

**IN THE HIGH COURT OF ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2010/HPC/0177**

BETWEEN:

**CITY EXPRESS LIMITED**

**PLAINTIFF**

AND

**TOMS TERRENCE AND TOMS DEBRA ANN  
DEFENDANT**

**1<sup>ST</sup>**

(T/A Sunshine Seedlings Services)

**MORGAN KANGUYA**

**2<sup>ND</sup> DEFENDANT**

**MADISON GENERAL INSURANCE COMPANY  
ZAMBIA LIMITED**

**THIRD PARTY**

**BEFORE THE HON. MR. JUSTICE C. KAJIMANGA THIS 11<sup>TH</sup> DAY OF  
OCTOBER 2012**

**FOR THE PLAINTIFF:** Mr. W. Mwenya, Messrs Lukona Chambers

**FOR THE DEFENDANTS:** Ms N. Nachalwe and Mrs. B. M. Chanda,  
Messrs M. Chalwe & Co.

**FOR THE THIRD PARTY:** Mr. K. Mwiche, Legal Counsel

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## **J U D G M E N T**

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**Cases referred to:**

1. The Attorney-General v Sam Amos Mumba (1984) Z. R. 14 (SC)
2. Central Refrigeration Co. Limited v The Attorney-General (1977) Z. R. 69 (SC)

3. Zambia Electricity Supply Corporation Limited v Redlines Haulage Limited (1990 - 1992) Z. R. 170 (SC)
4. Industrial Gases Limited v Waraf Transport Limited and Mussah Moheedhaid (1995/1997) Z. R. 183
5. Eagle Charalambous Transport Limited v Gideon Phiri SCZ Judgment No. 8 of 1994
6. Post Office v Norwich Union Fire Insurance Society Limited (1967) 2QB 363 C. A
7. China Henan International Economic Technical Cooperation v Mwange Contractors Limited (2002) Z. R. 28

The Court regrets the delay in delivering this judgment.

The Plaintiff, City Express Services Limited issued a writ of summons endorsed with a claim for:

- (i) Payment of K152,000,000.00 for loss of business income during the period 2<sup>nd</sup> September, 2009 to 10<sup>th</sup> October, 2009 arising from the negligent act of the Defendant's employee, servant and agent on 2<sup>nd</sup> September, 2009.
- (ii) Payment of K108,554,000.00 for costs and repairs to the bus.
- (iii) Damages
- (iv) Interest
- (v) Costs.

In its statement of claim, the Plaintiff contended that on 2<sup>nd</sup> September, 2009 the Plaintiff's bus was coming from Mwinilunga heading to Lusaka in the evening. When the bus reached Chisamba its driver indicated using the right indicator lenses that he was to start overtaking the Mitsubishi Canter light truck registration number ABM 2211 ("the truck") which was thirty

metres ahead of the bus. The bus driver also flashed the head lamps of the bus as a further warning that he was about to start overtaking the said Mitsubishi Canter truck which was being driven by Morgan Kayangula, an employee, servant and agent of the 1<sup>st</sup> Defendant. The bus driver also noticed that the road was clear from on-coming traffic and there was no other obstruction to overtaking the truck after which he started to overtake it.

The Plaintiff further contended that when the bus had started overtaking the truck its driver suddenly decided to turn right without indicating thereby causing a road traffic accident resulting in extensive damage to the bus. The accident was caused by the negligent act of the 1<sup>st</sup> Defendant's employee, servant and agent who failed to exercise due care when turning right from the main highway.

Particulars of negligence:

- (1) Failing to ensure that the road was clear before turning to the right from the main road into a minor road.
- (2) Failing to keep any or proper look out to observe the presence or approach of the Plaintiff's bus.
- (3) Failing to give any warning of his intention to turn right.
- (4) Failing to apply his breaks in time or at all so to steer or control the Defendant's truck to avoid the said collision.
- (5) Failing to observe road traffic rules before turning from the road.

The Plaintiff contended that as a result of the accident the Plaintiff could not use the bus from 2<sup>nd</sup> September, 2009 to 10<sup>th</sup> October, 2009 both days inclusive, resulting in the loss of business income of K152,000,000.00. As a result of the foregoing the Plaintiff has suffered loss and damage due to the negligent act of the Defendant arising from the road traffic accident.

In their defence and counterclaim, the Defendants denied the Plaintiff's claim and contended that the accident was caused by the sole negligence of the Plaintiff's driver, Leonard Lungu who was charged for careless driving. The Plaintiff is not entitled to the relief sought and that even if the accident was caused by the 2<sup>nd</sup> Defendant both the Plaintiff's and the 1<sup>st</sup> Defendant's vehicles were insured and therefore the Plaintiff's claim should be made to its insurance company and not the Defendants.

The Defendants counterclaimed damages for negligence and any consequential loss arising from the negligent conduct of the Plaintiff's driver, Leonard Lungu who without care of the motorists or the 1<sup>st</sup> Defendant's vehicle on the road negligently drove the Plaintiff's bus and caused the accident that has given rise to this cause of action; interest, costs and any other relief the Court may deem just.

