REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 28 of 2011

EQUATOR BOTTLERS LTD.....APPELLANT

VERSUS

FRED BEN OKOTH.....RESPONDENT

JUDGMENT

The Memorandum of Appeal dated 18th March 2011 is composed of five grounds. The substance thereof is that the trial magistrate erred by holding that the appellant was the manufacturer of the bottle that caused the accident and that the trial magistrate introduced fresh evidence that were not adduced at the trial.

The plaintiff here in who is a retailer on 23rd September 2008 went to buy soda from Tazama Hotel for the shop that he sells at Swan Centre Kisumu. One Peter who runs the said Tazama Hotel while selecting brands picked one coca cola brand bottle which was half full. Upon placing it aside the same exploded causing serious injury to the respondents eye. He was then rushed to Nyanza Provincial Hospital where he was admitted for two weeks. A surgery was done and his left eye removed.

The respondent later reported the matter to Railway Police Station where he was issued with a P3 form as well as a police abstract . He blamed the appellant who according to him was the producer of the substance that caused the explosion.

PW2 P. C. Daniel Sakwa investigated the incident upon receiving information from Peter Ochieng of Tazama Hotel. He however went to the scene a day later and collected the pieces of broken bottle. He told the court that he did not pursue the matter as there was no suspect.

PW3 Peter Ochieng Onyango is the shop keeper at Tazama Hotel. He testified that he sold the soda to the respondent on the material day. He confirmed that the half litre bottle indeed exploded and caused eye injury upon the respondent. He took him to Nyanza General Hospital. He then proceeded to report the matter to Railways Police Station.

PW4 Daniel Ouma Nyamwango is the respondent's father. He was called while at home and he found him at the ward. He was not at the scene.

DW1 Tom Omondi Oyoo is a production supervisor at the appellant's company. He testified that the appellants bottles are manufactured by Milly Glass Works Mombasa and are certified by Kenya Beureu of Standard.

He further said that the appellant is not the only manufacturer of coca cola but others like Rift Valley and Kisii are manufacturers too. He denied that the products complained of by the respondent were

manufactured by the appellant.

This courts role is clear and well chartered, namely to evaluate the proceedings afresh and come up with an independent decision (see Okeno =vs= Republic[1972] E. A. 32.

The issues to determine herein are two fold, namely, whether the products and the bottle indeed belonged to the appellant and whether it was sufficient for the respondent to have sued the appellant alone.

There is no dispute that the appellant is a manufacture and supplier of soda products and coca cola is one of its brands. It is undisputed also that the appellant is not the manufacture of the bottle but the products.

The question therefore is whether the substance that exploded and caused the serious injuries upon the respondent emanated from the appellant.

The respondent in no doubt sells a family shop at Swan Centre and one of its items is soda. Tazama Hotel sells these products too.

The trial court found that the products emanated from the appellant when it concluded:-

“The coca cola bottle that exploded was exhibited in court, the bottle top is intact and it is inscribed. “Equator bottlers Ltd, Angawa Avenue P. O. Box 780 Kisumu etc”.

This is what the appellant content that the same was plucked out of the blue by the learned Magistrate.

Evidence of PW1 states on cross examination that :-

“After the injury I just went to hospital, the table was just near. I've no evidence that Equator Bottlers, manufactured the soda”.

PW2 on the other hand said:-

“We did not purse the matter because there was no accused or suspect”.

He further went on to say:-

“I did not as certain the cause of the explosion I do not know the course of the explosion. I did not contact the manufacture”.

DW 1 on his part said:-

“**Other bottling company are Rift Valley and Kisii. The bottle top would carry the name and address of the bottler.”**

On re-examination he said:-

“Our bottles are identified by the crown”.

What emerges from the above is that if the crown or bottle top cap was available, what was so difficult for the respondent to confirm that the manufacturer was the appellant.

Secondly, why would PW2 fail to take action against the suspect if indeed the crown showed the appellant to be the manufacture.

Thirdly, assuming that the crown was available during the proceedings I would have found both advocates for the partes advancing this argument in the cross examination. From my deduction of re-examination of DW1 it would appear that his evidence was a matter of confirmation that if the bottle

came from them the crown would have certainly shown since other manufactures like Rift Valley Bottlers and Kisii manufactures the same products.

I do find that the respondent was unable to establish that the product that exploded was manufactured by the appellant.

Further PW2 told the court that the scene must have been disturbed as he went there the following day. There is no evidence to suggest that the broken pieces of the bottle were kept safely by the respondent to await any formal independent examination or at all.

In fact had the PW2 seen the crown he would have taken up his investigation with the manufacturer.

The next item to determine is whether it was sufficient for the respondent to have sued the appellant alone.

The respondent admitted having purchased the product from Tazama Hotel who according to the respondent are dealers and is owned by one Joyce Apondi.

It would appear then that Joyce Apondi of Tazama Hotel is the agent of the appellant company. It therefore follows that it was incumbent upon the said proprietor of Tazama Hotel to have been enjoined as a party to the case. The said proprietor would have told the court whether she purchased the product from the appellant or not.

In fact PW3 the one who sold the product to the respondent told the court that he had no evidence that he sold the soda to the respondent.

Guided by the principle enunciated in the celebrated case of **Donoghue =vs= Stevension (1932) AC 562** where both the manufacture and the stockist were sued for a tort resulting from injurious content bottled by the manufacturer and sold by the stockist it was incumbent to have included the said Tazama Hotel in the suit.

Ordinarily, once the products leaves a manufacturer in good conditions the duty of care would shift to the distributor or for that matter the next person holding or using the product. In this case it was the distributor, the stockist or the wholesaler whoever the case may have been. The manufacturer looses generally unless otherwise established control of its product once it leaves the factory.

Sad as it may, there was no negligence proved against the appellant. PW2 who perhaps would have been an independent investigator stopped at the level of issuing a P3 form and a Police abstract (whatever its worth). Had he been keen and had there been sufficient proof he would have carried out the necessary investigation.

On quantum I do not think there would be any need to interfere with the trials court findings. The same is not inordinately low or high. Considering the nature of the injuries and the authorities relied on by the partes the damages as assessed by the trial court are adequate and sufficient in the circumstances

For the foregoing reasons the appeal succeed with costs to the appellant.

Dated, signed and delivered at Kisumu this 25th day of March 2013

H.K. CHEMITEI

JUDGE

In the presence of:

.....for appellant

.....for the respondent

HKC/aao