IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CIVIL APPEAL NO. 23 OF 2005

(Originating from the District Court of Dodoma at Dodoma Vide Civil Case No. 22 of 2005.)

COCACOLA KWANZA LTD ..... APPELLANT

VERSUS

PILI ABEL MKOMA ..... RESPONDENT

J U D G M E N T

JULY 18, 2006 & SEPTEMBER 21, 2006

MJASIRI, J.:

This appeal arises from a product liability suit filed in the District Court of Dodoma. The Respondent a court clerk in Dodoma filed a suit against the Appellant Cocacola Kwanza Limited for damages for a defective product which the Respondent alleged was contaminated and upon drinking the same suffered bodily harm.

The District Court decided infavour of the Respondent and awarded damages of Tshs. Five million (5,000,000/=) to the Respondent.

Being aggrieved by the decision of the District Court the Appellant has appealed to the High Court. The Appellant Cocacola Kwanza Limited has filed two grounds of appeal which are reproduced as under:-

1. That the Trial Magistrate erred in law for adjudicating the matter without satisfying himself that he had jurisdiction to determine the same.

2. That the trial magistrate erred in law and infact in awarding damages against the Appellant without there being sufficient proof as required by law.

The Respondent filed a cross appeal. The following ground of appeal was filed which is reproduced as under:-

That the trial court erred infact and law in awarding the plaintiff only nominal damages of Tshs. 5,000,000/= in the circumstances where the same rightly found the plaintiff (Appellant) to have suffered actual damage by the Defendant's Respondent's acts of negligence.

The Appellant was represented by Mr. Tarimo Advocate and the Respondent was represented by Mr. Njulumi Advocate.

It was agreed by both counsels that the appeal and the cross appeal would be consolidated and would be argued together.

The background of the case is as follows.

The Respondent on October 11, 2004 went to Sarafina bar/grocery during her lunch break. While having lunch also ordered cocacola (a soft drink) which was alleged to be a product manufactured, distributed and sold by the appellant. When the bottle of cocacola was opened the usual pop sound was made indicating that the bottle was properly sealed before being opened. After drinking a quarter of the cocacola (coke) she felt nausea, saliva filled her month and she discovered that the drink was contaminated and there were white particles at the bottom of the Cocacola bottle.

The Respondent reported the matter to the police and a sample of the contaminated/adulterated drink was sent to

the government chemist for testing. The report from the government chemist stated that the sample contained remnants of cockroach eggs and was therefore unfit for human consumption.

As a result of the contamination the Respondent suffered a prolonged nausea, vomiting and had to be hospitalised for two days.

Both counsels argued with great force in favour of the grounds of appeal presented.

With regards to the first ground of appeal, Mr. Tarimo counsel for the Appellant submitted that the prayer in the plaint shows that the Respondent was asking for an award of Tshs. 1 billion whereas the jurisdiction of the District Court following the amendment to Section 40 of the Magistrate's Court Act 1984 is limited to only sh. 150 million. Mr. Njulumi counsel for the Respondent submitted that the amount appearing in the prayer to the plaint is a typographical error. According to Mr. Njulumi the main body of the plaint clearly stipulates a claim of shs. 100,000,000/=; paragraph 7 and paragraph 9 of the plaint clearly states the jurisdiction of the court.

In view of the contents of paragraphs 7 and 9 of the plaint I would agree with the counsel for the Respondent that the amount of one billion in the prayer is a typographical error. Therefore the argument relating to jurisdiction cannot hold. Paragraph 9 of the plaint clearly states the jurisdiction of the court.

With regards to the second ground of appeal the main issues to be determined are as follows:-

1. Whether the Respondent took a cocacola drink which was contaminated.

2. Whether the said drink was manufactured distributed and sold by the Appellant.

3. Whether the Respondent suffered any harm in drinking the said cocacola.

4. Whether the award of Tshs. 5,000,000/= was justified.

According to the evidence on record the Respondent bought a coke from Sarafina bar. The evidence of PW 2 relevant. The bottle of cocacola was found to have been contaminated as there were foreign white particles at the

bottom. This was confirmed by PW 2 and the report of the government chemist. According to the report of the government chemist there were cockroach eggs in the drink. The said drink though not containing poison was unfit for human consumption and could cause nausea, vomiting and stomach pain.

PW 5 the manager of Sarafina bar testified in court that the soft drinks in the bar were distributed by the Appellant. The Cocacola drinks served in the bar were bought directly form the depot.

With regards to the injury suffered by the Respondent, the nature of the Respondent's injury has not come out very clearly. The account given by the medical doctor PW 3 was of a general nature, based on the complaints made by the Respondent. The evidence of hospitalisation was not concretised and no medical record was produced in court to show the condition of the Respondent; the type of treatment given; the tests conducted and diagnosis made.

Product liability in negligence is a fairly recent tort, having its origins in Donoghue Versus Stevenson 1932 II AC 562. This is the landmark decision which allowed for

the first time an action of negligence for the liability of manufacturers. Prior to this decision, the law did not recognise that there could be any basis for a manufacturer to take due care in the absence of a contractual relationship.

The House of Lords held that a manufacturer owed a duty of care to a consumer of his products. In particular when they are marketed in the form in which the consumer will receive them, manufacturers have to take reasonable care in the preparation or putting the product. The decision in Donoghue Versus Stevenson laid down the basis for product liability claims in Torts and established that every manufacturer of a product owes a duty of care to the consumers of his product. Liability hawever will only arise when the manufacturer has breached that duty of care and caused reasonably forseable loss to the consumer.

Product liability focus on the damage or harm caused by the defective product and the consumers remedies are founded in negligence as there is no general statutory liability for unsafe products in Tanzania.

In view of the principles outlined above the consumer is entitled for damages for personal injury, pain and suffering, physical and psychological harm.

In the case of BA Minga Versus Mwananchi Total Service Station Shinyanga and Total (T) Limited 1972 HCD 241 where contaminated kerosene was sold, it was held as under:-

In view of the evidence on record it is clear that the Respondent owed a duty of care to the consumer. That duty consisted of taking precaution so that the substance sold, as kerosene is not contaminated and made dangerous by their negligence. The defendant knew or ought to have known that his duty of care existed and that in this case the consumer needed pure kerosene and not kerosene with something else which he had not bargained for. The defendant's duty was to the consumer. Damages were awarded to the plaintiff.

In the case of Cocacola Kwanza Limited Versus Bilson Mbezibwa DC Civil appeal no. 33 of 1999 Dodoma Registry (unreported) Kyando J. when considering whether the Appellant was negligent in the manufacturing of the tangawizi drink had this to say:

"Courts do infer negligence from the mere fact of a defect, at least where it is a manufacturing defect that can only have resulted from events while the product was in the manufacturer's hand Evans Versus Triplex Safety Glass Company 1936 I ALL AU ER 28 and HILL Versus James Crowe (1978) I ALL ER 812."

In this case as in the above case the inference is in escapable that the Appellant was negligent in the production of the cocacola which came out of the factory contaminated. There is no possibility of any intermediate interference with the drink as if this was so it would have been detected when opening the bottle at the bar. A pop sound would not have been produced if the bottle has been tempered with, by opening it before it reached the consumer. The drink must have left the Appellant's factory contaminated and the Respondent bought it and consumed it while it was in that state.

With regards to the award of Tshs. 5,000,000/= (Five Million) as damages; the Respondent asked for Tshs. 100,000,000/= (Shilings One Hundred Million); whether the trial court was justified to award the said amount.

I am quite aware of the authorities regarding the interference of the award of damages by the Appellate court. In Davies Versus Powell Duffryn Associated Collieries Ltd 1942 ALL ER 65 at page 664 and 665 Lord Wright said as under:-

> "In effect the court before it interferes with an award of damages should be satisfied that the judge has cited on a wrong principle of law or has misapprehended the facts or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heartily against the attacked if the Appellate court is to interfere whether on the ground of excess or insufficiency."

In the case of Jenkins Versus Richard Thomas and Another [1961] 2 All ER 15 at P 18, it was held as under:-

> "Save in exceptional circumstances, the rule is that, for better or for worse, the settlement of the trial is once and for all"

I am very much persuaded with the above authorities and would have left the award of the trial court without interfering except for the following reasons. I am of the view that the medical report form the basis of the award as it is supposed to give a picture of the nature of injury and the kind of harm caused by a product. Failure by the Respondent to tender in court medical records during the admission in hospital and the discharge, leaves a vacuum on the medical condition of the Respondent, and one would have thought that the medical record would have enlightened the court on the actual medical condition of the Respondent. The Respondent kept away from the court a vital and important document.

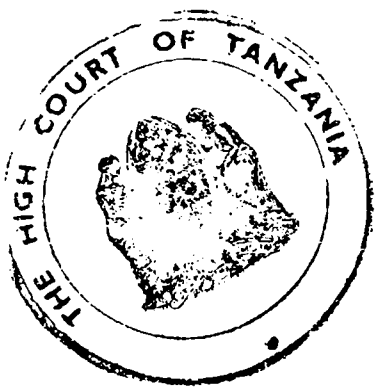
In view of that I feel duty bound to interefere with the award. The award of Tsh. 5 million damages is therefore reduced to nominal damages of Tsh. 500,000/= (five hundred thousand) in view of what I had stated above, the Appeal is hereby allowed only to that extent.

With regards to the cross appeal, it is my finding that the appeal has no basis. As pointed out earlier, though the Respondent suffered damage, the extent and the nature of the injury has not been set out. The Respondent/Appellant has not shown any basis for the

justification of the award of damages of 100,000,000/= shilings. Given the nature of the evidence on record the Respondent (Appellant in the cross appeal) was entitled to only to nominal damages. The Respondent in her testimony stated that she was hospitalised for two days. No medical records were produced on the nature of injuries suffered, treatment received tests conducted etc.

As stated when reviewing the record in respect of the main appeal, the clinical record during the Respondent's hospitalisation was absolutely necessary.

I am of the view that Respondent has shown no basis to justify the cross appeal. The court should not be turned into a treasure hunt path. The cross appeal is hereby dismissed with costs.



SAUDA MJASIRI

JUDGE

SEPTEMBER 20, 2006.

Delivered in Chambers this 21st day of September in the absence of the Appellant and Respondent and in the absence of Mr. Tarimo and Mr. Njulumi Advocates for the Appellant and Respondent.

SAUDA MJASIRI

JUDGE

SEPTEMBER 21, 2006.