Nairobi Bottlers Limited v Wanjiru (Civil Appeal 703 of 2017)
[2023] KEHC 46 (KLR) (Civ) (17 January 2023) (Judgment)

Neutral citation: [2023] KEHC 46 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 703 OF 2017

DAS MAJANJA, J

JANUARY 17, 2023

BETWEEN

NAIROBI BOTTLERS LIMITED ..... APPELLANT

AND

CATHERINE WANJIRU ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. W. Mburu, PM dated 8th December 2017 at the Chief Magistrates Court, Milimani in Civil Case No. 154 of 2014)

JUDGMENT

1. The appellant appeals against the judgment of the subordinate court holding it liable for selling a defective product and awarding the respondent, Kshs 150,000.00 as general damages, costs and interest.

2. In determining this appeal, the first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal bearing in mind that it never heard or saw the witnesses testify (see *Selle and Another v Associated Motor Boat Co Ltd and Others* [1968] EA 123)

3. The respondent's case as set out in the plaint dated January 17, 2014 is that on July 11, 2013, she purchased 2 fanta pineapple 300ml glass bottles of soda manufactured and marketed by the appellant and which she intended to consume. She stated that upon reaching home, she realised that one of bottles had a straw sealed together with the contents of the bottle. In her view, the drink was contaminated with impurities and was not fit for the purpose intended. She therefore accused the appellant of negligence and or breach of contract in producing, marketing and selling it to her in an open market for value knowing that it was not consumable as a result of impurities and/or contamination.

4. In the statement of defence dated April 17, 2014, the appellant denied the respondent's claim. It asserted that it did not owe the respondent any duty of care. It averred that if the alleged contaminated product came from its plant, that when it left the plant it was not defective and was fit for human consumption and that any contamination was caused by the respondent's improper use and tampering with the product. It contended that its products are manufactured under the most stringent quality control measures hence it was not liable as alleged or at all.

5. At the hearing of the suit, the respondent (PW 1) testified along the lines set out in her plaint. She called Samuel G Njoroge (PW 2), an officer with the Government Chemist, who recalled that on June 3, 2016, he was asked to examine a 300ml Fanta Pineapple soda which was intact and which he was requested to conduct an analysing of the presence of foreign matter. He observed and reported that there was a foreign object in the form of a drinking straw in the sample. The appellant called its officer, Richard Mutie Mutua (DW 2), as its witness. The thrust of his testimony was that given the nature of the manufacturing process, it was not possible for a drinking straw to be found in a sealed bottle. He doubted the findings of PW 2 on the ground that he was not aware of the tests that were done.

6. In the Judgment, the trial court framed four issues for determination. It however dealt with the issue whether it was necessary to join Nakumatt Mega as a defendant as the respondent had purchased the soda from it. The court ruled that in so far as the action was based on tort as opposed to contract, it was not necessary to join Nakumatt Mega. The first issue was whether the soda was produced by the appellant. On this issue the court found that soda was indeed produced or manufactured by the appellant. On the second issue, whether the appellant owed the respondent a duty of care, the court held that the appellant being a manufacturer of the soda owed the respondent a duty of care to take reasonable care when manufacturing its products so that they would not result in an injury. The next issue was whether the appellant had breached its duty of care and on this, the court held that the appellant breached its statutory/common law duty of care but also acted negligently. The final issue was whether the respondent was entitled to damages. The court noted that the respondent did not adduce any evidence to back the claim that she suffered loss and damage to back her claim. The court nevertheless awarded Kshs 150,000.00 as general damages but rejected the acclaim for aggravated and exemplary damages.

7. The judgment precipitated this appeal which is founded on the memorandum of appeal dated December 13, 2017 setting out 15 grounds of appeal. Although the respondent was directed to file written submissions, she did not do so. I will however, consider the appeal bearing in mind the primary role of the first appellate court namely to review the evidence before the trial court and reach an independent decision whether or not to uphold the judgment always bearing in mind that it did not hear or see the witnesses testify (see *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212).

8. In its written submissions, the appellant has condensed the submissions into three broad grounds. The first ground is that the court erred in making an award of general damages as the respondent did not suffer any injury and that the court failed to take into consideration awards in previous cases in order to make the award. The appellant points out that the respondent did not at any time consume the soda which she had purchased from Nakumatt or mention the effects the soda has on her. In the appellant's view, there was no basis to award general damages.

9. On this ground, I think the issue for resolution is more fundamental in so far as the respondent's claim was based on the tort of negligence. In order to establish a case for negligence, the claimant must first prove that the defendant owes him or her a duty of care. This is a situation where the law attaches liability to carelessness. Second, that the duty has been breached by the defendant failing to meet the standards set by the law and third, that the breach of that duty has resulted in loss or damages. In

Mcmullan v Lochgelly Iron and Coal Limited [1934] AC 1 the court held and summarised the tort of negligence as follows, "In strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

10. Damages is an integral element of proof of the tort of negligence. Without proof of damage, the claim must fail (see also *Eric Omudo Ounga v Kenya Commercial Bank Ltd* KSM HCCC No. 42A of 2015 [2017] eKLR). In this case, the trial court found as a fact that the respondent failed to prove damage. It opined that:

> I noted that despite the plaintiff's insistence that she had suffered ''loss and damage'' she did not adduce any evidence to back the claim. The evidence on record showed that neither the plaintiff nor her family consumed the offensive drink

11. I have reviewed the respondent's testimony. Her case was that she purchased the soda with a straw inside. She did not consume the soda. She did not set out any harm, loss or injury resulting from purchase of the soda. Having concluded that the respondent had not proved damages, the trial court had no option but to dismiss the claim.

12. The first ground is sufficient to dispose of this appeal but for completeness, I will deal with the other grounds which concern proof that the appellant was negligent. In the second ground, the appellant impugns the trial court's reliance of the testimony and evidence of PW 2. It complains that the trial court was persuaded that the report of the Government Chemist was of persuasive value despite the fact that no chemical, technical and or analytical tests were done on the soda. The failure to conduct these tests, the appellant argues calls into question PW 2's testimony particularly in light of the fact that DW 1 demonstrated to the court that there were various tests which were not done to demonstrate that the soda bottle could not have been tampered with.

13. In the third ground, the appellant also complains that it was necessary to join the store from which the respondent purchased the soda hence the trial magistrate was wrong to rule that Nakumatt was not a necessary party to the suit. It submits that a wholesaler or distributor must take reasonable steps to check the safety of what it distributes especially where the defect is apparent and not latent as is the case of the respondent.

14. The respondent bore the burden of proving that the defendant was negligent, as pleaded, on the balance of probabilities. There is no doubt that a manufacturer of a product owes the ultimate consumer a duty of care to ensure that its products are not harmful. This is the principle established in *Donoghue v Stevenson* [1932] All ER 1. In this case, the respondent established and the trial court accepted that the soda was manufactured by the appellant.

15. As to whether it was unwholesome, the respondent's case was that the soda bottle had, "straw sealed together with the contents of the bottle." Following a court order dated June 14, 2016 and in line with the pleading, PW 2 was requested to confirm the presence of foreign matter and in the report dated June 10, 2016, he concluded that, "A foreign object in the form of a drinking straw was observed in the sample." The appellant submits that apart from physical examination of the contents of the bottle, PW 2 did not conduct any other scientific tests that would be expected from an expert. It assails the contest the chain of custody of the soda on the ground that the respondent kept the soda in her possession for a period of four years before taking it for examination. In my view, the expert report and the chain of custody all go to the weight of evidence.

16. As regards the chain of custody, I cannot fault the respondent as the appellant did not respond to its letter of demand dated August 6, 2013 hence it was not unreasonable for her to keep the soda until the

trial. At the time the court directed the respondent to furnish the soda to the Government Chemist, it had the opportunity to request for all the tests it states were not done to be done in order to rebut the fact that the straw in the bottle was the result of interference by a third party. In this respect I would do no better than cite what Bosire JA., stated in *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR:

> Whilst it was the duty of the respondent to prove his case on a balance of probabilities on the basis of the principles enunciated in *Donoghue v Stevenson* [1932] ALL ER 1; the appellant had the evidential burden of explaining certain facts especially within its knowledge. It is not usual for bottled beer to have foreign particles inside it whether harmless or harmful. The presence of those particles must have been due to either negligence on the part of the appellant during the manufacturing process or the particles were introduced into the bottles subsequently.

17. In light of the fact that the respondent established that the soda contained a straw and it was opened by the Government Chemist, the evidential burden shifted to the appellant to demonstrate that the soda was wholesome and had not been interfered with. At this stage I would also point out that since, the respondent's claim was based on a breach of duty of care, it was unnecessary for the respondent to join Nakumatt Mega as a party to the suit. In any event, it was open to the appellant to seek contribution and indemnity from the third party.

18. On the whole therefore, there was sufficient evidence upon which the trial court found that the appellant breached its duty of care to the respondent. However, the respondent failed to prove that she suffered any harm, loss or damage and that she was entitled to an award of damages.

19. For the reasons I have set out above, I allow the appeal, set aside the judgment and substitute it with a judgment dismissing the suit. The respondent shall bear the costs of this appeal and the suit before the Subordinate Court.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2023.

D.S. MAJANJA

JUDGE

Mr Ongeri instructed by Obura Mbeche and Company Advocates for the appellant.

Ms Ochieng instructed by Mjeni Mwatsama and Company Advocates for the respondent.