



**East Africa Breweries Limited v Masinde & another (Civil Appeal  
E521 of 2021) [2024] KEHC 3361 (KLR) (Civ) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3361 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E521 OF 2021**

**AN ONGERI, J**

**MARCH 22, 2024**

**BETWEEN**

**EAST AFRICA BREWERIES LIMITED ..... APPELLANT**

**AND**

**OSCAR MASINDE ..... 1<sup>ST</sup> RESPONDENT**

**MOHALE LIMITED T/A SHEEBEEN ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. D. W. Mburu  
(SPM) in Milimani CMCC No. 1926 of 2012 delivered on 23/7/2021)*

**JUDGMENT**

1. The 1<sup>st</sup> respondent was the plaintiff in Milimani CMCC No 1926 of 2012 where he sued the appellant and the 2<sup>nd</sup> respondent seeking general damages for pain and suffering and special damages of Kshs 3,580/= together with costs and interest for injuries the 1<sup>st</sup> respondent sustained on 7/10/2011 when he consumed tusker malt lager containing a foreign matter at the 2<sup>nd</sup> respondent's restaurant.
2. The 1<sup>st</sup> respondent's case was that he took the bottle of beer to the Kenya Bureau of standards for analysis on 19/10/2011.
3. He said he suffered nausea, abdominal discomfort, diarrhea and vomiting as well as psychological trauma as a result of consuming the contaminated beer.
4. The respondent produced the report from the Kenya Bureau of Standards which showed that the bottle of beer was contaminated.
5. The appellant and the 2<sup>nd</sup> respondent denied the 1<sup>st</sup> respondent's claim.



6. The trial court found that the respondent proved his case to the required standard and found the appellant and the 2<sup>nd</sup> respondent severally liable for the loss and injury suffered by the 1<sup>st</sup> respondent.
7. The trial court awarded general damages of Kshs 300,000 and special damages of Kshs 2,580/= with costs and interest.
8. The appellant appealed to this court on the following grounds;
  - i. That the honourable learned magistrate erred in law and in fact in failing to take into account the evidence presented by the appellant detailing the process leading to the production of its products, which process was intended to ensure that the products remain uncontaminated, thereby arriving at the conclusion that the appellant failed to demonstrate that the production of its product was fool proof.
  - ii. That the honourable learned magistrate erred in law and in fact in failing to appreciate the fact that the appellant was denied the opportunity to conduct any investigations in view of the fact that the impugned product was never presented to it for analysis, considering the fact that no other complaints had ever been received from the tusker malt manufactured in the same batch.
  - iii. That the honourable learned magistrate having found that he who alleges must prove erred in law and in fact in failing to appreciate the fact that the respondent had failed to prove that he had consumed any tusker malt, noting that the impugned bottle was unopened at the time of examination, and in that regard finding the appellant liable on the basis of lack of evidence on the part of the 2<sup>nd</sup> respondent disproving the evidence of the 1<sup>st</sup> respondent.
  - iv. That the honourable learned magistrate erred in law and fact in failing to appreciate the facts that KEBS was not mandated to undertake any tests under the Standards Act and that the test report submitted by KEBS was therefore ultra vires and of no consequence.
  - v. That the honourable learned magistrate erred in law and in fact by failing to appreciate the fact that the medical evidence tendered was inconclusive/not sufficient to prove any injury suffered by the 1<sup>st</sup> respondent in view of the negative test returns.
  - vi. That the honourable magistrate consequently erred in law and in fact in failing to take into consideration the totality of the evidence tendered and consequently arriving at a decision not supported by the facts and evidence on record.
9. The parties filed written submissions as follows; the appellant submitted that its witness Mr. Wilfred Gichovi testified that the composition and nature of beer is such that it does not allow disease carrying micro-organisms to grow in the beer. This is due to the low PH and presence of carbon dioxide in the beer. He explained the process of cleaning of the bottle, electronic inspection and pasteurization that keeps the drink suitable for consumption for a period up to six months.
10. It was the appellants submission that before the product reaches the consumer it passes through a long chain of distribution and at each level the parties responsible are mandated to undertake inspections to ensure that the product is in good quality. The above-named processes do not leave room for any impurities to pass through particularly those that are visible to the eye. Further at no point did they receive any other complaints from other consumers with regards to contaminated beer during that period.
11. The appellant submitted that the drink was not presented for analysis, they could not ascertain if the bottle was tampered with which was crucial and unfortunately KEBS could not ascertain the same.



The appellant argued that they could not have reasonably been expected to conduct investigations into a matter that was not brought to its attention.

12. The appellant further submitted that the 1<sup>st</sup> respondent testified that he had drunk other bottles of beer. The other bottles were never presented as evidence and the 1<sup>st</sup> respondent only fell ill after noticing the foreign object in the unopened bottle. The appellant argued that it was necessary that the bottles be produced for analysis as one does not fall sick merely by looking at something and in support cited *Serulo Stephen & 2 others v Coca-Cola Company & 2 others* [2021] eKLR, the Court dismissed a claim for compensation stating as follows;

“The plaintiffs in this case did not ensure that the evidence, the bottle and contents were secured and the same submitted for analysis. They also did not prove that there was contamination.”
13. The appellant submitted that the 1<sup>st</sup> respondent presented a certificate of analysis under the Standard Act Cap 498. However, the Act does not give KEBS the mandate to undertake analysis such as the one that it undertook in this case. The relevant statute that would instead apply is the *Food, Drugs and Chemical Substances Act*. In any case, even assuming KEBS had the mandate to analyze the contents, an analysis carried out on a different bottle did not and cannot imply that any other bottle had similar content.
14. The appellant acquiesced finally that, there was no witness from the medical clinic at which the 1<sup>st</sup> respondent claimed to have been treated. The 1<sup>st</sup> respondent further submitted that he underwent several tests all which returned negative and one can therefore infer that there was thus no sickness. There was no medical evidence presented to demonstrate that the 1<sup>st</sup> respondent tissue was examined and found to have any substances from the alleged beer that occasioned bodily harm. The 1<sup>st</sup> respondent was therefore unable to prove negligence in the case herein.
15. The 1<sup>st</sup> respondent alternatively submitted that he testified that he went to the 2<sup>nd</sup> Respondent's establishment, ordered and was served with food and several bottles of Tusker Malt Lager. He has produced a receipt to confirm the same. He further stated that he had consumed four of the bottles of Tusker Malt Lager served upon him by the 2<sup>nd</sup> Respondent when he noticed a foreign object in one of the unopened bottles.
16. This fact was confirmed by the management of the 2<sup>nd</sup> Respondent on the spot. He paid for the expense and was allowed to carry the unopened bottle. The expert witness confirmed through their report that KEBS received the unopened bottle which contained 'foreign matter'.
17. The 1<sup>st</sup> respondent argued that in the appellant's own words, beer is produced, distributed and sold in batches just like any other food substances. The 1<sup>st</sup> Respondent was served Tusker Malt Lager by the same restaurant in the same seating. On a balance of probabilities, the 1<sup>st</sup> Respondent consumed beer that was contaminated. As correctly noted by the trial court, there was no evidence of the contrary from the 2<sup>nd</sup> Respondent, who were better placed to explain a different version of the events.
18. The 1<sup>st</sup> respondent submitted that the trial court was correct when it noted that the mere presence of foreign objects in the beer is enough proof of contamination of the whole batch. Indeed, the foreign objects were visible to the naked eye and did not require a special analysis to be identified.
19. Further, that Section 112 of the *Evidence Act* states that in the absence of any evidence to controvert the evidence of the 1<sup>st</sup> Respondent, the same remains true. It is irrelevant that no other report of contamination was reported.



20. The 1<sup>st</sup> respondent contended that the courts have held that the analysis should be done by an independent body such as government chemist, police or KEBS. The analysis done by KEBS confirmed that there was a foreign body in the beer. This is prima facie evidence of negligence on the part of the Appellant. In support the 1<sup>st</sup> respondent cited among others the case of *Kenya Breweries Ltd v William Kipsang* [2007] eKLR- where the court dismissed the Plaintiff's suit because: upon being asked by the Defendant, they refused to submit the beer bottle to an independent body such as KEBS for safe custody and analysis, and failed to provide a scientific report of the contents at the time it was ingested.
21. He also kept a half full beer bottle in his custody for four years. The court held that the Plaintiff did not ensure that the evidence, the bottle and contents were secured and a chain of custody maintained such that he could show that what he produced in court was part of what he had drunk over four years previously.
22. The 1<sup>st</sup> respondent submitted that he testified that after leaving the 2<sup>nd</sup> respondent's establishment, he went home and fell ill. The following day he sought medical assistance from Baba Ndogo Clinic. They conducted tests and having established that he was not infected the correct normal conclusion was that he suffered poisoning resulting from taking contaminated alcohol. The totality of the evidence proved that on a balance of probabilities the 1<sup>st</sup> respondent proved their case on negligence.
23. This being the first appeal, the duty of the first appellate court is to re-evaluate the evidence of the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
24. The issues for determination in this appeal are as follows;
  - i. Whether the 1st respondent proved his case against the appellant and the 2<sup>nd</sup> respondent.
  - ii. Whether the appellant and the 2<sup>nd</sup> Respondent are liable to pay the 1<sup>st</sup> respondent the damages granted by the trial court.
  - iii. Whether the appeal should be allowed.
25. On the issue as to whether the 1<sup>st</sup> respondent proved his case against the appellant and the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent's evidence was that he had consumed some bottles when he saw a foreign matter in the bottle which he took away.
26. The 1<sup>st</sup> respondent said he suffered nausea, abdominal discomfort, diarrhea and vomiting as well as psychological trauma as a result of consuming the contaminated beer.
27. The 1<sup>st</sup> respondent submitted that the trial court was correct when it noted that the mere presence of foreign objects in the beer is enough proof of contamination of the whole batch and further that the foreign objects were visible to the naked eye and did not require a special analysis to be identified.
28. The 1<sup>st</sup> respondent maintained that the appellant was in breach of its duty of care.
29. In the case of *Donoghue v Stevenson* (1932) AER 1, the general principle on duty of care was well established by Lord Atkin who stated that;

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.” By “Neighbour” Lord Atkin was referring to “all persons who are so closely and directly affected by my act that I ought to reasonably have them in contemplation as being so affected when I am directing my mind to the acts or the omissions which are called into question.” More specifically, in reference to manufacturers



Lord Atkin states that “a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property owes a duty to the consumer to take reasonable care.”

30. In the current case, there is undisputed evidence that the 1<sup>st</sup> respondent bought the beer from the 2<sup>nd</sup> respondent, however the bottle that the 1<sup>st</sup> respondent took to the Kenya Bureau of standards for analysis on 19/10/2011 was unopened.
31. The other bottles the 1<sup>st</sup> respondent had consumed were never presented as evidence and the trial court had no basis for finding that they too contained a foreign substance.
32. The 1<sup>st</sup> respondent said he fell ill after noticing the foreign object in the unopened bottle. There is no evidence that the bottles he had consumed also contained a foreign substance.
33. The beer that the 1<sup>st</sup> respondent presented to the Kenya Bureau of Standards was unopened and not the ones he had consumed.
34. The trial court made a presumption that the beer which the 1<sup>st</sup> respondent had already consumed also had a foreign substance.
35. I find that the 1<sup>st</sup> respondent did not prove that the appellant breached its duty of care.
36. The appellants submitted that the composition and nature of their beer was such that it did not allow disease carrying micro-organisms to grow in the beer. This was due to the low PH and presence of carbon dioxide in the beer.
37. The appellant’s witness explained the process of cleaning of the bottle, electronic inspection and pasteurization that keeps the drink suitable for consumption for a period up to six months.
38. It was also the appellants evidence that that before the product reached the consumer it passed through a long chain of distribution and at each level the parties responsible were mandated to undertake inspections to ensure that the product was in good quality.
39. Further, that the above-named processes did not leave room for any impurities to pass through particularly those that were visible to the eye and that at no point did they receive any other complaints from other consumers with regards to contaminated beer during that period.
40. I find that the report from the analysis carried out on a different bottle did not and cannot imply that any other bottles the 1<sup>st</sup> respondent had consumed had similar contents.
41. The 1<sup>st</sup> respondent did not adduce evidence to prove that the unopened bottle contained disease carrying micro-organisms and even if he did, that he fell sick as a result of consumption of the same.
42. I find that the 1<sup>st</sup> respondent did not prove his case to the required standard and I allow the appeal and I set aside the judgment and decree of the trial court and I dismiss the 1<sup>st</sup> respondent’s case with no orders as to costs.
43. It follows that the 1<sup>st</sup> respondent is not entitled to the damages he awarded by the trial court.
44. Each party to bear its own costs of this appeal.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
22<sup>ND</sup> DAY OF MARCH, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent

