IN THE HIGH COURT OF ZAMBIA **2011/HP/296**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

TEZA KAONGA	**PLAINTIFF**
AND	
SAULO MITI	**1ST DEFENDANT**
SAVIOUR PHIRI	**2ND DEFENDANT**
C. R. HOLDINGS LIMITED	**3RD DEFENDANT**
ZAMBIA STATE INSURANCE CORPORATION LIMITED	**4TH DEFENDANT**

Before the Hon. Mrs. Justice F. M. Chisanga, this .....day of 2018

For the Plaintiff:	*Mr. H. Silweya of Messrs Silweya & Company*
For the 1st Defendant:	*Mr. A. Shonga, SC of Messrs Shamwana & Company*
For the 2nd Defendant:	*Mr. A. Shonga, SC of Messrs Shamwana & Company*
For the 3rd Defendant:	*Mr. A. Shonga, SC of Messrs Shamwana & Company*
For the 4th Defendant:	*Ms. K. Z. Kanyembo, Legal Counsel, Directorate of Legal Aid*

JUDGMENT

Cases referred to:

1. ***Kabanda & Kajeema Construction vs Kasanga (1990/92) ZR 145***
2. ***Mohammed v The Attorney General (1982) ZLR 49***
3. ***Mazoka & Others vs Mwanawasa and Others (2005) ZR***
4. ***Warren vs Henley's Ltd (1948) 2 All ER 935***
5. ***Acropolis Bakery Ltd vs ZCCM Ltd (1985) ZR 232***
6. ***Mutale & Another vs The People (1995-97) ZR 227***
7. ***Dyer and Wife vs Munday & Another* (1895) 1QB 742**

8. ***Bayley vs Manchester, Sheffield and Lincolnshire Ry, Co. Law Rep. 8 C. P. 148***
9. ***Symour vs Greenwood 6 H.& N. 359, 7 H. & N. 355***
10. ***Bank of Zambia vs Anderson & Another. (1993/94) ZR P 47***
11. ***Moeliker v Reyrolle and Company Limited [1977] 1 ALL. E.R 9.***
12. ***Watkins vs Secretary of State for the Home Department (24) (2006) UKHC***

Legislation referred to:

1. ***Halsbury's Laws of England Vol 17, 4th Edn para 14***
2. ***Charlesworth on Negligence 4th Edn by R. A. Percy at paragraph 115***

The plaintiff's claim is for general, liquidated and special damages for pain, loss of earnings, loss of promotions and suffering arising from an accident occasioned by assaults, careless and negligent driving, breach of statutory duty and common law duty of care at Isoka bus station on the 14th October 2005.

The statement of claim states that on the material date, the plaintiff was a passenger in the 3rd defendant's bus registration No. ABC 8507 Scania Marcopolo driven by the 1st defendant. The plaintiff boarded the bus at the junction of the Great North Road and Mbala Road, which is between Isoka and Nakonde. He disembarked at Isoka bus station to collect some belongings at that station, from someone.

He re-entered the bus when it was about to start off for Lusaka. He stood on the door, on his way to his seat. The 1st defendant suddenly started the bus

and began to drive off the Isoka bus station fast, while the passenger door was still open. After a short distance from the bus stop, the 2nd defendant pushed the plaintiff off the bus door steps on to the ground under the bus. All the while, the driver was driving fast and the left rear wheel of the 3rd defendant's bus ran over the plaintiff's left foot, causing the injuries, pain and suffering.

The 1st defendant did not stop to assist the plaintiff, by taking him to the nearest Isoka hospital despite cries from on-lookers about the accident. Nor did the 1st defendant report the accident. The plaintiff lost all his belongings, being a 50Kg bag of rice, shoes, money, two blankets, shirts, GRZ boots and combat to the value of K9,400,000.00. He also lost the bus ticket issued to him at K90,000.00 and incurred costs of travelling, and medical expenses for treatment at Isoka Hospital, University Teaching Hospital (UTH) and Italian Hospital.

The particulars of negligence against the 1st defendant are: failing to keep any or any proper lookout for the plaintiff, and driving off suddenly, failing to ensure that the passenger door of the bus was closed and locked and free of passengers before starting the bus from Isoka Bus Station, failing to ascertain or take any adequate precautions to ascertain that there was nobody behind and under or on the steps of the open door before continuing to drive off, driving off without first ascertaining that it was safe to do so and failing to report the accident to Police at Isoka. Other particulars are, colliding with the plaintiff and running over the plaintiff's left foot in the process of driving away,

failing to hoot and blow the horn to signal his motion or failing to drive and manage the bus in such a way as to avoid running over the fallen plaintiff under the bus and to avoid said collusion.

Particulars of negligence and assault against the 2nd defendant are the following: Not helping the 1st defendant in ensuring that the passengers were safely seated inside the bus and failing to help the 1st defendant close the door before the bus could start off, pushing and assaulting the plaintiff while the bus was in motion, not telling the 1st defendant to stop the bus for the plaintiff to alight safely. Other particulars are: not helping the 1st defendant ensure that the plaintiff whom the defendant had pushed away was safe before the bus and crew could continue with the journey, assaulting the exerting force on the plaintiff, and failing to recollect that the plaintiff had been in the bus and had a reserved seat and needed care instead of being bullied and brutalized.

Particulars of injuries are, fractured and dislocation of all the Tarso Megarsal Joints of the left foot with 30% permanent disability, laceration on the left foot, abrasion wound on the left knee posteriorly. Liquidated losses and specific damages are listed as K50Kg of rice valued at K200,000.00, two pairs of shoes at K150,000 each, two blankets at K150,000 each, two shirts at K15,000 each, a suitcase valued at K150,000 each, a cell phone at K500,000, Italian hospital expenses at K7,500,000 and pocket money in the sum of K300,000. Taxi fares from Zingalume to UTH between June 2006 and Mach 2007 are claimed, in the total sum of K10,270,000.00.

The 1st, 2nd and 3rd defendants filed a joint defence, in which they admit that the plaintiff boarded the 3rd defendant's bus between Nakonde and Isoka, but did not buy a ticket and was only carrying a travelling bag. Upon reaching Isoka, the plaintiff disembarked from the bus to the surprise of the 2nd defendant. When asked why he was disembarking at that station when he had initially indicated he would be travelling to Lusaka, the plaintiff informed the 2nd defendant that a friend who had the funds to purchase the ticket did not show up at Isoka bus station and as such he had to drop off. The plaintiff left the bus with his travelling bag.

After the bus had started off, the plaintiff tried to board the bus in motion, shouting and claiming that he now had the money to buy the tickets. In the process, he missed the step and fell to the ground. The allegation that the accident was caused by the alleged or any negligence on the defendant's part is denied. It is averred additionally or alternatively, that the accident was caused or contributed to by the plaintiff's negligence. The particulars of said negligence are: failing to keep any or any proper lookout for the 3rd defendant's bus, failing to take any or sufficient precautions and standing in a bad position in relation to the bus, and attempting to board a bus in motion. The alleged injuries, loss and damage are not admitted.

The 4th defendant's defence denies paragraphs 6 to 12 of the statement of claim, and avers that should the 3rd defendant be found liable, the 4th defendant should contribute only up to the policy limit.

At the trial, the plaintiff testified that he was a serviceman, aged 36 years of age at the trial. On 14th October 2005, he boarded the defendant's bus, registration number ABC 8507 at the Mbala junction. He bought a ticket for K90,000 from CR Carriers. When the bus stopped at Isoka, he informed the conductor that he needed to collect something. He however did not do so as the bus was about to start off. He went to board the bus, and stood in the doorway. The bus door was open. The bus started off and as he was waiting for the conductor to give way to him so that he could go to his seat, the conductor pushed him, and because the door was open, he came off the bus and fell outside. As he was falling, the bus was in motion. When he fell, he rolled and one of his legs went underneath the rear wheel of the bus, which passed over his leg. The driver did not stop the bus despite screams from people and the plaintiff, but drove on.

The plaintiff was taken to Isoka Police Station by well-wishers. He came to learn that the driver of the bus in question was Saulo Miti, while the conductor was Saviour Phiri. He was treated at Isoka District Hospital, as shown by documents at pages 1, 2 and 3 of the plaintiff's bundle of documents. After he had been admitted at Isoka hospital, the plaintiff requested to be transferred to Lusaka, where his home was. His request was granted, and he was given the document appearing at page 3 of the plaintiff's bundle of documents.

He received treatment at UTH, as revealed by documents appearing at pages 4-7 in the plaintiff's bundle of documents. He was admitted at UTH for 5 days,

and discharged thereafter. He was required to attend Clinic 3 for review, and used to attend the said clinic. He referred to pages 7 and 8 of the bundle of documents as proof. During that time, he lived in Zingalume, and had to book taxis when going to the hospital, as he could not manage to board a bus because of the injury. He would pay K40,000 when going to the hospital, and the same amount when coming back, for a distance of approximately 15 kilometres each way. He would get receipts for the fare.

After the reviews, he felt the injury was not healed. He requested for a referral to the Italian hospital, and went to that hospital. He was given a medical certificate by Dr. Mulla, who certified that the plaintiff had 30% disability, as shown by page 17 of the bundle of documents. He also showed the court his picture at page 38, showing his injured leg. He complained that the owner of the bus did nothing about the matter.

The plaintiff is not working the way he used to work before. His colleagues have undertaken operations as a result of which they earn allowances, but because of the injuries, the plaintiff cannot undertake those operations. As a result, he would like the owner of the bus to compensate him. Zambia State Insurance Corporation had insured the bus at the material time.

When cross-examined, the plaintiff testified that he boarded the bus at Mbala turn off. He had paid the fare for the trip. His receipt went missing when he had the accident. When referred to the police report, he testified that it was accurate. He however amended his testimony and said the police report was

incorrect. He looked for the person he wanted to see at Isoka , but when he saw that the bus had started off, he ran to the bus. He got onto the bus before it started off.

The conductor did not ask him for the ticket, but just pushed him off, for no reason at all. There was no exchange of words. He denied getting on the bus while it was moving, and tripping as a result. He explained that when he fell, he rolled. The leg went underneath the bus. He conceded that the medical report did not show the treatment he received. He did not have a receipt for expenses at that hospital, but the evidence was that he had been attended to at that hospital.

In further cross examination, he stated that the 4th defendant was the insurer of the bus. He was so informed by the 3rd defendant. When he approached the 3rd defendant, he was told that he had wasted time, and should have claimed from Zambia State Insurance Corporation. He did not approach the 4th defendant, as it was the 3rd defendant who was supposed to do that. The accident occurred around 20:00 hours, and it was dark. The bus started moving after the plaintiff had boarded it. The plaintiff was waiting for the conductor to give him way, when the conductor pushed him out of the bus.

When re-examined, the plaintiff testified that he fell to the ground upon being pushed. He clarified that the portion of the police report that stated that he was at Isoka, waiting to board a bus was untrue. The rest of the report was correct.

He paid at the Italian hospital, as one is required to pay before receiving treatment. This was the end of the plaintiff's testimony.

Mr. Silweya applied for an adjournment so that he could call the police officer, and the doctor. I acceded to the application and when the matter came up for hearing, Mr. Silweya indicated that one of the witnesses he had intended to call had died, and the other one could not be traced. He would therefore rely on *res ipsa loquitur* and close the plaintiff's case. Mr. Shonga, SC, was unable to proceed and applied for an adjournment, which I granted.

When the matter was called for hearing subsequently, Mr. Shonga, SC, informed me that he would not be calling any evidence. I thereupon reserved judgment.

Both parties filed in written submissions. The plaintiff's submission are that he had proved the occurrence of the accident, and the driver was charged for careless driving, which offence he admitted, and paid admission fee to the police, as revealed by correspondence from the police. According to learned counsel for the plaintiff, it was strange that the defendants twisted this admission as one for assault. Even if it were said to be an assault, it was committed by the conductor. The 4th defendant was sued and liable for the misdeeds of the 1st and 2nd defendant's as insurer of the subject bus on an insurance policy. Leaned counsel echoed the plaintiff's claims and urged me to award the claims. He drew my attention to ***Kabanda & Kajeema Construction vs Kasanga***[1], where the Supreme Court awarded a victim of a

road accident a total sum of K35,000. In his view, the plaintiff should be awarded a sum five times more than that awarded in that case, with costs.

In the opposing arguments on behalf of the 1st, 2nd and 3rd defendants, I am reminded that the plaintiff is required to prove his case, as held in ***Mohammed vs Attorney General***[2], and ***Mazoka & Others vs Mwanawasa and Others***[3].

My attention is also drawn to **Halsbury's Laws of England Vol 17, 4th Edition para 14**, where the learned authors discuss the burden of proof resting on a party who desires the court to take action.

Volume 43 of the said work is also referred to, paragraph 950 thereof in particular where the learned authors state the following:

> ***"Where the evidence on both sides is nicely balanced and conflicting, the court will be guided by the probabilities of the cases set up. The reasonable way to do so is to analyse the facts in order to ascertain the principle subject of the inquiry on which the case hinges, and to endeavor to arrive at a satisfactory conclusion as to the testimony upon that matter. The plaintiff cannot succeed however, if the case is left in doubt, and it is for him to adduce preponderating evidence."***

It is learned state counsel's submission that the plaintiff does not accuse the 1st defendant of having caused the accident. He accuses the 2nd defendant of pushing him off the bus which in turn allegedly run over his foot. Learned state counsel contends that the particulars are of no use to the plaintiff. The only evidence against the 1st defendant was that the bus passed over his leg, and the driver of the bus didn't stop the bus despite calls from the people as well as

the plaintiff himself. This evidence, it is submitted, relates to an allegation occurring after the plaintiff had already been allegedly run over by the bus. There was no evidence to show that the 1st defendant even knew that the plaintiff had been pushed out of the bus. Learned state counsel contends further that the particulars against the 2nd defendant confirm that the driver could not have known about the plaintiff allegedly being pushed off the bus. Special reference is made to particulars number 4 and 5, which state:

> ***"4. Not telling the 1st defendant to stop the bus for the plaintiff to alight safely,***
>
> ***"5. Not helping 1st defendant ensure that the plaintiff who he had pushed out was safe before the bus and the crew could continue with the journey."***

Concerning the 2nd defendant, it is argued that the plaintiff's story is most improbable because the assertion that a person can push another off a moving bus in the absence of a difference or controversy is incredible and unbelievable. The medical reports on record show that the plaintiff sustained injuries on only one part of his body, the left foot. These injuries are inconsistent with a person being thrown off a moving bus. The plaintiff alleges that he was pushed out of the bus, yet he managed to fall towards the bus and had his food run over by the rear wheels of the bus. According to learned counsel this defies the laws of physics as we know them. The only way the plaintiff could have sustained the injuries he did, the argument proceeds, is that he attempted to board a moving bus, tripped and fell towards the bus. This accounts for his having sustained

localised injuries on his left foot. Had he been pushed off a moving bus, he would have had other injuries associated with falling on to the ground from a moving bus.

Coming to the 3rd defendant, it is contended that the assault committed by the 2nd defendant has no connection with his job as a conductor and should not bind the 3rd defendant vicariously. ***Warren vs Henly's Ltd***[4] and ***Acropolis Bakery Ltd vs ZCCM Ltd***[5] are enlisted.

Turning to the argument that *res ipsa loquitur* applies, learned state counsel argues that reliance on the plea is misplaced, as the record shows that the plaintiff alleges that the 2nd plaintiff pushed him off the bus, and the injuries suffered is as a result of being pushed off a moving bus. This reasoning is based on the explanation in **Charlesworth on Negligence 4th Edn by R. A. Percy at paragraph 115**, where the learned author states the following:

> ***"The doctrine of res ipsa loquitur does not apply when the cause of the accident is known. The res can only speak so as to throw the inference of fault upon the defender in some cases where the act of the defender is unexplained."***

Again, if the facts speak for themselves, and the solution is to be found in determining whether, on the facts as established, negligence is to be inferred or not.

Moving to the claim for liquidated losses and specific damages, it is submitted that the plaintiff did not lead any evidence to support the fact that he had any

of the items alluded to. He led no evidence to prove that he paid monies to the Italian hospital. Page 12 of the bundle of documents is an invoice and not proof of payment. The witness the plaintiff had indicated would be called to support the claim relating to expenses at the Italian hospital was not called.

Thus, the plaintiff had not made out a case of negligence against the 1st and 2nd defendants. Even though a case is made out against the 2nd defendant, the 3rd defendant cannot be held vicariously liable. I am urged to dismiss the plaintiff claims with costs.

I have considered the evidence led by the plaintiff, as well as the submissions of the parties. I should at the outset state that it appears that the report made to the police was inaccurate, as exemplied by the police report issued by the police to the plaintiff, dated 20th April 2007, at page 19 of the plaintiff's bundle of documents (the bundle). It was addressed to the plaintiff, who later issued a writ of summons on the 29th June 2007, two years later. In the statement of claim, he averred that he got on the 3rd defendant's bus on the 14th October 2005, at a point between Isoka and Nakonde. This averment is common cause, as it is confirmed in paragraph 1 of the defence. It is equally undisputed that the plaintiff disembarked from the bus at Isoka, and attempted to re-board the bus, when it was about to leave Isoka bus station. It will be remembered that a party who assets the affirmative of a case is required to so prove, on a balance of probabilities in a civil case. Equally pertinent is the principle that a plaintiff

must prove his case, never mind his opponent's case. This principle was restated in by Ngulube J, as he then was.

I am equally alive to the proposition that when a witness tells a lie on one aspect of his evidence, the weight to be attached to the rest of his evidence is greatly reduced. See ***Mutale & Another vs The People***[6].

It was noted earlier that the police report stated that the plaintiff was waiting to board a bus at Isoka bus station enroute to Lusaka. This report was addressed to the plaintiff. Be that as it may, the plaintiff did not aver as stated in the police report, and he explained that the report was wrong. My considered view is that the report does not impair his credibility on that score alone, as he averred the truth, as to the point at which he boarded the bus.

I move then to determine what occurred on the material date. The plaintiff states that he was pushed by the conductor as he was waiting for the conductor to give way, so that he could occupy his seat. He fell and as he was falling he rolled, and one of his legs went underneath the rear wheel which passed over his leg. According to learned state counsel, the plaintiff having been pushed from the bus, he could not fall toward it. I should state that this argument overlooks the possibility that a person pushed can fall in a heap, or even on his backside. You cannot predict a fall with precision, and foretell where a person's legs will end up in a fall. Speaking for myself, I do not view the manner of falling described by the plaintiff from the moving bus as improbable. The medical report states that the plaintiff had a big laceration of

the left foot with fractured metatarsals. Mertatasals are bones of the foot. The fracture of the bones is consistent with being driven over, contrary to learned counsel's submission and I so find.

The plaintiff claims that he did not differ with the conductor when he was pushed off the bus. I find it hard to believe that he could be pushed off the bus by the conductor, who had seen him embark on the bus before Isoka. There must have been something that made the conductor push him off as he did. Human experience is in this regard of assistance. It defies logic for a conductor, who has received the fare for the journey a passenger has undertaken to push the passenger off the bus. The plaintiff's testimony does not make sense. There must be an explanation for the push. As the plaintiff has not offered one, my conclusion is that he was pushed for a reason. That is the premise on which his claims have to be considered. In other words, he is to be viewed as a person intending to board a bus on which he was unwelcome.

The law is that a person is not to do anything that would endanger the safety of a trespasser, that is by willful or wanton misconduct or entrapment. The plaintiff can be likened to a person who had no permission to be on the 3rd defendant's bus. Nonetheless, the 2nd defendant had no right to endanger his safety. If he needed to prevent the plaintiff from boarding the bus, he could have done so in a safe manner. I find, by pushing the plaintiff off the bus, that the conductor was recklessly indifferent to the potentially injurious

consequences of pushing the plaintiff off the vehicle. He ejected the plaintiff from the bus in an unsafe manner, by recklessly pushing him off a moving bus.

It is contended that the 1st defendant, who was driving the bus, is blameless in the whole matter. It appears from the evidence that the 1st defendant did not satisfy himself that the door of the bus was closed and free of passengers. This was contrary to section 218, subsections (1) and (4) of the roads and Road Traffic Act, CAP 464 which read as follows:

(1) ***No person shall open any door of any motor vehicle or trailer on or near a road without reasonable consideration for the safety of other persons using the road.***

(2) .....

(3) .....

(4) ***No person shall drive a motor vehicle or trailer on a road unless the doors of such motor vehicle or trailer are closed.***

It will be noticed that infraction of the stated law gives rise to a criminal offence. The failure to ensure that the door of the bus was closed should however be viewed in the light of the duty of care owed to persons circumstanced as the plaintiff, by the defendants.

It goes without saying that a passenger in the doorway of a bus risks falling out of a moving bus, if he is not leaning against the bus or holding on to some fitting on the bus. It seems the 1st defendant did not ensure that no one was so precariously positioned at the time he started the bus. There is no evidence that had the plaintiff not been pushed, he would still have fallen out of the bus.

It is the alleged push that made him fall out. However, the driver should have checked to see that it was safe to drive off the station before doing so.

Turning to the 2nd defendant, it is clear that he was acting in the course of employment. ***Warren vs Henly's Ltd***[4] referred to learned state counsel is a first instance decision. I have however had occasion to consider ***Dyer and Wife vs Munday & Another***[7], a Court of Appeal Decision. In that case, the defendant employed a person to manage a branch of his business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person who was lodging in the plaintiff's house, and on one of the installments being in arrear, went to the house and removed the furniture. While so doing, he assaulted the plaintiff. For this assault he was summoned, convicted and fined, and he paid the fine. In an action against the defendant in respect of the assault the jury found that the manager committed the assault in the course of his employment. It was held on appeal that the mere fact that the assault was a criminal offence, and not only a tortious act, did not affect the liability of the defendant for the act of his servant.

In Lord Esher M.R.'s opinion, the question for the jury was whether the manager was employed to get back the bedstead, and did the acts complained of for the purpose of furthering that employment and not for private purposes of his own; and there was evidence on which they might find as they had done.

Lord Esher referred to the contention that if the excess acts complained of amounted to the commission of a criminal offence, that would take the case

out of the rule which makes the master liable for the acts of his servant. He disposed of this contention by referring to ***Bayley vs Manchester, Sheffield and Lincolnshire Ry[8],*** and ***Symour vs Greenwood[9]*** noting that in both cases, the acts complained of were criminal acts. In neither of those cases was the ground taken that because part of the excess was criminal, the master was exempt from liability.

Lord Esher M. R. went on to state that it could well be that the question whether the offence was a criminal one may be a material fact for the jury to consider from that point of view, but the mere fact that it is a criminal offence is not sufficient to take the case out of the general rule. The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says, that if in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable. There was evidence in this case on which the jury might be properly asked to give their opinion.

Lopes LJ put it this way:

> ***".....the jury might very reasonably come to the conclusion that Brice, as general manager for Munday, had, as part of his duty, to obtain possession of the bedstead directly the installments become in arrears. If so, the jury might also fairly consider that in order to carry out that employment with which he was entrusted Price committed the assault complained of. The law says that for all acts done by a servant in the conduct of his employment, and in furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he was given is exceeded.....There is no distinction in this respect between the effect of a tortious and a criminal act, provided such***

acts are done by the servant in the conduct of his employment and in the interest of his master."

In my considered opinion, ***Warren vs Henly's Ltd***[4] is distinguishable from The *Dyer* case because in the former, an act of vengeance was committed by the servant, while in the latter, the servant was doing what he was employed to do, albeit wrongly.

Turning to the present case, I have stated previously that the 2nd defendant ejected the plaintiff from the bus because he was unwelcome. The explanation for this might be that he was unable to pay his fare, or that the bus was full. I have rejected the plaintiff's version that he was pushed off the bus for no reason at all, and have found that the 2nd defendant had cause for ejecting the defendant from the bus.

In my opinion, he was acting in the course of his employment, viz, to keep persons from the bus, who had no business being on the bus. Although in preventing the plaintiff from riding on the bus, the 2nd defendant pushed him, the fact remains that he did so in the course of his employment. The circumstances are much like in the *Dyer case.* In preventing the plaintiff from riding on the bus, the 2nd defendant did not ask him to disembark nicely, but pushed him off the bus. This was no act of vengeance, but a misguided act in preventing the plaintiff from riding on the bus. The fact that the act was viewed as an assault does nothing for the 3rd defendant. In as much as the 2nd defendant was acting in the interests of his employer, the employer is liable for

the tortious conduct. The argument that the 3rd defendant is absolved because the act was also criminal is clearly unsustainable.

It is the ejection that led to the fall, culminating in the plaintiff's foot being driven over by the rear wheel of the vehicle. I thus find and hold that the duty of care owed to the plaintiff by the 1st, 2nd and 3rd defendants was breached on the facts, leading to damage. The submission that *res lipsa loqutur* applies is clearly misplaced, as the cause of accident was pleaded.

The plaintiff's claim is for damages. The medical report obtained from the Italian Hospital indicates that he suffered 30% deformity of the foot, his recovery having been partial. The medical certificate was admitted as a true copy of what it purported to be in terms of Order 27 of the Rules of the Supreme Court. I perceive no obstacle to its admission into evidence, even though the author was not called to testify. This I do in terms of section 3 of the Evidence Act. I thus find and hold that the plaintiff has suffered 30% deformity of the foot, and entitled to general damages as a result.

The general damages awarded to a plaintiff are for pain and suffering and loss of amenities. The plaintiff has not explained the pain he suffered as a result of the injury. I take judicial notice however that the injury inflicted must have caused pain and suffering for some short period of time. Loss of amenities must have been, and will continue to be suffered by the plaintiff as it is obvious he cannot do some of the activities he could do when his foot was unimpaired. He thus falls to be compensated.

Taking into account pain and suffering, and looking at earlier awards in this jurisdiction, I consider that a sum of K80,000 is adequate recompense as general damages. I take inflation into account, as I am entitled to do, per ***Bank of Zambia vs Anderson & Another***[10].

I turn to the claim for lost opportunities. The plaintiff's claim falls in the category of restriction on earning capacity. On 12th April 2007, a letter was written to the manager of the 3rd defendant company, almost 2 years after the accident, explaining that Teza Kaonga could no longer carry out military duties because of severe injuries he sustained, his left foot having been deformed.

Moeliker vs Reyrolle & Co. Ltd[11] explains the correct approach to a claim for restriction on future earning capacity. 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 is in finding a 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.

In the instant case, the plaintiff testified that he is unable to undertake certain operations, and has lost out on allowances as a result. He has not indicated what these operations are, how much he has lost out on, and will likely lose out on as a result. The state of the evidence is of no assistance in this respect. Even the loss of promotions is not addressed by the plaintiff in his evidence. I

take it that the later claim was abandoned. I will therefore proceed to make an inspired guess regarding the lost opportunities to earn allowances. I award the plaintiff K10,000.00 as damages in this respect.

I turn to consider the claims referred to as specific damages. I should state that I reject the averment, and testimony that the plaintiff lost the bus ticket issued to him, in light of my findings above. As regards the bag of rice, two pairs of shoes, two blankets, two shirts, a suitcase and cell phone, the oral testimony was wanting. No explanations whatsoever were made, as to how these items were lost. Besides, I have concluded that the plaintiff was unwelcome on the bus. His items cannot have been on the bus as a result, as one whose presence is unwelcome on a bus would not have their items kept on the bus.

Expenses incurred as a result of transportation to the hospital for review after the injuries inflicted on the plaintiff are a legitimate expense. I thus award the plaintiff the sum of K10,270.00. I have noted above that the plaintiff must have attended the Italian hospital, but his failure to produce receipts suggests that he did not pay the related expenses on his own. He thus suffered no loss in that regard.

I turn to consider the 4th defendant's position in this matter. Objection was raised, belatedly, that the plaintiff had alleged no facts in the statement of claim on which the claim for relief could be premised. Yet the 4th defendant had, several years before the trial commenced, filed a defence, in which it

averred in the alternative that should the defendant be found liable, the 4th defendant should contribute only up to the limit of the insurance policy.

I note that in ***Wise vs E. F. Hervey Limited***, the Supreme Court held that a cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other. Order 18 Rules of the Supreme Court makes provision for striking out pleadings and indorsements which disclose no reasonable cause of action or defence, or which are scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of the process of the court.

Order 18/19/4 expressly states that the application may be made even after the pleadings are closed, though it should not be heard at the opening of the trial save in exceptional circumstances.

In the present case, the issue was only raised at the trial. No exceptional circumstances were pointed out, to warrant the hearing of the application so belatedly, and I remained unpersuaded to accede to the application more so that third party insurance is compulsory in this jurisdiction, and the 4th defendant did admit that it was the insurer of the bus in question. I also note that under the compulsory statutory third party insurance, the 4th defendant is liable, as insurer to indemnify the 3rd defendant.

Therefore, the 4th defendant is liable to contribute to the damages up to the policy limit. On the foregoing, I enter judgment for the plaintiff against the 1st, 2nd and 3rd defendant, and the 4th defendant up to the policy limit. I award the plaintiff interest on the sums awarded at short term deposit rate from date of writ to date of judgment, and thereafter at current bank rate. I award the plaintiff costs against the 1st, 2nd and 3rd defendants to be agreed and in default taxed.

Dated the 29th **day of** March **2018**

F. M. CHISANGA
HIGH COURT JUDGE