Particulars of negligence:

- (i) The Plaintiff's driver Leonard Lungu disregarded and failed to take note of the 1<sup>st</sup> Defendant's motor vehicle which had stopped ahead of him and indicated as turning along the Great North Road on the material date.
- (ii) The Plaintiff's driver, Leonard Lungu negligently and without due care to other motorists in front of him, decided to overtake using the lane that the 1<sup>st</sup> Defendant's driver who was ahead of the Plaintiff's bus had indicated and turned into.

In its defence, the Third Party denied the Plaintiff's claim and contended that it settled an insurance claim in favour of the 1<sup>st</sup> Defendant out of the motor vehicle accident involving the 1<sup>st</sup> Defendant's motor vehicle registration number ABM 2211 which occurred on 2<sup>nd</sup> September, 2009. The Plaintiff is not entitled to recover from the Third Party the sum claimed as the Third Party Cover Limit on the 1<sup>st</sup> Defendant's insurance policy was limited to

K30,000,000.00 in an event where the insured was liable, which liability has since been denied by the 1<sup>st</sup> Defendant.

The Plaintiff paraded four witnesses. PW1 was Azim Mohamed Ticklay, the major shareholder in the Plaintiff company. His evidence according to his witness statement was that on 2<sup>nd</sup> September, 2009, the Plaintiff's Scania Iriza 69 seater bus registration number ABR 2373 was dispatched from Mwinilunga to Lusaka carrying with it forty-five Lusaka bound passengers. Later that day he received a report from his crew that the bus was involved in a road traffic accident in Chisamba. After retrieving the bus from the Police roadblock at Chisamba two days after the accident, he took photographs of the damage to the bus. He also took more photographs during the work in progress on the repairs to the bus and after completion. At the time of the accident the bus was comprehensively insured with Zambia State Insurance Company Limited. The income raised per round trip to and from Mwinilunga is K9,000,000.00 with expenses averaging K1,000,000.00 bringing the net income to K8,000,000.00. As a result of the accident, the bus was off the road from 2<sup>nd</sup> September, 2009 to 10<sup>th</sup> October, 2009.

PW1 also stated that after the accident he requested for a police report from Chisamba Police station but was told that the driver was to appear in court for the offence of negligent driving. After trial the driver brought to him an acquittal certificate from court. Some time in May 20112 he went back to Chisamba Police station where he was issued with a Police report on the accident which indicated that his driver, Leonard Lungu was acquitted from the charge of careless driving.

The witness statement of PW1 also disclosed that while the court case was going on he approached Elite Insurance Brokers Limited and Madison Insurance Brokers Limited, the broker and insurer for the 1<sup>st</sup> Defendant

respectively, to claim indemnity but they refused contending that their client had denied liability.

PW1 further stated that being in business he mitigated his loss by having the bus repaired at the Plaintiff's workshop to avoid losses which the Plaintiff was incurring at the rate of K8,000,000.00 per day. In buying the spares and body parts he was guided by the quotation received from Tandem Trailer Technology Limited which is one of the authorized assessors for Zambia State Insurance Company Limited. The Plaintiff is claiming the following against the Defendants for negligence resulting in loss and damage:

- (i) Payment of K152,000,000.00 for loss of business income during the period 2<sup>nd</sup> September, 2009 to 10<sup>th</sup> October, 2009 arising from the negligent act of the Defendant's employee, servant and agent on 2<sup>nd</sup> September, 2009.
- (ii) Payment of K108,554,000.00 for the costs of repairs to the bus.
- (iii) Damages
- (iv) Interest
- (v) Costs.

On the Defendants' counterclaim PW1 stated that the Plaintiff does not owe the 1<sup>st</sup> Defendant damages whatsoever arising from the said road traffic accident as the accident was caused by the negligent driving of the 2<sup>nd</sup> Defendant who failed to observe traffic rules.

In cross-examination, PW1 testified that the bus was always filled to capacity and that they got full loads of passengers from Lusaka to Mwinilunga via Solwezi. He said that at the material time the fare from Lusaka to Solwezi was K100,000.00 and K150,000.00 to Mwinilunga. PW1

told the Court that in spite of the manifest at page 19 of the agreed bundle of documents, the Lusaka-Mwinilunga trip was always 69 passengers. He also stated that notwithstanding the contents of page 20 of the agreed bundle of documents the income from Lusaka to Mwinilunga would still be K8,000,000.00 round trip. The witness, however, conceded that he had not provided accounts to show income and expenditure and that the figures could mean anything. He also stated that he had no evidence to substantiate the claim for loss of income.

In re-examination PW1 told the Court that according to page 20 of the agreed bundle of documents, the bus from Lusaka to Mwinilunga cashed the sum of K5,250,000.00.

PW2 was Leonard Lungu. His witness statement disclosed that on 2<sup>nd</sup> September, 2009 he was driving the Plaintiff's Scania Iriza 69 seater bus registration number ABR 2373 from Mwinilunga to Lusaka with forty-five passengers. As he approached Chisamba Curry House along Kabwe-Lusaka road before Caltex Filling Station and the main market around 21.30 hours, he saw a slow moving Mitsubishi light truck ahead of him in the direction of Lusaka. On the opposite lane there was no traffic heading in the direction of Kabwe. Having satisfied himself with the clearance of the road and that there was no other vehicle ahead of the Mitsubishi truck or the opposite side, he switched on the right indicators of the bus signaling that he was starting to overtake the truck. As a further precaution he flashed his head lamps on at least three times. He also hooted at least two times to alert and warned the driver of the truck that he was overtaking.

