



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 58 of 2003

(Appeal from the Judgement and Decree of the Senior Resident

Magistrate at Vihiga, M. C. CHEPSEBA (Mrs.), in SRM Civil Case No.26 of 1997 delivered on 18th March, 2003)

JUDITH MUDEREGANIAPPELLANT

V E R S U S

1. NOAH ANDOLO

2. CALTEX OIL (K)

LTD.RESPONDENT

J U D G E M E N T

On 18.3.2003, the Senior Resident Magistrate at Vihiga, Mrs. M. C. Chepseba, dismissed with costs the suit by the Plaintiff, Judith Muderengani, on the ground that the date pleaded in the plaint as the one on which the plaintiff suffered injury was different from the date given in evidence.

The Plaintiff had sought special and general damages against both Noah Ondolo who operated a paraffin pump at Kapsoi trading centre where the plaintiff had bought paraffin and Caltex Oil (k) Ltd. which was alleged to have supplied the 1st Defendant with the contaminated paraffin. It was the Plaintiff’s case that when she put the paraffin in her tin lamp it exploded and injured her, hence the suit for damages. The Defendants denied liability and sought dismissal of the suit.

The Plaintiff testified and called three witnesses. In her evidence, the Plaintiff explained how she had bought the paraffin on 12-1-96 from the only paraffin pump in her area namely Kapsoi in a jerrican which she used for that purpose. She knew Andolo who sold the paraffin to her. She knew that paraffin used to be ferried to the pump by a caltex lorry. She went home straight from the paraffin pump. The lamp had no paraffin when she put paraffin in it. When she struck a match to light it, it exploded and she got burnt. Her child was also burnt on the head. Dr. Moses Nasew who examined the Plaintiff testified that the latter had a big scar on the arm from the left elbow to the fingers and scars on the left and right thighs. The second witness was a police officer attached to Nyangori police Post. He had received during the period between 1-1-96 and 24-1-1996 reports from the Kapsoi area of explosions of stoves. The complainants had purchased paraffin from the Kapsoi pump. He confirmed having received a report from the Plaintiff. All the reportees had bought paraffin from Kapsoi pump of Noah Andolo, the 1st Defendant. Isaac Liyengwa, a chief from Banja Location also testified as the 2nd witness of the plaintiff. He got a report on 13-1-96 that the plaintiff had been injured while lighting a lamp in the evening of 12-1-96 when it exploded and burned her and others in the house. The report was made by the Plaintiff’s

father and the area assistant chief. He had received similar reports before of persons getting injured when lamps exploded when lit after paraffin bought from the 1st Defendant had been used.

The Defence called one witness, Joseph Okwiri, a sales representative employed by the 2nd Defendant in Kisumu Region whose work included “**overseeing the welfare of the 2nd Defendant as far as distribution in the region was concerned**” of the 2nd Defendant’s products. His records showed that the 1st Defendant purchased kerosene from the 2nd Defendant. He confirmed that Caltex Kenya Ltd. had received complaints in January of 1996 that Kerosene supplied was not pure. He labelled as false the claim by the Plaintiff because according to him, Kerosene had been supplied to the Kapsoi area on 15-1-96. He conceded that he was not involved in the supply and delivery of Kerosene by Caltex Kenya Ltd. at the time of the accident nor was he there during the testing of the samples. He agreed that the Kerosene delivered to the 1st defendant was not done by him. The second Defence witness, Zadock Oketch Amkegane, a technologist, examined samples of petrol delivered on 15-1-96 which date was irrelevant as the plaintiff had bought paraffin on 12-1-96.

Before the Plaintiff had closed her case the trial magistrate refused to allow an amendment to the Plaintiff to alter the date of the accident from 12-1-95 to read 12-1-96 to accord with the evidence given. The trial Magistrate dismissed the suit on account of this discrepancy.

In the four grounds of appeal set out in Memorandum dated 8-4-2003 the Appellant submitted –

- 1) that the trial magistrate erred in law and fact in failing to allow the amendment to pleadings even though the application was made at a reasonable stage of the proceedings and before judgement and;**
- 2) that the trial magistrate erred in law and fact in dismissing the suit merely due to typographical error in the pleadings; and**
- 3) that the trial magistrate erred in law and fact in failing to address herself to the pertinent issues of liability and quantum of damages and**
- 4) that the learned trial magistrate erred in law and fact in dismissing the suit even when liability had been proved against the Respondents.**

When the appeal came up for hearing on 1-12-2004, Miss Caroline Khasoa urged the court to reverse the decision of the trial magistrate refusing to allow the amendment and also dismissing the suit. The plaintiff’s counsel criticized the trial magistrate’s wrong use of her discretionary power and contended that no prejudice was going to be occasioned to the Defendant as a result of the amendment. She urged the court to allow the appeal as liability had been established against the Defendant.

No one appeared from Kalya & Co., Advocates for the Respondents. The point of law for determination in this appeal is whether the trial magistrate exercised her discretionary power correctly in refusing to allow the plaintiff to effect the amendment in the plaint by deleting the date to read 12-1-96 instead of 12.1.95. The evidence adduced as at the time the application to amend was made showed that the correct date when the Plaintiff bought the paraffin and got injured in the explosion was 12-1-96.

An appellate court will normally not interfere with the exercise of discretionary power unless the trial magistrate misdirected himself and therefore arrived at a wrong decision or it is manifest that he was clearly wrong in the exercise of the discretionary power and as a result injustice has been occasioned. This principle was enunciated in *Mbogo and Another vs Shah* (1968) EA 96.

The power of the court to allow amendment of pleadings is derived from Rules 3 and 5 of Order VIA of the Civil Procedure Rules. The court also has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Under the rules, the exercise of the discretionary power is intended to facilitate determination of the real question in controversy or correction of defect or error.

The power to allow amendments can be exercised by the court at any stage of the proceedings including the appeal stage. It is now well established as a general rule, that however late the amendment sought is, the court should normally allow it if it is made in good faith and is material or relevant providing costs can compensate the other party.

In my view, in refusing to allow the amendment the trial magistrate did not exercise her discretion properly. The amendment was not going to cause any prejudice to the Defendants. The evidence adduced by the plaintiff clearly showed that the Plaintiff purchased the paraffin from the first Defendant who was a retailer on 12.1.96. It also showed that the second Defendant supplied the paraffin to the 1st Defendant.

The 2nd Defendant was under a duty to ensure that the paraffin supplied to the 1st Defendant for sale to members of the public was safe for use. The fact that the lamp exploded and caught fire must mean that it was contaminated. The explosion gave rise to a prima facie inference of negligence on the part of the Defendants. To eschew liability, it behoved the defendants to displace that prima facie presumption of negligence. The evidence by the Defendants did not do this. Indeed, the witness who was called by the Defendants, namely, Joseph Okwiri was of no help. To escape liability the Defendants ought to have offered an explanation as regards the explosion which (explanation), in the words of **Sir Charles Newbold**, should have been consistent only with an absence of negligence (see **Emba Road Services vs Rimi (1968) EA 22 at p.25**. It was in **Turfena Achieng Abuto & another vs William Ambani Mise and another (Kisumu C.A. Civil Appeal No. 177 of 1995)** that the Court of Appeal held –

“ the respondents who dealt in paraffin which

is an article of common domestic use particularly

in the rural parts of Kenya like Ahero, owed a duty of

care to the consumer that what was sold as paraffin

was not contaminated and made dangerous. As already

noted, the purchaser of paraffin has no opportunity of

testing the quality of the paraffin that he purchases

neither is he indeed expected to test it. He rightly

presumes that what is pumped into his receptacle is

the safe article paraffin which he purchases.”

The Plaintiff had on the evidence adduced at the trial proved on the balance of probabilities liability on the part of the Defendants.

The trial magistrate had not quantified damages for the injuries suffered by the plaintiff. According to Dr. Moses Nasew, the injuries sustained by the plaintiff were

- a) a big scar on the left arm from elbow to the finger,
- b) big scar on the left thigh extending from the pubic area to the knee, a scar on the right thigh, burns on thighs.

He classified the injuries as 55% disability. He indicated that burns are very serious and may cause ailment of kidneys even after 10 years. They were embarrassing in a lady. He had not had an opportunity to re-examine the plaintiff.

In Mary Muhonja & another vs The Board of Governors of Erusui Girls Sec. School NBI HCCC No.1329 of 1992, this court awarded Shs.450,000/= for severe burns caused by spirit from a spirit lump. In Ngala Shedi vs Jackson M. Nyambu MSA HCCC No.152 of 1992 this court awarded Shs.250,000/= to the plaintiff who had suffered burns on both legs, arm, and back. The burns left Keloid scars on the left arm and back. That was over 12 years ago. In Lilian Otieno vs Joseph Kimana NBI HCCC No.2670 of 1986, the High court awarded Shs.150,000/= to the 19 year old plaintiff who had suffered burns on both legs. The Plaintiff was in hospital for 3 weeks. She was left with scars on both legs from thigh to the foot. The award was made more than 20 years ago.

There is need for consistency in awards for similar injuries. I have examined the injuries sustained by the plaintiff and doing the best I can I think an award of Shs.350,000/= will be appropriate.

In the result, the trial magistrate's judgement and orders are set aside and in their place is substituted an order allowing amendment to the plaint and entering judgement in favour of the plaintiff against the Defendants jointly and severally for the sum of Shs.350,000/= as damages for the injuries plus costs of the suit and of this appeal.

Dated at Kakamega this 25th day of February, 2005

G. B. M. KARIUKI

J U D G E