IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 32 OF 2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

REUBEN DAKA **APPELLANT**

AND

PENTECOSTAL HOLINESS CHURCH **RESPONDENT**

CORAM: CHISANGA JP, MAKUNGU, KONDOLO SC JJA
On the 29th day of June, 2018 and 3rd day of May, 2019

For the Appellant: Mr. K. I. Mulenga – Kumasonde Chambers
For the Respondent: Mr. M.D. Lisimba – Mambwe Siwila and Lisimba Advocates

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JUDGMENT

MAKUNGU, JA delivered the Judgment of the court.

Cases referred to:

1. *Household Fire and Carriage Accident Insurance Co. Limited v. Grant (1879) 4 Ex D216*
2. *Carlill v. Carbolic Smoke Ball Company (1893) 1 QB 256*
3. *Kakoma v. State Lotteries Board of Zambia (1981) ZR 11*
4. *Nsansa School Inter Education Trust v. Musamba (2010) ZR Vol 1 457*
5. *Edward v. Skyway (1964) 1 ALL ER 494*
6. *Finance Bank Zambia Limited v. Socotec International Inspection Zambia Limited and Zambezi Oil and Tranport Company Limited (in receivership) (2010) ZR 225 vol. 2*
7. *The Attorney General v. Marcus Achiume (1983) ZR 1*
8. *Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 172*

9. *The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as A Firm) v. The Lusaka City Council and Zambia National Tender Board11 (2004) Z.R. 109 (S.C.)*
10. *Morris v. C.W, Martin & Sons Limited [1965] 2 All ER 725*
11. *Donoghue v. Stevenson (1932) AC 562*
12. *Industrial Gases Limited v. Waraf Transport Limited & Mussah Mogeehaid (1997) SJ.6*
13. *The Minister of Home Affairs, The Attorney General v. Lee Habasonda Suing on His Own Behalf and on Behalf of The Southern African Centre for the Constructive Resolution of Disputes – SCZ Judgment No. 23 of 2007*
14. *Edwards v. Newland (E. Burcheft, Ltd, (Third parties) (1950) 1 ALL ER 1072*

Legislation referred to:

1. *Court of Appeal Rules, 2016, SI No. 65 of 2016*

Other authorities referred to:

1. *Chitty on contracts vol. 1 by Hugh Beale (2008) Sweet and Maxwell.*
2. *Charlesworth on negligence, 6th Edition, Paragraphs 16, 1104, 1105.*
3. *Blacks Law Dictionary Tenth edition by Bryan A. Garner Thomson Reuters 2014*
4. *Palmer, N. Bailment 2nd edition 1991, Sweet and Maxwell London*

This appeal is a result of the events that transpired on 6th May, 2014. It happened around 18:00 hours when the appellant parked his unregistered Hiace bus at the respondent's carpark with the help of DW2, Mathews Mkandawire, an employee of the respondent and caretaker of the car park at the time. The following morning around 04:00 hours, the appellant went to collect his bus but DW2 informed him that it had been stolen two

hours earlier by some men who were unknown to him. He narrated to him that the four strangers had offered him a fanta which he drank and immediately fell sick and they took advantage of his condition. At this point, the appellant thought it prudent to call DW1, Brian Mutale, the respondent's Church Administrator to whom he explained what transpired. Subsequently, DW1 arrived at the car park and found DW2 indisposed and they decided to take him to the hospital. On their way to the hospital, the appellant insisted that they first go to the police station to report the matter and they did. Thereafter, DW2 was taken to Levy Mwanawasa Hospital where he was found to have suffered food poisoning and was admitted for treatment.

On a later date, the parties tried to resolve the matter amicably in the presence of the police and an ultimatum was given to the respondent to pay for the stolen vehicle in two weeks' time. This was not done. The matter was later referred to Chelstone Police station.

The appellant claimed that he was using the respondent's car park for over a year and was never given any receipt for the fees that he paid. DW1's evidence revealed that he only came to know

the appellant was owing the arrears he had accumulated from using the car park following an audit. Consequently, DW1 proscribed the appellant from using the car park. Without DW1's knowledge, the appellant was later allowed to park his vehicle in the same car park. Upon inquiry on why this was so, he was informed that the appellant had paid the sum of K50 towards the arrears of parking fees and promised to pay the balance at the end of the week. This happened two weeks before the theft. The respondent did not produce any evidence to show how much was outstanding in parking fees.

DW2's testimony was that on the material date, whilst on duty, the appellant came to park his vehicle at about 17:00 hours. Between 19:00 hours and 20:00 hours, unknown men approached him and offered him a beverage that made him sick and thereafter he was attacked and robbed of a number of car keys including those for the appellant's bus.

