IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

Civil Appeal No. 45 Of 2014

BETWEEN

FRED BEN OKOTH ………………………….……......… APPELLANT

AND

EQUATOR BOTTLERS LIMITED …….………….…...... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu, (Chemitei, J.) dated 25th day of March, 2014

in

H.C.C.A. NO. 28 OF 2011

****

JUDGMENT OF D. K. MUSINGA, J. A.

Introduction

1. This is a second appeal from the original decision of **Awino, Senior Principal Magistrate**, in **CMCC NO. 71 of 2009** at Kisumu where the trial court, in its judgment delivered on 2nd March, 2011, found the respondent liable for an accident that caused total loss of sight to the appellant's left eye and awarded him general damages in the sum of **Kshs.650,000/=** and **Kshs.200,000/=** for further medical expenses.

2. Being dissatisfied with that judgment, the respondent preferred an appeal to the High Court (Chemitei, J). The learned judge held that the appellant had not established his claim against the respondent and set aside the trial court's judgment. That is the decision that triggered the appellant's appeal to this Court.

The appellant's pleadings before the trial court

3. In his plaint, the appellant stated that on 23rd September, 2008, being a retailer, he went to Tazama Hotel, a soda stockist/distributor, to buy sodas, which he alleged were manufactured and/or bottled by the respondent. The appellant averred that:

> **"… as a result of the negligence, breach of statutory duty of care and/or breach of common law duty of care of the defendant and/or the defendant's employee, servant, worker and/or**

agent, the plaintiff sustained serious bodily injuries when one bottle containing a soda exploded hitting the plaintiff's left eye resulting into loss of the said eye for which the plaintiff holds the defendant liable."

4. The appellant set out the following particulars of negligence and/or breach of statutory duty of care as against the respondent:

> **"(a) Failing to give proper warning and/or instructions to the plaintiff in handling and use of sodas and/or bottles.**
>
> **(b) Failing to initiate, provide and/or create an accident free working environment.**
>
> **(c) Exposing the plaintiff to potentially dangerous items, soda and/or bottle.**
>
> **(d) Failing to appreciate the safety of the plaintiff while on his business.**
>
> **(e) Allowing the accident to happen.**
>
> **(f) Failing/ignoring to maintain equipment/tools used in the course of working/duty by the defendants employees.**
>
> **(g) Ignoring and/or failing to employ qualified and competent staff/employees.**
>
> **(h) Failing to provide and/or maintain proper system or method of work.**
>
> **(i) Failing and/or ignoring to ensure proper and efficient manufacturing measurers and requirements.**
>
> **(j) Manufacturing a defective and substandard soda and/or soda bottle."**

Further, the appellant stated that he would rely on the doctrine of ***Res Ipsa Loquitur.***

The respondent's defence

5. The respondent denied the appellant's claim, and in particular, all the allegations of negligence and/or breach of duty of care levelled against it and put the appellant to strict proof of his allegations.

6. Further, the respondent averred that:

> ***"i. The plaintiff voluntarily exposed himself to the risk that befell him and is thus the author of his own misfortunes' (sic) the plaintiff shall rely on the doctrine of*** *volenti non fit injuria.*
>
> ***ii. Without prejudice to any of the foregoing, Tazama Hotel is not an establishment known and/or run by the defendant and any duty of making the said establishment*** *"accident free"* **rests *on the proprietor of the same.***
>
> ***iii. The products, including the bottling, bottled by the defendant have been inspected by the Kenya Bureau of Standards and certified as suitable for human consumption and use.***
>
> ***iv. Without prejudice, the defendant's equipment and/or tools used by its employees and/or staff as well maintained for use by its employees and/or staff. (Sic)***
>
> ***v. The defendant avers that it has employed qualified staff and/or employees."***

Proceedings before the trial court

7. The appellant testified that on the material day, an employee of Tazama Hotel was picking for him some sodas when he picked one Coca-cola bottle that was half full. The bottle was put aside on a table and suddenly it exploded, injuring his left eye. He blamed the respondent *"for the defective substance which blew up"* and injured him.

In cross-examination as to whether indeed the soda in question was manufactured by the respondent, the appellant stated:

> ***"I have no evidence that Equator Bottlers manufactured the soda."***

8. The incident was reported by an employee of Tazama Hotel at Railways Police Station, Kisumu, and Police Constable **Daniel Sakwa, PW 2,** went to the scene and recorded a statement.PW2 was shown pieces of a Coca-cola bottle and he collected them as exhibits. The broken bottle pieces were produced as *exhibit P.11.* PW 2 did not ascertain the cause of the explosion that caused injury to the appellant. He did not also contact the respondent.

9. **Peter Ochieng Onyango, PW 3,** who was selecting the sodas at the request of the appellant, corroborated the appellant's evidence as to how the explosion occurred. In cross examination, he stated that Tazama Hotel and the respondent are not related. He however denied that Tazama Hotel as a soda stockist could be held liable for the explosion. He added that one **Dick** from the respondent used to go to Tazama Hotel on a weekly basis to check on their stocks.

