JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 466 OF 2019

BETWEEN

ANDREW LEKERA ……...……..…… CLAIMANT
AND

CASTEL MALAWI LIMITED …….…….. DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Namasala, Counsel for the Claimant
Mr. Mbale, Counsel for the Defendant
Mrs. D. Mtaya, Court Reporter
Mr. H. Kachingwe, Court Interpreter

JUDGMENT

Kenyatta Nyirenda, J.

Introduction

The action herein was commenced by a specially endorsed writ of summons issued on 20th June 2019. The Claimant seeks against the Defendant damages for nervous shock and negligence and costs of this action.

The case of the Claimant is that he purchased a bottle of Sobo cherry plum at Petroda Filling Station shop in Ntcheu District. It is alleged that while consuming the contents of the bottle, the Claimant found glass particles within the bottle. Allegedly, the Claimant suffered nervous shock.

The Defendant disputes the action by the Claimant. Specifically, the Defendant denies that there was negligence on its part.

Respective Statements of Case

The Claimant's statement of claim is worded as follows:

> *"1. The Defendant carry business within the jurisdiction of Malawi and in the course of their business, they manufacture and sell Sobo Cherry plum products in the knowledge and with the intention that the same should be consumed without any or intermediate of previous examination thereof and with the knowledge that the absence of reasonable care in such manufacture would or might result in damage or injury to persons consuming them.*
>
> *2. On around the 23rd April 2019 the Plaintiff purchased a well-sealed bottle of Sobo Cherry plum at Petroda Filling Station Shop in the Ntcheu District and while consuming its contents he found glass particles and as a result he suffered nervous shock.*
>
> *3. The Plaintiff believes that the nervous shock was caused to the Claimant by the negligence and/or breach of duty of the Defendant, its Servants or agents.*
>
> ***PARTICULARS OF INJURIES***
>
> *3.1 Manufacturing and selling the Sobo Cherry plum product when they knew or ought to have known that the same or part thereof contained extraneous or dangerous substances, the consumption of which would cause damage and injury to the consumer.*
>
> *3.2 Failing to take any adequate or necessary precautions in the manufacture of Cherry plum product so as to prevent any injuries or dangerous substances being in them.*
>
> *3.3 Permitting the Cherry Plum product to contain injurious substances.*
>
> *3.4 Failing to take or adequate measure whether by way of examination, inspection test or otherwise to ensure that the Cherry Plum product manufactured sold by them did not contain any injurious substances.*
>
> *The Claimant will at the trial rely on the doctrine of res ipsa loquitur for its full purport and effect herein.*
>
> ***4. WHEREFORE** the Plaintiff's claim is for:*
>
> *4.1 Damages for nervous shock.*

4.2 Damages for negligence.
4.3 Costs of this action."

The Defendant contests the action and it, accordingly, filed a defence which is couched in the following terms:

"1. The Defendant denies the contents of paragraph 1 and the Defendant pleads that:

a. It does not carry on its business with the knowledge or with the intention that its products should be consumed without any or any prior examination as alleged or at all.

b. The Defendant does not prohibit any consumer from examining its products prior to consumption.

c. Its products leave its factory ready and safe for consumption.

d. The defendant takes reasonable care in the manufacturing of its products.

2. The Defendant denies that the Claimant purchased a bottle of Cherry plum that had glass particles in it and that resulted in the Claimant's nervous shock. The Defendant avers that its products leave its factory ready and safe for consumption.

3. The Defendant denies that it breached its duty of care. The Defendant avers that it takes all reasonable care in manufacturing its products and that its products leave the factory ready and safe for consumption. The Defendant also denies that the illness or harm which the Claimant allegedly suffered was a result of negligence on the part of the Defendant and puts the Claimant to strict proof thereof.

Particulars of reasonable care taken:

i. Reasonably rigorous bottle cleaning process
ii. Reasonably efficient water filtration process
iii. Clean and well-kept syrup manufacturing environment
iv. Clean and closed bottling environment
v. Reasonable supervision of all the processes.

4. The particulars of injuries are denied.

5. The defendant refers to paragraph 3 and denies that the doctrine of les ipsa loquitur applies since it would not have been in the exclusive control of the Defendant.

6. The Defendant denies the claims for nervous shock; negligence; and costs.

7. Save as herein before expressly admitted, the Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein set forth seriatim and specifically traversed."

Burden and Standard of Proof

It is trite that a plaintiff has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities. That means that he or she must prove a fact and his or her damages by showing that something is more likely so than not, that is, 50.1% versus 49.9%: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**,

The case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence:

> "*Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done*"

The essential elements of actionable negligence are (a) a duty to take care owed to the plaintiff by the defendant, (b) a breach of that duty, and (c) damage suffered by the plaintiff resulting from the breach of duty: see **Donoghue v. Stevenson [1932] AC 562** quoted with approval by Justice Ndovi, as he then was, in **Kadawire v, Ziligone and Another [1997] 2 MLR 139** at 144, **J. Tennet and Sons Limited v. Mawindo 10 MLR 366**.

Donoghue v. Stevenson, supra, is the basis of the manufacturer's common law liability in tort to the ultimate consumer. In this case, the defendants were manufacturers of ginger-beer, which they bottled: the pursuer had been given one of their bottles by a friend who had purchased it from a retailer who in turn had purchased it from a retailer who in turn had purchased from the defendants. There was no relationship between pursuer and defendants except that arising from the fact that she consumed the ginger-beer they had made and bottled. The bottle was opaque, so that it was impossible to see that it contained the decomposed remains of a snail: it was sealed and topped so that it could not be tampered with until it was

opened in order that the contents should be drunk. The House of Lords held these facts established in law a duty to take care as between the defenders and the pursuer.

I think that the principle of the decision is summed up in the words of Lord Atkin at page 599:

> *"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 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 that reasonable care."*

The duty owed is that of reasonable care and the burden of proving negligence is on the claiamnat. In the words of Lord MacMillan at p. 622:

> *"The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer."* – Emphasis by underlining supplied

However, the claimant will generally discharge his burden of proof by showing that the product was defective and that, on a balance of probabilities, the defect arose in the course of manufacturing by the defendant.

Even if the defendant gives evidence that the quality control system of his factory complies with approved practice, there is still the possibility that one of his servants was careless and prevented that system operating correctly, in which case he remains liable: see **Grant v. Australian Knitting Mills Limited** [1936] A.C. 85, 101. However, there must be sufficient evidence that the defect existed when the product left the manufacturer's hands and that it was not caused later: see **Winfield and Jolowicz** on Tort, 14th edition, page 261.

It, therefore, follows that in the present case the burden of proof is on the claimant as the party who has asserted the affirmative to prove on a balance of probabilities that he suffered loss, injury, harm and damage as a result of what he alleges the Defendant did.

The Issues

There are three issues for determination, namely, whether or not (a) the Defendant owed the Claimant a reasonable duty to take care in manufacturing a product that was safe for human consumption? (b) the Defendant breached that duty to take care? and (c) the Claimant suffered loss or damage as a result of the Defendant's breach of its duty to take care in manufacturing its product?

The Evidence

The Claimant called three witnesses in support of his claim. CW1 was the Claimant himself. He adopted his Witness Statement and this constituted his evidence in chief. The witness statement will be reproduced in full:

> *"1. It was on 23rd April, 2019 when my brother, Henry Lekera and I were on our way back from our home village in Ntcheu district where we had gone to fulfill a family obligation.*
>
> *2. Upon arrival at Ntcheu Petroda filling station we bought soft drinks to refresh ourselves. I purchased a well-sealed bottle of Cherry plum and my brother bought a bottle of Coca-Cola.*
>
> *3. As I was consuming the Cherry plum I found glass particles inside the bottle. At this time I had drank quarter of the bottle.*
>
> *4. After discovering that the drink was containing glass particles I showed the bottle to the Filling Station Manager who confirmed presence of glass particles in the Cherry plum bottle.*
>
> *5. I was greatly disturbed, and shocked with what I drank. I stopped forthwith consuming the drink and instantly I lost my appetite.*
>
> *6. On the following day, I presented the bottle to Castel Malawi, Kanengo offices and filed a complaint. I was told to return on a later day.*
>
> *7. On return, I was given a letter dated 17th May, 2019 signed by the Plant Manager confirming presence of glass particles in the bottle. Exhibited hereto is a copy of the said letter marked **"AL 1".***
>
> *8. Whenever I am reminded of the incident I shake in fear of effects of the said Cherryplum drink and what will come later on in life as a result of that consumption."*

In cross-examination, CW1 stated that he is a regular drinker of cherry plum and he bought the cherry plum around 11 hours. He stated that he saw glass particles at the

bottom after drinking about a third of contents of the bottle. He said this was first time to find glass particles in a bottle. He confirmed that it is very rare to find glass particles in a cherry plum bottle. When asked why he didn't bring to Court pictures for court's appreciation considering that it was a rare thing, he failed to answer. CW1 stated that took the bottle to the Defendant but never got it back. CW1 confirmed that he did not suffer any sickness and that he did not go to any hospital.

In re-examination, CW1 stated that he did not suffer any sickness but he commenced the case against the Defendant because of the shock that he suffered and because he now lives in fear of possible short term or long terms effects of the glass particles.

CW2 was Mr. Lumbani Chipole. He adopted his witness statement wherein he states that sometime around April 2019 while on duty at Ntcheu Petroda Filling Station he sold a bottle of cherry plum to the Claimant. He also states that as the Claimant was drinking the cherry plum in his full view, the Claimant found some glasses lying on the bottom of the bottle. CW2 further states that the Claimant showed him the bottle and he indeed saw some glass on the bottom of the glass.

During cross-examination, Counsel Mbale asked CW2 questions regarding issuance of receipts and taking of pictures. The Q and A proceeded thus:

Q: Do you have any document or any receipt to show that you sold the bottle?

A: No. I don't have

Q: Did you take any pictures of the bottle or any video?

A: At that time, we took pictures but as at now I do not have them. But we took the pictures

Q: Who took the pictures?

A: I took the pictures and the Claimant also took the pictures

Q: So, why have you decided not to bring them?

A: It is because it has taken so long and we have since changed the phones, therefore I did not know that they would be of any use

Q: But you would agree that if you could have brought them you could have helped the Court to appreciate these objects?

A: Yes, it is true

Q: You would also agree that if had brought the receipt that would have helped the Court to appreciate that you sold the bottle?

A: Yes, it is true indeed

Q: Lastly, would you agree that you have deprived the Court of very important information?

A: I can say so because the objects were very important.. This I have realized it now

The re-examination of CW2 by Counsel Namasala will also be quoted in full:

Q: I want to ask you about your practice in that shop. The whole practice, what do you do? For example, when someone comes to buy Fanta, coke how do you sell your products? Do you issue receipt when people buy?

A: Yes we do issue receipts

Q: Should we say these receipts are issued on each and every item people buy all the time?

A: Yes, we try our best although some people do not collect their receipts they just ignore them

Q: Some receipts remain with you

A: Yes

Q: How do you keep these receipts?

A: These receipts are kept in a book that has a carbon copy

CW3 was Mr. Moffat Gogolo. His witness statement is as follows:

"1. On 24th April, 2019, I escorted the Claimant at Castel Malawi Limited, Kanengo office because he had found glass fragments in the bottle of Cherry plum he bought in Ntcheu.

2. The Claimant asked me to escort him because his brother whom he was with together as he bought the Cherry plum was returning that day to South Africa.

3. Upon meeting the Plant Manager, we were told to leave the bottle as they wanted to run some tests as per their standard procedure. We were advised to return on a later day.

4. We went back on the 17th May, 2019 and on this day the Plant Manager said that their system is free from mistakes.

5. He did not indicate whether the tests were ran or not. However, he only emphasized that Castel Malawi has a water tight quality assurance system that cannot allow glass particles to be found inside a sealed bottle.

6. The Claimant was distressed with these comments as it made him look like a busy body with no valid fears."

During cross-examination, CW3 confirmed that he was not there at the time when the Claimant bought the bottle of cherry plum. CW3 explained that the purpose of his evidence was to support the Claimant's story that he escorted the Claimant to the Defendant's offices in Lilongwe. He confirmed that when they went to Castel offices they were told that the system cannot allow glass particles to pass through.

There was no re-examination of CW3 and the Claimant closed his case.

The Defendant called one witness only. DW1 was Mr. Ndizozo Chagomerana. He is the Defendant's Packaging Line Manager. He adopted his Witness Statement which details the four stages of the bottling process, namely, Stage 1 - Water Treatment, Stage 2 - Syrup Manufacturing, Stage 3 - Bottle Washing Process and Stage 5 - Blending.

In Stage 1 (Water Treatment), the water from Lilongwe Water Board is purified (treated). Initially, it is stored in reservoir tanks and thereafter it is channeled to the water treatment plant. At the water treatment Plant, there is a tank called reaction tank so called because different chemicals are mixed with water in the reaction tank. The chemicals are added to the water in the same tank but at different times.

The second chemical that is introduced into the water tanks is (Sodium hypochlorite) chlorine whose purpose is to kill microorganisms. It is also known as a sanitizer or disinfectant.

Thereafter Nalco 71213 is added to the water. The purpose of adding the chemical is to make the sediments settle. This process is known as flocculation. The chemicals are then left to circle for an hour. Thereafter the water is tested for alkalinity and chlorine concentration. The Ph (hydrogen power) is also tested.

Then the water is passed through sand filters where sediments are filtered. At this level there is still some presence of chlorine in the water. After the sand filters, tests for alkalinity are carried out, then water is stored in semi-treated tanks where the chlorine is still present. Thereafter, the water is pumped into carbon filters where all the chlorine is absorbed by the activated carbon. When the water is tested, there should not be no trace of chlorine. Water is then pumped into polishing filters to remove any traces of activated carbon. Thereafter, the water is ready to go to the production line.

In Stage 2 (Syrup Manufacturing), the second raw material that is processed before going to the production line is sugar. The sugar is supplied by Illovo in packets of 50 kilograms. The sugar is weighed to establish the gross and net weight. The bag is opened and poured into a tank where agitation process is done.

Agitation makes the soluble sugar into a sugar solution known as simple syrup. At this time tests are done on the simple syrup to verify its taste, odour and appearance. The simple syrup is transferred into final syrup tanks through the following sieve, filter sheets to remove foreign particles like sand stones.

Concentrates or ingredients are then added to the simple syrup in the final tanks while agitating. The resultant final syrup is tested for the following: taste, appearance, odour and brix. This is followed by blending and carbonation (reducing sugar concentration and adding of carbon dioxide). The product is then sent to the filter for bottling.

Stage 3 (Bottle Washing Process) involves washing of bottles. Returnable bottles collected from the consumers and stored in our warehouse are used. The bottles are first checked by the bottle inspector. The bottle inspector removes bottles that are different from the product that is under production and broken ones before feeding them into the washer.

The bottle washer has different chambers. The first chamber is the pre-rinsing chamber where the bottles are just soaked by being sprayed with warm water at a temperature of 40°C. Then the bottles go into the first tank of caustic soda with a concentration of 2.5% minimum which is the first tank of detergents. The caustic soda temperature in this tank is set between 80^0 C-85^0 C. The bottles stay in the

caustic soda tanks for a minimum of 5 minutes. Thereafter the bottles are conveyed into another chamber of caustic soda with a concentration of 2.5% minimum but at a lower temperature of between 65^0 C and 70^0 C. A unique feature in both tanks is that there are sprays which clean the inside of each and every bottle in the chamber.

The outside of each bottle is also subjected to highly pressurized caustic soda jutting from firing jets. Any substance that may have stuck inside or outside the bottles is supposed to be washed away. Then the bottles go into the next chamber of clear water at 40^0 C. The last chamber of the washing machine is the final rinse of cold water where chlorine of 2 – 5 ppm concentration is added to sanitize the bottles. Thereafter the bottles are released from the bottle washing machine on to the conveyor belt.

Soon after the bottles land on the conveyor belt the first person to see the bottles is the bottle washer operator. He checks the quality of bottles coming from the bottle washing machine. If some bottles are dirty, it is assumed that there is a problem with the washing process. The problem is checked and rectified. Personnel from the laboratory also take a sample of the bottles from the bottle washing machine at this juncture to carry out a methylene blue test.

With the methylene blue test, a complete roll of bottles is taken from the conveyor belt for testing. The changing of the colour to blue indicates that the substances unseen to the naked eye are stuck and present in the bottle. The methylene blue test is carried after every 4 hours.

After test is to find out if there is any caustic soda residue from the bottle. Distilled water and P indicators are used. The drops of P indicators are dropped in the bottle. If there is a colour change to purple then the result is that there are traces of caustic soda in the bottles from the bottle washing machine.

If the empty bottles are found to be faultless, they are left to flow on the conveyor belt. Whilst on the conveyor belt the bottles are subjected to an electronic bottle inspector. This machine inspects all surface of the bottle by using cameras. Only bottles which have passed this inspection are left for filling and packaging.

In Stage 4 (Blending), the beverage is mixed in a machine known as the blender where carbon dioxide is also added and it is tested in the laboratory to confirm that the beverage is good. A further test for the sugar concentration in the beverage and the concentration of carbon dioxide is done by DSA and pressure gauge respectively before the beverage is filling into bottles.

Once the bottles are filled and crowned, they remain on the conveyor belt and go through another check by inspectors. The bottles go through the FBI, Full bottle inspector, whereby empty bottles, brim filled bottles and bottles with foreign material are rejected.

The witness statement concludes as follows:

> *"… As can be seen, this is a thorough process and there is no way a bottle can leave our plants with no batch number.*
>
> *Considering the defendant's through and vigorous manufacturing process as outlined above, there was no way the alleged foreign substances which the Claimant alleges were found in the drink could have originated from our plant or escape the process."*

In cross-examinations, DW confirmed that his evidence was focused on detailing how cherry plum is manufactured. Regarding the letter dated 17th May, 2019 adduced in evidence by the Claimant, DW stated that he never recalls the Defendant having a Plant Manager by the name of Hubert Middy but Hubbert Sarafat. When asked by Counsel Namasala whether the bottling process at the Defendant is 100% perfect, DW answered as follows:

> *"when we put in multiple processes it means that if there is an error there then we have another process which will check and also do that, therefore minimizing the error from existing but the errors cannot be minimized to 100%"*

In re-examination, DW reiterated that he came to Court to establish that it is highly unlikely for the Defendant's products to contain foreign materials having regard to the different stages in the bottling process.

This marked the end of the Defendant's case.

Analysis and Determination

I have considered the evidence before the Court and it is my holding that the Claimant has failed to prove his claim to the requisite standard of proof. Firstly, the Claimant has failed to surmount the first legal hurdle, namely, whether or not the bottle of cherry plum in question was manufactured by the Defendant. It was incumbent on the Claimant to prove that the bottle in question came from the Defendant's plant. Matters have not been helped by the fact that neither the statement of claim nor the evidence by the Claimant's witnesses state that the Defendant is the sole manufacturer and distributor of Sobo cherry plum products within Malawi. Additionally, the Claimant lead no evidence whatsoever by way of batch numbers,

etc, to link the bottle of cherry plum in question to the Defendant. In this regard, the question whether or not the Defendant owed the Claimant a duty of care not to cause injury to him as consumer of the said bottle of cherry plum does not arise in the particular circumstances of this case.

Secondly, it is noteworthy that the bottle of cherry plum in question was at the material time in the hands of third parties where chances of tampering is also high. This being the case, the doctrine of res ipsa loquitur cannot apply. The following observations by Topping, Ag. J in the case of **Kang'ombe v. Kasema 9 MLR 279** are pertinent:

> *"In the case of Mullings –vs- Blantyre City Council Cause Number 460 of 1978, Skinner, C.J. reviewed the effect of the doctrine of resp ipsa loquitur, upon which the Plaintiff now relies to establish negligence, for there is no express evidence on which negligence could be found. He said, and I adopt his statement:-*
>
> > *"The Plaintiff's rely on the doctrine of res ipsa loquitur. In so far as the claim is concerned this doctrine comes into play when a Plaintiff who has to prove negligence has, by his evidence, established that the apparatus whereby the injury has been caused is under the control and management of the Defendant, and that the occurrence is such as would not occur in the ordinary course of events if the Defendant used proper care; and that the occurrence itself affords reasonable evidence that there was a want of care … res ipsa loquitur, of course, is no more than a rule of evidence affecting onus."*
>
> *In this exposition of the law the learned Chief Justice was adopting the line of the reasoning in Scott –vs- London & St. Katherine Docks Co. (1865) 3 H. & C. 596. In my respectful view this is a correct statement of the law. The learned Chief Justice continued:-*
>
> > *"Where the doctrine does apply, a Court would find negligence on the part of a Defendant unless he showed he was not negligent or gave a reasonable explanation of how the occurrence took place without negligence on his part."*
>
> *The initial point to be decided is whether or not the doctrine applies. In the reported case of a Hammack –vs- White 142 E.R. 926, it is stated that the mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but the Plaintiff must give some affirmative evidence of negligence on the part of the Defendant. The point is that the doctrine of res ipsa loquitur only applies where the direct cause of the accident and so much of its surrounding circumstances as was essential to its occurrence were within the sole control and management of the Defendants so that it would not be unfair to attribute to them a prima facie responsibility for what happened (per Fletcher Moulton, L.J. in Wing –vs- London Gen. Omnibus Co. 1909 2 KB 652)."*

In a nutshell, the doctrine of res ipsa loquitor is not applicable in the present case because one of the critical conditions for it to apply has not been met, namely, that

the thing that inflicts the damage must have been under the sole management and control of the Defendant.

Thirdly, the Claimant has failed to prove that he suffered any actionable damage as a result of drinking the cherry plum. In his evidence, the Claimant confirmed that he neither suffered any sickness nor went to hospital for treatment or examination by a doctor.

On a related note, there is no evidence that the Claimant suffered nervous shock as claimed. In **Chipiliro Banda v. Southern Bottlers Limited, MSCA Civil Appeal No. 7 of 2013,** the Supreme Court of Appeal stressed the following regarding the Appellant's claim in that case for mental and psychological stress:

> *"... It is not enough that he pleaded fear about his life, mental and psychological stress. He should have gone on to proffer evidence to prove that he suffered the same. ... Otherwise we would find ourselves coming to the indefensible conclusion that all a party needs to do in personal injury cases is to allege injury/damage and it will be assumed that such was the case"*

It is important to remember that nervous shock is a medical or psychological condition that needs to be proved, particularly when regard is had to the fact that the word "shock" is not used in the sense of a mental reaction but in a medical sense of nervous shock: see **Behrens v. Bentram [1957] 1 All ER 583**, **Owens v. Liverpool [1938] 4 All ER 727** and **Felix Chilinda v. Securicor (Malawi) Limited Civil Cause No. 1243 of 2004**.

All in all, the Claimant has failed to prove that he suffered nervous shock. This being the case, one of the essential elements in an action for negligence has not been satisfied, namely, loss or damage on the part of the Claimant as a result of the Defendant's breach of its duty to take care in manufacturing its product. In the circumstances, the action by the Claimant lacks a leg to stand on.

Fourthly, the Claimant has failed to prove that his alleged shock was a direct result of his drinking of the cherry plum. It will be recalled that in **Chipiliro Banda v. Southern Bottlers Limited**, supra, the Supreme Court of Appeal held that there must be a nexus by means of scientific analysis between the alleged contaminants and the claimed illness arising from drinking the defective product:

> "*It is obvious that before one can conclude that whatever injury/damage the appellant suffered flowed directly from the Fanta there should be proof on a balance of probabilities of some nexus between the Fanta and its contaminants on the one hand and the injury/damage on the other. On the evidence before us, the Malawi Bureau of Standards [the Bureau] only tested the fanta's contaminants as to what they were. In its letter of November 25, 2009 the Bureau never went beyond describing them as food remains and*

> *moulds. It did not, in its report or in viva voce evidence state what injury/damage the contaminants are capable of causing or indeed that they caused the appellant's alleged injury/damage.*
>
> …
>
> *Dr Dzamalala on the other hand never tested the fanta's contaminants. He could not have known exactly what the contaminants were save what he might have read in the Bureau's report mentioned above. …. But because he did not test the contaminants or the Fanta it was impossible for Dr Dzamalala or indeed any doctor to determine whether or not they were the genesis of the appellant's gastroenteritis. We therefore find, just like the trial judge, Doctor Dzamalala's conclusion that the appellant's gastroenteritis was as a result of consuming the Fanta and its contaminants improbable and untenable* - Emphasis by underlining supplied

In the present case, it was incumbent on the Claimant to prove that (a) he suffered nervous shock as pleaded, (b) the drink was contaminated by the alleged foreign object, and (c) the alleged nervous shock was a result of drinking the cherry plum in question. This can only be done by means of scientific analysis as per the leading case on the subject matter, to wit, **Chipiliro Banda v. Southern Bottlers Limited,** supra. The Claimant has not been able to do what the law requires. In the premises, the Court has no other option but to conclude that the Claimant has failed to discharge his burden of proof to establish a very critical aspect of his claim, that is, that the bottle of cherry plum was contaminated as claimed.

Fifthly, unlike in the English case of **Donoghue v. Stevenson,** supra, where it was impossible for the plaintiff in that case to see that the bottle contained the decomposed remains of a snail, no evidence has been led in the present case by the Claimant as to why he failed to notice the alleged glass particles before opening the bottle and drinking from it.

Sixthly, there are matters to do with the demeanour of the Claimant's witnesses and inconsistency in their respective testimonies. The Claimant's witnesses were very unreliable. For example, CW2 informed the Court that he did not have receipt for sale of the cherry plum to the Claimant yet he maintained that he always gives receipts whenever he sells drinks and he keeps carbon copies of the receipts. In this regard, I am inclined to agree with Counsel Mbale when he submits that:

> *"It means that if he had really sold the drink herein then he should have brought the receipt. This only leads to one conclusion that the Claimant never bought the drink herein. It is abundantly clear that the bottle herein was not authentic; the claimant just wanted to take advantage to cash in on the defendant.*
>
> *Mr Chipole's demeanor also spoke of someone who seemed to just have been couched to say something which he didn't know. He is not a reliable witness."*

The issue of pictures brought to the fore serious inconsistencies between the testimony of the Claimant and CW2. The Claimant stated that he did not take pictures. On the other hand, CW2 insisted that they both took pictures. I have difficulties in understanding how the Claimant could have forgotten about taking pictures. Surely, the very fact that Counsel Mbale asked him about taking pictures could have jogged his memory. Here again. I am very much inclined to agree with Counsel Mbale that *"All these inconsistencies lead to one reasonable conclusion that the claim is fabricated."*

Conclusion

I believe I have said enough regarding why the present action has to be dismissed with costs. It is so ordered.

Pronounced in Chambers this 2nd day of March 2022 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE