CONTINENTAL RESTAURANT AND CASINO LIMITED AND ARIDA MERCY CHULU

SUPREME COURT
SAKALA, A.D.C.J.
20TH JULY AND 24TH AUGUST, 2000
S.C.Z. JUDGEMNT NO. 28 OF 2000
APPEAL NO. 77/99

Flynote
Tort - Negligence - Duty of care - breach of that duty of care - consequential damage.
Negligence - Breach of duty of care - must provide credible evidence of consequential illness to uphold the award of damages.

Headnote
The respondent, who was a magistrate was invited for lunch by the Chief Administrator at Polo Grill, a restaurant owned by the Defendant Company. The respondent was served with some mushroom soup which contained a cockroach. The respondent only realised that it was a cockroach after it was already in her mouth. Thereafter she spat it out and was unable to complete her meal. The respondent suffered from nausea and stomach pains thereafter. The High Court made an award of damages in the sum of K85,000,000.00 upon establishing a duty of care and a breach of that duty of care by the appellant. The appellant appealed against this award claiming that there was no evidence of medical attention and that the damage, if any, was merely nausea. The appellant also argued that the condition suffered by the plaintiff did not warrant an award of colossal damages.

Held:
Mild condition is generally not enough of a basis for awarding damages. The plaintiff has a duty to bring credible evidence of illness. Nothing will be awarded if no proper evidence of a medical nature is adduced. We award a sum of K2 million. Appeal allowed.

Case referred to:
(i) Donoghue v Steveson (1932) A.C. 562.

Legislation referred to:
1. Food and Drugs Act, Cap. 303.

For the Appellant: M. Mutemwa, Mutemwa Chambers.
For the Respondent: E. C. Lungu, Andrea Masiye and Company.

Judgment
SAKALA, Acting D.C.J.: delivered the judgment of the court.

This is an appeal against a judgment of the High Court awarding the Respondent, a sum of K85 million as damages for injury suffered after eating food which contained a foreign matter. For convenience, the Appellant will be referred to as the Defendant and the Respondent as the Plaintiff, the designations which they were at trial.

The Plaintiff, who is a Magistrate, was on 22nd July, 1998, together with other Magistrates,

invited for lunch by the Chief Administrator at Polo Grill, a restaurant run and owned by the Defendant Company. While at the restaurant, the Plaintiff was served with some mushroom soup. This soup contained a cockroach.

The evidence of the Plaintiff was that while she was taking her soup, she felt something hard and rough in her mouth which she mistook for a piece of mushroom, but after she pulled it out from her mouth she noticed that what she thought was a piece of mushroom, was in fact a cockroach with its legs and wings intact. The Plaintiff hereafter failed to continue with her lunch. She alerted one of the Defendant's waiters. The Plaintiff remained at the restaurant when her friends had left. One of the management staff apologized to her and offered her fresh food to cook at home, but she refused. The Plaintiff also testified that she has since continued to suffer from nausea. The Plaintiff subsequently sued the Defendant Company for damages.

The learned trial Judge identified issues for determination as to whether the Defendant company owed any duty of care to the Plaintiff and if so, whether the duty was breached and whether the breach occasioned the Plaintiff any damage. After citing the provisions of Section 3(b) of the Food and Drugs Act, Cap. 303, the Court found that the Defendant company owed the Plaintiff duty of care. The court further found that this duty was breached. The Court had no difficulty to hold that Plaintiff suffered damage or injury as a result of having been served with the soup containing a cockroach.

In determining the amount of damages to be awarded, the court noted that a cockroach is an insect known to be one of the dirtiest insects. The Court pointed out that the damages to be awarded had to take this element into account. The court also observed that the injury suffered by the Plaintiff was such that it could not be completely forgotten hence entitling the Plaintiff to aggravated damages. Although the Plaintiff did not claim for exemplary damages in her statement of claim nor endorsed it in the writ, the learned Judge was still satisfied that this was one of the cases where damages to be awarded had to take into account the element of exemplary damages. The Court awarded a sum of K85 million as damages plus costs.

Mr. LUNGU, on behalf of the Plaintiff, did not file heads of argument and indicated that he conceded to all the arguments on behalf of the Defendant Company except on quantum of damages awarded.

On behalf of the Defendant, Mr. MUTEMWA filed written heads of argument. In his brief oral submissions, Mr. MUTEMWA pointed out that the actual damage suffered by the Plaintiff was that she felt nauseatic and had stomach pains that led her not to enjoy food for a week. He submitted that there was no evidence of medical attention and that the damage, if any, was merely nausea. Counsel also submitted that the condition suffered by the Plaintiff did not warrant an award of colossal damages and that she should be entitled only to nominal damages of K500,000.00.

Counsel concluded his submissions by pointing out that in cases of this nature, medical evidence is necessary to justify the award. Alluding to the case of *DONOGHUE v STEVENSON (1),* he submitted that in that case the Plaintiff was actually hospitalised.In his brief submissions on behalf of the Plaintiff, Mr. LUNGU submitted that the evidence of the injury suffered by the Plaintiff was not challenged. He pointed out however, that if the Court had to reduce the amount of K85 million, which he conceded was on the higher side, a sum of K50 million should be awarded.

The only issue for determination in this appeal is the amount of damages. But we wish to point out that in including exemplary damages in the award, which damages were not pleaded, the learned Judge overlooked the many decisions of this court where we have said that exemplary damages should be specifically pleaded. This had always and is still the law on exemplary

damages. These damages were not pleaded here. The important point to stress, however, is that in cases of this nature, the basis of awarding damages is to vindicate the injury suffered by the Plaintiff. The money was to be awarded in the instant case not because there was a cockroach in the soup, but on account of the harm or injury done to the health, mental or physical of the Plaintiff. Thus in the *DONOGHUE* case the Plaintiff was hospitalised. Mild condition is generally not enough a basis for awarding damages.

The Plaintiff has, therefore, a duty to bring credible evidence of illness. The award in the instant case comes to us with a sense of shock as being wrong in principle and on the higher side. We want to take advantage of this case to point out that in future, nothing will be awarded if no proper evidence of a medical nature is adduced. In this instant case, the learned trial Judge flew overboard in the award of damages. Accordingly, we set the award of K85 million aside. In its place, we award a sum of K2 million. We make no order as to costs in this court.

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