REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 40 OF 2014

NAIROBI BOTTLERS LIMITED .....APPELLANT

VERSUS

JULIUS MWANTHI .....RESPONDENT

(Being An Appeal From The Judgement of the Honourable M.K. MWANGI (Senior Principal Magistrate) Delivered on 7th March, 2014 at Machakos in CMCC No. 313 OF 2006 – Julius Manthi = Vs= Nairobi Bottlers Limited)

JUDGEMENT

1. The appeal arises from the judgement of Hon. M. K. Mwangi Senior Principal Magistrate in Machakos **CMCC No.313 of 2006** dated 7th March, 2014 wherein the Respondent was awarded general damages of Khs.60,000/= and special damages of Kshs.3,000/=.

2. The Appellant was aggrieved by the said judgment and raised the following grounds:

(i) The learned magistrate erred in law and in fact by awarding general and special damages of Kshs.63,000/= which is excessive and unjustified in the circumstances.

(ii) The learned magistrate erred in law and fact in not relying on any authority to arrive at a figure of Kshs. 60,000/= awarded in general damages.

(iii) The learned magistrate erred in law and in fact by holding the Appellant liable to the Respondent when no relationship either in law or in fact was established between the Appellant and the Respondent by evidence adduced before him.

(iv) The learned magistrate erred in law and in fact in failing to address himself or at all on the legal principles relating to the duty of care owed by the Appellant as a manufacturer to the Respondent as a consumer.

(v) The learned magistrate erred in law and in fact in not appreciating that liability of the Appellant was dependant on the fact that the Respondent did not scrutinize and/or examine the subject bottle.

(vi) The leaned magistrate is finding that the property in the soda had passed to the Respondent in order to attach liability against the Appellant is contrary to the law.

(vii) The learned magistrate erred in law and in fact in holding that the Appellant's liability has grounded on the fact that the Respondent did not consume a soda containing impurities.

(viii) The learned magistrate erred in law and fact in finding that the contents of the bottle taken for examination to the Kenya Bureau of standards was a product of the Appellant and that its content were those similar to those consumed by the Respondent while there was no comparison of the two nor any chemical test carried out.

(ix) The learned magistrate erred in law and in fact in fining that the evidence of the officer from the Kenya Bureau of Standards was admissible when the same was based only on physical examination of an alleged product of the Appellant.

(x) The learned magistrate erred in law and in fact in not taking into consideration the Appellants submissions or at all.

(xi) The learned magistrate erred in fact by holding the Respondent had on a balance of probability proved their case against the Appellant.

(xii) The learned magistrate erred in law and in fact by holding the Appellant liable without any negligence having been proved on the part of the Respondent.

(xiii) The learned magistrate erred in law and in fact by not giving a basis for the award made for damages.

(xiv) The learned magistrate erred in law and in fact by awarding full costs of the court and interest at court rates to the Respondent despite there being no evidence whatsoever against the Appellant.

(xv) The learned magistrate erred in law and in fact by failing to consider the Appellant's evidence while fully accepting the Respondent's evidence.

3. This being the first appelate court, its duty is to re-evaluate and reconsider the evidence and draw its own conclusion bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect (see **SELLE =VS= ASSOCIATED MOTOR BOAT CO. LTD [1986] EA 123).**

4. The Respondent (PW.1) testified and stated that on the 15/3/2006 he was at the Machakos bus stage preparing to travel to Nairobi when he decided to take a soft drink as he was thirsty. He bought a bottle of soda Fanta which was opened by the retailer and he took several gulps but realized that the taste was stale and harsh to the mouth. He felt like throwing up and immediately experienced adnominal pains. He checked the bottle and noticed some black foreign matter inside the Fanta soda bottle. He subsequently developed some mild fever and started to vomit and diarrhoea. He sought assistance from Dr. Patrick Lumumba who examined him and prepared a medical report. He also took the suspect bottle of soda to a Government analyst for check up. He maintained that he rarely drinks Fanta soda due to the nasty experience.

On cross-examination the Respondent stated that he left the suspect bottle with his lawyers for safe custody. He also stated that the retailer was one Mbithi.

5. Dr. Peter Kavoo Kilonzo (PW.2) stated that it was Dr. Patrick Lumumba who had examined the Respondent but that since the said doctor was not available he could produce the medical report as he was well acquainted with the handwriting and signatures having worked with the author for 8 years. He confirmed that the Respondent had been treated for vomiting, abdominal pain and partial diarrhoea as well as mild fever.

6. Daniel Cheruiyot Boit (PW.3) stated that he was a Government Analyst and had worked with a

colleague namely Tom Odhiambo Owiti who had subjected the contents of the suspect Fanta soda soft drink to analysis and who confirmed that the drink was not fit for consumption. On cross-examination he stated that the specimen was presented at the Government chemist on 7/4/2006 and that the Fanta bottle was not intact.

7. The Appellant called Stephen Mwene who was a team leader with Nairobi Coca-Cola Bottlers and who maintained that their products did not contain any foreign matter as all the bottles are cleaned with pressure pump machines. He stated that the Respondent did not lodge any complaint on the date of the alleged incident and further that the alleged Fanta bottle has never been availed to the Appellant.

Submissions

8. Learned counsels agreed to canvass the appeal by way of written submissions.

Appellant's submissions

9. It was submitted for the Appellant that the trial court failed to consider the fact that the alleged bottle that had impurities was not produced in evidence. Reliance was placed in the case of **KENYA BREWERIES LTD =VS= WILLIAM KIPSANG– ELDORET HCCA NO. 95 OF 2002**.

It was also submitted that the trial court failed to establish existence of a nexus between the Appellant and Respondent and whether there was any liability against the Appellant and as such it was out of place for the trial court to award general damages at Kshs. 60,000/= without stating how the same had been arrived at.

Respondent's submissions

It was submitted for the Respondent that the trial court had applied the correct principles in arriving at the award of Kshs.63,000/= as there was an authority in the case of **KISII BOTTLERS =VS= JOHN KEBASO KERUNDU C.A. No. 254 of 2009** where a similar award was given to a plaintiff who had sustained injuries similar to those of the present Respondent.

It was also submitted that the Respondent had established that he was owed a duty of care by Appellant by ensuring that it manufactured products which are fit for consumption and that there was breach of that duty which led to the Respondent suffering injuries. The case of **DONOGHUE =*VS*= STEPHENSON [1932] AC 562** was relied upon.

Determination

10. I have considered the evidence adduced before the trial court and the submissions presented by both learned counsels for the parties herein. I find the following issues necessary for determination namely:-

*(i) Whether the Respondent established the three principles in the case of **DONOGHUE =VS= STEPHENSON [1932] AC 562** namely duty of care, breach of the duty of care and injury suffered as a result of the said breach all attributed to the Appellant.*

(ii) Whether the award of damages was reasonable.

11. As regards the first issue, it is noted that the Respondent's claim against the Appellant was based on negligence. The Respondent had pleaded the same vide paragraph 5 of the Plaint dated 9/5/2006 as follows:-

> *(a) Manufacturing and sellign the said drink when they knew or ought to have known that the same or part thereof contained extraneous or deleterious substance, the consumption of which would cause damage or injury to the consumer and/or the plaintiff.*

(b) Failings to take any or any adequate or necessary precautions in the manufacture of the said soda so as to prevent any injuries or deleterious substances being contained therein.

(c) Permitting the said soda to contain injurious or deleterious substances.

(d) Failing to take any or any adequate measures whether by way of examination, inspection, taste or otherwise to ensure that the said soda manufacture or sold by them does not contain any injurious or deleterious substances.

The Appellant in its statement of defence dated 29/05/2006 denied the alleged injuries, loss and damage and attributed negligence upon the Respondent as follows:-

(a)Failing to observe high standards of personal hygiene or cleanliness.

(b) Failing to obtain a drink from a reputable supplier.

(c) Carelessly exposing himself to a risk of injury of which he knew or ought to have known.

(d) Failing to take any or any adequate measures of his own safety.

