

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY

2006/HK/54

(CIVIL JURISDICTION)

BETWEEN

PAMELA NGUNGU CHIWALA - 1ST PLAINTIFF

JAMES MUTUNGU CHIWALA (Suing as next friend - 2ND PLAINTIFF

of LUWI JAMES CHIWALA an Infant, and as

Administrator of the estates of NKISU CHIWALA, deceased
and LENNY KASONGO, deceased)

AND

MICHAEL MUKUKA - 1ST DEFENDANT

HIGHWAY TRANSPORT LIMITED - 2ND DEFENDANT

Before the Hon. Mr. Justice I.C.T. Chali in Open Court the 17th day of July,
2012

For the Plaintiffs: Mr. K. Bota - Messrs William Nyirenda and Company

For the Defendants: Mr. V.K. Mwewa - Messrs V.K. Mwewa and Company

JUDGMENT

Cases referred to:

1. Khalid Mohamed v The Attorney General (1982) ZR. 49
2. *Donoghue v. Stevenson* (1932) AC 562
3. *Blyth v. Birmingham Waterworks* (1856) II EX CH 781
4. *Michael Chilufya Sata v. Zambia Bottlers Limited* SCZ No. 1 of 2003
5. *Moschi v. Lep Air Services Limited and Another* (1972) 2 ALL ER 393
6. *Konkola Copper Mines Plc and Zambia State Insurance Corporation Limited v. John Mubanga Kapaya & Others* (2004) Z.R. 233
7. *Litana v. Chimba and Attorney General* (1987) Z.R. 26

Texts referred to:

1. *Charlesworth & Percy on Negligence* 12th Edition

On 22nd February, 2006 the Plaintiffs took out a writ of summons accompanied with a statement of claim seeking damages for personal injuries and death arising out of a road traffic accident which occurred on 13th December, 2005 along the Great North Road near Kabwe due to the alleged negligence of the 1st Defendant who was driving the 2nd Defendant's motor vehicle a Scania Bus, registration number ABE 8642 in the course of his duties.

According to the Plaintiffs' statement of claim, the 2nd Plaintiff sued as next friend of LUWI JAMES CHIWALA an infant and as Administrator of the estates of NKISU CHIWALA and LENNY KASONGO both deceased persons who died from injuries they sustained in the said accident. The claims are made under the provisions of the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act 1846.

The Plaintiffs alleged that on the material day the 1st Plaintiff, the infant and the two deceased persons were passengers on the 2nd Defendant's said bus travelling from Lusaka when at a point on the Great North Road known as Marple Hurst Farm, south of Kabwe, the said bus collided with another vehicle, a Toyota Hilux Registration Number AAH 4138. The cause of the accident was alleged to be due to the negligence of the 1st Defendant, the particulars of the said negligence being:-

1. Failure to keep any or any proper lookout or to observe in time or at all motor vehicle Toyota Hilux Registration Number AAH 4138 belonging to one CLEMENT TEMBO of Lusaka, a third party, which was ahead of the bus on the said road;
2. Driving too fast in the circumstances;
3. Failure to properly judge the clearance distance between the bus and the third party's motor vehicle;
4. Failure to apply brakes in time or at all or to so steer or control the bus as to avoid the said collision;
5. Driving the bus into the rear side of the third party's motor vehicle and losing control of the bus and plunging and falling off on the road side.

The Plaintiff's further alleged that by reason of the matters aforesaid, the 1st Plaintiff and the infant sustained severe injuries and pain and suffered loss and damage. In respect of the 1st Plaintiff, the particulars of injuries were given as:-

1. Large circular laceration over occiput with complete loss of skin and exposed skull bone;
2. Sutured laceration of the right temporal region;
3. Disarticulation of the right arm with large wound across the right shoulder girdle which necessitated amputation;
4. Deep grazing of the chest and loins.

As for the infant the injuries were:-

1. Two deep cuts on the right temporal region of the head; and
2. Abrasions on the shoulder.

The two deceased persons were killed and thereby lost the normal expectation of life and their estates thereby suffered loss and damage. The 2nd Plaintiff therefore seeks damages for loss of expectation of life under the laws cited.

The Defendants filed a joint defence in which the 2nd Defendant admitted to have been the owner of the bus and as employer of the 1st Defendant. They also admitted to the collision having occurred between the bus and the third party's vehicle. However, the Defendants denied that the said accident was the result of any negligence on their part. The Defendants averred that they were not to blame for the said accident.

I must mention at this point that the conclusion of this case has taken a very long time since its commencement due to what I can only describe as the poor attitude by the parties and their Advocates towards the prosecution of the case. Apart from several irrelevant interlocutory applications, the record shows that the case was adjourned on at least five occasions before my other learned brothers all adjournments being at the instance of the lawyers, mostly the Defendants' Advocates. Again before me there were seven adjournments before trial finally

commenced on 14th October, 2011. Thereafter there was another three adjournments. Once again it was entirely due to the conduct of the parties or their Advocates. On 27th July, 2012 when the matter was to resume for continued trial, none of the parties were at court although all had notice of the hearing date. There having been no good cause shown for the absence of the parties and their Advocates, and having heard the evidence of one witness for the Plaintiffs, I deemed the Plaintiffs to have closed their case and adjourned the matter to this day for my judgment on the evidence adduced before me. The reason for my decision is manifest from the long history of the case which in my view is an unfortunate history. The trend for unwarranted adjournments of cases and the resultant delays ought to be arrested.

At the trial I only heard one witness, Mrs. PAMELA NGUNGU CHIWALA, the 1st Plaintiff (PW). She testified that at about 07:00 hours on 13th December, 2005 she and her two children, NKISU CHIWALA and LUWI CHIWALA, and her husband's niece, LENNY KASONGO, boarded the 2nd Defendant's bus at Inter City Bus Station in Lusaka destined for the Copperbelt. However, the departure was delayed until about 12:00 hours due to a heavy downpour of rain. She said that when the bus started off the speed was alright until they reached Landless Corner. Then the driver of the bus and the conductor said that since it had stopped raining there was need to pick up speed so as to reach their destination early. Henceforth, the bus started running at a very high speed which prompted PW and another passenger to protest aloud. She said that the speed of the bus was so high that one could not clearly see trees or grass on the sides of the road.

Then at a point near Marple Hurst Farm before entering Kabwe, PW saw a vanette ahead of the bus whose rear brake lights had come on and which was indicating that it was going off the road to the left side. By then the bus was very near the vanette. The driver of the bus tried to swerve to the right in an attempt to avoid hitting into the vanette, but he failed and hit the vanette and the bus went and fell on its side off the road. In that process, the two children NKISU and LENNY, were thrown out of the bus which went to rest on them, crushing the children to death. Meanwhile her right arm was trapped under the bus outside while the rest of her body was inside the bus. That is how that arm was crushed. PW was the last person to be moved out of the

fallen bus and was taken to Kabwe General Hospital where she underwent surgery on the arm. She remained at Kabwe General Hospital for 12 hours whereafter she was moved to St. John's Hospital in Lusaka where she received specialized treatment for one month and two weeks. During that time PW underwent 7 surgical operations on her arm. In that accident PW said LUWI sustained a few bruises on his head.

PW said that at the time of the accident LUWI was aged one year and 9 months, LENNY was aged 19 years and doing Grade 9 at Woodlands basic School, while NKISU was aged 7 years 6 months and was doing Grade 3 at St. John's Private School. She said prior to the accident she and all the children had been in good health, and that she lost her arm in that accident.

At the trial PW referred to and identified the Police Report on the accident together with the sketch plan accompanying it, the road inspectors report on the bus, the medical reports on her and the children, the invoices and receipts of medical bills/expenses, and to the orders of appointment of the 2nd Plaintiff as administrator of the two deceased children's estates.

She said that the Doctors have recommended that she gets an artificial arm to help her cope because she is still an active person.

Under cross examination by Mr. Mwewa, Counsel for the Defendant, PW said she had been seated in the front right seat just behind the driver of the bus. She said the conductor was seated just on the steps by the door. She was able to hear the two crew members discuss picking up speed. She said she was not able to read the speedometer but she was able to judge that the speed had picked up considerably.

PW said that prior to the accident, she saw the vanette ahead of the bus which had indicated going off the road to the left by way of an indicator and by way of slowing down. She said that the bus was very near at the time, about 3 metres from the vanette, and although the bus driver swerved he could not avoid hitting into the vanette because of the short distance between the two vehicles. She said the bus was at full speed and the driver could not control it.

That is all the evidence I received in this case on which I now have to make my findings and determination. Although there was no evidence adduced on behalf of the Defendants, I must still satisfy myself that the Plaintiffs have proved their case on a balance of probabilities.

In the Supreme Court case of KHALID MOHAMED VS. THE ATTORNEY GENERAL (1982) ZR 49 the Defendant had denied an allegation of negligence on the part of his servant. The Learned trial Judge rejected the defence but still dismissed the Plaintiff's action for damages. On appeal, Counsel for the Plaintiff argued that where the defence set up is defeated the Plaintiff ought to succeed as a matter of course. In delivering the judgment on appeal, NGULUBE, DCJ as he then was, said at page 51 of the report:

“An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a Plaintiff's case collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed.”

That reasoning remains good law todate.

On the evidence before me, I am satisfied that the 1st Plaintiff and three children were passengers on the 2nd Defendant's bus which was being driven by the 1st Defendant in the course of his employment on the material day. As paying passengers, the Defendants owed the Plaintiffs a duty of care that the Plaintiffs arrived at their destination safely. The duty of care was expressed by Lord Atkin in the celebrated case of DONOGHUE VS STEVENSON (1932) AC 562 thus:

“.....You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be lively to injure your neighbour. Who, then, in law, is your neighbour? The answer seems to be persons who are closely and directly affected by your act that you ought reasonably to have them in your

contemplation to be affected, when you are directing your mind to the acts or omissions that are called into question.”

Further, in the earlier case of BLYTH VS BIRMINGHAM WATERWORKS (1856) II Ex Ch 781 it was said that:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations- which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do. The standard demanded is thus not of perfection but of reasonableness. It is an objective standard taking no account of the defendant’s incompetence - he may do the best he can and still be found to be negligent.”

The case for the Plaintiffs was that the bus had started off rather late from Lusaka due to the heavy rains earlier that day. The speed was alright until around the Landless Corner area when the driver decided to increase the speed so that they could arrive early at their destination. PW described how from then onwards the bus increased the speed to the extent whereby the picture of the trees and grass outside were blurred. This prompted PW and another passenger to protest. It appears from her evidence that the driver paid no attention to such protest.

PW described the events leading to the accident at Marple Hurst Farm. I am satisfied that at the place she was seated on that bus she was able to observe what was happening on the road ahead. She adequately described how she observed the vanette in front which was indicating an intention to go off the road to the left. However the bus was too near and too fast to avoid hitting into the vanette.

I am satisfied that the particulars of negligence tabulated in the Statement of Claim have been proved. In the circumstances I find that the 2nd Defendant through its employee, the 1st Defendant, fell short of the duty and standard of care required of them by the law. I also find that, as a result of the 1st Defendant’s negligence, the 1st Plaintiff and the children sustained injuries from which two of those children died.

In the case of MICHAEL CHILUFYA SATA VS, ZAMBIA BOTTLERS LIMITED SCZ NO. 1 of 2003 the Supreme Court said:

“For the Plaintiff to be entitled to damages in the tort of negligence, it has to be established that he or she has suffered some injury, failure to which damages will not be awarded.”

I find that such injuries were suffered by the 1st Plaintiff and the children.

At the time of the accident, the 1st Plaintiff was aged 33 years. According to the medical report dated 22nd December, 2005, she sustained the injuries particularized in the statement of claim. The report of 23rd May, 2006 shows that she had sustained a severely traumatized left arm which was then disarticulated at the shoulder level in Kabwe. When she was transferred to St. John’s Medical Centre in Lusaka, it was observed that the wounds in the scalp, the thigh and shoulder were severely contaminated. On 16th and 22nd December, 2005, 5th and 24th January, 2006 and 16th February, 2006 she underwent operative procedures to control sepsis and provide skin cover to the wounds. Thereafter, infection was brought under control and healing of scar tissue took effect.

At as 23rd May, 2006 the Consultant Orthopaedic Surgeon assessed the 1st Plaintiff as follows:

1. Complete loss of the right arm from the shoulder point;
2. Partial loss of the right clavicle;
3. Large irregular scar over right shoulder;
4. Large hypertrophic scars on the right side of the face and the occiput;
5. Scars from the right thigh.

