REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 316 of 2006(CONSOLIDATED WITH APPEALS NOS.308, 309, 310, 315 & 338 ALL OF 2006

TOTAL (K) LIMITED

STANSTUD MOTORS (K) LIMITED.....APPELLANTS

2. T/A KISII TOTAL SERVICES STATION

VERSUS

NAOMI KEMUNTO.....RESPONDENT

(An appeal from the judgment and decree in the Chief Magistrate's Court Kisii

Civil Suit No.574 of 2005 by Hon. Silvia Wewa, RM)

JUDGMENT

The respondent, **Naomi Kemunto**, was the plaintiff in **C.M.CC.NO.574 of 2005** at Kisii. The first appellant is a limited liability company engaged in sale and distribution of petroleum products in Kenya and the second appellant is an appointed dealer and/or agent of the first appellant in Kisii and its surroundings.

In a plaint filed on 20th June, 2005, the respondent stated that:

"***On or about the 12th day of April, 2005, the plaintiff was at home when Kerosene purchased from the said Kisii Total Service Station and being used for domestic purposes exploded and caused the plaintiff severe burns."***

It was alleged that the said incident was occasioned by breach of statutory duty and/or common law duty on the part of the appellants. The particulars of the alleged breaches were given as follows:

"***(a) Failing to ensure that the kerosene was safe and fit for consumption by the general public.***

(b) Failing to ensure that the Kerosene was of merchantable quality.

(c) Adulterating the said kerosene such that it became a danger to the users of the product.

(d) selling and distributing adulterated kerosene to the general public."

The respondent further averred that, in the alternative, the explosion incident was occasioned by negligence on the part of the appellants and/or their servants/agents. The following particulars of negligence were pleaded:

"***(a) failing to take adequate and reasonable steps to ensure that the kerosene was safe and fit for consumption by the general public.***

(b) failing to take reasonable care to ensure that the kerosene was transported, stored and distributed in its required standard.

(c) failing to take reasonable care to ensure that the kerosene was not adulterated.

(d) Adulterating the kerosene.

(e) Failing to warn the plaintiff of the danger exposed to her by the adulterated kerosene.

(f) Failing to remove the adulterated kerosene from circulation.

(g) ***Exposing the plaintiff to a risk of harm and/or injury of which it knew and/or injury of which it knew or ought to have known."***

The respondent also sought to rely on the doctrine of **res ipsa loquitur**. The respondent alleged that she suffered severe burns to the face, both hands, thighs and abdomen and as a result incurred treatment expenses of Kshs.2500/= and also paid Kshs.3, 000/= for a medical report. She prayed for general and special damages for pain suffering and loss of amenities as well as costs of the suit.

The appellants filed a joint statement of defence. They denied that the second appellant was an appointed dealer and/or agent of the first appellant and was being supplied with petroleum products exclusively by the first appellant for sale and distribution to the general public. The appellants further denied all the particulars of breach of statutory duty and common law as well as the particulars of negligence that were alleged by the respondent. They further denied that the respondent had suffered any injuries, loss and/or damage. The appellants added that if an accident occurred as alleged, the same was due to the sole and/or contributory negligence on the part of the respondent.

During the hearing, the respondent testified that on 12th April, 2005, she was lighting a lantern lamp when the kerosene that was inside exploded causing her severe burns to the chest, legs and hands. She alleged that she had bought one litre of kerosene from the second appellant at a cost of Kshs.55/=. She said she was not issued with any receipt. She blamed the second appellant for selling to her adulterated kerosene.

Following the said injuries, the respondent was treated at Kisii District Hospital. Later on she consulted Dr. Stephen Oketch who examined her and prepared a medical report dated 18th April, 2005 **(P.Exh.2).** She produced a receipt of Kshs.3000/= which she paid for the same **(P.Exh.3).** The respondent did not call any witness.

William Kuloba, DW1, was the supervisor at the second appellant's station. According to their records, on 12th April, 2005 the second appellant had 4087.5 litres of kerosene. It had received from the first appellant 10,000 litres on 5th April 2005. The witness said that kerosene is transported either alone or with diesel in a vehicle in different compartments. Whenever the second appellant received kerosene, the witness used to check its quality to ensure that it was not mixed with water. DW1 said that it was unlikely that anyone could to adulterate kerosene by mixing it with super petrol, regular or diesel because those products were more expensive than kerosene. The sales records for the period 2nd March, to 12th April, 2005 were produced as defence exhibit 2. The witness added that they issue receipts for all products that they sell. He denied that the second appellant had adulterated the Kerosene that it was selling at the material time or at all. He stated that no investigator visited their station to make any enquiries or conduct any investigations regarding the respondent's allegations.