The Respondent testified and maintained that upon taking a few gulps of the soda he felt a sharp nasty taste in the mouth and on closer scrutiny of the bottle spotted some impurities embedded on the bottom (inside) and suddenly started vomiting and diarrhoearing with a mild fever. He sought medical help from Dr. Patrick Lumumba who attended to him ad prepared a medical report. In the meantime the Respondent consulted his lawyers and had the suspect bottle of soda and contents handed over to the Government chemist for analysis whereupon Dr. Tom Owiti found the drink to be contaminated and not fit for consumption. Both the medical report and Analysis report were produced as exhibits.

The Appellant on its part called one of its team leaders Stephen Mwene who maintained that all their manufacturing processes are above board as the bottles are thoroughly cleaned with a pressure pump. He confirmed that their company indeed produces Fanta orange soft drinks. In the celebrated case of the **DONOGHUE =*VS*= STEPHENSON [1932] AC 562** the House of Lords held as follows:-

"*A person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of those articles. That duty he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption he intends and contemplates that they shall be consumed. By reasons of that very fact he places himself in a relationship with all the potential consumers of his commodities and that relationship which he assumes and desires for his own ends imposes on him a duty to take care to avoid injuring them.*"

In the Donoghue case (supra) the Plaintiff had purchased a ginger beer which was contaminated as it had remains of a decomposed snail which floated about. The Plaintiffs then 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-enteritis. In that case there was no dispute that the said ginger beer was contaminated.

The Respondent in the present case had to prove that there was contamination and presence of toxic substances and foreign bodies in the Fanta orange drink. The Appellant's witnesses Stephen Mwene vehemently denied the allegation of contamination as their production processes were above board. However, the Respondent had the soda drink analyzed by the government chemist where it was discovered that it was contaminated and not fit for consumption. He claimed he had drank some bit and fell sick as he vomited and further suffered mild diarrhoea as well as mild fever which were confirmed by Dr. Patrick Lumumba. The medical report and analysis report were produced as exhibits. The Appellant's witness confirmed that they are the sole manufacturers of Fanta orange soft drinks and therefore I find they owed a duty of care to all its consumers. Even though the suspected bottle was not

produced as an exhibit, I find the analysis report prepared by a government agency sufficient to establish that indeed there had been such a bottle containing Fanta orange drink which was contaminated. It is noted that the Appellant did not object to the production of the analysis report and neither sought for the production of the bottle. I am satisfied by the evidence of the Respondent that indeed the Fanta orange he had drunk had been contaminated. The Appellant owed a duty of care to the Respondent and that there was breach of that duty of care and as a result the Respondent sustained injuries. Hence I find the Respondent has established all the principles in the Donoghue case (supra) as attributed to the Appellant herein. The trial court did not err in finding the Appellant solely liable in damages to the Respondents as it owed a duty of care to those who consumed its products which should be wholesome and without contamination of any kind whatsoever. It must be noted that the Respondent had purchased the Fanta soda whose cap was firmly in place and only opened by the retailer. As such no negligence can be attributed to the Respondent.

12. As regards the second issue, it is trite law that an, appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate and that it must be shown that the judge proceeded, on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. (see **BUTT =VS= KHAN (1981) KLR 349**. It is noted that the Respondent herein was awarded general damages of Kshs. 60,000/= plus special damages of Kshs.3,000/=. The trial court had relied on the case of **KISII BOTTLERS LIMITED =VS= JOHN KEBASO KERUNDU – KISII HCCA. NO. 254 of 2009** where the circumstances were quite similar in that the Respondent therein had sustained injuries such as diarrhoea, dehydration, vomiting and acute gastro-enteritis and in which general damages of Kshs.60,000/= was awarded by the trial court and which was upheld by Makhandia J (as he then was). The said authority appears to be in all fours with the Respondent's case herein. I am therefore satisfied that the trial court did not factor irrelevant matters into account or left out a relevant one while assessing the damages. The award of Kshs.60,000/= in the premises cannot be said to be inordinately high or low as to amount to an erroneous estimate. I find the award was reasonable and commensurate with the injuries sustained.

13. In view of the aforegoing observations, I find that the appeal lacks merit and is accordingly dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at **Machakos** this **12th** day of **June, 2018.**

D. K. KEMEI

JUDGE

In the presence of:-

No appearance for Avedi - for the Appellant

Muumbi - for the Respondent

Josephine - Court Assistant