An action was brought in the lower court by the appellant for compensation for the loss of his vehicle purportedly valued at K65, 000. 00 at the time of the theft, interest at the short-term bank deposit rate with effect from the date of the loss of the

vehicle until final settlement, costs and any other relief the Court may deem fit.

The learned trial judge found that for a contract to be valid and binding, both parties must be of one mind as to the nature of the agreement. She relied on the cases of ***Household Fire and Carriage Accident Insurance Co. Limited v. Grant*** [1] and ***Carlill v. Carbolic Smoke Ball Company.*** [2]

The learned trial judge opined that it is trite law that for a contract to be valid, or an agreement to exist, there has to be an intention by both parties to create legal relations. In aid of this, reference was made to the case of ***Kakoma v. State Lotteries Board of Zambia.*** [3] On this foundation, the trial Judge found that there was no offer on the part of PW1 to the defendant, no acceptance by the defendant and no consideration paid on the material day. Further that, the evidence of DW1 that PW1 accrued arrears of car parking fees and never signed the parking book for nearly a year remained unchallenged. It was also found that PW1 parked his bus at his own peril because no contractual relationship was created by the parties for the defendant to be

vicariously liable. She accordingly dismissed the plaintiff's case and condemned him to costs.

When the matter first came up for hearing before us on 27th June, 2018, learned counsel for the respondent Mr. Lisimba made an application pursuant to Order 10 rule 9 (2) of the Court of Appeal Rules to dismiss the appeal because according to him there were no grounds of appeal mentioned in the memorandum of appeal. In response, learned counsel for the appellant Mr. Mulenga submitted that it was an oversight on his part as the grounds of appeal were set out in the heads of argument which were before court. We adjourned the matter to 29th June, 2018 for ruling. On that date, we allowed the appeal to proceed as we were able to decipher the grounds of appeal from the memorandum of appeal and heads of argument. The matter was adjourned to the September session to allow the respondent file heads of argument in response to the appellant's heads of argument.

The appeal only came up for hearing in November. At the hearing, of the appeal, counsel for the respondent was not in attendance and no heads of argument were filed on behalf of his

client. Both advocates were aware of the hearing date and on this basis, we proceeded to hear the appeal. The following are the grounds of appeal:

1. ***The court below erred both in law and fact when it held that 'a closer examination of the evidence adduced leads me to conclude that there was no binding agreement between the parties. There was no offer made by PW1 to the defendant to park his vehicle at its car park and no evidence of acceptance by the defendant.***
2. ***That the court below erred both in law and fact when it held that 'there was no consideration paid by PW1 for the use of the car park on the material date.***
3. ***The court erred both in law and fact when it held that 'in view of the foregoing, I find that PW1 parked his bus at the defendant's car park at his own peril and no contractual relationship was ever created between the parties through which the defendant could be held vicariously liable.'***

During the hearing of the appeal, counsel for the appellant relied on his heads of argument in which he argued ground one that there was an agreement between the appellant and the respondent and referred to various portions of the evidence led by the witnesses as follows:

The appellant's evidence at page 55 lines 19 – 20 of the record of appeal:

> ***"I used the car park for a year and I used to sign in a book."***

DW1's evidence at page 57 of the record of appeal lines 16 – 18 and page 58 lines 16 – 25 respectively:

> ***"I knew the plaintiff who was one of our clients when we were operating a car park service."***
>
> ***"I did not know PW1 for a long time, however, I discovered his details when I was auditing the church records on the car park users and found that he had the church record arrears. I asked the gentlemen who were manning the car park to stop him from using the car park until he settles the arrears."***

DW1's evidence under cross – examination on pages 59 and 60 lines 21 – 23 and Page 61 – 62 lines 22 respectively:

> ***"On the date the bus was stolen PW1 did not pay car park fees. However, due to the relationship we had with him, we allowed PW1 to park his vehicle."***
>
> ***"I allowed him to park because he was our old client and he had arrears but our supervisor allowed him to use the car park."***

Counsel was of the view that a contract need not be in writing, it can be oral or inferred from the conduct of the parties. He in this respect relied on **paragraph 1 – 076 Chitty on Contracts** [1] as follows:

> ***"Contracts may be express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are not stated in words by the parties. They are often said to be implied when their terms are not stated, as, for example, when a passenger is permitted to board a bus. From the conduct of the parties the law implies a promise by the passenger to pay the fare***

and the promise by the operator of the bus to carry him safely to his destination."

Counsel also relied on the case of ***Nsama School Inter Education Trust v. Musamba*** [4] where it was held among other things:

> ***"The court was alive to the general principle of law that a contract need not be in writing in order to be valid unless it relates to real property."***

With regard to ground two, counsel referred us to the evidence of PW1 at page 54 of the record of appeal lines 7 – 12 to the effect that he was told that the sum of K5 that he paid for parking per night was not sufficient to purchase a new bus. That this was after the police told the respondent to buy the appellant a bus. Further that, this evidence was maintained by the appellant under cross –examination on page 62 lines 8 – 12 where he stated that he paid the sum of K5 and signed in a book. However, no receipts were issued to car park users and this was confirmed by DW2 in cross-examination. The record book was never produced in evidence.

