondent testified that the Appellant had dug an eight feet hole to trap rainwater for the purpose of

using the water for construction of more letting rooms. It was the Respondent's case that the child called Rambo who was about 15-16 years and who had joined the inquiring group of neighbours, moved to the right side of the compound and soon called out that he had found the child Starbovic dead in a pool of water. The Respondent testified that the Appellant had dug an eight-foot hole to trap rainwater for the purpose of using the water for construction of more letting rooms. It was the Respondent's case that the child, Starbovic had drowned in the hole allegedly dug by the Appellant. He further alleged that the Appellant had left the whole uncovered for several months despite the Respondent's several warnings to him to cover it to avoid incidents like the one in issue.

In his plaint in the lower court against the Appellants, the Respondent alleged negligence on the part of the Appellant, for failure to cover the hole or prevent access of children to it and sought general and special damages against the Appellant.

On the other hand, the Appellant without exception denied that he had dug the alleged rain water hole and denied the Respondent's claim for special and general damages. The Appellant instead filed a counter-claim against the Respondent for specific damage caused by the Respondent and Respondents supporters who had destroyed and burned Appellant's house utensils including seats, food utensil and related goods.

During the trial the Respondent/Plaintiff testified and he called a Police Officer who produced an Occurrence Book report showing the report that had been recorded by a police officer who had visited the scene of the accident on the day the accident had occurred. The Respondent did not call Rambo to explain where exactly he had picked the body of the deceased and how he himself managed to elude drowning into the same hole. He called no one to testify and confirm the existence of the alleged hole the of which existence the Appellant had specifically denied. The entry in the Police Occurrence Book itself was based on vague allegations by the Respondent. The Police Officer who visited the scene of accident, did not record any statement confirming existence of such rain water hole. On the other hand, there was ample and undenied evidence that the area where houses were situated, including the Appellant's and Respondent's houses, was a notorious flooding area which retained water for long after it rained.

I have carefully examined the evidence upon which the trial court concluded that there existed a hole which had been dug by the Appellant. The evidence is vague, uncertain and totally unreliable to prove the case on the balance of probabilities. There was little or no evidence to show that the Respondents had warned the Appellant of any such danger as posed by such alleged hole. In short the Respondent totally failed to prove his case by any reliable evidence and the trial court should have dismissed the claim.

I have also examined the Appellant's counterclaim. It is not denied that his goods and utensils were damaged by people as a reaction of the neighbours over the death of the child of the Respondents. There is however, insufficient evidence to prove that the Respondent was response for the people reaction or that he told or encouraged, them to damage the Appellant's goods. The trial court was right in dismissing the counter claim.

The result is accordingly, that this appeal has merit and is hereby allowed, thus dismissing the Respondent's lower court claim against the Appellants. I considered the issue of costs too and made no order as to the same. Orders accordingly.

Dated and delivered at Nairobi this 28th day July, 2015.

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D A ONYANCHA

JUDGE