REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 318 OF 2016

MIDSTEEL ENGINEERING WORKS LIMITED.......................................APPELLANT

-VERSUS-

ALI HASHI AWALE T/A A.H.A AWALE COMPANY...............................RESPONDENT

(Being an appeal from the judgment and decree delivered by Hon. M. Obura (Mrs.)

(Principal Magistrate) on 7th June, 2016 in CMCC NO. 3833 OF 2009)

JUDGEMENT

1. The respondent being the plaintiff in CMCC NO. 3833 OF 2009 filed the plaint dated 18th June, 2009 seeking against the appellant special damages in the total sum of Kshs.1,920,000/ plus costs of the suit and interest thereon.

2. The respondent averred in his plaint that he was at all material times the registered owner of the fuel tanker registration number ZC 2828 (“the subject vehicle”) whereas the appellant ran and/or managed an engineering business and had been appointed by one of the respondent’s clients (Kenya Oil Limited) to maintain, service and modify the oil tankers contracted by the client.

3. The respondent pleaded that sometime on or about 6th August, 2008 he delivered the subject vehicle to the appellant’s workshop for modification of a small fault on the upper lid of the vehicle’s compartment and that the said vehicle was at the time in good and serviceable condition.

4. It was the respondent’s assertion that the appellant through its servants/agents negligently managed the subject vehicle, thereby causing it to explode and thus resulting in loss to the respondent as well as injury to his driver, Abdirizak Ibrahim. The particulars of negligence were laid out in the plaint.

5. The respondent went on to plead that as a consequence of the destruction of the subject vehicle, he was forced to incur the cost of Kshs.720,000/ in replacing the vehicle. Resultantly, the respondent sought for the sum of Kshs.720,000/ as well as loss of profits in the sum of Kshs.1,200,000/.

6. Further to the above, the respondent relied on the *res ipsa loquitur* doctrine.

7. Upon entering appearance, the appellant filed its statement of defence and counterclaim dated 27th July, 2009. In its defence, it essentially denied the statements set out in the plaint in addition to the particulars of negligence, further stating that at the time the subject vehicle was brought to its premises, it was not in serviceable condition but had fuel traces. Moreover, the appellant blamed the explosion on the respondent’s driver who dropped a lit match stick into the subject vehicle in a bid to prove that the vehicle had been steam washed.

8. In its counterclaim, the appellant pleaded that as a result of the explosion, damage was extended to its property in the sum of Kshs.102,830/ which sum was sought against the respondent together with costs and interest on the same.

9. At the hearing, the respondent relied on the evidence of two (2) witnesses for the plaintiff’s case whereas the appellant’s case as the defendant was supported by the testimony of three (3) witnesses. Thereafter, the parties filed and exchanged written submissions.

10. Finally, the trial court entered judgment on 7th June, 2016 in favour of the respondent in the manner hereunder:

a) Liability 100%

b) Special damages Kshs.600,000/

Total Kshs.600,000/

Plus costs of the suit and interest at 21% p.a. from the date of filing the suit. Furthermore, the trial court dismissed the counterclaim.

11. The abovementioned judgment now forms the subject of the appeal before this court. The appellant has filed the memorandum of appeal dated 22nd June, 2016 raising the following grounds:

> ***(i) THAT the learned trial magistrate erred and misdirected herself in law and fact by finding the appellant 100% liable when there was no evidence to support that finding and by ignoring the appellant's evidence totally.***
>
> ***(ii) THAT the learned trial magistrate erred and misdirected herself in law by failing to appreciate that the respondent did not specifically prove the special damages contained in the pleadings as required by law.***
>
> ***(iii) THAT the learned trial magistrate erred and misdirected herself in law and fact by failing to appreciate that the respondent did not produce a valuation report of the tanker registration no. ZC 2828 or an assessment report to prove its value before the explosion.***
>
> ***(iv) THAT the learned trial magistrate erred in law and in fact by entering judgment against the appellant in the sum of Kshs.600,000/ plus interest when there was no evidence to support the claim.***
>
> ***(v) THAT the learned trial magistrate erred in law and in fact and misdirected herself by delivering judgment against the appellant without the benefit of the plaintiff exhibits 3 & 4 both dated 07/08/2008 which contradicted plaintiff exhibit 6, the police abstract dated 06/08/2008.***
>
> ***(vi) THAT the learned trial magistrate erred in law and in fact by awarding judgment which is neither supported by the respondent's pleadings nor by its evidence.***

12. The appeal was disposed of through written submissions which were subsequently highlighted. The appellant began by submitting that since it was at all material times the duty of the respondent to ensure the subject vehicle was clean and this was not done, there was no basis for finding the appellant 100% liable.

13. On the award in respect to the special damages, the appellant submitted that no evidence was adduced before the trial court to indicate the value of the subject vehicle prior to the explosion, neither did the respondent avail any form of evidence such as a valuation report to warrant its entitlement to the sum of Kshs.600,000/ or any amount for that matter; adding that the demand note and police abstract tendered as evidence could not have been used to determine the value of the subject vehicle.

14. On the same note, it was the appellant's argument that PW1's claim for Kshs.700,000/ was not supported by evidence. The appellant felt strongly that the trial court had ignored the evidence of its witnesses in entering judgment.

15. Not only so; the appellant contended that the trial court delivered judgment without the benefit of the plaintiff's exhibits 1-4 hence there was no ground on which to find the appellant liable. In so arguing, the appellant relied, *inter alia*, on the Court of Appeal case of ***Douglas Odhiambo Apel & another v Telkom Kenya Limited [2014] eKLR*** where it was held that it is the duty of a plaintiff to prove his claim through the presentation of evidence, as well as ***Linus Fredrick Msaky v Lazaro Thuram Richoro & another [2016] eKLR*** where the court appreciated that where damages have been occasioned to a motor vehicle, the same ought to be specifically pleaded and strictly proven as special damages.

16. In his opposing submissions, the respondent argued that evidence was adduced before the trial court to support the version of events laid out in his pleadings, including the evidence of the driver who was injured in the process, while simultaneously pointing out that there were a number of inconsistencies in the evidence of the appellant's witnesses. On that basis, the respondent supported the trial court's finding on liability.

17. On the subject of special damages, it was the respondent's submission that the value of the damaged subject vehicle was pleaded and proved by way of the assessment report by Bhachu Industries Limited and backed by the police abstract, both of which constituted the respondent's list and bundle of documents and later produced as exhibits.

18. The respondent concluded by arguing that he had proved negligence on the part of the appellant to the required standard, with reference to ***Dr. John Gachanja Mundia v Francis Muriira & Another [2017] eKLR*** where the court acknowledged that the elements of proving negligence must exist for a claim of such nature to succeed.

19. The appellant's counsel, *Miss Muendo,* restated the submissions on record, adding that since the respondent's driver was sent to clean the subject vehicle on three (3) occasions, the trial court ought to have taken this fact into account and ought not to have found the appellant liable.

20. Counsel further argued that in awarding the special damages, the trial court relied on documents that could not have been used to ascertain the value of the subject vehicle which is to say that the award under this head was erroneous.

21. On her part, *Miss Manyama* learned advocate for the respondent maintained that the particulars of negligence were pleaded and proved, further urging this court to consider where the appellant's witnesses were at the time of explosion of the subject vehicle.

22. The advocate also stood her ground that the special damages awarded were both pleaded and proved.

23. I have taken into consideration the contending submissions on appeal hand in hand with the authorities cited. I have likewise re-evaluated the evidence tendered before the trial court. I do note that the six (6) grounds of appeal touch on liability and quantum, hence I deem it practical to discuss the grounds under those two (2) limbs.

24. I will start off with the limb on liability, raised in grounds (i) and (v) of appeal. Turning to the evidence at trial, Mohamed Sadique Ali who was PW1 testified that he was at all material times the Finance Operating Manager of the respondent's company and that on the material day, he received a call from one Ismael informing him that the driver of the subject vehicle had been injured from the explosion, following which he went to hospital and later on, to the scene of the accident.

25. PW1 stated that he knew the aforesaid driver to be a quiet man and a non-smoker. The witness explained that he subsequently wrote to the appellant, demanding compensation for the damaged goods. He also produced two (2) invoices as P. Exhibits 3 and 4.

