

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

2016/HP/0135

BETWEEN:

EDWIN CHINDA CHISENGA

AND

NAOMI MALAMA



PLAINTIFF

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 31st DAY OF MARCH,
2017**

For the Plaintiff : Mr Innocent Nyambe, Legal Aid Board

*For the Defendant : Ms Natasha Chilambwe Zimba, National Legal
Aid Clinic for Women*

J U D G M E N T

CASES REFERRED TO:

- 1. Kabwe Transport Company Limited V Press Transport 1975 ZR 43**
- 2. Philip Mhango V Dorothy Ngulube and Ors 1983 ZR 61**
- 3. Faindari Daka (suing as Administratrix of the estate of Fackson Daka, deceased) V The Attorney General 1991 SJ.**
- 4. Wilson Masauso Zulu V Avondale Housing Project 1992 ZR 172**
- 5. Zambia National Building Society V Ernest Mukwamataba Nayunda 1993-1994 ZR 29**
- 6. Andrew Tony Mutale V Crushed Stone Sales Limited 1994 SJ 98**
- 7. Reuben Nkomanga V Dar Farms International Limited SCZ No 25 of 2016**

The Plaintiff on 22nd January 2016 commenced this action by way of writ of summons claiming;

- I. *Damages for permanent injuries inflicted by the Defendant's negligent driving of motor vehicle registration number ALX 8751 ON 15th March, 2015*
- II. *Refund of monies used for medical expenses and transportation to and from the hospital.*
- III. *Any other relief the court may deem fit*
- IV. *Interest*
- V. *Costs*

The statement of claim reveals that the Plaintiff was a cyclist along Commonwealth Road near Matero Market on 7th March 2015, whilst the defendant was the driver of a Toyota Ist ALX 8751 on the same road that the Plaintiff was cycling on, and she reversed the car and hit into him.

The statement of claim further reveals that upon being hit, the Defendant flew into the air and fell face down on the rocky ground, resulting in him sustaining injuries on his face and elbow. That the Plaintiff reported the matter to Matero Police station, where the defendant went and acknowledged having driven the vehicle negligently.

In paragraph 6 of the statement of claim the Plaintiff avers that his injuries only healed after three weeks, and that he was examined as

an out-patient at the University teaching Hospital (UTH), and that the final medical examination revealed that his left elbow had sustained permanent injury, that cannot be corrected.

The particulars of negligence are stated in the statement of claim as;

- I. The Defendant being in breach of the statutory duty of care to drive in a proper manner, as she negligently drove the vehicle.
- II. The Defendant reversing without taking reasonable care by being cautious of the rights of other road users.

That due to the permanent elbow injury, the Plaintiff has suffered financial loss, mental anguish and distress as well as injury.

In the defence filed, the Defendant contends that when she was reversing the car, the Plaintiff came from nowhere and fell right behind her car, after he lost balance. That she therefore did not hit him as alleged. The Defendant states in the defence that the Plaintiff sustained some bruises but was not bleeding, and he was helped up by the Defendant's husband and an onlooker, and he insisted that he was fine.

In paragraph 5 of the defence the Defendant states that she only admitted the charge of driving the vehicle negligently as the Officer in Charge Matero Police had insisted that since she had engaged the gear, she was guilty of the offence.

The defence further states that the Plaintiff had told her that he was fine but would inform her if he was found to have sustained any internal injuries, and she only heard of the fact that he had been to UTH at Matero Police. The Defendant disputes the Plaintiff's claim of having suffered the permanent injury, as the medical report from UTH as well as the x-ray taken of the Plaintiff do not record broken bones or fractures, but that the Plaintiff had only bruises, and a swollen lip.

That the Plaintiff is a retired teacher who is being supported by his wife, and hence the Defendant denies that he has suffered any financial loss, distress or injury.

At the hearing the Plaintiff testified and called no witnesses, while the Defendant also testified and called one witness. In his testimony the Plaintiff stated that on the material day he was cycling along Commonwealth Road near Matero market around 15:40 hours, when the Defendant reversed a Toyota Ist registration number ALX 8751 and hit his bicycle.

He stated that he was thrown into the air and he fell face downwards and sustained injury on his face and elbow, but the bicycle was fine. He further testified that he got both the Plaintiff's and her husbands' phone numbers as he had no one to leave the bicycle with, and he went and reported the matter to Matero Police Station. That he was referred to UTH as his elbow was swollen, and there an x-ray was taken.

