REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

CORAM: MWERA, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 211 OF 2008

BETWEEN

NAOMI KEMUNTO …….. APPELLANT

AND

TOTAL (K) LIMITED ……..……..…..…….. FIRST RESPONDENT

STANSTUD MOTORS (K) LTD *T/A*

***KISII TOTAL SERVICE STATION* ……..……..….. SECOND RESPONDENT**

(Appeal from the judgment and decree of the High Court of Kenya at Kisii (Musinga, J) dated 11th July 2007

in

H.C.C.C. NO. 316 OF 2006)

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JUDGMENT OF THE COURT

This is a second appeal, the first appeal having been heard and determined by the High Court of Kenya in Kisii. The appeal arises from six suits filed in the Chief Magistrate's Court at Kisii as follows:

i. *Civil Suit No. 572 of 2005 – Margaret Maina vs. Total (K) Ltd & Another;*

ii. *Civil Suit No. 573 of 2005 – Nicholas Mireri Makworo vs. Total (K) Ltd & Another;*

iii. *Civil Suit No. 574 of 2005 – Naomi Kemunto vs. Total (K) Ltd & Another;*
iv. *Civil Suit No. 575 of 2005 – Jane Monyangi Mokaya vs. Total (K) Ltd & Another;*

v. *Civil Suit No. 576 of 2005 – Divinah Nyanchama (Minor) suing through next friend Matabori Mochache vs. Total (K) Ltd & Another; and*

vi. *Civil Suit No. 577 of 2005 – Judith Nyanchama (Minor) suing through next friend Elizabeth Moige Ndara vs. Total (K) Ltd & Another.*

In each of the suits, it was pleaded that on some particular six dates between 2nd March 2005 and 12th April, 2005, the plaintiffs were at home when kerosene purchased from the second defendant and being used for domestic purposes exploded and caused the plaintiffs severe burns. It was further pleaded that the 2nd defendant was the exclusively appointed dealer or agent of the 1st defendant responsible for selling and distributing petroleum products to the general public. The particulars of breach of statutory duty and or common law duty or negligence on the part of the defendants were particularized as well as the injuries and special damages alleged to have been suffered by the plaintiffs. Save for the parties, the date of the alleged cause of action and the particulars of injuries and special damages, the plaints were uniform in all other respects.

The defendants filed their defences dated 8th July 2005. The said defences were all similar and denied any dealership or agency between the plaintiffs, all the particulars of breach of statutory duty and or common law duty or negligence and all the particulars of injuries and special damages. In the alterative, it was pleaded that if there was an accident involving kerosene, the same was caused by the negligence of the plaintiffs, the particulars of which were set out in paragraph 9 of all the defences.

The cases were heard by S. R. Wewa, Senior Resident Magistrate. Each plaintiff testified on their own behalf and the parties agreed that the defendants' evidence in Case No. 574 of 2005 would be applied to the other suits. In one and half page judgments bordering on the casual, the learned magistrate awarded the respondents general damages ranging from 180,000/- to 300,000/- as well as special damages.

Aggrieved by the judgments, the respondents appealed to the High Court of Kenya at Kisii. Again, six appeals namely Nos. 308, 309, 310, 315, 316 and 318 all of 2006 were filed. On 9th April, 2008 all the six appeals were consolidated and heard together in Appeal No. 309 of 2006. The parties agreed that the outcome of Appeal No. 309 would apply to all the other appeals.

In a judgment dated 11th July, 2008, the learned judge allowed the appeals but made no orders on costs. Aggrieved by the judgment and decree of the learned judge, the appellants lodged this second appeal. Again six appeals namely Court of Appeal at Kisumu Civil Appeals Nos. 207, 208, 209, 210, 211 and 212 all of 2008 were filed and consolidated at the hearing. Eleven grounds of appeal were listed as follows:

1. That the learned judge erred in law in misevaluating the evidence of the trial court hence reaching a wrong finding;

2. That the learned judge erred in law in failing to warn itself (sic) that it (sic) had not seen nor heard the witnesses and failed to make due allowance in this respect leading to a miscarriage of justice;

3. That the learned judge erred in law in interfering with primary findings of fact made by the trial court when there was no legal basis for doing so;

4. That the learned judge erred in law in finding that there was inadequate evidence to support the findings that the appellant purchased the subject kerosene from the defendants;

5. That the learned judge erred in imposing an extra evidential burden upon the appellant which was unnecessary thus leading to a miscarriage of justice.

6. That the learned judge erred in inviting extraneous circumstances and failing to appreciate that each case must be decided on its own peculiar facts.

7. That the learned judge erred in law in failing to find that the doctrine of res ipsa loquitur was applicable and available to the appellant in the circumstances of this case.

8. That the learned trial judge erred in law in failing to appreciate that the plaintiff had attained the required burden of proof and had thus proved her case to the required standard;

9. That the learned judge erred in law in overstepping the boundaries of a first appellate court;

10. That the learned judge erred in law in reversing the findings of the learned trial magistrate when there was no material to entitle him to do so.

11. That the learned judge erred in law in allowing the appeal when the evidence adduced in the case did not support such finding."

This being a second appeal, we remind ourselves that ***section 72 of the Civil Procedure Act*** applies and that only issues of law fall for consideration. (See ***KITIVO V KITIVO (2008) KLR 119).***

Prolix as they seem, the grounds of appeal raise only three issues, namely the evaluation of the evidence of the trial court by the learned judge (grounds 1, 2, 3, 4, 6, 9,10 and 11), burden of proof (grounds 5 and 8) and the doctrine of ***res ipsa loquitur*** (ground 7). We shall address the grounds in that order.

As regards the evaluation of the evidence of the trial court by the learned judge, we do not see any basis for complaint that the learned judge did not warn himself before interfering with the findings of the trial magistrate or that he came to the wrong conclusions so as to amount to an error of law. The judgment shows very clearly (at page 10) that the learned judge first reminded himself of the duty of the first appellate court and cited the case of ***SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123, 126*** where the Court considered the principles upon which it acts in a first appeal noting as follows:

"Briefly put they [the principles] are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

The learned judge carefully re-evaluated the entire evidence as he was entitled to do and held that the appellants' case had been conducted in a rather casual manner. We do not see anything in the reconsideration and re-evaluation of the evidence by the learned judge that can justify the complaint that the court was not alive to its duties and responsibilities in a first appeal or of misevaluation, consideration of extraneous matters or overstepping the boundaries of a first appellate court.

On burden of proof, there is nothing to show that the learned judge imposed a burden other than the ordinary burden in a civil trial. He held, correctly in our view, that the appellants were bound to prove that they had purchased the kerosene in question from the second respondent and not from any other source and they had not done so. He noted that after the alleged explosions the incidents had not been reported to the respondents or the police. He found further that the appellants did not even produce evidence of a demand letter to the respondents. Relying on ***S. 107 (1) of the Evidence Act*** which obliges whoever asserts existence of facts to prove the same, the learned judge found that it was incumbent on the appellants to adduce such evidence as in the circumstance would show that the kerosene complained of was purchased from the second appellant and not from any other source.

Lastly on the doctrine of ***res ipsa loquitur,*** the learned judge found that the appellants could not rely on the doctrine without first proving the facts which gave rise to inference of the doctrine. He noted that the appellants could only rely on the doctrine of ***res ipsa loquitur*** upon proof that the kerosene had been purchased from the second respondent and that a link between the appellants and the respondent had either to be established or admitted before the doctrine could be relied upon by the appellants. Since the appellants had not proved on a balance of probabilities that the kerosene in question had been purchased

from the second respondent, there was no justification for drawing an inference of negligence on the part of the second respondent. The learned judge considered at length and distinguished several authorities on the application of the doctrine of ***res ipsa loquitur***, namely ***TRUFENA ACHIENG ABUTO & ANOTHER V WILLIAM AMBANI MISE & ANOTHER, KISUMU CA NO. 177 OF 1995***, ***MWANANCHI SERVICE STATION V MINGA (1973) EA 305***, ***MUKASA V SINGH & OTHERS (1969) EA 442*** and ***MARY AYO WANYAMA & OTHERS VS. NAIROBI CITY COUNCIL, CA NO. 252 OF 1998***. We do not find any error or misdirection in the refusal of the learned judge to rely on the doctrine of ***res ipsa loquitur*** in the circumstances of this case.

The upshot is that we find no merit in this appeal and the same is dismissed with costs to the respondents.

Dated and delivered at Kisumu this 24th day of May, 2013.

J. W. MWERA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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