The witness further stated that if the 10,000 litres of kerosene that it had purchased was adulterated, it would have affected very many people, not just the six plaintiffs who had filed suits. In his view, the kerosene must have been purchased from elsewhere, adding that there were two other fuel stations near theirs.

Ezekiel Ochieng Ogolla, DW2, was an employee of the first appellant at the depot of Kenya Pipeline Company, Kisumu. He had been working there for twenty-eight years. The first appellant purchases its products from Kenya Pipeline Company. The witness testified that there are specialiased seals that are used in motor vehicles that transport petroleum products to ensure that drivers cannot access the products. He was the one who was doing the sealing. He added that Kerosene and diesel are transported in the same motor vehicle but in different compartments. That way the two cannot mix, DW1 stated. The witness further testified that on 12th April, 2005 the first appellant was not informed of any complaint regarding this case or any other.

Parties through their advocates filed their respective written submissions. The trial court held that the respondent had proved her case on a balance of probabilities and awarded general damages in the sum of Kshs.300, 000/= plus special damages of Kshs.3000/=.

The appellants were aggrieved by the said judgment and preferred an appeal to this court. The grounds of appeal were as follows:

"***1. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on the same.***

2. The learned trial magistrate did not in the alternative consider or sufficiently consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the appellants.

3. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same..

4. The learned trial magistrate grossly misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.

5. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the appellants.

6. The learned trial magistrate erred in failing to hold that the respondent had failed to prove negligence on the part of the Appellants while the onus of proof lay with the Respondent.

7. The learned trial magistrate misdirected herself in not taking into consideration the nature of of the Respondent's injuries at the time of assessing damages.

8. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent.

9. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-a-avis the respondent's injuries and consequences arising therefrom."

Mr. Odhiambo for the appellants submitted that the learned trial magistrate misapprehended the law by holding that the respondent had proved her claim when indeed she had not done so. The respondent resorted to relying on the doctrine of **res ipsa loquitor** due to lack of material evidence, counsel added. He further submitted that there was no proof that the respondent purchased the alleged kerosene from the second appellant. Mr. Odhiambo also faulted the learned trial magistrate for failing to consider the appellants' evidence and simply stating that the respondent's evidence was overwhelming.

The appellant's counsel sought to distinguish two authorities that had been relied upon by the respondent's advocate before the trial court. In **TURFENA ACHIENG' MISE & ANOTHER VS WILLIAM AMBANI MISE & ANOTHER,** Civil Appeal No.177 of 1995 at Kisumu, where the appellant had sued the respondents on more or less similar facts as obtained in the suit that was before the trial court, there was public outcry about kerosene that had been purchased form a particular petrol station at Ahero. The area District Officer and the Police had visited the station and stated that people in the area were complaining of burns due to kerosene explosion.

In the case that gave rise to this appeal, there was no such public outcry and no reports had been made to the police or the provincial administration.

The other authority that he sought to distinguish was **MWANANCHI SERVICE STATION & ANOTHER VS MINGA** [1973] E.A 305. In that case, the first appellant was the distributor of the second appellant's petroleum products. The first appellant sold as kerosene an inflammable mixture of kerosene and petrol. The explosion and fire which resulted when the respondent's friend attempted to use the mixture damaged his house. Mr. Odhiambo submitted that the appellant was held liable because there was a report from a Government Chemist that showed that the mixture consisted of 17.6 percent super petrol and 82.4 percent kerosene and that it was highly inflammable and combustible. In the present case, there was no scientific report of any nature.

Mr. Odhiambo further contended that for the doctrine of **res ipsa loquitor** to be applicable, there had to be a link between the appellants and the respondent, it had to be proved that the respondent purchased the kerosene from the second appellant and that the appellants had not taken any precaution to ensure that the kerosene that was being sold was merchantable and of good quality. That was not demonstrated.

Mr. Ochieng for the respondent submitted that there was evidence from all the plaintiffs in the six cases that they purchased kerosene from the second appellant and that the same exploded in their lamps when they were lighting the same. That in itself was clear demonstration that the kerosene was not of good quality. That also pointed to negligence on the part of the appellants. He cited the case of **EMBU PUBLIC ROAD SERVICES LTD VS RIIMI** [1968] E.A. 22. Mr. Ochieng further referred to the two authorities which Mr. Odhiambo tried to distinguish in his submissions. He urged the court to dismiss the appeals.

The duty of the first appellate court was well stated in **SELLE & ANOTHER VS ASSOCIATED MOTORS BOAT CO. LTD & OTHERS** [1968] 123. The court is not bound to follow the trial court's findings of fact if it appears that the court failed to take into account particular circumstances of the case. The appellate court must reconsider the evidence, re-evaluate it and draw its own conclusions.