At the end of the treatment it was found that the elbow could not fully stretch, and the doctor had advised him that the injury was permanent, and could not be corrected. He referred to the document on page 4 of his bundle of documents as being the doctor's findings on the elbow.

He could not recall how many times he went to the hospital for treatment, but testified that he would use a bus to go and return. He also testified that he is left handed, and has thus been unable to perform physical duties well. That apart from preaching, he supervises construction, and it has proved a challenge to lift the blocks. He asked the court to compensate him for the permanent injury, as well as the transport and medical costs with interest.

In cross examination the Plaintiff stated that he had cycled from the accident scene to Matero Police. He further stated that he was not admitted in hospital after the accident, and he had not exhibited receipts for the medication and transport.

The Defendant in defence agreed that on the material day she was driving the said vehicle along Commonwealth road in Matero, and that as she reversed on to the road she had looked in the mirrors and she noticed that a person had fallen. She then drove the vehicle in front and parked it. Both herself and her husband came out of the vehicle and asked the person on the ground if he was okay, and he said that he had minor injuries, but that the bicycle was okay.

It was her evidence that the person had bruises as he had fallen on the stones, and she confirmed that the person got both hers and her husband's phone number, so that he could let them know if there was anything.

DW1 told the court that after a week she was phoned by the police to go there, and when she went there she was told that she had hit a person, and the parties were asked to resolve the matter. She testified that she had met the Plaintiff whilst in the company of her mother, father, and aunt and he demanded to be paid ZMW1, 000, 000.00, stating that he had sustained permanent injury. That she could not pay such an amount and had advised him to sue. Her prayer was that the court dismisses the matter, as the Plaintiff had distressed her, and he had gone to her place of work to see her manager, and he had also been to see her mother.

When cross examined the Defendant stated that she had a driver's licence at the material time, but the vehicle was not insured at the time. She agreed that the law requires that all motor vehicles must be insured. Her evidence was that the Plaintiff was cycling on the side of Commonwealth road, and he had a right of way. She also agreed that as a driver she owes pedestrians and other road users a duty of care when driving.

She denied that the vehicle hit the Plaintiff as he was cycling, but agreed that the police report shows that she was negligent when reversing. She also admitted having paid the admission of guilt fee at the police, and that she was issued a receipt for the same. The

Defendant agreed that the accident report shows that the Plaintiff sustained injury as a result of the accident.

She stated that her husband is a businessman who is out of town sometimes, and that only his number and that of the Plaintiff were given to the police. She denied that her husband's phone is ever unreachable. She maintained that the Plaintiff harassed her at work, although she had not pleaded this in her defence.

The last defence witness was Edward George Changuluka, the Defendant's husband. He stated that he was with her in the car when the accident happened. That he had sat in the passenger's seat as the Defendant reversed slowly and the Plaintiff who was cycling towards them lost control, and fell down as he wanted to hit into their car.

DW2 confirmed that when they got out of the vehicle and went to see the Plaintiff, he had told them that he was okay. DW2 had observed that he had a bruise on his hand, but he had asked for DW2's phone number saying that he may need assistance as he did not know what could be wrong after the accident.

That when DW2 had given him his phone number, the Plaintiff had cycled off, and on Monday Matero police had called him saying that he had hit someone. When DW2 went to the police and explained everything, the police insisted that the Defendant goes there, as she was the person who was driving the vehicle at the time of the accident, and she went.

He also confirmed the Defendant's evidence that the police had advised them to settle the matter, and he stated that they were even given a room in which to discuss with the Plaintiff. DW2 told the court that the Plaintiff had demanded ZMW500, 000.00, as he had suffered permanent disfigurement, and they had advised him to sue.

It was DW2's evidence in cross examination that indeed the Defendant drove the vehicle on the material day. He denied that she had hit the Plaintiff, stating that he had cycled into the vehicle. He admitted that a fine for careless driving was paid, and that the Defendant had caused the accident, as police had stated that as long as she had engaged the gears, she had caused it. He also stated that they had challenged the police report despite having paid the admission of guilt.

He agreed that the vehicle was not insured at the time of the accident, stating that at the time this was optional. He added that the law only became compulsory in 2016. He also agreed that a driver is liable to pay damages if a vehicle is not insured.

DW2 testified that the Plaintiff had bruises on his hands and had told him that he would let him know of any other internal injuries he may have sustained after he went to the hospital.

He agreed that the document on page 4 of the Plaintiff's bundle of documents shows that the Plaintiff sustained permanent injury on

his left elbow, but that the Plaintiff did not show them that document.

He further agreed that the Defendant as a driver owed a duty of care to all the road users. It was his evidence that the Plaintiff asked for K500, 000.00 and when he followed the Defendant to her work place he had asked for K1, 000, 000.00.

I have considered the evidence. It is a fact that the Plaintiff was a cyclist on Commonwealth road in Matero on 7th March 2015. It is also a fact that the Defendant was reversing the Toyota Ist registration number ALX 8751 on the same road into the direction that the Plaintiff was coming from, when the Plaintiff flew up and fell down, and sustained injuries of his left elbow and face.

The dispute is on whether the Defendant hit the Plaintiff causing him to fall from the bicycle and sustain the injuries. From the evidence it is clear that the Defendant was reversing the vehicle from where it had been parked with other vehicles. It is also clear from the evidence that the Plaintiff was cycling into the direction from which the Defendant was reversing.

The claim by the Plaintiff arises from negligence. As rightly submitted by Counsel for the Defendant, in order for the Defendant to be found liable in negligence, three elements ought to be proved, as was held in the case of ***FAINDANI DAKA (suing as Administratrix of the estate of Fackson Daka, deceased V THE ATTORNEY GENERAL 1991 SJ.***

These are that firstly, a duty of care must be owed by the Defendant to the Plaintiff, secondly that the Defendant breached the said duty of care, and lastly that the Plaintiff has suffered damage as a result of the breach.

As a driver the Defendant owed pedestrians and other road users such as the Plaintiff who was a cyclist a duty of care when driving or indeed reversing. She was therefore under a duty to look out for any vehicles or pedestrians by looking into the rear mirror as well as the side mirrors of the vehicle when reversing.

The defendant in the submissions argued that the Defendant did in fact use her mirrors before and after she started reversing, and that in fact she was reversing very slowly, and did not hit into the Plaintiff. There is nothing in the evidence to explain how the Plaintiff fell if the Defendant did not hit him. What is not disputed is that the Plaintiff was cycling into the direction the Defendant was reversing.

Had the Defendant looked in the mirrors of the car she would have seen the Plaintiff who was cycling towards them. The evidence does not show that the Plaintiff cycled into the vehicle from a corner such that it would be reasonable to infer that his appearance was sudden, and his being hit cannot be wholly attributed to the Defendant. In fact when the Plaintiff was cross examined no questions were put to him to show that he is the person who had cycled into the vehicle and lost control and fell. The Defendant

when cross examined agreed that the Plaintiff had the right of way on the area that the Defendant was reversing on.

That being the position, it is my finding that the Plaintiff was visible as he cycled towards the vehicle that was driven by the Defendant. As such the Defendant was negligent in reversing by not exercising due care to ensure that there was no one behind the vehicle.

Thus the argument by the Defendant in the submissions that the statement of claim does not specify what conduct the Defendant exhibited that amounts to reckless, negligent or careless driving, making it difficult to decipher, which duty of care that she breached, lacks merit as the statement of claim alleges negligent driving when reversing.

Equally the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT 1992 ZR 172** relied on by the Defendant which held that “**a Plaintiff who has failed to prove his case cannot be entitled to judgment, whatever be said of the opponent’s case**”, does not apply, as it has been shown that the Defendant when reversing failed to look out for the Plaintiff who was cycling towards the car.

The Defendant in the submissions also states that the pleadings filed by the Plaintiff are silent on the conviction for careless driving. It is trite that evidence of conviction in criminal matters cannot be used as evidence of liability in civil proceedings, and the case of **KABWE TRANSPORT COMPANY LIMITED v PRESS TRANSPORT**

1975 LIMITED 1984 ZR 43 is instructive. In as much as there was reference to the criminal conviction or admission of guilt by the Defendant during these proceedings, the basis upon which the negligence has been proved, is not on the conviction, but by the failure of the Defendant to look out for the Plaintiff as she reversed.

That being the position I find that the Plaintiff has proved his case on a balance of probabilities, and succeeds on his claim. His first claim is for payment for the permanent injuries that he suffered as a result of the accident. The medical report which is a hospital discharge slip dated 15th July 2015 shows that the Plaintiff on being discharged was found with tenderness and stiffness of the left elbow with a loss of extension of ten degrees.

The Defendant in the submissions referred to the case of **ZAMBIA NATIONAL BUILDING SOCIETY V ERNEST MUKWAMATABA NAYUNDA 1993-1994 ZR 29** arguing that the case is instructive on the quantum of damages to be awarded, and that it was stated in that case that a Plaintiff should not be in a prejudiced position nor be unjustly enriched.

It was stated in that case that “***the essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched***”.

The Defendant argued that based on the principles set out in that case, the Plaintiff has more or less resumed his normal life even though the hospital discharge slip indicates clinical loss of 10 degrees extension, there is no percentage disability warranting the exorbitant amount in excess of K500, 000.00 demanded by the Plaintiff.

Bearing in mind the principles cited governing the award of damages, the question that arises is what damages are due to the Plaintiff in this matter? In the case of **REUBEN NKOMANGA V DAR FARMS INTERNATIONAL LIMITED SCZ No 25 of 2006** reference was made to the book *Munkman on Damages for Personal injuries and Death 11th Edition* which has the Judicial Studies Board guidelines for assessment of general damages in personal injuries cases.

In that case the Supreme Court on page J13 when awarding the Plaintiff damages based on the guidelines in the book, stated that the awards tabulated in pounds had to be divided by a quarter to give a value in Zambian kwacha as the pound and kwacha do not command the same purchasing power.

Munkman on page 244 under (g) tabulates awards for injuries to the elbow that cause impairment of function but not involving major surgery or significant disability. For less severe injuries the award is stated as ranging between 8, 250 and 16, 500 pounds. As already seen the Plaintiff's disability stands at ten percent. Therefore it would be appropriate to award a lower amount under

the range. I accordingly award the Plaintiff the amount of one quarter of 8, 250 pounds being 2, 062.5.

According to the Zambia Daily Mail dated 27th March 2017 the exchange rate of one pound to the kwacha is K11.8513. When the K2, 062.5 is multiplied by K11.8513 it comes to K24, 443.31, and this the amount I award to the Plaintiff as damages for the injury to his left elbow.

The Plaintiff also claims a refund of transport charges and medical expenses. It is trite that any medical expenses and transport costs incurred are special damages. The case of **ANDREW TONY MUTALE V CRUSHED STONE SALES LIMITED 1994 SJ 98** held that for special damages to be awarded they must be pleaded, and must be proved satisfactorily before they are awarded.

In his evidence the Plaintiff stated that he had no documentation to show how much he had spent on the medical expenses as well as on transport to go to the hospital. In the case of **PHILIP MHANGO V DOROTHY NGULUBE AND ORS 1983 ZR 61** it was stated that *"It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant. However, we are aware that, in order to do justice, notwithstanding the indifference and laxity of most litigants, the courts have frequently been driven into making*

intelligent and inspired guesses as to the value of special losses on meagre evidence”.

Going by the decision in that case and bearing in mind that the Plaintiff did attend hospital after the accident, he is entitled to a refund of the transport expenses and medical expenses if any. The accident occurred on 7th March 2015 and the discharge slip is dated 15th July 2015, a period of four months later. The Plaintiff could not recall how many times he went to the hospital and I am therefore at large to make an intelligent guess as to how many times he did so.

I will therefore state that the Plaintiff attended hospital three times in a month, and over the four month period it comes to twelve times. He testified that he used a bus to go the hospital. The fare price of a bus from Matero where the Plaintiff stays to UTH was not stated, but it would be reasonable to conclude that one gets on a bus to town and thereafter boards another bus to go the hospital.

I will estimate the bus fare as K5.00 per route coming to K10.00 per trip to go the hospital and another K10.00 back home. For the twelve days this comes to K120.00. The nature of the medical expenses incurred was not stated. The evidence as given by the Plaintiff is that he had an x-ray taken of his arm. Any other expenses on medication were not stated. I accordingly estimate the expenses for the x-ray and any other incidentals at K500.00.

The amounts awarded are as follows;

K24, 443.31 for the permanent injury to the left elbow

K120.00 for transport

K500.00 for medical expenses

Total **K25, 063.31**

The judgment sum shall carry interest at the average short term deposit rate from date of issue of the writ until judgment and thereafter at a rate of six percent per annum until payment. The Plaintiff is also awarded costs to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 31st DAY OF MARCH, 2017

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**