THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-OO-CV-CS-1181-1997

1. KALEMERA GODFREY
2. KANAKULYA JOHN ::::::::::::::::::::::::::::::::::::::: **PLAINTIFFS**
3. NAMUKABYA REBECCA
(ALL MINORS SUING THROUGH
THEIR MOTHER AND NEXT FRIEND
BERNADINE MULONDO)

VERSUS

1. UNILEVER (U) LIMITED
2. EAST AFRICA INDUSTRIES LTD ::::::::::::::::**:::::::::::::::: DEFENDANTS**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The plaintiffs jointly and severally claim against the defendants general and special damages for negligence, interest and costs.

From the pleadings and evidence, the plaintiffs are children of Bernadine Mulondo alias Bernadine Zawedde who is their next Friend for purposes of this suit and through whom they bring this action against the defendants. The first defendant is a distributor of blue band margarine in Uganda.

Sometime in July 1996, the plaintiffs' mother bought a plastic yellow container of blue band margarine from a shop in her village, Mutundwe — Kampala. The shop belonged to one

Daddy Frank. It is the plaintiffs' case that after consuming the said margarine they suffered loss, damage and sickness for which the defendants are liable.

Issues:

1. Whether the plaintiffs consumed the defendants' products.
2. Whether the plaintiffs suffered any loss and damage.
3. Whether the defendants are liable for the loss and damage.
4. Remedies.

Counsel:

Mr. Stephen Mubiru for the plaintiffs

Mr. Denis Wamala for the defendants.

Issue No. 1: ***Whether the plaintiffs consumed the defendants' products,***

Issue No. 2: ***Whether the plaintiffs suffered any loss and damage.***

Learned Counsel for the defendants concedes that the plaintiffs consumed the product of the defendants; and, that they suffered loss and damage. In view of that concession, the first two issues are answered in the affirmative.

Issue No. 3: ***whether the defendants are liable for the loss and damage suffered by the plaintiffs.***

It is strongly contended that the defendants are not liable for the loss and damage suffered by the plaintiffs on the following grounds: -

(a). That no case has been made out at all in evidence, against the second defendant. That in fact, according to the evidence of PW1 Bernadine Zawedde, she was not aware that she ever sued the second defendant. That she could not recall the name of the manufacturer of the margarine and the other witnesses of the plaintiffs, including the

first plaintiff himself, made no mention whatsoever of the case against the second defendant. That the plaintiffs' complaint as brought in evidence is only against the first defendant.

(b). i. That the uncontested evidence of the defendants (DW1's testimony) shows that the reason for the margarine being unfit for human consumption was poor storage. The evidence of PW4 Onen Geoffrey, a Senior Government Analyst, also confirms that the possible reason for the spoilage was bad storage when the sample was exposed to oxidation and moisture.

ii. That the question to be answered therefore is who is liable for the bad storage. That according to DW1 Nganzi, spoilage could only have occurred during the retail process in the hands of Daddy Frank.

iii. That according to PW1 Zawedde the blue band was bought from a village shop belonging to Daddy Frank. There is no evidence of the circumstances under which the said blue band was being kept in Daddy Frank's shop except that it was stocked in shelves. That DW1 further testified that Daddy Frank has never been the defendants' agent.

iv. That the plaintiff's failure to add Daddy Frank as a party to the suit or to call him as their witness to explain the circumstances under which the margarine was being kept at his shop was fatal to the plaintiffs' claim.

c). That the plaintiffs have not made out the case that it was the margarine that caused them loss and damage.

The defendants' sole witness, Kenneth Nganzi, works for Unilever as its Supply Chain Manager. He admitted that the product in issue, the tin of blue band margarine was indeed the 2nd defendant's product. The first defendant is a distributor of the 2nd defendant's product in

Uganda. From the pleadings, the plaintiffs' claim against the 2nd defendant is founded on the manufacturer's product liability and against the first defendant as the distributor thereof.

The law of product liability is the area of law that deals with the liability of the manufacturer, wholesaler or retailer of a product for injuries resulting from that product. This includes the manufacturer of component parts of the product, an assembling manufacturer, the wholesaler, the retail store or other ultimate seller of the product, and any other party in the distributive chain, regardless of whether you actually purchased the item yourself. It is therefore immaterial that the plaintiffs are not the ones who bought the impugned product.

