REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.17 OF 2013

M/S KISII BOTTLERS LIMITED..APPELLANT

VERSUS

MELCHIZEDEK M. ATIKA t/a

SERENGETI BAR & RESTAURANT......................................RESPONDENT

(an Appeal against the judgment and decree of the HonourableP.I.Shinyada – SRM in Kisii CMCC No.270 of 2009 delivered on 29th February 2012.)

JUDGMENT

The respondent herein **Melchizedeck M. Atika t/a Serengeti Bar & Restaurant Limited** was the plaintiff in CMCC Kisii Civil Suit No.270 of 2009. He sued the appellant herein **Kisii Bottlers Ltd** seeking the following prayers:-

a) Damages for loss of business,

b) Costs of this suit and interest,

c) Any other relief this Honourable court may deem just and proper to grant.

The cause of action was captured at paragraph 4, 5 & 6 of the plaintiff's plaint where he stated that on or about 10th May 2008 the defendant's agents sold to the plaintiff crates of sodas of different brands at his business premises in Kisii town for sale while knowing that the said products were unsafe for human consumption. That upon the plaintiff purchasing the said products from the defendants and selling them to his customers, they discovered patent impurities on **Krest 500 ml** which made such customer to utter words to the plaintiff as his business, which words and utterance made the members of the public more particularly his customers to have negative attitude towards the plaintiff particularly his business and as a result of such utterances the plaintiff's business has suffered loss of business.

The plaintiff particularized particulars of loss and damages as follows:-

a)Decline in sales,

b) Loss of earnings (to be adduced during the hearing hereof)

c) Loss of credit facilities.

Particulars of negligence on the part of the defendant were particularized as follows:

a) Selling goods unfit for human consumption.

b) Packaging goods without due care and attention.

c) Failing to confirm that their goods are of good quality.

d) Failing to observe the conditionslaid down by the Kenya Bureau of Standards.

e) Failing to stop selling contaminated products.

The defendants on their part filed a statement of defence dated 28th April 2009 whereby they denied the plaintiff's allegations. The matter then proceeded to formal proof.

PW1 was the plaintiff MelchizedeckAtika. He told the court that he run a hotel by the name Serengeti Pama Bar & Restaurant. That on 10th May 2008 as he was serving customer with drinks a client shouted and complained that his soda had some substances. He then stated that he had bought the said soda from the defendant which was a Krest 500 ml. He produced the said Krest soda bottle in court and the said particles were visible. The said Krest soda bottle was marked as P. Exhibit 1. He also produced his liquor licence and Municipal Council permits for the year 2008 which were marked as P. Exhibt 2 & 3 respectively.

Apparently, the client who was served the Krest accused the plaintiff of selling poisonous sodas and food as he stated the same were contaminated by witchcraft to lure clients to his hotel. As a result of the said utterances he claimed that his business was affected, and customers left without paying bills. Furthermore, his business went down as people avoided his hotel and pub. Consequently the name of the hotel was spoilt in the process and he was therefore not able to earn as previously and the bank could not advance him credit.

Following the said incidents he got his accountant who did the valuation of the business before and after the incident *i.e*. February, March, May, June 2008. He claimed that before the incident, his business was doing well as he lost about Ksh.500,000/=. To back up his claims he produced PMFI-4 for the court to look at the computation.

Lastly, he contended that immediately after the event, their sales went down as it was caused by the defendant company that sold goods not fit for human consumption, failing to confirm that the goods are fit, failure to stop the selling of such items and given that his hotel was in competition with others it was greatly affected. He prayed that the court assists him to get general damages for loss of business and any other relief besides the costs of this suit.

On cross-examination he revealed that the soda was never taken for analysis to see whether it had been interfered with.

PW2 was Peter NyakundiOsebe an accountant by profession. He told the court that he was instructed to prepare books of accounts for the plaintiff for the months of February to July 2008. They were the balance sheet and final accounts of all statements. He stated that the major impact was on sales where in the first 3 months the volume of sales was high but for the last 3 months the sales declined. He further explained that in the last 3 months he (plaintiff) lost about Ksh.400,000.00 – 500,000.00 as at 31st July 2008. He produced the statement as exhibit which was marked as P. Exhibit 4.

This marked the close of the plaintiff's case.

DW1 was Zachary ObwochaOmondi a quality Assurance Supervisor with the defendant company. He

stated that his duties are to foresee the processing and bottling of soft drinks hence ensuring that the products are of high quality. That where there is any complaint on product quality the complaint is received by consumer response co-ordination and then ends up on his table. He confirmed that P. Exh.1 was a product of Kisii Bottlers but the date code on the bottle was not clear. He also confirmed that no complaint was made in that office concerning P. Exhibit 1 and if a complaint had been made, they would have recorded the detail and sent product to the government analysis. He also stated that had the bottle been analyzed there is a possibility that they could find out if the bottle had been interfered with as the bottle before court was intact since the seal had not been interfered with.

Lastly, he reiterated that they had never received any prior notice to the effect that complainant had received a bad product since the bottle was not subjected to any test and therefore they were not liable. He thus prayed that the suit be dismissed with costs.

In re-examination he reiterated that if the product was analyzed they would know what it contains.

That marked the close of the defence's case.

In its judgment the trial court awarded the plaintiff Ksh.400,000/= for loss of business and awarded costs of the suit at court rate to the plaintiff from the date of judgment.

The above judgment and decree has triggered this appeal. In his Memorandum of Appeal the defendant now appellant has appealed against the entire judgment and decree on the following grounds:

> **1) That learned trial magistrate erred by failing to find that no general damages could issue for the respondent's alleged loss of business.**
>
> **2) The learned trial magistrate failed to appreciate that the profitability of the respondent's business was subject many factors including among others, implementing of prudent and /or sound management policies and the nature of the environment in which the business operated determined by the performance of the national economy which the appellant could not have influenced.**
>
> **3) The learned trial magistrate failed to appreciate that though couched as a claim for 'loss of business the respondents case was in effect a claim or for 'loss of profit' and having failed to specifically plead the same his suit was bad in law and ought to have been dismissed.**
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> **4) The learned trial magistrate erred in failing to find that on the preparation of evidence adduced the appellant had proved its case.**
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> **5) In any event, minored against the respondent's alleged dip in profits, the learned trial magistrate's award was too high as to amount to a wholly erroneous assessment of damages.**
>
> **6) The learned trial magistrate treated the appellant's submissions per fundorily thereby arriving at a manifestly wrong decision WHEREFORE it is proposed to ask this honourable court to:**
>
> ***a) Set aside the judgment delivered in Kisii CMCC No.270 of 2009 and substitute the same with judgment dismissing the same.***
>
> ***b) Award costs of this appeal and of Kisii CMCC No.270 of 2009 to the appellant in any event.***

When the matter came before me on 5th December 2014 it was agreed that the above appeal proceeds by way of written submissions. Both written submissions have been filed by advocates representing both parties.

This suit in his first appeal has duty and obligation to re-analyze and evaluate the evidence made by the

lower court before coming to itsindependent decision in this appeal.

It is undisputed that the claim brought against the appellant by the respondent in the lower court was a claim based on the tort of negligence in **Kenya Breweries Ltd vs William Kipsang [2007] eKLR Ibrahim** observed:

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

The judge continued:

> **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 substance, 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 in analysis to prove that the beer had contaminations and toxic substances. The nature and type of foreign bodies was not identified or determined.**

In the case of **Donoghue v. Stevenson (*the snail in the bottle case*) 1932 A.C 362** 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-enteritis. In that case therefore there was no dispute that the bottle contained noxious substance.

In this case, the respondent brought to court a bottle of soda Krest (500 ml though intact) the respondent did not call any analyst or produce any scientific report or analysis to that the soda had contaminations and toxic substances. The nature and type of the foreign bodies was not identified or determined.

Furthermore, it was the appellant's evidence during trial that there was no report made to their company about a soda which had impurities. This evidence in my view was never rebutted hence it is safe to conclude that the respondent never made any complaint concerning the soda in his restaurant which had impurities.

In my humble view, the appellant as the manufacturer of soft drinks having its own laboratory was entitled to suggest that the analysis be done at its laboratory. If the respondent had reported the matter to the police immediately or the Kenya Bureau of Standards, they would have taken custody of the soda secured. The police in my view are entitled to investigate the sale of substandard products beside other authorities.

I think that it was an error in law and fact for the trial court to find the defendant liable because they refused to carry out test before and that also that they failed to do so even at the trial. The trial took place between 22nd November 2010 – 30th November 2011. Over 3 years after the incident (which took place on 8th May 2008). Even if the soda bottle was intact for the whole period, the contents could not remain the same and secondly the chain of custody was insecure as the respondent kept the bottle and contents and did not place it in the hands of an independent party on authority.

Thus in my humble view, the plaintiff ought to have surrendered the bottle of soda immediately after the incident to the police or other independent body and having said all that, the burden of proof is still upon the plaintiff and the trial court shifted the burden of proof from the plaintiff by its judgment.

Therefore, the plaintiff in this case had no 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 soda was contaminated, it had toxic substances or foreign bodies at the time the soda was brought to the customer

to consume. Firstly, the plaintiff did not ensure that the evidence, the bottle and content were secured and a chain of custody. In this case the plaintiff could have easily interchanged the bottle from the one which was initially produced in the restaurant.

This court also takes judicial notice that soda being a beverage or drink made from perishable ingredients could not remain in the same condition between 25th May 2008 – 30th November 2011 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 substances at the material time.

One of the requirements to prove negligence as stated in the Donaghue case (*supra*) is that it must be shown the breach of duty was the cause 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 even prove that there was a malicious comment from his customer who refused to take the Krest soda in his restaurant. The said customer whom the plaintiff stated was well known to him did not testify and his reasons for not testifying were not established. Also, as I have stated above the said impurities which were seen in the Krest soda never underwent any analytical test to establish whether the said soda was contaminated in the appellant company or was interfered with after leaving the appellant company.

Therefore the issue of loss of earning in my view was very farfetched as the plaintiff had to prove that the impurities in the soda were by fact impurities emanating from the appellant company thus making the appellant liable.

For the above reasons 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 appellant.

Orders accordingly.

Dated, signed and delivered at Kisii this 17th day of July 2015

HON. C. B. NAGILLAH

JUDGE

In the presence of:

- M/S Ogwoyo for the Appellant
- M/S Muguche for the Respondent
- Samuel Omuga: court clerk