REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL 107 OF 1999

MULTIPLE HAULIERS LTD).

JOSEPH NGUGI KAMAU).....APPELLANTS

VERSUS

JOHN ODONGO HAGAI.....RESPONDENT

JUDGMENT____

During the month of July 1998, Joseph Ngugi Kamau, (DW1), thesecond appellant, was working as a driver of a Mercedes Benz primemover, truck reg. no. KAE 980B with a trailer reg. no.2B67 (whichwill be referred to hereafter as "the tanker") owned by M/s MultipleHauliers Ltd. of Nairobi, the first appellant. On 13th July 1998, thesecond appellant took the said tanker to m/s Kenya Pipeline LtdDepot in Kisumu where it was loaded with 43,500 litres ofsuper/premium petrol which was to be delivered to Total, Uganda inKampala. At about 2.00 p.m., the second appellant, in company of Martin Mbugua Kabui (DW4) his turn- boy set off from Kisumu forKampala via Busia. Unfortunately at about 5.00 p.m. when the saidtanker was approaching a market known as Sidindi along the saidroute it veered off the main road and went into the bush andeventually it landed in a shamba where it fell and lay on its right side.Both (DW1) and (DW4) managed to come out of the vehicle and

many people who had heard the accident rushed to the scene. (DW4) had sustained some minor injuries on his mouth as a result of theaccident but (DW1) came out unhurt. Thereafter (DW1) proceeded tothe market in search of a place to make a telephone call to the headoffice of the first appellant to report the accident. He also wanted toinform local police about it. It appears that (DW4) also thereafter leftthe scene in search of a place where he could obtain treatment. It ison record that many people kept on coming to the scene and it wasclaimed by the defence witnesses that some of those people werehelping themselves to the petrol. After a period of between 25minutes and 35 minutes from the time of accident a fire broke out andwas followed by an explosion of the tanker and an intensive firespread very fast and caught the people at the scene and extensivelyburned them causing a great horror. At the end it was found that 38people had lost their lives due to the bums they had sustained andother 34 survived after treatment of the severe injuries

they hadsuffered. As a result of this tragedy sixty six civil suits were filed atthe Senior Magistrates' Court Busia against the appellants for generaldamages ranging from those for pain and suffering for injuriessuffered to those for loss of dependencies. By consent of parties in allthe suits against the appellants it was agreed that on liability this caseshould be taken as a test case and that its outcome be applied to allother pending cases.

2

In his plaint the respondent in this case averred that he wasgoing to rely on the provisions of the Petroleum Act (Cap 116) todemonstrate that the appellants were under a duty and obligation toexercise extreme care and caution while transporting the saidproducts so as to avoid harm to the third parties. The respondentfurther averred that on 13th July 1998 (DW1) the second appellantwhile in the course of his duties as a driver of the said tanker whichwas fully loaded with petrol at Sidindi along Kisumu-Busia roadnegligently and carelessly caused it to overturn and as a result thepetrol cargo being ferried exploded into flames causing intense firewhich spread to several metres and severely burned the plaintiffcausing him to suffer serious injuries. The particulars of thatnegligence were enumerated. The respondent further pleaded that asa result of the said breach of duty the appellants created a publicnuisance and that he would rely on the doctrine of res ipsa loquitur.

The appellants in their joint defence denied all the claims andaverments of the respondent relating to the background facts of thecase. They also denied that there was any accident involving motorvehicle Reg No. KAE 980B at the alleged place which resulted in thesaid vehicle overturning and the fuel exploding. The appellantsfurther denied that the respondent was burned by fire which spreadafter the alleged accident. On the alleged negligence of the secondappellant, they categorically denied it including its particularsenumerated. In the alternative the appellants averred that (a) the

3 respondent was guilty of contributory negligence (b) the respondentvolunteered himself to the risk and (c) the damage sought were tooremote to have been caused by the appellants by the reason that therewere intervening acts between the time of the accident and the outbreak of fire. The appellants particularised the contributorynegligence of the respondent and the intervening acts.

Eventually the case was tried before Mr. Riechi S.R.M. who atthe end of the trial held in his judgment that the appellant werenegligent and was liable to the respondent in damages for injuries hesuffered as a result of the out break of fire. The Magistrate furtherheld that the fire was started by sparks from the running engine of thetanker. It was the magistrate's further holding that the appellantswere negligent in that they did not ensure that the tanker was safe fortransporting fuel. Thereafter the Magistrate assessed generaldamages which he considered would adequately compensate therespondent in the sum of shs.300, 000/= with shs.100, 000/= for futuremedical expenses and shs.3, 600/= special damages and in additioncosts and interest were awarded to him. The appellants lodged thisappeal against the judgment and orders of the learned Magistrate andlisted 41 grounds on which they would rely.

It was contended for the appellants that the learned magistratehad erred and wholly misdirected himself when he failed to considerthe three defences advanced by the appellants and that if he hadcarefully examined the said defences he would have come to a

4different conclusion. According to Mr. Kapila the respondent hadpleaded in paragraph 6 of the plaint that as a result of the tankeroverturning its cargo exploded spontaneously and the fire it causedseverely burned the plaintiff and that as the appellants had advancedthe defence of novus actus interviens it was imperative for themagistrate to have carefully analysed the evidence

adduced in thelight of the pleadings of the parties as they are bound by theirpleadings (see Candy vs Caspar Air Charter (1956) EACA 139). Itwas further contended that the magistrate should have made a findingwhether or not the accident of the tanker and the explosion werespontaneous, or whether or not there were intervening acts andwhether or not petrol escaped from the tanker as a result of theaccident. It was claimed that had the magistrate considered all theseissues he would have come to different conclusions. It wassubmitted that the magistrate wholly failed to deal with these issues.

For the respondent Mr. Ndolo submitted that the Magistrate wasalive to the defences advanced by the appellants as shown by the factthat he set them out in his judgment. According to Mr. Ndolo all themagistrate had to do was to comply with the provisions of Order XXrule 4 of the Civil Procedure Rules, and that there were no obligationin his part to re-state every piece of evidence adduced by witnesses.He contended that the appellants did not adduce sufficient evidencein support of the defences they had advanced.

5

Before examining the evidence on record so as to see whetheror not what the trial court decided can stand, I have to remind myselfof the duties and responsibilities of an Appellate Court and thecircumstances under which it may take a different view from those oftrial court.

In the case of Peters vs. Sunday Post (1958) EA 424 Sir KennethO'Connor P. at page 429 had the following to say:"It is a strong thing for an appellate court todiffer from the finding, on a question of fact,of the judge who tried the case and who has had theadvantage of seeing and hearing the witnesses. Anappellate court has, indeed, jurisdiction to reviewthe evidence in order to determine whether theconclusion originally reached upon that evidenceshould stand. But this is a jurisdiction which shouldbe exercised with caution: it is not enough that theappellate court might itself have come to a differentconclusion."The learned judge thereafter stated that he took as a guide to theexercise of this jurisdiction some extracts from the opinion of theirLordships in the House of Lords in Wath vs Thomas (1947) AC 484where at page 485 Viscou Simon L.C. said:

"..... I desire to make observations as to the circumstances in which an appellate court may be

6

justified in taking a different view on facts from that

of a trial judge..... Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding of question of law …an appellate court has of course jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) then appellate court will not hesitate so to decide. But of the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on a conflicting testimony by a tribunal which saw and heard the witnesses the appellatecourt will bear in mind that it has not enjoyed this opportunity and that view of the first judge as to where credibility lies is entitled to greats weight. This is not to say that the judge of the first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact but it is a cogent circumstances that a judge of first instance when estimating the value of verbal

testimony has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

Lord Macmillan at page 491 said:

"So far as the case stands on paper, it is not infrequently happens that a decision either way may seem equally open. When this is so then the decision of the trial judge who has enjoyed the advantages not available in the appellate court, becomes of paramount importance and ought notto be disturbed. This is not an abrogation of the powers of a court of appeal on question of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies …….or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

In the case of Bundi Makube fan infant suing by his next friend Bundi) vs Joseph Onkoba Nyamuro Civil Appeal no. 8 of 1983 (unreported) the Court of Appeal at page 33 stated:

"..... a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based

on no evidence on misapprehension of the evidence on the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

I further note the observation of the Court of Appeal as the functions of the first appellate court in the case of Selle vs. Associated Motor Boat Co. (1968) E.A. 123 where it was stated thus:

"…….. The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld as well of course as deal with any questions of law raised".

