IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

HCCA NO. 44 OF 2015

ARISING FROM CHIEF MAGISTRATE'S COURT CIVIL SUIT NO. 2830 OF 2008

CROWN BEVERAGES LTD…….APPELLANT

V

SSEKIDDE NURDIN……RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant appealed the judgment and orders of HW Julia Acio , Assistant registrar dated 26.3.2015 on four grounds of appeal that I will revert to later in the judgment.

The appellant was represented by Sebalu, Lule & Co. Advocates while the respondent was represented by Makeera & Co. Advocates. Both counsel filed written submissions that I have carefully considered.

The duty of the first appellate court is to re-evaluate the evidence adduced in the trial court and arrive at its own conclusions on issues of fact and law.

It is not disputed that in June 2006, the plaintiff purchased and drank a mirinda fruity drink from Nasunna's eating place where he occasionally had his meals. Namatta Florence who served him the drink testified as PW2. Both the plaintiff and Namatta were emphatic that the plaintiff took his drink as he ate food. As he was sucking at it, he felt particles on his tongue which were also confirmed by Namatta.

The plaintiff then reported to the coordinator of Kacitta PW3 Kibuuka Wasaka who also viewed the bottle and its contents and observed particles in the drink which he then forwarded to central police, Kampala.

The letter forwarding the drink and the plaintiff is dated 12.6.2006.

The said drink was received by Ahimbisibwe Stanley PW5 government analyst on 6.7.2006 but he carried out the analysis on 29.3.2007 upon which he found that the drink was a genuine mirinda fruity that contained no poison but it contained foreign particles .

Ahimbisibwe concluded that the foreign particles could have been caused by degeneration of the drink or because it was not washed properly before filing it with soda. He did not test the foreign particle to ascertain its properties .

Counsel for the appellant faulted the trial court for concluding that there were solid particles in the drink when PW5 Ahimbisibwe the expert simply called them foreign particles.

As submitted by counsel for the appellant, the burden of proof in civil case rests on the one who asserts a fact. It was therefore incumbent on the plaintiff to prove negligence on the part of the defendant. As held in **Kalemera Godfrey and two others v Unilever ltd and another HCCS. No. 1181 of 1997m(unreported)** , it was incumbent on the plaintiff to prove that there was a defect in the product latent at the time it left the factory and occasioned by the carelessness of the manufacturer.

Counsel for the appellant argued that Ahimbisibwe left room for doubt as to the origin of the particles in the bottle . By his finding that the particles were due to degeneration , counsel argued that this was likely because the drink was opened on 10.6.2006 when the plaintiff drank it , received by the government analyst on 6.7.2006 and examined on 29.3.2007.

Counsel was of the view that degeneration was the most likely cause of the particles.

Right from the day the plaintiff observed particles in the drink and on his tongue after taking the drink, the testimony of Namatta who also confirmed she saw particles , PW3 Kibuuka Wasaka and PW6 Seargent Aliga the police officer who received the drink, runs the glaring fact that there were foreign particles in the drink when it was opened by Namatta. The same foreign particles were confirmed by PW5 Ahimbisibwe the expert.

The fact that the particles were present at the time the drink was purchased by the plaintiff means that it was incumbent on the defendant to disprove the rebuttable presumption that the manufacturer was responsible for the defect.

The defendant called no witnesses but relied one evidence in cross examination of plaintiff and his witnesses. The defendant avers in the written statement of defence that during production of its products, it discharges standard care owed to the consumer and adheres to strict quality control standards set by Uganda National Bureau of Standards.

However, no evidence of these protocols was adduced.

This means that the plaintiff discharged his duty to prove that he drunk adulterated mirinda fruity for which the defendant was liable in negligence.

The defendant is liable in the tort of negligence by a manufacturer . This tort was first recognised in **Donoghue v Stevenson** where Lord Atkins held that a manufacturer of a drink owes a duty of care to consumers of its products to supply drinks free of defects.

The trial court correctly found that the plaintiff had proved that the foreign particles were in the bottle before consumption and that this was a defect under the Donoghue v Stevenson principle . Whether they were caused by not washing the bottle is irrelevant. What is material is that they were there and the defendant had breached its duty of care to the consumer.

I now turn to the grounds of appeal

Ground one

The learned assistant registrar erred in law and in fact when she failed to properly evaluate the evidence on record thus arriving at a wrong conclusion that the respondent was negligent .

I have re-evaluated the evidence and found that the trial court properly evaluated the evidence and arrived at a correct conclusion of facts and law. Ground one fails.

Ground two

The learned assistant registrar erred in law and in fact in finding that the respondent suffered damage, inconvenience , pain and loss as a result of consuming the appellant's beverage.

The plaintiff relied on his own evidence and that of PW4 Mr. Gasaaka Senior Medical Clinical officer to prove that he suffered injuries. According to the plaintiff he felt pain in the throat after taking the drink and was treated at Nsambya hospital. Furthermore, that he is not active sexually . PW4 Gasaaka examined the plaintiff on 12.6.2006 who complained of abdominal pain but he was not anaemic. He put his suffering at 60%.

The trial magistrate found that the plaintiff suffered damage, inconvenience , pain and loss. It was counsel for the appellant's submission that there was no proof of damage or suffering as a result of taking the soda.

The trial court rightly considered that evidence by PW4 that suffering could be psychological.

The fact that he consumed the defendant's drink that had foreign particles was sufficient proof of a tort having been committed and therefore entitles the plaintiff to damages.

This ground of appeal fails.

Ground three

The learned assistant registrar erred in law and in fact in awarding excessive general damages of 10,000,000/ .

As submitted by counsel for the respondent, the first appellate court will interfere with the assessment of damages only ifit is based on a wrong principle or is so excessive or minimal that it is an erroneous estimate**. Crown Beverages ltd v Sendi Edward SCCA. No. 1 of 2005.**

After a careful re-evaluation of the evidence on damage suffered, I find that the only evidence proved was that foreign particles were in the drink part of which he drunk. Moreover, it was proved that the plaintiff did not consume any glass because there was no glass found in the drink. This means the plaintiff's suffering was psychological rather than pyhiscal as suggested by PW4 Gasaaka.

This means the learned assistant registrar over estimated the damages payable by the defendant.

I shall therefore reduce the sum awarded to 8,000,000/.

This ground of appeal succeeds.

Ground four

The learned assistant registrar erred in law and in fact when she awarded general damages for loss of business which was neither pleaded not proved.

No such damages were pleaded nor did the lower court award them.

In the result, this appeal succeeds in part.

The judgment and orders of the lower court are varied as follows.

1. The defendant shall pay the plaintiff general damages of 8,000,000/ with interest at 8% p.a from date of judgment in the lower court until payment in full.
2. The defendant shall pay ¾ of the taxed costs of this appeal and the trial in the lower court.

DATED AT KAMPALA THIS 6TH DAY OF APRIL 2017.

HON. LADY JUSTICE H. WOLAYO