IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 127 OF 2007

KENYA BREWERIES LTD ……...…….……..APPELLANT

AND

GODFREY ODOYO …….……...RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Visram, J.) dated 8th August, 2005

in

H.C.C.A. NO. 480 OF 2002)
****

JUDGMENT OF ONYANGO OTIENO, J.A.

This is a second appeal.

In a plaint filed on 29th January 2001in the Chief Magistrate's Court at Milimani, and amended on 25th May 2001, the respondent ***Godfrey Odoyo*** sued and sought judgment against the appellant ***Kenya Breweries Limited*** for general damages; special damages of Ksh.21,990/=, interest on both damages at such rate and for such period as the court would think just. These were sought on grounds that the respondent, being a beer manufacturer which manufactures among other brands of beer, Tusker Malt Larger, (300 ml) did manufacture and put on sale on 23rd June 2000, three Tusker Malt Lager bottles which the respondent bought and partly consumed but which were not fit for human consumption as they did not comply with the specification on foreign matter and clarity and consequently, the respondent suffered severe injuries and special loss and that he had to go for treatment as a result of the injuries. The respondent, in an amended statement of defence filed on 6th November 2001 denied liability. After full hearing before the Senior Resident Magistrate (Mrs. N. A. Owino), the trial court found the appellant liable and awarded to the respondent general damages in the sum of Ksh.70,000/= for pain and suffering and a further Ksh.21,990/= being special damages in respect of hospital fees paid for treatment.

The appellant felt aggrieved by that decision. He appealed to the superior court raising twelve (12) grounds of appeal, three of which were abandoned at the hearing of the appeal. The superior court (Visram, J. as he then was), in a judgment dated and delivered on 8th August 2005 upheld the Senior Resident Magistrate's decision on liability and on special damages but set aside the award of Ksh.70,000/= for general damages and substituted it with an award of Kshs. 20,000/=. Thus total award for damages both general and special made by the superior court stood at Ksh.41,990/=. The superior court awarded one third of costs of the appeal to the appellant.

The appellant still felt aggrieved by the superior court's decision and hence this appeal before us premised on three grounds which are that:-

"1. The learned Judge in the appeal erred in law upholding the trial court's finding on liability and in particular that the appellant's injuries, if any, were caused by beer manufactured by the appellant.

2. The learned Judge in the appeal erred in law in holding that the appellant was negligent and that such negligence resulted in injury or damage to the respondent and further failed to follow the principles laid down in decided cases relating to negligence.

3. The learned Judge erred in law in failing to award the appellants the full costs the appeal having been substantially successful."

Mr. Lutta, the learned counsel for the appellant and Mr. Ochieng' Ogutu, the learned counsel for the respondent both addressed us at length on the above three grounds of appeal. I will set out hereunder the gist of their submissions, but first the brief facts of the case as can be deciphered from the record before us.

The respondent, Godfrey Odoyo was living at Huruma in the month of June 2000. He had been drinking since 1980s. On 23rd June 2000 at about midday, he took his lunch. At 4.00 p.m. the same day he ate roasted meat at a public place in Huruma. Thereafter, at 11.00 p.m. he went to Feeders Inn Bar in the neighbourhood. He asked for Tusker Malt Lager and was told that only three bottles of that brand were available. He bought all the three bottles and started to drink them. After he had consumed the first bottle he started drinking the second bottle, but in the middle of that bottle, he noticed black particles in the glass contents. He shook the glass contents but he noted that they were non dissoluble particles. He looked at the bottle and observed that the offending particles were inside the bottle. He then checked the contents of the third bottle which was as yet unopened and saw similar particles in that bottle as well. He stopped taking the beer and went to the toilet to wash his mouth. As soon as he reached the toilet he started to throw up. He vomited for about ten minutes. He went to Amani Medical Centre for treatment. This was now about midnight. He was received by Samuel Ngobe (PW1), a retired Community Health Nurse who was running that clinic. At the clinic, he also started to diarrhoea even as vomiting continued. Ngobe carried out tests and admitted him for about eight hours while he was undergoing treatment. Ngobe also carried out investigations such as laboratory tests on stool, and blood and tests for typhoid. The results were that the respondent had suffered fungal infection. Ngobe concluded that the cause of the problem was an infection due to oral drink. Ngobe stated in his evidence that the respondent told him that he had taken alcohol which had particles and Ngobe concluded that the respondent got infection from the alcohol he had taken. He produced laboratory reports, appointment card, prescription for drugs, and receipt he issued to the respondent in respect of the fees for services rendered to the respondent. In cross examination, Ngobe said that although the respondent had eaten sometime prior to taking beer, he eliminated food poisoning as the cause of the respondent's vomiting and diarrhoearing but he admitted that any other foods or drinks could cause similar problems. However in re-examination, he asserted that the cause of the problem was oral fluids. The respondent was released from the clinic on 24th June 2000. He said he gave contents of the bottle to Ngobe and later he took the bottles to the appellant company. One of the appellant's employees told him to leave them there for the appellant to analyse the contents but he felt it was unsafe and he hired the services of a lawyer. The services of Kenya Bureau of Standards were sought. Job Muriithi Ngatia (PW3), then a Senior Laboratory Analyst received the unopened Tusker Malt Lager from the respondent on 8th August 2000. He carried out tests on the beer and prepared certificate of analysis which he produced at the trial. His conclusion was that the contents in the bottle submitted to him failed to comply with the specification on foreign matter and clarity and the beer was not fit for human consumption. A representative of the appellant, Julius Mwangi (DW1) was present but left just before the test took place.

Julius Mwangi (DW1) was working with the appellant as Company Micro-biologist at the relevant time. In his evidence before the trial court, he narrated the key steps in beer manufacture and the supervision and examination that is carried out during the manufacture and storage of beer to ensure that any contamination is eliminated. Following all those vigorous procedures, Julius stated that it is almost

impossible for a foreign matter to be found in the beers manufactured by the appellant company. In June 2000, when the offending beer was manufactured, he never received any complaint from the market about beers manufactured then. Complaints fall in his department. This was the only complaint received and he physically examined the beer. He said further in evidence in chief:-

"We also check on particulars to comply with the brand. We check all this against the records of the day of manufacture and specifications for that brand."

and stated after seeing the Kenya Bureau of Standards report, that it did not indicate what the foreign matter was and that the appellant reassures beer clarity using a hazametre but he did not know if that was done in respect of the subject bottle. He ended his evidence in chief by saying that alcohol does not cause vomiting or diarrhoearing; that he was present initially when the sample was taken to Kenya Bureau of Standards and that:-

"The group of the bottle was fine."

In cross examination, Julius stated that the results of the tests carried out by Kenya Bureau of Standards were served upon the appellant. He did not agree with the same results but he did not request for the sample so as to carry out further tests as he did not think it was necessary nor important to carry out further tests. At the end of the cross examination, he stated:-

"It's reasonable to assume that if one beer is contaminated, the rest manufactured on that day are so contaminated."

And in re-examination he stated:-

"Its highly possible that if one beer is contaminated, the rest are."

Peter Kamau (DW2) was a trained Doctor in Public Health. In his evidence, common causes of vomiting and diarrhoea are numerous and these include infection of various substances such as alcohol. Many pathogens cause diarrhoea and vomiting and excess taking of alcohol can cause diarrhoea. In cases of foods the symptoms of poison food will occur within one hour or two. In some cases, symptoms of food poisoning may take 2 to 3 days, but consumption of 2 – 3 beers cannot cause poisoning and beer cannot cause alcohol poisoning. From the tests that were carried out on the respondent, there was nothing that could have caused the vomiting and diarrhoea. In cross-examination, he admitted that if beer had foreign matters, he would not know if it would have caused vomiting and diarrhoea as he would need to see the beer itself and have it examined.

The above were the facts that gave rise to the suit that was before the Senior Resident Magistrate for trial and to the appeal before the superior court. In his address to us, Mr. Lutta, the learned counsel for the appellant urged first and second grounds in the memorandum of appeal together and without specifically abandoning the third ground, he did not urge it. He submitted that as the bottle that was submitted for analysis was not the bottle consumed by the respondent, there was no evidence of any product of the appellant that connected it to the respondent. That being the case, Mr. Lutta contended, the principles enunciated in the well known case of ***Donoghue vs. Stevenson*** ***(1932) AFR 1*** which were first that there be a duty of care to the respondent by the appellant, secondly, that that duty is breached, and thirdly that the respondent suffered as a result of the breach of that duty were not proved. In his view, findings of the two courts below were based on inferences and that was not proper. Further, Mr. Lutta submitted, that the report by the Bureau of Standards was not properly obtained as the Bureau, in carrying out such tests on the bottles' contents, breached the law that required it to do such tests only when requested for by the Minister whereas in this case such test was requested for and done at behest of an advocate. This was in breach of ***section 4*** of the Bureau of Standards Act Chapter 496. Thus, Mr. Lutta maintained that Certificate of Analysis was not a competent authority for proof of the contents of the bottle the substance of which was tested. In his submission, the beer should have been tested under the Provisions of Food and Chemical Substances Act Chapter 254 – Laws of Kenya, ***section 30*** thereof**.** He therefore asked us to allow the appeal.

On his part, Mr. Ochieng' Ogutu, the learned counsel for the respondent invited us to accept that as this was a second appeal, only matters of law were available for our consideration and not matters of fact. In his mind, matters of law that were before us were, first whether there was a duty of care binding the appellant to the respondent; secondly, whether there was a breach of that duty, and thirdly, whether the appellant suffered injury as a result of the breach of that duty of care. In his submission, this case falls within the ambit of the decision in the case of ***Donoghue vs. Stevenson*** (supra). The appellant did not deny the existence of the duty of care. He referred us to the record and contended that the results of the lab analysis produced in evidence to prove injury were enough and there was no need for any further medical report on the injury as those lab results were never challenged at the trial. The appellant was represented when testing was done but they never sought to carry out any further tests on their own. The certificate produced by the Kenya Bureau of Standards stated that the contents of the bottle were unfit for human consumption and that being so, even shock to the respondent was enough injury. Lastly, he maintained that as the respondent bought three bottles which were produced, in one batch, and in the process of taking the second he noted impurities in that bottle and in the third bottle the duty extended to all the bottles manufactured in the same batch by the appellant.

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see ***Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123.*** 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 two 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. In the case of ***Stephen Muriungi and another vs. Republic*** ***(1982-88) 1 KAR 360***, Chesoni Acting JA (as he then was) said at page 366:-

"We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

Second, in considering the appeal, I must bear in mind that the standard of proof in civil cases is different from that in criminal cases. In civil cases, the standard of proof required is on a balance of probability as opposed to proof beyond reasonable doubt required in criminal cases.

Bearing the above two principles in mind, I note that the most contentious issue in this appeal is as to whether or not this case falls within the principles set out in the well known case of ***Donoghue vs. Stevenson*** (supra). There are other matters raised by Mr. Lutta, which I will consider hereafter but these were, in my view peripheral. Mr. Lutta's point, if I understand him, is that as the bottle that was examined, was a bottle which had not been opened, and thus no part of its contents had been consumed, whatever contents were in it had not affected the respondent and therefore the appellant could not be held to have breached any duty to the respondent in respect of that bottle as there was no nexus between that bottle and the respondent since it was not the bottle, the contents of which the respondent had consumed whereas in the ***Donoghue case***, (supra) the victim had consumed the contents of the subject bottle. In my view, this argument looks valid but with respect, only on its face. A full analysis of the evidence on record as was done by the two courts below shows a different scenario, and in my view demonstrates that the concurrent findings by the two courts reflected the correct position.

The evidence on record as conceded by Julius, the appellant's employee, is that the respondent, after discharge from the clinic took the offending bottle to the appellant. From that time, the appellant

knew or ought to have known that there was a complaint against that bottle. Indeed Julius said they did receive a complaint in this case and examined the bottle physically. He admitted that he was present initially when the sample was being tested by Kenya Bureau of Standards and he said the bottle indicated expiration date as December from 9th June 2000 and he said that group of bottles was fine. The results of the Kenya Bureau of Standards tests were served upon the appellant and it did not agree with the results. He had special knowledge of how the appellant manufactured its beer and knew whether the offending bottle and the other two bottles, the contents of which were consumed by the respondent were of the same batch or were produced together. He never demonstrated to the court that the three bottles were not of the same batch. This was a matter especially within its knowledge. However, in his answers in cross-examination, part of which I have reproduced hereinabove, he readily accepted that it was reasonable to assume that if one beer is contaminated, the rest manufactured in that batch are so contaminated and, in re-examination, that it was highly possible that if one beer is contaminated the rest are. These were answers to questions clearly enquiring as to whether if the second bottle which was opened, had impurities, the third unopened bottle could also have had the same, it being that they were bought together and that the respondent maintained throughout, which was not challenged that he saw similar impurities he had seen in the half consumed bottle in the unopened bottle as well. On the principle that standard of proof in Civil cases is on the balance of probability and not like in Criminal case and if I accept, as I do, the principle enunciated in the case of ***Martin vs. Glywed Distributors Ltd*** (supra) that I have loyalty to accept the findings of the facts of the lower court, then I am duty bound not to interfere with the concurrent findings of the two courts below that as the unopened bottle, which was examined by Kenya Bureau of Standards contained the same impurities as the opened bottle which was partly consumed by the respondent, and as the appellant's witness accepted that if they were bottles of the same batch it was reasonable to assume that if the opened bottle had impurities, the unopened one too had the same impurities as was witnessed by the respondent. This in effect means that what the respondent consumed and what was in the unopened bottle which was examined were the same and only in different containers. As Julius said, it was highly possible that if one beer was contaminated, the rest were. In that scenario, there was a clear nexus between the bottle manufactured by the appellant and respondent and I see no proper reason to interfere with that concurrent finding of the two courts on that aspect which was a finding on fact based on cogent reasoning. It would not have been possible to know whether there were other complaints by people in respect of the same batch, but it is important that the appellant never took any action to separate the examined bottle from the others in the batches a task they could have carried out very easily since as I have stated, they had special knowledge of their system of production and could have very easily produced evidence to show that the unopened bottle, though could be seen to have what looked like similar impurities in the half consumed bottle, was nonetheless, a separate bottle not produced together with the offending bottle. They had all the time before them to do so from the time the bottle was taken to them by the respondent to the time they gave evidence in court, but they found it unnecessary to do so, yet this is a civil case where they also have an evidential burden to explain certain matters. Chances are that if the half consumed bottle was taken for examination, allegations of the respondent introducing the impurities would have been made.

The other matters raised by Mr. Lutta that he contended negated the application of ***Donoghue case*** were first that the Kenya Bureau of Standards breached their own law in examining the offending bottles without proper authority. That may be so. But here the results cannot be vitiated by that alleged breach. The appellant had that report at the hearing of the case. They did not apply to have it excluded on grounds that it was improperly obtained. I doubt whether they would have succeeded as Job Muriithi Ngatia who carried out the tests was availed as a witness and he was not challenged on that issue in cross-examination. Before the superior court all they raised in its memorandum of appeal was:-

"10. The learned Magistrate erred in law and in fact in finding that the evidence of the officer from Kenya Bureau of Standards was admissible when the same was based only on physical examination of an alleged product of the appellant."

The appellant did not challenge the legality of the report by the Bureau of Standards in the trial court. Nor did it do so in the superior court on grounds that it was improperly obtained. In my view, even if it had been proved that it was improperly obtained, that alone would have probably only affected its value and not its admissibility.

The next complaint raised concerning the application of the principles in ***Donoghue vs. Stevenson*** (supra) was that there was no evidence to show that the beer taken by the respondent was the cause of the injury the respondent suffered, i.e. that it was the cause of vomiting and diarrhoearing since the Bureau of Standards Certificate merely confirmed that the beer did not comply with the specification on foreign matter and clarity. In Mr. Lutta's view, the correct approach would have been to subject the beer to a test pursuant to ***section 30*** of the Food, Drugs and Chemical Substances Act. That section gives powers to an authorized officer to carry out certain acts including power to open and examine any receptacle or package which he believes contains any article to which that Act or any regulations made thereunder apply. I do agree that the best course would have been to proceed under that Act as the beer was within the food bracket. But the report that was made by Kenya Bureau of Standards, a body empowered by law to ensure proper standards of products released into the market, which would include beers and several other products, cannot be ignored. It categorically stated that the beer did not meet the standard required meaning it was not fit for human consumption. In any case, the appellant, as I have stated above had all the opportunity to subject the subject beer to tests it felt suitable as Julius said he received the Kenya Bureau of Standards' results but did not agree with them. The appellant did not do anything to demonstrate that the beer was wholesome and fit for human consumption unlike the results of the Kenya Bureau of Standards indicated. In short, all the appellant did was to refuse to accept the results and to say that the Bureau of Standards had no authority to carry out the tests but the appellant never subjected the beer to those who had authority to do so. Thus in my view the accepted evidence, was that the appellant consumed beer which had impurities and which was unfit for human consumption. It does not matter where the test was carried out and it does not matter under which law the examination was done so long as the report has dealt with the essential aspects of the matter and the same test was admitted at the trial by a competent court of law.

The last issue is, whether the respondent was injured as a result of taking the beer? Ngobe who examined him immediately after the incident said he was injured and produced documents including laboratory test forms and results. These were matters of fact. The two courts analysed that evidence and accepted it. I have no reason to interfere with their concurrent findings. It was suggested that he could have been poisoned by other foods such as meat he ate at 4.00 p.m. that fateful day. Dr. Kamau's evidence that symptoms of food poisoning would occur within one or two hours of eating eliminated that proposition.

Considering all the above, while I agree with Mr. Lutta on the principles in ***Donoghue vs. Stevenson*** (supra) that in order to hold a defendant liable to the plaintiff the plaintiff has to prove that the defendant owes him a duty of care; that that duty has been breached and that as a result of that breach, the plaintiff has suffered injury, I do not with respect agree with him that in this case the three principles were not satisfied. The appellant manufactures beer including Tusker Malt Lager for consumption by all and sundry. It obviously owes a duty to the consumers of its Tusker Malt Lager. It clearly acknowledged that through the evidence of Julius when he narrated to the trial court the various stages of care the appellant takes in preparing its product. In this case a batch of bottles of its Malt Lager had impurities in them which could be seen with naked eyes, and which on examination by the Kenya Bureau of Standards, was found to be unfit for human consumption. The respondent consumed one and a half bottles from the batch and fell sick. There were documents produced in court to prove the same and those documents were not challenged on their contents. Whether the suffering was minor resulting from shock of having drank beer that had impurities or real resulting into vomiting and diarrhoearing as the respondent said, it all boils down to the fact that those were injuries. All these in my view clearly brought the case within the principles in ***Donoghue and Stevenson*** (supra).

I have perused and considered all the other authorities to which we were referred and I do appreciate the legal propositions contained in them, but I am not persuaded that both the trial court and the superior court's decisions invited this Court's intervention.

In the result, I would dismiss the appeal on liability. On the quantum, the special damages were properly awarded as it was pleaded and proved by documentary evidence. The award of Ksh.70,000/= by the trial court was reduced to Ksh.20,000/=. Much as I felt that was on the lower side, there is not much this Court can do on it as there was no cross appeal challenging the reduced award. It will stand at

Ksh.20,000/=.

Lastly, although Mr. Lutta did not argue the last ground of appeal which was seeking the full costs of the first appeal, I am of the view that the learned Judge was plainly right in awarding one third costs to the appellant. The appellant lost his appeal on liability. It lost on special damages and only succeeded in reduction of general damages from Ksh.70,000/= to Ksh.20,000/=. That was not substantial success on appeal. I would not interfere with that award of costs.

In conclusion, I would dismiss this appeal for lack of merit. I would order costs to be paid to the respondent by the appellant.

Dated and delivered at Nairobi this 16th day of April, 2010.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

JUDGMENT OF BOSIRE J.A.

I have had the benefit of reading in draft form the judgments of Onyango Otieno and Nyamu JJ.A, and I with respect agree with the reasoning and conclusions reached by Onyango Otieno J.A. I wish however, to add the following.

It was common ground that the third unopened beer bottle the respondent bought had visible solid particles in the beer. These are the ones the Kenya Bureau of Standards examined and concluded that they rendered the beer in that bottle unfit for human consumption. It was also common ground that the respondent did not consume the contents of that bottle. He however, testified, and both courts below accepted his testimony that the two bottles he had opened and consumed the contents therefrom, had similar particles. The respondents had presented the three bottles to the appellant but declined to surrender them to it before the available contents were analysed.

It cannot be gainsaid that the appellant had exclusive control of the production line of the beer in question. 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 **Donoghue v. Stevenson** [1932] ALL ER1; 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. A witness from the appellant explained the production process. He did not however explain how the foreign particles could have found their way into the three bottles. Section 112 of the Evidence Act, Cap 80 of the Laws of Kenya provides thus:

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

It was incumbent upon the appellant to show that its production line was foolproof. It had also the burden of disproving the suggestion that the foreign particles which, it admitted, were found inside at least the third bottle, were harmless. The respondent having adduced evidence, which both courts below accepted, that he suffered as soon as he consumed beer forming part of a batch of three bottles he bought from one stockist, the burden shifted to the appellant to show that the contents in those bottles were harmless or that the particles were introduced into the bottles by a third party.

The facts and circumstances of the case clearly raise a rebuttable presumption of fact that the vomiting and diarrhoea resulted from the consumption of the unwholesome beer, and that all the three beers were contaminated.

It is instructive that the appellant took no steps to have a second opinion obtained concerning the purity of the beer, if only to disprove the findings of the Kenya Bureau of Standards.

For these reasons, I agree with ***Onyango Otieno, J.A.*** that this appeal lacks merit. I also agree with the orders he has proposed. The order of the Court shall, therefore, be in terms proposed by ***Onyango Otieno, J.A.***

Dated and delivered at Nairobi this 16th day of April, 2010.

S.E.O. BOSIRE
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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF NYAMU, J.A.

The facts that have given rise to this appeal are as recorded in the trial court and the superior court, the first appellant court in this matter. This is therefore the second and final appeal.

At the outset, I must state that the conclusions reached in this judgment are confined to the facts, evidence and findings as recorded by the two lower courts. I must however point out that there are facts and evidence not reflected in the judgments of the two lower courts although they conspicuously appear on the record. I bring this out this early because ***section 72*** of the Civil Procedure Act defines this Court's mandate as the final appellate court and that mandate includes our respect for the concurrent findings of fact by the two lower courts and our province being restricted to matters of law. ***Section 72*** of the Civil Procedure Act reads:-

"Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall come to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely:-

a. the decision being contrary to law or some usage having the force of law;

b. the decision having failed to determine some material issue of law or having the force of law;

c.a substantial error or default in the procedure provided by the Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits."

I will therefore start off by narrating the story as the two courts recorded it. The significance of adopting this approach will presently become apparent. The superior court's factual story is as under:-

"*Mr Godfrey Odoyo,* **the respondent in this appeal, was a fan of Tusker Malt Lager, a beer manufactured by the appellant, Kenya Breweries Limited (herein "KBL"). Odoyo likes beer. He has been drinking it since the 1980s. At around 11 pm on the night of 23rd June, 2000 he went to the** *Leaders Inn Bar* **in** *Mathare***. He asked for his favourite beer, Tusker Malt Lager. The barman said**

there were only three bottles left. He ordered all three. They were brought to his table unopened. He drank the first bottle, happily. As he seeped through the second bottle, almost half-way through it, he noticed black particles were inside the surface of the glass bottle. He shook the bottle to see if it would dissolve. It did not. He then examined the unopened bottle and noticed similar particles in that bottle. He rushed to the bathroom to clean his mouth and while there, he began to throw up. He vomited for about 10 minutes. It was almost midnight. He rushed to the Amani Medical Centre, a health clinic in his neighbourhood, taking with him both the opened and the unopened bottle of beer. Upon his arrival at the clinic he continued throwing up and began to suffer from diarrhea. He was treated, given medicine and discharged some eight hours later. When he got better, Odoyo submitted the unopened beer bottle to the Kenya Bureau of Standards (KBS) for examination and analysis. KBS found that the beer contained foreign particles; that it did not comply with the required specifications and that it was not fit for human consumption."

On the basis of the above facts, the lower court gave judgment against the appellant and it awarded him general and special damages in the tune of Kshs.91,990 but this figure was reduced to Kshs.41,990 by the superior court.

The appellant aggrieved by the superior court judgment (***Visram, J*** as he then was) has appealed to this Court on the following grounds:-

1. "The learned judge in the appeal erred in law (sic) upholding the trial court's finding on liability and in particular that the appellant injuries, if any, were caused by beer manufactured by the appellant.

2. The learned judge in the appeal erred in law in holding that the appellant was negligent and that such negligence resulted in injury or damage to the respondent and further failed to follow the principles laid down in decided cases relating to negligence.

3. The learned judge erred in law in failing to award the appellant the full costs (sic) the appeal having been substantially successful"

During the hearing of the appeal, the appellant was represented by ***Mr Lutta***, advocate, while the respondent was represented by ***Mr Ochieng Ogutu*** advocate.

Mr Lutta in his submissions and inspite of the provisions of ***section 72*** of the Civil Procedure Act pointed out to him by the Court, put up a fight based on what he considered to be points of law. He submitted that the lower courts completely ignored to connect the facts and evidence on the issue of liability whose essentials as per ***DONOGHUE v STEVENSON (1932) ALL ER 1*** are:-

1) The duty of care.

2) Breach of that duty of care.

3) Proof that the loss or injury sprung from the breach of care.

He stated that for liability to be established, all the three ingredients must be proved. Thus, in his submission, counsel lamented that the third bottle which was allegedly analysed was not the bottle that was consumed by the respondent, the second half drunk bottle was never submitted for analysis nor was there proof that the consumed product was manufactured at the same time as the one allegedly analysed and that it was not fit for the purpose despite the appellant's well known method of manufacturing of its products on an assembly line with the same brand bearing similar ingredients yet the two courts especially the first appellant court relied heavily on the similarity of the facts in ***Donoghue v Stevenson*** (supra) and the case before them as is clear at page 10 of the judgment which states:-

"The facts of the case in *Donoghue v Stevenson* **(supra) and in the case above are remarkably similar. In both cases we are looking at individuals consuming beer and the fact of the matter is**

that in both these cases, it has been proven that there were impure particles in the beer which should not have been there. Based on *DONOGHUE v STEVENSON (supra) this duty to take reasonable care has been breached."*

Counsel submitted that there was no linkage or nexus between the unconsumed third bottle in this matter and the injury allegedly suffered by the respondent. Thus, there was no factual linkage nor duty of care as regards the third bottle and that there was no factual nexus to the inference made by the courts as per the quote above. He further submitted that there was no similarity either factual or legal between the matter before the Court and the facts in the case of ***DONOGHUE v STEVENSON (supra)*** inthat in the ***Donoghue*** case, the injury, namely the shock arose from drinking the content of the manufactured bottle that contained a snail but in this case, the alleged impurities in the analysed bottle had no impact or effect on the respondent consumer and there was no proof either that it was the same third bottle sold to the respondent that night or any other substituted bottle which gave rise to the alleged injury since the same bottle sold could have been interfered with between the date of sale and the date of analysis, the beer having been drunk, and the third undrunk bottle was only analysed for standards on 8th August 2008, a span of over two months, and there was therefore no evidential linkage to the alleged injury and finally there was no proof whatsoever that the respondent's analyst was qualified to undertake the analysis of contents of beer. He further submitted that apart from the respondent's own allegations that the alleged injury could have been caused by the act of the beer drinking, there was in fact no medical evidence in support of the respondent allegations since a healthcare clinical officer was not professionally qualified to attribute scientifically acceptable conclusions concerning the linkage. He stated that it was illegal under the Standards Act Cap 499 for any other person to request for analysis from the Kenya Bureau of Standards (KBS) since the Act only empowers the Minister to do so, yet it is the respondent's advocates who requested for the analysis contrary to ***section 4*** of the Act. As a matter of law, counsel added the certificate of analysis, relied on by the counsel and subsequently by the two lower courts did not chemically deal with the contents of the alleged dangerous particles and it erroneously based its findings on general specifications and that as a matter of law, the KBS had no expertise to deal with the contents of drinks or foods and that the competence for analysis on drinks or foods lay with the experts appointed under the Food, Drugs & Chemicals Substances Act Cap 250 of LoK. Counsel faulted the analysis carried out by the KBS, stating that it did not come up with a chemical analysis of the offending particles but only with a generalized specification and a standard. He illustrated the point by submitting that samples of any alleged contaminated drink or food should have been availed to the competent authority under ***section 30*** of the Food, Drinks and Chemical Substances Act which sets out a foolproof method of sampling and testing of the drink unlike the Standards Act which dealt with this issue of specifications and standards. Mr Lutta wound up his submissions by stating that existence or proof of negligence or not, was a matter of law and the two courts failed to establish the negligence as per the particulars pleaded in the plaint and quite incorrectly relied on analysis and evidence not based on proven facts and in support of these submissions, counsel submitted a long list of authorities stretching from the celebrated case of ***DONOGHUE v STEVENSON (supra)***up to recent decisions on the subject in comparable jurisdictions.

On his part, Mr Ogutu supported the challenged judgment by stating that the second half consumed bottle as the third unconsumed analysed bottle, according to the oral evidence of the respondent, contained the same particles and that the court did believe the evidence of the respondent's witnesses concerning the dangerous nature of the particles and that they caused the injury and that for this reason, the court could not go behind those findings of fact or unravel them as the final court and that as regards the analysis of the third unused bottle the appellant's representative was present and therefore the appellant is deemed to have accepted the results of the analysis; that a manufacturer of a product was liable if the product was used by the consumer in the same state as it was manufactured and it was the manufacturer's duty to eliminate any errors in the manufacture of their products; that items for analysis could be supplied for analysis by any aggrieved party pursuant to ***section (1)(c)*** of the Standards Act and finally that it was not correct for the appellant to allege that the judgments were based on an assumption or inference and that on the contrary, the judgment was based on proven facts and the applicable law.

I have carefully put the submissions of both parties as outlined above on the scales. In brief, I am generally in full agreement with the powerful submissions made by the learned counsel for the appellant Mr Lutta.

Before illustrating the point, I must begin by stating that in my view, ***section 72*** does not prevent this Court from finding that failure by first appellate court to properly analyse, re-assess or re-consider the evidence and reach its own independent conclusions, is a matter of law and that only this Court can rectify any mistakes arising from such a failure. Again, whether the three ingredients of a manufacturer's liability as enunciated in the case of ***DONOGHUE v STEVENSON (supra)*** were as per the record proven is also a matter of law. In addition, whether or not the applicable law in terms of scientific analysis was the Standards Act or the Food, Drinks and Chemical Substance Act, is also a matter of law, and finally, whether or not there was a nexus between the alleged dangerous particles in the unused third beer bottle to all the three necessary ingredients necessary to establish liability under the ***DONOGHUE v STEVENSON*** case, is a matter of law. On this, I find myself in complete agreement with all the submissions made by the learned counsel Mr Lutta by way of challenging the superior court judgment. To illustrate why I was quick to incline to the appellant counsel's powerful submissions which ordinarily would be a very rare conclusion, perhaps a good starting point is that, there is no nexus whatsoever, between the results contained in the certificate of analysis and the injury suffered by the respondent for the reasons Mr Lutta outlined. On the admission of the respondent himself, he had at the material time eaten ***roast meat*** which according to the expert evidence on record, had the potential of causing vomiting and ***diarrhea***. There is also medical evidence from a qualified specialist and a doctor that, the quantity of beer consumed per se could also cause the alleged injuries and further there is evidence that a qualified brewer illustrated all the stages of beer manufacturing to underscore why it would not have been easy for the beer manufacturing process to have been adulterated without the internal systems of the appellant detecting it and had this happened, the chances of it being confined to only the three bottles were extremely remote and many more consumers of the beer during the relevant manufacturing period could have been affected. Instead of the first appellate court doing the analysis of the evidence, it went straight away to draw an inference of negligence as if the facts in the case were the same as in the ***DONOGHUE v STEVENSON*** case, yet they were in my view dissimilar like day and night as indicated above firstly due to the scientific strides made in the manufacture of beer since 1932 and secondly as there was no mention of expiry dates of the beers this could have broken the chain of causation. Surely, a stockist of beer who keeps them on the shelf for sale after the expiry date would in my view attract liability as a separate tortfeasor and the sale of an expired beer would also in my view break the beer manufacture chain of liability. It is illustrative that no inquiry of the expiry was undertaken at all. Even with the scientific knowledge available in 1932, when the ***DONOGHUE*** case was decided, it was the same bottle which contained the offending snail yet in the present case the inference of liability was based on an unused bottle that was never consumed by the respondent and therefore the important factor of causation was ignored by the superior court.

Turning to the certificate of analysis, the same was applied for and compiled pursuant to the provisions of the Standards Act. This, in my view, was not the proper thing to have been done in law. The Standards Act cap 498 clearly deals with standards and specifications as its title states:-

"An Act of Parliament to promote the standardization of the specifications of commodities, and to provide for the standardization of the standard of commodities and codes of practice to establish a Kenya Bureau of Standards to define its particulars and provides for its management and control and for matters incidental to, and concerned with the foregoing."

"***Approved specification***" means:-

A specification … of which a standardization mark has been specified under *section 10(b).*

"***Specification***":-

"means a description of any commodity by reference to its nature, quality, strength, purity, composition, quantity, strength, weight, grade, durability, origin, age or other characteristics or to any substance or material of or with which, or the manner in which any commodity may be manufactured, provided processed, treated, tested or sampled."

Surely there is nothing in the certificates of analysis which shows that the third bottle was not a beer. It is

apparent from the certificate of analysis that the specification set by the KBL for beer if any were never explained, or the standard set for beer compared with the contents at all. In my view, the KBS acted ultra vires the Act by doing the analysis for the purpose of connecting it with any alleged injury on consumption. It is not actually mandated by the law to do so and any purported analysis was ultra vires the Standards Act. It follows that the reliance by the two lower courts on the certificate of analysis from KBL for the purpose of establishing liability was with great respect, based on a misapprehension of the applicable law and none of the two courts addressed this important aspect at all and as a result, the courts ended up by relying on experts not recognized by the applicable law. In my view, the certificates had no value in establishing liability.

At the other end of the scale is the Food, Drugs and Chemical Substance Act Cap 254 (LoK).

The objective of the Act is set out as under:-

"An Act of Parliament to make provision for the prevention of adulteration of foods, drugs and chemical substances and for matters incidental, thereto and connected therewith."

Article includes:-

"(a) any** food, drink**, cosmetic device or chemical substance and any labeling or advertising material in respect thereof; (emphasis mine)

(b) anything used for the preparation, preservation, packing or storage of any food, drink, cosmetic device or chemical substance."

Authorised officer:-

"means (a) a medical officer of health, a public health officer, or any suitably qualified person authorized in writing by a municipal council for the purpose of the Act and – (b) for the purpose of any provision of this Act relating to the taking of samples including a police officer of or above the rank of inspector;

(b) …… not relevant
(c) …… not relevant

Food:-

"Includes any articles manufactured sold or represented for use as** food or drink for human consumption**, chewing gum and any ingredient of such food, drink or chewing gum." (emphasis mine)

It is as clear as the light of day that beer is a drink covered by the Act and any analysis of it when necessary, must be undertaken in terms of the Act.

In the case before the Court, this was never done and it follows that the expert evidence given outside the provisions of this Act ought not to have carried any weight in law. Yet the lower courts gave great weight to that evidence in establishing their findings on liability. To my mind, reliance on the KBS certificate of analysis was a serious misapprehension of the applicable law.

Again, even on the evidence as recorded and relied on, there was the evidence of the respondent having eaten roast meat at the material time and the doctor's evidence that this could have been the cause of his complaints and it is also on record that the unused bottle top had a "dent" which could have resulted in the interference with the contents of the beer between the date of sale and when it was subsequently analysed. Similarly, the significance of this should have been apparent to the courts in their findings touching on liability because in product liability, the issue of causation is an important ingredient and without it no finding on liability ought to have been made at all. The two illustrations clearly provided gaps in causation which should have been addressed as the cases reviewed here below clearly

show. In my opinion, the court's failed to take into account the impact of science in the beer manufacturing and had this dimension been taken into account and its obvious bearing on liability over the eighty years after the seminal ***DONOGHUE v STEVENSON*** would have been apparent**.** As if this was not enough, the relevant and applicable statute law dealing with the subject matter was ignored. With respect, none of the principles of ***DONOGHUE v STEVENSON (supra) were*** in existence as a matter of law. Thus, there was a break in causation due to the admission by the respondent having eaten roast meat, lack of medical evidence linking the injury to the beer, the certificate of analysis having been obtained from unqualified body (KBS) expert and the possibility of the existence of other tortfeasors if the beer had been sold after the expiry date and finally nature of the foreign particles was never chemically analysed and its linkage to the injury established.

On the facts as per the record, the respondents own expert witness, ***Mr Job Muriithi Ngatia***, the analyst who compiled the controversial analysis report had this to say:

"A bottle labeled as Tusker Malt, Lager was brought to me. It was not opened. I do not know what the plaintiff had taken. No other bottle was brought to me for comparison. I did not compare the contents in the bottle with any other. …… I did not check to see if the said (sic) had been tampered with. I did not carry out any pressure test. Pressure test is to make sure that the beer is not flat. ……. I did not establish the foreign matter in the beer (emphasis mine). I did not know what was in the beer. I did not use a hecimetre to test the alcohol. I do not know the details of this case (emphasis mine) ……. I do not know at what stage the foreign matter was put in the bottle (emphasis mine). There was no need to carry out chemical analysis."

For the appellant, ***Mr Julius Mheni Mwitungi*** the KBL Micro biologist had this to say as per the record:-

"Kenya Breweries is so certified, various productions are found at various stages. This is to ensure that the beers meet specifications of end brew and whole sale for consumption. Beer is examined in every stage of manufacture. It is tested in each step. Finally, before the beer goes to the warehouse, it is tested and examined physically before passed over for distribution. Every beer manufacture must go through these processes. All bottles for the market go through a washer. They are all electronically inspected on line. The electronic bottle detector is examined after one hour for 100% efficiency (sic). It rejects bottles which are not clean or have residues in them or any defect in the bottle in that which does not conform with our specifications. It is not common for a foreign body to be found in our beer. We may have nature or process matter and *not extraneous matter* ***to the beer manufacture process. Our system is enclosed not open. It is almost impossible for a foreign matter to be found in our beers. ……. We did not receive any complaint from the market around mid June 2000 when this beer was manufactured. ……*** *The report does not indicate what the foreign matter is****. We measure beer clarity using a hexameter. ……. Beer clarity cannot be determined by using a naked eye. ……. Vomiting and diarrhearing is caused by a food product that has organisms that produce toxins. ……. I noted a dent on crown of the bottle with the dent any possible tampering of the bottle should have been done. (Emphasis mine.)***

From the aforesaid, it is clear that as a matter of law, no liability should have been established against the appellant. Indeed, Lord Maxmillan in the ***DONOGHUE v STEVENSON (supra)*** held:-

"On proof of these facts, the appellant would be entitled to recover."

The proof of facts was the snail in the bottle. In the matter before the Court, the third unused bottle could not in law form the basis of a fact capable of giving rise to an inference of liability in the face of what is recorded above. Even on the basis of the certificate of analysis, the foreign matter in the beer was not chemically identified. To my mind, the facts, science and law were all against the two judgments in the lower courts and with respect it would be unjust for this Court to shelter behind ***section 72*** so as to let a clear miscarriage of justice apparent on the face of the record take place. In my opinion, the philosophy behind an appeal system anywhere, is to encourage and make it possible for systems to be free to do justice, distill it and enhance its quality as the final product of the appeal process and not to "strangle" justice. In the circumstances prevailing in this case, the ***DONOGHUE*** case principles were misapplied

taking all the above factors into account. Thus, at page 37, ***Lord Macmillan*** handed down the ratio of the case in these words:

"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 loquitor – Negligence must be both averred and proved."

From the above it is obvious that had the superior court evaluated the evidence set out above it would have been clear that its conclusions on liability would have been different. But it is quite clear to me that the evidence was never evaluated.

Concerning the important legal point of causation which was never addressed by the court at all the recorded evidence on a possible cause of the alleged complaint appears was as follows:-

"Initially I thought a neighbor had put cigarette particles in my glass. I had also had lunch (sic) *I do not know what caused my problem* ***(emphasis mine). I had lunch between 12-1.oo p.m. I had supper at about 4.00 p.m. I ate meat. It was roasted. It was in a public place in Huruma. I took the second beer. ……..***

The beers were opened by the waiter in my presence. I took the last meat at about 4.00 p.m. upto 11.00 p.m. I had no problem."

Had the superior court again properly evaluated the evidence on record its legal view on the facts as recorded would have followed the conclusion recorded by the court in the shipping case of ***RHESA SHIPPING SA vs EDMONDS HL(E) I WLR, 951 by Scrutler LJ*** in these words:-

"This view renders it unnecessary finally to discuss the burden of proof, but in my present view, if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship … and an examination of all the evidence and probabilities leaves the court doubtful, what is the real cause of the loss, the assured has failed to prove his case."

Causation is part of the neighbourhood principle as handed down in the Donoghue case (supra). With respect, the superior court having misapplied it and having failed to relate it to the peculiar facts of this case is in my opinion a matter of law. The unused beer bottle was never consumed and the half consumed beer was never analysed and therefore the linkage of its contents to the injury was by an inference not by actual factual proof of negligence. Again with due respect, causation is at the heart of the law of negligence including product liability. For this reason, I endorse fully as good law on causation the holding of the House of Lords in the case of ***KAY vs AYRSHIRE AND ARRAN HEALTH BOARD 987 ALL ER 417*** where their Lordships held:-

"Where two competing causes of damage existed, such as the overdose of penicillin and the consequences of the meningitis, the law could not presume in favour of the plaintiff that the tortious cause was responsible for the damage if it was not first proved that it was accepted fact that the tortious cause was capable of causing or aggravating such damage. Since, according to the expert evidence, an overdose of penicillin had never caused deafness, the appellant's son's deafness had to be regarded as resulting solely from the meningitis. Thus, appeal would therefore be dismissed."

As per the record, since the beer in the analysed bottle was never taken by the respondent, but he accepts that he did eat roast meat at the same time, which food the expert says could have caused the alleged injury, the scientific position of the meat being a possible cause was the only reasonable conclusion as per the scientific evidence tendered in the case.

As in the ***KAYs case (supra)*** in the matter before us, there was no medical evidence from any person qualified to do so that it was the contents of the first bottle, or the half consumed bottle or the third unused bottle which had caused the injury and the two courts were therefore not entitled to base liability on an unscientific inference. Thus, in the same case where "***causation***" was discussed as an important linkage in negligence, the court clarified the position beyond any guesswork in these words at page 423:-

"…….

The question and the only question argued in this appeal is whether the permanent bilateral deafness from which Andrew suffers was caused by meningitis only, in which event the First Division's decision appealed from was correct or was brought about at least to a material extent by the overdose of penicillin which was administered to him on 29th November, the day after his admission to hospital, in which event the Lord Ordinary's decision was right. It is obvious that the answer to this crucial question must depend on medical evidence. It is not a matter on which a judge would be able to reach a conclusion without such evidence. The Lord Ordinary heard a considerable body of skilled testimony and he formed the clear impression that all the medical witnesses that he heard were doing their best to assist the court to understand a complicated medical picture. On the evidence addressed to him, the Lord Ordinary was not satisfied that leaving the present case out of account, penicillin had ever been proved to have caused or contributed to deafness."

In the current case, the so called foreign matter was never chemically analysed to establish its potential to bring about the respondent's alleged injury. A statement by an unqualified body and unqualified analyst that the contents of the third beer were unfit for human consumption constituted an empty statement in terms of the required medical evidence since it is apparent the foreign bodies were never given any medical names or their potential to cause the particular harm medically or chemically established and as observed in the same House of Lords case, it was not open to the two courts to reach the verdict they gave because it was both inappropriate and unjust but put in the Lord Ordinary's terms it rendered itself at page 427 thus:-

"To decide an issue of causation between the parties in an area of medicine where matters are very complicated and much as not yet understood on a theory not supported by medical testimony is neither appropriate nor just."

The same point was made in yet another House of Lords decision in the case of ***WILSHER v ESSEX AHA 1988 I ALL 871*** where it held:-

……

"Instead the burden remained on the plaintiff to prove the causation link between the defendant's negligence and his injury."

Again in the same case, the House of Lords observed:-

"The conclusion I drew from these passages in *Mr McGlee vs National Coal Board* ***laid down no new principle of law …. On the contrary, it confirmed the principle that the onus of proving causation lies on the pursuer or plaintiff."***

Where as in the current case, there were a number of different agents for example such a roast meat provider and the beer stockist the possibility that any injury could have been the responsibility of more than one tortfeasor and not the manufacturer became real in view of the gaps in the causation .

To wind up, I accept as good law the elements of causation as set out in the case of ***FAIRCHILD vs GHENHAKEN FUNERAL SERVICE LTD [2007] I KLR at page 1072*** and venture to suggest the findings in this particular matter fell far short of those standards. The facts in this matter were as analysed above not similar to those set out in the snail's case - ***DONOGHUE v STEVENSON (supra)*** nor were they the same as those set out in the case that the followed, namely ***GRANT vs AUSTRALIA KNITTING***

MILLS 1936 AC 85 where an individual suffered dermatitis as a result of defective underpant!

As is apparent from the review of the comparable cases up to the year 2002 while the principle ennunciated in ***DONOGHUE v STEVENSON (supra)*** remains acceptable in many jurisdictions including ours, in my view, the question posed in that case "who is my neighbor in-law must be answered in the context of the facts of each case and the neighbourhood principle has over the span of 80 years been modified or must be modified to take into account the great leap found in medicine and science since 1932. Its application must take into account the phenominal development in terms of science and its impact on the issue of causation on liability and the neighbourhood principle carefully assessed and analysed. In my view, the neighbourhood principle, the duty of care owed, and its breach and consequential loss have been substantially influenced by the scientific dimension and medical advancement in the last 80 years. In some cases depending on the facts, the principle has been restricted in its application or expanded by the ever changing frontiers of science. Liability at this time and age must in my view take this into account. Indeed the manufacturers' liability to the ultimate consumer should be determined on the basis of the facts and not a matter of routine. The application of the ***DONOGHUE v STEVENSON*** ratio line, hook and sinker to the special facts on this case is patently erroneous.

To sum up, evidence including expert evidence obtained contrary to statute cannot form the basis for any liability including tortious liability; the analysis should have been sought as per the relevant law but this was not what was done; the superior court regurgitated the facts without evaluating the evidence also contrary to the relevant law; an erroneous conclusion was reached that the facts of the current case were similar to those prevailing in the ***DONOGHUE v STEVENSON*** case and this was not the case; there was no nexus between the offending particles in the beer and the alleged injury; no importance was attached to the intervening act of eating roast meat and this had a bearing on causation the analysis of which was not done leading to the erroneous conclusion that the injury if any was caused by the beer drinking only; and finally, as a matter of law, no evaluation and reconsideration of the evidence was undertaken by the superior court and had this been done, it could as well have given a different verdict; and also the impact of expert evidence on microbiology pathogens and the process of beer manufacture including medical evidence was not addressed at all yet this should have constituted the hub upon which liability should have turned including the determination whether or not on the facts and the law as analysed the respondent had discharged the burden of proof on a balance of probability in the face of the new process of beer manufacture.

Arising from the above it is important to observe that while negligence could be equated to a big river with many tributaries emptying into it, the tributaries could constitute independent causes of action not necessarily against one tortfeasor but many tortfeasors. For example, in the context of the meat eating and bear drinking culture practiced in some cultures including this country, the issue of any liability which could arise from such pursuits in my view goes beyond the concept of the neighbourhood principle as expressed in ***DONOGHUE v STEVENSON***- thus, although the beer manufacturer could be a tortfeasor vis a vis the drinker where the drinker had undertaken the two pursuits almost at the same time the butcher/meat roaster could constitute a separate tortfeasor in negligence that would have no relation to the duty of care created by the neighbourhood principle of ***DONOGHUE v STEVENSON***. This in turn underscores the importance of the law taking into account the big developments in science and the importance of relying on correct expert medical evidence or chemical analysis of "the offending item." In a sentence the long shadow of scientific advances since 1932 negates liability under the ***DONOGHUE*** principle in the circumstances of this case.

Having determined this matter purely on the basis of its special facts and the law as above, it was certainly unnecessary to look at the direction the neighbourhood principle has taken in comparable jurisdictions. However, it is always instructive to realize that we cannot be insland of jurisprudence. In this regard, I have derived considerable encouragement from the judgment of the Supreme Court of Canada in ***BDC LTD vs HOTSTRAM FARMS LTD 1986*** *Can LII [1988] ISCR 228* where Estey J had a vision of the development of the neighbour principle which he described in these words:-

"… courts will be vigilant to protect a community from damages suffered by breach of the neighbourhood duty. At the same time, whenever the realities of modern life must be reflected by the

enunciation of a defined limit on liability capable of practical application so that social and commercial life can go unimpeded by a burden outweighing the benefit to the community of the neighbor historical principle."

Slightly down south in the US, the court in the case of ***FORD v ALDI 832*** on liability for emotional distress set out two requirements as follows:-

1) That the defendant should have known that his conduct involved an unreasonable risk causing emotional distress.

2) The emotional distress is medically diagonisable and is severe enough to be medically significant."

From the above, it is quite apparent that the effect of the shadow of science on the neighbourhood principle and the tort of negligence generally has been appreciated even in the US. Thus, to succeed on the merits in a product liability, the plaintiff must establish each of the following elements by a preponderance of the evidence.

1) The defendant sold the product in the course of his business.

2) The product was then unreasonably dangerous when put to a reasonable use without knowledge of its characteristics.

3) The defect did not give an adequate bearing of danger.

4) The plaintiff was damaged as a result of the product being sold without adequate bearing.

In the light of the above comparables and my earlier analysis of the present case, I have no doubt whatsoever that the evidence fell far short of the required threshold or benchmark of liability.

I have had the advantage of reading the majority judgments in draft, and I respectfully dissent for the reasons appearing in the face of my judgment. I accordingly allow this appeal and set aside the judgment of the superior court with costs both here and below to the appellant.

I would so order.

DATED and delivered at Nairobi this 16th day of April 2010.

J.G. NYAMU
……
JUDGE OF APPEAL