REPUBLIC OF KENYA

IN THE HIG COURT OF KENYA

AT BUSIA

CIVIL CASE NO. 45 OF 2007

COCA COLA COMPANY LTD.....1ST APPELLANT

EQUATOR BOTTLERS COMPANY.....2ND APPELLANT

=VERSUS=

JOSEPHAT OKELLO ODUORI.....RESPONDENT

[From the decree and orders of E.K. Keago, RM in Busia PMCC No. 295 of 2001]

J U D G E M E N T

The Respondent herein, Josephat Okello Oduor, filed an amended plaint dated 13.9.2001 against the first and second appellants/plaintiffs, respectively. He claimed that on 11.7.2001, he, the plaintiff, consumed a soft drink called “fanta” manufactured jointly by the defendants, as a result of which, he sustained severe injuries, including stomachache, headache, diarrhea, sweating, loss of appetite and mental anguish. He further claimed that the sicknesses were occasioned by reason of the defendants’ manufacturing negligence which led to a breach of duty of care to him as a consumer.

The respondent also claimed that on 23.8.2001 the defendants jointly and/or severally, in breach of a written agreement between them and the defendant, and without reasonable notice, unlawfully, entered the plaintiff’s premises and carried away a defendants’ cooler, however taking with them a sum of Kshs5000/= which had been kept under the cooler, all this, to the loss and detriment of the plaintiff.

The plaintiff accordingly sought the refund of the Kshs5000/= aforestated and, general damages for pain and suffering as well as costs and interests.

The trial magistrate found for the plaintiff in general damages of Kshs80,000/= plus a refund of the Kshs5000/= against the 1st appellant but dismissed all claims against the 2nd appellant, although he also denied the 2nd appellant costs. The findings aggrieved both appellants who filed this appeal. The appellant's main complaints are that:-

a) The Respondent (plaintiff) failed to prove negligence as the respondent failed to establish sufficient evidence for such proof.

b) That there was no evidence to show that the "fanta" soda was manufactured by the 1st appellants or evidence that the impurities could not have been introduced deliberately by a third party who is not the appellant.

c) That the adverse effect of the foreign substances of the drinks upon the respondent was not established, nor linked to the drink, nor was it proved to be harmful or unfit for human consumption due to lack of laboratory tests.

d) That the level of general damages at kshs80,000/= was inordinately high, unwarranted and unjustified.

e) That the trial court erred in failing to award costs to the 2nd appellant.

I have carefully perused and considered the pleadings, the evidence on record and the Judgement of the lower court. There is evidence on record, to the effect that the "fanta" drink which the respondent half drunk on 11.7.2001, was manufactured by the 1st Appellant. The trial court concluded so, basing its finding on the code printed on the bottle. The respondent/plaintiff, had testified that he had taken half the contents of the "fanta" drink before noticing that it contained dark foreign material which, in a short while, triggered sickness in him. He testified also that he soon experienced stomache, headache, diarrhea, sweating and loss of appetite. He was within a short period forced to go to hospital where he was treated. He also testified that he developed anxiety and anguish fearing what might be the effect of the drink in his body. Later the fear drove him to take the drink to Kisumu's Kenya Bureau of Standards for more reliable tests. It also gave him the reason to look out for more similar drink bottles with foreign substances in them.

Dr. Martin Muswaga Nyakeamo who testified for the plaintiff as PW1 in his evidence confirmed that his analysis of half drunk "fanta" drink had some foreign materials in it. He confirmed that it had been produced or manufactured by the 1st defendant, the Coca Cola Company Ltd. That he had received two other similar bottles with drinks containing similar foreign substances.

The trial court proceeded to find that the 1st Defendant, who had a legal duty of care to those who drink the sodas manufactured by it, was under obligation to ensure that their products are manufactured to meet the stipulated standards. Dr Martin Musungwa had described in his evidence the standards required to be maintained which standards were also being supervised and implemented by the Kenya Bureau of Standards. From Dr Nyakeamo's evidence, the court concluded, in my view rightly so, that in allowing or failing to prevent the foreign dark material from entering into and mixing with the drink, the 1st defendant was negligent and therefore liable for any adverse consequences arising from its conduct.

Although this court has jurisdiction, as the first appellate court, to overturn the trial court on such findings of fact, in this case I find no good reason to do so. Indeed the mere fact that such foreign material was found mixed with the manufactured fruit drink freely consumable by the public, placed the 1st defendant

in a position where it was required to explain how the foreign material found its way into the bottle. This, the 1st defendant failed to do. Indeed, this court doubts the fact that the 1st defendant/Appellant could have sufficiently exonerated itself from blame once the foreign materials were convincingly found in the drink. More so in this case where PW1, an expert from the Kenya Bureau of Standards, confirmed that aside of the one drink bottle allegedly opened by the Respondent/plaintiff, the other two were confirmed by him, as having foreign substances, although they had not been opened or tampered with by anyone. This enabled the trial magistrate to rightly presume that even the first bottle opened by the Respondent/plaintiff, must not have been tampered with. That eliminated the appellant's ground of appeal that the trial magistrate should have found high probabilities that the plaintiff himself must have opened the drink and added foreign material to it to fix the defendants.

As to the appellant's argument that the foreign substance was not proved to have itself caused the injuries to the respondent who had taken the drink, the position under the law does not support such a proposition. In my view it is not necessary for the plaintiff to show that the foreign substance probably drunk into the body, had bacteria or germs or disease in it that in turn, caused the sickness or injury on the plaintiff. It would be enough that the plaintiff feared that the foreign substance had gone inside his stomach with the drink and that it might or will harm him. The test is not a scientific one which proves an actual situation. It is a mental one which triggers fear, anxiety or anguish that the swallowed substance is likely to cause harm in the person who has absorbed it into his system.

<u>Salmond on Law of Torts</u>, P 286-287 puts the Principle as follows –
"…….an action lies for shock resulting in physical injury when the plaintiff has been placed in reasonable fear of immediate injury to himself as the result of negligence of the defendant. The principle is that if the plaintiff has been put in peril of physical impact, it is immaterial that the, impact did not materialize if physical injury is in fact caused by shock arising from the peril. There seems to be no magic in actual personal contact. A threatened contact producing physical results should be an equivalent…….....The shock, where it operates through the mind, must be a shock which arises from reasonable fear of immediate personal injury to oneself."

In this case the plaintiff's/Respondent's reaction after he believed that he had drunk the impurities in the "fanta" bottle was revulsion. He developed fear of harm to himself followed by mental anguish. He became sick and started to sweat, with nausea. He developed vomiting and diarrhoering, and had to rush to hospital for medical attention.

In my view and finding, the trial magistrate was right and entitled to come into the conclusion that these reactions were caused on the plaintiff/Respondent by the mental condition created in him after he drunk the contaminated "fanta" drink. The situation was caused by the negligence of the 1st appellant who had manufactured the soda. It must carry the liability. This court upholds the finding of the trial court on liability.

As to the quantum of damages of Kshs80000/= which the court awarded plus Kshs5000/= which was lost by the respondent through the crude method used by the 2nd appellant to take away their cooler, the appellant has not shown same to be excessive. It has not explained the figure to have been based on any wrong law principle. This court accordingly sees no good reason for interfering with the sums awarded.

Finally, the lower court declined to award costs to the 2nd defendant/appellant against whom the respondent's case failed on the reason that the 2nd appellant did not attend court to adduce any evidence. Otherwise the record shows that the advocate who had filed appearance and defences for the defendants/appellants, was one and the same advocate. It however remains that the respondent had

without sufficient cause brought the suit against the 2nd defendant and that has been demonstrated by the dismissal of the case. In my considered opinion, the fault lies with the respondent who should have done a better investigation before filing the case against the 2nd appellant. The 2nd appellant, should therefore have been awarded its costs. In the circumstances this court orders that the respondent should pay the 2nd defendants their costs.

The result is that this appeal fails and is dismissed with costs except for the 2nd appellant's appeal which succeed in respect of costs. Orders accordingly.

Dated and delivered at Busia this **11th day** of **May** 2011.

D.A. ONYANCHA

JUDGE.