26. During cross examination, the witness testified that the subject vehicle was washed the day prior to the date of the accident and thereafter collected on the date of the accident. He also admitted that he was not present at the scene when the explosion occurred.

27. The driver, Abdirizak Ibrahim, gave evidence as PW2. In his testimony, he mentioned that PW1 had instructed him to take the subject vehicle to the appellant's premises, and that the appellant advised him to take the said vehicle for washing before returning it to the appellant. That upon arrival, he was directed to the welder who uses a gas cutter and that it was immediately after the welder lit a match that the subject vehicle exploded, causing him to sustain bodily injuries.

28. On being cross examined, it was PW2's evidence that he took the subject vehicle for cleaning twice on the material day and that by the time he returned to the appellant's premises, the subject vehicle was clean, maintaining that he is not the one who lit the matchstick which resulted in the explosion.

29. In contrast, Andrew Muli vide his testimony as DW1 stated that he was at all material times an employee of the appellant, working as a supervisor. This witness clarified that the appellant and respondent had been in business for sometime and that on the material day, the subject vehicle had been brought to the appellant's premises for repairs and it is at this point that he noted there was fuel in the vehicle, but that the driver of the subject vehicle insisted that there was no fuel and ensured to prove so by lighting a match, only for the vehicle to explode.

30. DW1 testified during cross examination that before issuing vehicles with quotations, he had to confirm that there was no presence of fuel or fumes, further stating that when the subject vehicle was tested for the second time, the testing gadgets showed that it still had fuel/fumes but the driver did not want to listen to him.

31. Joshua Kiwanza followed as DW2 and testified that he was asked to test the subject vehicle using a cutter gas detector and that even after the driver took the vehicle for washing before later returning, the vehicle still had fumes but the driver objected. That the said driver then packed the subject vehicle in the calibration shed before lighting the matchstick. This was reiterated in his cross examination.

32. Last but not least was Kasingi Nguti who; in his evidence as DW3; stated that an argument ensued between the driver of the subject vehicle and one of his colleagues, leading up to the lighting of the matchstick and the consequent explosion. The witness went on to state that the welder had not been used on the subject vehicle on the material day since the vehicle had not been formally quoted, testifying on cross examination that he was outside waiting to be assigned with duties when the explosion occurred.

33. Eventually, the learned trial magistrate in her analysis pointed out that the appellant's case constitutes mere denials and the appellant's employees ought to have demonstrated any attempts made at stopping the driver from lighting the matchstick but did not. According to the learned trial magistrate, the appellant's employees, being well aware of the risks attached to a tanker with fuel, ought to have taken all necessary precautions and in failing to do so, were to blame for the accident.

34. Having considered the above, I note that it is not disputed that the parties herein shared a business relationship. It is equally not disputed that on the material day, the respondent's subject vehicle; being driven by PW2; was at the appellant's premises when the explosion took place. Further to the above, the parties are in agreement that PW2 had taken the subject vehicle for cleaning on the material day.

35. In that case, the learned trial magistrate's foremost duty lay in determining who was likely to blame for the explosion and damage resulting therefrom. Having re-looked at the evidence, I noted that there are two conflicting positions: on the one hand, the respondent blamed the appellant's employees while on the other hand, the appellant blamed PW2.

36. To begin with PW2 in his oral evidence explained that he took the subject vehicle for cleaning and calibration at Samore Engineering Limited on two (2) separate occasions on the material day. DW1 produced two (2) invoices issued by Samore Engineering Limited and dated 7th August, 2008 as P. Exhibits 3 and 4 indicating that the subject vehicle was indeed cleaned.

37. It is my observation that the date borne on the aforesaid invoices differs from the date of the explosion by one (1) day. For one reason or another, the respondent did not call an employee or official from Samore Engineering Limited to clarify the position. Be that as it may, PW1 during re-examination stated that the invoices were usually issued to the respondent's company once or twice a month. Additionally, the particulars on the invoices indicate that the subject vehicle was cleaned/calibrated and in any event, I do not deem the date referenced therein

to be so far off as to lead me to deem the invoices unreliable.