The consultant’s further impression was that the 1st Plaintiff had 70% disability for the loss of the right arm, 15% disability for loss of right handedness, 10% facial disfigurement, and 30% for total pain suffered during the time of trauma and throughout her treatment period. The orthopaedic technician at the University Teaching Hospital had recommended that she acquires an artificial arm.

As for LUWI who, as already noted, was one year and 9 months old at the time of the accident, the medical report dated 4th January, 2006 from St John’s shows that

he sustained two deep cuts on the right temporal region of the head, one measuring about 6cm and the other 5cm horizontally. He also had some abrasions on the shoulder. The X-ray showed no fracture of the skull. The Doctor observed significant scarring on the right temporal region of the face. Although unsightly the scarring did not produce any aggravation. The Doctor's further opinion was that LUWI had not suffered any permanent disability.

With regard to NKISU the Report on Post Mortem Examination shows that she died from injuries sustained in the said accident, namely,

1. Severe head trauma – crush fracture of the head;
2. Severe chest trauma – fracture of ribs, sternum, rupture of right atrium of heart, hemopericard;
3. Severe abdominal trauma – rupture of liver, abdominal bleeding;
4. Open fracture of right arm.

The Report on Post Mortem Examination on LENNY reveals similar injuries and cause of death.

As to damages recoverable, the learned authors of CHARLESWORTH & PERCY ON NEGLIGENCE 12th Edition have the following to say at paragraph 5-82:

“Any injured person is likely to suffer loss in many ways in which it is not possible to measure in financial terms, such as pain, disability and the reduced ability to derive pleasure from life. In order to attempt to achieve restitution, which is the purpose of damages for personal injuries, the court must embark upon the wholly artificial exercise of placing a financial value upon such losses”.

At paragraph 5-84 the said authors state, regarding awards of damages for pain and suffering:

“Clearly in all cases where the body’s integrity has been violated, resulting in either temporary or permanent impairment, the injury by itself properly attracts an award of damages”.

And further at paragraph 5-86:

“Damages for pain and suffering are intended to provide reasonable compensation for the claimant’s actual and prospective bodily hurt, including that which results from necessary medical care, surgery and treatment. No perfect compensation can be given. The Court is not estimating the price which the victim would have accepted as consideration for suffering the injuries sustained. Inevitably, monetary compensation will fall short of the value placed by the victim upon the injury to his mental and physical health....”

I have considered the injuries sustained by the 1st Plaintiff which include the permanent loss of the right arm, which requires replacement with an artificial limb, and permanent scarring and facial disfigurement. The injuries called for a number of surgical operations over a period of time. I form the view that the 1st Plaintiff suffered a lot of physical pain and will continue to suffer a lot psychologically from the said wounds, scars and disabilities. For the 1st Plaintiff I find an award of K180,000,000=00 to be reasonable in the circumstances for pain and suffering. I accordingly award the 1st Plaintiff that amount.

As for LUWI, he did not suffer any permanent disability and the injuries appear to have healed except for the unsightly scars. I find an award of K10,000,000=00 to be adequate and I award him that sum.

With regard to the two deceased children, the 2nd Plaintiff claims damages for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia as well as under the Fatal Accidents Act 1846.

In the case of KONKOLA COPPER MINES PLC AND ZAMBIA STATE INSURANCE CORPORATION LIMITED v. JOHN MUBANGA KAPAYA & OTHERS (2004) Z.R. 233, the Supreme Court explained the concept of **“loss of expectation of life”**

under the Law Reform as being: **“a head of damage when claimed on behalf of the estate of the deceased and it is law that such an award is by a small sumIn the case of LITANA v. CHIMBA AND ATTORNEY GENERAL (1987) Z.R. 26 where this court awarded K1,500,000=00 for loss of expectation of life, the court gave the following guide:-**

“We feel it is our duty to give guidance to Courts dealing with awards after 3rd October, 1985. Without taking into account any future serious fluctuations in the value of the kwacha after the date of this judgment (a matter which will have to be considered in future decisions), we recommend that the proper award of damages for loss of expectation of life, regardless of the age of the deceased, should be K3,000,”

Since the LITANA Case, the Supreme Court has gradually increased the award for loss of expectation of life as follows:

1. K3,500 in ZAMBIA STATE INSURANCE CORPORATION LIMITED AND ANOTHER v. MUCHILI (1988-1989) Z.R 149;
2. K25,500 in KABANGA AND ANOTHER v. KASANGA (1990-1992) Z.R. 145;
3. K300,000 in ATTORNEY GENERAL v. JUMBE (1995-1997) Z.R. 105;
4. K1,000,000 in KABWE INTERNATIONAL TRANSPORT AND ANOTHER v. MATHEWS NJELEKWE (1998) Z.R. 68.
5. K5,000,000 in BETTY KALUNGA (SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE EMMANUEL BWALYA) v. KONKOLA COPPER MINES PLC, (2004) Z.R. 40.
6. K5,000,000 in KONKOLA COPPER MINES PLC AND ANOTHER v. JOHN MUBANGA KAPAYA AND OTHERS (2004) Z.R. 233.

In the case before me, after taking into account the fluctuations in the Kwacha, I consider an award of K7,000,000=00 as adequate for the loss of expectation of life. I accordingly award that sum to each estate

In the LITANA Case the court explained at page 28 of the Report that:

“a claim under the Fatal Accidents Act is a claim on behalf of the dependants for the loss arising to them out of the death of the deceased. This usually takes the form of an award in respect of the loss of the anticipated earnings of the deceased”.

This is called **“loss of dependency”** and in the KAPAYA Case the awards under this head **“must be given to each specific dependant according to the dependency”**.

PW3’s evidence was that the two deceased children were not in employment and there was no evidence that they had any dependants; in fact, they were in school at the time. Clearly there cannot be any claim in respect of this head, and I decline to make any award.

Lastly, the Plaintiffs claimed special damages arising from and linked directly to the aftermath of the accident. These were particularized in the Statement of Claim as follows:

1. K20,000,000=00 in Medical bills
2. K500,000 damaged clothing
3. K500,000 lost cash
4. K900,000 transport
5. K17,000,000 funeral expenses

With respect to medical expenses, there can be no dispute, and I accept, that the 1st Plaintiff and LUWI received medical attention mostly at St. John’s. The Plaintiffs exhibited eleven receipts for medical expenses which add up to K6,979,000=00 plus an invoice for K12,187,100=00, to make a total of K19,166,100. These expenses were not seriously challenged and I do not find any reason to doubt them. I accordingly award the Plaintiff’s the said sum of K19,166,100 in medical expenses.

One cannot expect or indeed demand that the Plaintiffs to produce receipts for damaged clothing or cash lost in the accident. Since these were not seriously challenged I find the claims under those particulars to be reasonable and I award the claims for K500,000=00 for damaged clothing and K500,000=00 for lost cash.

Under cross-examination PW had admitted that the K900,000=00 was paid by her friends for the ambulance which moved her from Kabwe to Lusaka. Since she did not say if she paid back that money to the friends, I refuse to award her that sum.

As for the funeral expenses, PW said she did not have any receipts for them. However, it cannot be doubted, and I accept, that the Plaintiffs incurred funeral expenses for the two deceased children. The Plaintiff's filed with their Additional Supplementary Bundle of Documents a list of expenses from which I noted the following in particular in relation to the claim for funeral expenses.

1. K 1,600,000=00 funeral services including coffins;
2. K 50,000=00 fuel for bus at burial.
3. K 100,000=00 fuel for hired bus from ZAF;
4. K 80,000=00 labour at grave;
5. K 30,000=00 transport for sand and stone at grave;
6. K 74,000=00 cement
7. K 60,000=00 sand

K1,844,000=00 Total

Whereas I found some of the items on the list to be quite unrelated to the funeral, I found the items listed above to be directly related to the funeral. The said expenses are in my view not unreasonable. I accordingly award only K1,844,000=00 as funeral expenses.

All the awards shall carry interest at Bank of Zambia long term deposit rate from the date of the writ to the date of this judgment and thereafter at the short term deposit rate until full payment.

The Plaintiffs shall also have the costs, some to be taxed if not agreed.

Delivered at Kitwe in Open Court this 17th day of July, 2012

I.C.T. Chali
JUDGE

