



IN THE COURT OF APPEAL

AT KISUMU

CORAM: KWACH, AKIWUMI & TUNOI, JJ.A.

CIVIL APPEAL NO. 177 OF 1995

BETWEEN

TURFENA ACHIENG' ABUTO MOLLY

ACHIENG' ABUTO (MINOR-NEXT FRIEND.....APPELLANT

MICHAEL ABUTO NYAMUOK, HER FATHER.....APPELLANT

AND

WILLIAM AMBANI MISE C/O AHERO

TOTAL SERVICE STATIONRESPONDENT

TOTAL OIL PRODUCTS (EAST AFRICA) LIMITED....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu (Justice Kuloba) dated 16th March, 1995

IN

H.C.C.C NO. 198 OF 1994)

JUDGMENT OF THE COURT

This is an appeal against the judgment of Kuloba J dismissing the suit brought by the appellants the suit brought by the appellants, mother and daughter, the latter a minor suing through her next friend, her father, for general and special damages for injuries sustained by the appellants through the negligence of the respondents.

What then are the circumstances leading to institution of the suit by the appellants. According to the first appellant who dwells in the rural town of Ahero, she had on 3rd June, 1988, bought 10/- worth of what she thought was paraffin from the Total Service Station at Ahero operated by the first respondents which was pumped into her plastic jerrican . Later that day whilst standing by the fire in fire place of her house and pouring the paraffin from the jerrican into her unlit lantern, the paraffin exploded and caught fire. She and her daughter suffered several burns as a result of the explosion and fire. In the context of the

rural life of this country where the appellants live, paraffin is an article of common household use and known to all rural dwellers as a safe substance, and there is thus, no special duty on the part of the appellants to take any special precautions in handling it. The paraffin had reached the first appellant in the same state in which it had left the paraffin pump and the paraffin could not, neither was it expected, to be examined by the first appellant. 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 loquitur* 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 first 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.

At the hearing in the high court, the evidence given by the first appellant as to how the accident occurred was really not disputed and the learned 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 3rd June, 1988. In the plaint it had been averred that the paraffin had been purchased on 5th June, 1988, and on which same day, the accident had occurred on 3rd June, 1988, and the trial had proceeded on that basis. The learned judge, however, without any evidence to support the proposition that there had been any *novus actus interveniens* on the part of the first appellant, came strangely to the conclusion that the evidence for the appellants was too scanty to support any proper decision and further, that for the appellants to establish their case, they had to adduce scientific evidence to establish that the paraffin that the first appellant had bought from the first respondent was capable of behaving the way it did, and also that the plastic jerrican had not contain any explosive substance. We fear that the learned judge had, in view of the undisputed evidence of the first appellant surrounding the occurrence of the accident, and the well known qualities of paraffin as a safe substance, misapprehended the principles of the doctrine of *res ipsa loquitur*. It would seem that the learned judge, in his determination to discredit the evidence of the first respondent, went on as far as to say that:

“On the other hand there was evidence on the part of the respondent that their paraffin had been used by members of the public and no explosion occurred. If this was correct and there is no reason why it should be doubted, then the record for chemical tests of the paraffin used by the plaintiff is even more apparent.”

But there was before the learned judge cogent evidence to cast doubt on this very assertion that he made, and it is a travesty of justice for him to have overlooked this. In the evidence of the first respondent himself, he had said the following:

“On 6th June, 1988 the district officer came to my station. Police also came. They came and said people in the area were complaining of burns of paraffin bought from various outlets as Ahero.”

The Western Kenya Area Manager for the second respondent who gave evidence for the evidence for the respondents also confirmed like the respondent, that there had been complaints from the general public about exploding paraffin bought in Ahero where there is only one other service station apart from the one operated by the first respondent, and which had led to the closure of the first respondent's paraffin pump. The relevant evidence of the Area Manager is as follows:

“In June, 1988, I received a report on my office that Ahero Police had stopped sales of Kerosene at Ahero Petrol Station. I drove there to do investigations. When I got to the station Mr. William Ambani had stopped selling Kerosene. I sought explanation for stopping. I was informed that the Kerosene was contaminated and explosive.

I took some Kerosene and to carry out physical tests. We put it on 3 bottle tops and struck a match to light it. I saw normal flame, with no explosion.”

Need we say any more!

The last paragraph of the above excerpt from the evidence of the Area Manager, contains some evidence which may be considered in the context of the evidence of the respondents. But before doing this, it would be convenient to consider more fully, the principles involved in the doctrine of *res ipsa loquitor* and how it applies to the present appeal.

Paraffin as we have already observed, is a non dangerous common household substance which is of daily use in the rural areas of the country. As Lutta, J.A. observed in the case of Mwanachi Service Station and Another v Miagen (1973) EA 305 at 309:

“Ordinarily a purchaser or customer of Kerosene does not examine it nor does he have reasonable opportunity to analyse the same in order to discover any defects therein or to observe whether its condition, in all probability, is likely to cause damages to property or injury to person: Kerosene is not dangerous in itself..... There was thus no special duty on the part of the Plaintiff or the consumer (or rather the purchaser) to take appropriate precautions in handling the mixture.”

In the case of Embu Road Services v Rimi (1968) EA22 at 25, Sir Charles Newbold P in his leading judgment after considering with approval the then two leading East African authorities on the doctrine of *res ipsa loquitor* namely, Mzuri Muhhidin v Nazzor Bin Self (1960) EA 201 and Menezes v Stylianides Ltd (Civil Appeal No. 46 of 1962 unreported) went on to say:

“As I understand the law as set out by these two judgments of this court, where the circumstances of the accident give rise to the inference of negligence the defendant, in order to escape liability, has to show, in the words of SIR ALISTAIR FORBES, ‘that there was a probable cause of the accident which does not create negligence’ or in the words which I have previously used ‘that the explanation for the accident was consistent only with an absence of negligence.’ The essential point in this case, therefore, is a question of fact, that is, whether the explanation given by the defendant shows that the probable cause of the accident was not due to his negligence or that it was consistent only with the absence of negligence.”

In considering the explanation given by the respondents, it must not be forgotten and this is based on what the first respondent and the Area Manager themselves said, that the paraffin pump of the first respondent had been shut down by the police because of exploding paraffin experienced by members of the public who had about that time, purchased paraffin in Ahero. It was after then that the experiment conducted by the Area Manager with paraffin obtained from the paraffin pump of the first respondent, showed that the paraffin which had then been obtained from the pump did not explode; but the Area Manager and the first respondent failed significantly to say on which date they had conducted this experiment. What is clear, is that this took place several days after the appellants had been injured by the explosion and after the police had on 6th June, 1988, closed down the first respondent’s paraffin pump, at least by which time, the state of the first respondents’ paraffin then in its tank may well have changed. It may well also be true that the police took a sample of the paraffin from the first respondents’ service station but there is no evidence to show that was among the samples examined by the Government Chemist which he found to be innocuous. The same can also be said of the sample that the husband of the first appellant said he had given to the police which as it happened, he had obtained not from the lantern or the jerrican which was empty, but from another source, a tin lamp. The failure to call the policeman who submitted the samples to the Government Chemist for examination to give evidence renders the evidence of the Government Chemist of no probative value. In any case, the learned judge did not find his conclusion that the appellants’ evidence was too scanty and that it was up to them to adduce scientific evidence as to the flash point of the paraffin that the first respondent had purchased and on the pristine condition of her jerrican. On the expert evidence of the Government Chemist. In the result, one is left only with the evidence of the first appellant as to the cause of the explosion and fire and the inference that it must have been caused by some dangerous substance with which the paraffin which the first respondent had purchased from the first respondent’s service station had been contaminated. 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 seller and manufacturer of paraffin like the first and second respondents on the other hand, owed the duty of care which have been described. The second respondent supplied the first respondent with the paraffin that was transported in sealed tanks and pumped directly into the underground storage tank of the first respondent. According to the first respondent, he would check the seals on the tanker and make non scientific test of the paraffin to ensure its safety. He in turn, would pump the paraffin into the containers of purchasers. In these circumstances the appellants were entitled to assume that the respondents in their various roles, must, to adopt the words of Lord Atkin in the well known case of Donoghue v Steveson (1932) AC 562 at 580:

“take reasonable care to avoid acts or omissions which you can reasonable foresee would be likely to injure your neighbour.”

In answer tot he question who then in law is ones neighbour? Lord Atkin went on to say:

“The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.”

Inspite of the proposition that the procedure described for the supply and sale of paraffin made it unlikely, that the paraffin would have been contaminated, the fact that it exploded as described by the first appellant and the fact that there was no novus actus interveniens on her part, give rise to the inference that there must have been some negligence on the part of both the respondents. This was also the view taken by the East African Court of Appeal in the judgment of Mustafa JA in the case of Wananchi Service Station & Another (Supra) at 306.

But were the respondents able to escape liability from the interference of negligence that arises from the evidence of the first respondent and the other evidence that we have directed attention to? From our analysis of this evidence, we can safely conclude that the respondents had not shown that there was a probable cause of the accident which does not connote negligence on their part.

All that now remains to be said is that the appeal is allowed with costs.

We must now consider what damages should be awarded to the appellants. The learned judge attempted to do this and in doing so, ignored important medical evidence as to the seriousness of the injuries sustained by the appellants. Some of the sites of the burns suffered by the first respondent may not be visible, but their severity and effect are factors that should not have been ignored by the learned judge. Dr. Olima, the well known surgeon in Kisumu, in his evidence, said that the first appellant was admitted to his nursing home on 3rd June, 1988, in severe pain and shock and suffering from first degree burns on the head and neck including the lips. She also sustained severe burns on her left arm and right hand. She was discharged some six weeks later on 18th July, 1988. His prognosis was that the hypertrophic scar of the left arm was unstable and would require skin grafting otherwise she stood the risk of developing cancer. She also had constructed left elbow and shoulder joints which would require surgical operation to free them. The second appellant was also admitted to his nursing home on 3rd June, 1983. She was in shock and suffering from burns on the lower abdomen, back, the left arm and the left and right lower limbs. She too stayed in the nursing home for about a month, before being discharged on 4th July, 1988. She was left with scars on the lower abdomen and back. These scars are unstable and will require skin grafting if she is to avoid the risk of skin cancer. The cost of skin grafting would according to Dr Olima be between 15,000 – 40,000 shillings.

In spite of the medical evidence being uncontradicted, the learned judge who himself, is no expert in these

matters, awarded general damages for the first and second respondent at 80,000/= and 30,000/= respectively, because to quote him,"the injuries healed well." This completely ignored the important medical evidence that the appellants had each spent not less than a month in hospital indicating the severity of their injuries, and that their scars were unstable and skin grafting would be required if the appellants were to avoid the risk of skin cancer. The general damages which the learned trial judge assessed was in the circumstances, ridiculously and manifestly low. We will assess them as 350,000/= for the first respondent and 200,000/= for the second respondent which are hereby awarded to the appellants against the respondents jointly and severally.

In order to succeed on the special damages claimed, they must be clearly proved. The only receipts produced which can be said to relate to the medical treatment received by the appellants are the one dated 4th July, 1988, for 750/= in respect of the first appellant, the one dated 18th July, 1988, for 80/= in respect of the second appellant and the two dated 19th August, 1993, for 2,000/= each being the cost of the medical reports on each of them prepared by Dr Olima and produced in evidence. The total of special damages comes to 2,750/= in respect of the first appellant and to 2,080/= in respect of the second appellant which are hereby awarded against the respondents jointly and severally.

It is so ordered.

Dated and delivered at Nairobi this 1st day of December, 1995.

R. O. KWACH

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL