



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Appeal 95 of 2002

KENYA BREWERIES LTD.....APPELLANT

=VERSUS=

WILLIAM KIPSANG.....RESPONDENT

JUDGMENT

This is an appeal against the judgment of the Senior Resident Magistrate's Court, Hon. J.A. WANJALA on 26th August 2002.

In the suit, the Plaintiff had sued the Defendant the Kenya Breweries Limited for general and Special damages in respect of alleged negligence of the Defendant in selling contaminated beer to the Plaintiff. The Plaintiff claimed that on 26th December 1996, he purchased the Defendant's beer products for consumption and after consuming and in the course of doing so, he suffered injury as the beer was contaminated, contained toxic substances and foreign bodies. The particulars of negligence set out in the Plaintiff were:-

- (i) Selling to the Plaintiff contaminated beer with foreign bodies and substances.
- (ii) Causing the Plaintiff injury, loss and damage by their beer products which they advertise as good.
- (iii) Failing to inspect and check as bottled beer, its standard consumability, effect on consumers and failing to remove foreign bodies from the beer.
- (iv) Brewing beer carelessly and negligently and causing contamination to the beer with foreign bodies therein.
- (v) Selling to the Plaintiff expired beer products.
- (vi) Handling beer products carelessly and causing contamination.

The Plaintiff claimed that he suffered the following injury:-

- v Acute vomiting episodes
- v Acute and severe stomach pains

v Severe diarrhoea

v High Fever

He claimed special damages in the sum of Kshs. 19,050/= for treatment, drugs, medicines and the medical report.

The Defendant defended the suit and set up detailed grounds of defence. Upon hearing the case, the Hon. Trial Magistrate found the Defendant liable for negligence and awarded damages in the sum of Kshs 221,260/= made up as follows:-

- General damages shs 200,000/=
- Special damages shs 21,260/=

TOTAL SHS 221,260/=

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The Plaintiff testified that on the night of 25th – 26th December 1996, he had a party at his home in Kapsoya, Eldoret. It started between 6 p.m. -8 p.m. Drinks were taken 9.00 p.m. There were soft drinks, beer (Tusker, Tusker Export and Pilsner). All the beers are the products of the Defendant. The Plaintiff bought the beer from a bar. At 10 p.m., he took one bottle of Tusker. While taking a second one, he started feeling pain in the stomach. He started to vomit. He also had diarrhoea. He was taken to hospital in the night.

The Plaintiff on cross-examination said that he looked at the bottle. There was a black thing which looked like a ball. No chemical or scientific analysis was done to determine the nature of the contents in the beer.

The Plaintiff said he kept the bottle of beer. He instructed an advocate, who sent a demand letter to the Defendant on 5th March, 1997.

The Court notes that the demand was made over 2 months after the incident. Upon receipt of the letter, the Defendant wrote on 24th March, 1997 and requested for the bottle of beer so that they could have it analysed. They sent the Area Sales Manager, Eldoret to contact the Plaintiff with a view of obtaining those contents in the bottle to be analysed.

The Plaintiff said that the Manager came to his office and asked for the bottle. The Plaintiff said that they should go to the District Hospital for tests in the company of his Counsel. In other words, the Plaintiff insisted that the analysis was to be done in at the District Hospital in the presence of his Counsel. He declined to release the beer bottle together with the contents or any part of it to be taken to the Defendant's laboratory for tests.

The law in respect of proving negligence is very clear. The burden of proof is on the Plaintiff to prove the negligence and liability on a balance of probability.

The Plaintiff was under a duty to prove that the beer was contaminated at the time it was taken by the Plaintiff and that it contained toxic substances, contaminations and foreign bodies. After this it had to be shown that the said contamination, toxic substances and foreign bodies were ingested and caused the injuries or sickness.

The Plaintiff brought to Court the bottle of beer which was half-full (half-filled) with beer. The Plaintiff

did not call any analyst or produce any scientific report or analysis to prove that the beer had contaminations and toxic substances. The nature and type of the foreign bodies was not identified or determined.

I did not see anything in the record to show that the Defendant refused to carry out the test in the presence of the lawyer. The record shows that the Plaintiff insisted on the test to be done elsewhere other than the Defendant's laboratory.

I think that as the manufacturer and having its own laboratory, the Defendant was entitled to suggest that the analysis be done at its laboratory. If there was a disagreement then it was incumbent for the Plaintiff to take the samples or contents to the Government Chemist or other laboratory for tests and tender such evidence.

If he had reported the matter to the police immediately or the Kenya Bureau of Standards, they would have taken custody of the beer bottle and its contents. Such bodies would be independent and the chain of custody of the beer secured. It is not true that such a complaint would be purely a civil claim. The Police are entitled to investigate the sell of sub-standard products besides other authorities.

I think that it was an error in law and fact for the Court to find the Defendant liable because they refused to carry out tests before and that also that they failed to do so even at the trial. The trial took place between 10/2/2002 and 26/7/2002. Over 4 years after the incident. I think that it was wrong to expect the Defendant to carry out the tests at this stage. An open beer bottle for such a period by itself is likely to result in contamination of the contents or at least further deterioration. The contents could not remain the same. Secondly, 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.

This Court is of the view that the Plaintiff ought to have surrendered the bottle of beer immediately after the incident to the Police or other independent body.

Having said all that, the burden of proof is still upon the Plaintiff. The trial Court shifted the burden of proof from the Plaintiff by his judgment.

In the case of **DONOGHUE =VRS= STEVENSON (the snail in the bottle case) 1932 A.C. 562**, there was no dispute that the ginger beer was contaminated. It had the remains of a decomposed snail which floated out. The Plaintiff as a result of the nauseating sight of the snail and the impurities of the ginger beer which she had already consumed suffered shock and severe gastro-interitis. In the case there was no dispute that the bottle contained noxious substance.

The Plaintiff in this case had to prove that there was contamination and presence of toxic substances and foreign bodies. I do hold and find that the Plaintiff did not prove that the beer was contaminated, had toxic substances or foreign bodies at the time he drank the beer. Firstly, the Plaintiff did not ensure that the evidence, the bottle and contents were secured and a chain of custody maintained such that he could show that what he produced in court was part of what he had drank over four years previously.

The Court takes judicial notice that beer being a beverage or drink made from perishable ingredients could not remain in the same condition between 26th December 1996 and 10/7/2002 when the trial was concluded.

Thirdly, the Plaintiff did not produce any analytical report or other evidence to prove that the contents had been tested to prove that indeed the beer was contaminated, had toxic material or substances at the material time.

One of the requirements to prove negligence as stated in the **Donoghue case** is that it must be shown the breach of duty was the *causa causans* i.e the direct and proximate cause of the damage complained of. If the causal connection between the negligent act and the damage is not direct, the damage is so remote for which there is no remedy in law.

In this case the Plaintiff did not prove that his sickness was caused by the second bottle of beer he took due to its contents. The beer was not produced in evidence or evidence of the nature of the contents on the date of the incident. What was brought was a bottle containing an unknown liquid. If what was brought to court was the “beer” which was in the bottle, then there was no guarantee that the beer had not become contaminated or had not perished due to the lapse of time of 4 years.

The Plaintiff took a huge risk when he decided to retain the bottle of beer in his custody for over 4 years. It was unreasonable and denied the Defendant the opportunity for a fair and independent analysis within a reasonable time.

As a result, I do hereby allow the appeal, set aside the judgment with costs to the Appellant. The suit before the trial Court is hereby dismissed with costs to the Defendant. Orders accordingly.

DATED AT ELDORET THIS 23RD DAY OF NOVEMBER 2007

M.K. IBRAHIM,

JUDGE