IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO 78 OF 2014

COCA COLA KWANZA LIMITED.....APPELLANT

VERSUS

CHRISTINA MRIMI.....RESPONDENT

(Appeal from the judgment and decree of the Resident Magistrate's court of Dar es salaam at Kisutu dated 25th day of April 2014 by Hon. N. Mwaseba Mwaseba, SRM)

JUDGMENT

Date of final submissions: 07/01/2015

Date of judgment: 13/02/2015

Hon. L. J. S. Mwandambo, J

The facts resulting into this this appeal arise from a class of actionscommonly known as product or manufacturersliability cases. Before the trial court the Respondent sued the Appellant claiming payment of TZS 20,000,000/= general damages for injury said to have sustained following consumption of a sprite soda claimed

to have been manufactured by the Appellant. At the end of the trial in which one witness testified for each of the parties, the trial court found the Appellant liable for the damage and entered judgment for the Respondent awarding her TZS 10,000,000/= general damages with costs. Aggrieved, the Appellant preferred an appeal containing six grounds of appeal whereby by and large, the Appellant criticizes the trial magistrate for holding her liable for a liability which was not sufficiently proved to the required standard. This Court is thus urged to interfere th the trial court's findings and reverse its judgment with ultimate order allowing the appeal. For the sake of nvenience and ease of reference, I reproduce the pellant's grounds of appeal as under:

1. That the trial magistrate erred both in law and fact in entering judgment and decree in favor of the Respondent without there being a proof of Plaintiff's case at required standard by the law.

2. That the trial Magistrate erred in both law and in fact in holding that the sprite drink alleged to be consumed by the plaintiff was manufactured by Defendant without there being any proof thereof.

3. That the trial magistrate erred both in law and in fact in holding that the Defendant was negligent in manufacturing the said drink without any evidence thereof.

4. That the trial magistrate erred both in law and in fact in holding that the plaintiff did consume the alleged sprite drink.

5. That the trial magistrate erred both in law and in fact in holding that the Plaintiff suffered any damage as a result of consuming the sprite drink.

6. That the trial magistrate erred both in law and in fact in awarding the Respondent with payment of general damages of Tzs 10,000,000/=.

Like in the court below, the parties in this appeal retained the services of a same advocates namely; Legal Link Attorneys for the Appellant and Respicius Didace for the Respondent. At the Court's instance Counsel filed their written submissions for and against the appeal to which I will, to the extent necessary make reference in the course of my judgment.

Upon a closer examinationof the grounds of appeal it will be clear that the first ground is a very general one cutting across all other grounds. I will accordingly deal with it later. I will thus start with ground two.

Addressing the Court in support of ground two,the learned counsel for the Appellant submittedthat. there was no evidence that the drink was a product of the Appellant which proof could have been established by examination of the bottle and confirmation by Tanzania Foods and Drugs authority (TFDA), Tanzania Bureau of Standards (TBS)and the Chief Government Chemist. Relying on the evidence of DW1 the learned Counsel submitted further that had the drink been the product of the Appellant, it could have been easily identified as such by reference toits code date showing the date on which it was produced, the machine which produced it and the manufacturer. This is so counsel the submitted, because there were several manufacturers of the drink apart from the Appellant. In reply, the Respondent's counsel was of the firm view that since the drink was sold to the Respondent in Dar es Salaam in the Appellant's exclusive distribution territory, the trial court was right in holding that the drink was manufactured by the Appellant.

In dealing with the first issue which was whether the sprite drink allegedly consumed by the Plaintiff (Respondent) was manufactured by the Defendant (the Appellant), the trial court answered it in the affirmative relying on the evidence of D.W.1 who testified that Dar es salaam was its exclusive distribution territory and therefore the drink alleged to have been consumed by the Respondent must have been its product. Having examined the record of proceedings of the trial court I do not agree with the Respondent's submission that the mere fact that the Appellant had an exclusive distribution of its products in Dar esSalaam by itself was sufficient proof that the sprite soda said to have been consumed by the Respondent was manufactured by the Appellant. In my view, in the absence of evidence that the Respondent purchased the drink at a restaurant whose existence was not established, the learned trial Magistrate strayed into an error in finding that thealleged drink was manufactured by the Appellant. This is so because apart from very wild assertions from PW1 there was no proof before the trial court that the Restaurant from which the Respondent claimed to have purchased the drink existed in the first place and if so, there was no proof that the Respondent purchased the said drink at New Mina Restaurant. Furthermore, apart from

the photographed bottle of the drink (exhibit P2) there was no sample of it taken and subjected to industrial laboratory test to confirm that it was indeed a product of the Appellant. But to cap it all, there was no evidence tendered at the trial to confirm who took the photograph and the place it was taken as well as the date on which the same was taken and witnessed by any other person. Had the learned trial Magistrate directed his mind properly to the testimony before him, he should not have made the finding he did in determining the first issue thereby arriving at a conclusion that the drink the Respondent claimed to have consumed was manufactured by the Appellant. Accordingly, Iam constrained to hold as I hereby do that the Respondent did not discharge her burden of proving that the drink she alleged to have consumed was manufactured by the Appellant. Consequently, I would allow ground two which takes me to ground three.

The thrust of the Appellant's counsel on this ground is and in my view rightly so, the Respondent did not discharge her burden of proving negligence to justify the finding arrived at by the trial court. Counsel referred this court to a passage in Winfield and Jolowicz on Tort by W.V.H Rogers 13th edition at page 245 which the learned author refers to

a speech by Lord Macmillan qualifyingthe application of the rule laid down by lord Atkin ***in Donoghue Vs. Stevenson [1932] A.C 562***. For his part, the learned Counsel for the Respondent submitted that negligence had been proved within the rule laid down in Donoghue's case and thus the trial Magistrate was right in holding the Appellant liable in negligence. For my part, I think the learned resident Magistrate relaxed the rule laid in Donoghue too wide as if it was a panacea for all cases involving negligence. This is so because there is nothing in the judgment that he analyzed the evidence beforehim in the light of the rule in Donoghue's case before arriving at the conclusion thatthe Appellant was negligent. For instance, assuming there was proof that the drink wasindeed manufactured by the Appellant, it was wrong for the trial court to say as itdid that the bottle containing colourless drink was opaque and thus the Respondent could not have easily seen the foreign substance she claimed to have seen after consuming it. Similarly, unlike in Donoghue's case where the ultimate consumer of a defective product succeeded in establishing the supplier, the Respondent in this appeal has failed to prove that she bought the alleged drink and from whom. The two aspects were sufficient to distinguish and thereby limit the application of the rule in Donoghue's case. Had

the trial court directed its mind properly to the facts and evidence before it in the light of the rule laid down in Donoghue's case it would have arrived at a different conclusion namely; answering the second issue against the Respondent. Be it as it may, I have already held that the drink alleged to have been consumed by the Respondent wasnot manufactured by the Appellantand the question of the Appellant being negligent falls away. In consequence, I allow ground three.

As I have already allowed grounds two and three, I need not belabor more than necessary in addressing grounds four and five. Contrary to the trial court's findings, there was no evidence before it to prove that the Respondent consumed any drink manufactured by the Appellant which could have resulted in the Respondent suffering damage. Even assuming I had held otherwise, unlike the learned trial Magistrate I am unable to link exhibits P1, P2 and P3 not only to the consumption of the drink but also the alleged damage. Indeed, it seems to me the learned trial Magistrate himself was halfheartedly about the Respondent's claims regarding consumption of the drink as well as damages. At page 7 of the judgment the trial Magistrate stated:

"...From the evidence adduced in court I ***have noticed that it seems the plaintiff drank the said sprite and it affected her to some extent*** ...."(emphasis mine).

The basis for saying so is none but the exhibits tendered which I have already held that none of them supported that finding. For avoidance of doubts, Exhibit P1 is anelectronically generated receipt from TMJ hospital bearing the name of the Respondent and the Appellant. However, the Respondent did not call any witness from TMJ hospital to testify in support of her case.In the absence of such evidence, it is hard to believe that exhibit P1 had any link with drinking the soda. Likewise, Exhibit P2 a photograph of sprite drink could hardly have any link with the Respondent drinking the soda said to have been harmful to the Respondent.. Finally, exhibit P3 said to be a written commitment from the Appellant to compensate the Respondent for the dirty drink she claimed to have consumed has nothing to do with the Appellant more so because it does not bear the name of the Appellant let alone making reference to the alleged incidence. But above all, it is not signed neither is it dated. In my view I find it

difficult to hold that the said exhibit had any evidential value to link the Appellant with the alleged drink.

Later on in the judgment the trial court made a further reference to the exhibits to justify the award of damages. This is what the trial court said at page 8:

> "The exhibits shows (sic!) That the plaintiff was taken to hospital and was treated ***and it seems she was real (sic!) feeling bad but not ascertained to what extent....***"(emphasis added).

As rightly submitted by the Appellant's counsel there was no witness from any hospital let alone TMJ who testified that the Respondent was admitted treated the illnesses complained of as a result of consuming the drink. Accordingly, the finding by the learned trial Magistrate as reproduced above had no support from the evidence on record. In consequence, grounds four and five stand allowed which takes me to ground one.

As highlighted earlier, the first ground is all encompassing and having allowed the rest of the grounds I have no difficult in upholding the Appellant's submission to the effect that most of the Respondent's allegations were left

hanging and could not have resulted in the lower court entering judgment in her favour. Had the trialMagistrate evaluated the evidence before it and directed his mind properly, he should have dismissed the suit. The Respondent could have only succeeded in proving the case founded on negligence by establishing the existence of essential ingredients in negligence namely; existence of duty of care, breach of duty and damages by evidence on the required standard. In my view, the evidence before the trial court did not establish two of the ingredients namely; that the Appellant breached any duty owed to the Defendant resulting in damages of any sum whatsoever.

Having determined all grounds in favour of the Appellant, I think I need not discuss ground six because that will be superfluous except to say that the Respondent's case at the trial was not proved to the required standard to entitle her to damages awarded or any lesser sum.

In the result and for the foregoing reasons, I am constrained to allow the appeal as I hereby do in its entirety with costs.

L.J.S Mwandambo

JUDGE

12/02/2015

Judgment delivered in Court this 13th day of February 2015 in the presence of Karoli Tarimo learned Advocate appearing for the Appellant and holding the brief of Respicius Didace Advocate for the Respondent.

L.J.S. Mwandambo

JUDGE

13/02/2015