In arguing ground three, Mr. Mulenga stated that the evidence before the lower court reveals that the parties had an unwritten contractual relationship arising from their conduct which resulted in the appellant accumulating parking fees in arrears and this fact was not disputed. He referred us to the case of ***Edward v. Skyway*** [5] wherein it was held as follows:

> ***"Where there was an agreement and the substance of the agreement related to the business affairs, the onus of establishing that the agreement was not intended to create legal relationship, which was on the party setting that defence, was a heavy one."***

In light of the foregoing, counsel submitted that the respondent had failed to demonstrate that there was no legal relationship created between the appellant and the respondent through their conduct.

Counsel went on to refer to the case of ***Finance Bank Zambia Limited v. Socotec International Inspection Zambia Limited and Zambezi oil and Transport Company Limited (In liquidation)*** [6] wherein it was held among other things that:

"The mere fact that the party to a contract does not execute a contract does not mean that it can escape liability."

According to Mr Mulenga, the judgment appealed against, reveals that the trial judge relied heavily on the respondent's evidence and failed to properly evaluate the rest of the evidence. Counsel was of the view that the lower court's decision does not conform to the guidelines for Judgment writing. To fortify this submission, he relied on the case of ***The Attorney General v. Marcus Achiume*** [7] where it was held among other things as follows:

"An unbalanced evaluation of evidence where only flaws of one side but not of the other are considered is a misdirection which no trial court should reasonably make and entitles the appeal court to interfere."

Reliance was also placed on the case of ***Wilson Masauso Zulu v. Avondale Housing Project*** [8] where it was held as follows:

"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every

matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided."

According to Mr. Mulenga, failure on the part of the lower court to evaluate and analyze the evidence before her, amounted to a misdirection and he on this basis urged us to interfere with the findings.

We have considered the record of appeal together with the arguments advanced by counsel for the appellant. We shall handle the three grounds of appeal as one as they are interrelated.

In the case of ***The Rating Valuation Consortium D.Y Zyambo and Associates (suing as a firm) v. The Lusaka City Council and Zambia National Tender Board*** [9] it was held among other things that:

"The approach of analysing the process of reaching business relationships in simplistic terms of offer and acceptance, gives rise to complications. What is required

is for the court to discern the clear intentions of the parties to create a legally binding agreement."

In the present case, it is clear from the pleadings and the evidence on record that the appellant used to park his vehicle at the respondent's car park for over a year prior to the ordeal. It is an undisputed fact that even though the appellant had accumulated arrears for the car park usage, he was allowed to park his vehicle in the respondent's car park by the respondent. We are of the measured view that there was a business relationship between the parties that enabled the appellant to park his vehicle at the respondent's car park for a charge of K5. No receipts were issued but a book was entered and signed by the customer in accordance with the normal course of dealings that existed between them. We infer from the facts of this case that the intentions of the parties were to create a legally binding agreement. A legally enforceable contract therefore existed on the material date by their conduct.

We therefore reverse the findings by the trial court that the parties were not of one mind because they were not actively aware of the existence of the contract as the findings were not

supported by the evidence on record. We accept Mr. Mulenga's submission that the lower court erred by making on unbalanced evaluation of the evidence whereby only the flaws of the appellant were considered **Attorney General v. Marcus Achiume** [7] refers.

We are guided by Chitty on Contracts and the cases of **Household Fire and Carriage Accident Insurance Company Limited v. Grant,** [1] **Kakoma v. State Lotteries Board** [3] and **Edward v. Skyway.** [5]

We note that the relationship between the appellant and the respondent herein was that of bailor and bailee respectively. Blacks Law Dictionary defines Bailment as:

> ***"A delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose, usually under an express or implied-in-fact contract."***

When ascertaining the scope of bailment in contemporary legal conditions, there is general wisdom in Professor N. Palmer's observations in his book on bailment at P. 1285 that: -

> ***"The important question is not the literal meaning of bailment but the circle of relationships within which its***

characteristic duty will apply. For most practical purposes, any person who comes knowingly into the possession of another's goods is, prima facie, a bailee."

As explained by Diplock LJ in **Morris v. C.W Martin & Sons Limited,**[10] the two most obvious duties arising out of the relationship of bailor and bailee are the duties on the part of the bailee to take reasonable care of the goods and not to convert them. Both negligence and conversion are, of course, typical torts.

