IN THE HIGH COURT FOR ZAMBIA **2010/HP/623**
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

SISTER AGNESS MILIMO **PLAINTIFF**

AND

PONSIANO CHIDILA **1ST DEFENDANT**

JOSTER SIAKULA **2ND DEFENDANT**

BEFORE HON. MRS. JUSTICE M.S MULENGA ON 10TH DAY OF JULY 2014

FOR THE PLAINTIFF : MR. C.L. MUNDIA SC – MESSRS C.L. MUNDIA AND COMPANY

FOR THE DEFENDANTS : MR. C. SIATWINDA, LEGAL AID COUNSEL – LEGAL AID BOARD

J U D G M E N T

Cases cited:

1. **Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 Vol. 1 (S.C)**
2. **Miller v Minister of Pensions [1947] 2 All ER 372 at 373 -374**
3. **Reuben Nkomanga v Dar Farms International Limited SCZ Judgment No. 25 of 2008,**
4. **Attorney General v D G Mpundu [1984] ZR 6**
5. **Donnely v Joyce (1974) Q.B. 454**

This matter was commenced by Writ of Summons and Statement of Claim dated 14th June 2010 claiming the following reliefs:

i. *Damages for injuries sustained in the road accident caused by the 1st Defendant.*

ii. *Damages for pain and suffering as a result of the accident caused by the 1st Defendant*

iii. *Damages for mental strain and anguish arising from the accident*

iv. *Interest at statutory rates from date of occurrence*

v. *Any other relief the Court may deem fit and appropriate*

vi. *Costs.*

The Plaintiff averrs in her Statement of Claim that she is a Sister in the Roman Catholic Church stationed at the Fumbo Mission Parish in Chisekese, Monze. That the 1st Defendant was at the material times am employee or driver of the 2nd Defendant and the 2nd Defendant was at the material time a business man specialized in transportation business and the employer of the 1st Defendant and sued vicariously in that respect.

That on 15th January 2010 around 17:10 hours, the Plaintiff was driving a Toyota Hilux registration AAV 3084 when it collided with a Mitsubishi light truck Canter which was unregistered at the material time and driven by the 1st Defendant. The cause of the accident was as a result of the negligent or improper overtaking by the 1st Defendant at the Monze Chisekese junction resulting in the 1st Defendant colliding with the Plaintiff's vehicle.

That the Plaintiff sustained the following personal injuries:

a. shock and severe pain

b. serious injury to the right hand which included laceration to the dorsum of the right hand
c. nerve injury to extensors (ring finger) of the right hand as well as extensive injury to the right thumb.
d. as a result of the accident, the Plaintiff still finds difficulties in the proper use of her right hand.

The particulars of negligence are as follows:

a) negligently driving and overtaking at a T-junction without due care.
b) failure to apply sufficient and sound brakes to stop the motor vehicle which would have avoided the road traffic accident.

That by virtue of the accident, the Plaintiff had to be hospitalized and had to incur transport costs thereafter to and from hospital as well as costs towards medical treatment. The Plaintiff suffered special damages at the time of the accident as follows:

a) Transport and hospital bills including specialized treatment - K2,163,000.00 (now K2,163.00 after the rebasing).
b) Loss of motor vehicle whose value was K40 million.
c) Loss of use of motor vehicle.

It is in the premises that she claims the reliefs as stated above.

The Plaintiff testified at the trial that on 15th January 2010 she was driving a Toyota Hilux AAV 3084 from north to south along Monze Chisekese Road and as she approached the junction of Water Affairs, she

applied brakes as she was turning to the right. She indicated that she was turning. A Mitsubishi Canter white in colour driven by the 1st Defendant bashed her on the driver's seat. The Canter was also coming from the north heading south on the Monze Chisekese road. The Canter was behind her. She did not see it because she was concentrating on the other side as she was turning.

The Plaintiff's vehicle was extensively damaged on the right side. She sustained injuries on the right palm, the right thumb had a deep cut and on the ring finger. Her right arm was also affected. At the time of the trial, she stated that there was still numbness on the thumb and it was still swollen.

She was treated at Monze Mission Hospital and was attended to by Doctor Mvula. She was then referred to University Teaching Hospital and was attended to by many doctors. Thereafter she was referred to Chainama Hospital for physiotherapy and subsequently, the Italian Hospital as her thumb was swollen. The Plaintiff then referred to page 8 of her bundle of documents, which is a patient referral form from Monze Hospital signed by Doctor Mvula. Pages 9 to 15 are forms from University Teaching Hospital. Page 16 is from Chainama Hospital. Pages 17 to 23 are invoices and other documents from the Italian Hospital.

