IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 150 OF 2018

WINFRED MKUMBWA .....APPELLANT

VERSUS

SBC TANZANIA LIMITED ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mambi, J.)

Dated the 28th day of July, 2016

in

Civil Appeal No. 26 of 2015

JUDGMENT OF THE COURT

22nd & 29th October 2019
MZIRAY, J.A.:

This is a second appeal. It emanates from a claim based on the tort of negligence in the area of breach of duty of care. The suit commenced in the Resident Magistrates' Court of Mbeya on a claim lodged by the appellant seeking redress in the sum of Tshs 100,000,000/= as a result of breach of duty of care caused by the respondent's company. The appellant alleged that he consumed an adulterated pepsi drink

manufactured by the respondent upon which he suffered nervous shock, psychological injury, emotional distress and loss of appetite.

We find it indispensable, at the outset, to go into the background of this matter, albeit briefly. It is as follows: The appellant alleges that on 1/2/2015 while in his office at Nzovwe Mbeya purchased three bottles of pepsi products manufactured by the respondent to quench his thirst; the product being one of his favourite drinks. He had a visitor one Jonathan Lameck in his office, so he offered him one of the bottle to drink. There remained one bottle unopened. While refreshing themselves with the drink, each started to experience stomach upset accompanied with vomiting and loss of consciousness. Later on when they recovered, he decided to examine the remaining unopened bottle of pepsi and detected a kind of substance inside the bottle. He referred the matter to Tanzania Food and Drugs Authority (TFDA) in Mbeya and later instituted a suit in the trial court.

After a full trial, the trial court decided the suit in favour of the respondent. Aggrieved, he unsuccessfully challenged the findings of the

trial court in the High Court. Still discontented, he filed this appeal raising eight grounds in his memorandum of appeal, which we reproduce as hereunder:-

"1. *That the learned judge erred in law and in fact in deciding that the respondent has not committed any breach of his duty.*

2. *That the trial Judge erred in law and in fact for failing to determine the main claim of the appellant pleaded in the memorandum of appeal.*

3. *That the trial Judge erred in law and in fact for failing to consider the psychological injury and nervous shock suffered by the appellant.*

4. *That the trial Judge erred in law and in fact for relying on the principles set out in the case of* ***Donoghue*** *without distinguishing the nature and circumstances surrounded the suit at hand.*

5. *That the trial judge erred in law and fact for ignoring to award the appellant a relief as he claimed by relying on the narrative story of*

production system which never proved the contrary on the case.

6. *That the learned trial judge erred in law and fact in concealing and not disclosing the nature of exhibit P1 which was the source of the dispute since it was admitted before him and witnessed it but instead misdirected himself by determining other facts which were not at issue.*
7. *That the learned trial Judge erred both in law and fact by not considering and relying on the liability of the manufacturer for manufacturing unfit drinks to consumers.*
8. *That the learned trial judge erred both in law and fact by not considering the damages suffered by the appellant during and after the matter in motion".*

When the appeal was placed before us for hearing, the appellant was unrepresented; whereas the respondent was represented by Mr. Kamru

Habibu, learned advocate. The appellant adopted the contents of his written submissions filed before the Court and prayed for the appeal to be determined on the strength of the memorandum of appeal and the written submissions. When the Court posed a question to the appellant on the principle articulated in the case of **Donoghue v. Stevenson** [1932] AC 532**,** which he relied upon in his claim, it seemed that he had no clue about this principle and confessed that someone assisted him to prepare the documents.

In response, Mr. Habibu adopted the written submissions he filed on behalf of the respondent. In elaboration, he submitted that the appellant misapplied the principle in **Donoghue's case** to seek for damages which he did not deserve. While referring to page 27 to 30 of the record of appeal, he argued that the appellant's case is distinguishable from that of **Donoghue v. Stevenson** because he did not suffer any damage. He said he misconstrued and misapplied the principle and there was no duty of care casted upon the respondent as stated by the appellant. It is his contention that if at all the health of the appellant was affected, something which is highly disputed, he would have gone to hospital for treatment. The learned advocate went on to submit that there was no iota of evidence

to substantiate the assertion that the pepsi drink was adulterated as it was not tested laboratory wise or anyhow. He continued to challenge the evidence of the appellant by stating that the pepsi he consumed was not the one produced in court, instead he produced another pepsi bottle which was not yet opened. Also there was another person in the company of the appellant who also consumed the alleged illicit pepsi; it was alleged he suffered health problems but surprisingly he did not come to testify to support the case for the appellant, he argued. He concluded by stating that with all those above shortcomings in the appellant's case the principle in **Donoghue's case** was inapplicable and inappropriately applied.

In his rejoinder the appellant admitted that he didn't neither go to hospital nor drink from the bottle which he presented in the trial court. He also conceded that the pepsi he consumed was not analysed and that the person whom he was with could not be traced because he was a mere client at his offece.

Having considered the submissions from either side, grounds of appeal and the entire record, we think there are three main issues calling for our immediate determination and these are: **One,** whether the respondent

breached its duty of care. **Two,** whether the appellant suffered any damages from the breach of duty of care by the respondent. **Three,** and lastly, whether the principle in **Donoghue's case** is applicable in the circumstances of the case.

As for the first issue regarding the breach of duty of care, from the evidence adduced, there is no controversy that the respondent company is the manufacturer of soft drinks known as pepsi. We are settled that by virtue of being a manufacturer, the respondent is duty bound to ensure safety in its products to its consumers. Thus, the respondent owes a duty towards its customers. As correctly observed by the trial court at page 108 of the record of appeal, a finding which we endorse, the respondent owes a legal duty of care not only towards the appellant but also to all customers it is serving.

In the Book titled **The Principles of Tort Law, 4th Edition, Vivienne Harpwood, Cavendish Publishing Limited 2000** at page 25, it was stated thus:

> *"The first matter to be proved is that the defendant owed a duty of care to the claimant. Unless it is*

possible to establish this in the particular circumstances of the case, there will be no point in considering whether a particular act or omission which has resulted in harm was negligent.... The existence of a duty of care depends upon oversight, proximity and other complex factors. It should be noted that in the vast majority of negligence cases there is no dispute about the existence of a duty of care."

What the learned author has articulated hereinabove was cemented 87 years ago in the famous case of **Donoghue v. Stevenson** [1932] AC 532 where Lord Atkin propounded that:

"...a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation of putting up of the product is likely to result in injury to the consumers life or property, owes a duty to the consumer to take that reasonable care"

The principle of duty of care in the tort of negligence has thrived long in most of the Commonwealth jurisdiction and the principle propounded in the case of **Donoghue** above, despite being old, reigning about 87 years now, is still good law and undoubtedly very much applicable in our jurisdiction.

Thus, for the claim of the appellant to sustain, then he was supposed to prove that the respondent had a duty of care; there was breach of that duty of care and as a result of that breach the appellant suffered damages. The duty casted upon the respondent was to discharge the burden that the said breach of duty was not proved. On the evidence adduced, the appellant contended that on the material day, he received a visitor one Jonathan Lameck and bought three bottles of pepsi product manufactured by the respondent and no sooner had they started to consume the alleged drinks, they started to experience stomach upsets resulting into vomiting and loss of consciousness. Later on when they recovered, the appellant decided to examine the remaining bottle of pepsi and discovered that from inside there was an unspecified substance. However, the respondent through the evidence of DW1 opposed the

allegation very strongly by providing a scientific analysis of the whole process of sanitation and thus asserted in his evidence that if the bottle will be contaminated with any unusual substance then it is hard for the said substance to remain, as the beverage could be interrupted in the process and remain half.

Deducing from the two rival evidence we are of the considered view that even though the respondent owes a duty of care to its customers but the appellant had failed totally to establish on a balance of probabilities that the duty of care was offended. We say so because the bottle which was contaminated with the abnoxious substance was not the one which was consumed by the appellant. He tendered an exhibit which was not relevant for his case. We think that, which we are sure is the correct position, he was supposed to tender the bottle containing the remaining substance which caused havoc to his health. Further to that, the appellant asserted that he felt stomach upset and started to vomit and later lost consciousness, but with respect, he never produced any proof to the effect that indeed he suffered health problems. We think that with such serious condition which resulted into loss of consciousness, he was supposed to attend hospital for medical examination and produce a medical report to

that effect. He never did so, hence we fail to agree with him that he suffered serious health problems.

Concluding with the last issue, we say that the case at hand is distinguishable with **Donoghue v. Stevenson** (supra) as in that case the plaintiff consumed a ginger beer with a decomposed remain of a snail which was not detected until a greater part of the contents of the bottle had been consumed, as a result she suffered nervous shock and severe stomach upset. Compared with the case at hand, the appellant alleged that he consumed a pepsi drink which contained an unspecified substance, but surprisingly, before the trial court, he tendered an exhibit which was not opened and the substance was easily detected by naked eyes even before consuming the alleged drink. The position is quite distinct from that in **Donoghue case** where a decayed snail was not easily detected until a greater part of the content has been consumed.

The distinction we find between the instant case and that of **Donoghue** is that the victim in **Donoghue case** consumed the very same drink which contained a snail while in this case the appellant did not consume a contaminated pepsi. Had he consumed an adulterated drink,

ordinarily it was expected for the appellant to call his visitor the said Jonathan Lameck as a witness, who apparently was also allegedly affected by the drink, rather than calling as a witness one Jedaiya Zebadia (DW2) who was a mere passerby and did not actually witness the incident. Above all, exhibit P1 tendered was neither consumed by the appellant nor tested with laboratory analysis, or TFDA. In the absence of such evidence, the likelihood of the alleged drink to be tampered with cannot be wholly overruled. As rightly held by the trial Court there is yet another distinction between the present case and Donoghue in the latter, the bottle was opaque while in the case at hand, the bottle was transparent.

In conclusion we are strongly convinced that the appellant has failed to show the connection of the unopened bottle of pepsi he tendered as exhibit with the health problems he suffered. There is simply no nexus. As the bottle presented by the appellant was not the one which the appellant consumed, obviously he failed to link the damages claimed with the unopened bottle. We are increasingly of the view that the appellant has failed to prove his claim, hence he is not entitled to any award of damages as rightly observed by the trial court and confirmed by the first appellate

court. In the same stride, we consequently dismiss this appeal for lack of merit and uphold the decisions of the two courts below. We did not see the logic behind denying the respondent costs in the High Court. No doubt the respondent was entitled to costs. We accordingly award the respondent costs of this appeal and the two courts below.

Order accordingly.

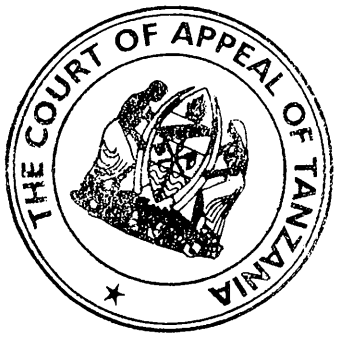
DATED at **MBEYA** this 28th day of October, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 29th day of October, 2019 in the presence of the appellant in person, unrepresented and Mr. Kamru Habibu counsel for the respondent is hereby certified as a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL