Tungwa & another v Board of Trustees Pandya Memorial Hospital (Civil Appeal E002 of 2022) [2024] KECA 1916 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1916 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E002 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 11, 2024

BETWEEN

MLONGO TUNGWA ..... 1ST APPELLANT

LEWA NGUTA LEWA ..... 2ND APPELLANT

AND

BOARD OF TRUSTEES PANDYA MEMORIAL HOSPITAL ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 26th October 2020 in HCCA No. 217 of 2019)

JUDGMENT

1. This is a second appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 26th October 2020 in HCCA no 217 of 2019 whereby the learned Judge allowed the respondent's appeal and set aside the judgment and decree of the trial court in Mombasa CMCC no 1792 of 2017.

2. The genesis of the appeal before us is that, by a plaint dated 24th October 2017, the appellants, Mlongo Tungwa and Lewa Nguta Lewa, acting as legal administrators of the estate of Hassan Kamanza Nguta (the deceased), sued the respondent, the Board of Trustees of Pandya Memorial Hospital, in Mombasa CMCC no 1792 of 2017 claiming compensation for the benefit of the deceased's estate under the *Fatal Accidents Act* (cap 32) and the *Law Reform Act* (cap 26).

3. The appellants' case was that, on or about 8th May 2017, the deceased was standing near a wall forming part of the perimeter fence surrounding the respondent's hospital when it collapsed and fatally injured him; that the accident was caused by reason of negligence on the part of the respondent, their servants or agents, particulars whereof were set out in the plaint; that, in consequence of the deceased's death, the appellants and other dependents suffered loss and damage as particularised in the plaint; that, prior to his death, the deceased was aged 41 years and in good health; that the deceased carried on business

earning ksh 15,000 monthly; and that he was the sole breadwinner on whom the beneficiaries stated in the plaint were dependent. By reason of the matters aforesaid, the appellants prayed for judgment against the respondent for special damages in the sum of ksh 16,550; general damages under the *Fatal Accidents Act* and the *Law Reform Act*; costs of the suit and interest.

4. The appellants' suit was subsequently consolidated with Mombasa CMCC no 890 of 2018 filed by Chidima Mwanduka and Stephen Thomas Munga against the respondent, acting as the legal administrators of the estate of Ismael Konde (deceased), who was also alleged to have been standing by the respondent's perimeter wall on 8th May 2017 when it collapsed in consequence whereof he sustained fatal injuries. The plaintiffs in that suit pleaded facts similar to those disclosed by the appellants and sought reliefs similar to those sought in the appellants' claim.

5. Denying the claims in the two suits, the respondent filed similar Statements of Defence dated 28th November 2017 and 7th June 2018 respectively. It denied the averments as set out in the respective plaints. The respondent averred that, if any wall collapsed as alleged, then it was part of the boundary wall between its premises and Mbaraki Girls Secondary School, Mombasa County; that the perimeter wall was constructed within the Code of Building Regulations, and that it had taken all reasonable safety measures at its entire premises; that the perimeter wall had adequate channels/vents; that, in the alternative, the collapse of the boundary wall was an act of God, which was not foreseeable or avoidable on the part of the respondent, particularly as a result of the unusually heavy rains that pounded Mombasa County for 12 hours between 7th and 8th May 2017; that the two deceased persons were dwelling in illegal structures using part of the boundary wall as their rear support without the knowledge, authority and/or consent of Mbaraki Girls Secondary School and the Mombasa County Government; that, by so doing, they negligently weakened the structure of part of the perimeter wall; and that the doctrine of non-fit injuria was applicable in their respective cases.

6. In its judgment dated 28th October 2019 delivered by Lesootia A. Saitabau, PM., the trial court held: that the appellants were clothed with the authority to bring their suit having been granted letters of administration; that, when the respondent acquired its premises, it must have known whether there was a perimeter wall between its premises and that of Mbaraki Girls Secondary School; that, if the respondent believed that the wall was built by, and belonged to, the said school or to any other party, then it should have taken out third party proceedings against such other party; that, by failing to do so, or to adduce evidence to prove that the wall did not belong to it, the court had no reason to doubt that the wall belonged to the respondent; that there was no evidence that the deceased were at the scene illegally, or that they had erected illegal structures against the wall; that, if the wall was constructed according to the required standards and in adherence to building codes, it should have withstood the rains that pounded the area the previous day; and that the wall was structurally defective due to negligence on the part of the respondent.

7. In conclusion, the trial court found that the appellants and the other plaintiffs had proved their case on a balance of probabilities, and that the respondent was 100% liable for the collapse of the wall, and for the death of the two deceased. Accordingly, the court entered judgment as prayed and awarded the appellants a sum of ksh1,140,000 as damages under the heads of loss of dependency, loss of expectation of life and pain and suffering; costs of the suit; and interest thereon at court rates from the date of judgment until payment in full.

8. Dissatisfied with the trial court's decision, the respondent filed an appeal to the High Court of Kenya at Mombasa in HCCA no 217 of 2019 essentially faulting the trial court for finding that the appellants had capacity to sue; that the respondent was negligent and liable to the appellants as claimed; and for awarding them the reliefs sought.

9. In its judgment dated 26th October 2021, the High Court (P. J. O. Otieno, J.) observed that the issue of the appellants' legal capacity surfaced for the first time in the respondent's submissions and was never pleaded; and that, nonetheless, the limited grant of letters ad litem issued to the appellants not only authorised the appellants to file suit, but also to prosecute their claim. According to the learned Judge, the initial burden of proof was on the appellants to establish on a balance of probabilities that the respondent constructed the wall, and that the respondent's negligence resulted in the fatal injuries sustained by the deceased; that the appellants did not discharge this burden; and that it was therefore erroneous for the trial court to shift the onus to the respondent to disprove negligence on its part.

10. The High Court further held that the trial court erroneously found that the respondent's failure to take out third party proceedings was an implicit admission of its ownership of the wall, which was contrary to the provisions of Order 1 Rule 15 of the *Civil Procedure Rules, 2010* since the issue for determination between the appellants and the respondent was whether the respondent constructed the collapsed wall in contravention of the building specifications and thereby exposed members of the public to danger as pleaded in the plaint; and that there was no evidence furnished by the appellants to prove that the collapsed wall was not built in accordance to the required standards and in adherence to the building codes. The court therefore set aside the finding on liability and substituted therefor a finding that liability was never proved.

11. Aggrieved by the High Court's decision on liability, the appellants moved to this Court on appeal on 8 grounds set out in their Memorandum of Appeal dated 15th December 2021 faulting the learned Judge for: holding that the appellants did not prove their case on a balance of probability; failing to appreciate that the ownership of the wall in question was never disputed, and that it was not an issue in the case; considering only one particular of negligence; failing to appreciate that it is the respondent who departed from its pleadings; failing to appreciate that the doctrine of res ipsa loquitur applied in the present case; holding that it was not the duty of the respondent to join a third party in this case; failing to consider the appellants' submissions; and for allowing the respondent's appeal on liability.

12. In support of the appeal, learned counsel for the appellants, M/s. B. N. Kwenzi & Company, filed written submissions dated 28th February 2023 citing 11 judicial decisions, which we have taken into consideration, including: the proper application of the doctrine of *res ipsa loquitur* under which negligence may be inferred in certain circumstances; the evidential burden placed on a party by virtue of sections 109 and 112 of the *Evidence Act* (see *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2004] eKLR); and the proposition that courts determine issues as between the parties before it (see *Mary Wanjiru Maina (Suing as Administrator Ad Litem of the Estate of the late Jane Wanjiru Maina) v Lilian W. Macharia & Another* [2019] eKLR).

13. On their part, learned counsel for the respondent, M/s. Mogaka Omwenga & Mabeya, filed written submissions dated 20th March 2023 in opposition to the appeal, citing 6 judicial decisions on the authority of which they submitted: that the jurisdiction of the second appellate court is restricted to consideration of points of law unless it is shown that the two courts below considered matters they should not have considered, or failed to consider matters they should have considered or, looking at the entire decision, it is perverse (see *Kefa Omanyala Ingura v Ibrahim Omerikit Papai* [2015] eKLR; *Nkene Dairy Farmers Co-operative Society Limited & Another v Ngacha Ndeiya* [2010] eKLR; and *Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another* [2014] eKLR; and that, on the authority of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR, in the absence of pleadings, any evidence produced by the parties cannot be considered; that no party should be allowed to travel beyond its pleadings; that parties are bound to take all necessary and material facts in support of the case set up by them; and that it is neither desirable nor permissible for a court to frame issues not arising on the pleadings.

