KHALID MOHAMED v THE ATTORNEY-GENERAL (1982) Z.R. 49 (S.C.**)**

SUPREME COURT

NGULUBE, D.C.J., MUWO, J.S. AND BWEUPE, AG .J.S.

26TH AUGUST AND 23RD SEPTEMBER, 1982

(S.C.Z. JUDGMENT NO. 26 OF 1982)

APPEAL NO. 3 OF 1981

Flynote

Civil procedure - Appeal - When appellate court may reverse findings of lower court.
Civil procedure - Defence - Failure of defence - Whether plaintiff automatically succeeds.
Tort- Negligence- When liable.
p50

Headnote

The respondent's servant a fire ranger set fire to some vegetation several hundred yards away from the appellant's farm without giving notice to him. The ensuing fire spread onto the appellant's farm despite the fire break and destroyed a maize crop and a field of star grass. The trial court found that the respondent's servant could neither foresee nor abate the hazard and that the continuation of the fire could not be attributed to him.

Held:

(i) The appellate court may draw its own inferences in opposition to those drawn by the trial court although it may not lightly reverse the findings of primary facts.

(ii) A plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case.

(iii) The respondent's servant's conduct in failing to give prior notice and burn in the proper manner amounted to negligence; and the question of his ability to abate would only have arisen if he had been accused of permitting the continuance of the fire.

Cases referred to:

(1) Goldman v Hargrave and Ors [1966] 2 All E.R. 989.
(2) Mulholland and Tedd Ltd v Baker [1939] 3 All E.R. 253.
(3) Mason v Levy Auto Parts of England Ltd. [1967] 2 All E.R. 62.

Legislation referred to:

Natural Resources Conservation Act, Cap. 315, ss. 2, 28.

For the appellant: W. M. Muzyamba, Chigaga and Co.
For the respondent: A. M. Kasonde, Principal State Advocate.

Judgment

NGULUBE, D.C.J.:

The salient facts of this case were these: On 14th September, 1974, one Bernard Muunga, fire ranger, acting in the course of his employment, set fire to the vegetation along the Lundazi Road at a spot some 600 yards away from the appellant's farm. While he did notify some persons with houses near the road he gave no notice to the appellant of his intention to burn the road side bush. A fierce fire ensued. When the appellant was alerted he apprehended the fire ranger and took him to the local chief but, as it turned out, that trip was fruitless. In the meantime, the appellant mobilised his labour force and for the whole of that afternoon and late into the night they fought bravely to bring the fire under control. Some of the workers suffered various burns. There was evidence that the authorities responsible for tsetse fly control had previously cut down a lot of trees, and that while the grass-fire had been brought under control the appellant and his workers failed to extinguish the free in the dead-wood. There was evidence that while a few workers remained to keep an eye on the fire in the dead-wood the rest had given up late at night, exhausted and tired. There was evidence also that the appellant had around the farm a fire-break

measuring some fifteen metres wide, a fire-break which it is to be observed appears to have satisfied the minimum requirement for a fire-break as defined under s. 2 of the Natural Resources Conservation Act, Cap.315. On the morning of 15th September, 1974, the wind fanned the fire in the dead-wood carrying flames across the fire-break. A fierce grass fire started which spread to the appellant's unharvested maize crop and star grass causing severe loss and damage. Proceedings were commenced in which the appellant alleged that the fire ranger Munga, had been negligent, among other things, by his failure to burn in a proper manner dry, tall grass in an area where there was lot of dead - wood, logs and maize, and by his failure to give prior notice that the area was going to set on fire. The defence was a denial that the fire ranger was acting in the course of his employment. The learned trial judge rejected this defence and Mr Muzyamba submits that in that event and in every case where the defence set up is defeated, the plaintiff ought to succeed as matter of course.

An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence.

Mr Muzyamba does, however, submit in the alternative that there was in fact evidence of negligence on the part of the respondent's fire ranger. He attacks the findings made by the court below that Munga, could neither have foreseen nor abated the hazard which did arise, and that in any event the continuation of the fire or the second fire that did break out the next day could not be attributed to the fire ranger. He submits that having regard to the efforts made by the appellant and his workers to fight the fire the respondents remained answerable for the damage caused by the fire which Munga had started. There is substance and force in Mr Muzyamba's alternative submission. I cannot accept Mr Kasonde's submission in support of the findings below that Munga could not have foreseen the hazard of fire spreading from the dead-wood. Munga had, as alleged in the statement of claim, set fire to the bush which did have dead-wood and logs. It was his failure to advise himself with regard to the state of the vegetation and the extent to which any fire he proposed to start might spread which formed the essence of those particulars of negligence already referred to. Mr Kasonde submits that it was the appellant's own negligence in failing to

extinguish the fire in the dead-wood that led to the second hazard which caused damage I do not agree. As Mr Muzyamba points out this was not case of one or two logs burning. This was case of fire in dead-wood from a large number of trees which the tsetse fly control authorities had cut down over large area. Again as Mr Muzyamba pointed out this was not a

p52

case where the victim had failed to take action. The appellant and his workers had in fact done all they could within their power and means to combat this fire which had been thrust upon them without any prior warning, or notice as required not only by common sense but also by s. 28 of the Natural Resources Conservation Act, an authority in point, though not cited by counsel.

The principles applicable to case of this nature are as summarised by Lord Wilberforce in *Goldman v Hargrave and Ors* (1), where after reviewing the authorities, he said at p. 995:

"All of these endorse the development, which they lordships find in the decisions, towards measured duty of care by occupiers to remove or reduce hazards to their neighbours. So far it has been possible to consider the existence of duty, general terms: but the matter cannot be left there without some definition of the scope of his duty. How for does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable" since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast, has, ex-hypothesis had this hazard thrust on him through no seeking or fault of his own. His interest, and his resources whether physical or material, may be of very modest character either in relation to the magnitude of the hazard, or as conspired with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of duty must be based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. Moreover many cases, as for example in Scrutton, L. J's hypothetical case of stamping out fire, or the present case, where the hazard could have been removed with little extort and no expenditure, no problem arises; but other cases may not be so simple. In such situations the standard ought to be to require of the occupier what it is reasonable the to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able bodied: the owner of small property where hazard arises which threatens neighbour with substantial interests should not have to do so much as one with larger interests of is own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more. This approach to a difficult matter is in fact that which the courts in their more recent decisions have taken."

p53

In the light of this authority (which the learned trial judge referred to though arriving at a different conclusion from mine) I would not hesitate to conclude that the appellant who had done everything that could be done could not be penalised, and the respondent remained liable for the

consequences, of the fire started by Munga. I appreciate that this conclusion necessarily reverses certain findings made by the court below. While it is now accepted that an appellate court should not lightly reverse findings made by a trial court, there is a world of difference between findings of primary facts and findings based on the drawing of conclusions or inferences from undisputed primary facts. In the latter event the appellate court is in as good position to draw the inferences or conclusions as the trial court. The basic facts of this case were not dispute. The decision below rested on a consideration of the questions, whether or not on those undisputed facts Munga had knowledge of the hazard, was able t foresee the hazard and was able to abate it. The conclusion which I find the evidence impels me to reach is that Munga had or ought to have had in his contemplation the hazard in question, and that his failure to advise himself with regard to the state of the vegetation to be affected by his fire as already stated was an act of gross negligence. The ability to abate, I consider, could only have been relevant if the respondents were accused of permitting the continuance of the hazard much in the same manner as the appellant would not have succeeded had it been clearly proved that he had through his own inaction failed to abate hazard which he had the means and power to abate. Liability depends on negligence (*see*, for instance, *Mulholland and Tedd Ltd v Baker* (2) and *Mason v Levy Auto Parts of England* (3) and the appellant did establish negligence against the fire ranger on two grounds, namely the failure to give prior notice and the failure to burn in the proper manner by which I apprehend the failure to take into consideration the state of the vegetation likely to be affected by the fire should it spread, as it did spread.

For the foregoing reasons I would allow this appeal and award to the appellant the sum of K12,000 in respect of the maize that was burnt, the sum of K820 in respect of the empty maize bags, and the sum of K2,000 in respect of his star grass. The plaintiff should also have his costs both here and in the court below, to be taxed in default of agreement.

Appeal allowed