Lord Diplock rejected the idea that a contract needs to exist for a relationship of bailor and bailee to be found. In the same case Lord Denning, M.R. put it clearly that:

"If you go through the cases on this difficult subject, you will find that in the ultimate analysis, they depend on the nature of the duty owed by the master towards the person whose goods have been lost or damaged. If the master is under a duty to use due care to keep the goods safely and protect them from theft and depredation, he cannot get rid of his responsibility by delegating his duty to another. If he entrusts that duty to his servant, he is answerable for the way in which

the servant conducts himself, therein. No matter whether the servant be negligent, fraudulent, or dishonest, the master is liable. But not when he is under no such duty."

"Once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe: and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show – and the burden is on him to show – that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty."

In the present case, we note that in paragraph 10 of the statement of claim, the appellant claimed that the defendant breached the duty owed to him by failing to secure his vehicle. In paragraph 6 of the defence, the defendant denied that it owed any duty to the appellant to secure the vehicle. And in paragraph 8 of the defence, the defendant denied that the plaintiff had suffered loss as a result of its negligence or failure or omission or that the appellant is entitled to any compensation from the

defendant. In paragraph 9 all the claims were denied. This indicates that although the appellant did not claim damages for negligence outrightly, it was clear to the defendant that the claim was based on allegations of negligence resulting in loss of property notwithstanding that particulars of negligence were not given. We therefore have no option but to resort to the law of tort.

The case of ***Donoghue v. Stevenson*** [11] sets down the principles or ingredients to be proved in order that liability may exist. It was stated that the party complained against should owe to the party complaining, a duty of care: The plaintiff should prove breach of that duty and that he has suffered damage as a result of that breach. In the same vein, **paragraph 16 of Charlesworth** on Negligence reads:

> ***"Negligence is only actionable if actual damage is proved. There is no right of action of nominal damages. Negligence alone does not give a cause of action, damage alone does not give a cause of action, the two must co – exist."***

In the case of ***Edwards v. Newland*** [14] ***(E. Burcheft, Ltd, (Third parties)*** the Court of Appeal of England established that a

bailee who takes possession of goods is required to exercise reasonable care in looking after them; he can only deal with them in accordance with the authority, express or implied, conferred on him by the bailor.

In light of the authorities referred to above, our firm position is that the respondent's caretaker or guard in his capacity as an employee of the respondent was responsible for securing the motor vehicles parked in the respondent's car park including the appellant's bus. The caretaker owed a duty to the appellant to take reasonable care of his bus. The evidence of the appellant is to the effect that DW2 told him that he allowed the four strange men who stole the bus to sit in his bus around 20:00 hours and they stole the bus around 02:00 hours. This evidence remained unchallenged. In the premises, DW2's testimony in the court below was an afterthought and this is confirmed by lack of medical evidence that he suffered food poisoning as alleged by DW1. We must state here that DW1's evidence that he was told by the Doctor that DW2 had suffered food poisoning was inadmissible hearsay evidence.

The view we take is that it was DW2's failure to take reasonable care of the appellant's bus that led to the theft of the bus. It is

clear from DW2's evidence on record that only the keys to that bus were stolen. This coupled with the fact that DW2 was entertaining the strangers, raises suspicion against DW2. It also raises doubt as to whether he was attacked. The fact that DW2 was found in a bad state after the theft, does not exonerate the respondent from its responsibility because the respondent as bailee is vicariously liable for its employees' actions. In the case of ***Industrial Gases Limited v. Waraf Transport Limited and another*** [12] it was held that as long as the wrong is committed by the employee in the course of his employment, the general rule is that the employer will be vicariously liable. There is nothing in the present case that vitiated the scope of the duty of care that was owed to the appellant.

Coming to the issue of format of the judgment, in the case of ***The Minister of Home Affairs, The Attorney General v. Lee Habasonda Suing On His Own Behalf And On Behalf of The Southern African Centre for the Constructive Resolution of Disputes*** [13] it was held that every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities

if any, to the facts. In the present case, the judgment of the trial court sets out the evidence, arguments, findings of fact and reasoning. Even though there was a misdirection on the part of the court in finding that there was no meeting of the minds, we decline the appellant's submission that the Judgment was not written in the correct format.

Having determined that there was a contract between the parties and that the respondent breached its duty to secure the motor vehicle, we take the view that the appellant is entitled to compensation for his loss.

We note that other than what has been set out in paragraph 11 of the statement of claim and the oral evidence of PW1, there is no documentary proof that the stolen bus was worth K65,000.00 as alleged. We therefore refer the matter to the Deputy Registrar for assessment of the value of the vehicle as at the time it was stolen.

The award shall carry interest at the average commercial bank deposit rate from the date of the writ to the date of this judgment and thereafter at the current bank lending rate until full settlement.

Costs here and in the court below shall be borne by the respondent. The same should be taxed if not agreed between the parties.

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F.M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE