**IN THE HIGH COURT OF ZAMBIA** **2012/HP/1323**
**HOLDEN AT LUSAKA**
*(Civil Jurisdiction)*



BETWEEN:

**YOHANNES ANTONYO** **PLAINTIFF**

**AND**

**JULY DANOBO (T/A JULDAN MOTORS)** **DEFENDANT**

*Before the Hon. Lady Justice F. M. Chisanga, this .....day of .....2014.*

*For the Plaintiff:* *Ms. Sianondo & Mr. Haimbe, Messrs Malambo & Co.*

*For the Defendant:* *S. Zulu S.C., Messrs Sebastian Zulu and Company.*

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# JUDGMENT

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***Cases referred to:***

1. **King vs Philips (1953) 1 ALL E.R. 617.**
2. **Attorney General vs Kakoma (1975) ZR 212.**
3. **Hay (or Bourhill) vs Young (1942) 2 ALL E.R. 396.**
4. **Browne vs De Luxe Car Services (1941) KB 549 at 552.**
5. **Bell Telephone Co of Canada vs Ship Mar-Tirenno (1974) 52 DLR (ed) 702.**
6. **Ritchie's Car Hire Ltd vs Bailey (1958) 108 L.J 348.**
7. **Daborn vs Bath Tramways (1946) 2 ALL E.R. 333.**
8. **A.C. Billings vs Riden (1957) 3 ALL E.R. 1.**
9. **January Gringo Nakalonga vs The People (1980) ZR 252.**
10. **Anderson Kambela Mazoka and Others vs Levy Patrick Mwanawasa & Others 2005 ZLR P. 138.**
11. **Times Newspater Ltd vs Kapwepwe (1973) Z.R. 292 S.C.**

The plaintiff Yohannes Antonyo seeks damages against the defendant. He avers, in his statement of claim that he was, on 1st March, 2010, a passenger in the Defendant's coach ABL 7039 enroute from Chipata to Lusaka. As a result of negligent management of the coach, the driver lost control of the bus where by 31 passengers were injured while one died on the spot. The plaintiff was among the injured. Particulars of the negligence are stated as:

a) Driving too fast.

b) Driving at an excessive speed when it was unsafe to do so.

c) Failing to apply his brakes in time or at all and/or so to steer or control his bus as to avoid overturning.

It is averred that by reason of the defendant's negligence, the plaintiff sustained severe personal injuries and has suffered loss and damage. He has outlined particulars of injury as well as particulars of special damages. He thus claims for general damages, exemplary and aggravated damages, special damages, damages for mental anguish, physical disability, loss of income, physical pain and anxiety and distress.

The defendant, while admitting that the plaintiff was on 1st March, 2010 a passenger on the defendant's coach No. ABL 7039, has denied the alleged negligence and averred that its driver, Raymond Ndawa, was a competent and very experienced driver who had been employed as a luxury coach driver for the defendant for almost 12 years since 1989, having worked elsewhere for four years before being employed by the defendant. It is

averred that the said accident was the first motor accident the said driver was involved in during the 16 years. That he has been driving the defendant's luxury coaches from Lusaka to Chipata, Livingstone, Mongu, Nakonde, Copperbelt, Kashikishi, Nchelenge and Mpulungu without incident. It is averred that on the material date, the said Raymond Ndawa was driving at 80Km per hour when he reached Mtilizi near Nyimba. It was raining, though not heavily. The bus started swerving from side to side because the road was very slippery due not only to the rains but also to poor quality of the road.

It is averred that the said driver tried to control the bus which first swerved to the left, then to the right and again to the left whereupon it was going straight to hit into a small shop. He tried to control it, but the bus fell on its side. It is denied that the accident was due to the said driver's negligence or default.

At the trial, PW1 was Emelda Muntemba, a sergeant with service number 35588, based at Nyimba police station. She testified that she received a report of a road traffic accident while on duty on 1st March, 2010. The accident occurred at Mutilizi junction about 2.5 kilometres, east of Nyimba. When she went to the scene, she found a bus resting on its side. There was one casualty in the accident and 31 injured passengers were admitted at the hospital, while others were treated as out patients. The plaintiff was among those who were badly injured and was rushed to the theatre. The witness concluded that the bus travelling was at high speed, hence the accident. She charged the driver with one count of causing death by dangerous driving

contrary to section 161 (1) of the Road Traffic Act. She referred to the Traffic Accident Report appearing at page 23 of the plaintiff's bundle of documents. She also referred to page 30 of the said bundle of documents, which was a picture of the plaintiff showing the injuries he suffered in the accident. She also drew the court's attention to the Bus at page 1 of the plaintiff's bundle of documents.

