

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2008/HP/1122

(Civil Jurisdiction)

BETWEEN:

ALBERT ANDREW KAHILI

PLAINTIFF

AND

MUBANGA CHITI SIBANDA

1ST DEFENDANT

THE ATTORNEY GENERAL

2ND DEFENDANT

Before the Hon. Mrs. Justice A. M. Sitali on the 12th day of October, 2015.

For the Plaintiff : *Mr. F. Nsokolo of
Legal Resources Chambers*

For the Defendants : *Miss C. Mulenga,
Principal State Advocate*

J U D G M E N T

Cases referred to:

- 1) Zambia Railways Limited v. Pauline S. Mundia and Brian Sialumba (2008) Vol.1 ZR 287
- 2) Khalid Mohamed v Attorney-General (1982) ZR 49
- 3) Elijah Bob Litana v. Bernard Chimba and the Attorney General (1987) ZR 26

Legislation referred to:

1. **The Road Traffic Act No. 11 of 2002, section 184 (3).**
2. **The Highway Code, sections 10 and 149.**

Other Works referred to:

3. **W.H.V. Rogers, Winfield and Jolowicz on Tort, 10th edition (London, Sweet and Maxwell, 2006).**
4. **Paula Giliker, Tort, 5th edition, London, Sweet and Maxwell, 2014.**
5. **Charlesworth & Percy on Negligence, 9th edition, London, Sweet & Maxwell, 1997**

The plaintiff commenced this action against the defendants on 3rd November, 2008 by writ of summons claiming for damages for personal injuries with interest on all amounts found due, any other relief the court may deem fit and costs.

The statement of claims states that the first defendant is and was an employee of the Ministry of Health and the driver of the motor vehicle Toyota Land cruiser registration number ABA 6802 belonging to the Ministry of Health of the Republic of Zambia. The second defendant is sued in these proceedings pursuant to section 12 (1) of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

At the trial of the action, Andrew Albert Kahili, the plaintiff who was PW1 testified that on 5th October, 2006, he was travelling from Chavuma to Lusaka with his brother Peter Owa. When they reached Moto village on

the Chingola-Solwezi road, he got off the motor vehicle to buy some food and as he crossed the road he was hit by a speeding Toyota Land Cruiser registration No. ABA 6802 driven by Mubanga Chiti Sibanda, the 1st defendant. He said that his leg was injured and he was admitted to Chingola hospital for one day before he was transferred to Kitwe General Hospital where his leg was amputated. He produced the medical report which was issued to him on page 1 of the plaintiff's bundle of documents.

The plaintiff stated that prior to crossing the road, he looked to the left and to the right to ensure the road was clear. He stated that the accident was caused by the excessive speed at which the 1st defendant was driving the motor vehicle. He prayed that he may be granted the reliefs he seeks.

In cross examination, when the plaintiff's attention was drawn to the cause of the accident as stated in the road traffic accident report issued by the police on 5th October, 2006, the plaintiff stated that although the road traffic accident report states that he crossed the road without looking out for the oncoming motor vehicle, he did look out for the oncoming motor vehicle. He insisted that the accident occurred because the driver of the motor vehicle was over speeding. When referred to the Zambia State Insurance Corporation motor accident report on pages 1 to 3 of the defendant's bundle of documents whose details of occurrence revealed that he crossed the road without observing the road safety rules, the plaintiff insisted that he did observe the road safety rules except that the motor vehicle was too fast.

The plaintiff stated that the accident occurred at a market place and that although the police and Zambia State Insurance Corporation traffic accident reports do not state that the driver was speeding the people who saw the motor vehicle said he was speeding.

In re-examination the plaintiff stated that the 1st defendant should have reduced his speed when he reached the market place but instead he continued to drive at an excessive speed. He denied that he did not look out for oncoming traffic and said that the police officer who prepared the report was not present at the scene of the accident when it occurred.

PW2 was Peter Owa, the plaintiff's brother who testified that on 5th October, 2006, the plaintiff and he were travelling to Lusaka from Solwezi. On the way they stopped at a market and he parked his motor vehicle by the road side. He asked the plaintiff to go and buy some food across the road. PW2 said that the plaintiff got out of the motor vehicle. The road was clear but as the plaintiff tried to cross the road to get to the other side a Land cruiser which was in fast drive hit him. The Land cruiser failed to stop and careered off the road where it had a tyre burst before it stopped.

PW2 stated that he got out of his motor vehicle and run to where the plaintiff was lying on the ground. He found him unconscious. The driver of the Land cruiser came running to where they were. PW2 said he took the plaintiff to Chingola General Hospital. He stated that the area where

the accident occurred was a market area where the speed limit was 50 kilometres per hour.

In cross examination, PW2 stated that the road was clear when PW1 started to cross the road. He contended that the 1st defendant hit him because he was driving his motor vehicle too fast.

That was the plaintiff's case.

When the matter came up for defence, Miss Mulenga, counsel for the 1st and 2nd defendants informed me that she had failed to secure the attendance at court of the 1st defendant and the police officer who prepared the traffic accident report. She stated that the 1st and 2nd defendants would therefore not adduce any oral evidence in their defence.

That notwithstanding the amended defence filed by the 2nd defendant on 1st October, 2012 is on record and reads as follows:

- “1. Paragraph 1 of the plaintiff's statement of claim is in the exclusive knowledge of the plaintiff;*
- 6. The contents of paragraphs 2 and 3 of the plaintiff's statement of claim are not disputed.*
- 7. Paragraphs 4 and 5 of the statement of claim are denied and the defendant will aver that the accident was not caused by the negligence of the defendant, the defendant shall aver that the accident was caused by the negligence of the plaintiff who crossed the road without due regard for highway safety rules*

expected of pedestrians by way of checking properly for oncoming vehicles. As a result the 1st defendant only saw the plaintiff at an acute distance. The plaintiff will be put to strict proof thereof.

- 8. The defendant herein denies the particulars of negligence as alleged by the plaintiff in paragraph 5 of his statement of claim, the 1st defendant was not driving too fast, he did not fail to keep a proper look out on the road, but rather it is the plaintiff who failed to keep a proper outlook on the road. The defendant is not liable for the same and the plaintiff shall be put to strict proof thereof.*
- 9. In response to paragraph 6 of the statement of claim, the defendants shall aver that there was negligence on the part of the plaintiff.*
- 10. Save as is herein admitted, the defendants deny each and every allegation set out in the statement of claims as if the same were set out herein and traversed seriatim."*

Mr. Nsokolo counsel for the plaintiff filed written submissions in which he submitted that the facts of the case are that the plaintiff was crossing the Solwezi Chingola Road when he was knocked down by the second defendant's motor vehicle, which was being driven by the first defendant resulting in the plaintiff's left leg being amputated. The plaintiff also sustained other injuries as stated in the medical report produced before court.

It was further submitted that there is direct evidence from both the plaintiff and his elder brother, that the first defendant drove at a high speed at a market place where any prudent driver should reduce speed owing to the nature of the place. It was contended that had the first defendant reduced his speed as he passed the market place, the plaintiff would not have been injured.

Counsel submitted that there is no evidence to rebut the evidence of the two eye witnesses who had no reason to come to this court and tell lies. Counsel therefore submitted that on the plaintiff's overwhelming evidence, the court must find for the plaintiff.

With regard to the defendant's defence as per police report and Zambia State Insurance Corporation Limited report contained in the defendant's bundle of documents, counsel submitted that the report which was compiled by the police who visited the scene after the accident and the Zambia State Insurance Company Limited report, though admissible, are secondary, if not hearsay evidence as the said reports were based on secondary information obtained after the accident. Counsel further submitted that the persons who compiled the two reports are alive and should have been called to testify as to how they compiled an adverse report against the plaintiff. Counsel further submitted that a police officer has a duty to attend court when he is summoned and the police officer in this case decided not to come and testify for reasons best known to himself.

Counsel went on to submit that it is trite law that when a court makes an adverse finding against a party, it must justify that finding by giving reasons. Counsel therefore contended that the arresting officer's adverse report against the plaintiff is inadmissible as there are no reasons for the court to believe it, and the maker of the report did not come to Court to testify so that he could be questioned about the report.

Counsel cited the cases of *Machobane vs. The People* (1972) ZR 105, *Dentsil, Darling and Banda vs. Zambia Engineering Construction Co. Ltd* (1966) ZR 161 and *Shawaza Farazi vs. The People* (1995) Supreme Court Judgment No. 9/49 and submitted that in those cases, the court emphasized the importance of recording the demeanour of a witness so that it can assess his credibility. He submitted that in the present case, the police officer did not come to testify and so this court should not be left to speculate but should act on the available credible evidence of the plaintiff and his witness.

Counsel reiterated that the 1st and 2nd defendants have no defence in this case and prayed that the Court should find in favour of the plaintiff.

Counsel went on to submit that during the cross examination of the plaintiff and his witness, the learned Acting Principal State Advocate insisted that the plaintiff did not observe the traffic rules of checking the road for oncoming traffic before crossing the road. Counsel submitted that both the plaintiff and the witness however stated that the plaintiff checked the road before he crossed and that he was hit because of the excessive speed at which the first defendant was driving. Counsel

contended that the plaintiff was not at fault and he cannot be liable even under contributory negligence as the place where the accident occurred is a market area where pedestrians and a large number of people move about as they buy and sell their merchandise.

Counsel submitted that a driver who chooses to drive at an excessive speed at a market place, which is what the first defendant did, is guilty of negligence and is liable for any wrongs that may result out of his careless conduct. Counsel submitted that in conclusion that there was no contributory negligence on the part of the plaintiff in this case.

Counsel reiterated that the 1st and 2nd defendants have no defence in this case and prayed that the Court should find in favour of the plaintiff.

Counsel for the defendant did not file any submissions. If she did the submissions are not on record.

I am grateful to learned counsel for the plaintiff for his submissions. I have considered the evidence adduced by the plaintiff and the written submissions filed on his behalf. I have also considered the defence filed by the 1st and 2nd defendants which defence I have set out earlier in this judgment.

From the evidence on record, it is not disputed that on 5th October, 2006, the plaintiff whilst crossing the Chingola-Solwezi Road was hit by a Toyota Land Cruiser registration number ABA 6802 driven by the 1st defendant along the said road. The plaintiff sustained serious injuries to his left leg in the accident as a result of which the leg was later

amputated. The plaintiff also sustained deep cuts on the right leg. It is further common cause that the 1st defendant was an employee of the second defendant and was driving the motor vehicle in the course of his duty at the time of the accident. The motor vehicle was the property of the Ministry of Health.

The plaintiff alleges that the accident occurred as a result of the negligence of the 1st defendant. The plaintiff therefore claims for damages for personal injuries with interest and costs.

The defendants deny that the 1st defendant was negligent in the manner he drove the motor vehicle at the time of the accident. They contend that it was the plaintiff who failed to keep a proper look out on the road and was negligent in the manner he crossed the road. Hence this action.

It is settled law that a person who commences a civil action must prove his case against the defendant in order to succeed in his claim. To that effect, the learned authors of Phipson on Evidence, 17th edition in paragraph 6-06 at page 151 state the following regarding the burden of proof in civil cases:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him.”

In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging negligence to establish each element of the tort: See Charlesworth & Percy on Negligence, 9th edition, paragraph 5-10 on page 387.

In the present case, the burden to prove his allegation of negligence against the 1st defendant and consequently against the 2nd defendant as the 1st defendant's employer, therefore, lies with the plaintiff who must adduce evidence to prove the facts on which he bases his claim for damages. I should clearly state here that although the 1st defendant was not called to testify and no other witness was called to testify on behalf of the defendants, the plaintiff still bears the burden to prove his case of negligence against the defendants.

The standard to which he must prove his case is on a balance of probabilities. In the case of Zambia Railways Limited v. Pauline S. Mundia and Brian Sialumba (1) the Supreme Court held that the standard of proof required in civil matters is on a balance of probability and that the party who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable. If the plaintiff fails to prove his case against the defendants to the required standard, judgment will not be entered in his favour, even if the defendants' case fails: see Khalid Mohamed v Attorney-General (2).

The plaintiff claims for damages for personal injuries from the defendants on the premise that the accident in which he sustained his injuries was caused by the negligence of the first defendant.

Negligence is defined as a breach of a legal duty to take care which results in damage to the claimant: see W.H.V. Rogers, Winfield and Jolowicz on Tort, Tenth Edition, at page 45. To establish the tort of negligence the claimant must prove three things namely, that the defendant owes the claimant a duty of care; that the defendant has acted in breach of that duty, and that as a result, the claimant has suffered damage which is not too remote a consequence of the defendant's breach: see Paula Giliker, Tort, 5th edition, (2014) p. 27.

Thus the issue which I must determine is whether the 1st defendant is liable for negligence in the manner he drove the motor vehicle resulting in the accident which occurred on 5th October, 2006 in which the plaintiff was injured.

It is settled law that a motorist owes a duty of care to other road users to drive his motor vehicle with due care on the road and to observe the provisions of the Road Traffic Act No. 11 of 2002 and the Highway Code issued pursuant to section 234 of the Act. With regard to the duty owed by motorists to pedestrians, section 149 of the Highway Code provides as follows:

"149. Motorists are required to drive carefully and slowly when pedestrians are about to cross the road particularly in crowded shopping streets, when they see a bus has stopped, or near a parked mobile shop or in vending places. A motorist is required to look out for pedestrians coming from behind parked or stopped

vehicles, or from other places where a driver may not be able to see them."

From the foregoing authority, the 1st defendant as a driver of a motor vehicle on a public road owed a duty of care to the plaintiff who was a pedestrian on the road on which the accident occurred. The duty he owed was to drive his motor vehicle carefully and slowly as he drove past the market place. If the 1st defendant is proved to have driven his motor vehicle at a high speed in an area where there was a market place and so hit the plaintiff as he crossed the road as alleged by the plaintiff, he will be held to have breached his duty of care to the plaintiff and to have been negligent in the manner he drove the motor vehicle at the time of the accident.

The plaintiff's evidence before this court is that on 5th October, 2006, he was crossing the Chingola-Solwezi road at a place called Moto village when the first defendant who was driving a Toyota Land Cruiser hit him. The plaintiff contends that the accident occurred at a market place and that the first defendant was driving too fast and failed to keep a proper lookout on the road and so failed to notice the plaintiff on the road or even to brake and swerve in order to avoid hitting the plaintiff. The plaintiff contends that as a result of the accident he sustained severe injuries to both legs as a result of which his left leg was amputated.

On the other hand, the defendants in their defence filed into court deny the allegation that the accident was caused by the negligence of the 1st defendant or that he drove his motor vehicle too fast and so failed to keep

a proper look out on the road. The defendants contend that the accident was caused by the negligence of the plaintiff who crossed the road without looking out properly for oncoming vehicles in accordance with the highway safety rules expected of pedestrians and that as a result the 1st defendant only saw the plaintiff at an acute distance. The defendants thus deny any liability in damages for the injuries sustained by the plaintiff in the accident.

As the plaintiff contends that the accident occurred due to the excessive speed at which the 1st defendant drove his motor vehicle at the time of the accident, the plaintiff should have called expert evidence regarding the estimated speed at which the 1st defendant drove the motor vehicle at the time of the accident to support his assertion. This is because in the absence of expert evidence as to the estimated speed at which the motor vehicle was driven, it is not competent for me as a trial court to arrive at a conclusion regarding the speed of the 1st defendant's motor vehicle. In making this observation, I rely on the holding of the Supreme Court in the case of Elijah Bob Litana v. Bernard Chimba and the Attorney General (3). In that case, the facts were that the appellant was driving at night on the road from Ndola to Kabwe when he collided with an army truck which reversed across the road in front of him. As a result of the accident the two children of the appellant aged one and a half and three and half years respectively, were killed and the appellant suffered a minor injury to his knee. The appellant's car was also extensively damaged.

The learned trial commissioner found that the appellant must have been driving too fast because he was unable to stop or to swerve around the vehicle with which he collided. He further found that there had been contributory negligence on the part of the appellant to the extent that he was fifty per cent to blame for the accident. He therefore reduced the damages which he awarded to the appellant by half.

On appeal, Gardener J. S. as he then was, stated as follows:

"There was no expert evidence as to the estimated speed of the appellant having regard to the damages to the vehicles and the injuries to the occupants and in the absence of such evidence, it was not competent for the trial court to come to a conclusion that the speed of the appellant's vehicle was excessive." (Emphasis mine).

In the present case, although the plaintiff and PW2 contended that the 1st defendant drove at an excessive speed at the time of the accident, no expert witness was called to testify regarding the estimated speed at which the 1st defendant drove his vehicle at the time of the accident. In the absence of such expert evidence, I cannot come to a conclusion that the speed of the 1st defendant's vehicle was excessive.

Further, the plaintiff testified that prior to crossing the road, he looked to the left and to the right to ensure that the road was clear before he proceeded to cross the road. He alleged that the accident occurred because the 1st defendant's speed was excessive. On the other hand the defendants contended that the plaintiff was negligent in the manner he

crossed the road as he did not observe the road safety rules before he stepped out on to the road. To support their assertion the defendants produced the road traffic accident report which was issued by the Zambia Police. The said report which is on pages 4 and 5 of the defendant's bundle of documents states that:

"The accident occurred when the driver mentioned overleaf was driving Toyota Land Cruiser registration No. ABA 6802 along Chingola-Solwezi road from east to west direction. As the motor vehicle was approaching Mato Village, Mutenda area, Chingola it hit a pedestrian male Andrew Kahili who was crossing the road from North to South without checking on the oncoming motor vehicle."

The defendants also produced the Zambia State Insurance Corporation Limited motor vehicle accident report which stated the following regarding the circumstances in which the accident occurred:

"As the vehicle was approaching Mato village along Chingola-Solwezi road, there was a stationery vehicle on the right and an oncoming truck and trailer. The pedestrian only regarded the truck and no sooner had the truck passed that he dashed to cross the road ignoring the safety rules of the High way code when crossing the road. Just after the truck the driver saw the pedestrian at an acute distance where warning was of little help ... "

The two reports attribute the accident to the failure by the plaintiff to observe road safety rules. As the two reports state that the plaintiff

stepped onto the road without observing the road safety rules and therefore caused the accident, it was incumbent upon the plaintiff to adduce clear evidence that he did not cause the accident by failing to observe road safety rules with regard to the crossing of roads by pedestrians as alleged by the defendants. The plaintiff's assertion that he did look out for oncoming traffic and that he saw the 1st defendant's vehicle before he attempted to cross the road and his explanation that the accident occurred because the 1st defendant drove the vehicle too fast do not assist his case. This is because the implication of the plaintiff's evidence is that he stepped out onto the road in front of a speeding motor vehicle.

If indeed the plaintiff did look out for on coming vehicles on the road and saw that the 1st defendant's motor vehicle was too fast, he should not have stepped out onto the road. He should have waited for the speeding motor vehicle to pass before crossing the road. Both the Road Traffic Act No. 11 of 2002 and the High Way Code require a pedestrian to satisfy himself that a road is clear of oncoming traffic and that he will cross the road safely before stepping out to cross the road. To that effect, section 184 (3) of the Road Traffic Act provides as follows:

"184. (3) No pedestrian shall cross a public road without satisfying oneself that the carriageway is sufficiently free of on-coming traffic to permit the pedestrian to do so in safety."

Further, section 10 of the High Way Code which is issued pursuant to section 231 of the Road Traffic Act No. 11 of 2002 requires a pedestrian

who intends to cross the road to first of all find a safe place to cross the road. When he gets to the kerb or edge of the road he should look right, look left and right again and if traffic is coming, he should let it pass and cross only when it is safe. Whilst crossing the road a pedestrian is required to keep looking around and listening for traffic while he is crossing, in case there is traffic that he did not see or in case other traffic appears suddenly.

From the foregoing provisions of the law, it is clear that the plaintiff as a pedestrian had a duty not to cross the road until he was satisfied that the road was clear of oncoming traffic and that it was safe to cross the road. Thus based on the plaintiff's own evidence and that of his witness PW2, I find that the plaintiff attempted to cross the road notwithstanding that the 1st defendant motor vehicle was close by and that in the process, he was hit by the 1st defendant's vehicle. As the plaintiff failed to observe the road safety rules, I find that the plaintiff was negligent in the manner he crossed the road and that he was responsible for the accident in which he was injured.

I accept the defendant's defence as stated in paragraphs 3 and 4 of the amended defence to the effect that the accident was not caused by the negligence of the first defendant but that it was caused by the negligence of the plaintiff who crossed the road without due regard to road safety rules. I further accept the averment that the 1st defendant only saw the plaintiff at a short distance and could therefore not avoid hitting him. As it is the plaintiff who failed to keep a proper look out on the road and stepped onto the road in front of oncoming traffic, I find that the 1st

defendant is not liable for negligence with regard to the road traffic accident in which the plaintiff was injured.

On the totality of the evidence, I find that the plaintiff has not proved on a balance of probabilities that the accident was caused by the negligence of the 1st defendant. That being the case, I find that the 1st and 2nd defendants are not liable for negligence. As the plaintiff has not proved his case of negligence against the defendants, I find that he is not entitled to any damages or any other relief that he claims in his writ and statement of claim.

The plaintiff's action therefore fails in its entirety and is dismissed. Given the facts of this case, each party will bear their own costs of this action.

Leave to appeal granted.

Dated the 12th day of October, 2015.



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A. M. SITALI
JUDGE