IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2021

CORAM: YEBOAH, CJ (PRESIDING)

PWAMANG, JSC

AMEGATCHER, JSC

OWUSU (MS.), JSC

HONYENUGA, JSC

CIVIL APPEAL

NO. J4/10/2020

29TH APRIL, 2021

1. **ALSAJ ABDUL KADEL**
2. **FATAWU IBBRAHIM** — **PLAINTIFFS/APPELLANTS/APPELLANTS**
3. **YAHAYA IBRAHIM**

VRS

1. **B. B. C INDUSTRIES COMPANY (GH) LTD.**
2. **GHANA NATIONAL FIRE SERVICE** — **DEFENDANTS/RESPONDENTS/ RESPONDENTS**

JUDGMENT

OWUSU (MS.) JSC:-

On 30th May, 2019, the Court of Appeal, Accra, dismissed plaintiffs' appeal and affirmed the judgment of the High Court Tema dated 29th September, 2017.

Dissatisfied with the decision of the Court of Appeal, the plaintiffs have appealed to the Supreme Court.

The relief sought from the Supreme Court is to set aside and or reverse the Judgment of the Court of Appeal.

Before dealing with the arguments canvassed in support and against this appeal, we will give a brief background of the case.

By its amended writ of summons, the plaintiffs claim against the defendant, the following reliefs;

a. *The payment of an amount of Two Hundred and Forty- Four Thousand and Six Hundred Ghana Cedis (Ghc244,600) being the total cost of the four vehicles of the plaintiffs destroyed in the Fire Outbreak at the premises of the defendant company which was due to the negligence of the defendant.*
b. *Interest on the said amount at the prevailing commercial bank rate from the day the vehicles were destroyed in the Fire Outbreak 12/01/2013 till the day of final payment.*
c. *An order directed at the defendant to pay to the plaintiffs the loss of earnings that would have accrued to them for the use of the vehicles had same not been destroyed in the Fire caused by the negligence of the defendant company at the rate of Ghs 450.00 per day per truck for five working days in a week from 12/01/2013 till date of final judgment.*
d. *Interest on the said amount at the prevailing commercial bank rate from the day the vehicles were destroyed in the Fire Outbreak 12/01/2013 till date of final payment*
e. *General Damages.*
f. *Costs including legal fees*

The defendant/respondent/respondent, to be called "the respondent" is a company that manufactures plastics products in its factory at Tema Industrial Area. On Saturday, 12th April, 2013 the respondent engaged the services of the plaintiffs/appellants/appellants, to be called "the appellants", to transport raw materials for its factory in four cargo trucks from the port of Tema to the factory premises. The vehicles arrived after working hours so they parked on the premises of the factory. Unfortunately, in the night there was a fire outbreak on the factory premises. The Ghana National Fire Service (GNFS) were called in promptly but failed to bring the fire under control with the result that, it devastated the factory buildings and warehouse of the respondent and burnt the appellants' vehicles beyond economic repairs. As part of their statutory function the GNFS investigated the cause of the fire by setting up a committee that inspected the premises and interrogated some of the workers of the respondents and other witnesses. After their investigations, they prepared a report in which they indicted the respondent of being responsible for the fire outbreak. The respondent did not accept responsibility for the fire and rather accused the GNFS of being unprofessional in managing the fire causing it to spread extensively. Nevertheless, the respondent through its insurance company sought to pay the appellants an amount of money which the latter rejected.

The appellants sued respondents in the High Court, Tema for the value of the vehicles and loss of use on grounds of negligence. When the respondent was served with the appellants writ of summons, the former filed a defence with a counter claim for contributory negligence against the GNFS and 1st appellant who was in fact their worker and owner of two vehicles that were destroyed in the fire outbreak. They contended that the 1st appellant was the official of the company responsible for maintaining the premises where raw materials were stored and the space where the vehicles were parked on the fateful day.

In the trial in the High Court, the appellants tendered and relied substantially on the fire report prepared by the GNFS who despite being made a party through the counter claim failed to participate in the proceedings and did not testify even on their report. The respondent on its part testified through its board chairman and called four witnesses. At the close of the trial, the High Court found in favour of the respondent but did not grant its counter claim. The court held that the appellants built their case on the allegation of negligence on the part of the respondent that caused the fire. But failed to adduce sufficient evidence of negligence.