10. The respondent called **Tom Omondi Oyoo, DW 1,** its production supervisor. He testified that the respondent's products bore the diamond mark of quality from the Kenya Bureau of Standards and produced the permit to use the said mark for the year 2007/2008.

The respondent sources its bottles from Milly Glass Works Limited, Mombasa, DW 1 stated. He also produced certificates of analysis showing that the bottles met the required quality specifications.The witness added that it was unlikely that their bottles would explode, saying, *"that would be the only one."* DW 1 further stated that there were other soda bottling companies serving the area of Kisumu, namely, Rift Valley and Kisii Bottlers. The bottle tops carry the name and address of the bottler, DW 1 stated.

11. In cross examination, DW 1 admitted that Tazama Hotel is a stockist of coca-cola products but he could not tell whether the bottle that had exploded was from the respondent. In re-examination, the witness said that the respondent's bottles are identifiable by the crown, that is,the bottle top. Throughout the trial, no bottle top was shown to DW 1 or indeed any of the witnesses who testified for the appellant.

12. The parties filed their respective submissions. In his submissions, the appellant, through his learned counsel, contended, ***inter alia***, that the soda in question was manufactured by the respondent. He stated:

> ***"The coke/bottle top tightly fixed on exhibit P 11 (broken pieces of bottle) reveal that the soda was manufactured by the defendant company."***

13. As to the cause of the accident, the appellants learned counsel submitted:

> ***"There is no any reason why the bottle/soda could explode if the contents were not defective."***

14. On its part, the respondent denied any nexus between it and the alleged bottle. It contended that there was no conclusive evidence that it was the manufacturer/bottler of the specific soda in question, saying that there were several other Coca-cola bottling companies. The respondent further submitted that both the appellant and PW 3 had testified that they had no evidence that the soda in question had been purchased from the respondent.

15. The respondent further submitted that the appellant had not shown that the bottle exploded due to negligence on the part of the respondent. It added that the appellant ought to have sued both the alleged manufacturer of the soda as well as the stockist (Tazama Hotel) who had in its possession and handled the

soda bottle in issue.

<u>The trial court's findings</u>

16. The trial court framed the issues for determination as follows:

> ***"(1) Whether the bottle belonged to the defendant.***
>
> ***(2) Whether the defendant owed the plaintiff duty of care.***
>
> ***(3) Whether the defendant was negligent.***
>
> ***(4) Whether the plaintiff is entitled to damages. "***

17. In a short answer to the first issue, the learned magistrate stated:

> ***"The Coca-cola bottle that exploded was exhibited in court, the bottle top is intact and it is inscribed – Equator Bottlers Limited, Angawa Avenue, P. O. Box 780, Kisumu, etc. "***

18. The learned magistrate further held that the respondent owed the appellant a duty of care and that it was the respondent's negligence that caused the explosion of the bottle that occasioned serious injuries to the appellant. The trial court then awarded general damages in favour of the appellant as stated in paragraph 1.

<u>The first appeal</u>

19. The respondent was dissatisfied with the aforesaid decision and in its appeal to the High Court contended that the learned magistrate erred in law in failing to find that both the plaintiff (appellant) and his witnesses had testified that they did not have evidence that the bottle in issue had been manufactured by Equator Bottlers Limited. The respondent accused the learned trial magistrate of basing his decision on an issue that had not been raised during the hearing.

<u>Determination by the first appellate court</u>

20. The High Court identified two issues for determination, namely, *"Whether the products and the bottle indeed belonged to the appellant and whether it was sufficient for the respondent to have sued the appellant alone."*

21. With regard to the first issue, the learned judge observed that the appellant had categorically stated that he had no evidence that Equator Bottlers (the respondent) had manufactured the soda.

Similarly, he noted that the respondent's witness, DW 1, testified that the bottle top ordinarily carries the name and address of the bottler. In cross-examination, the witness said that he did not know whether the bottle that exploded had come from the respondent. The issue of the bottle top was further pursued in re-examination and DW 1 stated that:

> **"Our bottles are identifiable by the crown."**

22. All along the advocates for both parties did not refer any of the witnesses to the bottle top, if at all it was available before the court. The learned judge determined the first issue as follows:

> **"What emerges from the above is that if the crown or bottle top was available, what was so difficult for the respondent (now the appellant) to confirm that the manufacturer was the appellant? *(the respondent).***
>
> **Secondly, why would PW 2 fail to take action against the suspect if indeed the crown showed**

the appellant to be the manufacturer?

Thirdly, assuming the crown was available during the proceedings, I would have found both advocates for the parties advancing this argument in the cross examination. From my deduction of re-examination of DW 1 it would appear that his evidence was a matter of confirmation that if the bottle came from them the crown would have certainly shown since other manufacturers like Rift Valley Bottlers and Kisii (Bottlers) manufactures the same products."

23. On the second issue, the learned judge held that the suit should not have been filed against the respondent alone. The stockist, Tazama Hotel, who sold the soda to the appellant, ought to have been joined as a defendant so that it could testify as to where it purchased the soda from, given that the respondent was not the only bottler of Cocacola soda around Kisumu. He cited the celebrated case of **DONOGHUE V STEVENSON [1932] AC.562** where both the manufacturer and the stockist were sued for a tort resulting from injurious contents bottled by the manufacturer and sold by the stockist.

