



**OBIM alias IM v Kisii Bottlers Limited (Civil Appeal  
26 of 2019) [2023] KECA 902 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KECA 902 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 26 OF 2019  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
JULY 21, 2023**

**BETWEEN**

**OBIM ALIAS IM ..... APPELLANT**

**AND**

**KISII BOTTLERS LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Kisii (D.S. Majanja, J) dated 29th November, 2018 in High Court Civil Appeal No. 1 of 2018)*

**JUDGMENT**

**Judgment of Mumbi Ngugi JA**

1. The appellant, OBIM alias IM, was eight years old when, on a date sometime in August or September of 2005 as he avers in his plaint dated 27<sup>th</sup> August 2015 in Kisii CMCC No. 547 of 2015, he consumed a substance from what he described in his plaint as a ‘freshly emptied plastic container of chemical matter’ used in the respondent’s processes. He averred that the container had been released from the respondent’s factory in Kisii where the respondent manufactured popular soft drinks and Dasani water.
2. It was his case that as a result of consuming the chemical, he sustained severe permanent injuries from his mouth and down the gullet towards the stomach. He further averred that he continued to undergo pain, suffering and loss of amenities and would need regular medical care at an average cost of Kshs. 6,000 per session for his entire life. He therefore claimed general damages, exemplary damages, special damages, costs and interest against the respondent
3. In its defence, Kisii Bottlers Limited, the respondent, admitted being a manufacturer, bottler and seller of various brands of soft drinks and mineral water. However, it denied the appellant’s claim and maintained that it has, in the conduct of its business, complied with its statutory obligation in ensuring that it operates and functions in responsible practices in keeping with national and international



- practices and standards, with regard to disposal of waste and disposable stock, with a view of ensuring and keeping them safe, hygienic and healthy.
4. The trial court found the respondent fully liable for the appellant's injuries. It awarded him general damages of KShs. 1,800,000, costs of future medical expenses of KShs. 720,000 and the costs of the suit.
  5. The respondent was aggrieved by the decision and filed an appeal before the High Court. It raised seven grounds of appeal before the High Court, arguing, first, that the trial court erred in finding it liable considering the totality of the circumstances surrounding the appellant's alleged injuries; in failing to find, on a balance of probabilities, that the respondent was not and could not reasonably have been the source of the offensive jerrican which allegedly contained corrosive matter; that the trial court, while determining the question of liability, placed (unduly) heavy reliance on the fact that the appellant uses acidic and alkaline substance in its manufacturing processes notwithstanding that the respondent, being a manufacturer, was bound in any event to use such substances.
  6. The trial court's decision was further impugned on the ground that it failed to appreciate the exculpatory uncontested evidence the respondent had tendered in court which clearly showed that the substance allegedly ingested by the respondent which was allegedly in the jerrican was incapable of occasioning the injuries allegedly sustained; had erred in the award of damages for future medical expenses as such award was unsupported by the pleadings and evidence on record; the award of damages was too high as to be a wholly erroneous estimate of damages, and the decision of the trial court was a miscarriage of justice.
  7. Upon re-evaluating the evidence before the trial court and its decision, the High Court found in favour of the respondent. It was its finding that from the evidence tendered, the appellant did not refer to Odex, which was the established cause of his injuries. He had also not pleaded that Odex was a corrosive substance, that it emanated from the respondent, and that it caused the appellant's injury. Without such a pleading, the respondent was effectively denied the opportunity to deny that it used Odex or that Odex was not a corrosive substance capable of causing injury to the appellant.
  8. The High Court further found that the appellant was under a duty to establish a causal link between the occurrence of the injury and the respondent before the court could find the respondent liable.
  9. The first appellate court found no basis for interfering with the award of damages. It noted that the respondent did not cite any authority to suggest that the sum awarded to the appellant was too high or give a reasonable suggestion. It further held that it would not have interfered with the award for future medical expenses, noting that the claim had been pleaded and evidence tendered that the appellant would undergo endoscopy and dilation of the digestive system to avoid stricture formation in the digestive system at a cost of KShs. 12,000.
  10. In the result, however, since the appellant had failed to establish a causal link between his injuries and the respondent, the High Court allowed the respondent's appeal, set aside the trial court's decision, and substituted it with an order dismissing the appellant's claim, leading to the appeal now before us.
  11. In his memorandum of appeal dated 2<sup>nd</sup> January, 2019, the appellant raises five grounds of appeal, contending that the first appellate court erred in law:
    - i. in finding that he did not establish a causal link between the occurrence of his injuries and the respondent;
    - ii. in misdirecting itself by imposing a standard of proof that was higher than the one required in civil cases-balance of probabilities;
    - iii. in the face of paragraph 13 of its judgement, its conclusion was an error in law.



- iv. In failing to hold that in engaging in non-core business by selling unsafe disposable stock for profit, the respondent a body corporate, assumed a greater duty of care owed to the public, especially the appellant who thereby suffered injury.
12. The appellant contends in his final ground that the decision of the first appellate court was ‘otherwise contrary to the law or usage having the force of law.’
13. Learned counsel, Mr Nyatundo, appeared for the appellant at the hearing of the appeal. He submitted that the first appellate court, having found for a fact as it did in paragraph 13 of its judgment in which it stated that it was not disputed that the respondent sold or disposed of jerricans to its staff and members of the public, and that one of the jerrican contained a substance which was ingested by the respondent causing him severe injuries, the court’s conclusion negated its findings of fact as a first appellate court. It had therefore ended up with a judgment that is against the law.
14. The appellant further submitted that in its decision, the first appellate court relied on the dissenting view of Musinga JA in *Fred Ben Okoth v Equator Ltd* [2015] eKLR instead of the majority judgment in that case, which this Court should be guided by to reinstate the appellant’s case.
15. It was submitted on behalf of the appellant, finally, that he sustained severe injuries that he will have to live with all his life.
16. Learned counsel, Mr. Nyamurongi, appeared for the respondent. He submitted that this being a second appeal, only matters of law, not fact, are available for consideration, yet the appellant has raised both issues of fact and law in his appeal.
17. Regarding paragraph 13 of the High Court judgment, the respondent submitted that the court analysed the evidence against the pleadings. Further, that in considering the whole judgment, the first appellate court, at paragraph 20, found that the appellant did not prove that the chemical that caused his injuries emanated from the respondent.
18. It was further submitted on behalf of the respondent that the first appellate court was right in holding that causation was not proved. Mr. Nyamurongi submitted that in his pleadings and evidence before the trial court, the appellant did not expressly indicate what he consumed. It was his submission further that causation was not proved. He noted that from the pleadings, the events at issue occurred in September of 2005 but the evidence which was presented to both the trial court and the superior court was a document called a disposal advise which bore a date of 1<sup>st</sup> March 2007.
19. Mr. Nyamurongi submitted that the appellant could not have come across the jerrican by purchase in 2007 and consumed matter from the same jerrican in 2005. It was his submission therefore that the chronology of events was [too] improbable to support a finding that the respondent was negligent by any act or omission. His submission was that the first appellate court cannot therefore be faulted for so finding.
20. I have considered the appellant’s memorandum of appeal and the judgment and proceedings before the first appellate court. I have also considered the proceedings before the trial court contained in the Further Supplementary Record of Appeal dated 7<sup>th</sup> March 2023 filed pursuant to the order of this Court at the hearing of the appeal on the said date.
21. I have also considered the oral submissions of learned counsel for the parties. I observe that there were no submissions placed before this court by the parties. While Mr. Nyatundo informed the court that he had filed submissions, none were furnished to the Court. On his part, Mr. Nyamurongi referred the



court to his submissions before the trial court, and was, properly so, directed to make oral submissions before this Court.

22. As this is a second appeal, this Court's remit is confined to a consideration of matters of law, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have or, looking at the decision as a whole, it is perverse- see [Kenya Breweries Ltd v Godfrey Odoyo](#) [2010] eKLR.
23. The first appellate court is faulted, primarily, for finding that there was no causal link between the injuries sustained by the appellant and the respondent, and in thereby dismissing the appellant's claim. This, in my view, is the core issue, indeed the sole issue, for determination in this appeal.
24. I observe, first, that since this was a claim in negligence, the appellant was required to establish three things. First, that there existed a duty of care owed to him by the respondent; secondly, that the duty was breached; and thirdly, that he suffered injury as a result of breach of that duty. These principles were enunciated in the majority decision of this Court in [Fred Ben Okoth v Equator Bottlers Limited](#) [2015] eKLR eKLR in which Murgor JA stated:

“In a claim for negligence, since the renowned UK case of *Donoghue v Stevenson* (1932) AII E.R. I, where similar issues were in contention, it is settled law that in order for a claimant to satisfy a claim for negligence they must prove that firstly; the defendant had a duty of care, that secondly, the incident occurred that caused the claimant injury, and that thirdly, the injury was due to the defendant. Coca-cola a soft drink is a widely consumed beverage and when the prerequisites of the principles set out in *Donoghue v Stevenson* are applied to the circumstances of this case, it is evident that the manufacturer of such a product owes a duty of care to consumers”.

25. The question is whether the appellant was able to establish these requirements. His case before the trial court was that on 28<sup>th</sup> August 2005, he was sent by his father to pick empty jerricans at the respondent's premises. At the gate, he met a Mr. Simon Areri, now deceased, who gave him the empty jerricans, and he went home with them. In the evening, while it was raining, he collected water with the jerricans and the contents 'bubbled' in the way the respondent's popular soft drinks did, so he drank the contents of the jerricans. As a result, he sustained severe injuries to his mouth, gullet and stomach.
26. There is thus no dispute that the appellant suffered injuries after he drunk the contents of one of the jerricans he had received from Mr. Simon Areri at the gate of the respondent's factory. In his decision in [Fred Ben Okoth v Equator Bottlers Limited](#), Gatembu JA observed as follows:

“I think the decision in *Donoghue vs. Stevenson* [1932] AII E.R I supports the proposition that where, as here, the manufacturer of a product sends it out in a form which shows it should reach the ultimate consumer in a form in which it left the factory with no reasonable possibility of intermediate examination by the retailer or consumer, and with the knowledge that want of reasonable care on his part in the preparation of the product may result in the injury to the consumer, the manufacturer owes a duty of care to the consumer to take such care, and will be liable to the latter in damages if he suffers injury through the failure to take such care”.

27. The appellant testified before the trial court that he got the jerricans from Simon Areri outside the respondent's premises. There was no evidence before the trial court with regard to the contents of the jerricans, and the appellant's averment in his pleadings was that he had consumed a corrosive alkaline substance that was in the jerricans. The evidence by the respondent was that the 'concentrate' used



for manufacturing soft drinks was acidic and was intended for human consumption. In *Donoghue v Stevenson (supra)* Lord Macmillan stated at page 37 that:

“The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party when he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim *res ipsa loquitur* – Negligence must be both averred and proved.”

28. With regard to causation, Clerk & Lindsell on Torts, 20<sup>th</sup> Edition at Page 55 states that:

“The burden of proving causation rests with the claimant in almost all instances. The claimant must adduce evidence that is more likely than not that the wrongful conduct of the defendant in fact resulted in the damage of which he complains.”

29. The appellant stated as follows with respect to the cause of the injuries that he sustained:

“I blame the company. They were supposed to clean the jerricans before selling them. The jerricans were returned to the company, they cleaned them before returning them to us.”

30. In cross-examination, he stated that:

“I got the jerricans at the gate from outside Kisii Bottlers plant. I saw them at the gate. ... I do not know what happened to the jerricans between the time Areri took them from the Company to the time I received them from him.”

31. There was, however, no evidence before the trial court to show what the contents of the jerricans were, though the appellant stated in his evidence that the contents of the jerricans “were brought along to the doctor to confirm their content because at the time nobody knew what it was.”

32. In his evidence, Dickens Agutu Abiero (DW1), the sole witness for the respondent, testified that the ingredients for making Coca Cola, referred to as ‘concentrate’, which has a flavouring agent that is acidic in nature, are usually packed in 20 litre containers. He further testified that once the jerricans are empty, they are cleaned and sold to the public. He narrated to the trial court the cleaning process the empty jerricans went through before disposal to staff and members of the public.

33. In its decision at paragraph 13 relied on by the appellant in this appeal, the High Court stated:

“13. From the facts disclosed from the evidence, it was not disputed that the appellant sold or disposed of jerricans to its staff and members of the public and that one of the jerrican contained a substance which was ingested by the respondent causing him severe injuries.”

34. Paragraph 13 of the judgment, however, cannot be read independently of the subsequent paragraphs in which the High Court stated:

“14. I have evaluated the evidence afresh and the question to be answered is what caused the respondent to suffer injury and whether it was attributed to the negligence of the appellant. According to the Discharge Summary issued



by Kenyatta National Hospital, the respondent accidentally swallowed an alkaline substance by the name Odex which it identified as alkaline. This is confirmed by the report of PW2 who, in his report dated 19<sup>th</sup> November 2014, stated that the respondent is, “Alleged to have swallowed a chemical by the trade name Odex which was collusive and resulted in extreme damage of the digestive system.”

15. From the respondent’s documents and by the time the plaint was filed, the cause of the respondent’s injury was known and was not a matter of speculation. The respondent, in his pleading, referred to a “Chemical residue” whose character described as “bubbled like any of the defendant’s soft drinks ...” The respondent did not refer to Odex which was the established cause of his injuries. Why is this important? The duty of the respondent is to establish a causal link between the occurrence of the injury and the appellant before the court can find the appellant liable.”
35. I find that the first appellate court cannot be faulted for reaching the conclusion that the appellant had not established a causal link between his injury and the acts or omission of the respondent. The evidence that the appellant tendered, which, though a matter of fact, goes to causation, is that he was sent by his father to collect the jerricans from one Simon Areri, deceased at the time of the trial.
36. Areri’s brother, Samuel Areri (PW3), testified that his brother used to purchase jerricans for sale from the respondent. While the incident occurred in 2005, the evidence of purchase of the jerricans that Samuel Areri produced before the trial court was a disposal advice dated 1<sup>st</sup> March 2007 and a receipt dated 2<sup>nd</sup> March 2007, which he testified was given to him by his late brother. These documents cannot be taken as proof that the jerrican out of which the appellant drunk a corrosive substance that caused him injury came from the respondent.
37. A more important failure on the part of the appellant, that was at the core of the decision of the High Court, is that the appellant did not plead that his injury was caused by an alkaline chemical known as “Odex”. I observe, as the first appellate court found, that the plaint attributed the appellant’s injury to a corrosive substance. The first mention of ‘Odex’ as the alkaline chemical substance that caused the appellant’s injury was from the evidence of PW2, Dr. Odanga Zoga, and the medical report that he prepared in 2014.
38. That being the case, the first appellate court was correct in finding that the appellant had not established a causal link between his injuries and the acts of the respondent. In reaching this conclusion, the first appellate court observed as follows:
  - “20. Considering the totality of the evidence, I must come to the conclusion that the respondent did not prove that the chemical that caused his injuries emanated from the appellant. In summary, the cause of the respondent’s injury was known but the respondent failed to establish causation.”
39. While I do have great sympathy for the appellant who sustained what appear to be life-altering injuries at a very young age, I am constrained to find that the first appellate court correctly found that he had not established a causal link between his injuries and any act or omission on the part of the respondent.
40. I would therefore dismiss the appeal. However, given the circumstances of this case and the unfortunate situation in which the appellant found himself at a very young age, I would not burden him further



with an order to pay costs. I would therefore propose an order dismissing the appeal, but with an order that each party bears its own costs.

**Judgment of Kiage, JA**

- 41. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, JA. I entirely agree with it and have nothing useful to add.
- 42. As Tuiyott, JA is in agreement, the appeal shall be dismissed along the lines proposed by Mumbi Ngugi, JA.

**Judgment of Tuiyott, JA**

- 43. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY JULY, 2023.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