14. In addition, counsel cited the cases of *M'Iruanji Muchai v Broadways Bakery & another* [1996] eKLR for the proposition that there is yet to be liability without fault in the legal system in Kenya, and that a plaintiff must prove some negligence against a defendant where the claim is based on negligence; and *Mbuthia Macharia v Anna Mutua Ndwiga & Another* [2017] eKLR for the proposition 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 exist

15. Unless otherwise provided, this Court's mandate on 2nd appeal is limited to points of law. Section 72 (1) of the *Civil Procedure Act* provides that:

> 72. Second appeal from the High Court
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> 1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
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> a. the decision being contrary to law or to some usage having the force of law;
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> b. the decision having failed to determine some material issue of law or usage having the force of law;
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> c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

16. In *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, this Court held that:

> " We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law."

17. In the same vein, this Court held thus in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of *Stephen Muriungi and another v Republic* (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
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> > " We would agree with the view expressed in the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.'" [Emphasis added]

18. Except for the doctrine of res ipsa loquitur; and the contention that the respondent should have instituted third party proceedings against Mbaraki Girls Secondary School to avoid liability, both of which have a bearing on points of law, and which the appellants invoke in an attempt to challenge the learned Judge's holding on liability in favour of the respondent, the other grounds of appeal advanced by the appellants raise evidential matters of fact that fall outside the scope of this Court's jurisdiction on second appeal.

19. Likewise, the rival submissions of learned counsel essentially leaned on various judicial decisions on the authority of which they made gallant attempts to unsuccessfully translocate matters of factual evidence to the realm of mixed law and fact with intent albeit misperceived to blaze a trail not trodden by this Court on second appeal. That said, we have taken to mind those decisions that deserve our attention in determination of the appeal.

20. On the 1st issue as to whether the appellants' plea of *res ipsa loquitur* shifted the evidential burden on the respondent to avoid liability, counsel for the appellants submitted that the doctrine holds that, once invoked, the appellants has met their burden of evidence and the respondent must show either no negligence on its part or that there was contributory negligence to avoid liability. According to counsel, the onus of proof for the averment that the perimeter wall was built in accordance with the code of standards and that the respondent was not the owner moved from the appellants to the respondent; and that, in the absence of any explanation to show that the respondent was, on the balance of probabilities, not negligent, a finding of negligence is inevitable once it is shown that the doctrine of *res ipsa loquitur* applies.

21. In rebuttal, counsel for the respondent submitted that the appellants bore the burden to prove the construction of the wall, which they did not discharge; that, in the circumstances, the doctrine of *res ipsa loquitur* was not applicable to the case; and that liability could not be inferred against the respondent.

22. In his judgment, the learned Judge held that:

> "30. It follows that the initial burden of proof was upon the plaintiffs - the Respondents in this Appeal, but the same would shift to the Defendant-the Appellant in this Appeal, once the evidence led points to the plaintiff's explanation being the probable position. That never was and therefore the burden never shifted and the plaintiff's (sic) remained unproved.
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> 31. In this appeal, it is the Appellant's contention that both PW1 Lewa Nguta and PW2 Mlongo Tungwa on cross-examination confirmed 'not knowing who authorized the construction of the wall and exactly why the wall collapsed save for the heavy downpour'. Such evidence goes a long way in demonstrating that the case was never proved even if the decision had been based on the pleaded act of constructing the wall.
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> 32. Clearly, the plaintiff/appellants' testimony was that they did not know who authorized the construction of the wall and what caused it to collapse. The respondent's witness also testified that he did not know who constructed the wall and further that there were no records on its construction in their records. Against that evidence, the trial court found that the wall belonged to the appellant because 'it did not explain whether the wall was constructed prior to its allotment of the land or consequently'. Because the burden of prove had remained on the appellants to establish their case, it was erroneous and in fact

amounted to an act of shifting the onus to a party with no obligation in that regard. That is the other reason the appeal must succeed."

23. *Black's Law Dictionary* (9th Edn.) elaborates on the application of the doctrine of *res ipsa loquitur* at p.1424 thus:

> The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes ....
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> It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or omission. When the fact of control is used to justify the inference that defendant's negligence was responsible it must, of course, be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."

24. Regarding the pre-requisites for properly invoking the doctrine of *res ipsa loquitur*, this Court in *Martlin A. Waindi v Pharmaceutical Manufacturing Co. Ltd. & another* [1994] eKLR observed that:

> " The maxim res ipsa loquitor comes into operation:
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> 1. on proof of the happening of an unexplained occurrence;
> 2. when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and
> 3. the circumstances point to the negligence in question being that of the defendant, rather than that of any other person. See *Charlesworth & Percy on Negligence*: (*supra*) 7th edition at page 350."

25. In *Scott v The London and St Katherine Docks Company* (1865) 159 ER 665, Erle CJ also elucidated on the doctrine as follows:

> ... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

26. In our considered view, the learned Judge was not at fault in concluding, on re-evaluating the evidence, that it was not demonstrated to the required standard of proof that the respondent authorised the construction of the wall and that the wall was under its control and/or management. Without demonstrating that the circumstances of the case pointed to the respondent's negligence, and not of any other person, the appellants could not benefit from the doctrine of res ipsa loquitur to impute liability on the respondent. Consequently, this ground of appeal fails.

27. Next in the submissions by the appellants' counsel is the contention that the respondent was liable under the *Occupiers' Liability Act* or the *Occupational Safety and Health Act*, a matter not pleaded or tried on evidence in the appellants' case before the trial court, and subsequently determined on appeal to the High Court. In the circumstances, we hasten to observe that This Court cannot entertain such an issue, one that is raised for the first time in submissions by counsel on second appeal to this Court. In *Pacific Frontier Seas Ltd v Kyengo & another* [2022] KECA 396 (KLR), this Court had this to say with regard to unpleaded issues raised belatedly on appeal:

> " 42. As regards unpleaded issues, the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues because the issues determined by the court must flow from pleadings. It is the pleadings which guide the litigation and succinctly inform the parties and the court what is in dispute. However, where the parties lead evidence and address the unpleaded issues and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the court, the court will validly determine the unpleaded issues. (See *Captain Harry Gandy v Caspar Air Charters Ltd* [1956] 23 EACA 139; *Odd Jobs v Mubea* [1970] EA 476, *D.E.N. v P.N.N.* (*supra*), *Baber Alibhai Mawji v Sultan Hashim Lalji & Another*, CA No 296 of 2001; and *Mapis Investment (K) Ltd v Kenya Railways Corporation* (2005) 2 KLR 410)."

28. On the issue as to whether the respondent was obligated by law to institute third party proceedings against Mbaraki Girls Secondary School so as to avoid liability for the accident in issue, counsel for the appellants submitted that the respondent failed to plead in its defence any fact pointing to the school's ownership of the wall in question, or its liability for the accident; that the respondent ought to have joined the school or any other party in third party proceedings to enable the trial court determine the issue of liability as between the respondent and such third party; and that, failing institution of third party proceedings, the respondent bore liability for the fatal accident. What the appellants did not explain is why they excluded from their suit the school or other third party whom they considered to have been liable either severally or jointly with the respondent.

29. In response, counsel for the respondent submitted that the learned trial Magistrate misdirected herself on the purpose and intents of the provisions of Order 1 rule 15(1) (a), (b) and (c) of the *Civil Procedure Rules, 2010*; that the relevant issue that fell to be determined between the appellants and the respondent was whether the respondent constructed the collapsed wall in contravention of building specifications and thereby exposed members of the public to danger as pleaded in the plaint; that the suit and defence raised no issue for determination as between the appellants, the respondent and Mbaraki Girls Secondary School or as between the respondent and the school; and that, accordingly, no need arose for third party proceedings.

30. As correctly observed by the learned Judge:

> " 33. The other reason the court found against the appellant was that it did not take out third party proceedings which was to the court an implicit admission of its ownership of the wall. Third party proceedings are provided for by the Rules under Order 1 Rule 15 of the *Civil Procedure Rules, 2010*. In that stipulation, defendant can only join a third party, where it is its case:
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> i. That it is entitled to a relief or remedy against the third party relating to or substantially relating to or connected with the

subject matter of the suit and or substantially the same as some relief claimed by the plaintiff against the defendant.

ii. There is a question or issue relating to or connected with the said subject matter which is substantially the same question or issue arising between the plaintiff and the defendant and/or can properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any of the parties.

34. On the basis of the pleadings on record, I do agree with the appellant that the issue which was to be determined between the respondents and the appellant was whether the appellant constructed the collapsed wall contrary to the building specifications and exposed members of the public to danger as pleaded in the plaint. I further find that that there was no question or issue relating to or connected with the said subject matter which could have could (sic) properly have been determined - not only as between the respondents and the appellant but as between the respondents and the appellant and Mbaraki Girls Secondary School or between any of the parties. To that extent I find that the Learned Magistrate erred and misdirected himself on the intents and purposes of the provisions of order 1 rule 15(1) (a), (b) and (c) of the *Civil Procedure Rules, 2010* because there was no need or reasons for the appellant (sic) enjoin Mbaraki Girls Secondary School as a third party."

31. In addition to the foregoing, we also agree with the holding of the learned Judge rendered in the following words:

" 35. In light of what I have stated above, this Court cannot uphold the finding of the trial magistrate on the issue of liability and finds that there was no evidence furnished by the respondent to prove that the collapsed wall was not built in accordance to the required standards and in adherence to the building codes. That allegation having been made by the respondent, it was his onus to avail evidence in proof thereof and without such proof it was an error to find for him."

32. We take the liberty to set out the provisions of Order 1 rule 15 of the *Civil Procedure Rules, 2010* thus:

15. Notice to third and subsequent parties

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

a. that he is entitled to contribution or indemnity; or

b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third

party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

33. In the Ugandan Court of Appeal case of *Sango Bay Estates Ltd and others v Dresdner Bank Ag* (no 2) [1971] 1 EA 307, Lutta, JA held that:

> "I have stated earlier that ... the Rules, *inter alia*, limit the third party procedure to cases where a defendant claims to be entitled to the remedy of indemnity; it therefore seems to me that one of the objects of this procedure is to prevent a multiplicity of actions. As Lord Esher, M.R., said in *Baxter v France* (no 2), [1895] 1 QB 591, at p. 593, when considering the refusal by a judge at chambers to give directions under O. 16, r. 52:
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> > The general scope of the third party procedure is to deal with cases where by applying it, all the disputes arising out of a transaction as between the plaintiff and the defendant, and between the defendant and a third party, can be tried and settled in the same action. In a case where there will remain a dispute arising out of the transaction which cannot be tried in the same action, but must form the subject of another action, so that in the result there must be two actions, the judge will rightly exercise his discretion by declining to give directions."

34. With regard to the object of third-party procedure, Scrutton, LJ. explained in the case of *Barclays Bank v Tom* [1923] 1 KB 221 at 224 that it is meant to "... get the third party bound by the decisions given between the plaintiff and the defendant ... to save the extra expense which would be involved by two separate independent actions". According to the Lord Justice, in a third party proceeding, it is for the defendant to satisfy the court that there is a "proper question to be tried as to liability of the third party.

35. As between the appellants and the respondent, that was not the case. The respondent merely advanced its defence in the appellants' suit founded on negligence, and without any attempt to shift blame to a third party. Neither do we find anything on record to suggest that the respondent was intent on seeking indemnity from anyone in the event that it were to be held liable for the accident in issue. Likewise, this ground of appeal fails.

36. Having carefully considered the record of appeal, the impugned judgment, the rival submissions of counsel, the cited authorities and the law, we find that the Appeal fails and is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF OCTOBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR