

**IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 153/2014
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

BETWEEN:

KAPANSA MWANSA

APPELLANT

AND

ZAMBIAN BREWERIES PLC

RESPONDENT

**CORAM: MAMBILIMA CJ, KAJIMANGA AND KABUKA JJS;
 on 9th May, 2017 and 24th May, 2017**

**For the Appellant: Mr. C. Siatwinda, Legal Aid Counsel,
 Legal Aid Board**

For the Respondent: No Appearance

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. MICHAEL CHILUFYA SATA V ZAMBIA BOTTLERS (2003) ZR 1
2. CONTINENTAL RESTAURANT AND CASINO LIMITED V ARIDAH
MERCY CHULU (2000) ZR 128
3. DONOGHUE V STEVENSON (1932) AC 562
4. WILSON MASAUTSO ZULU V AVONDALE HOUSING PROJECT
LIMITED (1982) ZR 172

WORKS REFERRED TO:

- a. CHARLESWORTH AND PERCY ON NEGLIGENCE, 12TH EDITION
CHRISTOPHER WALTON AND OTHERS, SWEET AND MAXWELL AND
THOMSON REUTERS LONDON 2010 PAGES 405-406

This is an appeal against the Judgment of the High Court, delivered on 17th February, 2014, dismissing the Appellant's claim for damages for personal injuries and consequential losses in an action for negligence.

Facts leading to this litigation are brief and substantially not in dispute. The Appellant, sometime in January 2011 at about 09.00 hours, bought a castle lager beer from Titanic bar in Riverside, Kapiri Mposhi. The bar attendant opened the bottle of beer in his presence and gave him to drink. The Appellant told the Court below that he had consumed part of the contents when he noticed that there were some particles floating in the drink. Thereupon, he immediately informed the bar attendant who sent someone to buy milk, which he drank. The bar attendant also referred him to the Respondent's agent, Santa Flo, from where the whole consignment of beer was bought. The Appellant explained that when he went to the Santa Flo container, the manager denied any responsibility for the contamination but offered to replace the bottle of beer. The Appellant stated that he turned down the offer because he was worried about the particles he had consumed. He thereafter reported the matter to the Police who furnished him with

a medical report and he was treated for abdominal pains at Kapiri hospital.

The Appellant took his complaint to Kapiri Mposhi Municipal Council who sent the bottle of beer to the Food and Drugs Control laboratory in Lusaka for analysis. The findings issued by the Public Analyst on 10th February, 2011, some twelve days after the incident, confirmed that there was foreign matter in the contents of the bottle. The foreign matter was identified as fungal growths. The said analysis report read as follows-

**"The Director
Kapiri Mposhi Municipal Council
P.O Box 810006
KAPIRI MPOSHI**

ANALYSIS REPORT- CASTLE LAGER-KP/FS/01/11

On 21st January, 2011, the Laboratory received from Mr. William Lubemba, Environmental Health Technologist of Kapiri Mposhi District Council, Kapiri Mposhi; one (01) brown bottle containing 280 ml of liquid with some foreign matter labelled "CASTLE LAGER"

The foreign matter was identified as fungal growths.

The Food and Drugs Act 303 Section 3 (b) stipulates that any person who sells any food that consists in whole or in part of any filthy, putrid, rotten, decomposed or diseased substance or foreign matter, or otherwise unfit for human consumption shall be guilty of an offence.

**Margaret Sakala
PUBLIC ANALYST"**

Armed with these findings, the Appellant sued the Respondent claiming damages for personal injuries and consequential losses, damages caused by negligence and breach of statutory duty of care by the Respondent in the manufacturing and bottling of the castle beverage; interest; costs and any other reliefs that the Court deemed fit.

The Appellant contended in his statement of claim that after consuming the contaminated beer, he constantly visited the hospital and experienced strange growths in the mouth, which a medical practitioner found to be fungal. He further averred that attempts to resolve the matter amicably with the respondent through communication, either by phone or in writing, failed because the Respondent refused or neglected to make good the loss he had suffered. That as a result of the Respondent's negligence and breach of duty of care, the Appellant had suffered loss and damage.

The Appellant called one witness, Mr. Bwalya Chiluya (PW2) who confirmed that the Appellant bought the bottle of beer from his shop and that he consumed the contents outside the shop. PW2

testified that when the Appellant returned to show him the contents in the bottle, he saw some white particles floating inside.

On their part, the Respondent denied any wrongdoing. It was averred in the Respondent's defence that if the incidents particularised in the statement of claim were true, they had nothing to do with them. That they did not breach any duty of care nor were they negligent. That contrary to the Appellant's assertions, the Respondent's drinks and beers are carefully and properly packaged in an environment with the highest hygienic conditions and therefore, there was no possibility that a packaged beer could contain foreign matter.

The Respondent argued that if there was any foreign matter or fungal growth in the bottle, these could be attributed to reasons in which the Respondent had no role to play, namely, that either the foreign matter was introduced or grown after the bottle had been opened; or that the drink was expired or a counterfeit; or that the drink may not have been consumed immediately after opening; or that there was sabotage by unknown people after the bottle left the Respondent's control.

During trial, the Respondent's witness, Allan Bwalya (DW1), a Quality Trade Manager, admitted that they received a complaint from the Appellant over the incident, but that, the Appellant did not produce the beer bottle to enable the Respondent to identify whether the castle beer was their product and determine the substances alleged to have been found in the bottle. According to DW1, there were several countries in Africa that manufactured the castle lager brand and that some of these products were normally smuggled into the country resulting in many counterfeit products on the market. DW1 also told the Court that they visited Titanic bar and found foreign brands of castle beer. They also found counterfeits of castle beer in various parts of Kapiri Mposhi.

DW 2 further testified that with the measures that the Respondent has put in place to clean the empty bottles, it is not possible that substances can be introduced into the bottles during the brewing process. That there are machines which can detect any foreign objects in the bottles. With the evidence of this witness, the Respondent closed its case.

The Respondent filed written submissions to rebut the Appellant's claim. Its argument, in the main, was that for the

Appellant's claim of negligence to succeed, he needed to prove that the Respondent was negligent in the manufacturing, packaging and distribution of the beer in issue and that he suffered damage after consuming its contents. To support this proposition, he cited the case of **MICHAEL CHILUFYA SATA V ZAMBIA BOTTLERS**¹ where we held that-

"...negligence is only actionable if actual damage is proved, there is no right of action for nominal damage."

and a passage from Lord Reading CJ, which we cited in the case of **MICHAEL CHILUFYA SATA**¹, that-

"Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist."

Counsel argued that, the burden to prove, on a balance of probabilities, that the beer in issue was manufactured, packaged and distributed by the Respondent; and that at the time of packaging, it contained foreign matter or fungal growth rested on the Appellant. That the Appellant failed to discharge this burden because there was no evidence to show that the beer in issue was manufactured by the Respondent. That the Appellant proceeded merely on the assumption that the castle lager beer was manufactured by the Respondent. He pointed out that the bottle of

beer was never brought to the Respondent nor was it produced in Court.

Counsel also submitted that the Appellant did not provide evidence to show that he became ill. In his view, the medical report that the Appellant produced in Court did not show that he was ill, and it fell far short of the requirements set out by this Court in the case of **CONTINENTAL RESTAURANT AND CASINO LIMITED V ARIDAH MERCY CHULU**². In that case we held that-

"Mild condition is generally not enough basis for awarding damages. The plaintiff has, therefore, a duty to bring credible evidence of illness... We want to take advantage of this case to point out that, in future, nothing will be awarded if no proper evidence of medical nature is adduced."

The learned Judge in the Court below considered the evidence before her and the submissions that were advanced by the Respondent, and determined that what she needed to establish was whether the Respondent was under a duty of care to the Appellant; and if so, whether that duty had been breached as a result of which the Appellant suffered damage. The learned Judge relied on the celebrated case of **DONOGHUE V STEVENSON**³ which, she said, properly illustrates and defines the existence of this duty. She noted that the **DONOGHUE**³ case besides, adding new

jurisprudence to the law of negligence, in so far as it relates to liability of a manufacturer, also sets out the ingredients to be proved in order that liability may exist. She noted that the principles of liability, were to the effect that the party complained against should owe the party complaining, a duty of care and that a breach of this duty should be proved and that as a consequence, the complainant suffered damage.

Evaluating the evidence before her, the learned Judge found as a fact, that *Zambian Breweries Plc* owe a duty of care to its consumers such as the Appellant, who told the Court that, after consuming a bottle of castle beer which he alleged was manufactured by the Respondent, he suffered from a fungal illness.

The learned Judge observed that the Appellant had admitted that he did not take the bottle of beer whose contents he had consumed to the Respondent when he sought compensation but that the analyst's report showed that the bottle had white fungal particles. The Court took note of the Respondent's argument that the purported beer could have been a counterfeit and that the Appellant had failed to show that the product in question was packaged and distributed by *Zambian Breweries Plc*. The

learned Judge then held that while she did not dispute the findings of the Public Analyst's report, the analyst did not state that the product belonged to Zambia Breweries Plc. In her view, the Appellant's failure to go with the bottle to the Respondent made it difficult for the Court to conclude that the product was manufactured by Zambian Breweries Plc.

At the end of the day, the learned Judge concluded that while all the elements of negligence had been established, the Appellant had not established that the Respondent had manufactured the castle beer in question. This was more so, in the light of DW1's evidence that he had visited Titanic bar where the Appellant had bought the beer and found that some of the products were imported while others were counterfeit. She said that the failure by the Appellant to establish the person who manufactured the beer in question worked in the Respondent's favour. On that basis, she held that the Appellant had failed to prove his case on a balance of probabilities and she, accordingly, dismissed his action.

Being dissatisfied with the Judgment of the lower Court, the Appellant has now appealed to this Court, advancing three grounds of appeal, namely-

- 1. That the learned trial Judge misdirected herself by failing to properly balance the evaluation of the evidence and thereby fell in grave error.**
- 2. That the learned trial Judge misdirected herself by establishing that there was failure by the Appellant to establish the person who manufactured the beer in question and that this worked in favour of the Respondent thereby falling in grave error.**
- 3. That the learned trial Judge misdirected herself by stating that the Appellant failed to prove his case on a balance of probability when she agreed with all the evidence thereby falling in grave error.**

The learned Counsel for the Appellant filed written heads of argument in which he argued all the three grounds of appeal together. The kernel of his submissions, is that the learned Judge in the Court below failed to properly balance and evaluate the evidence. He contended that there was evidence on record to show that the bottle in question was bought from PW2, who in turn bought the products from the Respondent's suppliers. That consequently, the Appellant properly discharged his burden by indicating that the product was from *Zambian Breweries Plc.* That this evidence was corroborated by the testimony given by PW2. According to Counsel, the duty was, therefore, on the Respondent to bring forth evidence to show that the product was not theirs. Counsel also argued that, after finding that all the ingredients of

negligence had been proved, the learned Judge fell in grave error when she dismissed the Appellant's claim.

The Respondent did not file any heads of argument in response to the Appellant's arguments.

We have examined the evidence on record and the Judgment appealed against, as well as the submissions and the authorities relied on by Counsel. In our view, there is only one issue for determination, and this is whether the learned Judge erred in dismissing the Appellant's claim for damages in negligence, on the basis that there was no evidence to link the Respondent to the manufacture, packaging and distribution of the contaminated beer. Like Counsel, we propose to deal with all the grounds of appeal together, as they are inter-related.

From the outset, we are mindful that the grounds of appeal in this case seek to attack findings of fact made by the Court below. This Court has always been slow to interfere with findings of a trial Court that has had the benefit of hearing and seeing the witnesses. Unless, of course, as stated in the case of **WILSON MASAUTSO ZULU V AVONDALE HOUSING PROJECT LIMITED**⁴, we are satisfied that the trial Court, in its evaluation of the evidence, was

wrong in principle or did not take into account certain evidence or did in fact take into account evidence it ought not to have.

The main argument raised by Counsel, is that the learned Judge in the Court below failed to properly balance the evaluation of the evidence which showed that the contaminated beer was bought from the Respondent's dealer. Further, that after finding that all the elements of negligence had been established, the Court erred by holding that it had not been established which person manufactured the adulterated castle beer.

On the authority of the **DONOGHUE**³ case, it is trite that for an action in negligence to succeed, it must be shown that the defendant owed a duty of care to the Plaintiff; that that duty had been breached; and, that the plaintiff had suffered damage by that breach. The law of negligence also places a duty on a manufacturer of products to take reasonable care. This Court has adopted these principles, with approval, in a plethora of cases, including the ones cited by Counsel.

From the evidence on record, there is little doubt that there were some foreign particles in the bottle of castle beer that the Appellant purchased from Titanic bar. The report from the public

burden shifted to the Respondent to prove otherwise. We respectfully disagree. The law of negligence places the burden on the claimant to prove every element of the tort. We are fortified in this proposition by the learned authors of **CHARLESWORTH AND PERCY ON NEGLIGENCE^a** who state in paragraph 6-02 at page 406 of the 12th Edition that-

“During the course of a trial, whilst the state of the evidence as to some particular issue was to impose a provisional burden of proof on the defendant to rebut an inference or presumption to which the evidence gives rise, the legal burden of proof continues to rest throughout upon the claimant as the person alleging negligence.”

According to the learned authors, this means that the evidence led must allow the court to proceed beyond pure guesswork so as to reach an appropriate legal inference. In our view, this provisional burden was properly discharged by the Respondent. In the circumstances, the legal burden still rested on the Appellant to prove that he suffered injury as a result of the Respondent's breach of duty. This burden was not discharged by the Appellant.

In our view, the findings of foreign matter in the castle beer notwithstanding, the absence or failure by the Appellant to produce the actual bottle containing the fungal matter and the resultant failure to establish if the beer was a product of the Respondent were

fatal to the Appellant's case, as these went to the root of the claim. This is more so in the light of uncontroverted evidence by the Respondent that they found foreign brands of castle lager beer in Titanic Bar from which the beer was bought and counterfeit castle lager on the market in Kapiri Mposhi.

From the foregoing, we find no good reason to disturb the lower court's findings of fact. This appeal, therefore, is without merit and we accordingly dismiss it. As the Appellant is a legally aided person, we order that each party should bear their own costs.



I.C. Mambilima
CHIEF JUSTICE



C. Kajimanga
SUPREME COURT JUDGE



J.K. Kabuka
SUREME COURT JUDGE