IN THE SUPREME COURT OF ZAMBIA **Appeal No.157/2014**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

SYLVESTER MUSONDA SHIPOLO **APPELLANT**

AND

MASSTORES (PTY) LIMITED **1ST RESPONDENT**
(MASS DISCOUNTERS ZAMBIA GAME)

CHARLES AKUN EGAN **2ND RESPONDENT**

Coram: Mambilima CJ, Kajimanga and Kabuka, JJS on 9th May, 2017 and 2nd June, 2017

FOR THE APPELLANT : In person

FOR THE RESPONDENT : Mr. B. Mosha of Messrs Mosha & Company

J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to

1. **Webner v Titan Distribution, inc 267. F3d828-37 (8th cir.2001)**
2. **Price v City of Charlotte G3 F-3d 1241, 1234 (4th Circ 1996)**
3. **Mayer v Chicago Mechanical Services (citation not given)**

4. **Communications Authority v Vodacom Zambia Limited S. C. Z Judgment No. 21 of 2009**
5. **Michael Chilufya Sata MP v Zambia Bottlers Limited (2002 ZR. 1 (SC)**
6. **Georgina Mutale (T/A GM Manufacturers Limited) v Zambia National Building Society SCZ Judgment No. 5 of 2002**
7. **Wilson Masauso Zulu v Avondale Housing Project Limited [1982] ZR. 172**

Legislation and authorities referred to:

1. **Supreme Court of Zambia Act Chapter 25 of the Laws of Zambia, Rule 58**
2. **Halsbury's Laws of England Volume 78 (2010) 5th Edition Volume 78**

This is an appeal from a judgment of the High Court delivered on 10th July 2014, dismissing the appellant's claim against the respondent for damages for negligence.

The facts of this case are that on 9th October 2012, the appellant purchased a pair of slippers in the sum of K86,000.00 (now K86.00) from the 1st respondent's shop (Game Stores at Manda Hill Mall) for use during his travel to Uganda as an advance party for the Football Association of Zambia (FAZ) in preparation for the 2012 AFCON qualifier game between Uganda and Zambia. Whilst the appellant was at the 1st respondent's shop, he approached one of its workers who directed him to the sportswear section where he found half a pair which fitted him well upon trying it on. The 1st respondent's worker proceeded to the store room to collect the other half and returned with a box which he handed over to the appellant and informed him that the slippers were the last pair of his size in stock. The appellant then proceeded to the counter to pay for the slippers and left for the airport to board his flight.

The appellant testified at the hearing, that whilst on the plane, he opened the box of slippers so that he could wear them only to discover that the slippers were both for the left foot. As a result, the slippers were never utilised for their intended purpose of refreshing his feet on the plane and at the hotel in Uganda. The appellant also stated that because his feet were hurting he was compelled to walk bare footed on the plane. He, however, admitted that the floor on the plane was smooth and clean. It was also the appellant's evidence that he was laughed at on the plane by his friend Silwamba, when he informed him that he bought slippers which were both for the left foot. The appellant testified further, that the respondents were written to on two occasions regarding the matter but they never responded to the letters prompting him to commence court proceedings.

On 21st December 2012, the appellant issued a writ of summons against the respondent claiming damages for negligence in the sum of K100,000,000.00 (now K100,000.00), aggravated damages for lack of remorse, interest and costs. Subsequently, the respondents filed a defence disputing the appellant's claim.

In their defence, the respondents contended, among other things, that the transaction was subject to established trade practices requiring the appellant to satisfy himself to the quality and state of items purchased prior to concluding the sale and leaving the 1st respondent's premises. According to the respondents, the appellant had in fact duly satisfied himself of the items purchased being to his liking before leaving its premises. It was further contended that the 1st respondent sells manufacturer pre-packed products for which it cannot be held liable for mistakes in contract, if any.

Mweemba Kamela, a sales manager at the 1st respondent's shop, testified on behalf of the respondents. His evidence was that he met the appellant on or about 13th October 2012, when he presented a complaint that he bought Reebok slippers and that both were meant for the same side of the foot. However, the appellant did not come with the slippers but only the purchase slip. He testified that he advised the appellant that the 1st respondent had a company policy on the return of defective products and refunds and that he requested the appellant to return the slippers to the store so that they could exchange them with another pair or refund him but the appellant refused to do so and instead demanded the sum of K80,000,000.00 (now K80,000.00) as damages.

After considering the evidence of the parties, the learned trial judge found as a fact that the appellant bought the slippers from the 1st respondent's store, namely Game Stores at Manda Hill Shopping Mall on 9th October 2012 for K86.00 and that in the box, there were two left foot slippers instead of a normal pair. She stated that the time on the receipt showed that the appellant made the purchase at 11:09 hours when he was rushing to the airport to board a plane to Uganda whose departure time as reflected on his ticket was 11:05

hours. The learned trial judge found that it was apparent from the times on the purchase slip, the ticket and boarding pass that the appellant was in a hurry and did not check the contents of the box and took it for granted that they were the right size and correct pair that he needed.

The learned trial judge also found that upon his return from Uganda, the appellant approached the officers at the 1st respondent's shop who included the respondent's witness, Mweemba Kamela. She found that the appellant was advised by Mr. Kamela that according to their policy, he had the option of returning the slippers with the purchase slip and be either given another pair in exchange or be refunded his money but the appellant declined both options and opted to write demand letters and later commenced this action seeking for damages.

The learned trial judge went further to state that on the basis of the holding in the case of **Masauso Zulu v Avondale Housing Project Limited [1982] ZR. 172**, the appellant was required to prove the allegations that he suffered damages as a result of the respondent's negligence and that the same was aggravated by lack of remorse. She, however, found that although the appellant claimed that he had suffered embarrassment, ridicule, humiliation, pain and anguish, he had failed to prove the claims or to show that he suffered physical injury or damage to sustain an action for negligence.

It was the view of the learned trial judge that on the totality of the evidence tendered by the appellant, it was not possible to state that he suffered any damage to warrant him being awarded damages, in that the appellant had not adduced evidence to show the lower Court what kind of duty of care he was owed to avoid the damage which, if any, resulted. Further, the appellant had failed to show on a balance of probabilities that he suffered any damage or physical injury worth pointing at on which the claim for negligence could be sustained.

The learned trial judge accordingly dismissed the appellant's claims against the respondent as being misconceived and lacking merit. She, however, ordered that the appellant should return the defective slippers to the respondent with the purchase slip or receipt for a refund of the K86.00 that he paid to buy the slippers.

Dissatisfied with the above decision, the appellant has now appealed to us on four grounds contained in his memorandum of appeal which are couched in form of arguments or narrative, contrary to Rule 58(2) of the Supreme Court Rules, Supreme Court of Zambia Act Chapter 25 of the Laws of Zambia which states as follows:

> **"The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."** (emphasis added)

As rule 58(2) is couched in mandatory terms this appeal should have been dismissed on this score. However, we shall proceed to determine the appeal on its merits in the interest of justice, and considering that the appellant who was representing himself is not a lawyer.

We also note that although the appellant advanced four grounds in his memorandum of appeal, his heads of argument contain the four grounds but in summary form and an additional fifth ground. In respect of the additional fifth ground, Rule 58(3) of the Supreme Court Rules states that:

> **"The appellant shall not thereafter without leave of the court put forward any grounds of objection than those set out in the memorandum of appeal, but the court in deciding the appeal shall not be confined to the grounds put forward by the appellant.**
>
> **Provided that the court shall not allow an appeal on any ground not stated in the memorandum of appeal unless the respondent, including any person who in relation to such ground should have been made a respondent, has had sufficient opportunity of contesting the appeal on that ground."**

The respondents have contested the appellant's additional fifth ground in their heads of argument. We will, therefore, allow this ground to stand as the respondents have had sufficient opportunity to contest it.

Omitting the narrative parts, the four grounds advanced by the appellant in his memorandum of appeal can be discerned as follows:

> **"1. That the learned trial judge erred in law and fact when she found and concluded that the appellant was in a hurry and thus**

did not check the contents of the box considering the timings which were on the ticket and the receipt in that the evidence that should have [been] considered was the fact that the appellant checked the displayed slippers and tried the same after which it was confirmed that they were of the right size and appropriate for use.

2. That the learned trial judge erred in law and fact when she found and concluded that the appellant when he returned from Uganda approached the respondent on the first time with the purchase slip only upon which he was advised of the policy of the respondent which was either a refund or exchange without taking into consideration the fact of damages sustained as a result of the action of the respondent.

3. The learned trial judge erred in law and fact when she found and concluded that the appellant failed to prove the duty of care owed to him by the respondent when the same was sufficiently adduced upon the production of the receipt which was given after buying the slippers and explained the same in his testimony.

4. The learned trial judge erred in law and fact when she found and concluded that the appellant's claim could not be sustained and no damages could be awarded on the failure to produce evidence of the physical injury caused by the negligent act without taking into consideration emotional injuries the fact that the appellant indicated in his claim of statement as well in his testimony (sic) during trial having suffered physical pain, emotional pain, inconvenience and mental anguish including humiliation when he was laughed at by Silwamba and

neighbours in the Plane, and when he stepped on the floor of the plane bare footed, and when he forced himself to get back into the shoes when exchanging planes and from the airport to Kampala, at the hands of the negligent act of the respondent, of selling the appellant defective slippers which ended up not being used for the intended purpose."

The fifth additional ground of appeal contained in the appellant's heads of argument is that:

"The court below erred when it made an order that the appellant return[s] the defective slippers for a refund of a costing price which he paid for the slippers and that he pays costs for the respondents."

Both parties filed heads of argument which they entirely relied on at the hearing of the appeal. In support of ground one, the appellant submitted that the timings on the purchase slip and air ticket are of no relevance in that it is normal practice the world over where footwear is sold that only half a pair is displayed and that upon a customer trying on the footwear and being satisfied with the quality thereof, the shop attendant proceeds to package a full pair. The appellant argued that there is no second fitting or checking of the footwear and in most cases the package is sealed and given to the customer upon payment of the purchase price.

The appellant further submitted that the fact that the shop attendant stated that the slipper on display was the last pair in stock was guarantee enough that the packed slippers were of the correct sides in that only half a pair was presumed to have been in the box while the other half was the one on display for customers to fit in and thus, there was no need to check the slippers in the box. The appellant argued that the shop attendant had a duty of care to the customer to ensure that the customer is not given defective items or items which are not similar to the one already tried on by the customer.

In support of ground two, the appellant submitted that the assertion that the appellant firstly approached the 1st respondent with only the purchase slip was untrue and was only said by the respondents in order to persuade the court that they had tried to correct their wrongdoing when in fact not. To buttress this argument, the appellant referred us to his testimony in the court below where he explained that upon his return from Uganda, he went to the 1st respondent's premises on Monday 15th October 2012 with a typed letter of claim to which the 1st respondent stated they would get back to him but they never responded.

In respect of ground three, the appellant contended that supermarket sellers and vendors have a duty of care to customers over the products they market and sell. The appellant contended that the 1st respondent had a duty of care when packaging the slippers which had been tried on by the appellant.

On ground four, it was submitted that the testimony of the appellant that he was the only person who walked barefooted on the plane and hotel coupled with the fact that he was laughed at for being sold slippers which were of the same side was sufficient proof of the injuries of humiliation, embarrassment and ridicule which he pleaded in his writ of summons. The appellant argued that in his testimony he had shown that he had been inconvenienced by the respondents in that the slippers could not be utilised for their intended purpose. It was the appellant's contention that even though the floor of the plane was smooth, his barefoot walk on the plane was inconveniencing, humiliating and painful as all the other passengers were putting on foot wear.

To support his argument, the appellant referred us to the case of **Webner v Titan Distribution**[1] where it was held that the testimony of the claimant alone, if specific, may be enough to meet the burden of proving an actual injury caused by the defendant. We were also referred to the case of **Price v City of Charlotte**[2] where the court concluded that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress. We were further referred to the case of **Mayer v Chicago Mechanical Services**[3] (no citation given) where it was concluded that compensation for being inconvenienced can only be awarded if the plaintiff shows that alternative conditions prevented him from doing what he wanted to do as a result of the negligent act of the other party.

In support of ground five, the appellant submitted that the fact that the Court below ordered that the slippers be returned to the respondents was a clear indication that the respondents were found to have sold the appellant defective products and, therefore, the Court below ought to have ordered the respondents to refund the cost of the slippers with interest because the appellant never used the slippers. It was further submitted that the order made by the Court below for the return of the slippers was proof of the appellant having partially succeeded in the action and as such each party ought to have been made to bear their own costs.

In the respondents' heads of argument, Mr. Mosha submitted in response to ground one, that the lower court was on firm ground when it concluded that the appellant did not have time to check the contents of the box based on the time on the purchase slip and air ticket. The learned counsel contended that the finding of fact by the court below was based on the relevant evidence produced by the appellant, being the time on the purchase slip and the air departure time on the air ticket. He referred us to the case of **Communications Authority v Vodacom Zambia Limited**[4] where it was held as follows:

> **"The appellate court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which on a proper view of the evidence, no trial court acting correctly, can reasonably make."**

The learned counsel accordingly submitted that the findings of fact by the court below should not be reversed as they were not made under a misapprehension of fact or in a perverse manner and that any proper court acting correctly would have made the same findings.

In response to grounds two and five, Mr. Mosha submitted that the court below did not err in law and fact when it found that the appellant first approached the 1st respondent with a purchase slip and declined both options which were explained to him of either returning the slippers and getting a replacement or be refunded as per the 1st respondent's policy.

The learned counsel contended that the lower court was on firm ground when it made these findings as the appellant did not rebut the evidence during cross-examination that he was offered those options. Further, that the court below relied on the testimony of the appellant and the witness called by the respondents, whose evidence the appellant did not challenge.

Mr. Mosha also submitted that the court below did not err in law and fact when it ordered that the appellant should return the defective slippers for a refund of the purchase price which he paid for the slippers. The learned counsel contended that the court below was on firm ground when it made this order as the appellant failed to prove negligence. He referred us to the case of **Michael Chilufya Sata MP v Zambia Bottlers Limited**[5] where it was held as follows:

> **"Negligence is only actionable if actual damage is proved. There is no right of action for nominal damages."**

Mr. Mosha further contended that the fact that the court ordered the return of the defective slippers to the respondents and that a refund be given to the appellant is proof that a breach of contract was committed by the respondents and that the appellant had partially succeeded in his action. According to the learned counsel, the appellant did not plead breach of contract as rightly pointed out by the court in its judgment [at page 20, lines 13 to 15 of the record of appeal] where the trial court stated as follows:

> **"...the appropriate action is for the plaintiff to claim for his rights, if any, under the contract governing the sale. This however, has not been done by the plaintiff."**

It was further submitted by Mr. Mosha, that the lower court was on firm ground when it ordered that the appellant pays costs for the respondent. The learned counsel contended that it was trite law that the court has the discretion to award costs to a party who it deems fit. To support this argument, we were referred to the case of

Georgina Mutale (T/A GM Manufacturers Limited) v Zambia National Building Society[6] where it was held as follows:

> **"The courts' discretion to deprive a successful party of his costs must be exercised judicially, on grounds which are explicable or evident and which disclose something blameworthy in the conduct of the case".**

The learned counsel, therefore, contended that this court should not interfere with the costs that were awarded to the respondents as the conduct of the case by the court below does not disclose something blameworthy.

In response to ground three, Mr. Mosha submitted that the court below was on firm ground when it held that the appellant failed to prove the duty of care owed to him by the respondents. The learned counsel argued that the appellant was required to prove his claims and he referred us to the case of **Masauso Zulu v Avondale Housing Project Limited**[7] where it was held as follows:

> **"I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever maybe said of his opponent's case."**

Mr. Mosha also submitted that the court below was on firm ground when it relied on the **Halsbury's Laws of England Volume 78 (2010) 5th Edition paragraphs 2 and 3** which discusses negligence, duty of care and causation as follows:

> **"Negligence is a specific tort and in any given circumstances [it] is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all...**
>
> **The defendant must owe a duty of care in relation to [the] general class within which the claimant and the type of damage that has arisen fall before there can be any question of liability to the claimant in question. Where there is no such notional duty to exercise care, negligence in the popular sense has no legal consequence. However strong the facts of the claimant's particular claim, it will unless the defendant owes a duty to take care in the kind of relationship in question...**
>
> **The claimant must also prove that the defendant's wrong doing was a cause, although not necessarily the sole or dominant cause, of his injuries...**
>
> **It is a question of fact whether the defendant has failed to show reasonable care in the particular circumstances. The legal standard is objective; it is not that of the defendant himself; but that which might be expected from a person of ordinary prudence, or [a] person**

of ordinary care and skill, engaged in the type of activity in which the defendant was engaged..."

The learned counsel contended that the appellant failed to establish any of the principles outlined above. He further submitted that the appellant had failed to prove actionable negligence in accordance with the holding in the case of **Michael Chilufya Sata MP v Zambia Bottlers Limited** where the supreme court restated that there is negligence on which a cause of action does not arise and actionable negligence on the other hand, and that for actionable negligence actual damage must be proved as well as the cause of action.

The learned counsel submitted that proof of damage is cardinal to sustain and prove negligence under product liability or consumer protection. It was his contention that the appellant had failed to substantiate any of the issues that he is alleging in his appeal. Further, the appellant had failed to prove that he was owed a duty of care and that such duty was breached resulting in injury or loss to him.

In response to ground four, Mr. Mosha submitted that the lower court was on firm ground when it held that the appellant failed to show the injury sustained. The learned counsel contended that the appellant in his evidence admitted that the floor of the plane was smooth and clean and that he did not suffer any inconvenience. It was submitted that these findings by the lower court were findings of fact and we were again referred to the case of **Communications Authority v Vodacom Zambia Limited.**

The learned counsel finally submitted that the grounds of appeal advanced by the appellant lacked merit and that the findings of fact by the court below should not be reversed and that this appeal must be dismissed with costs.

In his reply to the respondent's heads of argument, the appellant submitted in respect of ground one that the respondent's argument that the trial judge was on firm ground when she relied on the time on the purchase slip and air ticket is misconceived as the time on the air ticket and the purchase slip were irrelevant to determine whether he had checked and chosen the right size and type of slippers to purchase or not. It was his contention that checking is done before giving a go ahead to the shop attendant that they are the right size and type for the event. According to the appellant, the court below ought to have taken judicial notice of the practice in the sell and purchase of footwear the world over in retail shops that customers check and try on the displayed items and after choosing the right size and type the seller goes with the item which has been checked and brings the full pair in the box. Further, in this case the seller confirmed that the slipper had been checked when he told him that the said slippers were the last pair in the shop and consequently there was no reason for him to suspect that he would be given a pair of slippers of the same side. The appellant, therefore, submitted that the findings of the court below should be reversed as they were made upon a misapprehension of facts and on evidence of the purchase slip and air ticket which was not relevant to the checking of the purchased item. To further support his argument, the appellant also referred us to the holding in the case of **Communications Authority v Vodacom Zambia Limited** which was cited by counsel for the Respondents in response to ground one.