PW2 also stated that whilst driving at 65km/hour he started overtaking the truck before reaching Caltex Filling station when suddenly, the driver of the truck without indicating right or giving any signal warning turned right on the lane he was already on when overtaking. In order to avoid causing an accident, he applied breaks and swerved to the right side of the road forcing

the bus to go from the lane for overtaking. The bus then hit the truck's cabin on the from right hand side pushing the truck back to the overtaking lane and the bus went to hit the kurb on the bridge near the market and finally landed on the dust road next to the market. The driver of the truck ignored his warning when he was overtaking him and decided to turn right without indicating or giving him a warning that he was turning from the main road. In addition, the driver of the truck neither indicated by break lights, right indicators nor hazard lights that he was turning to the right. He did not give any hand signal to warn him either. His decision to turn right was abrupt as he started turning some 20 to 25 metres before the turn to the right heading to the market. The bus hit the truck in the overtaking lane before it reached the junction turning right to the market. As a result of the accident, the bus was extensively damaged on the front part including the passenger door. It was also extensively damaged on the left hand side and the rear was damaged too. The front windscreen and left side door glass were also shattered. He also observed that the front radiator and other accessories were damaged.

PW2 further stated that afterwards, he saw a Police officer, Mr. Zaza with a white man. They invited him to go to the Police Post where he was interviewed. He

was charged with careless driving which he denied.

Regarding the Defendants' counterclaim, PW2 denied causing the road traffic accident as alleged. He stated that on the material day the 2<sup>nd</sup> Defendant acted negligently by failing to indicate that he was turning right from the main road prior to his decision to start overtaking the truck. It was the 2<sup>nd</sup> Defendant who was at fault. The reason he was prosecuted was that he denied causing the accident. He was acquitted by the Court after it was found that the 2<sup>nd</sup> Defendant was the one who caused the accident by negligent driving.



In cross-examination, PW2 testified that there was no truck between the bus he was driving and the 1<sup>st</sup> Defendant's truck. He told the Court that before he overtook the 1<sup>st</sup> Defendant's truck he hooted twice and flashed head lamps three times because the truck was too slow and in order to alert its driver that he was already in the overtaking lane. PW2 testified that he was driving at 65km per hour as the scene of the accident is a built up area. He conceded that the speed of 65km per hour was too high in those circumstances.

The witness told the Court that the accident occurred because the driver of the 1<sup>st</sup> Defendant's truck ignored his signal and he was already in the overtaking lane when the truck driver turned right. It was also his evidence that they saw a packet of sheki sheki opaque beer in the cabin of the truck but stated however that he did not know whether the driver was tested for alcohol.

In re-examination, PW2 stated that 65km per hour was slow for him to over take the vehicle in front.

PW3 was Juddah Hanenke, a Police Inspector based at Chisamba Police Camp. In his witness statement he testified that he received a report on a road traffic accident on 2<sup>nd</sup> September, 2009 around 22.00 hours. Officers were sent to the scene of the accident near Vans General Dealers opposite the market. The accident involved a Scania Iriza bus registration number ABR 2373 belonging to City Express Services Limited and a Mitsubishi Canter registration number ABM 2211 belonging to Sunshine Seedling Services. A docket was later opened and the driver for the bus Leonard Lungu was charged with careless driving. He denied the charge and the matter was referred to the Subordinate for trial.

The witness statement of PW3 further disclosed that after trial he was given a copy of the court proceedings and judgment. The driver (PW2) was

acquitted and the Court found that the accident was caused by Moses Zulu who at the time was not a licenced driver. After studying the court proceedings and judgment he prepared a police report dated 5<sup>th</sup> May, 2010 based on the finding of the Court. He relied on the report as part of his evidence.

In cross-examination, PW3 testified that he was not one of the officers sent to the scene after the accident. He said that he visited the scene one month after the accident. He told the Court that the docket was opened on the same day of the accident by Inspector Zaza who was in charge of the case and that he was aware of the report Inspector Zaza prepared. The witness testified that he prepared another police report after he received a copy of the Subordinate Court proceedings and judgment on which he based his entire report. He conceded that his police report was variance with the one produced by Inspector Zaza.

PW3 also testified that he neither interviewed Moses Zulu nor any driver. He told the Court that he had been a police officer for twenty-five years and he did not find it relevant to interview the two drivers but that he just went through their evidence. The witness testified that he was aware that Inspector Zaza interviewed the individuals involved in the accident. He said that as officer in charge, he went through Inspector Zaza's docket and realized that there was a mistake in his report to the effect that the accident happened because the driver of the bus was not overtaking improperly. PW3 stated that he had no opportunity to see the damage to the bus.

PW4 was Teddy Ernest Tembo, an employee of the Plaintiff company. In his witness statement he stated that on 2<sup>nd</sup> September, 2009 he was on the Plaintiff's Scania Iriza 69 seater bus registration number ABR 2373 from Minilunga to Lusaka with forty-five Lusaka bound passengers. He sat in front on the conductor's seat opposite the driver's seat. The driver of the bus was PW2. When they were approaching Chisamba Curry House after 21.00 hours

but before Sunshine Seeding Services and Caltex fillings station, he saw a Mitsubishi light truck white in colour which was moving very slowly. PW1, the bus driver flashed the head lamps for the bus twice and gave the right indicator showing that he wanted to overtake. Before overtaking he hooted twice and then started to overtake. As PW2 was almost overtaking the truck driver suddenly turned to the right without any signal. Where the driver of the truck turned suddenly to the right there is no road joining the main road. He saw the driver of the truck turning to the right before reaching the turn which goes to the market on the right side of the road. The bus was not very fast when PW2 was overtaking although it was faster than the van which was in front of him and moving slowly. The next thing he saw was the bus heading towards the trench on the right and off from the main road. In trying to avoid going into the trench the bus turned a bit on the left along the pavement but the truck continued moving towards the bus resulting in the accident. The bus then hit a kerb on the right turn to the market and ended up stopping in the road opposite the market. No one was injured in the bus. The truck was hit on the driver's door but never over turned.

PW4 further stated that after the bus stopped he managed to come out through the window and forced a large opening on the same window to allow passengers to come out of the wreckage. He then asked the driver of the truck why he was driving carelessly but he responded that the driver was on the passenger's seat. When he asked the driver why he gave the truck to someone else to drive he responded that he was sorry and he then ran away. The one who was driving the vehicle also disappeared in the night. He later saw a Police officer, Mr. Zaza at the scene of the accident and he helped with the moving of the bus to the Police post. The bus was extensively damaged on the left hand side, including the passenger door. The front fender was also extensively damaged together with the first left boot. The rear fender also got damaged.

PW4 also stated that he appeared in the Chisamba Subordinate Court as a witness where he testified on the accident. At Court he met the driver of the truck who he came to know as Mr. Zulu and he was called as a witness together with the passenger in the truck.

In cross-examination, PW4 testified that there was no vehicle between their bus and the Defendant's truck. He said that the driver for the bus hooted, flashed and indicated before overtaking and that this is what drivers do at night. PW4 told the Court that the bus should have been moving at a speed of 65 to 75 km per hour. He testified that he never gave a statement at the police station but testified in Court. The witness also told the Court that it is normal practice for the vehicle being overtaken to give a left indicator. He said that if he does not do so it suggests that it is not safe to overtake.

The Defendant also paraded four witnesses. DW1 was Morgan Kanyangula, the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant's driver. The evidence in his witness statement was that on 2<sup>nd</sup> September, 2009 he was driving a truck registration number ABM 2211 along Great East Road from the Copperbelt to Chisamba around 22.00 hours near Vans General Dealers. He had a passenger in the vehicle by the name of Moses Zulu, also an employee of the 1<sup>st</sup> Defendant. He recalled two vehicles driving behind him, a truck and a passenger bus. The truck was driving right behind him and the bus was behind the truck. He indicated to turn right as he was approaching Vans General Dealers. As he was turning right the bus which had been driving behind the truck that was immediately behind him suddenly hit into his truck on the driver's side. It went off the road and landed in the ditch and the bus also went off the road into the junction where he had intended to turn.

DW1 also stated that the bus was moving at very high speed and that is why he was pushed about ten metres off the road. Moses Zulu was asleep and only woke up after the vehicle was hit. Subsequently, Hangoma Moono

who was the first person to arrive at the scene of the accident came and tried to stop the people from the bus who were beating him. Mrs. Debbie Toms came and took Moses Zulu and himself to Bethel Clinic. From the Clinic they went back to the accident scene and the police from Chisamba turn-off police post came and took statements from him, Moses Zulu and the driver of the bus. Mr. Bannocks Simakando, the Plaintiff's farm manager got the police report relating to the accident and Leonard Lungu, the bus driver was charged with careless driving and he was tried by the Chisamba Subordinate Court.

In cross-examination, DW1 testified that the truck he was driving was almost two hundred metres from the one that was following him. He said that he was able to know that it was a truck because of the nature of its lights. DW1 testified that at the time of the accident the bus had already overtaken the truck which was following him and was in the overtaking lane.

Regarding the photograph at page 41 of the agreed bundle of documents, DW1 testified that the damaged part of the bus is the side that hit into his truck. He told the Court that the dent on the truck at page 69 of the agreed bundle of document is the part that was hit but the trailer was not hit because it was still on the left side of the road. It was also his evidence that the sketch plan on page 63 of the agreed bundle of documents could not show the truck that was following him. He said that the point marked 1 on the sketch plan is where the accident happened and it is near the turning point.

DW1 also testified that he checked in the right hand side mirror before turning right and that he only saw a truck coming behind him which was about two hundred metres away but he did not know where the bus was. He said that he did not hear any hooter when he was turning. The witness told the Court that he started indicating about one hundred metres before the junction and the truck was about two hundred metres behind.

DW1 further testified that at the time of the accident he was driving at 60 km per hour because it is a built up area and by the time he was turning right the speed was about 20km per hour. He said that before turning he checked in the mirror and did not see the bus overtaking the truck behind him.

In re-examination DW1 testified that the point marked 1 on page 63 of the agreed bundle of documents is a possible place of impact but the accident happened at the junction. He said that he did not know why the truck which was following him is not in the sketch plan.

DW2 was Moses Zulu. He stated in his witness statement that on 2<sup>nd</sup> September, 2009 he was a passenger in a truck registration number ABM 2211 belonging to the 1<sup>st</sup> Defendant. At the material time the said vehicle was being driven by DW1 along Great North Road in Chisamba around 22.00 hours near Vans General Dealers. DW1 and himself were coming from the Copperbelt and he fell asleep from about six minutes before the accident happened. Before he slept, he had seen a truck behind the truck they were travelling in. He was awakened by the bang when their truck was hit by a Scania bus registration number ABR 2373 and their vehicle went off the road into the junction where DW1 had earlier intended to turn.

DW2 further stated that after the accident some people came out of the bus and pulled DW1 through the broken window and started beating him. At that point he decided to get out of the vehicle and phoned Mrs. Debbie Toms and informed her that the truck had been involved in an accident with a bus. Two people by the names of Lackson Chingwe and Hangoma Moono came to the scene of the accident and stopped the men who were beating DW1. Mrs. Toms came and the Police allowed her to take DW1 and himself to Bethel Clinic. From the clinic they went back to the scene of the accident where the Police officer, Mr. Zaza took statements from them.

In cross-examination, DW2 testified that he did not witness the accident as he was asleep. He said that he did not know the make of the truck behind their vehicle. He denied that he was driving the truck at the time of the accident.

DW3 was Moono Hangoma, a store man at Vans General Dealers. His witness statement disclosed that on 2<sup>nd</sup> September, 2009 he was walking along Great North road from Mwayasuuka market on his way home. He saw three vehicles on the road driving from north to south that is a Mitsubishi Canter, a truck and a Scania bus. There was a truck between the Mitsubishi Canter and the Scania bus. He saw the light truck indicating to turn right and the same time the bus started overtaking at high speed and that there were humps just a few metres from the scene of the accident.

DW3 further stated that the bus hit into the truck on the driver's side. He rushed to the scene and found the driver of the truck (DW1) being pulled out of the window of the vehicle by two people who had come out of the bus and started hitting him with a metal rod. DW1 fell to the ground and the witness helped him to get up and within a few minutes other people had come to the accident scene. He left the scene of the accident around 23.00 hours.

In cross-examination DW3 testified that he did not hear the bus hooting. He said that the bus over took the truck in between but not the one it hit into. He said that according to his judgment the bus was at high speed although he was not a driver. DW3 told the Court that he saw the accident happen. It was also his evidence that the truck which was hit by the bus was in the overtaking lane when the accident happened.

DW4 was Bannocks Lubinda Simakando the 1<sup>st</sup> Defendant's farm manager. His evidence according to his witness statement was that on 2<sup>nd</sup> September, 2009 he received a call from Rodwell Siame, the Defendant's

Chief Security officer informing him that their Mitsubishi truck registration number ABM 2211 had been involved in a road traffic accident. Upon receipt of this information he went to the scene of the accident where he found the truck in a ditch and the engine was still running while the indicator was indicating a right turn. He did not find DW1 and DW2 at the scene and when he enquired, he was told that they had been taken to the clinic. He got into the truck to check if there was anything but only found a cheque. He then switched off the engine and took the keys. He waited for DW1 and DW2 to come back before they could leave the scene of the accident. A police officer by the name of Charles Mwiya Zaza came and took statements from DW1 and DW2 as well as the driver of the bus. The cabin, trailer and chasis of the truck were damaged.

In cross-examination, DW4 told the Court that he did not witness the accident.

The Third Party called one witness, Pamela Sinyinza, its claims negotiator. She stated in her witness statement that on 1<sup>st</sup> July, 2009 the 1<sup>st</sup> Defendant through its broker renewed its comprehensive insurance policy for its motor vehicle, a Mitsubishi Canter registration number ABM 2211 and an insurance certificate number 158013 was issued to it. The limit for the insurance policy taken out by the 1<sup>st</sup> Defendant was K60,000,000.00 for it and K30,000,000.00 for injury or damage to third party property.

Her witness statement further disclosed that on 22<sup>nd</sup> October, 2009 the 1<sup>st</sup> Defendant lodged a claim through its brokers, Elite Insurance Brokers Limited claiming that it had suffered loss on 2<sup>nd</sup> September, 2009 as its insured motor vehicle had been involved in a road traffic accident and was hit by a Scania bus registration number ABR 2373. They received information that the driver of the 1<sup>st</sup> Defendant's motor vehicle at the time of the accident had no driver's licence, but their investigations proved that he had a driver's licence. They then processed and settled the 1<sup>st</sup> Defendant's



claim in the sum of K55,500,000.00 but paid the 1<sup>st</sup> Defendant 49,500,000.00 after deducting 10% excess as per insurance practice. They did not receive a third party claim from the Plaintiff but they explained to them that they could not participate in the claim as the insured had denied liability, thus the Plaintiff as third party could not recover under the 1<sup>st</sup> Defendant's insurance policy.

In cross-examination the witness testified that they used the document at page 54 of the agreed bundle of documents to process the claim. She told the Court that the documents at pages 54 and 68 of the agreed bundle of documents confirm that the Plaintiff's driver was acquitted. She said that they refused to pay the third party's claim because to date no document in support of the third party claim has been submitted. It was also her evidence that she was aware of the document at page 33 of the agreed bundle of documents in which the Third Party was refusing to entertain the claim. She said that the Third Party was now willing to pay the claim.

In re-examination, the witness told the Court that they were willing to pay the third party property damage as per the insurance policy.

For the Plaintiff Mr. Mwenya submitted that the evidence of PW1 that the Plaintiff suffered loss of business due to the accident was not discredited and remained unshaken. He contended that this evidence was supported by documents at pages 3 to 22 of the agreed bundle of document. On the damage to the Plaintiff's bus, counsel submitted that the documents at pages 35 to 44 provide evidence of the repairs done by the Plaintiff. He relied on the case of ***The Attorney-General v Sam Amos Mumba(1)*** where it was held that:

***“Where loss of business forms part of the claim, it must be pleaded as special damages and strictly proved.”***

Mr. Mwenya also contended that the evidence of PW2 that he was already in the overtaking lane before DW1 started to turn right was uncontroverted. He submitted further that the evidence of PW2 that DW1 just turned right when the bus was already in the right lane remained unshaken and was corroborated by the evidence of PW4; DW1, DW3 and DW5. He contended that DW1 acted negligently causing the accident for failure to keep a proper look out before turning right. The Court was referred to the case of **Central Refrigeration Co. Limited v The Attorney-General(2)** where it

was held that:

- “(i) It is the duty of any driver who intends to change direction to make sure that it is safe to do so, and that his proposed manoeuvre will not endanger or inconvenience other road users.***
- (ii) Even assuming the Defendant indicated his intention to turn right, had he been keeping a proper lookout he would have seen the overtaking vehicle, and it was his duty to continue to observe that overtaking vehicle and to make sure that his indication had been seen and that his proposed manoeuvre was safe.”***

Mr. Mwenya also submitted that DW1 had the sole control of the truck at the time and yet failed to ensure that the road was clear before turning right and relied on the doctrine of *res ipsa loquitor*. He cited the case of **Zambia Electricity Supply Corporation Limited v Redlines Haulage Limited(3)** where the Court stated at page 173 as follows:

***“The doctrine of res ipsa loquitor applies where the thing that inflicted the damage was under the sole management and control of the Defendant, someone for whom he is responsible or when he has a right to control, where the occurrence is such that it would not have happened without negligence and where there must be no evidence as to why or how the occurrence took place.”***

Counsel for the Plaintiff further submitted that the 1<sup>st</sup> Defendant did not offer any evidence before Court to deny that the 2<sup>nd</sup> Defendant was in the course of his employment at the time of the accident and cited that case of ***Industrial Gases Limited v Waraf Transport Limited and Mussah Moheedhaid(4)***.

It was also Mr. Mwenya’s submission that there were a number of inconsistencies on the evidence of defence witnesses regarding the presence of an alleged truck; the distance between the 1<sup>st</sup> Defendant’s truck, the alleged truck and the Plaintiff’s bus. He contended that such inconsistencies go to show that the defence witnesses were not truthful on this issue and that therefore their evidence ought to be treated with caution.

Mr. Mwenya further submitted that the Third Party admitted unequivocally that it was willing to pay the Plaintiff Third Party property damage as per the insurance policy for damages to the Plaintiff’s bus. He accordingly submitted that judgment on admission be entered against the Third Party for the sum claimed in the writ of summons; to be paid with interest and costs against the Third Party.

For the Defendants Mrs. Mutale submitted that there was no evidence before court to support the claim by PW1 that the Defendant’s bus carries 69 passengers when going to Mwinilunga. She also contended that the Plaintiff did not provide any accounts to show the income and expenditure of it

business. She argued that the claim for loss of business income was not accurate as it was based on a simple mathematical calculation of merely reducing the gross income by the fuel expense and should therefore not be entertained.

Mrs. Mutale also submitted that the only reasonable inference that can be drawn from the facts is that PW2 did not see the Defendant's truck because he was attempting to overtake two cars at the same time while driving at high speed. She contended that the Plaintiff did not call any eye witnesses to rebut the evidence of DW3 to the effect that there was a truck driving between the bus and the Defendant's truck. It was her further submission that DW4's evidence that he found the engine of the truck running when he arrived at the accident scene and the indicator still on was also not rebutted. She argued that DW3's evidence that there was a truck between the bus and the Defendant's truck and that he saw the Defendant's truck with a right turn indicator is more reliable because he is an independent witness with no interest to serve whereas the Plaintiff did not call any independent witness to testify in support of their version of what exactly transpired.

Mrs. Mutale submitted that the 2<sup>nd</sup> Defendant did not in any way act negligently as he obeyed all traffic rules by indicating right. She contended that PW2 was the negligent party as he attempted to overtake before ascertaining or paying attention to DW1's indicator and attempting to overtake near speed humps at high speed.

On the doctrine of *res ipsa loquitur* the Court was referred to the case of ***Eagle Charalambous Transport Limited v Gideon Phiri(5)*** where the Supreme Court stated that:

***“The doctrine of res ipsa loquitur is no more than a rule of evidence affecting the burden of proof. It is a confession by***

***the Plaintiff that he has no affirmative evidence of negligence and a statement that an event which has occurred which is in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence and the duty is on the defendant to disprove that.”***

Mrs. Mutale submitted that the doctrine of *res ipsa loquitur* cannot apply in this case as it is not an obvious fact that because the accident occurred it was as a result of the negligence of DW1. She contended that the Plaintiff still needs to satisfy the Court on the balance of probabilities that the 2<sup>nd</sup> Defendant was negligent. Counsel reiterated that the Plaintiff’s driver was negligent and his failure to exercise due care resulted in the collision.

Mrs. Mutale further contended that the evidence of DW3 was generally unreliable as he conceded in cross-examination that he only visited the scene a month after the accident had happened. It was her submission that Inspector Zaza’s findings are more reliable because he visited the scene shortly after the accident had occurred and the two vehicles involved in the accident were still at the scene and he had an opportunity to interview the drivers and other witnesses.

Counsel also submitted that PW4 is an interested witness and his testimony cannot generally be relied on. She contended that PW4’s evidence demonstrates that PW2 was negligent in the way he drove the bus in that he was driving at a high speed in a built up area at right and while overtaking.

Mrs. Mutale also contended that the Third Party’s admission that they are willing to pay the Plaintiff’s Third Party property damage is not sound at law as indemnity only arises once liability on the part on the insured has been established. The Court was referred to the case of ***Post Office v***

**Norwich Union Fire Insurance Society Limited(6)** where the Court stated that:

***“An action would not lie direct by an injured party against an insurer for indemnity under the contract of insurance in respect of damage occasioned by the insured who is alleged to be a wrong doer unless and until liability of the insured has been ascertained and determined to exist by a judgment or an award or by agreement.”***

Counsel submitted that the Plaintiff’s argument that judgment on admission should be entered against the Third Party is not tenable because no primary liability against the Defendant has been established.

For the Third Party Mr. Mwiche submitted that the Plaintiff cannot succeed on its claim as the evidence clearly fails to prove negligence on the part of the Defendants. He contended that the evidence on record from the defence, to a large extent suggests that PW2 was over speeding and did not hang back to allow DW1 make his right turn once he saw that he had indicated to make a right turn. Counsel submitted that the testimony of DW3 which corroborates that of DW1 and remained unshaken under cross-examination was that there was a truck between the Defendant’s truck and the bus and therefore the only reasonable explanation would be that PW2 attempted to overtake the motor vehicles at the same time and at high speed.

Mr. Mwiche also contended that the Plaintiff alleged particulars of negligence in its pleadings and as was held in the ***Eagle Charalambous Transport Limited***, it cannot rely on the doctrine of *res ipsa loquitor* but must adduce evidence to prove the negligence on a balance of probabilities which it has failed to do.

Counsel contended that in her evidence TPW1 stated that if liability was established against the 1<sup>st</sup> Defendant the Third Party would have no difficulty in settling the Plaintiff's claim as per the insurance policy. He submitted that the foregoing testimony does not amount to an admission on the part of the Third Party to entitle the Plaintiff to a judgment on admission. He contended that the circumstances in which a judgment can be entered on admission are as stated in ***China Henan International Economic Technical Cooperation v Mwange Contractors Limited (7)*** where the Supreme Court highlighted that judgment could be entered on admission in accordance with Order 21, rule 6 of the high Court rules Cap 27 which provides that:

***“A party may apply on motion or summons, for judgment on admission where admissions of fact or part of a case are made by a party to the cause or matter whether by his pleadings or otherwise.”***

Counsel submitted that from the foregoing no admission has been made on the part of the Third Party for judgment on admission to be entered against it.

Mr. Mwiche further submitted that a contract of insurance is one of indemnity and thus it can only indemnify the 1<sup>st</sup> Defendant where the Defendant is found liable. Counsel also cited the case of ***Post Office v Norwich Union Fire Insurance Society Limited*** where the Court stated that indemnity against the insurer would only be met when liability is ascertained and determined against the insured. He submitted that there being no liability on the part of the Defendants, the Third Party cannot indemnify the Defendants.

Mr. Mwiche finally submitted that there was no evidence on record to sustain the Plaintiff's claim and urged the Court to dismiss it with costs.

I have considered the evidence on record, skeleton arguments, authorities cited and the written submissions filed on behalf of the parties. There is no dispute that the Plaintiff's bus driven by PW2 collided with the 1<sup>st</sup> Defendant's truck driven by DW1. The main issue for determination is who between the two drivers was at fault or negligent. The contention of each party is that the other party's driver was negligent. The critical witnesses for the Plaintiff are the driver (PW2) and his bus conductor (PW4). The sum and substance of PW2's evidence is that he took every precaution to alert the 1<sup>st</sup> Defendant's driver (DW1) that he was overtaking by switching on the right indicators, flashing his head lamps and hooting. This testimony was also echoed by PW4. Both of them further stated that as PW2 was overtaking, DW1 suddenly turned right without any signal hence the collision. I have difficulties appreciating the credibility of the testimony of PW1 and PW4 in view of my findings below.

The evidence of Moono Hangoma (DW3), is in my firm opinion, quite pertinent in determining who between the two drivers was negligent. Unlike PW1 and PW4, DW3 was not only an eye witness but also a person without any interest to serve. According to his evidence, he saw with his own eyes, while walking along the road three vehicles heading in one direction. He said that he saw the 1<sup>st</sup> Defendant's truck indicating to turn right and at the same time the bus started overtaking the two trucks at a high speed resulting in the bus hitting into the 1<sup>st</sup> Defendant's truck which was in front of the truck in the middle. The testimony of DW3 remained unshaken under cross-examination. Having observed DW3 when he was giving his testimony, I found his demeanour to be without a blemish. I am therefore satisfied from the evidence of DW3 that the accident was caused by the negligence of PW2. The testimony of DW3 was in fact corroborated by the police report prepared by a police officer who had gone to the scene of the accident and interviewed both drivers. This report dated 12<sup>th</sup> October, 2009 appears at



pages 67 and 68 of the agreed bundle of documents. The report reads at page 67 with reference to the driver of the bus as follows:

***“He was over taking improperly and went and hit on the driver’s door of the first motor vehicle.”***

Inspector Juddah Hanenke (PW3) contrived to rebut the police report dated 12<sup>th</sup> October, 2009 by preparing another one the following year dated 5<sup>th</sup> May, 2010 appearing at pages 54 to 55 of the agreed bundle of documents. In this report PW3 gives the cause of accident in the following terms:

***“ACCIDENT HAPPENED WHEN THE SECOND M/V DRIVER WAS OVERTAKING IN PROCESS HE HIT INTO THE FIRST M/V WHICH WAS TURNING RIGHT WITHOUT INDICATING.”***

I do not give any weight to this police report for reasons not hard to discern. According to the evidence of PW3 under cross-examination, he visited the scene of the accident one month after the accident; he neither interviewed the two drivers; and his report was based on the proceedings and judgment of the Subordinate. In short PW3 did not investigate the accident and consequently his report is far from being credible as it was based on hearsay evidence.

Furthermore the evidence of DW3 is also corroborated by that of DW4. This witness testified that when he arrived at the scene of the accident, he found the 1<sup>st</sup> Defendant’s truck in the ditch and the engine was still running while the indicator was indicating a right turn. This testimony of DW4 was not gainsaid by the Plaintiff. As indicated earlier, I am satisfied that the accident was cause by the negligent driving of the Plaintiff’s driver (PW2). The fact that he was acquitted by the Subordinate Court is inconsequential because that was a criminal matter which has no bearing on this one which is a civil case and such a decision cannot influence or alter the outcome of

these proceedings. In the result the Plaintiff's claim against the Defendants cannot succeed. Stated differently, the Plaintiff has not proved its claim against the Defendants on a balance of probabilities.

As regards the Plaintiff's claim against the Third Party, I am of the firm view that this too cannot succeed. I am fortified by the holding in the **Post Office** case cited by the Third Party which enunciates the principle that indemnity in a claim of this nature only arises when liability on the part of the insured is established. I have since concluded above that the Plaintiff's claim against the Defendants has failed, that is to say, no liability against the 1<sup>st</sup> Defendant has been established. This being the case it follows that the Plaintiff's claim against the Third Party also fails. The Plaintiff contrived to pray for judgment on admission against the Third Party based on the evidence of TPW that the Third Party was now willing to pay the Third Party's claim to the Plaintiff. As correctly submitted by Mr. Mwiche, this does not amount to an admission envisaged in the **China Henan** case. To me the Plaintiff's argument is simply a red herring.

I now turn to the Defendants' counterclaim. They have counterclaim damages for negligence and consequential loss arising from the negligent driving of the Plaintiff's driver which resulted in the accident. The evidence of the eye witness (DW3) who witnessed the accident was that he saw the 2<sup>nd</sup> Defendant indicating to turn right and at the same time the bus started overtaking at high speed. I did indicate earlier that this evidence was not rebutted by the Plaintiff. The evidence of DW3 was corroborated by the Police report to the effect that the Plaintiff's driver drove improperly. This simply means that he drove negligently. On this basis, I concluded that the Plaintiff's driver was negligent.

From the foregoing, I conclude that negligence has been proved by the Defendants. I accordingly award them damages to be assessed by the Deputy Registrar at Chambers.

Costs follow the event and will be taxed in default of agreement.  
Leave to

appeal is granted.

**DELIVERED THIS 11<sup>TH</sup> DAY OF OCTOBER 2012**

**C. KAJIMANGA**  
**JUDGE**