Bearing in mind all the above stated principles I now turn to examine the evidence on record in this case. I think it is more logical to start from the time just before the tanker veered off the main Kisumu-Busia road. It is on record that just at that time the said tanker as it traveled was seen by (PW1), (PW3), (PW5) and (DW3) who were witnesses going about their businesses near the scene. Both the driver and the turn boy (DW1) and (DW4) respectively on their part explained what took place as they traveled.

(PW1) told the court that he was herding his cattle near Kisumu-Busia road on the material day at about 5.30 p.m. when he saw atanker 300 metres away. He claimed that the vehicle was driven veryfast but it was moving in a zig zag manner before it veered off theroad and went into the bush and eventually it overturned. He added that the tanker overturned at a place which was about 50 metres awayfrom; the main road. (PW3) said that at about 5.00 p.m. on the saiddate he was going home from the market when he saw a tanker whichwas being driven very fast and that it began to move in a zig zagmanner on the road before it veered off the road. (PW5) stated thaton the material date he was traveling to Kisumu from Sidindi inanother motor vehicle when he saw a tanker from Kisumu directionwhich was moving very fast and in a zig zag manner. (PW5) furthersaid that the tanker then veered off the main road to the left as onefaces Busia and fell into the maize plantation 15 metres from the mainroad. This witness stated that there was something wrong with thetanker.

(DW3) also claimed that he was also herding his cattle byKisumu-Busia road near Sijimbo primary school at about 5.30 p.m.on the material date when a tanker passed him. This witness went onto say that he then heard a tyre burst from the tanker and then itveered off the road into the bush and it overturned. The witness saidthat the vehicle was not being driven very fast.

It is clear that that all these witnesses are agreed that the tankerwhich had traveled on the main

road veered off and went into thebush before it fell down. (PW1), (PW3) and (PW5) saw it move in azig zag manner before veering off the road, but it is only (DW3) whoclaimed that he heard a tyre burst as the tanker was moving away.(DW1) the driver/second appellant stated that before he reached Sidindi market a left front tyre burst and that thereafter the vehicleleft the road as he was unable to control it and that it moved into ashamba where it fell on the diver's side. (DW1) asserted that he wasdriving at 60 k.p.h. at the time.

(DW4) the turn boy also confirmed that there was a tyre burstwhen they were near Sidindi market and that the driver lost control ofthe vehicle which veered off the road and went into the bush. (DW4) claimed that the driver tried to control the tanker without success andthat the vehicle eventually fell on the driver's side.

In his judgment the learned magistrate had the following to sayon issue of speed and tyre burst.

"This (claim that DW1 was driving at 60 kph) was could not in my view be correct given that motor vehicle which was fully loaded would veer off the road and travel in the bush for all that distance before overturning or coming to a stop. This (in) my mind indicates that the driver was driving at high speed. I do not find any evidence to support his assertion it was caused by a tyre burst even if it was, no evidence of attempt to control it has been tendered to establish it. I therefore find that the driver of the motor vehicle was driving the vehicle negligently and that was the cause of the motor vehicle overturning".

As shown above (DW1) and (DW4) stated clearly that there was atyre burst which (DW3) heard. (The DW1) and (DW4) appear tosuggest that that was the cause of the zig zag movement of the tankeras the driver tried without success to control it. That movement wasseen by (PW1), PW3), and (PW5) who appear to have been stationedat different parts along the said road. In claiming that there was noevidence in support of the assertion by (DW1) that there was a tyreburst the magistrate clearly misdirected himself in that he ignored that (DW4) and (DW3) had corroborate his evidence and that the zig zagmovement was a further support of that explanation of in support of atyre burst, as (PW5) observed when he said that there was somethingwrong with it.

On the issue of the speed (PW1), (PW3) and (PW5) stated thatthe tanker was being driven at very fast, but the driver said that hewas driving at 60 k.p.h. and (DW3) said that it was not being drivenvery fast. The magistrate did not believe the driver for the reason thatthe motor vehicle travelled far from the main road before coming to astop. Although the magistrate does not appear to have mentioned that (DW3) had supported the driver I think on the material available tohim the magistrate was justified in holding that the driver was drivingthe tanker at a high speed. The learned magistrate cannot also befaulted in holding that the second appellant was negligent in view ofthe nature of the cargo he was ferrying.

The next question is, did that negligence of the second appellantin driving at a high speed the tanker start the fire which brought aboutthe explosion of the fuel?

In his plaint the respondent pleaded that the cause of theexplosion of petrol into the flames which burned him was theoverturning of the tanker. However in their joint defence, theappellants denied that averment and they advanced three defenceswhich were -

(i) The accident was as a result of the sole and/or

contributory negligence of the respondent, (ii) The respondent and those who were with him volunteered themselves to the risk and (iii) The damage claimed was too remote to have been caused by the appellants by reason of the fact that there were intervening acts between the accident and the out break of the fire.In his testimony and that of his witnesses the respondent did notadduce any evidence which supported his pleading that the explosionwas caused by the overturning of the tanker. The respondent whotestified as PW2 said that he heard the accident of the tanker while hewas at his place of work at Sidindi market and that

he thereafter wentto the scene and the explosion occurred while he was at the spot andthat is how he got burned.

(PW1) who was herding his cattle witnessed the overturning ofthe tanker and he went and assisted the occupants of it to come out.(PW1) said that later on he went to herd his cattle and it was thenwhen he heard the explosion. (PW3) also witnessed the overturningof the tanker and then he took the driver to the Post office where heleft him and he went to the Assistant chief's home and that while atthe chief's home he heard the explosion. (PW3) claimed that theexplosion took place 30 minutes after the accident. (PW1) who didnot visit the scene but heard both the accident and the explosion fromSidindi market said that the interval was about 25 minutes. (PW5) onhis part assessed the interval as more than 30 minutes. In histestimony (DW1) the second appellant claimed that after the accidenthe went to Sidindi market to make some telephone calls and that as hewas about to go back to the scene he heard the explosion. (DW2) theassistant chief claimed that he was with (DW1). However the learnedmagistrate discredited (DW2) the assistant chief of the area on somesuggestions put to him by the advocate for the respondent in cross-examination that he was a witness for hire and that he had a grudgewith those people involved in this accident. The respondent when hetestified did not confirm those allegations against this witness and noother person made any adverse comments against him. In my viewthere was insufficient evidence to discredit this witness who mayhave been one of the few independent witnesses. In my view the learned magistrate misdirected himself on this matter as crossexamination cannot form a basis of any finding of fact.

(DW2) claimed that explosion occurred about 30 minutes fromthe time the tanker had an accident. I find that the respondent did notprove his pleading that the explosion was caused by the overturningof the tanker. As parties are bound by their pleadings the magistrateshould have rejected that respondents' averment.(see Condy vs Caspir Air Charters Ltd.(1956) EACA 139). The saidnegligence of the driver did not start fire as can be seen from theevidence.

The respondent called (P8) an expert on chemicals who in histestimony stated that super petrol cannot catch fire on its own andthat it needs a spark, or flame on an open fire like a cigarette for it tostart burning. This witness further claimed that if there is adisturbance in a running engine sparks are emitted which are capableof igniting gas phase of such petrol fast. He claimed that such sparksfrom a running engine come through its exhaust system. Accordingto this witness flames from petrol can burn up to 200 metres of anarea. The trial court accepted that pence of evidence relating toperformance of an engine when disturbed and yet the witness did notprofess to be an expert on engines. It is also noted that although theevidence of (PW8) had been available to the respondent before thehearing of this case the plaint was not sought to be amended so as toplead that the fire was started by sparks from the disturbed running

engine of the tanker. The learned magistrate accepted the suggestionthat fire was started by sparks from the running engine as a logicalexplanation and made a finding that in this case fire was started bysparks emitted from the running of the tanker. The learnedMagistrate erred in basing his finding as to the cause of fire on matterwhich were not pleaded by parties. In making that finding the trialMagistrate did not rule out the other two possibilities put forward by (PW8). He also said he did not believe the evidence of (DW1) thedriver of the tanker who had said that he switched off the engine aftercoming out of it. The magistrate does not appear to have analysed theevidence before him before he decided to disbelieve the driver. Itwas (PW1) who claimed that the driver left the engine of the tankerrunning when he went to Sidindi to make a telephone call. (PW5) onthe other hand said that when he arrived at the scene he saw twopeople struggling to come out of the tanker through a smashedwindow screen and that the engine was still running. The witness didnot say whether or not the engine was switched off or it went on orrun, after the driver came out of it. However (D Wl) the drivercategorically stated that he switched off the engine after

he came out.That evidence was corroborated in material particulars by (DW4) theturn-boy whose evidence does not appear to have been considered bythe magistrate. Even in crucial issues such as the claim that there wasa tyre burst, switching of the engine of the tanker and other relatedissues the evidence of this witness was wholly ignored altogether.

16

That is also a misdirection by the Magistrate. On the claim that theengine of the tanker was left running (PW1) and (PW5) said it wasrunning but (DWl) and (DW4) said it was switched off. On suchevidence it was not possible to come to the conclusion arrived by theMagistrate.

The other issue which does not appear to have been consideredby the trial court is the spillage of the fuel. In his judgment themagistrate held that the petrol leaked when the motor vehicleoverturned and that the appellants had not ensured that the equipmentwas safe for transporting fuel. However before him there wasevidence which was in conflict and which he did not make an effortto resolve. Both (PW1) the driver stated that after coming out of thevehicle he inspected the tank and found no leakages. (DWl's) evidence was corroborated by the evidence of (DW4) his turnboywho claimed that he and (DWl) checked if there was leakage andfound none. In addition (DWl), (DW2), (DW3) and (DW4) told thecourt that many people rushed to the scene after the accident. (DWl) said that many people came to the scene and that some began to cutthe seals of the dip stick, removed a cork and started removing petrolfrom the tank. He went on to say that they were tapping it withdrums. (DWl) further claimed that those people refused to heed thewarning of the assistant chief. (DW2) the Assistant chief alsoconfirmed that the people were looting petrol when he arrived at thescene and that when he tried to stop them they became unruly and

17

threatened to beat him up. (DW3) on his part named some personswhom he saw opening the tanker before they started collecting petrol.(DW4) also claimed that he saw some people at the scene break theseals of the tanker and thereafter they tapped petrol before he left thescene to seek treatment for the injuries he had sustained at theaccident. It is evident once again that the magistrate did not analysethe evidence on record as to the cause of spillage of petrol and thathis finding that the petrol leaked when the tanker overturned is not

supported by evidence.

In short I find that the Magistrate had misdirected himself in anumber of issues as enumerated above. He also failed to fullyanalyse evidence adduced before him and as a result arrived at awrong conclusion. I also find his acceptance of one of thepossibilities of cause of fire made by (PW8) as the only logicalexplanation to have been not founded on sound evidence and itamounted to a speculation. His conclusion cannot therefore be

supported.

The respondent in his plaint had pleaded that he was to rely onthe doctrine of res ipsa loquitur and the Petroleum Act in addition toother legislations. The trial Magistrate does not appear to haveexamined that doctrine of res ipsa loquitur because he had decidedthat fire was caused by sparks from the disturbed running engine. Asevidence does not support that finding that fire was caused by sparksfrom running engine the said doctrine of res ipsa loquitur may apply

18

after all. The Magistrate correctly observed that Petroleum Actimposes on immense duty of the transporters of petroleum products invehicles.

It appears to me that the Parliament in enacting the PetroleumAct imposed so stringent conditions for the transporters of petrol inbulk by vehicles that a special instance of the negligence has beencreated. Apart from ensuring that the equipment is safe the driver ofthe petrol tanker has to take special caution not to do anything thatwould harm third parties when he is transporting such cargo. Itwould appear to me that the said Act has classified petrol asdangerous thing which is likely to cause injury to those persons whomay come by them in terms of the holding of Lord Macmillan inDenoghue vs Steveson (1932) AC (611 to 612). In the present case thedriver - the second appellant admitted at the trial court that petroleumis dangerous and that he was trained by Shell in Kampala and knowsabout the danger, related to petrol. Apart from (DW4) the turnboythe second appellant was the only person who knew that the petrol hewas transporting was super premium which was more inflammableand more dangerous than ordinary petrol. This appellant said that hewas supposed call Police to restrain people from going near thetanker but he admitted that there was an Assistant chief and a villageelder at the scene but does not appear have used these local leadersto tell people that petrol was very dangerous. In fact what theAssistant chief appears to have been worried about was theft of petrol

19

and not danger it might have caused to people. In my view it was theduty of the driver who in fact was not hurt at the accident to tell thepeople in no uncertain terms about the dangers of the super petrol inthe tanker. As there was also no conclusive evidence on what startedthe fire which burned the people I find that the principle of res ipsaloquitur applies to this case. In the circumstances I find that thesecond appellant is liable to the respondent and consequently the firstappellant is vicariously liable to him for damages arising from theburns he suffered. I therefore agree with the Magistrate in theconclusion that the appellants are liable for different reasons.

Before me the appellants complained that the three defencesthey had advanced in their defence were not considered by the trialcourt. These were contributory negligence, violent non fit injuriaand novus actus intervenes. The respondent did not respond tothese defences as he ought to have done.

In the case of Mount Elgon Hardwares vs. United Millers Ltd.Civil Appeal No. 19 of 1996 where the Court of Appeal stated:-

. . …The respondent denied any form of negligence

on its part and in turn alleged negligence against theappellant. The respondent properly pleaded the particularsof such negligence. The appellant wholly failed to traverseby any further pleadings the particulars of negligence allegedin the respondents defence. In those circumstances thelearned Judge was perfectly entitled to consider that the

20

appellant had admitted negligence alleged in the defence

in terms of Order VI Rule 9 (1) of the Civil Procedure Rules".

Taking the last of these defences first I do not see in thisevidence any acts which intervened the acts of the appellants. Unlikethe case of Alima and others vs Hiral (1974) EA 557 where thestriking of

the match which caused the explosion was the interveningact, there is no such act in this case. The fact that there was the lapseof about 30 minutes from the accident to the explosion does not helpthe appellants in this case as the second appellant negligent for he didnot warn the people of the dangers of petrol.

As to the defence of violent non fit injuria I find that therespondent voluntarily risked himself by going to the scene where atanker was. It appears that the duty of care imposed upon the appellants in thiscase stems from the Petroleum Act. The defence of volenti non fit injuria doesnot therefore apply (See VI. 12 Halsbury Laws of England 4th Edition para.1212).

I think there is evidence of contributory negligence on the part of therespondent as confirmed by some of those who were at the scene immediatelythe accident took place. (DW1), (DW3), (D4) and (PW3) all stated at the trialcourt that people were looting petrol from the tanker when explosion occurred.(DW3) added that there was a quarrel which preceded that explosion. The (PW1) and (PW5) were silent on the stealing of petrol by people. As indicatedthe trial court did not consider this defence and did not make a finding on theissue. In my view all those people who were tapping petrol negligentlycontributed to the disaster. This applies to the respondent who did not tell the

21

court why he left the place of his business and went to the scene. I would asses their liability of their contribution as 30%.

As there was no challenge to the assessment of damages awarded by that court I do not make any interference of the same.

In the result I dismiss this appeal to the extent shown above.The costs to be in proportion to the ratio of liability made.

Dated and delivered at Kisumu this 16th day of May 2001.

(B.K. TANUI)JUDGE

22