The appellant responded to the respondents' arguments in respect of grounds two, three, four and five together. In his submissions, the appellant stated that the respondents' claim that the court below did not err in law and fact when it found that he went to the 1st respondent with a purchase slip and was informed of their policy of returning slippers is misconceived. The appellant argued that the true position is that he went to complain over the tort which had already been committed and that the slippers were his evidence which could only be disposed of after the determination of the whole case.

On the question of costs, the appellant submitted that he had successfully proven that the respondent had sold him a pair of slippers which were of the same side of the foot and as such it is the respondents who ought to be made to bear the costs of the action.

The appellant also submitted that the respondent's claim that he failed to prove his case on a balance of probabilities is misplaced in that he did not use the slippers and was made to walk barefooted and although he did not suffer any physical injury, he suffered returned. The appellant, accordingly, prayed that the court finds the court below to have erred and grant him the appeal with costs.

We have considered the record of appeal, the judgment appealed against and the submissions of both parties.

Grounds one to four attack the lower court's findings of fact. Time without number, we have stated in a plethora of cases that this court can only reverse findings of fact made by a trial judge where it is shown that such findings were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts. See for example, the case of **Communications Authority v Vodacom Zambia Limited** cited by counsel for the respondent, among others.

The gist of ground one is that the learned trial judge erred when she found that the appellant was in a hurry and thus did not check the contents of the box considering the times on the air ticket and the receipt. In advancing this ground, the appellant submitted that the timings on the receipt and air ticket are of no relevance because the normal practice worldwide is that only half a pair of footwear is displayed for trying on and upon a customer being satisfied with the quality, the shop attendant proceeds to pack a full pair. According to the appellant, there is no second fitting or checking of the footwear which in most cases is sealed and given to the customer after paying the purchase price. He further argued that the purchase slip and air ticket were not relevant to the checking of the slippers he purchased.

The contention by Mr. Mosha is that the findings of fact by the court below were based on the relevant evidence produced by the appellant being the time on the purchase slip and the departure time on the air ticket. According to the learned counsel, the findings should not be reversed because they were arrived at on the basis of the relevant evidence that was produced.

The specific findings of the lower court appear at page 16 of the record of appeal as follows:

> **"The time on the receipt shows that the Plaintiff made the purchase at 11.09 hours whilst he was rushing to the airport to board a plane to Uganda whose departure time as reflected on his ticket was 11.05 hours. From the times on the purchase slip, the ticket and boarding pass, it [is] apparent that the plaintiff was in a hurry and thus did not check the contents of the box and took it for granted that they were the right size and correct pair he needed."**

From the above excerpt, the view we take is that the learned trial judge's findings cannot be faulted in any way. They were based on the evidence before her namely, the purchase slip issued to the appellant when he purchased the slippers and his air ticket. The ticket is at pages 51-52 and the purchase slip (tax invoice) is at page 53 of the record of appeal. We are, therefore, satisfied that the findings by the learned trial judge were neither perverse nor made in the absence of relevant evidence or upon a misapprehension of fact. Contrary to the appellant's assertion, we are of the considered view that the purchase slip and the air ticket were relevant to the circumstances surrounding the purchase of the slippers by the appellant and it was appropriate for the learned trial judge to take them into consideration. We believe that under normal circumstances, a prudent purchaser would have checked to verify that he was buying the right pair of slippers before paying for them. In the view taken by the learned trial judge, this was not possible in the case of the appellant because he had no time. To this extent, we are certain that the learned trial judge was apt in concluding that the appellant did not check the contents of the box because he was in a hurry. Accordingly, there is no basis upon which we can reverse her findings. Ground one therefore fails.

In ground two, the appellant attacks the finding of the learned trial judge that when the appellant returned from Uganda, he approached the respondent with the purchase slip only upon which he was advised of the respondent's policy of either refunding or exchanging the returned item without taking into consideration the fact that he was not in any way affected by the respondent's policy in the face of damages sustained as a result of the action of the respondent. The appellant submitted that it was untrue that he approached the 1st respondent with only the purchase slip as he also went with a typed letter of claim to which there was no response in spite of the 1st respondent premising to do so.

Mr. Mosha's argument on this ground was that the lower court was on firm ground when it found that the appellant first approached the 1st respondent with a purchase slip and declined both options of either returning the slippers and getting a replacement or a refund. According to counsel, these findings were based on the testimony of the appellant and the respondents' witness. That the latter's evidence was not challenged by the appellant in cross-examination.

Based on the evidence before her, the learned trial judge found as follows at pages 16 – 17 of the record of appeal:

> **"The plaintiff approached the officers at the 1st defendant who included DW1, Mweemba Kamela, on his return from Uganda. He did not present or show them the slippers but only the purchase slip. The plaintiff was advised by DW1 that according to their policy, he had two options namely, to return the slippers with the purchase slip and be either given another pair in exchange or be refunded his money. The plaintiff declined both options and opted to write demand letters and later commenced this action seeking for damages."**

The evidence of the respondents' witness which was not rebutted by the appellant appears at pages 88 – 89 of the record of appeal as follows:

> **"You came with a receipt, you came with Mr. Chilenga whom I requested to come and join me...**
> **Yes you refused to return the slippers...**
> **We have a return policy or guarantee. We care for our clients. In the store we have over 52,000 different items and so if there is any defect we refund or exchange."**

We are, therefore, satisfied from the evidence on the record, that the learned trial judge was on firm ground in her findings. These findings were based on the evidence adduced before the lower court.

Since there is no impropriety in her findings, ground two must also fail.

Ground three is that the learned trial judge erred when she found that the appellant failed to prove the duty of care owed to him by the respondent when the same was sufficiently adduced upon the production of the receipt which was given after buying the slippers and explained in his testimony. The appellant contended that the 1st respondent had a duty of care when packaging the slippers which he had tried on as supermarket sellers and vendors have a duty of care to customers over the products they market and sell.

Mr. Mosha's argument on this ground was that the appellant was required to prove his claim in accordance with our holding in the **Masauso Zulu** case (supra). He also contended that the appellant failed to prove actionable negligence in accordance with holding in the **Michael Chilufya** case (supra). That for actionable negligence, actual damage must be proved as well as the cause of action. That the lower court was on firm ground when it held that the appellant failed to prove the duty of care owed to him by the respondent.

In her judgment at page 21 of the record of appeal, the learned trial judge found as follows:

> **"On the totality of evidence tendered by the plaintiff it is not possible to state that he suffered any damage warranting him being awarded damages. The plaintiff has not adduced evidence to show this court what kind of duty of care he was owed to avoid the damage which, if any, resulted."**

We have gone through the testimony of the plaintiff on the record. Indeed, we also find nothing in his evidence showing proof of the duty of care he was owed by the respondent, which the respondent breached. The appellant argued that proof of the duty of care was sufficiently adduced upon the production of the receipt which was given to him after buying the slippers. We do not agree. In our view, the appellant should have adduced evidence showing the duty of care the respondent owed him in the transaction, how that duty was breached by the respondent and the damage he suffered as a consequence of such breach, if his claim for negligence was to be sustained. The appellant having failed to adduce such evidence, the learned trial judge cannot be faulted for making such a finding. We consequently find no merit in ground three.

In ground four, the appellant assails the finding by the lower court that he failed to show the injury sustained. His contention was that in his evidence, he stated that he was the only person who walked with bare feet on the plane even though the floor was smooth; he was laughed at by his friend Silwamba, for being sold slippers which were of the same foot; and he had been inconvenienced by the respondents as he could not utilise the slippers for their intended purpose. According to the appellant, the foregoing was sufficient proof of the injuries of humiliation, embarrassment and ridicule which he suffered.

In supporting the lower court's finding, the learned counsel for the respondent submitted that in his evidence, the appellant admitted that the floor of the plane was smooth and clean and he did not suffer any inconvenience.

In her judgment at pages 21 – 22 of the record of appeal, the learned trial judge found as follows:

> **"The plaintiff has failed to show on a balance of probability that he suffered any damage or physical injury worth pointing at on which the claim for negligence could be sustained. I am sure it was upsetting for the plaintiff to discover that he bought a pair of slippers**

which were both meant for the left foot that made him opt to walk barefooted on the plane which plane was smooth and clean instead of keeping on his shoes and socks. This however did not result in any injury as he has failed to show what king of injury he sustained."

We agree with the learned trial judge that the appellant failed to show the injury he suffered as a result of buying slippers for the same foot. In any event, the appellant concedes in his submissions that he suffered psychological and social injury but not physical injury. The point should be made that psychological or social injury are not injuries recognised by the tort of negligence. As correctly opined by the learned trial judge, albeit the appellant could have been inconvenienced for not wearing the slippers on the plane or at the hotel, and if we may add, for being laughed at by his friend Silwamba, such inconvenience cannot amount to injury capable of being compensated in damages. In the **Michael Chilufya Sata** case (supra) we made it categorical that for an action for negligence to succeed, one must prove actual damage. In the present case, we are satisfied from the appellant's evidence, that he failed to prove that he suffered any physical or actual damage as a result of not wearing the slippers, for which he can be compensated.

The cases of **Webner v Titan Distribution** and **Price v City of Charlotte** relied on by the appellant are good law on the principle that a plaintiff's testimony alone can prove injury caused by a defendant. However, on the facts of this case where the appellant failed to show the injury he suffered, we are certain that these authorities cannot fortify his appeal in any way. For the same reason, we believe that the case of **Maryer v Chicago Mechanical Services** is also cited out of context. Ground four lacks merit and it is equally dismissed.

Ground five is that the lower court erred when it ordered that the appellant returns the defective slippers and that he pays costs for the respondent. The thrust of his contention on this ground was that the order made by the lower court for the return of the slippers for a refund was proof that the appellant had partially succeeded and as such each party ought to bear their own costs. The learned counsel for the respondent did not respond to this ground.

We do not agree with the appellant. We take the view that the lower court's order that the respondent should return the defective slippers for a refund of the purchase price does not suggest, impliedly or otherwise, that the appellant had partially succeeded in his claims against the respondent. The reason for our conclusion is that it was the policy of the respondent to either exchange defective items upon their return or refund the purchase price. The appellant did not deny that he was availed this option which he declined in preference to bringing the matter to court. Further, a perusal of the writ of summons and statement of claim at pages 23 – 27 of the record of appeal clearly shows that the return of the slippers for a refund was not one of the claims sought by the appellant. For the avoidance of doubt, the specific claims sought by the appellant in his pleadings are as follows:

> **"(i) Damages for negligence amounting to K100,000,000.00**
> **(ii) Aggravated damages for lack of remorse**
> **(iii) Any other relief the court may deem fit,**
> **(v) Cost[s] with interest"**

The general rule is that costs follow the event, that is, that an unsuccessful party must pay the costs of the successful party. The only exception to this rule is where the evidence shows that the successful party was in some way blameworthy in the conduct of his case. In this case, such evidence does not exist on the record. Therefore, the appellant having been wholly unsuccessful on all his claims against the respondents in the court below, the learned trial judge was on firm ground in dismissing his action with costs to the respondents. Ground five meets the same fate as other grounds for lack of merit.

The net result is that this appeal is devoid of merit and it is accordingly dismissed. Costs in the court below and here shall be for the respondents and to be taxed in default of agreement.

I. C. Mambilima
CHIEF JUSTICE

C. Kajimanga
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE