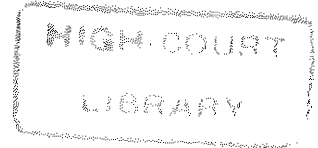




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IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NUMBER 217 OF 2019

BETWEEN

CHARLES MAIDA.....CLAIMANT

AND

CARLSBERG MALAWI LIMITED.....DEFENDANT

Before Justice Jack N’riva

Counsel for the claimant Messrs. B Mhango and Malumbo Kumwenda

Counsel for the defendant Mr L Ulaya

Ms D Nkangala, Court Clerk and Interpreter

JUDGMENT

The claimant commenced this action claiming that, due to negligence on the part of the defendant, he consumed the contaminated beer as a result of which he became sick.

During the hearing the claimant testified and called two witnesses. The defendant called one witness.

In his witness statement the claimant stated as follows:

That on 8th January 2018 together with the second witness he went to Afro Motel around Wenela Bus Depot. They sat at the counter at the bar and he ordered Carlsberg green whilst his friend ordered Carlsberg Special.

The barman opened the beverages in front of them and he started consuming the beverage in the packaged bottle. He said that he realised that there was a foul smell coming from the bottle and when he examined the bottle, there are some foreign bodies floating in the beverage, which he saw. He informed the barman about the smell, and foreign bodies in the beverage. The barman took the matter to the manager of the bar, who said that they should take the matter up with the manufacturers of the beer.

He then proceeded to Malawi Bureau of Standards with the bottle on the same day. He said that the Malawi Bureau of Standards found that the beverage had unknown bodies. He attached the report from the Malawi Bureau of Standards to his witness statement. He said then he proceeded to Queen Elizabeth Central Hospital the same day with the second witness where he said he was diagnosed with food poisoning. He said he suffered the food poisoning due to defendant's breach of duty of care to him as a consumer of their beverage.

In cross-examination he said that he was with the second witness and that the second witness was his very close friend.

He said he went to the hospital the next day around 5am. And he went with his friend the second witness. He was referred to paragraph 10 of his witness statement where he said that he proceeded to Queen Elizabeth Central Hospital the same day of consuming the beverage. He said he was confirming that statement. He was then referred to paragraph 9 of the second witness's statement where he said that on the evening of the same day Mr. Joseph Maida had drunk the beverage, he received a call from him that telling him that he was unwell. So, he rushed to collect him from his house and drove from to Queen Elizabeth Central Hospital, where he received treatment.

He said he remembered what he said. He said he went to the hospital using the second witness's car. He was referred to his witness statement in paragraph 8 where he said that they went to Malawi Bureau of Standards with the beverage bottle the same day. He said that he called him the same night and because it was

at night, he might have thought that it was the next day. He denied the assertion that he was lying. He said that he started feeling unwell the same day at 7pm. He said that he could not remember when he went to Malawi Bureau of Standards but it was the same day. He says that he remembered that he said that he went to Malawi Bureau of Standards at 1pm.

He was then referred to complaint registration form of the Malawi Bureau of Standards which showed that the date of purchase was 7 January 2019. He said that that was an error of the date. He said that he started feeling unwell 30 minutes after consuming the beer. At around 7 p.m., he said he started thinking about going to the hospital. Then he went to the hospital in the morning he said he had diarrhoea for two days.

He said he did not remember the doctor who treated him at the hospital and that he was not calling him because he did not know him and because it had taken long. He said that he did not ask his name. He said he did not take the bottle to the hospital and that the doctor did not examine the bottle. He was referred to the third paragraph of the letter from Malawi Bureau of Standards which stated that it was technically difficult for them to confirm the authenticity of the complaint as to whether or not the foreign bodies came from the manufacturer's plant. He said that he did not understand the report. He just took it to the hospital.

In re-examination, he said that he took the beer at around 1 p.m. and that it was on the 7th and that on the 8th was when he went to the hospital. He said he could not remember when he filled the form at the Malawi Bureau of Standards but it was in the afternoon. Further, he said that at 7pm was when he got more serious.

The second witness for the claimant was Edson Mkawa.

He said that on 8th January 2021, the claimant and he went to Afro Motel to drink some beer. The claimant ordered Carlsberg Green while he ordered a Special. He said that the barman opened the beverages and they started consuming them.

The claimant realised that there was foul smell coming from his bottle and they both examined the bottle and could see that it had some foreign bodies floating. Then they went to Malawi Bureau of Standards with the beverage the same day. In the evening, on the same day, he received a call from the claimant telling him that he was feeling unwell and they rushed to Queen Elizabeth Central Hospital.

In cross examination, he said that he was in court to say what happened. He was referred to his paragraph 9 and he said that that was what had happened. In the paragraph, he said that in the evening of the same day he received a call from the claimant and he rushed to collect him and drove him to Queen Elizabeth Central Hospital.

The third witness was Humphrey Chimwere who was the barman at the bar where the alleged contaminated beer was purportedly consumed. He said on 8th January 2019, the first and second witnesses came to Afro Motel and ordered beverages. He said he opened both bottles and were sealed. Then the claimant realised that there was a foul smell coming from the bottle. They all examined the bottle and saw that there were some foreign bodies floating. Then they took the bottle to Malawi Bureau of Standards. He said that he believed that the claimant suffered great illness and pain as a result of the defendant's breach of duty to 'me as a consumer of their beverage.' [sic]

In cross-examination, he said he worked as a barman for 3 months. He said that it was impossible to re-cap a bottle. He said it was impossible because 'it was food'. He said it cannot happen for one to re-cap a bottle.

The witness for the defendant was Elias Kachere, the defendant's Quality Assurance Manager. He said that his job was basically to ensure that the finished product is up to required specification. Said the first step is to analyse raw materials taken from various suppliers. The sample is taken from each of those raw materials and undergo rigorous testing to avoid unnecessary materials being

accepted. If a sample passes this test, large consignment is ordered from the suppliers. Eventually a final analytical test on the samples is taken so that they are to their required specifications. He said that some of the raw materials for beer production are malt, rice, sugar, caramel, and water from Blantyre Water Board.

The initial stage in the beer production, he said, was brewing. He said that brewing comprises further subdivisions, which are milling, mashing, mash filtration and wort boiling. He said that in all those stages, they take analysis and after producing wort, they also undertake a full analysis to ensure that all parameters are in line with the required specifications. He went on to describe the brewing processes including processing, fermentation, filtration and packaging and bottling in relation to the case in.

In relation to the present case, he said that it was significant to note that the returned bottle was opened, and that that was confirmed by the Bureau of Standards representative who brought the complaint to the breweries for consultation. He said that the alcohol percentage and colour of the product was also different compared to the retention sample that was analysed in the presence of the Malawi Bureau of Standards representative. He said that if the beer was contaminated during the manufacturing process at their factory, the alcohol percentage and the colour of the contaminated beer would have matched their retained product which is always kept as a control product. He, therefore, said that in the premises it was more likely than not that the contamination of the beer took place after it had left the factory through tampering.

In cross-examination, he said that he had an office and that is not alone in the office. He said he had some junior staff that he supervises namely quality team leader, microbiologist, lab technician and lab assistants. He said that he supervises the lab technicians. He said that the beer is subjected to pressure to keep out oxygen which could spoil the beer since oxygen aids growth of microorganisms. He said that the retention sample is what they collect from every batch that is produced. He said the aim of the retention sample is to check the

ageing of the product and for comparisons with complaint products. He said that if the contamination took place at the brewery the colour of the alcohol content of the complaint and the retained sample would have matched. He did not agree that oxygen changes colour of the product. He said that “most likely” was not the same as “not possible” and said that it was possible that contamination could have happened at the brewery. He said that he saw the foreign bodies in the bottle. He said the foreign body was not tested but the beer was tested. He said that they have had complaints before; others were genuine and others were not.

During the hearing it became apparent that the issue for determination is whether the claimant had proved that he suffered injuries after consuming defective beer and whether the defective beer was as a result of negligence on the part of the defendant

In his submissions the claimant quoted Mwaungulu J, as he then was, in *William Kanjira v Carlsberg Malawi Limited and Alliance General Insurance Company Limited* Personal Injury Case number 932 of 2011 where the learned Judge said that where the product is out of control of the manufacturer evidence of the manufacturer’s acts or omission is demonstrated by establishing that at the point of consumption the product was defective at the point of manufacture or when the manufacturer was in control of the product. That is the point. The question in each case is whether the claimant has given sufficient evidence to justify the inference of negligence against the manufacturer.

The claimant argued that he had adduced sufficient evidence to show that the contamination to the beverage that he partook was at the hands of the defendant.

The defendant argued that the claimant merely brought evidence that the claimant drank Carlsberg Green beer with foreign bodies; he did not demonstrate what the defendant did or did not do that which a reasonable manufacture would have done or not that caused the beer to be contaminated.

I believe that both parties have summarised the law on negligence.

Manufacturers of goods owe consumers of the goods a duty of care that the goods that they manufacture should not injure them. Therefore, the manufacturer does not have to do acts or omit to do acts that would result in injury to the consumers. In the matter that is before this Court, the defendant has a duty to ensure that its product does not cause harm or injury to consumers. In relation to the complaint that is in this Court, the defendant must not do acts that would damage the final product-the beer. In the context of the allegation in this matter, the duty of the defendant is to ensure that its product does not contain deleterious objects that would damage the beer or cause injury to the consumers.

With this background, the claimant had to show that the contamination to the beer was done to the beer while it was in the control of the defendant. One has to show that there have been no other intervening factors or that it is only the defendant whose acts or omission would have caused the defect.

There are several issues in this matter that leave a lot to be desired in as far as the question of proof of negligence is concerned. For example, as to the time when the claimant went to the hospital, there are three versions from what the witness and his witness told the Court. The first is that he went to the hospital immediately after his visit to Malawi Bureau of Standards. He said he went to the Bureau around 1pm. Yet the other version is that he went to the hospital at night. And the other vision is that he went to the hospital the following morning. Then there is the question of the date when he reported to the Malawi Bureau of Standards. Elsewhere, he said that he reported on the 8th of January 2019. Elsewhere he said that he reported to the Malawi Bureau of Standards on 7th January 2019 and went to the hospital the next day, on 8th January 2019. The evidence is, simply put, inconsistent. Be that as it may, the evidence of the claimant falls short of showing that the contamination to the beer, if at all, occurred while the product was in the control of the defendant.

As counsel for the defendant argued, that although the claimant's witnesses tried to show that it is impossible for the beer to be tampered with, that was contrary to the evidence the claimant gave to Malawi Bureau of Standards and the evidence of the defence witness. He said the document from Malawi Bureau of Standards suggested that the beer was most likely tampered with. The defence witness testified that the sample of beer that the Malawi Bureau of Standards brought was different from the retained sample.

It was not conclusive from the evidence that the contamination of the beverage was while it was in control of the defendant. The evidence was less probable.

On that point, although counsel for the claimant argued that this line of questioning was merely speculative, the third claim witness was very defensive. Thematically, his theory was that the beer could only be contaminated while under the control of the defendant. He insisted that it was impossible for contamination to take place after a beer has left the defendant's control. The reason he gave was that it was impossible for one to open the bottle and close it again with a crown. During the short cross-examination, the witness was quite defensive as if he was the one being accused of tampering with the beer. Suffice to say that I was not convinced that after leaving the brewery, no one can open and re-crown a beer bottle. The witness said that the bottle cannot be opened and re-capped because it is food. I failed to appreciate that reasoning.

All in all, the point is that the claimant hardly established that the defendant was responsible for the contamination of the bottle in question.

Apart from that, the evidence of the first and second claim witnesses was full of inconsistencies as I have demonstrated earlier in the determination. This was especially on the time and day they went to the hospital. It is, however, unnecessary to deal with that issue. This is because the immediate past finding

solves the issue of the claim against the defendant. Neither is it necessary to deal with the issue of sickness the claimant claims to have suffered as well the issues of medical report.

In summary, the claimant has not shown that the defendant breached the duty of care it owed the claimant, as a consumer.

The claim is dismissed with costs.

MADE the 17th day of December, 2021

A handwritten signature in black ink, appearing to read 'J N'RIVA', written in a cursive style.

J N'RIVA

JUDGE