Learned Counsel for the plaintiffs has submitted that where a product leaves a factory through a process of manufacture and packaging that does not or is designed not to allow for its opening by an intermediary until it reaches the final consumer, then common law imposes a duty of care on the manufacturer to ensure that it does not harm the final consumer. That by reason of such manufacture and packaging, the consumer becomes proximate to the manufacturer in respect of whom therefore the latter bears a duty of care breach of which gives rise to liability of the manufacturer in negligence.

I agree.

How far the courts are prepared to extend this **'duty of care'** was decided, in part, by a decomposing snail in the leading case of ***Donohue vs. Stevenson 119321 A.C. 562.***

A summary of the facts in that case is worth being given here in as far as they are relevant to the facts in issue herein.

One August evening in 1928 Mrs. May Donoghue and a friend went out to an Italian café in Paisley near Glasgow. Mrs. Donoghue's friend bought her a ginger beer. As she poured herself a second helping, the revolting remains of a decomposing snail floated into her glass.

The unhappy combination of this nauseating sight and the impurities in the ginger beer she had already drunk produced both shock and gastroenteritis for which Mrs. Donoghue had to be hospitalized. What could she do? If it had been her friend's ginger beer he would have been able to sue the café owner. He had bought it. He had made a contract and, of course, could have sued for breach of contract. The woman, however, had not made any contract: She had been treated to the drink. Nevertheless, she sued a local beer merchant, Stevenson.

Ultimately, the House of Lords had to decide: if a company has manufactured a drink and sold it to a distributor, was it under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article was free from defect likely to cause injury to health?

To a large extent, according to ***Richard Bruce*** *in Success in Law,* 4th *Edition at* p. *355,* and I agree, the decision in this case represents the basis of the modern law of negligence. Lord Atkin lay down the basis of the present law in the doctrine of the **'neighbour'** principle in this often quoted passage:

> ***"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be — persons who are closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or omissions which are called in question."***

Applying the same principle to the instant case, PW1 Zawedde, a house wife, went to village shop and bought blue band. She took it home and stored it in a cupboard for use the following morning. The blue band was in a plastic yellow container. The following morning her school going children partook of it on bread and left for school. The children are the plaintiffs herein: Godfrey Kalemera, Rebecca Namukabya and Kanakulya John Mary. By the time the children partook of it, she was still in bed. On waking up to serve breakfast to her husband,

she opened the blue band container and it smelt rancid. She immediately thought of the health of the children who had partaken part of it that morning. She returned the same to the shop and asked for a substitute. She could not find the same size. She declined to take the smaller size but instead took a bar of soap and a packet of tea leaves and left the blue band with him.

Around 2.30 p.m. two of the children returned home: Kalemera and Rebecca. The children told her that they had had stomach pain all day long and had vomited. For that matter, they had been escorted home. She took them to a clinic. They were still vomiting. The medical personnel asked her for the blue band, she went back to the shop and collected it. He put the children on drip, administered syrups and tablets. He asked her to return them to the clinic the following day and she did.

The third child also returned home. He found her at the clinic in the evening, around 6 p.m. He too was complaining of stomach pains and was put on drip. The following day they were returned to the clinic where they continued with the treatment.

She went to the 1st defendant's factory three days after the said visit to the clinic. She explained her case and some officer offered her a carton of blue band in compensation. The factory people gave her someone to go with to Wandegeya with the container. They handed it over to a chemist. A few days later, the chemist gave her a copy of his findings which she returned to the factory.

Later, she instructed lawyers to pursue her claim. Hence this matter. The second witness, Kanakulya John Mary, was the victim of the ill-fated blue band margarine. His evidence is on all fours with that of his mother, PW1. It is therefore unnecessary to reproduce it here.
The third witness, Semakula Katamba Ronald, tendered in evidence the treatment notes of the medical personnel who attended to the children at the clinic. The medical officer was out of the country at the time.

