Kisii Bottlers Limited v Mogaka alias Ian Mogaka (Civil Appeal 1 of 2018) [2018] KEHC 2060 (KLR) (29 November 2018) (Judgment)

Kisii Bottlers Limited v Omari Bota Ian Mogaka [2018] eKLR

Neutral citation: [2018] KEHC 2060 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 1 OF 2018

DAS MAJANJA, J

NOVEMBER 29, 2018

BETWEEN

KISII BOTTLERS LIMITED ..... APPELLANT

AND

OMARI BOTA IAN MOGAKA ALIAS IAN MOGAKA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. R. B. N. Maloba, SRM dated 1st December 2017 at the Chief Magistrates Court at Kisii in Civil Case No. 547 of 2017)

JUDGMENT

1. The appellant has appealed against an award of Kshs. 1,800,000/- as general damages, Kshs. 720,000/- as cost of future medical treatment following a finding of negligence against it.

2. The plaintiff's case before the trial court was set out in paragraph 4 and 5 of the plaint as follows;

   (4) In 2005, when our client was a minor aged 8, he consumed liquid matter, being contents of a plastic chemical container that the defendant had freshly released from its factory at Kisii at which the defendant had manufactured and bottled hugely popular soft drinks like Coca Cola, Fanta, sprite, Krest (lemon and soda/tonic water) and Dasani Mineral water believing the same to have been any of the defendant's said brand of soft drinks knowing the container to have originated from the defendant.

   (7) In or around August – September 2005, and in breach of the defendant's aforesaid duty owed to the public especially the plaintiff, the defendant sold and or caused, let and/or permitted to be sold or given out, a freshly emptied Plastic Container of chemical matter used in its processes; which contained chemical residue, which, bubbled like any of the defendant's said soft drinks, otherwise known as ''soda", locally; and the plaintiff took it as such.

3. The plaintiff claimed that he sustained severe permanent injuries from the mouth down to the gullet and the stomach subjecting him to pain, suffering and loss of amenities. He further claimed that he was required to have medical care twice a month for the rest of his life at an average cost of Kshs. 6,000/- per session of treatment.

4. In its statement of defence, the appellant denied the allegations made by the respondent and the particulars of injuries. It admitted that manufactured, bottled and sold various soft drinks and mineral water and in doing so complied with statutory obligations to operate in a responsible manner and also complied with international practices and standards relating to disposal of waste and disposal of stock with a view to ensuring and keeping them safe, hygienic and healthy.

5. At the hearing the respondent (PW 1) testified and called Dr Oganda Zoga (PW 2) and Samuel Areri (PW 3) as his witnesses. The appellant called Dickens Agutu Abiero (DW 2), a technician at its Quality Assurance Section. After hearing the matter, the trial magistrate held that the respondent had demonstrated that the appellant was the source of the jerricans and corrosive substance in them and was liable for the respondent's injuries loss and damage thus precipitating this appeal.

6. Before I deal with the arguments raised by the parties, I must now recall the duty of the first appellate court so clearly elucidated by Sir Clement De Lestang in Selle v Associated Motor Boat Company Ltd [1968] EA 123 as follows:

> This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally.

7. PW 1 testified that sometime on 28th August 2005, when he was aged 8 years old, he was instructed by his father to go and collect some plastic jerricans from Coca Cola Company where he met a Mr Areri who gave him 6 jerricans and took them home. Later it started raining so they used the jerricans to collect rain water. The water had a sweet smell which he thought was soda. When he swallowed some of the liquid, it felt corrosive causing his mouth to swell. The skin around his mouth was burnt. He could not swallow anything. He was taken to Kisii District Hospital for treatment where he was admitted for 2 weeks and discharged thereafter. After 2 weeks of discharge, he was re-admitted for another week and then transferred to Hema Hospital for 3 days. He was later taken to Kenyatta National Hospital where he was admitted for 1 ½ months while undergoing surgery of the neck and stomach. PW 1 further testified that after surgery he has been going for treatment twice a week. He told the court that he learnt the clear liquid was detergent used to clean. He blamed the company for selling the jerricans before cleaning them.

8. PW 2 examined the respondent on 19th November 2014. He testified that the appellant had taken a chemical called Odex which caused the following injuries; extensive chemical burns in the digestive system from the mouth to the colon, burns on the upper and lower lips and the chin and burns on the anterior neck. PW 2 testified based on examination of the treatment records, the respondent would require constant check-ups. PW 3 testified that he was the elder brother to Simon Areri, who was now deceased, and who, prior to his death, used to buy jerricans from Kisii Bottlers and sell them to earn a living.

9. DW 1 gave detailed evidence of the process of disposing of containers. He explained that the ingredients used to carry concentrates used to make Coca Cola beverages come in 20 litre containers. DW 1 explained that after the concentrate is used for manufacture beverages, the jerricans were not released to the public with any contents in acidic form. The jerricans are then released to the public after confirmation that they do not contain any matter. He maintained that any matter that remained in the jerrican could not bubble as alleged and was non –corrosive.

10. In the memorandum of appeal dated 12th January 2018, the appellant challenged the judgment and decree on the following grounds;

    1. The learned trial magistrate erred in find the appellant liable considering the totality of the circumstances surrounding the respondent's alleged injuries.

    2. The learned trial magistrate erred in failing to find, on the balance of probabilities, that the appellant was not and could not reasonably have been the source of the offensive jerrycan which (allegedly) contained corrosive matter.

    3. The learned trial magistrate while determined the question of liability placed undue heavy reliance on the fact that the appellant uses acidic and alkaline substance in its manufacturing processes notwithstanding that the appellant being a manufacturer was bound in any event to use such substances.

    4. The learned trial magistrate failed to appreciate the exculpatory uncontested evidence tendered in court by the appellant's witness which clearly showed that the substance which was allegedly in the jerrycan allegedly ingested by the respondent was incapable of occasioning injuries allegedly sustained.

    5. The learned trial magistrate erred in her award of damages for future medical expenses as the same was unsupported by the pleadings and evidence on record.

    6. The learned trial magistrate's award of damages was too high as to be a wholly erroneous estimate of damages.

    7. The learned trial magistrate judgment is a miscarriage of justice.

11. In his oral and written submissions, counsel for the appellant, submitted that from the evidence, the trial court was faced with conflicting accounts tendered by the parties and the trial magistrate had two probabilities which the trial magistrate was required to decide. On the one hand whether the respondent was injured corrosive matter in a jerrycan released by the appellant and the appellant's case that it was not responsible for the respondent's injuries. In his view, the trial magistrate opted to determine the case in favour of the respondent without any evidence on record to show that the material consumed was corrosive in nature and emanated from the appellant.

12. Counsel for respondent, in his oral and written submissions, contended that the respondent's case that he established that the corrosive substance emanated from the appellant and did indeed cause the respondent injury was not rebutted by the appellant and accordingly liability was established.

13. From the facts disclosed from the evidence, it was not disputed that the appellant sold or disposed of jerricans to its staff and members of the public and that one of the jerrican contained a substance which was ingested by the respondent causing him severe injuries.

14. I have evaluated the evidence afresh and the question to be answered is what caused the respondent to suffer injury and whether it was attributed to the negligence of the appellant. According to the

Discharge Summary issued by Kenyatta National Hospital, the respondent accidentally swallowed an alkaline substance by the name Odex which it identified as alkaline. This is confirmed by the report of PW 2 who, in his report dated 19th November 2014, stated that the respondent is, "Alleged to have swallowed a chemical by the trade name Odex which was collusive and resulted in extreme damage of the digestive system."

15. From the respondent's documents and by the time the plaint was filed, the cause of the respondent's injury was known and was not a matter of speculation. The respondent, in his pleading, referred to a "Chemical residue" whose character described as "bubbled like any of the defendant's soft drinks ...." The respondent did not refer to Odex which was the established cause of his injuries. Why is this important? The duty of the respondent is to establish a causal link between the occurrence of the injury and the appellant before the court can find the appellant liable. The learned authors of Clerk & Lindsell on Torts (20th Ed.) at Page 55 state that:

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

16. The respondent did not plead that Odex was a corrosive substance, that it emanated from the appellant and that it caused the respondent's injury. Without such a pleading, the appellant was effectively denied the opportunity to deny that it used Odex or that it was not a corrosive substance capable of causing injury to the plaintiff. At the end of the day, the nature of the corrosive substance was never established before the court and connected to the appellant.

17. Counsel for the respondent referred to the case of Dewayne Lee Johnson v Monsanto[1] decided by the Superior Court of the State of California for the County of San Franscisco where the court found in favour of a groundskeeper of a school who, in the course of this work sprayed the school grounds using Round-up herbicide manufactured by Monsanto, resulted in cancer. Counsel pointed out that in that case that company was found liable even though the claimant was not an employee or client but worked for a third party. He submitted that in the present case, the respondent was not an employee or the person who checked out the disposable stock but a person who was injured as a result of the appellant selling unsafe disposable stock.

18. While I note that the Monsanto decision was a jury verdict, I would point out that the claimant in that case was able to point out that the chemical that was used was Round-up manufactured by the Monsanto and which was proved to cause cancer. In this case, nothing in the evidence showed that the chemical substance, Odex, which caused the respondent's injury originated from the appellant.

19. When DW 1 testified, counsel for the respondent did not put to him the question whether Odex was a chemical substance used by the appellant in its operations. What emerged from his evidence is that the soda concentrate, which came in 20 litre jerricans, was acidic in nature while the detergent used to clean bottles is alkaline and is supplied in bulk form in tankers. This evidence together with evidence that once the soda concentrate was diluted and treated becomes inert, tends to undermine the respondent's case.

20. Considering the totality of the evidence, I must come to the conclusion that the respondent did not prove that the chemical that caused his injuries emanated from the appellant. In summary, the cause of the respondent's injury was known but the respondent failed to establish causation. Despite the conclusion that I have reached, I am obliged to consider the issue damages to which I now turn.

21. The guiding principle for consideration of this appeal is that for the appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration

an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see Butt v Khan [1981] KLR 349).

22. The medical evidence showed that the respondent sustained extensive chemical burns in the digestive system all the way from the mouth upto the colon. He sustained burns on the lips, chin and neck. He was treated by irrigation of the digestive system, gastric lavage. He had to undergo multiple operations to release the slush and to join the colon and oesophagus to enable him absorb food as his health was deteriorating.

23. The appellant submitted that the award of Kshs. 1.8 million was excessive in the circumstances. Before the trial court, the respondent submitted that an award of Kshs. 3 million was sufficient in view of the dearth of cases for the kind of injuries sustained by the respondent. In response, the appellant submitted that, "The plaintiff's submission that an award of Kshs. 3,000,000/- general damages be made, is unsupported by precedent."

24. The trial magistrate admitted that she was not able to get any comparable case but referred to Agnes Wanjiku Ndege v Kenya Power and Lighting Company Embu HCCC 119 of 2008 [2014]eKLR where the plaintiff in that case was awarded Kshs. 1.3 million in 2014 after suffering severe and extensive burns all over the body leaving scars all over the body which became itchy and painful in cold weather. The burns caused extensive disfigurement leaving her neck stiff and causing her inability to carry heavy loads. In light of this decision, the trial magistrate held as follows:

> Due to the sensitive nature of injuries suffered herein which have far reaching lifelong ramifications on the plaintiff's health and which in my considered view are more severe than those in the cited authority, I would award the plaintiff Kshs. 1.8 m in general damages.

25. The award of general damages is not a precise or scientific exercise. Since general damages are damages at large, the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards recalling that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR that:

> Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

26. I would also add what the Court of Appeal stated in Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR that:

> The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.

27. Flowing from the aforesaid principles, it is the duty of the advocates to provide guidance to the trial magistrate by providing relevant and necessary cases so that the court can reach a conventional award. In this case, the parties and indeed the magistrate accepted that the nature of injuries sustained by the respondent were unique. The trial magistrate did the best she could in reaching a reasonable award and the appellant who did not cite any cases to suggest that the sum of Kshs. 3 million was too high or give

a reasonable suggestion can hardly complain in the circumstances. I do not find any error that would entitled me to intervene within the parameters set in Butt v Khan (Supra).

28. The other claim contested was for future medical expenses. In paragraph 8 of the plaint the respondent alleged that he would need regular medical care twice monthly at an average cost of Kshs. 6,000/- per session for his entire life. In calculating the award for future medical expenses, the trial magistrate utilised a multiplier of 20 years since the respondent was 20 years old and reached an award of Kshs. 720,000/- (3000 X 12 X 20).

29. The appellant complained that the award was unsupported by the pleadings and evidence. The governing principle was explained by the Court of Appeal in Kenya Bus Services Ltd v Gituma [2004] EA 91 as follows;

> And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded.

30. A cursory glance at the plaint shows indeed the claim was pleaded at paragraph 8 of the plaint. that the claim for future medical expenses was not pleaded. Dr Ogando Zoga (PW 2) testified that due to his injuries, he would undergo treatment for the rest of his life. He told the court that he would require endoscopy and dilation of the digestive system to avoid stricture formation in the digestive system. He estimated the monthly charges to be about Kshs. 12,000/-. The trial magistrate awarded Kshs. 3,000/- instead. The respondent did not cross-appeal against this award.

31. While I would uphold the award of damages, in view of the conclusions I have reached on the issue of liability, I allow the appeal. I therefore set aside the judgment of the subordinate court and substitute it with an order dismissing the suit. The appellant shall have the costs of the suit before the trial court and of this appeal.

DATED AND DELIVERED AT KISII THIS 29TH DAY OF NOVEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Nyamurongi instructed by Nyamurongi and Company Advocates for the appellant.

Mr Nyatundo instructed by Nyatundo and Company Advocates for the respondent.