38. PW2 also mentioned the welder as the person who lit the match, thereby causing the explosion. He did not disclose the name of the welder. However, in his witness statement, he pointed out that DW3 was the welder at the time and that it is he who was working on the subject vehicle when the same exploded.

39. On their part, all the appellant's witnesses testified that it is PW2 who lit the matchstick that caused the explosion and going by their respective testimonies, it would seem they all witnessed the said explosion first hand. However, going by their evidence it would appear only DW3 sustained injuries. I find it strange to note that there is nothing to indicate that the remaining witnesses were injured in the process, neither did they report that they otherwise escaped from the subject vehicle following the explosion. Taking this view, I am convinced that it is more likely than not that DW1 and DW2 were not near the subject vehicle at the time of the incident.

40. Further to the above, I note that the parties had filed separate police abstracts, each setting out the complaint in accordance with the position taken by each side.

41. In my opinion, therefore, whereas the learned trial magistrate ought to have considered the invoices adduced as evidence at trial, she still appreciated that going by the evidence, the respondent appears to have taken the necessary precautions by taking the subject vehicle for cleaning prior to the maintenance, hence the appellant's employees were equally responsible for ensuring all the safety measures necessary were taken to prevent a catastrophe such as the one which occurred but have not demonstrated that they did so. It is worth mentioning that the respondent in his pleadings relied on the *res ipsa loquitur* doctrine. The Court of Appeal in the case of ***Margaret Waithera Maina v Michael K. Kimaru [2017] eKLR*** sought to illustrate the applicability of the doctrine in the following manner:

> ***"The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed."***

42. In the present instance, the respondent attempted to explain the events leading up to the incident. Having re-evaluated the same against the version offered by the appellant, it is my view that the doctrine would be applicable here. I am thus satisfied that in the circumstances which the trial court had to consider and supported by the evidence on record, the respondent proved on a balance of probabilities that the explosion was caused by the appellant's negligence through its employees. Consequently, the learned trial magistrate arrived at a proper finding on liability.

43. I now turn to the second limb relating to the award on special damages as captured in grounds (ii), (iii), (iv) and (vi) of the appeal. I find relevance in the evidence of PW1, who stated that as per the demand letter adduced as P. Exhibit 1, the respondent claimed from the appellant the sum of Kshs.600,000/ and that an assessment was equally done by Bhachu, in addition to compensation for loss of profits, totaling Kshs.1,200,000/.

44. Ultimately, the trial court only awarded the sum of Kshs.600, 000/ plus interest thereon at the rate of 21% p.a. I have re-evaluated P. Exhibit 1 which is the demand letter dated 15th December, 2008 addressed to the appellant by the respondent. The same alludes that the subject vehicle was valued at Kshs.600,000/. The respondent also relied on the police abstract mentioned hereinabove and produced as P. Exhibit 6 as well as the letter dated 9th October, 2008 from Bhachu Industries Limited indicating the subject vehicle's value at Kshs.600,000/ and further placing the price of a new tank trailer at Kshs.720,000/.

45. The respondent; however; did not adduce any evidence to illustrate the manner in which such valuations/assessments were arrived at by Bhachu Industries Limited, for instance, by way of a valuation report. The evidence tendered was not tangible proof of the special damages that were sought.

46. The law is well settled that when it comes to special damages, the same must be specifically pleaded and strictly proved. This position was echoed by the Court of Appeal in ***Douglas Odhiambo Apel & another v Telkom Kenya Limited [2014] eKLR*** cited by the appellant, where the court rendered itself thus:

> ***"The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved."***

47. Being both bound and guided by the above analysis, I take the view that the respondent did not prove the special damages pleaded which is to say that the learned trial magistrate had no basis on which to grant the same.

48. In the end, the appeal succeeds only in respect to the award on special damages. Consequently, the award of Kshs.600,000/ under this head plus interest thereon at 21% p.a. is hereby set aside and substituted with an order dismissing the same. For clarity purposes, the judgment shall now read as follows:

a) Liability 100%

b) Special damages NIL

In considering the nature and circumstances of the appeal, I will order each party to cater for its own costs.

Dated, signed and delivered at NAIROBI this 21st day of November, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

…………………………………. for the Appellant

…………………………………. for the Respondent