



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 320 OF 2014

COCA COLA EAST & CENTRAL AFRICA LIMITED.....1ST APPELLANT

NAIROBI BOTTLERS LIMITED.....2ND APPELLANT

VERSUS

BONIFACE KYENE.....1ST RESPONDENT

AUGUSTINE KAINDI.....2ND RESPONDENT

JUDGMENT

The Respondents herein, sued the appellants claiming both general and special damages, interest plus the costs of the suit. It was averred that the Respondents purchased sodas from the Appellant's depot in North Airport in Nairobi, at a cost of Kshs. Four hundred and fifteen shillings per crate amounting to a total of Kshs. Twenty Three thousand two hundred and forty shillings (23,240/-)

The Respondents delivered the sodas to a wedding and raised an invoice for Kshs. Forty thousand (40,000) but the invoice was not settled because in the course of serving the said sodas to the guests who were attending the wedding, one guest began vomiting and screaming after consuming one of the sodas (a Krest)

That upon close scrutiny, the Respondents noticed that the said soda was contaminated by a large foreign body which was floating and nauseating to look at, and so were the other sodas at the wedding reception.

The Respondents averred that the screams by the guest who was affected, attracted the attention of other guests who became infuriated at being served with contaminated sodas. The angry mob of guests wanted to beat the respondents but upon intervention by the master of ceremony, the guests calmed down but they insisted that the entire delivery of the sodas be removed from the wedding tables immediately. This, it is alleged, embarrassed, humiliated and caused great trauma to the Respondents who were forced to leave the wedding venue immediately. They also suffered financial loss and damage as their catering contract was terminated and the wedding party refused to settle their invoice of Kshs.40,000/-.

They contended that, the Appellants were negligent and liable for manufacturing, producing, supplying and distributing and/or selling to members of public, contaminated sodas that were not fit for human consumption. The particulars of negligence were set out in paragraph 13 of the plaint which are that; manufacturing, supplying, distributing and/or selling to members of the public contaminated sodas, selling products that are not fit for human consumption and failing to adhere and observe the standards required by Kenya Bureau of Standards. The Respondents also pleaded the doctrine of strict product liability.

The appellants on the other hand denied the allegations set out in the plaint stating that they did not owe the Respondents any duty of care. The first appellant further averred that it is neither a producer nor owner of soft drinks while the 2nd appellant contended that if the alleged contaminated product came from its plant which was denied, the product when it left the control of the 2nd appellant was not defective and was fit for human consumption. The Appellants further stated that the alleged contamination was caused by the Respondents' improper use and tampering with the product. Further, and without prejudice to the foregoing, it was averred that the Respondents did not properly identify and/or determine who made the defective products in question. The appellants denied each and every allegation of negligence attributed to them and further denied that the Respondents suffered loss, injuries and damages. The appellants urged that all their products are produced under the most stringent quality control measures.

At the hearing, the Respondents testified as PW1 and PW2 respectively. They both adopted their witness statements and reiterated the particulars pleaded in the plaint. They stated that they were contracted by one Steve Mburu to provide catering services, by supplying soft drinks at a wedding reception that was to be held on 28th day of August, 2010. They sourced the sodas at Coca cola depot in North Airport where they bought 50 crates at a total cost of Kshs.23,240/- but raised an invoice of Kshs.40,000/-.

On taking one of the sodas, one guest started vomiting and upon scrutiny, they saw a large foreign body which was floating in the soda and it was nauseating to look at. Other sodas at the wedding reception were also contaminated by foreign objects. As a result, the other guests became infuriated at being served with contaminated drinks and they were forced to leave the wedding venue immediately as the guests wanted to beat them, which caused them embarrassment, humiliation and trauma.

The first Respondent produced a receipt for the purchase of the sodas in the name of Stephen Njoroge who was said to be a distributor for the 1st appellant. Though he stated that he paid in cash, the name of the purchaser is not indicated. He stated that the contaminated soda was not taken for analysis and he could not tell if the sick guest went to hospital. He produced the sample of the sodas that were said to be contaminated and which, according to him, had not been tampered with.

The Appellants did not call any witnesses.

The trial court analyzed the evidence adduced by the Respondents and found that the Respondents had proved the case on a balance of probability. She found that the Respondents had proved negligence on the part of the Appellants in breaching a duty of care owed not only to the Respondents but to the general public. She awarded special damages in the sum of Kshs.40,000 and general damages of Kshs.1,000,000 (One million) for embarrassment and disappointment as well as distress caused to the appellants while at the wedding.

Being aggrieved by the judgment, the appellants filed the instant Appeal and have listed twelve (12) grounds of Appeal, as set out in the Memorandum of Appeal. Looking at the grounds of Appeal, the same is on both liability and quantum of damages awarded to the Respondents.

The Appeal was disposed of by way of written submissions which this court has carefully considered.

The Appellants submitted that the Respondents lacked the *locus standi* to maintain the action as no reasonable cause of action was disclosed against them as the Respondents did not consume the sodas complained of. The Appellants relied on the case of **Donoghue Vs. Stevenson**, the dissenting judgment of Lord Buckmaster where the Judge emphasized on the overarching aim that there is no negligence outside contract. The case of **Landridge Vs. Levy (1837) 2m & w 519, 150 ER 863** was also relied on in which the court discussed the inescapable side effect of the privity of contract doctrine and the three exceptions to the doctrine which are that; the manufacturer made a fraudulent representation as to safety, failed to disclose a known danger and the product was “dangerous in itself”. It was submitted that the Respondents did not produce any evidence to indicate that the Appellants had made any fraudulent misrepresentation on the safety of their products or had any knowledge of the danger associated with them.

It was contended that the learned magistrate failed to take cognizance of the fact that there was no chemical analysis carried out to ascertain whether the contents were toxic or not. The case of **Kenya Breweries Limited Vs. Geoffrey Ondoyo(2010) eKLR** was relied upon. It was submitted that it had not been established that the Appellants’ breach of duty of care caused or materially contributed to the damage suffered by the Respondents, if any. That the Respondents did not prove that the soda was manufactured by the Appellants. In support of this contention, the Appellant relied on the case of **Nairobi bottlers Ltd. Vs. Daniel Kyalo Musuu (2011) eKLR**.

The Appellants also took issue with the fact that the Respondents held onto the soda for a period of 18 months prior to instituting the suit herein and a further period of (8) months after instituting the same and there was no telling that the soda was not tampered with whilst the Respondents’ possession. The Appellants quoted the case of **Kenya Breweries Vs. William Kipsang (2007) eKLR** where Justice Ibrahim when dealing with a similar matter stated that the chain of custody was insecure as the plaintiff kept the bottles and the contents and did not place it in the hands of an independent party of authority”.

It was contended that since the person who drank the alleged contaminated soda was involved in merry making, the trial court failed to consider that the vomiting could possibly have been as a result of food consumed at the party and not necessarily as a result of the substance in the soda. It was submitted that the Respondents did not prove the special damages that they suffered. That they also did not tender any evidence of any other pecuniary loss which they may have suffered by way of diminished business sales and the alleged loss of patronage. Reliance was made on the case of **Fred Ben Okoth Vs Equator Bottlers Limited (2015) eKLR**.

On their part, the Appellants submitted that in the law of negligence, a plaintiff does not have to demonstrate some contractual arrangement for negligence to be proved. Counsel quoted the case of **Donoghue Vs. Stevenson**. Further, it was contended that manufacturers have a duty of care to end consumers of or users of their products. That they owe them a duty of care when manufacturing a product to reach consumers in the form in which they left the manufacturer. The case of **Kenya Breweries Ltd. Vs. Godfrey Odoyo (2010) eKLR** was relied on.

The Respondents contended that the manufacturers in this case, the appellants, intend for their products to reach the ultimate consumer and not only the distributor. As such, they owe a duty of care to the distributors and the consumers as well. The Respondents averred that the Appellants did not tender evidence to prove that their manufacturing process is fool proof. That they ought to have given an explanation as to how the foreign material could have ended in the soft drinks meant for human consumption. The Appellants cited the case of **Fred Ben Okoth Vs. Equity Bottlers Limited quoted in the case of Eschola CocaCola of Fresno 24 Cal 201 453, 150p, 2d 430 (1944)** where the court stated thus,.....

a manufacturer incurs an absolute liability when an article he places in the market knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings

As the first Appellate court, I am enjoined by law to analyze the evidence adduced in the lower court and re-evaluate the same. See the case of **Selle & Another Vs. Associated Motor Boat Company Limited and others (1968) EA 123**. When considering the twin issues of liability and quantum of damages awarded to the Respondents, it should be remembered that the Respondents had a duty of proving their case on a balance of probability. In so doing, the Respondents were expected to prove

- (a) There existed a duty of care to them, by the Appellants.
- (b) The duty was breached.
- (c) They suffered loss as a result of the breach of that duty.

These ingredients were well enunciated in the case of **Fred Ben Okoth Vs. Equity Bottlers Limited (2015) eKLR** where Justice A.K. Murgor stated

“in a claim for negligence, since the renowned UK case of Donoghue Vs. Stevenson (1932) AII E.R. I, where similar issues were in contention, it is settled law that in order for a claimant to satisfy a claim for negligence they must prove that firstly; the defendant had a duty of care, that secondly, the incident occurred that caused the claimant injury, and that thirdly, the injury was due to the defendant. Coca-cola a soft drink is a widely consumed beverage and when the prerequisites of the principles set out in Donoghue Vs. Stevenson are applied to the circumstances of this case, it is evident that the manufacturer of such a product owes a duty of care to consumers.

In the case herein, did the Appellants owe the Respondents a duty of care? The Respondents' cause of action is based on the loss they suffered on purchasing the sodas and on the embarrassment that was caused to them. In their evidence, they stated that they purchased the sodas and they were issued with a receipt. The said receipt is not in their names but in the name of a third party who was not called to testify in evidence but who is said to have been a supplier of sodas on behalf of the Appellants. This person was not called in evidence to confirm that indeed the sodas were purchased by the Respondents and that he is the one who sold the sodas to them. The liability of the Appellants in this case is not direct but a consequence of what they alleged was breach of duty on their part. Though I concur that a manufacturer owes a duty of care to the consumers, the Respondents herein have not filed this claim as consumers. It is noted that the person who allegedly drank the contaminated soda was not called in evidence to confirm that fact. Again, the soda that he was taking that is said to have been contaminated was never taken for chemical analysis to connect his vomiting to the contamination.

According to the evidence of PW1, the sample that was produced in court had been with their lawyer since 2010. It was a bottle of Krest which was marked as Plaintiffs' exhibit 5. It was his evidence that the bottle had not been tampered with. In her judgment the learned magistrate did not comment on it or make any observations regarding that bottle. The evidence of PW1 was taken on 21st day of January 2014 which was four (4) years from the date of the alleged cause of action. The court was not told where the bottle was kept and under what conditions. It is even difficult for the court to establish whether it could have been interfered with or not. In this regard, I wish to quote Hon. Justice Ibrahim in the case of Kenya Breweries Ltd. Vs William Kipsand (2007) eKLR where he stated;-

.....the chain of custody was insecure as the plaintiff kept the bottle and contents and did not place it in the hands of an independent party or authority.

I fully concur with the learned Judge's view and find that the chain of custody was insecure.

This court is alive to the fact that a manufacturer incurs absolute liability when an article he places in the market knowing that it is to be used without inspection proves to have defect that causes injury to human beings. This was held in the case of **Fred Ben Okoth Vs. Equity Bottlers Limited** quoted by Justice A.K. Murgor in the **Eschola case** (supra), but the kind of damage the Respondents are said to have suffered is not injury to themselves as they did not consume the product. The only claim that could have succeeded is for special damages had it been proven. As it is now, the same though pleaded, was not proven as the receipt that they produced is not in their names but in that of a third party and no evidence was adduced to support their connection with that person.

On general damages, the Respondents were under duty to prove that the wrongful conduct of the Appellant in fact resulted in the damage which they complain of. In this regard, I wish to quote an extract from the case of Fred Ben Okoth Vs. Equator Bottlers Limited (2015) eKLR in which Judge Musinga quoted Clerk & Lindsell on Torts as follows:-

“The burden of proving causation rests with the claimant in almost all instances. The claimant must adduce evidence that more likely than not the wrongful conduct of the defendant in fact resulted in the damage of which he complains”

The Respondents testified that they got embarrassed, humiliated and greatly traumatized and were forced to leave the wedding venue immediately. They did not call an independent person who was in the wedding to support that allegation that they were embarrassed and that they were almost beaten up by the crowd. The Respondents did not adduce evidence to show what damage they suffered as a result of the alleged embarrassment and humiliation, if they were humiliated at all.

In the circumstances foregoing, it's my considered view that the award of Kshs.1 million as general damages was not deserved and the learned magistrate erred in awarding the same. The case was not proved to the required standard. I allow the Appeal and set aside the judgment of the lower court. The costs of the Appeal are awarded to the Appellant. I so order.

Dated, Signed and Delivered at Nairobi this 27th day of **September, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:

.....*For the Appellants*

.....*For the Respondents*