IN THE HIGH COURT OFMALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NUMBER 363 OF 2012

BETWEEN

FRED CHIPEMBERE.....CLAIMANT

AND

CARLSBERG MALAWI LIMITED.....MALAWI LIMITED

BEFORE: Hon Justice Jack N'riva ,Judge

Mr Chikabvumbwa of counsel for the claimant

Mr C Kambale of counsel for the defendant

Ms D. Nkangala, Court clerk

JUDGMENT

By a specially endorsed writ the claimant commenced this action alleging that on or about Friday, 5th day of May 2012, he was attending a church fundraising dinner at Mount Soche Hotel where he consumed a bottle of Carlsberg Light, an alcoholic beverage manufactured and supplied by the defendant. As he was drinking the said beverage, he experienced nausea and immediately he went to the bathroom where he vomited violently. He said that after that he felt general bodily pains, nausea, vomiting, headaches, light headedness, dizziness and diarrhoea. He claimed that he suffered the pain as a result of negligence on the part of the defendants, their servants or agents.

The claimant gave evidence to support his statement of claim.

In evidence-in-chief he said that when he ordered the drink, it was sealed and that when he opened it there was there was sound of an unopened bottle. He, however, said that the taste was "a bit off". He said he told the waiter about the issue. Suffice to say that he said that after consuming the beverage, he rushed to the

toilets where he vomited. He discovered that there was some whitish or greyish substance in the bottle. He then informed the hotel manager about the instance and the manager apologised to him for the inconvenience, trauma and humiliation that he went through. Next day he suffered diarrhoea, mild headache, general bodily pains and vomiting. On Saturday he went to a doctor who found out that he suffered gastrointesic and acute abnominal pain. He was treated and was put on a three-day bed rest.

On the next Monday, he said he received a call from Carlsberg Malawi from Towera Phiri who asked him to go and meet her for discussions.

He said that when he went to meet her they said that **an analysis** had been done and it was confirmed that the bottle had some decomposed substance.

He said that she offered him two crates of Coca Cola.

He said he asked her for a report of the analysis at the bottle and the bottle. He said that she could not give him the bottle and that they were going to send a report to him to him. He said that he was not happy when she refused to give him the bottle. He also said that he declined the two crates of Coca Cola. He said that he got a letter from Carlsberg which confirmed the said substance but denied liability.

In cross-examination by counsel for the defendant, the claimant said that he was a lawyer by profession. He said that he was in court as a an ordinary witness. He also said that he remembered that he took some lunch comprising *nsima* and beef. He further said that Dr Chipendo was his friend. He said that he did not take the contents to Dr Chipendo for analysis. He said that he did not analyse the contents but did an opinion based on what he had told him and the symptoms that he saw.

The second witness was Dr Stewart Chipendo who said that on 26 May 2012, he received a phone call from the claimant who complained about nausea, vomiting, diarrhoea, and mild headache and general bodily pains. He said that the claimant reported to him that the previous night, at Mount Soche Hotel, he had consumed a bottle of Carlsberg Light from which he noted some foreign objects. He said that the claimant reported to him that he started feeling the problems after consuming the beverage. He said that by the time the claimant reported to him he told him that he had vomited about six times and that he experienced a loose bowel motion for about four times while experiencing light headedness and dizziness. He said that he suspected that the claimant's illness could have been as a result of contaminated beer he took on 25 May 2012. He said he advised him to have a bed rest, take lots of fluids and any analgesia.

He said that he recalled that on Monday 28th May 2012, the claimant looked pale, weak and gaunt which indicated that he had been severely dehydrated although some of the earlier symptoms had improved. He said he treated him with myprodol as well as anti-diarrhoea medication. He said he advised him that he was experiencing was gastroenteritis whose many complications were dehydration and bowel perforation. He said that later he met the claimant who said that the defendant told him that the contents of Carlsberg Light had some moulds which he said confirmed his earlier suspicion and assurance to the claimant that his illness was caused by foreign objects in the bottle.

In cross-examination he said that the claimant called him and told him about his story. He said he asked him some questions and through the history in the past 24 hours, he formed the opinion that he had suffered the gastroenteritis. He said that he did not see the bottle. When he was referred to Paragraph 6 of the witness statement, he said that he made a reference to contaminated beer. This question was in response to the question whether he had seen the bottle. Asked whether he took steps to confirm his suspicion, he said he took steps to confirm the suspicion. He said he suspected gastroenteritis after the claimant told me about the symptoms.

He said that he knew that gastroenteritis could be caused by several things such as food or chemical poison and drugs. He said that he took proper history of the claimant who told him that he had a proper meal around lunch hour. He said that he told him that he had lunch consisting of *nsima* and beef. He disputed the assertion that the symptoms could be of malaria. He said that he did not know who carried out the analysis. This was in response to his paragraph 10 where he said that he again meet the claimant again who advised him that the the beer there were moulds namely fungi and other objects. He said that his evidence was not hearsay. He confirmed that he did not analyse the contents himself.

In re- examination he said that when the claimant called him, he said that he was not feeling alright. He said that it was his responsibility to find out what could have caused that. He said that he had to take his history and find out the direct cause of his situation.

In my judgement on the evidence, it is not in dispute that the beer that the claimant took was defective. It is undisputed that one of the defendant's officials confirmed this phenomenon to the claimant. From the evidence, it is further in no dispute that the claimant suffered some injuries after consuming the said drink. There was a suggestion that gastroenteritis could be caused by other factors. However, the witness stated that he made reference to the claimant's history. Much as the doctor

did not analyse the beer, which the claimant alleged the defendant withheld, he gave evidence that the beer was defective.

I find it that it is not in dispute that the claimant vomited immediately after consuming the beer and that he was later diagnosed with gastroenteritis.

The question in dispute is whether the defendant was liable for the defect.

The claimant told the Court that immediately after consuming the beer, he experienced nausea and straight away he went to the bathroom where he vomited violently. He said that after that he felt general bodily pains, nausea, vomiting, headaches, light headedness, dizziness and diarrhoea.

When he ordered the drink, he said it was sealed and that when he opened it there was sound of an unopened bottle but the taste was a bit off. He said he told the waiter about the issue. He rushed to the toilets where he vomited. He discovered that there was some whitish or greyish substance in the bottle. Next day he suffered diarrhoea, mild headache, general bodily pains and vomiting. On Saturday he went to a doctor who found out that he suffered and acute abdominal pains.

On the next Monday, he said he received a call from Carlsberg Malawi who asked him to go for discussions. He said the defendant's official said that an analysis confirmed that the bottle had some decomposed substance. The defendant, the claimant stated, offered him two crates of Coca Cola.

He said he asked her for a report of the analysis at the bottle and the bottle. He said that the defendant's official told him that she could not give him the bottle and that they were going to send a report to him to him. He said that he got a letter from Carlsberg which confirmed the said substance but they denied liability. The question one would ask is why the defendant offered the claimant the crate of Coca-Cola. Further, one would ask why the defendant declined to give the claimant the sample and the bottle. Then the defence turns around and argue that Dr Chipendo did not analyse the contents but did an opinion based on what the claimant had told him and the symptoms that he saw.

In cross-examination the second witness stated that the claimant old him his history in the past 24 hours. He said he formed the opinion that he had suffered the gastroenteritis. He said he did not see the bottle. He said the claimant made a reference to contaminated bottle of beer. He suspected gastroenteritis after the claimant told about the symptoms. He said that he took proper history of the claimant. It is true that he did not carry out an analysis of the contents of the bottle and that he did not know who carried out the analysis. Much as he did not carryout the analysis, I believe it is open to a doctor to form an opinion after being

told how a patient is feeling. I believe this should be common knowledge. A doctor would the carry out, or prescribe , a test to confirm his or her assumption. All in all, in my view, it does not seem to me that itis in dispute that the claimant suffered some sickness. Itis further not in dispute that the claimant suffered the sickness after consuming a beer manufactured by the defendant. After all the claimant vomited after finding out that the taste of the beer us not normal. After all, it is in evidence that the beer was found to be defective. There is nothing to suggest that the beer might have been contaminated whilst outside the care of the defendant. The acts of the defendant appear to be consistent with acceptance of some breach of duty.

In re- examination he it was his responsibility to find out what could have caused that. He said that he had to take his history and find out the direct cause of his situation.

Acoording to Mwaungulu J, as he then was in *Kanjira v Carlsberg (MW) Ltd & Anor.* Personal Injury Case Number 932 of 2011,

> "Where the product is out of control of the manufacturer as, for example, where it is consumed through other distributors of the product, evidence of the manufacturer's acts or omissions 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. The claimant must demonstrate that there was no intervening actions or omissions that could have caused the defect. There need not be demonstration of specific acts or omissions. Where the contents, like here, were in a container, a court will infer defects at manufacture or during the manufacturer's control where it is demonstrated that at the time of consumption or use the container was properly sealed or was improperly sealed by the manufacturer. The evidence is circumstantial and, therefore, as is the nature with such evidence, there must be a connection among the proven facts on which the only inference is that the negligence was by the manufacturer. If the evidence shows a break in the chain or leads to other possible inferences, the court may not infer negligence. In cases like the present one, where the product is distributed through retail outlets, it must be demonstrated that the defect could not have been caused at the point of distribution where the manufacturer has no control. This is achieved by evidence that the container was intact or sealed at the point of consumption."

On a balance of probabilities, there is no evidence of bottle tampering. It was sealed and the sound was not consistent with tampering. There being no evidence to the contrary, I find that the claimant has proved the allegation against the defendant. The claim succeeds. The matter shall proceed to consider damages payable to the claimant. The parties will address the Registrar on that issue.

DELIVERED the 22nd day of December 2021

J. N'RIVA

JUDGE