Further, the Plaintiff testified that the accident was investigated by the police. She did not give any statement to the police as she was sick. She learnt afterwards that one of the passengers from the Canter died on the

spot. The Plaintiff repeated that her state of health was not very good. She prayed to be given the damages, compensation and the expenses incurred worth K30 million.

Under cross examination, the Plaintiff testified that she was indeed turning to the right. It was not true that two vehicles had already overtaken her. She also denied the fact that her vehicle was on the far left of the road when the accident occurred and that she did not indicate. She denied having turned abruptly as one has to slow down when turning. In reference to page 4 of her bundles, she stated that the impact was on the right side of the vehicle. The Canter should have been damaged on the front part as it hit her.

When asked whether one would not infer from the damages and sequence of events as narrated that she was on the extreme left when the impact occurred, the Plaintiff denied being on the extreme left as the Canter found her on the middle of the road turning right. After the impact, both vehicles swerved to the same direction. She had no occasion to go to the scene of the accident as she was paralyzed and did not know what was happening.

After recovery, she went to the scene and that is why she was able to say that there were marks of the two vehicles colliding on the other side.
The skid marks are for both vehicles as her vehicle went to the other side and so did the Canter. She was not aware that there were skid marks for the Canter on the scene. All she knew was that both cars went off the

road after the impact of the Canter. She was not aware that the Canter turned to avoid hitting her. She maintained that she indicated on time and the 1st Defendant was supposed to look at the indicator. She learnt about the deceased when she was discharged from hospital.

She denied the possibility of her being charged with causing death by dangerous driving despite the fact that she was hospitalized for long. The Hilux she was driving was insured and all the expenses incurred were paid for by the diocese and the insurance company.

In re-examination she stated that to her knowledge the 1st Defendant was charged with the offence of causing death by dangerous driving by the police. She insisted that she did not turn abruptly. She indicated in time for every car behind to see the indicator. She went to the scene once sometime in September 2010 as she was in Lusaka all along doing physiotherapy. She did not see the other two vehicles which were said to have overtaken her.

PW2 was Sergeant Manival Muleya Lipingi, a Traffic Officer based at Gwembe Traffic who testified that on 15th January 2010 around 17:00 hours, he received a report of a fatal road traffic accident which occurred at Water Affairs junction along Monze Chisekese road. That he went to the scene of the accident with three (3) other officers.

At the scene, he drew a sketch plan not to scale. It was revealed that a Toyota Hilux AAV 3084 driven by the Plaintiff and a Mitsubishi Canter unregistered driven by the 1st Defendant were involved, coming from

north to south. Furthermore, it was revealed that the accident happened when the 1st Defendant was improperly overtaking at a T - Junction and in the process went and hit into the Toyota Hilux which was turning right. Both vehicles were off the road at the time he went to the scene. One passenger from the Canter died on the spot and three others were seriously injured. The Plaintiff also sustained serious injuries at her right palm and her passenger Sister Cleopatra Kanyimba was also injured. Both vehicles were extensively damaged.

After all the investigations PW2 recorded a warn and caution statement from the 1st Defendant who admitted the charge and he was arrested for causing death by dangerous driving contrary to section 161(1) of the Road Traffic Act no. 11 of 2002. The Plaintiff and others who were injured were issued with medical reports. The Plaintiff was referred to Lusaka for specialist treatment. Pages 4 and 5 of the Plaintiff's bundle of documents is the report of the road traffic accident prepared by PW2's supervisor Inspector Ng'ambi, while he was away. Under cross examination, PW2 stated that he was the investigating officer. His supervisor only prepared the report based on the information that he had placed in the occurrence book. The supervisor never visited the scene.

PW2 took the statement from the 1st Defendant who did not mention that he indicated when overtaking. He investigated the Plaintiff's driving. When he arrived at the scene of the accident, the Plaintiff was in a critical condition but they found her vehicle with the indicator still on fifteen (15) minutes after the accident. It was indicating to the right. The

Hilux was pushed off the road. It was on the left turning right. There were no skid marks on the road. The Canter was also found on the right side off the road. According to investigations, PW2 found out that no brakes were applied as the vehicle stopped after impact.

In his Defence, the 1st Defendant admits the contents of paragraphs 1 to 4. As regards paragraph 5, the 1st Defendant states that it was in fact the Plaintiff who negligently and improperly turned at the said Monze-Chisekese Junction without indicating to the 1st Defendant and other road users, thereby contributing to the said accident. Further, the Plaintiff slowed down while approaching the said junction and drove off the road to the side before turning without indicating. The Plaintiff's driving off the main road to the side of the road made the 1st Defendant believe that the Plaintiff was parking thereby proceeding to overtake. Further the 1st Defendant did indicate in good time that he was overtaking as required by the Road Traffic rules.

The 1st Defendant admits the contents of paragraphs 6 and 7 as same are within the knowledge of the parties and states further that the Defendants also suffered mental torture and anguish due to the death of one of the passengers who was in the motor vehicle and who was also a friend to the Defendants.

The 1st Defendant further stated that he did apply brakes and skid marks were still visible on the road. Further that the 1st Defendant exercised due care before overtaking. That the 1st Defendant actually

swerved off the road to try and avoid the accident but the carelessness of the Plaintiff's turning made it impossible for the 1st Defendant to avoid the accident. Further paragraph 9 is partly admitted as the Defendants also suffered damages caused to the motor vehicle.

The 1st Defendant testified that on 15th January 2010, in the afternoon, he was heading south towards town. About 2km from Monze at a point where there was a curve after Musonda junction, he met three (3) vehicles ahead of him. He was driving an unregistered Mitsubishi Canter. All the vehicles were heading south. The vehicle in front, the Toyota Hilux was moving slowly thus the vehicle following it overtook it and so did the third vehicle.

Whilst the third vehicle was overtaking the Toyota Hilux, when the two were at par, the Hilux went to the left with the yellow line in between the tyres. When the 1st Defendant saw that he thought the same was parking as there was a small parking space. That is when he moved to the right coming off the lane. That according to the traffic laws if the vehicle is off its lane, it means it is not on the road. The 1st Defendant then decided to overtake it and when he came at par with it, the Hilux came back onto the lane and then drove onto the overtaking lane. The 1st Defendant then tried to swerve and went off the road but the Hilux followed until they collided. He tried by all means to apply some brakes and even the skid marks were on the road.

The spot is not a T-junction where someone can turn but a mere path. When the vehicles collided one of his passengers fell out of the vehicle and was ran over by the same Toyota Hilux. When the vehicles stopped he looked around and saw two people under the Toyota Hilux and he then called for help from the people around who assisted him to remove them from under the vehicle. One was discovered dead. The Plaintiff was removed from the Hilux and they discovered she was a sister from Monze parish.

The dead body was then put in the parish vehicle and on their way to the hospital, he saw a police vehicle heading to the scene, he disembarked and went with the officers to the scene. The police got some statements and the vehicles were towed. He was charged with causing death by dangerous driving and was later fined.

The 1st Defendant further testified that if he was negligent he would have hit the Plaintiff from the back. That the Plaintiff indicated that she was parking on the side of the road hence his decision to overtake. That if the Plaintiff had checked her side mirror she would have seen him as he had indicated that he was overtaking. He was unhappy that his friend died and the charged of causing death by dangerous driving was affecting him.

As regards medical expenses, the 1st Defendant said they were not from the Plaintiff's personal pocket as the receipts show that they were paid by the Handmaid Sisters who cannot claim back their money.

Under cross examination, the 1st Defendant testified that the 2nd Defendant was his employer. He was employed as a driver. At the time of the accident he was ferrying passengers for a reward. The spot where the accident occurred was not a T-junction. This was in the rainy season and the road was invisible. There is no sign post of a junction. The Plaintiff may have tried to protect herself by lying that there was a T-junction. The 1st Defendant heard PW2's testimony that the accident was at a T-junction but insisted that there is no T-junction. He admitted that PW2 visited the scene but lied that there was a T-junction.

The 1st Defendant further stated that he was driving between 60km to 65km/h when he was overtaking. It was an open road with dotted lines. The maximum speed is 100km/h on an open road. He admitted having been charged with causing death by dangerous driving but that it was based on the Plaintiff's statement. That the police did not get a statement from him although he told them how the accident happened. That it was because of the statements from the people at the scene and himself that made the police charge him

The 1st Defendant further stated that there were skid marks which were still visible in July when he filed the Defence but admitted hearing PW2 state that there were no speed marks and that PW2 was not cross-examined over the skid marks.

When referred to pages 16, 17 and 18 of the Plaintiff's bundle of documents, the 1st Defendant admitted that those particular payments

were made by the Plaintiff. As regards the document at page 19 the 1st Defendant stated that there is something wrong with the Handmaid Sisters for them to claim money from him as he is also a member of the Catholic Church. There is no document to show that this money should be paid back. However, he admitted that there is nothing wrong for them to pay for their member as they did when she was in hospital. The Plaintiff's vehicle was comprehensively insured thus they cannot claim from him as it was an accident.

Prior to the accident, the 1st Defendant had been driving for 3 years and he was 27 years old. He did not go to the driving school, he just read books. He came to know about the Highway Code through reading. It is not true that a driver from a driving school is better than a self taught one. In re examination, the 1st Defendant stated that there were dotted lines on the road which allow a vehicle to overtake another according to the Zambian Laws.

This marked the close of the trial.

Counsel for the Plaintiff filed submissions dated 26th February 2014 which have been taken into consideration in arriving at this Judgment. The claims as endorsed on the writ of summons are for damages for injuries, pain and suffering and mental anguish with interest.

Negligence is a tort and arises in circumstances where there is a failure to exercise due care towards another person. For one to succeed in a negligence action, one must show that one was owed a duty of care for

the type of damage sustained. It must also be proved that the wrong doing was the cause of the injuries. In the case of road users, the 1st Defendant owed a duty to the Plaintiff as a fellow road user to move with due care on the road and to observe the Highway Code and Roads and Road Traffic Act No. 11 of 2002. The question is always one of fact.

The issue for determination is whether the 1st Defendant is liable in negligence for the accident which occurred on 15th January 2010.

The evidence of the Plaintiff is that the 1st Defendant improperly attempted to overtake her vehicle at the Monze Chisekese junction thereby resulting into the accident. That the 1st Defendant attempted to overtake her vehicle at a T-junction without due care resulting in the accident and the subsequent injuries sustained. The further evidence against the 1st Defendant is that of PW2 who stated that the former attempted to overtake the Plaintiff's vehicle at a T-junction and thus caused the accident and that the Plaintiff's vehicle was found still indicating right a few minutes after the accident.

The 1st Defendant denies these allegations and states that the Plaintiff moved out of the road and thus he made up his mind to overtake and at that point she came back onto the road and the accident occurred. He denied that the accident occurred at the T-junction although he acknowledges in the Defence on record that the accident occurred at a junction.

The standard of proof in civil matters as held in **Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 Vol. 1 (S.C)** "... **is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability "as opposed to beyond all reasonable doubt in a criminal case". The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable. "**

Further Lord Denning in **Miller v Minister of Pensions [1947] 2 All ER 372 at 373 -374** held as follows:

> **"That degree is well settled. it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."**

The question then is whether it is probable than not that the 1st Defendant caused the accident and is liable for the injuries suffered by the Plaintiff. The answer is in the affirmative. The Plaintiff has established on a balance of probability that the 1st Defendant did attempt to overtake at a T-junction thereby causing the two (2) vehicles to collide. The evidence of PW2 is even more damning as it went unchallenged even in cross examination that the 1st Defendant overtook the Plaintiff at a T-junction and further that the Plaintiff had indicated to turn right as the indicator was found indicating right a few minutes after the accident.

The 1st Defendant has sought to argue that the accident was caused by the Plaintiff suddenly getting onto the road and onto the overturning lane

without indication. This argument has been effectively rebutted by the Plaintiff and the evidence of PW2, the traffic officer. Their uniform evidence is that the Plaintiff's vehicle was indicating that it was turning to the right on which there was a T-junction. Both witnesses further stated that there was indeed a T-junction at the point where the accident occurred. Further PW2 said it was after seeing the vehicles involved in the state they were stationed and interviewing people on the scene including the 1st Defendant that he made up his mind to charge the 1st Defendant for the offence of causing death by dangerous driving. That at this point he did not interview the Plaintiff who was rushed to the hospital.

This evidence shows that the Plaintiff indicated that she was turning right on the T-junction and was breaking to slow down and started turning when the 1st Defendant came to hit her on the right side of the road. The 1st Defendant said he saw the Plaintiff's car apparently brake and park off the road and that is when he decided to get into the overtaking lane but that when he reached parallel to the Plaintiff's vehicle, the Plaintiff drove onto the road and on to the overtaking lane. This however does not reasonably explain the fact that the 1st Defendant hit the Plaintiff on the driver's side whilst the Plaintiff's vehicle was indicating that it was turning to the right at the T-junction. The 1st Defendant was expected to exercise due and reasonable care and to sufficiently look out before overtaking. The 1st Defendant himself said he saw the Plaintiff brake but that he did not see the indicator. The fact that the 1st Defendant used the overtaking lane shows that his version

that the Plaintiff parked off the road is not true as he would have by passed using the same left lane. I therefore find in line with the Plaintiff as regards how the accident happened. The road traffic accident report shows that the Plaintiff's car was damaged on the right side while the vehicle the 1st Defendant was driving was damaged on the front part. The Plaintiff has discharged the burden of proof and shown that the 1st Defendant negligently caused the accident. The 1st Defendant has not proved contributory negligence on the part of the Plaintiff.

In claims for damages for personal injury, the courts have developed a practice of breaking down the claim in different heads so as to apportion loss on each particular head as stated in the case of **Reuben Nkomanga v Dar Farms International Limited SCZ Judgment No. 25 of 2008,** where the Supreme Court broke down the heads as hereunder:

a. *Pain and suffering*
b. *Loss of amenities*
c. *Permanent disability*
d. *Loss of future prospective earnings*
e. *Special damages*

This means that the claim for mental strain and anguish is not a stand alone one but is reasonably covered under pain and suffering. The same applies to the claim for damages for injuries which is also covered under pain and suffering and special damages.

The Plaintiff is entitled to damages for pain and suffering which is only awarded for a specific period before recovery. In **George Chishimba v Zambia Consolidated Copper Mines Limited (1999) ZR 198 (SC)** it was stated that:

> **"In calculating awards of general damages for pain and suffering and loss of amenities, account is taken of the pain and suffering from the date of the accident, the operations undergone, the future operations, the past and future day to day pain suffered during walking and other activities. For loss of amenities, account is taken of the inability to participate in sport and family activities as well as the possibility of the loss of earning capacity."**

In the **Nkomanga case** cite supra, the court awarded K50 per week as damages for pain and suffering. These damages were awarded not for permanent pain but for a specific period before recovery. In the instant case the Plaintiff was hospitalized from 15th January at Monze Hospital, referred to University Teaching Hospital, Chainama Hospitala and finally Italian Hospital. The documents in her bundle shows that she was still attending treatment for physiotherapy as at 6th April 2010. Thus this converts to eleven (11) weeks of treatment.

The K50.00 in 2008 cannot remain the same in 2014. The rule is that inflation should be factored in to determine the net present value. The average annual inflation from 2008 to 2014 has been at over 10% per year. What has to also be factored in is the cost of living. This shows that the value of K50.00 in 2008 is now about K600.00. Therefore K600.00 multiplied by 11 weeks equals K6,600.00. This is the amount the Plaintiff is entitled to under pain and suffering.

The Plaintiff did not lead any evidence to show loss of amenities and loss of prospective and future earnings and these are therefore not applicable.

Under Permanent disability the Plaintiff in her evidence stated that she still finds it difficult to use her right hand. The Medical report at pages 9, 10 and 12 only state that "loss of ring finger tendon extendor'. It is not clear what percentage of permanent disability this constitutes. Since the tendon extender was lost, I take it that this is a permanent disability although a relatively minor one and I award the Plaintiff K3,000.00 under this head.

Under special damages the Plaintiff not only needs to plead special damages but also to prove them. The case of **Attorney General v D G Mpundu [1984] ZR 6** comes to mind wherein; it was held that "***... special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore they must be claimed specially and proved strictly.***

The Plaintiff has produced receipts for the various expenses incurred as follows:

K20.00 for X-ray as it appears on page 16

K700.00 paid to Italian Hospital at 17

K290.00 Taxi cost page 18

K700.00 Paid to Italian Hospital at page 19

K70.00	"	page 20
K13.00	Jubilee Chemists	page 20
K10.00	Italian Hospital	page 21
K120.00	" "	Page 22
K120.00	" "	Page 23

K2,043.00

This sum of K2,043.00 is the total for special damages for medical expenses and transport expenses that have been proved by the Plaintiff. The fact that some of these expenses were paid on her behalf by the Handmaid Sisters does not mean that she cannot recover the same from the Defendants. In **Donnely v Joyce (1974) Q.B. 454** it was stated that a claimant can recover in services rendered, irrespective of any legal obligations to pay for them. Further that damages must be assessed on the basis of the proper and reasonable cost of meeting the medical or nursing services needed and the claimant is not under legal obligation to reimburse the third party who paid for them on the claimants behalf.

I note that the 1st Defendant stated that the vehicle he was driving had third party insurance. However, no evidence was adduced as to whether the Plaintiff was paid something from the same. This action by the Plaintiff has been proved as against the 1st and 2nd Defendants. The 2nd Defendant is vicariously liable for the actions of the 1st Defendant.

In summary the Plaintiff is awarded K6,600.00 for the pain and suffering, K3,000.00 for permanent disability and K2,043.00 for special damages as against the two Defendants. These amounts total K11,643.00 which shall attract simple interest at 10% per annum from the date of Writ to the date of Judgment.

Thereafter interest will be at the average Bank of Zambia lending rate from the date of Judgment to payment.

Costs are for the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 10th day of July, 2014

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M.S. MULENGA

HIGH COURT JUDGE