The learned judge concluded that negligence had not been proved against the respondent.

The Second Appeal

24. The gravamen of the appellant's appeal to this Court was that the learned judge erred in law in holding that the bottle top in question had not been produced in the lower court. The appellant contended that the trial court was best placed to examine the evidence relating to the broken pieces of the bottle and make a conclusion thereon.

25. **Mr. Nyawiri,** learned counsel for the appellant, submitted that the bottle top and pieces of the broken bottle were collected and collectively presented as one exhibit. The production was by consent, he added.

Counsel further submitted that the appellant had proved, on a balance of probabilities, that the respondent was the manufacturer of the soda and it was upto it to dislodge the appellant's evidence.

As to whether Tazama Hotel ought to have been joined as a defendant, Mr. Nyawiri submitted that it was not mandatory to do so.

26. **Mr. Okero,** learned counsel for the respondent, submitted that it is the bottle top that constituted the "*smoking gun*" for the appellant, that is, the irrefutable evidence against the respondent, yet there was no evidence of its production before the trial court. Counsel submitted that if at all the bottle top existed, it was the responsibility of the appellant's counsel to lead the appellant to produce it. He added that the evidence on record referred to pieces of broken bottles only. In his words, "*the bottle top made its maiden appearance in the trial magistrate's judgment.*"

However, Mr. Okero admitted that the issue of the bottle top had first been raised in the submissions that were filed by the parties.

Determination

27. This appeal challenges the findings reached by Chemitei, J. on a first appeal. The duty of the court on a first appeal was well stated by this Court in **SELLE V ASSOCIATED MOTOR BOAT COMPANY LIMITED [1986] E.A.123** that:

"An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on

some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case general."

28. Mr. Okero submitted that where it is demonstrated that there was substantial inconsistency between the proceedings and the judgment, an appellate court is entitled to interfere with the decision arrived at by the trial court.

He cited this Court's decision in **KASMIR WESONGA ONGOMA & ANOTHER VS WANGA,** [1978] eKLR.

29. Before the trial court, the appellant's contention was that the bottle of soda that exploded and injured him had been sourced by Tazama Hotel from the respondent, though he had no evidence to prove that the soda actually came from the respondent. The appellant categorically stated:

"I have no evidence that Equator Bottle, (sic) manufactured the soda."

30. DW 1 also said that Cocacola bottle tops bear the name and address of the bottling company. That being the case, why didn't the appellant's counsel simply wipe out any doubt as to the origin of the soda bottle by showing DW 1 the bottle top if he contended that all along it was before the court? It has not escaped my mind that it was the appellant's counsel who first stated in his submissions that the bottle top, tightly fixed to one of the broken pieces of the bottle, revealed that the soda was manufactured by the defendant company.

Apparently, the appellant's (plaintiff's) submissions were filed on 1st March, 2011, whereas the respondent's submissions had been filed earlier on 24th February, 2011. The respondent had stated in its submissions that the bottle top, which had details of the bottler, had not been produced. The respondent haddenied all the appellant's averments and put him to strict proof of his allegations in the plaint and the appellant was duty bound to prove his case on a balance of probabilities.

31. In the circumstances, I cannot understand the basis upon which the trial magistrate remarked that the bottle that exploded was exhibited in court and the bottle top was inscribed, *"Equator bottlers Limited."* I believe that the first appellate court was not bound to accept the trial court's holding to that effect simply because the record did not support that critical finding. The list of exhibits shows that plaintiff's *exhibit 11* was pieces of broken bottle only. There was no mention of any bottle top, the most important piece of evidence.

32. But even assuming that the bottle in question had been sold to the stockist by the respondent, the appellant still needed to adduce evidence to prove that the explosion was caused by the respondent's negligence. A causal link between the occurrence of the explosion and the respondent was necessary before the trial court could hold that there was negligence on the part of the respondent.

Proof of causation is crucial to the success of most of the actions in tort, except in instances where the doctrine of *"res ipsa loquitur"* is applicable.

33. I accept Mr. Okero's submission that the bottle top was the *"smoking gun"* that was critical in proving that the bottle of soda that had exploded was actually supplied to Tazama Hotel by the respondent, yet there is no evidence on record that the bottle top was at any specific time produced or specifically cited by the appellant and/or his witnesses.

34. **CLERK & LINDSELL ON TORTS,** 20th. Edition at Page55 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."

None of the particulars of negligence and/or breach of statutory duty of care that had been pleaded by the plaintiff (appellant) were proved. The appellant did not therefore prove his case. **Section 3** of the **Evidence Act** states that a fact is not proved when it is neither proved nor disproved.

35. The respondent uses bottles made by Milly Glassworks Limited which were shown to have met all the quality standards as required by the Kenya Bureau of Standards. **No** attempt was made by the appellant to show that perhaps the bottle was defective or substandard in any way.

Equally, there was no iota of evidence that the soda in the bottle was not fit for human consumption or could cause an explosion. The proprietor of Tazama Hotel, **Joyce Apondi,** the stockist or distributor who sold the soda to the appellant was neither joined as a defendant nor called as a witness.

Joyce would have testified and produced evidence as to where she was buying her stock from. She would also have been examined as to how her stock was handled and/or kept in her business premises to rule out any possibility of foul play or deliberate adulteration of any of the products stored therein. There was no evidence whatsoever that the bottle of soda that exploded was half full when it was originally bought from whichever bottling company.

36. Liability under **DONOGHUE V STEVENSON** *(supra)* is not limited to the manufacturer of a product that is found to be defective but can be extended to all the players in a business chain. **CLERK & LINDSEL ON TORTS,** 20th. Edition at **page 759** states that:

> **"Not only those involved in production are covered; so also are those further down the distribution chain. Thus a wholesaler must take reasonable steps to check the safety of what he distributes."**

I would therefore agree with the learned judge that the proprietor of Tazama Hotel ought to have been joined as a defendant.

37. Was the doctrine of ***res ipsa loquitur*** applicable in this case? I do not think so. **BLACK'S LAW DICTIONARY**, 9th edition, page 1424 explains the doctrine of **res ipsa loquitor** *("the thing speaks for itself")* as follows:

> **"The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes.'**
>
> **'it is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or omission. When the fact of control is used to justify the inference that defendant's negligence was responsible it must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."**
>
> **"Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability … The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type of category of accidents involved."**

38. In **LLOYDE V WEST MIDLANDS GAS BOARD** [1971] 1 WLR 749, it was held that where the product could have been interfered with between manufacture and accident, the claimant must establish at least the improbability of such interference having caused the relevant defect. This may be said of the appellant's claim.

39. For these reasons, I would uphold the learned judge's decision and dismiss the appeal. But in view of the concurring decision of the majority, Gatembu and Murgor, JJ.A., the final orders shall be those proposed by Murgor, J.A.

DATED and delivered at Kisumu this 5th day of November, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF GATEMBU, JA

1. I have read, in draft the Judgment of my sister the Honourable Lady Justice Murgor, JA. The background to this appeal is fully set out in that Judgment. I agree with the conclusion reached by Murgor, JA although I take a different path to reach that conclusion.

2. The central question in this appeal regarding the issue of liability of the respondent for the 'accident' that resulted in the loss of the appellant's eye is whether a nexus was established between the offending bottle of soda that exploded injuring the appellant and the respondent. The learned trial magistrate framed the issue thus: "**whether the bottle belonged to the defendant**." In that regard, the magistrate stated in his judgment:

> "***The Coca-Cola bottle that exploded was exhibited in Court, the bottle top is intact and it is inscribed-Equator Bottlers Ltd, Angawa Avenue P. O. Box 780, Kisumu, etc***."

3. The magistrate also accepted the evidence of PW3, an employee at the hotel where the accident took place, who testified that the respondent's personnel visited the hotel premises on weekly basis to check on stocks as a basis for concluding that the offending bottle that exploded belonged to the respondent. The learned magistrate was therefore satisfied and found as a fact that the nexus between the offending bottle and the respondent was established.

4. On appeal, the High Court, after reviewing the evidence, reversed the judgment of the Magistrate's court on the basis that the nexus between the offending bottle and the respondent was not in fact established. The learned Judge accepted the rather elegant submission by counsel for the respondent made before him that the bottle top on which the magistrate relied as establishing the link between the bottle and the respondent made "*a maiden and only appearance*" in the judgment of the trial court. According to the Judge therefore, "***there was no negligence proved against the appellant***" with the result that the judgment of the trial court was set aside.

5. The duty of the court on a first appeal was articulated by this Court in the well-known and often cited case of **Selle v. Associated Motor Boat Company [1968] E.A. 123** where the Court stated that:

> ***"An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."*** [Emphasis added]

6. The Court underscored that an appellate court when discharging its duty to review and re-evaluate the evidence should bear in mind that it has not itself had the opportunity to see or hear the witnesses. Equally, in my view, where as here a finding of fact is based on the trial court's own examination and appreciation of an exhibit produced before it, an appellate court should be slow to interfere with such a finding particularly if the appellate court does not itself examine such exhibit.

7. The legal principle in criminal law jurisprudence that finds expression in such decisions as **Chemagong vs. R [1984] KLR611** that an appellate court should not interfere with findingsof fact by the trial court unless such findings are not based on evidence or are based on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings that it did, applies equally to civil cases.

8. The testimony of the appellant before the trial court was that the soda bottle exploded and hit his eye; and that *"the police took custody of the bottle."* Police constable Daniel Sakwa of Kisumu Railways Police Station who was PW2 testified that he went to the scene where the accident took place and was shown pieces of bottle of coke and that he *"collected the same and took the pieces as exhibits"* which he then produced before the trial court as exhibit P11. Under cross-examination the witness was emphatic that he "*collected the broken parts at the scene*." There was no suggestion when that witness was cross examined that the bottle top, which is ordinarily an integral part of a filled and sealed soda bottle, was not part of the *"broken parts"* that he collected and produced before the court. On what basis, I ask, could the High Court conclude that the learned trial magistrate 'created' the evidence that "***The Coca-Cola bottle that exploded was exhibited in Court, the bottle top is intact and it is inscribed-Equator Bottlers Ltd"?*** In my view, there was no basis for the High Court to interfere with the trial magistrate's finding in that regard.

9. In the decision of the Supreme Court of India in the case of **State of Maharashtra vs. Ramdas Shrinivas Nayak & Anr 1982 AIR1249** to which learned counsel for the respondent Mr. Okero drew our attention, the following statement appears:

> "**if judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence**."

10. In my view, that statement is applicable to the circumstances of this case. The High Court did not have any basis for contradicting the trial magistrate in his finding that exhibit P11 included the bottle top that bore the respondent's details as the source of the bottle.

11. Having established that the injury to his eye was occasioned by the exploding bottle, and having linked that bottle to the respondent, the burden then shifted, and it was incumbent upon the respondent as the bottler to prove that the explosion occurred without negligence on its part. As Bosire, JA stated in **Kenya Breweries Ltd vs. 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 the case of <u>Donoghue v Stevenson [1932] All E R1</u>; the appellant had the evidential burden of explaining certain facts especially within its own 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**.”

Similarly, it is not usual for a bottle of soda to explode. In my view an inference of negligence on the part of the respondent, the bottler, arises.

12. On the question whether the proprietor of Tazama Hotel, the premises where the accident occurred, should have been joined in the suit, my view is that it was not necessary to do so. I think the decision in **<u>Donoghue vs. Stevenson [1932] AII E R I</u>** 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.

13. For those reasons I would agree with the order proposed by Murgor, JA that it is necessary to set aside the judgment of the High Court and restore the judgment of the trial court.

Dated and delivered at Kisumu this 5th day of November,2015

S. GATEMBU KAIRU, FCIArb,

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

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DEPUTY REGISTRAR

<u>JUDGMENT OF A.K. MURGOR, JA</u>

The appellant, Fred Ben Okoth has appealed against the judgment of the High Court which reversed the trial magistrate’s decision that found in the first instance that, the respondent was liable for the injuries sustained by the appellant from a bottle that exploded.

On 23rd September 2008, the appellant who is a retailer in their family shop went to buy sodas from a stockiest, Tazama Hotel. While sorting through various brands of soda, a ½ full Coca-Cola bottle that was selected exploded seriously injuring the appellant’s left eye. He was rushed to Nyanza Provincial Hospital where following a surgery, his left eye was removed as it could not be saved.

In his plaint the appellant stated that as result of the respondent’s negligence and breach of the duty of

care, he had suffered injury and blindness to the left eye. He stated that would rely on the doctrine of res ipsa loquitar. As a consequence he claimed general and special damages.

In defence, the respondent denied causing injury to the appellant and contended that it would put the appellant to strict proof thereof. It further contended that in respect of the duty of care, it would invoke the doctrines of *actori incumbit onus probandi* and *volenti non fit injuria*, that Tazama Hotel is not an establishment owned or run by the respondent, and that there was an obligation for such establishment to be accident free. The respondent concluded by stating that the products including its bottles were inspected by the Kenya Bureau of Standards, and were suitable for human consumption and use.

During the hearing the appellant called four witnesses while the respondent called one witness. The appellant testified that on 23rd September 2008 whilst going about his business of selecting sodas for Tazama Hotel, one soda bottle which was ½ full exploded. The fragments hit his left eye causing injury. He was taken to Kisumu District Hospital and later to Nyanza Provincial Hospital where his left eye was removed as it had been completely damaged. He claimed damages.

PC Daniel Sakwa (PW2), an Investigating Officer attached to Kisumu Railway Police Station testified that, he had received a report of an accident where a Coco-Cola bottle had exploded injuring the appellant's eye. He recorded statements and collected pieces of broken bottle as exhibits. ***Peter Ochieng Onyango (PW3)*** stated that, he witnessed the incident which resulted in the injury to the appellant's eye. He further testified that he took the appellant to the hospital. ***Daniel Ouma Nyamwango (PW4),*** the appellant's father also confirmed that he had received a report of the accident, and when he went to see the appellant in hospital he found that his eye had been injured following the accident.

Tom Omondi Oyoo (DW1), the respondent's Production Supervisor produced the Diamond mark of quality from the Kenya Bureau of Standards as well as a Certificate of Analysis from Milly Glassworks for the production of the bottles supplied to the respondent. On cross examination, he testified that they manufacture Coco-Cola products, but he was not able to confirm whether the bottle that exploded was manufactured by the respondent.

Upon hearing both parties, the learned trial magistrate found that the bottle that exploded resulting in injury to the appellant belonged to the respondent, and as a consequence found the respondent liable to pay general damages of Kshs. 650,000/- costs of further medical expenses of Kshs.200,000/- and special damages of Kshs. 5,400/-.

The respondent was dissatisfied by the decision of the trial magistrate, and appealed to the High Court. The learned judge overturned the trial magistrate's decision on the basis that the appellant had not proved that the respondent was the manufacturer of the bottle that injured the appellant.

Being aggrieved by the judgment of Chemitei, J. delivered on 25th March 2014, the appellant filed this appeal which is before us on the grounds in summary that, the High Court in failing to appreciate that the bottle crown, the subject matter of the respondent's appeal, was produced as an exhibit in the trial magistrate's court, reached the wrong conclusion that the appellant did not prove his case against the respondent; that the High Court erred in law by requiring the appellant to prove his case beyond the required standard of proof in the trial court yet the evidence on record was sufficient to arrive at a finding in favour of the appellant, and finally that the High Court failed to properly evaluate the evidence.

During his submissions, learned counsel for the appellant, ***Mr. C. Nyawiri***, informed us that he would consolidate the grounds of appeal into one ground, namely that the learned judge failed to appreciate that the bottle top which was produced in court identified the respondent as the manufacturer of the offending bottle. It was counsel's submission that, the learned trial magistrate rightly found that the Coca-Cola bottle that exploded was exhibited in Court together with the bottle top where the respondent's name and address was inscribed and that it was still intact. That it was not in dispute that the broken bottle pieces were produced in court. The trial court saw and observed the evidence and evaluated it and reached a conclusion, that the respondent was responsible for the appellant's injuries. Counsel also faulted the learned judge for questioning whether bottle crown was produced in court, and for failing to re-evaluate

the evidence and appreciate that on a balance of probabilities, that since the respondent was the manufacturer of Coco-cola, and broken Coca-Cola bottle pieces and the crown were produced in court, then the respondent must have been responsible for the appellant's injuries.

It was counsel's further submission that it was not necessary for the appellant to have made the proprietor of Tazama Hotel a party to the suit.

Mr. Okero, learned counsel for the respondent, opposed the appeal and submitted that the learned judge could not be faulted, particularly where liability had not been established. From the judgment of the trial magistrate, liability rested on the owner of the bottle. There was no evidence of the bottle crown where the respondent's name would have been inscribed. In addition, the appellant testified that he did not know whether Equator Bottlers manufactured Coco-Cola. On the existence of the bottle crown, counsel contended that PC Daniel Sakwa only produced the broken pieces of bottle in court, while no reference was made to the bottle crown within the proceedings. It was Counsel's position that, the first and only reference to the bottle crown was found in the trial magistrate's judgment. Counsel concluded that since the bottle crown did not exist, no nexus to the respondent had been established.

I have considered the issues, having perused carefully the pleadings on record the judgment by the courts below, and heard the submissions of learned counsel. In this regard, the jurisdiction of this Court on a second appeal is restricted to matters of law, and the Court must not interfere with the findings of fact arrived at by the two courts below unless there is no basis upon which they can be justified.

In this regard, this Court is guided by the case of ***Kenya Breweries Ltd v Godfrey Odoyo, Civil Appeal No. 127 of 2007***, where this Court held:

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal confines itself to 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 considered or looking at the entire decision, it is perverse…" emphasis mine)***

The appellant has faulted the learned judge for failing to re-evaluate the evidence and appreciate that, since the respondent was the manufacturer of Coco-Cola, and it was a Coca-Cola bottle that injured the respondent, evidenced by the broken bottle pieces which also comprised the crown that were produced in court, then, on a balance of probabilities, the respondent was responsible for the appellant's injuries.

In opposition, the respondent has argued, not so, since the bottle crown was not produced in court. It was argued that without the bottle crown, there was insufficient evidence to conclusively point to the respondent as the manufacturer of the felonious bottle. In the respondent's view this evidence was a creation of the trial court, without which, no nexus could be established between the Coca-Cola that exploded and the respondent.

The genesis of the appeal resides in the decision of the trial magistrate, where in determining the question of whether the respondent was liable the court stated thus,

> ***"The Coco-cola bottle that exploded was exhibited in Court, the bottle top is intact and it is inscribed- Equator bottles Ltd, Angawa Avenue P.O., Box 780 Kisumu, etc."***

On appeal, upon consideration of the evidence in its entirety, the learned judge was not satisfied that a bottle crown was produced as an exhibit in court. In determining the issue the learned judge concluded thus:

> ***"What emerges from the above is that if the crown or bottle top cap was available, what was so difficult for the respondent to confirm that the manufacturer was the appellant. Secondly, why would PW2 fail to take action against the suspect if indeed the crown showed the appellant to be the manufacturer. Thirdly, assuming that the crown was available during the proceedings I***

> ***would have found both advocates for the parties advancing this argument in the cross examination. From my deduction of re-examination of DW1 it would appear that his evidence was a matter of confirmation that if the bottle came from them the crown would have certainly shown since other manufacturers like Rift Valley Bottlers and Kisii manufactures the same products."***

Given that the findings of fact by the courts below are at a variance on the question of the identity of the manufacturer of the bottle that exploded, the evidence must be reevaluated again to arrive at an independent conclusion based on the facts of the case.

Turning to the appellant's evidence on cross examination he testified that,

> ***"I've no evidence that the Equator bottle, manufactured the soda."***

On re-examination, he stated,

> ***"I am not aware of any other Manufacturer of Coca-cola other than Equator bottlers."***

PC Daniel Sakwa testified thus,

> ***"I recorded the statement and went to the scene and was shown pieces of bottle of Coke by Peter Ochieng. I collected the same and took the pieces as exhibits these are the bottles (broken)."***

On cross examination he stated,

> ***"I collected the broken parts at the scene… I did not ascertain the cause of the explosion. I do not know the course (sic) of the explosion. I did not contact the manufacturer***."

It was the evidence of ***Peter Ochieng Onyango*** that,

> ***"There are the broken bottle. Then he was duly treated."***

The ***Thomas Omondi Oyoo*** the respondent's production supervisor stated,

> ***"Other bottling Company are- Rift Valley and Kisii bottlers. The bottle-top would carry the name and address of the bottler."***

On cross examination he went on to say,

> ***"We deal in Coco-cola products, the contents are in glass bottles. We manufacturer the sodas and Coke (sic) them. Rift Valley and Kisii Bottlers also deal with Coca-cola, Tazama is a stockiest and a hotel. They stock Coca-cola products…I do not know whether the bottle was from Equator bottle or not."***

From these excerpts, there were broken pieces of bottle that were produced in evidence, but from the record, it cannot be said with certainty that the bottle crown was produced in evidence.

A re-evaluation of the evidence shows that reference was made by all the witnesses to broken pieces of a Coca-Cola bottle, but no reference was made to a bottle crown affixed to a broken bottle part. Mr. Oyoo testified that a bottle crown would usually have inscribed on it the name and address of the bottler, yet the proceedings do not demonstrate that either the appellant or the respondent led evidence to show that the bottle crown that was allegedly produced in court, was in fact inscribed with the respondent's name and address. It is noteworthy that the list of exhibits only specified broken bottle pieces, without providing any description of a bottle crown. Indeed, as observed by the learned judge, if the bottle crown had been produced, what precluded counsel for the appellant from reading out the inscription for the benefit of the record? Without any reference to the bottle crown in the proceedings or in the list of exhibits, the only

conclusion to be drawn is that, the bottle crown was not produced as evidence and so, did not exist.

As a consequence, there was no basis for the trial magistrate to rely on a bottle crown that did not exist. It is extraneous as there is no evidence of its existence on the record. As such, I find that the reference to a bottle crown was wrongly included in the judgment, which amounted to a misdirection on the part of the trial magistrate.

But having said that, the matter does not end there. Besides this evidence, the next question I must determine is whether the availability of the bottle crown was of material significance in the identification of the manufacturer, or whether on a balance of probabilities, there was other evidence which was sufficient to point to the respondent as the manufacturer of the Coco-Cola in question.

The appellant' case is that though he had no evidence to show that the Equator Bottlers manufactured the Coco-cola in question, as far as he was aware, the respondent was the only manufacturer of Coca-Cola in Kisumu.

This evidence was not disproved by the Mr. Oyoo, the respondent's production supervisor, who in effect confirmed that the respondent was a soft drinks manufacturer and bottled Coca-Cola as one of its products. The vigorous contention was that there was nothing to prove that the Coco-Cola bottle in question was produced by the respondent as there was no label identifying it as the manufacturer. As a consequence, it could not be held to be liable for the injury.

In addressing the question where the evidence is that A or B must have caused the injury ***Clerk & Lindsell on Tort 20th Edition, page 85*** had this to say,

> ***"In*** *Cook vs Lewis [1951] SCR 830****, A and B were out shooting. Both fired in the direction of C who was injured but his injury resulted from a single bullet. He could not prove from which gun the bullet came. The Supreme Court of Canada suggested that where the claimant was unable to prove which of them caused his injury, the onus of disproving liability is thrown on each of the defendants. If both fail to disprove causation, both will be found liable."***

In ***Ballard vs North British Rail Co. Ltd*** ***[1923] S C (HL) 43*** it was posited that, it is not sufficient for the defendant to advance some hypothetical cause, as to the reason for the accident, but it must be able to demonstrate that the accident did not occur due to its own negligence.

Similarly, mere denial or speculation that a third party may have been responsible, will not be enough to absolve the defendant from blame. The defendant must demonstrate that some other party was responsible for the accident, failing which the onus rests upon him to disprove liability.

The issue in question is that since the name of the manufacturer of the actual bottle that injured the appellant was not on a label or crown affixed to the bottle pieces, was there evidence to link the bottle to the respondent, particularly taking into account that other third party bottlers in the region namely, Rift Valley Bottlers and Kisii Bottlers, also manufactured Coca-Cola.

Documents were produced by Mr. Oyoo providing particulars pointing to the respondent as the Coco-cola manufacturer. These included the Kenya Bureau of Standards Standardization Mark Scheme which specified that "***Equator Bottlers Limited, P.O. Box 780 KISUMU Angawa Street Road…"*** was issued with a permit for use of the Diamond Mark of Quality on its products which included Coco-Cola, and Certificates of Analysis issued by Milly Glass Works Limited also indicated that they produced Coca-Cola bottles for their customer ***Equator Bottlers Limited – Kisumu.*** No doubt the respondent manufactured Coco-cola, and this is not denied.

On the existence of other Coco-cola manufacturers, besides Mr. Oyoo's evidence alluding to this possibility, there is nothing on record to support this observation. No Coco-cola bottles labelled with the addresses of other manufacturers were produced. There was no evidence showing that Kisii Bottlers and Rift Valley Bottlers manufactured Coco-cola, let alone that they even existed. It was not enough for the

respondent to simply say that it manufactured Coco-cola, but that it did not manufacture the deleterious Coco-cola that exploded without demonstrating that some other entity could also have been responsible. The simple answer is that, there was no other manufacturer of Coco-cola evident to whom the burden can shift so as to discharge the respondent from liability. As such the inevitable conclusion is, that the respondent manufactured the Coco-cola that injured the appellant.

When the totality of the evidence is taken into account, a Coco-cola without a label exploded injuring the appellant in his left eye. The facts pointed to the respondent as the only manufacturer of Coco-cola. The burden shifts to the respondent to rebut liability or adduce substantive evidence to point to some other manufacturer of Coco-cola. It failed to do so. The only irrebuttable presumption on a balance of probabilities is that the Coca-Cola manufactured by the respondent injured the appellant.

Having identified the manufacturer of the Coco cola, I will now address the question of whether negligence was established against the respondent.

In a claim for negligence, since the renowned UK case of ***Donoghue vs Stevenson* [1932] All ER 1**, 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 legal duty of care, that secondly, the incident occurred that caused the defendant 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 vs 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.

There are however instances where the plaintiff can prove that the accident occurred, but cannot prove how it occurred so as to demonstrate that the defendant was responsible. This is where the maxims res ipsa loquitar comes into operation.

In the case of ***Wahindi vs Pharmaceutical Manufacturing* [1994] KLR page 206**, this Court citing ***Charlesworth & Percy on Negligence 7th edition at page 350*** outlined the pre requisites for invoking the maxim and stated thus;

> ***"(1) on proof of the happening of an unexplained occurrence;***
>
> ***(2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and***
>
> ***(3) the circumstances point to the negligence in question being that of the defendant rather than any other person."***

The effect of properly invoking the maxim res ipsa loquitar shifts the burden of proof to the defendant to show that the accident did not occur due to its negligence.

In the US case of ***Escola vs Coca Cola Co of Fresno* 24 Cal. 2d 453, 150 P. 2d 436 (1944)** which involved facts similar to the present case, Gladys Escola, a waitress in a restaurant was packing away bottles, when one of them, a Coca-Cola bottle exploded causing her to sustain injuries on the palm of her hand. Invoking the maxim res ipsa loquitar, the Supreme Court of California found in her favour. In the leading judgment, Gibson C.J stated thus;

> ***The next question, then is whether the plaintiff may rely upon the doctrine of res ipsa loquitar to supply an inference that the defendant's negligence was responsible for the defective condition of the bottle at the time it was delivered to the restaurant. Under the general rules pertaining to the doctrine as set forth above, it must appear the bottlers of carbonated liquid are not ordinarily defective without negligence of the bottling company."***

In a concurring judgment Justice Traynor stated;

> ***"…it should now be recognized that a manufacturer incurs an absolute liability when an article he places in the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings…"***

The facts in the instant case are not disputed, in that on 23rd September 2008, whilst the appellant was selecting Coco-Cola products, a bottle exploded seriously injuring the appellant's left eye. It is not also in dispute that the bottle that caused the injury was a Coco-Cola bottle.

Given the circumstances of the case, I find that the maxim of res ipsa loquitar was applicable, as it is not a normal occurrence for a soda bottle to explode in the ordinary course of things, particularly where there is nothing to show that neither the appellant nor any other person improperly handled the bottle in question.

As a result of this finding, the burden of proof shifted to the respondent to rebut the inference of negligence. In this regard, minimal effort was made on the respondent's part. No explanation was tendered to show the precautions, if any, that were taken to prevent Coco-cola bottles from exploding, whether during the carbonation process, or in the inspections undertaken to detect bottle defects. Without any explanation, the only inference that can be drawn is that the respondent was negligent.

As a consequence, I find it necessary to interfere with the decision of the High Court which wrongly concluded that there was insufficient evidence to hold the respondent liable for the appellant's injury despite the evidence to the contrary.

I would therefore allow this appeal, set aside the judgment of the High Court dated 25th March 2014, and reinstate the judgment of the ***Chief Magistrate's Court Kisumu Civil Case Number 71 of 2009*** dated 2nd March 2011, with costs to the appellant.

As Gatembu, JA agrees, the order of the Court is that judgment is in favour of the appellant for Kshs. 855,400/= with costs and interest as ordered in Chief Magistrate's Court Kisumu Civil Case No. 71 of 2009 dated 2nd March, 2011 is reinstated.

It is so ordered.

DATED and delivered at Kisumu this 5th day of November, 2015.

A. K. MURGOR

…...............................

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR