



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 254 OF 2009

KISII BOTTLERS LIMITED.....APPELLANT

-VERSUS-

JOHN KEBASO KERUNDU.....RESPONDENT

JUDGMENT

(Being an appeal from Judgment and Decree of Madam L. Komingoi the Senior Resident magistrate in Nyamira SRMCC.No. 3 of 2007 dated and delivered on 4.11.2009)

The respondent in this appeal was the plaintiff in a suit he commenced against the appellant then as he defendant in the Senior Resident Magistrate's court at Nyamira. In the suit the respondent alleged interlia that on or about 24th June, 2006, he bought 2 bottles of soda, Krest 500 ml from Highway bar in Nyamira town and consumed one but upon close scrutiny patently visible were impurities in unopened bottle to wit; min packer of Krest bitter lemon and or christened in the said bottle. As a result of the shocking discovery, he suffered mental anguish flowing from the fact that he had been consuming impure Krest that was detrimental to his hitherto good health. He suffered unusual stomach pains and experienced diarrhea and vomiting as a result of which he sought medical treatment. He sustained acute gastroenteritis, dehydration and severe diarrhoea. The case for the respondent was that, the loss, damage and ill health resulted from taking the contaminated drinks arose from the negligence of the appellant, it's agents, servants and or employees. He proceeded to give particulars of negligence. He therefore sought general and special damages, costs of the suit and interest.

In response, the appellant denied the respondent's claim in its entirety, negligence attributed to it and the particulars thereof. The appellant further pleaded in the alternative that in the event that the respondent suffered loss and damage then the same was caused by independent acts not directly related to its products.

The hearing of the suit commenced before **L. Komingoi**, SRM on 21st November, 2007. The respondent testified that on 24th June, 2006, he was with a friend at Highway bar within Nyamira town. He ordered two Krest soda and his friend ordered two coca cola sodas as well. He did not finish drinking his Krest soda. 25 minutes or so later he stated feeling stomachache. He had poured the Krest soda in a glass from which he was drinking. He called the counterman and told him that he had sold him contaminated soda. On looking closely he saw whitish substances that were milky in the glass. There were also whitish substances in the unopened Krest soda. The unopened Krest soda was tendered in evidence soon thereafter he started vomiting. He was taken to Nyamira District hospital for treatment. Thereafter he reported the incident to the public health officer, Nyamira who prepared a

report. Later he was examined by **Dr. P.M. Ajuoga** who prepared a medical report. He blamed the appellant for the harm he suffered since it is the manufacturer of the soda he had consumed and which was contaminated.

Cross examined, he stated that the counterman opened the soda and poured the content in the glass. He drunk and cleared the first glass. After 15 minutes he started feeling bad. He poured the rest of the soda in the presence of the counterman. The 2nd soda had similar problem but he did not drink it.

Dr. Ajuoga testified that he examined the respondent on 5th January, 2007. He had suffered severe Diarrohea, dehydration, vomiting and acute gastroastrific. He prepared a medical report along those lines which he tendered in evidence.

The public health officer, one **Richard Oburu Nyakundi** too testified on behalf of the respondent. His evidence was that the respondent had come complaining that he had taken a soda and started having stomach pains. He wrote a letter as a result of the complaint which he tendered in evidence.

Upon close of the respondent's case, the appellant offered no evidence in rebuttal. The learned magistrate after analysing and evaluating the evidence on record, the submissions filed and the law came to the conclusion that the appellant was liable to the respondent for the injuries he sustained from drinking contaminated soda. She thereafter proceeded to award the respondent Kshs. 60,000/- general damages and Kshs. 3,000/= proven special damages, costs and interest.

The appellant was aggrieved by the judgment and decree aforesaid. It therefore preferred this appeal. It advanced 6 grounds in support thereof to with:

- “1. The learned trial magistrate erred in law and in fact when she held that the appellant had manufactured, bottled and supplied a soda that had foreign matter to the Respondent**
- 2. The learned trial magistrate erred in law when she held that the Respondent had proved negligence in the circumstances of the case that was before her.**
- 3. The learned trial magistrate erred in law and in fact when she relied on plaintiff's exhibit 1 and held that the same and the contents thereof had been manufactured by the appellant.**
- 4. The learned trial magistrate erred in both law and infact when she held that the defendant owed a legal duty of care to the plaintiff by insuring that the plaintiff did not get injured due to its act of omission while manufacturing and or bottling the sodas which decision was vehemently opposed.**
- 5. The learned trial magistrate erred in both law and infact when she awarded Kshs. 60,000/= as general damages for pain suffering and loss of amenities which amount is manifestly excessive and exorbitantly high and constitute an erroneous estimate of the alleged damages suffered.**
- 6. The learned trial magistrate erred in both law and infact when she relied on exhibits as produced at the trial contrary to the provisions of section 35 of the Evident Act without their makers being called to testify and or to produce the same at the trial and in failing to dismiss the respondents suit with costs for want of proof.....”**

When the appeal came up for directions on 6th October, 2010, **Mr. Odhiambo** and **Mr. Ogari**, learned counsels for the appellant and respondent respectively agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently parties filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

This being a first appeal, this court has to re-evaluate the evidence, assess it and make its own conclusion. This court must however be weary that it neither saw nor heard the witnesses and hence make due allowance for that. **Selle –vs- Associated motorboat Co. Ltd (1968) E.A.123.**

The only evidence on record is that of the respondent and his witnesses. The appellant did not at all offer any evidence in rebuttal to the respondent's claims. Accordingly, the evidence of the respondent is unchallenged, uncontroverted and or unrebutted. The learned magistrate therefore had no choice in the matter but to act on the evidence and find in favour of the respondent. No good reasons were advanced by the appellant as to account for its failure to call evidence in rebuttal and in support of its defence. As it is therefore though the defence was on record, it was of no use to the magistrate in the absence of evidence in support thereof. Averments in pleadings are mere allegations which must be buttressed by evidence. If no evidence is called in support thereof, the allegations in the pleadings remain just that, mere allegations. The defence of the appellant in the absence of evidence to support it must be seen in that light.

The appellant has in its written submissions raised several issues which ideally ought to have been the subject of evidence by the appellant. In other words, what the appellant is submitting on should first have come by way of evidence by the appellant and or its witnesses. The appellant in his submissions has therefore attempted to tender evidence from the bar. It is attempting to introduce evidence from the back door. This is inadmissible and unacceptable. The issues like corroboration of the respondent's evidence that he bought two Krest bottles which had impurities that the soda he drunk had impurities, that the impurities which caused the complications were actually in the soda before the respondent poured it in the glass and that the impurities were possibly planted by the respondent is neither here nor there. Those issues were amply dealt with in the evidence of the appellant and his witnesses.

I quite agree that it is trite law that parties are bound by their pleadings as per the provisions of **Order VI rule 6 of the Civil Procedure rules**. A party cannot therefore purport to depart from his pleadings in evidence. The appellant takes the view that the respondent had pleaded in his plaint that the unopened bottle of Krest 500 ml which had in it visible impurities caused him to suffer mental anguish believing that he had consumed the impure Krest leading him to suffer unusual stomach pains and diarrhoea. Yet in his evidence he had stated that the opened bottle of Krest was not the cause of his complications for the simple reason that he did not consume it. I am unable to agree with this submission. A careful perusal of paragraph 4 and 5 of the plaint and the evidence tendered by the respondent does not support that conclusion. I do not therefore agree that the respondent departed from his pleading in his evidence. On the issue of liability, the learned magistrate cannot be faulted

I have been urged by the appellant that in the event that I find it culpable which I have I should consider interfering with the damages awarded. In the case of **Kembro Africa Ltd t/a Meru Express Services, Gathoni Kanini .v. A.M. Lubia and Olive (1982-88) KAR 729**, the court of appeal laid down the principles upon which an appellate court will interfere with the award of damages given by the trial court. The appellate court will only do so if the trial court took into account an irrelevant factor, left out of account a relevant one, or that short of this the amount is so inordinately low or so high that it must be wholly erroneous estimate of the damages. From the record it is difficult to discern any irrelevant factor taken into account or a relevant one left out. The award of Kshs. 60,000/= in the circumstances cannot be said to be inordinately high or low as to amount to an erroneous estimate. It was within the acceptable range for those sort of injuries at the time.

For these reasons I find that the appeal lacks merit and is accordingly dismissed with costs to the respondent.

Ruling dated, signed and delivered at Kisii this 17th January, 2011.

ASIKE-MAKHANDIA
JUDGE