When cross examined by learned state counsel, she said she was not on the bus, but found the accident had already happened. The driver said he had been driving at 80 kilometres per hour. She said there was no speed limit before town. She thought the cause of accident could have been excessive speed. She confirmed it was raining at the time the accident occurred and that the locality at which the accident occurred is a black spot. The stretch is too smooth, and when it rains, it becomes very slippery such that when brakes are applied, the vehicle would start swerving. She confirmed the state of the road is bad. She said a Toyota Hiace from Malawi and a small car were also involved in an accident about 200 metres away from the spot where the defendant's bus was. The accident involving the Toyota Hiace and small car had occurred at a different time. The witness confirmed that the driver of the defendant's bus complained about the smoothness of the road.

PW1 confirmed that a post bus had also been involved in an accident on the same stretch and 4 lives were claimed. She was the dealing officer. A police vehicle was also involved in the said accident, but the occupants suffered injuries only. There were no casualties.

She informed the court that officers from Road Development Agency confirmed, in the presence of the Division Traffic Officer Mr. B.C. Vuka that the road was bad and Sable contractors were required to work on it again.

When referred to page 25 of the plaintiff's bundle of documents, she said the report was written when she was no longer at that station.

When re examined, PW1 said the point where the accident took place was known as a black spot even before the accident. She said there was a sign post indicting 40 kilometres per hour as one entered town. She said that was the limit at which one was to drive in town. She said the driver admitted to dangerous driving when she warned and cautioned him.

PW2 was the plaintiff. He testified that on 1st March, 2010, he boarded Juldan Bus in Chipata enroute to Lusaka. He was, at the time, employed by Christian Aid based in Lusaka, as Regional Emergency Manager for Southern Africa, that is, Malawi, Zambia, Zimbabwe, South Africa and Angola. He informed the court that it was raining, and as the bus approached Nyimba between 9-10 hours in the morning, people started yelling in Nyanja that the driver should reduce speed as that was a bad spot. The next thing the plaintiff recalled is that he was being pulled from the bus which had fallen on its side. He regained consciousness at that point. He said he was conscious at the time of impact, but became unconscious and was out for some time. He was rushed to the theatre where the right side of his face was sutured and both arms bandaged. He referred to page 30 of the plaintiff's bundle of documents. His condition deteriorated

and his employers decided to evacuate him to Milpark hospital in South Africa. A Zambia Airforce aircraft was hired to evacuate him from Nyimba to Lusaka airport and from there an airbus was chartered from Lusaka to Johannesburg.

At Milpark hospital, he was examined and it was discovered that the bones around the right side of his face were broken and a face reconstruction had to be done for the insertion of metals. He had sustained a fracture of the spine, and had a broken left hand clavicle, a fractured left humerous, as well as broken 8th and 12th ribs in his left hand side. Three ribs on his right hand side, and especially 2nd, 3rd, 4th and 5th ribs were badly damaged to the extent that they had penetrated his lungs. As a result the left lung collapsed. The thorax also collapsed due to the heavy internal bleeding. His chest had to be punctured so as to drain the blood from it. Metal was fit on his clavicle, humerous and face. The plaintiff was on a ventilator for 4 weeks as he could not breath properly using his lungs as they had collapsed. He was in intensive care unit from 3rd March to 11th April, 2010, and was discharged thereafter and had to see the Doctor once every month up to October, 2011. The doctors had performed surgery and skin grafting on his right arm. A lung specialist had also attended to him. After the October review, he was told he could only go and see them if he was feeling pain or was feeling uncomfortable. He said he had not improved since then. He felt pain in his chest and his left arm had developed a shock line. He felt pain every time he touched his arm. As a result, his office sought an appointment for him to go for another review in August, 2012. The doctor felt that the

plaintiff was incapable of executing his duties as regional manager. The plaintiff's employers, upon receipt of the doctor's report, sought a second opinion from Stanton Med Clinic in South Africa, where the plaintiff was examined on 6th February, 2013, by three doctors, specialist in physiotherapy and issues of work ability. They equally recommended that the plaintiff was incapable of carrying out his duties. As a result, his employers terminated the plaintiff's employment as at 5th July, 2013. He was thus no longer working having failed to execute his duties due to the injuries sustained in the accident. His job entailed a lot of physical activity and one had to be physically fit to operate emergency operations.

The plaintiff informed the court that he went to Zambia State Insurance Corporation (ZSIC), the defendant's insurers where he was given a medical certificate. He was informed he could not be paid as the insurer had paid the money which was available, to those who were involved in the bus accident. He referred to page 18 of the plaintiff's bundle of documents. The document was taken to the doctor who handled the plaintiff's case in South Africa. The doctor indicated that he had suffered 50% disability. He also referred to page 20 and informed the court that the document was the same one at page 18.

He was assisted by Joseph Kakole in pursuing the matter. Kakole sent an email to Joyce at ZSIC and copied it to the plaintiff. He referred to page 19 and read the email. He informed the court he wrote the email below, but had not received any compensation for his injuries. ZSIC had not indicated that they would pay the plaintiff.

He referred to the medical report at page 26 written by Dr. Pahad after the assessment done in August, 2012. The plaintiff's employers said they did not have the suggested position. They as a result decided to terminate his contract. He showed the court the notice of termination of employment on medical grounds authored by Christian Council. He went on to say that he was 51 years old on 5th July, 2013. That according to Malawi Law, he should have retired at 65. He was paid severance pay of 3 months' salary. Drawing the court's attention to documents at page 2-3 of the plaintiff's bundle of documents, he said those were expenses he incurred while in hospital.

He said he was joined by his wife during admission and that the expenses were incurred as a family in the sum of ZAR 4, 631. Travel expenses from Malawi to South Africa were met by Christian Aid, as per, pages 1 to 62.

He went on to inform the court that he earned handsomely while employed at Christian Aid. He had enjoyed a free car, free accommodation good medical cover, free education, free air ticket for holiday anywhere in the world. But he had lost all that as a result of the accident. Additionally, he now has limitations in carrying out the duties a man is supposed to carry out in the house. As a husband, he cannot fulfill his duty to his wife due to the spinal injury. He cannot provide for his family. He used to do farming in his spare time, but due to the injuries suffered, he cannot drive his tractors, nor can he work with oxen because he needs to hold the ploughs with two hands. He used to fish, but cannot do so now. Nor can he cater for his children's school fees. He had to sell off one of his houses to cater for the

fees. His health is worsening, more especially walking. He did not feel well when coming from Malawi for the court case. He asked the court to award him the relief sought in the statement of claim.

When cross examined, the plaintiff said he could not be specific on the speed of the bus as he was not with the driver. It was raining. He did not hear the driver apply the brakes. He was reading a presentation he was to make on that day. He said he was not claiming the expenses paid by his employers, Christian Aid. Rather, he was claiming damages for injuries sustained as well as the sum of ZAR 4, 631 that he spent. He said the driver was supposed to be cautious and drive defensively. He said even the yelling should have indicated that there was something wrong. He said he was aware that one could slip even when going slowly. He was not suggesting the driver should have slammed the brakes. Rather, he should have reduced the speed because it was raining. He said applying brakes gently was taking defensive action, but when one applied the brakes at a certain distance the vehicle lost balance. The plaintiff said he joined in urging the defendant to reduce speed but it was too late for the driver to reduce speed; the plaintiff suspected he slammed the brakes, and that was why he lost direction and the vehicle overturned.

In re-examination, the plaintiff said he did not see an attempt by the driver to reduce the speed.

DW1 was James Phiri, a police officer, sergeant by rank. His number is 37051. He informed the court that he is based at Matero police station. He however said that on 1st March, 2010, he was at Nyimba Police Station,

under traffic. He received a report of an accident involving a Malawian vehicle. When he booked out to the scene, he found the motor vehicle, a minibus, Toyota Hiace with passengers, at the point where a post bus had had an accident some months before. He informed the court that the place was prone to accidents because the tarmac was very slippery. The officer started interviewing the Malawians who were involved in the accident in the middle of the road. He heard a vehicle coming from the eastern direction, and it was at a curve. When the vehicle appeared, he heard the engine brake and he was sure it would stop where he was, as he had put on reflectors and could hear the engine brake. As the bus was slowing down and reached the point where the tarmac is slippery, he saw the bus sliding from one lane to the other and he advised those on the road to move away, as the bus became unstable, and they scampered off the road. The bus by passed in that unstable state moving from one lane to another, until it went off the road to the right. The driver managed to take it back to the road, and in the process, the bus overturned in the middle of the road. DW1 said there is a lot of bitumen on the road, and when it rains, the bitumen becomes hard like rubber making the road slippery, and many accidents have occurred on that spot. A police truck, a post bus and two land cruisers have all had accidents at that place. DW1 said they stood in the middle of the road because it was raining. There was no speed limit. He attributed the accident to the slippery road.

When cross examined, DW1 said he has never had an accident at that spot because he knows the nature of the road. He agreed that the impact would

depend on the speed at which the bus was driven. He agreed that a cautions driver would slow down. When shown the police report, he said the accident was due to excessive speed. He conceded that vehicles pass safely despite the rain and the road condition.

DW2 was Raymond Ndawa, driver of the defendant's vehicle on the material day. He has driven buses for a total of 16 years. He has been driving the defendant's motor vehicles for the past 13 years. He testified that on 1st March 2010, he was driving the defendant's bus from Chipata towards Nyimba. He drove at 80 kilometers per hour. He apparently reached a curve, as he said he was trying to negotiate a curve. In so doing, he was trying to reduce the speed, so he applied the engine brake. He said he wanted to reduce the speed because there was a dangerous spot in front. He knew that the road was slippery as he had passed there various times. He saw police officers in front trying to stop him, about a hundred metres away. When he saw the police, he tried to stop the bus by applying the brakes, but the bus started swerving. He explained that as he had already applied the engine brake, he was going to be moving slowly. He informed the court that one passenger died and he was charged with causing death by dangerous driving and was yet to be tried. He observed that the road was repaired after the accident. He in fact drove over the said road six times after it had been repaired. He denied negligence on his part.

When cross examined, DW2 said he was a very experienced driver. It was his view that one needed to reduce speed when approaching a curve, as one could not see the other side. He said he saw the police when coming out of

the curve. He tried to stop. He was familiar with that area us he has passed there on six occasions. If one was driving slowly, they would pass safely over the area. He had driven over the said area. He drove at 70-80 kilometres per hour on the instances he had passed through the area in question, during the dry season. He agreed that the road conditions were significantly different in the rainy season and that one needed to exercise caution. He conceded 80 kilometres per hour was not a safe speed, but said it was okey to enter the curve at 80 kilometres per hour. He said he would have controlled the vehicle better had he been driving at 40 kilometres per hour.

He said had the police officers not been on the road, he would have managed to stop. He then said he would not have managed to stop had he driven at a lower speed. He came out of the curve at 70/km/h. He could not estimate the distance between the curve and the slippery patch. He applied the brake because he was approaching a slippery spot.

Submissions have been filed in on behalf of the plaintiff. The gist of the submissions is that the plaintiff was owed a duty of care. Reference has been made to **King vs Philips (1953) 1 ALL E.R. 617**.

My attention has been drawn to the Zambian Highway Code, and it is submitted that a driver who fails to observe the Highway Code falls short of the objective standard of a reasonably prudent driver. It is submitted such a driver is a negligent driver. It is argued that the driver ought to have adapted his driving to suit the road conditions.

Submissions have equally been filed in on behalf of the defendant. It is submitted that the testimony of PW1 is not admissible at law on the ground that the plaintiff did not plead the alleged admission by DW2 of causing death by dangerous driving. Learned state counsel has referred to **Attorney General vs Kakoma (1975) ZR 212** where the plaintiff had in the writ of summons, claimed, damages for false imprisonment. In response to a request for further and better particulars, he alleged that he had also been assaulted. He described the assault as being "with fists and all over the body". It was held inter alia, by the Supreme Court that the assaults alleged in court by the plaintiff had not been pleaded and the plaintiff could not rely on them.

The testimony of the witnesses has been recited and it is thereafter submitted that the accident was inevitable and the driver not negligent. He switched on the automatic engine brake before he reached the curve. By the time he had negotiated the curve, the speed had reduced from 80 kilometres to 70 kilometres per hour and it continued reducing. It is further submitted that the police knew that the spot of the accident was slippery and a black spot in terms of accidents, but they were still attempting to interview the witnesses of another motor accident, and were in the middle of the road where they should not have been.

It is argued that driving the bus with an automatic engine brake switched on so that the speed could continue reducing when passing through the slippery surface of the road was what a careful driver was supposed to do. There is no expert evidence that had the bus been travelling at 45 kilometres

per hour and not 70 km per hour at that point, the bus could not have swerved from side to side.

It is submitted that the defendant only has to prove that he was not negligent on a balance of probability. The fact that the plaintiff sustained very serious personal injuries does not prove that the bus driver was careless or negligent. Adverting to **Charlesworth on Negligence paragraph 1081**, it is submitted that as per the statement of the law in that work, there is no inevitable accident unless the defendant can prove that something happened over which he had no control and the effect of which could not have been avoided by the exercise of care and skill. Further, that a defendant he must show what was the cause of the accident and that the result of that cause was inevitable and could not have been avoided.

It is submitted that the cause of the accident was a slippery surface of the road with the police presence in the middle of the road which caused the driver to step on the main brakes when he was already driving in automatic engine brake which continued to reduce the speed. That the police presence in the middle of the road put the driver in the agony of the moment. Had he not stepped on the main brakes, he could have passed the black spot safely because he had done so several time before. It is argued DW2 was not negligent in the circumstances and the defendant has discharged the burden placed on him.

I have considered the evidence tendered in by both parties. I have equally considered the submissions. I think it is convenient to state the law in so far as it is applicable to this case.

The plaintiff's claim is premised on negligence. To successfully prosecute a claim founded in negligence, a claimant is required to prove that the defendant owed him a duty to care, that the said duty was breached, and the claimant sustained damage as a result. The law was aptly stated in **Hay (or Bourhill) vs Young (1942) 2 ALL E.R. 396,** cited by learned counsel for the plaintiff. Lord Macmillan said the following on the duty to take care:

"***The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably be anticipated if the duty is not observed.***"

And the duty of a driver was expressed by Lord Jamieson in the cited case as follows:

***"No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care."***

The learned authors of **Charlesworth & Percy on Negligence, Twelfth Edition, Sweet and Maxwell 2010** state the meaning of inevitable accident at para 4-129 page 275 as follows:

Inevitable accident arises where a person performs some action, not in itself unlawful, which causes damage without negligence or intent. The learned authors make reference to **The Schwan (1892) P. 419 at 434**, where the term was explained in the following words:

***"An inevitable accident in point of law is this; Viz, that which the party charged with the offence could not possibly prevent by exercise of ordinary care, caution and maritime skill."*** The said case was a maritime case. The learned authors state that the principle operates equally in cases on land.

In **Browne vs De Luxe Car Services (1941) 1 KB 549 at 552**, Lord Greene said:

***"I do not feel myself assisted by considering the meaning of the phrase "inevitable accident" I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence. In such a case, loss lies where it falls, unless it can be shown that it was caused by a breach on the part of some other person of a duty to take care, or of some duty making it wrongful for him to have inflicted the loss upon the person who has suffered."***

Facts in the case were that in 1932 the Birkenhead Corporation discontinued the use of a tramway system which they had taken over from a limited company. On June 27, 1939, a motor car skidded on one of the roads on which the trams had formerly run, with the result that the motor car knocked over three boys who were on bicycles, of whom two were injured and one killed. An adjoining garage was also damaged. The defendant was found liable in negligence.

In **Bell Telephone Co of Canada vs Ship Mar-Tirenno (1974) 52 DLR (ed.) 702**, an underwater cable was damaged when a ship broke loose from its moorings at a pier, as a result of tidal ice, and an anchor had to be dropped. The ship's captain had been warned of the danger of ice and it was held:

***That the onus was on him to establish that all reasonable precautions against the danger had been taken and there was no reasonable alternative to securing the ship to the pier.***

The decision in that case demonstrates that the defence cannot be relied upon where the risk is reasonably foreseeable and no reasonable precautions taken against that risk.

Turning to the present case, the plaintiff was a passenger on the bus driven by DW2, a driver employed by the defendant. If negligence be established on DW2's part, the defendant would be vicariously liable. The presence of the plaintiff on the bus in question cast a duty on the driver DW2 to, in the course of driving, avoid doing or omitting to do anything that might inflict injury on the plaintiff. The duty to take care is thus established.

And there can be no doubt that it was reasonably foreseeable to DW2 that injury would be inflicted on the plaintiff if DW2 breached the duty to take care that he owed to the plaintiff and the bus involved in an accident as a result. In **Bolton vs Stone (1951) AC 850 at P.859,** it was stated that

***"It is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it."***

DW2, as a reasonable man should have contemplated that injury was a likely result once he had breached the duty to take care, thus causing an accident.

How then is negligence determined? Asquith J stated the test in **Daborn vs Bath Tramways (1946) 2 ALL E.R. 333** when he said at page 336E,

***"In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances."***

In **A.C. Billings vs Riden (1957) 3 ALL E.R. 1**, Lord Reid said, at page 8H, with Lords Simonds and Cohen concurring, ***"But in considering what a reasonable person would realize or do in a particular situation, we must have regard to human nature as we know it, and if one thinks that in a particular situation the great majority would have behaved***

***in one way, it would not be right to say that a reasonable man would or should have behaved in a different way. Reasonable man does not mean a paragon of circumspection."***

Lord Somervel expressed the test in the following words at 14C:

***"The duty being a general duty to use reasonable care, reasonableness is the test of the steps to be taken."***

Turning to the instant case, and applying the stated principle to this case, the question to be asked is: How would a reasonable man have behaved in the circumstances? Put differently, what would have been reasonable in the circumstances?

To the facts then. It is common cause that on 1st March 2010, the plaintiff was a passenger on the bus, bearing registration number ABL 7039 driven by DW2. DW2 has stated that he drove at 80 kilometers per hour on the Great East Road. There is no evidence to the contrary. I accept that he was driving at that speed. He had to negotiate a curve, so he applied the engine brake. By so doing, he wanted to reduce the speed because there was a dangerous spot in front. The road was slippery, and he knew this because he had driven over that patch of the road several times before. This testimony was not refuted by the plaintiff. I therefore find these facts proved.

I accept that he saw police officers a hundred metres away, wearing reflectors in the middle of the road. He saw them as he was coming out of the curve. He tried to stop the bus by applying the brakes, but the bus

started swerving and it overturned as a result. It is undisputed that the plaintiff was injured in the accident. He lost his job as a result.

It is submitted that PW1's testimony that DW2 admitted the charge of causing death by dangerous driving is inadmissible as it was not pleaded. PW1 did testify that DW2 admitted the said charge. At the time she gave that testimony, no objection was raised to that testimony. It is a settled principle that when evidence on unpleaded matters is led and not objected to when led, the court is bound to consider it. In **Anderson Kambela Mazoka and Others vs Levy Patrick Mwanawasa & Others (2005) ZLR P. 138**, it was held, interalia that,

***"In a case where any matter not pleaded is let in evidence and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues."***

It will be observed that this decision was made later than the one in the *Kakoma case* cited by learned state counsel. I am therefore required to follow the later decision.

The plaintiff did not plead that the driver of the bus in question admitted guilt. Nor has evidence of such admission been tendered in court. If such evidence had been availed, I would have been bound to accord it due weight. This is due to two factors: First the testimony that the driver DW2 admitted guilt does not amount to recasting the claim. Further, it was testimony that

would buttress the plaintiff's claim. And as earlier pointed out, such evidence, on a matter not pleaded falls to be considered.

PW1's claim that DW2 admitted the charge of causing death by dangerous driving is not supported by evidence however. That lack of evidence, coupled with failure to plead it leads to the inference that it is unlikely to be true. I therefore discount that aspect of PW1's testimony.

I now turn to consider the question how DW2 should have behaved as a reasonable man and whether his driving fell short of that of a reasonable person. DW2 was possessed of the following facts whilst approaching the spot on which the accident occurred:

i. He had to drive through a curve and ahead of him, was a slippery and bad road. The curve obstructed his vision of the slippery patch of the road.

ii. After exiting the curve, he would have to drive over a slippery patch, a dangerous patch.

iii. It was raining.

When he emerged from the curve, he saw police officers on the road and applied the brakes, whereupon the vehicle started swerving, and overturned. It will be observed that he was unaware of the presence of police officers on the road. Should he, as a reasonable man, have anticipated the presence of the police on that slippery patch?

As earlier found DW2 saw the police on the road a hundred metres away. They did not cut across his path, so that he had to apply emergency brakes

suddenly on the spur of the moment. On such an occurrence, a reasonable person would instinctively apply the brakes of the motor vehicle, in a bid to save the life of the person who has suddenly appeared on the road. There are those endowed with great presence of mind, who would choose the lesser evil of driving on regardless, rather than imperil a bus load of passengers. But I think the great majority would instinctively apply the brakes as it is human nature to try and avoid running down a human being, if it can be helped.

It is argued that the police should not have been on the road at all, as they knew that that spot was slippery and a black spot. That there was no speed limit at that point. That driving over that patch with the automatic engine brake switched on is what a careful driver would do. That there was no expert evidence that had the bus been travelling at 45 kilometres per hour and not 70 kilometres per hour at that point, the bus would not have swerved from side to side.

From the evidence led by DW2, it is clear he was unable to stop safely on that slippery patch of the road within the space of a hundred metres, at the speed he was travelling. Learned counsel for the plaintiff have drawn my attention to rule 96 of the Zambian Highway Code, which provides:

***"Never drive so fast that you cannot stop well within the distance you can see to be clear. Go much more slowly if the road is wet or if there is fog or dust. Always anticipate trouble in time so as to avoid violent braking or swerving."***

I have equally been referred to **January Gringo Nakalonga vs The People (1980) ZR 252,** where Cullinan JS said, at page 255:

***"In view of the provisions of section 257 (5) of the Roads and Roads Traffic Act, failure to observe the Highway Code is of course no more than evidential in its effect in these proceedings. In failing to observe the code however, that is to say, in driving at such a speed and at such a distance from the vehicle in front that the appellant was unable to safely slow down or stop but was forced to swerve across the centre line of the road, his standard of driving clearly fell below the objective standard of the reasonably prudent driver."***

In **Browne and Others vs Deluxe Car Service and Birkenhead Corporation opcited,** Lord Green said, at page 384:

***"Counsel for the plaintiffs quite rightly called attention to the fact that the road was in a condition which required the exercise of care, and it was in that condition to the knowledge of the driver of the car, but it is not right to say that, because the road was known to be in a dangerous condition, and because an accident took place, it follows that the driver must have been negligent. The degree of care which is called for from a driver depends upon the circumstances of the case, a driver who is proceeding along a piece of road which he knows to be slippery has imposed upon him the burden of driving with an extra degree of care. Certain maneuvers upon such a road would no doubt be dangerous, and any prudent driver would know that they were***

***dangerous. A sudden alternation of direction, a sudden application of brakes, driving in such a way that one or other of those two manoeuvers might suddenly become necessary are all things which the prudent driver must avoid, but if a driver upon a road which he knows to be slippery is driving with that measure of care which, in ordinary circumstances would be perfectly safe upon such a road, he is not bound to be found guilty of negligence because for some reason or another, an accident takes place owing to a skid.***

***The driver in the present case, driving at a perfectly proper speed on a straight line and at a steady pace because his actual acceleration had finished, and he was driving as he says at a steady acceleration, that is to say, his pressure upon the accelerator pedal was steady, suddenly found himself involved in a skid. It seems to me that there was nothing in the manoeuver which he executed which a prudent driver would not have thought it perfectly proper and safe to execute, notwithstanding the condition of the road."***

I think Lord Green admirably articulated the duty of a driver who knows that the road on which he is driving is in a dangerous state. I agree, as submitted on behalf of the defendant that the mere fact that an accident has occurred in which a plaintiff sustains grievous injuries is not indicative of negligence. One has to look at the circumstances, to determine whether the driver in this present case exercised the degree of care cast upon him as the plaintiff's neighbor.

It is established DW2 had to drive through a curve. That curve obstructed his vision of the road ahead of him. On that road was a slippery patch, on which he had to drive with care. If he had to stop on that slippery patch he had to do so at a low speed, at 40 Kilometers per hour or so. He said had he driven at that speed, he would have been able to control the bus better. Possessed of these facts, ought DW2 to have merely engaged the engine brake so as to gradually reduce the speed at which he was driving?

It is argued that the speed was reducing steadily having gone from 80-70 kilometres per hour. It is obvious that DW2 assumed that the road ahead of him would be clear of obstruction at all times, each time he emerged from the curve. In my considered view this assumption was misplaced and dangerous. I take judicial notice that road traffic accidents are quite frequent on Zambian roads. And one is likely to encounter a vehicle that has broken down as they drive along our roads. DW2 knew that he was approaching a slippery and bad patch; a spot on which a post bus had overturned in the past. It was possible therefore that there could be an obstruction on the road, and that DW2 might be required to stop the bus if necessary. As a prudent driver, he should have known that a sudden application of brakes would be a dangerous manoevre on that slippery road. He therefore ought not to have driven at a speed at which it would be dangerous to apply the main brakes if it suddenly became necessary for him to do so. A prudent driver, not able to see whether the slippery road ahead was free of obstruction or not, and knowing that sudden application of brakes called for a lower speed than the one he drove at on that slippery

patch would have considerably reduced his speed before driving through the curve, so as to safely manoevre or stop the vehicle on that slippery patch, should the need to do so arise. That is what a reasonable driver would have done.

It will be observed that in the *Browne, case*, the driver suddenly found himself involved in a skid, notwithstanding that he was driving steadily, as was expected of a prudent driver. In the present case the situation is different in that the driver suddenly applied the main brakes, and the bus began to swerve from side to side as a result, and overturned. Had he driven more slowly and emerged at a lower speed from the curve than he did, he would have been able to stop safely on the slippery patch and not overturned. By not exercising proper care, he placed himself in such a position that he had to apply emergency brakes about a hundred metres away from DW1 who was trying to stop him. The standard of care exercised by DW2, in those circumstances, was less than that expected of a prudent driver, possessed of knowledge that the road he was travelling on was dangerous. It was not enough to merely engage the engine brake. DW2 should have gone further by ensuring that a dangerous manoeuvre did not become necessary on that slippery road. And he could have only done that had he emerged from the curve at a lower speed, that would have allowed him to stop the bus with ease on the slippery patch should the need to do so arise. Although there is no expert evidence that the bus would have stopped safely on the slippery patch of the road had it been travelling at 45km/h, the

fact remains that DW2 would have controlled the vehicle better had he been travelling at 40 kilometre per hour, as he conceded in cross examination.

I therefore agree with learned counsel for the plaintiff that DW2 drove too fast in the circumstances.

That being the case, the defence of inevitable accident cannot avail the defendant. The onus to show that the accident could not have been prevented by exercise of ordinary care and caution in the course of driving has not been discharged. It cannot be said that DW2 had no control over what happened. It could have been avoided by the use of extra caution care and skill. As for the presence of the police on the road, it is that very kind of obstruction that DW2 should have been on the lookout for. It was said that accidents had occurred on that slippery patch in the past. That fact should have led DW2 to slow down sufficiently to stop safely, in case he found an obstruction on the road, necessitating that he stops the bus. In any event, he should have driven at such a speed as he would have been able to stop within the limits of his vision, coming from the curve as he was. On a preponderance of probabilities, the plaintiff has, as earlier found, proved that DW2 drove too fast in the circumstances.

On the foregoing, I am satisfied that DW2's standard of driving fell short of that of a reasonable person. It was negligent in the circumstances and that negligence led the bus to overturn and the plaintiff was as a result injured. The three elements required to be proved are established.

It is undeniable that DW2 drove the bus in question in the course of employment by the defendant. The defendant is vicariously liable as a result. The plaintiff has produced evidence of extensive injuries inflicted on him as a result of the accident. The injuries are admitted as the defence is silent on that aspect of the claim. The plaintiff claims general damages, special damages, damages for mental anguish suffered, damages for physical disability, loss of income suffered as a consequence of change in employment up to retirement age, loss of income in post-retirement from formal employment due to inability to engage in a self-sustaining activity, physical pain, anxiety and distress.

In considering the above claims, I have had a look at the principles stated in **The Quantum of Damages Personal Injury Claims** by **David A. MCI. Kemp, Margaret Sylvia Kemp and Richard O. Havery Third Edition Volume 1. London Sweet & Maxwell 1967**.

The learned authors state at page 11 that general damages are awarded in respect of the pain and suffering a plaintiff has undergone up to the date of trial and is likely to undergo thereafter. As an example, it is stated that damages may be awarded for the mental suffering of a plaintiff who knows that his expectation of life had been greatly reduced and that he must spend his remaining days in misery. Damages for loss of amenities embrace everything which reduces the plaintiff's enjoyment of life, apart from any material or pecuniary loss which may be attendant upon the loss of amenity. Aggravated damages are awarded.

I now turn to consider the damages that fall to be awarded to the plaintiff. Lord Blackburn stated the principle applicable to such awards in **Livingstone vs Rowyards Coal Company (1880) 5 APP. Cas 25**, on an appeal to the House of Lord from Scotland thus:

***"I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in setting the sum of money to be given by reparation of damages you should nearly as possible get at that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation or reparation."***

The difficulty faced by a trial judge lies in quantifying pain and suffering in monetary terms. The answer to this predicament is that the Courts award sums which are in the nature of conventional awards. On this point, Lord Diplock, in **Wright vs Railways Board (1983) 2 A.C. 733** said of non-pecuniary loss:

***"Such loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases."***

The assessment of damages for pain and suffering therefore depends largely on the amounts awarded in previous cases which are perceived to be similar or at least, where there are no such cases, upon the generality of awards of compensation for injury of that general type.

A global award for pain and suffering and loss of amenities is in practice awarded. The Court is required to take into account, in making the assessment, the pain which the particular plaintiff has actually suffered and will suffer, as well as the suffering which he has undergone and will undergo.

The age of the plaintiff and his expectation of life are of utmost importance in cases where pain and suffering will continue for life as they determine the period for which he will likely suffer pain and experience suffering. See **Damages for Personal injury and Death David Kemp Q.C assisted by Peter Manstle P 126 – 137.**

A plaintiff who has suffered personal injuries is entitled to reparation for loss of amenities. Loss of amenities embraces everything which reduces the plaintiff's enjoyment of life apart from pain and suffering, material or pecuniary loss which may be attendant upon the loss of amenity. Regard must be had to how long the plaintiff will be deprived of those amenities.

A party who suffers personal injuries may recover for the unpaid services of a friend or a relative. Loss of earnings or profit is a legitimate head of damages, and a party is entitled to the net loss from the date of accident to the date of trial. The quantum on this head is the net difference between

what he has earned and what he would otherwise have earned. The Court is required to assess the prospects of promotion and damages accordingly.

Future expenditure for continuing care and medical expenses fall to be awarded where present. Loss of future earnings as well as loss of prospects of promotion are equally legitimate head of damages. See **Damages for Personal Injury and Death** op. cit, for the foregoing statements of the law.

The Supreme Court of Zambia considered the guidelines in assessing pain and suffering in **Bank of Zambia vs Caroline Anderson and Andrew W Anderson 1993/1994 ZLR P.47**. It was stated there that account must be taken of the pain and suffering since the date of the accident, the operations undergone, the past and future day to day pain suffered during walking and other activities. The inability to engage in all activities the plaintiff used to engage in when he was without the disability suffered as a result of the accident has to be considered as well.

It is manifest that the plaintiff claims damages for pain and suffering and loss of amenities, as well as restriction on future earning capacity, loss of a chance of favourable employment or prospects and loss of career. He equally claims special damages for expenses he incurred while hospitalized.

In **Moeliker vs Reyrolle and Co Ltd (1977) 1 ALL ER 9**, the correct approach to a claim for restriction on future earning capacity was explained. It was stated that the Court has to quantify the present value of the risk of future financial loss. Where there is a significant risk, its value depends on how great the risk is and how far in the future it is. Where the risk lies in

finding a new job if the present one is lost, the plaintiff's skills and adaptability or lack of them should be taken into account, and the opportunities likely to be open in his field. The Court is required to apply its judgment to the relevant factors and assess a round figure.

The loss of an opportunity is a valid claim, take for instance loss of an opportunity to commence or continue an apprenticeship, or a career in the forces, which may be caused by an accident at a critical time. See **Damages for Personal Injuries and Death by John Munkman, Tenth Edition P. 72-73**.

In the instant case, general damages in respect of pain and suffering would take into account the physical disability, physical pain, mental anguish, anxiety and distress. I award the plaintiff general damages for pain and suffering under these claims. I equally award the plaintiff damages for restriction of earning capacity as a result of his injuries. The damages will be assessed by the Deputy Registrar. I award the plaintiff special damages for expenses he personally incurred while hospitalized in South Africa, to be assessed. As for aggravated damages, it was held in **Times Newspaper Ltd vs Kapwepwe (1973) Z.R. 292 S.C.** page interalia that

***"In Zambia exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's right."***

I am unable to discern aggravating conduct on DW2's part. I am not persuaded therefore that aggravated damages fall to be awarded.

The damages awarded will bear interest at short term deposit from date of writ to date of judgment and thereafter at current bank rate till payment in full. The special damages will bear interest at Bank of Zambia short term deposit rate applicable on foreign exchange transactions with effect from date of writ to date of judgment and thereafter at the Bank of Zambia current Bank rate applicable on foreign exchange transaction with effect from date of judgment to date of payment. The plaintiff will have the costs of this action which will be taxed in default of agreement. Leave to appeal is granted.

**Dated the** 10th **day of** October **2014**

**F. M. CHISANGA**
**HIGH COURT JUDGE**