FLORENCE MUNTHALI v THE ATTORNEY-GENERAL (1980) Z.R. 157 (H.C.)

HIGH COURT
SAKALA, J.
17TH SEPTEMBER,1980
1977/HP/989

Flynote
Tort - Negligence - Disobeying traffic signs on highway by driver of ambulance - Whether negligent.
Tort - Negligence - Duty of care - Duty owed by driver of ambulance to other road users.

Headnote
The driver of a GRZ ambulance belonging to the Ministry of Health collided with the plaintiff's vehicle. The GRZ driver coming from a side road failed to obey a giveway sign and thus collided with the plaintiff's vehicle travelling on the main road. In her claim the plaintiff alleged *inter alia* that the defendant's driver was negligent in failing to give way to the traffic on the main road. In a counterclaim the defendant pleaded that the plaintiff's driver failed to give priority to a hospital ambulance travelling or manoeuvring in an emergency with a sounding siren in operation. The court considered the issue of whether a driver of a hospital ambulance, driving in an emergency situation with or without a siren and hazard light in operation owes a duty to the public to drive with care and attention and without exposing the members of the public to unnecessary danger.

Held:
(i) To disobey traffic signs in the absence of any explanation for that disobedience, resulting in injury or damage to other road users amounts to negligence.

(ii) No emergency would justify' the driver of a fire engine or ambulance in taking the risk of colliding with other vehicles proceeding in accordance with the signal indications. An ambulance driver does not have priority on the highway, although as matter of custom when the siren and hazard light are on other drivers generally give way.
(iii) A driver of an ambulance be it in an emergency situation or not owes a duty to other road users.

Case cited:
(1) Ward v London County Council, [1938] 2 All E.R. 341.

For the plaintiff: A.J. Nyangulu Esq., Fitzpatrick Chuula and Co.
For the defendant: A.Kasonde Esq., Senior State Advocate.

Judgment
SAKALA, J.:

The plaintiff's claim as endorsed on the writ of summons is for K2,278.71 in respect of costs of repairs to her taxi cab vehicle registration number AJA 863 and K40.00 per day as loss of use of the vehicle from 31st May, 1977, to a date when the vehicle was put on the road again; the damage being as a result of the negligent driving of motor vehicle registration number GRZ 132R on the part of Joseph Banda an employee of the Ministry of Health while acting in the course of his employment as a servant or agent of the Government when he collided with the plaintiff's driver Moses Phiri on the 31st May, 1977, at 0730 hours at the junction of Lumumba/ Salima /Vubu Roads, Lusaka.

Apart from a statement of defence and counter claim the defendant did not adduce any evidence. The material facts leading to the accident which are common cause from the pleadings and the plaintiff 's witnesses are that the plaintiff's driver, Moses Phiri, was on the 31st May, 1977, at 0730 hours driving the plaintiff's motor vehicle registration number AJA 863 in the northern direction along the main highway, namely, Lumumba Road at a point between Salima/Vubu Roads, junction. At the same time the defendant's driver, namely, Joseph Banda employed by the Ministry of Health acting in the course of his employment was driving a VW Kombi registration number GRZ 132R in a western direction along Salima Road at its intersection with Vubu Road and Lumumba Highway.

> Paragraphs (4), (5) and (6) of the statement of claim read:
> "4. The defendant's said driver so negligently and unskilfully drove the said motor vehicle that it came into collision with the plaintiff's taxi car;
> 5. The negligence of the defendant consists in:
>
> (a) failing to keep a proper look out.
> (b) failing to sound his horn and otherwise give warning to his approach.
> (c) driving at a speed which was too fast having regard to the presence of other vehicles and the plaintiff's on the road way.
> (d) failing to slow down and steer clear of the plaintiff.
> (e) failing to give way to the traffic on the main road.

> 6. As a result of the said collision, the plaintiff's taxi car was damaged and she sustained repair expenses amounting to K2,278.71 and the plaintiff therefore claims the said amount of K2,278.71 and further any other relief as the court may deem fit and costs and K20.00 per day for loss of use of the taxi car from the 31st day of May, 1977 to such date as the said taxi car is put on the road again."

The defendant in their defence deny all these three paragraphs contending that in the alternative the alleged damages or injuries of the plaintiff were solely caused or in the further alternative contributed by the negligence of the plaintiff's driver. The particulars of this negligence are set out in paragraph (5) of the defence as follows:

> "5. Alternatively the defendant says that the alleged or any damages or injuries of the plaintiff were solely caused or in the further alternative contributed to by the negligence of

the plaintiff his/ herself or her own servant Moses Phiri in and about the driving and management of the plaintiff's taxi car registration number AJA 863.

PARTICULARS

The plaintiff or the plaintiff's servant Moses Phiri was negligent in that he or she:

(a) drove at an excessive speed or alternatively too fast for a congested and busy road such as Lumumba Road usually is during the morning "rush hours"

(b) failed to steer, brake or otherwise control the said taxi car so as to avoid a collision with the defendant's vehicle

(c) failed to keep any or proper lookout

(d) failed to give priority to the defendant's vehicle which was a Hospital Ambulance travelling or manoeuvring in an emergency with a sounding siren in operation."

By reason of the alleged negligence on the part of the plaintiff the defendant has counterclaimed for the cost of repairs of damages to the Hospital Ambulance driven by Joseph Banda.

PW1 testified that he had been a driver from 1972. In May, 1977, he was employed by the plaintiff to drive her taxi. On the 31st May as he was driving along Lumumba Road, he reached at the intersection of Vubu Road with Lumumba Road when he saw a VW vehicle from a side road crossing Lumumba Road without stopping. He applied his brakes, his vehicle skidded until it hit into the VW vehicle. The police arrived, they asked the driver of the other vehicle by the name of a Mr Banda as to why he did not stop. According to PW1 Mr Banda said the vehicle had no brakes. He said he was on the main road himself while Mr Banda was driving on the side road which was controlled by a giveway sign. Mr Banda was driving an ambulance. The siren was not on at that time, neither was the hazard light on. The radiator of the vehicle he was driving

was damaged and the front was smashed in. The vehicle was subsequently repaired at Incar. He could not remember the registration number of the vehicle but it was a light blue four-door Fiat. In cross-examination he testified that he was receiving a salary of K90.00 per month. On that day of the accident he was driving from town going to Lilanda along Lumumba Road. He had four passengers in the vehicle who had each paid twenty ngwee. There was a lot of traffic on the road at the time. He said Vubu Road crossed Lumumba Road and after crossing, the name changes into Salima Road. He said he was paid off after the accident because there was no other vehicle he could use. The vehicle involved in the accident was kept at Incar for six months. During this period he was still paid K90.00 per month. He said when the taxi was in operation he used to make K48 to K50 per day. He explained that at the scene of the accident there was a Ford Cortina vehicle which had stopped at Salima Road and which was also involved in the accident. He denied that he did not keep a proper look out. He said there was no vehicle ahead of him. He saw the ambulance about twenty feet from him. He testified that if he saw the ambulance with the siren on he would have stopped because it would have meant that it was either carrying a serious patient or going to collect a patient. But as it had no siren on he could not give it way.

He testified that he was not aware that by its nature an ambulance should be given the right of way.

PW2 is the Police officer who investigated the accident. He testified that he found Joseph Banda, the driver of GRZ 132R, VW Kombi at the scene of the accident as well as Moses Phiri the driver of AJA 863, Fiat 128. According to the Police officer Moses Phiri told him that he was driving along Lumumba Road towards Matero. Also at the scene the officer found a driver by the name of Patterson Kateni who said he was driving a Ford Cortina which was stationary along Salima Road across Lumumba Road. The Police officer said after the investigations he warned Joseph Banda the driver of the GRZ vehicle for the offence of careless driving. He admitted and signed for the statement. He made a rough sketch plan of the scene. He explained that the Kombi had damages to the rear side mudguard. The Fiat was extensively damaged. The bonnet and engine were twisted. The Ford Cortina registration number EV 683 had its spot lights broken with right mudguard damaged as well as the grill and the bumper. He told the court that there were stop signs on both sides at Salima, and Vubu Roads so that a vehicle travelling from both these roads had to stop to give way to the vehicles on Lumumba Road. The witness produced in evidence a booklet ZP 127 in which the sketch plan was drawn The booklet was marked exhibit 'P1'. In cross-examination the Police officer stated that there is a giveway sign on Vubu Road and Salima Road before entering Lumumba Road and not a stop sign. According to the witness, a stop sign is more serious than the giveway sign.

PW3 the plaintiff and the owner of the vehicle in question testified that in 1977 she was running one taxi, a Fiat 128, registration number AJA 863. On the 31st May, 1977, the vehicle was involved in an accident.

It was at that time being driven by Moses Phiri, PW1. She took the vehicle for repairs at Incar. She paid K2,278.71. She had a valid licence under which she operated the taxi. She paid the driver K90.00 a month.

After the accident the driver was just staying until after six months when she paid him off. She did not put the car back on the road after the accident because it was not in good condition even after it was repaired. She sold it in January, 1978, at K2,000. She had bought it at K3,000. During the course when the vehicle was running as a taxi she said she used to make an average of K40.00 a day including the expenses of repairs and petrol. She said she is claiming from the Government damages for loss of business, damages for expenses incurred in repairing the vehicle. She said the expenses amounted to K2,278.71. She was claiming loss of business up to January when she sold the vehicle. In cross-examination she said the repairs were completed on the vehicle on the 15th December. From that date until the time she sold the vehicle she was using it. She bought the vehicle in January, 1977, at K3,000 as a second hand. She began using it as a taxi from the 4th April, 1977. She agreed that the recording in the bundle of documents indicating that her average earnings were K20.00 per day was correct. She also admitted that on the 8th and 18th April, 1977, the vehicle was impounded by the Police. But she denied that the profits claimed in respect of the vehicle were exaggerated. She said the driver remained in employment for six months when the vehicle was being repaired because she thought that the vehicle was going to be repaired in good time and she did not want to lose the driver because he was good. The plaintiff also told the court that she claimed nothing under insurance for her vehicle. In re-examination she also said she is

claiming K20.00 per day as from the 31st May to the 15th December, 1977.

At the end of the plaintiff's evidence on the 30th May, 1980, Mr Kasonde for the defendant asked for an adjournment to trace the driver of the GRZ vehicle. Despite the strong objection from Mr Nyangulu, counsel for the plaintiff, the court granted Mr Kasonde the adjournment to 23rd July, 1980. After a period of over two-and-a-half months, when the trial resumed on the 23rd July, 1980, at 09 10 hours Mr Kasonde informed the court that despite the long adjournment he was unable to find the witness. Accordingly, he closed the case for the defendant.

In his brief submission, Mr Nyangulu pointed out that the evidence of the plaintiff stood unchallenged and that there was no evidence called to prove the counter claim. He urged the court to enter judgment in favour of the plaintiff and dismiss the counter claim. In his submissions, Mr Kasonde contended that although the evidence of the plaintiff stood unchallenged, in so far as the causing of the accident is concerned, the court will have to observe from the evidence of the driver that even if the defendant's driver did not comply with the traffic sign of giveway it is in itself not conclusive that the plaintiff's driver was in no way to blame. It was Mr Kasonde's contention that there being no evidence that the plaintiffs driver stopped or swerved to avoid the accident, a reasonable inference can be drawn of contributory negligence on the part of the

plaintiff's driver. On the question of damages, Mr Kasonde contended that the claim of K20.00 per day cannot be the earning of a single day when there are occasions when it was out from the road, Mr Kasonde suggested that a figure of K10.00 per day would be a realistic one.

I have fully addressed my mind to the evidence in this case as well as to the submissions by both learned counsel. I have observed that the endorsement on the writ of summons claims K40.00 per day for loss of use of the taxi while the statement of claim supported by the plaintiff's evidence claims for K20.00 per day for loss of the taxi.

I have already set out the material facts which I have said are not in dispute. The first question for consideration is whether the defendant's driver was negligent in his manner of driving at the material time. He did not give evidence himself. The evidence I have from PW1 is that the defendant's driver who was driving an ambulance without a siren or hazard light on joined Lumumba Road from a side road without giving way to traffic on the said Lumumba Road, the side road being controlled by "a give way sign". Mr Kasonde submitted that failure to obey a traffic sign is not conclusive evidence of negligence, I agree with this submission. But the absence of any explanation for the failure is in my view prima facie evidence of negligence. As has already been said and argued PW1's evidence stands unchallenged and uncontradicted. I therefore accept it *in toto*. Accordingly, I hold that to disobey traffic signs, in the absence of any explanation for that disobedience, resulting in injury or damage to other road users amounts to negligence. In the instant action, I hold that the defendant's driver in the course of his employment in failing to observe the traffic signs was negligent. Since he was in the course of his employment I find the defendant vicariously liable.

The next question I have to consider is whether the plaintiffs driver was guilty of contributory negligence. The defence supported by the sub missions of Mr Kasonde and particularly his cross-examination of PW1 appears to suggest that the defendant's vehicle which was a hospital ambulance was travelling or manoeuvring in an emergency situation with a sounding siren in operation. In those circumstances it was submitted that it had priority to be given way. The plaintiff's driver, it was contended, having failed to give it priority was negligent or contributed to the accident.

In the first place, I would like to observe on the point, that there was no evidence that the hospital ambulance had its siren on. In addition there was no evidence that if it had a siren on, the defendant's driver failed to give it priority. I do however, concede that the point although not supported by the authorities raises a very important question and certainly well taken. But it is unfortunately not supported by evidence. Since it has been raised in the pleadings I think I am complied to consider it. The question can be framed as follows: Does a driver of a hospital ambulance, driving in an emergency situation with or without a siren and hazard light in operation owe a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger?

1980 ZR p163
SAKALA J

My limited research has revealed no specific authority on the point. However, the operations of a hospital ambulance can in my view be fairly equated to the operations of a fire engine. The Editorial Note in the case of *Ward v London County Council* (1) reads:

> "As a matter of general custom, other drivers upon the highway have for many years given a right of way to fire engines proceeding to a fire. It might therefore be thought that such vehicles were entitled to some privilege at crossings controlled by lights, but it has been conceded that they are entitled to no such privilege, and, indeed, that the granting of any such privilege would not materially help them in carrying out duties where speed is a vital consideration."

The facts of that case from the headnote are that: "a fire engine proceeding to a fire came to a light-controlled crossing when the lights were against it. The driver who had been sounding his horn in the usual way, seeing no vehicle upon the crossing, proceeded to cross in disobedience to the red light. The plaintiff in his car, coming along the road at right angles, with the lights in his favour, passed on to the crossing and collided with the fire engine. It was contended that, as a driver is bound by the regulations, even when the lights are in his favour, to have due regard to the safety of other users of the roads, the plaintiff should have given way to the fire engine. The court held that:

> "The accident was caused solely by the negligence of the driver of the fire engine."

In the course of his judgment Charles, J., at p. 343 cited the directions of the London County Council to drivers which read:

> "The drivers of vehicles such as fire engines and ambulances are subject to the same

> obligation to obey sight-signals as the drivers of other vehicles. These vehicles normally take precedence by common consent over other traffic, and it might be thought that light-signals would be likely to hamper the carrying out of emergency duties for which they are intended. In practice, however, serious difficulties do not arise. No emergency would justify the driver of a fire engine or ambulance in taking the risk of colliding with other vehicles proceeding in accordance with the signal indications."

He then on the same page proceeded to say as follows in his judgment:

> "According to the driver's own story, that is precisely what he did. He saw this car coming across fast, at a moment when with the greatest ease he could have stopped and given the road to the car, which was proceeding in accordance with the signal indications. No emergency would justify the driver of a fire engine in taking the risk of colliding with such a vehicle. In my judgment, the driver was taking his chance, and rushing over that crossing at a high speed, endangering other vehicles that might be in the vicinity, approaching, or designing to cross, those crossroads with the lights in their favour.

1980 ZR p164
SAKALA J

> It is said that, because he was driving a fire engine, he was in a certain privileged position. That is not so. He was not in a privileged position at all. It is perfectly true that, when the bell is clanged, people generally draw aside, but, if they do not draw aside, the driver of a fire engine has no business to charge into them. He must use reasonable care, and get to the scene of the fire as quickly as possible. Indeed, the traffic regulations of the London County Council make it perfectly clear that that is the position which is recognised by them. The fire brigade must get there as quickly as possible, and they add, and I have no doubt rightly, that stopping at the red signal in practice is found not to hamper the proper conduct of the fire brigade in the carrying out of duty."

Again due to my limited research I have not come across specific provisions governing fire engines and ambulances on our highways in Zambia. But I think it is common knowledge that for many years drivers on our highways have given right of way to ambulances and fire engines in emergency situations. But I entirely agree with the statement in the London County Council directions to drivers that "No emergency would justify the driver of a fire engine or ambulance in taking the risk of colliding with other vehicles proceeding in accordance with the signal indications."

I appreciate that the *Ward* case involved traffic lights. But in my opinion the principle is applicable to the present case. There is therefore no question of an ambulance driver having priority on the highway, although as a matter of custom, when the siren and hazard light are on other drivers generally give way. In the instant case the evidence is that the plaintiff's driver could not have avoided the collision. I am therefore unable to hold him guilty of contributory negligence. My answer to the question earlier posed is in the affirmative, that is to say, a driver of the ambulance be it in an emergency situation or not owes a duty to other road users. For my part I consider this as a logical proposition otherwise we would have endless emergency situations on our roads created by the ambulances themselves.

Turning to damages, again there was no evidence that contradicted the plaintiff's claim in so far as the actual amounts are concerned, although an attempt in submission was made by Mr Kasonde that K20.00 average net earnings per day was on the higher side. On the evidence before me, I do not share that view, particularly when one considers that the figures of two weeks for the month of April as per document 2 in the bundle range from K30 to K50 per day. Accordingly I enter judgment in favour of the plaintiff and award the following damages:

(a) K2,278.71 being expenses on the repairs of the car;
(b) K20.00 per day being loss of use of the taxi car from 31st May, 1977, to 15th December, 1977, when the plaintiff obtained her car from the garage. Both days inclusive.

1980 ZR p165
SAKALA J

The awards carry interest at 6 per cent from the date of the writ of summons to the 6th May, 1980, when the trial first commenced. Costs to the plaintiff.
As to the counter-claim Mr Kasonde properly conceded that he had adduced no evidence to support the same. Accordingly, the counterclaim is dismissed with costs.

Judgment for the Plaintiff