All the plaintiffs were under an obligation to prove that they purchased the kerosene from the second appellant and not from any other source. None of the plaintiffs obtained a receipt for the kerosene purchased. All the plaintiffs appeared to have been unaccompanied when they were doing the purchase. They did not make any effort to name or describe the pump attendant who had served them, if at all.

The respondent herein and indeed all the other respondents in the other appeals did not make any complaint either to the appellants or to the police immediately after occurrence of the incidents that gave rise to these matters. Even if they had been rushed to various hospitals, their friends and/or family members could have made the complaints on their behalf. If any demand letter was ever written to the appellants immediately after occurrence of the various incidents, none was shown to the trial court. The appellants had in their statement of defence denied that the kerosene had been purchased from the second appellant and demanded the strictest proof thereof. It was therefore incumbent upon the respondents to adduce such evidence as would have been sufficient in the circumstances to show that the kerosene complained of was actually purchased from the second appellant and not from any other source.

I am not saying that the respondents did not purchase the kerosene from the second appellant; I am saying that if they did there was no proof to that effect. The burden of proof lay upon the respondents and they had an obligation to discharge the same. **Section 107(1)** of the **Evidence Act** provides that:

"***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists."***

In **TURFENA ACHIENG ABUTO & ANOTHER VS WILLIAM AMBANI MISE & ANOTEHR** (supra), the evidence given as to how the accident occurred was not disputed and the trial judge was also of the view that it could not be said that the first appellant had not bought paraffin from the first respondent on the material day. In the above quoted case, the police and the area District Officer had been notified about the complaint by various people and had gone to the petrol station and made enquiries about the issue. The Western Kenya Area Manager of Total Oil Products had also been notified and visited the concerned petrol station and commenced investigations.

In the appeals herein, no such complaints had been made by any of the respondents. Secondly, the respondents did not make any effort to prove that the kerosene was adulterated. If they had made an appropriate complaint to the relevant authorities, samples of the kerosene could have been taken and subjected to scientific tests and analysis as was the case in **MWANANCHI SERVICE STATION & ANOTHER VS MINGA,** (supra).

The doctrine of **res ipsa loquitor** could only be applicable upon sufficient proof that the kerosene had been purchased from the second appellant. In **TURFENA ACHIENG ABUTO** case, the Court of Appeal stated:

"***The fact that the paraffin exploded and caught fire means that it was contaminated and the onus would be on the respondents to show that the contamination was not due to their negligence. It is not therefore, surprising that the appellants in their plaint relied on the doctrine of res ipsa loquitor to establish their claim. In other words, the circumstances of the accident give rise to the prima facie inference of negligence on the part of the first respondent who sold the paraffin to the appellant, and the second respondent who manufactured and supplied the paraffin to the first respondent, and both of whom have in order to escape liability, to displace the prima facie presumption of negligence.***"

As earlier stated, in that case there was undisputed evidence of the first appellant concerning the occurrence of the accident. If this were the case in the present appeal, the doctrine of **res ipsa loquitor** would have been applicable because ordinarily, good quality kerosene in a lantern lamp does not explode when the same is lit. A link between the appellants and the respondent had either to established or admitted before **res ipsa loquitor** can be relied upon.

The doctrine is not a substitute for proof of negligence as was held in **MUKASA VS SINGH & OTHERS** [1969] E. A. 442.

In **MARY AYO WANYAMA & OTHERS VS NAIROBI CITY COUNCIL**, Civil Appeal No.252 of 1998, the Court of Appeal held, **inter alia**, that the plaintiff must prove facts which give rise to what may be called **the res ipsa loquitor** situation.

It appears to me that the respondents' cases were conducted in a rather casual manner. Much as I do not doubt that they suffered serious injuries, they had to be thoughtful and tactful so as to bring such evidence before the court as would be sufficient to prove their case. In our country there is yet no liability without fault and the respondents had to prove that they purchased kerosene from the appellants and that the same was adulterated. I find that they failed to do so. If they had so proved, this court would have upheld the awards of damages as assessed by the trial court because I do not consider them inordinately high for the kind of injuries sustained by the respondents.

I am not without sympathy to the respondents for the unfortunate incidents that caused them severe burns but I must state that I found their evidence scanty and unsatisfactory. Consequently, I allow these appeals but make no order as to costs.

DATED, SIGNED and **DELIVERED** at **KISII** this **11th** day of **July**, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Otieno HB for Mr. Menezes for the Appellants.

N/A for the Respondents.

D. MUSINGA

JUDGE.