The appellants' appeal from the High Court judgment was dismissed by the Court of Appeal who took the view that, the trial judge was right in concluding that the appellants did not lead sufficient evidence of negligence against the respondent.

APPEAL TO THE SUPREME COURT.

The appellants have further appealed to this Court on the following grounds;

1. ***The Judgment is against the weight of the evidence.***
2. ***The Judges at the Court of Appeal misdirected themselves at Law as to the burden of proof on the parties in relation to the cause of the Fire Outbreak, which legal burden they placed on the plaintiffs which said misdirection at Law occasioned a substantial miscarriage of Justice against the appellants. This ground of appeal is raised herein for the first time.***
3. ***The Court of Appeal also misdirected itself as to the law and facts regarding and in relation to the principles of Equity, morality, public policy, the conduct and statements of the Respondent and its works on the totality of the evidence in relation to the Evidence Act, (NRCD 323) section 26 and the burden of proof***

placed on the Respondent which misdirection occasioned a miscarriage of justice. This ground of appeal is also being herein raised for the first time.

4. ***That the Court of Appeal got the fact wrong when it stated that Defendant's Insurers paid the Defendant an amount of fifty thousand (Ghc50,000.00) as compensation for the Fire, contrary to the evidence on record where Respondent admitted collecting $1 million or Ghc1 million for the Fire Outbreak and offered Ghs 50,000.00 for the four trucks of the appellants who rejected same.***

In their statement of case, the appellants impeach the judgment of the Court of Appeal on the grounds that the court erred in law in the manner of allocation of the burden of proof in this case. They argued that, since they only parked their vehicles on the premises of the respondent and the vehicle got burnt, it was the respondents who ought to have been required to prove how the fire occurred despite their exercise of due care and not the appellants who do not control the place should be required to prove the respondent's negligence. The appellants assert that, even if the burden of proof is placed on them to prove the negligence of the respondent, there is sufficient evidence in the fire report that proves that the fire was caused by the negligence of the respondent. In the circumstances, we shall consider the appeal on the lines of the two issues that arise from the submissions of counsel for the appellants namely;

1. Who in law bears the burden of proof of negligence in the circumstances of this case and;
2. Is there sufficient evidence on the record that proves that the fire was caused by the negligence of the respondent.

From the facts of the case, the legal relationship between the appellants and respondent was that of a contractual bailees and bailor. Where a bailee suffers

damage in the course of such relationship, the bailor can only be held liable if it was negligent. See the case of **MENSAH v NATIONAL SAVINGS & CREDIT BANK [1989-1990] 1 GLR 620.** The appellants were therefore right in pleading negligence with particulars. The allocation of the burden of proof is provided for in Section 11 (1) of the Evidence Act 1975 (NRCD 323).

What the appellants are now saying would have applied if they have pleaded res ipsa loquitor. That would have shifted the burden of proof on the respondent as rightly submitted by counsel for the respondent in his statement of case. It is too late to seek to rely on res ipsa loquitor.

The appellants also argued that, the fire report was prepared on statutory authority so they did not need an official from the Fire Service to testify. That is not wholly correct. It is true that under Section 126 0f the Evidence Act, such a report is admissible as an exception to the hearsay rule, but it is only prima facie evidence. Therefore, if the report is challenged, the author must be called to be cross examined on it. See the case of **ASANTE v REPUBLIC [2017-2020] 1 SCGLR 132, 144** where His Lordship PWAMANG JSC delivering the Judgment of the Court on the admission and use of DNA report as scientific evidence had this to say;

"We wish to also say a few words about the DNA evidence that has been adduced in this case which appears to be a new area of scientific evidence as far as our country's criminal justice system is concerned, Section 121 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) provides that in any criminal proceedings a scientific report may be used as evidence of the facts contained in it. A scientific report is a prima facie evidence of the matters contained in it and not conclusive evidence so the law requires that where the accuracy of a scientific report is disputed in proceedings then the person who undertook the investigation

or examination and produced the report should testify and subject himself to cross-examination (our emphasis)

Relating the Asante case supra to the case under consideration, the respondent in this case challenged the report of the GNFS and even counter claimed against GNFS, so the latter was required to testify.

Counsel for the appellants also submitted that, the 1st appellant who tendered the fire report was not challenged that the findings in the report were not accurate so its accuracy is deemed admitted by the respondent. Counsel for the appellants relied on the case of **FORI v AYIREBI [1966] GLR 627 SC** to support his submission. But this is not the correct position of the law. **In DZAISU v GHANA BREWRIS and GHANA PORTS AND HARBOURS AUTHORITY & CATAIN ZEIN v NOVA COMPLEX LTD [2007-2008] 2 SCGLR 806** the Supreme Court held that, where a party adduces evidence contrary to his opponent, then even if he did not controvert the opponent's evidence he cannot be deemed to have admitted it. But contrary to the submission of counsel for the plaintiffs that the latter were not cross examine on Exhibit E, F and G, 1st plaintiff who testified for himself and for 2nd and 3rd plaintiffs was cross examined on the Reports at page 99 of the record of appeal when he was asked;

"Q. You also agree with me that the fire service report that you claim to be relying upon was not able to specify complete the cause of the fire?

A. My lord, the report points out everything.

Q. I am suggesting to you that is because you are mistaking the import of the report that you brought this issue to court.

A. No my lord".

So, the question is, are the conclusions and inferences drawn by the High Court and affirmed by the Court of Appeal supported by the evidence on record?

In his judgment, the trial judge agreed with the evidence of DW5, the Fire Expect when he held that;

"The Fire Investigation (sic) *could not just write that personnel of the defendant company were smoking even during the fire fighting and leave it at that; and attribute to it, a probable cause to the very fire incident. In effect, the cause has no evidence, but the effect has, meanwhile he claimed to have observed both.*

It seems to me from the foregoing matters that serious doubt is cast on the credibility on the conclusions reached as a probable cause of the fire. On the fire report examined in its entirety, I find the findings generally unreliable and lean in favour of the account of the Fire Expert".

We cannot but agree with the trial Judge with this finding and conclusion reached on Exhibit E, F and G. This is because from the evidence of DW5, the Fire Expert, the 1st defendant company practice non-smoking in its premises as there are 'no smoking' sign placed on vantage points in the company. He captured one of the sign on Exhibit NSP which can be found at page 394 of the record of appeal. In the face of Exhibit NSP, the trial Judge was right in coming to the conclusion that, Exhibit "E" was unreliable. We say so for the simple reason that, the evidence of people smoking when the fire was raging whilst the Fire Officers were trying to put the fire out is hard to believe in the absence of further prove. The next probable cause was attributed to electrical fault. In Exhibit 'E', the first paragraph, bullet 7, the Report states,

"Due to the Extent of damage, it was impossible to trace the electrical connections at the affected warehouse. However, remains of burnt electrical wires were seen hanging".

This is clearly contradictory. If due to the extent of damage it was impossible to trace the electrical connections, then on what basis did the author of Exhibit 'E' come to the conclusion that, the probable cause of the fire outbreak was electrical fault. No explanation has been offered and same must be held against the plaintiffs.

The third probable cause as stated in the Report is;

"Spontaneous ignition due to poor segregation of stored wares/materials couple with poor housekeeping."

This probable cause needs some further explanation which plaintiffs could not give. In the face of the testimony of DW5, Joseph Afari Idun (a Fire Management Consultant) which testimony was not shaken under cross examination, coupled with Exhibit NFPA 1, the Guide for Fire Explosion Investigations 2004 Edition, which can be found at pages 223 to 238 of the record of appeal, the trial judge was right in coming to the conclusion that, Exhibit E, F and G were unreliable as the contradictions in the said Reports were not explained. Secondly, the Reports were not professionally generated as it failed to use the acceptable codes and standards set by the NFPA. But more importantly, the Reports were tendered by the plaintiffs through 1st plaintiff who was not able to explain some of the contradictions in the Reports as he is not the author. Thirdly the trial judge saw and heard DW5, believed him and came to the conclusion that, in the face of his testimony, the plaintiffs failed to discharge the burden cast on them in proving the particulars of negligence in their statement of claim in terms of section 14 (1) of the Evidence Act, (NRCD 323). Consequently, the findings of the trial Judge that the plaintiffs were not able to prove the particulars of negligence they averred in their statement of claim is clearly supported by the evidence on record and this court, as the second appellate court cannot substitute its own findings for that of the trial court. Ground (I) of the appeal fails and it is accordingly dismissed.

This bring us to the allocation of the burden of proof.

As rightly pointed out by counsel for 1st defendant, the legal burden of proof of negligence of 1st defendant is on the plaintiffs who allege that, 1st defendant was negligence and its negligence resulted in the fire outbreak in contention. Plaintiffs went further to give the particulars of 1st defendant's negligence. In proving the alleged negligence of 1st defendant the plaintiffs tendered the Fire Reports Exhibit E, F and G. The 1st defendant has led evidence to discredit these reports that they were not professionally generated as the methodology used did not meet the acceptable standards and guidelines as provided for in Exhibit NFPA 1, a guide for fire and explosion investigation 2004 Edition. Exhibit E, F and G were also full of inconsistencies which have not been explained as demonstrated above. In the face of the evidence of DW5 and Exhibit NFPA 1, the trial judge believed the evidence of DW5 and Exhibit NFPA 1 as against the evidence of 1st plaintiff and Exhibit E, F and G. The onus of proof required in every civil trial was by preponderance of probabilities in accordance with section 12 of the Evidence Act 1975, NRCD 323 and the amount of evidence required to sustain that standard of proof was dependent on the nature of the issue to be resolved. See the case of **ARYEE v SHELL GHANA LTD & FRAGA OIL LTD [2017-2020] 1 SCGLR 721, 724.** See also the case of **ARMAH v HYDROFOAM ESTATES (GH) LTD [2013-2014] 2 SCGLR 1551,** where this Court held that, the credibility of the witness and his knowledge of the subject matter are determinant factors in proof of a point in issue. In the context of this case, DW5 is an expert in Fire Management. Secondly, Exhibit E, F and G had been discredited. From the forgoing, the High court and the Court of Appeal did not err when they held that the plaintiffs bear the burden of proof and were not able to discharge that burden. This ground of appeal has not been made out and it is accordingly dismissed.

Ground (iii) of the appeal is that;

The Court of Appeal also misdirected itself as to the law and facts regarding and in relation to the principles of Equity, morality, public policy, the conduct and statements of the respondent and its works in totality of the evidence in relation to the Evidence Act (NRCD 323) section 26 and the burden of proof placed on the Respondent which misdirection occasioned a Substantial miscarriage of Justice.

The argument in support of this ground is that, the High Court and the Court of Appeal failed to appreciate the fact that, the 1st defendant relied on the Fire Report Exhibit E, F and G to make Insurance claims, but this is the same Report it is seeking to repudiate and denying its authenticity. Counsel for the plaintiffs therefore submitted that, it is unfair, inequitable, immoral and against public policy to allow the 1st defendant to use the Report to make Insurance claim of over $1m for itself and when it came to the turn of the plaintiffs says the report is not authentic. Counsel concluded his submission on this ground that, 1st defendant cannot approbate and reprobate. Additionally, the employees of 1st defendant are estopped from denying their statements to 2nd defendant when they were interviewed.

In answer to the submissions on ground (iii), counsel for the 1st defendant submitted that, this ground of appeal is argumentative and in breach of Rule 6 (4) of the Supreme Court Rules, CI 16. Besides, the trial Judge cast serious doubt on the credibility of the Fire Report, Exhibit E, F and G. Counsel for 1st defendant therefore invited us not to disturb this finding.

The credibility or otherwise of the Fire Report, Exhibit E, F and G had been dealt in our discussion of ground (ii) of the appeal and we do not intend to revisit that analysis again. On the 1st defendant's Insurance claim, that is a matter between the 1st defendant and its Insures. The 1st defendant insured its property and fire guttered it. It is only natural for 1st defendant to put in a claim and it is up to the Insurers to consider the content of the

Report and act upon it. We do not find any merit in this ground and it is accordingly dismissed.

The last ground of appeal is that;

That the Court of Appeal got the fact wrong when it stated that "Defendant's insurers paid the defendant an amount of Fifty thousand Ghana Cedis (GHs50,000) as compensation for the fire". This is contrary to the evidence on record where Respondent admitted collecting $1m or GHs1million for the fire outbreak from its insurers and offered GHs50,000 for the four trucks of the appellants who rejected same.

This ground of appeal is moot as the plaintiffs in their statement of claim and evidence said they rejected the GHs50,000 compensation offered them for their burnt trucks, hence this action.

From all of the forgoing, we find no merit in the appeal and it is accordingly dismissed.

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

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