The fourth and last witness for the plaintiffs was Onen Geoffrey, a Bio-Chemist and Senior Government Analyst at Wandegeya. They received a request to examine blue band margarine to confirm if it was fit for human consumption. They received it from Oryem William, a Logistics Officer of Unilever (U) Ltd. I take it that this is the Company Officer PW1 talked about. After analysis, he confirmed that the blue band was not fit for human consumption. He came to that conclusion because:

> ***"the peroxide value was 45 far above the recommended 10, the acid value was above 63 far above the recommended value of 0.6, the level of micro organism was above 320,000 organisms. The recommended should not exceed 3,000."***

His view was that one reason for this spoilage could have been bad storage where the sample is exposed to oxidation and moisture. He said there was no anti-oxidant activity based on this data. The report is on record as Exhibit P1.

To succeed in an action of this nature, it is incumbent on the plaintiffs to prove that there was a defect in the product latent therein at the time it left the factory; that the defect was occasioned by the carelessness of the manufacturer; and, that the circumstances were such as to place upon the manufacturer a duty to take care not to injure the plaintiff as the consumer. This much was considered in
Sendi Edward vs. Crown Beverages Ltd C. A. No. 17/2002 (C. A unreported).

As regards a manufacturer's duty of care, a manufacturer is liable for its failure to exercise due care to any person who sustained an injury proximately caused by the manufacturer's negligence in:

(i). designing the product

(ii). selecting materials (including any component products purchased from another seller that are incorporated into a finished product).

(iii). Using appropriate product processes;

(iv). Assembling and testing of the product; and

(v). placing adequate warnings on the product, which inform the user of dangers of which an ordinary person might not be aware.

Relating the above principles to the instant case, DW1 Nganzi testified that their product, margarine, is packed in varying weights in plastic containers sealed with foil and capped with a plastic lid. He explained that the product is meant to be kept airtight until it gets to the consumer. Learned Counsel for the plaintiffs has submitted that the product in issue is of such kind as creates a duty of care by a manufacturer toward a consumer by reason of its mode of packaging. I accept that submission.

As regards presence of defect in the product, I have already stated that for the manufacturer to be liable there must be proof of a latent defect in the product at the time it left the factory. This is of course a rather technical area.
It is akin to where an employee alleges that an accident was due to the failure by his employers to provide a safe system of work. It is not necessary in every case that he should plead and prove what proper system of work was. Devlin L. J. could not have put it better in ***Dixon vs. Cementation Co (19607 1 W.L.R. 746,*** considering a dictum of Viscount Simon L. C. in ***Colfar vs. Coggins & Griffith (Liverpool) Ltd [1945]A.C* 197** at p. 203 when he observed:

> ***There may be cases in which the plaintiff will not get very far with an allegation of unsafe system of work unless he can show some practicable alternative, but there***

are also cases..... .in which a plaintiff can fairly say: "If this is dangerous, then there must be some other way of doing it that can be found by a prudent employer and it is not for me to devise that way or to say what it is."

In the instant case, the evidence of PW4 Onen and that of DW1 Nganzi comes to this: that when exposed to oxidation, the product becomes rancid; that if the product were to be enriched with an anti-oxidant, during its manufacture, such an occurrence would be prevented. DW1 in fact stated that the second defendant (whom he had ever worked for according to him) was at all material time aware of this risk. It chose not to use any anti-oxidant but rather to manage it by making the packaging air-tight.

From this evidence, court is satisfied that the danger of the product going bad (rancid) as a result of oxidation was a latent defect that existed in the product at the point of manufacture only that the 2nd defendant considered it a minor risk for purposes of using an antioxidant as more full proof preventive measure compared to air-tight packaging, the 2nd defendant's preferred choice.

In a negligence claim, a plaintiff must show that a manufacturer, seller, wholesaler or other party involved in the distributive chain had a duty to exercise reasonable care in the processing of manufacturing or selling a product and failed to fulfill that duty, resulting in injury to the plaintiff. Negligence consists of doing something that a person of ordinary prudence would not do under the same or similar circumstances; or failing to do something that a person of ordinary prudence would do under the same or similar circumstances. I have already indicated that this can take the form of negligence in drawing up or reviewing plans of a product, negligence in maintaining the machines that make component parts of the product, negligence in failure to anticipate probable uses of the product, negligence in failure to inspect or test the product adequately; negligence in issuing inadequate warnings or instructions regarding the use of the product or any other aspect of the manufacturing or distribution process where due care is not used.

In the instant case, the plaintiffs have demonstrated to the satisfaction of the court that the negligence in this suit arises from the fact that the mode of packaging could not withstand the natural wear and tear involved in the distribution of the product yet they have continued to rely on it as a safe mechanism to check the risk of oxidation. It is immaterial that cases of this nature are uncommon. In all these circumstances, court is satisfied that the second defendant is liable to the plaintiffs for the loss and damage caused to them, in its capacity as the manufacturer of the product, and the first defendant as its distributor. By dealing in products manufactured by the second
defendant and marketing them in Uganda, the first defendant gave an implied warranty as to the safety of the 2,d defendant's product. It is therefore immaterial that the retailer, Daddy Frank, has not been sued. The plaintiffs were at liberty to sue him jointly with the defendants or not to sue him at all. It is trite that the plaintiff is at liberty to sue anybody he thinks he has a claim against and cannot be forced to sue somebody: ***Bahemuka vs. Anywar [19877] HCB 71.***

In any case, no evidence was adduced by the defendants or at all that **'Daddy Frank'** was storing the defendants' product in a manner that contravened the defendants' product safety regulations. It is equally immaterial that Daddy Frank was not their known agent, so long as the defendants do admit that they manufactured and put the product on the market for sale to the general public.

I would also answer the 3 issue in the affirmative and I do so.

Issue No. 4: Remedies

The plaintiffs' first prayer is for special damages in the sum of Shs.40, 000/=. It is pleaded in paragraph 15 of the plaint that they incurred expense of Shs.40, 000/= on medication and treatment.

That the plaintiffs sought medical treatment appears not to be disputed by the defendants. Even if they did, there is in my view ample evidence that they did so. The dispute is on the

amount.

Special damages must be strictly proved. However, they need not be supported by documentary evidence in all cases.
See: Kyambadde vs. Mpigi District Administration [1983] HCB 44

: Donald Egeju vs. Attorney General HCCS No. 585/90 reproduced [1994] IV KARL 157.

Applying the same principle herein, although no payment receipt was produced in support of the expense of Shs.40,000/=, in view of the unchallenged evidence that the three children were treated at a clinic for two days, I'm inclined to allow the plaintiffs' claim to that tune. I have allowed that claim.

As regards the claim for general damages these are what may be presumed by law to be the necessary result of the defendant's wrongful act. The plaintiff may not prove that he suffered general damages. It is enough if he shows that the defendant owed him a duty of care which he breached. In the instant case the plaintiffs have demonstrated to the satisfaction of the court that the defendants owed them a duty of care and that they breached it. They deserve an award of general damages.

In ***Sendi Edward vs Crown Beverages Ltd.*** Supra, the appellant bought a bottle of Mirinda-Fruity from a retailers shop. On opening to gulp down its contents, he sensed some small stones on his tongue and when he looked at the bottle, he sensed some dirt in it. On analysis, the bottle was found to contain some starch substance suspended therein which was unsafe for human consumption. The Court of Appeal awarded him Shs.15, 000,000/= in compensation against the manufacturer. Counsel for the plaintiffs would wish his clients to be compensated in the same amount.
Learned Counsel for the defendants has invited me to find that the plaintiffs' claim is frivolous. He suggested to me that in the event of non-dismissal of the suit a token sum of

Shs.100, 000/= be awarded to each of the plaintiffs.

Taking into account the defendants' conduct towards the plaintiffs, the fact that Daddy Frank consoled them with a bar of soap and a packet of tea leaves, and doing the best I can in the unique circumstances of this case, an award of Shs.3,000,000/= (three million only) to each plaintiff would, in my view, meet the ends of justice. Both awards shall attract interest at the rate of 25°k per annum from the date of judgment till payment in full.

The plaintiffs shall also have the costs of the suit.

In the result, judgment is entered for the plaintiffs against the defendants jointly and severally in the following terms:

(i). Special damages: Shs. 40,000/= (forty thousand only)

(ii). General damages: Shs. 9.000, 000/= (nine million only)

(iii). Interest on (i) and (ii) above at the rate of 25% per annum from the date of judgment till payment in full.

(iv). Costs of the suit.

Orders accordingly.

Yorokamu Bamwine

JUDGE

19/11/2008

19/11/08

Denis Wamala for defendants

Plaintiff's next friend present

Mr. Stephen Mubiru for plaintiffs

Court:

Judgment delivered

Yorokamu Bamwine

JUDGE

19/11/08