

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

**2017/HP/1650**

**BETWEEN:**

**ALEX MALIWA**

**PLAINTIFF**

**AND**

**SIMON GONDA**

**DEFENDANT**



**BEFORE THE HON. JUSTICE G. MILIMO - SALASINI IN  
CHAMBERS ON THE 20<sup>TH</sup> DAY OF JULY, 2020**

**For the Plaintiff:** Mr. L. Mungambata – legal Resources  
Chambers

**For the Defendant:** Ms. M. Chansa – Moshia and Company

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## **J U D G M E N T**

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**CASES REFERRED TO:**

1. *Donoghue v Stevenson* (1932) A. C. 562
2. *Bourhill v Young* (1943) A. C. 92
3. *Kambarange Mpundu Kaunda v the People* (1990-92) Z. R.
4. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z. R. 172
5. *Promart Investment Limited T/A Chas Everitt v African Life Financial Services Zambia Limited* (Appeal No. 98) (2013 ZMSC1)
6. *In re H (minors)* (1996) A. C. 563 at 586

**LEGISLATION REFERRED TO:**

1. Penal code, Chapter 87 of the laws of Zambia
2. Firearm Act, Chapter 110 of the Laws of Zambia

**OTHER WORKS REFERRED TO:**

1. Bryan A. Garner, *Black's Law Dictionary, Eighth Edition*, (St Paul, Thomson West, 2004)
2. *Halsbury's Laws of England, Fourth ed. Volume 16, paragraphs 561, 562 and 563*
3. Rodgers, W.V.H. *Winfield and Jolowicz on Tort*, (London, Sweet and Maxwell, 2006)

This action was commenced on 25<sup>th</sup> September, 2017, by way of writ of summons. The plaintiff's claims are for the following:

1. *Damages for personal injuries sustained as a result of the negligence of the Defendant when the Plaintiff was shot at and wounded without cause;*
2. *Refund of the amount of K1, 900 incurred by the plaintiff as special damages;*
3. *Any other relief the Court may deem fit;*
4. *Interest and*
5. *Costs.*

According to the statement of claim that accompanied the writ of summons, the plaintiff Mr. Alex Maliwa, is a resident of Chongwe and averred as follows: that on or about 17<sup>th</sup> February 2017, the Plaintiff was amongst members of the who had gone to the Defendant's farm to urge the Defendant to take the body of a former employee of the Defendant to the hospital after the Defendant's son recklessly ran him over with a motor vehicle following a dispute over with a motor vehicle following a dispute over unpaid wages when the Defendant shot him with a gun.

The particulars of negligence as set out in paragraph 5 of the statement of claim state as follows; (i) The Defendant aiming at the Plaintiff with his firearm; (ii) The Defendant firing at the Plaintiff (iii) The Defendant's agent and/ servant failing to ensure that his gun was not fired except in the direction which it was safe to do so. The Plaintiff claims that by reason of the alleged negligence he suffered personal injuries and has been put to loss and expense.

On 10<sup>th</sup> October, 2017, the defendant filed his defence. He denied any liability for negligence and averred that he did not fire a gun at the Plaintiff nor did he cause any injury to the Plaintiff by reason of firing a gun or any other reason. That it was in fact not the Defendant the caused injury to the Plaintiff. That the Plaintiff was reported to the police for trespass and causing damage to the Defendant's property and that such report was withdrawn after a reconciliation and that the Defendant in fact paid the Plaintiffs medical expenses in the sum of K2,000. That the Defendant denies each and every allegation in the statement of claim.

The Defendant further makes a counter claim that on or about the 18<sup>th</sup> of February 2017, the Plaintiff in the company of a mob of villagers illegally and without just cause raided the Defendants farm with threats to cause physical harm to the Defendant and his family. That the Plaintiff with intent to cause physical harm to the Defendant and his property did loot, steal and cause damage to the Defendants property. The particulars of damage and loss are set out in paragraph 11 of the Defendant's defence as (i) broken windows and doors for 3 of the Defendants

houses as a result of the Plaintiff and his mob breaking in and looting, (ii) loss of K63, 500 stolen during the Plaintiff and his mob looting of the Defendants property and (iii) the Defendant has as a result of the Plaintiff acts of terror suffered loss, damage and psychological injury and claims the following; (a) cost of repairing the damaged window and door occasioned to the Defendants property, (b) the sum of K63, 500.00 stolen in the course of the break in and looting at the Defendants property by the Plaintiff and his accomplices (c) damages for mental stress and anguish.

On 27<sup>th</sup> October, 2017, the Plaintiff filed its reply and defence to counter claim which he averred that he shall prove at trial that the gathering that the Plaintiff was a part of was at the entrance of the Defendant's farm which had been blocked to prevent the Defendant from leaving the body of his body of his former employee who had been recklessly run over by the Defendant's son. That the Defendant did in fact aim and shoot at the Plaintiff using his rifle which was momentarily seized by police officers in Chongwe to establish whether he had a licence authorizing him to own a firearm. That no complaint was ever made by the Defendant relating to any purported looting or damage to the Defendant's property. That the Defendant only went to the police station to answer to a complaint against him after he unlawfully shot at the Plaintiff. That the Plaintiff denies the contents of paragraph 10 of the Defendant's counter claim and that the Defendant's farm was never raided and no threats to cause physical harm to the Defendant and his family were ever made by the Plaintiff or anyone

at all. That the contents of paragraph 11 and the particulars therein of the Defendant's counter claim Are denied and the plaintiff shall aver at trial that the community members who gathered at the Defendant's farm following the killing of his former employee were at the entrance to the Defendant's farm and peacefully requested the Defendant to take the body of his former employee to the mortuary. That the Plaintiff shall further prove at trial that no complaint of damaged or missing property was made by the Defendant against the Plaintiff.

The trial of this action commenced on 25<sup>th</sup> April, 2019, and Alex Maliwa; the Plaintiff testified as PW1 and called one witness Grace Nyangu. The plaintiff recalled that on 17<sup>th</sup> February, 2017 he was at his house at Chisko Village when in the evening around 17-18 hours he heard some voices of people crying from the eastern direction where the Defendant's farm is. He testified how he decided to go there and found his sister at the scene crying as she explains what had happened. He testified that he had found a dead body of a one Gaston Banda who had been ran over (bashed) by the Defendant's son Daniel Gondo. He also testified that he found people who requested that the motor vehicle which had bashed the Gaston Banda should take the deceased to the mortuary. He went on to tell the court how the Defendant refused to pick the body as it was against his religious beliefs but the people still insisted that the Defendant takes the body to the mortuary. He further testified how the Defendant left and came back with a gun which he shot the Plaintiff with on his left buttock. He went to state that he fainted

and later regained consciousness at Chongwe hospital. He continued to testify how he was referred to Levy Mwanawansa hospital because the bullet was deep. He informed the court that he was admitted for one week at Levy Mwanawansa hospital and given pain killers. He also informed the court that the bullet would not be extracted and was still in his body because he would have challenges with some nerves if the bullet was extracted. He referred to page 1 the Plaintiff's Bundle of documents filed into court on 10<sup>th</sup> January 2018 and explained to the court that the document was given to him by a doctor and shows the condition of his injury.

He testified how he has been feeling some pain from the time he was shot especially after working; hence he fails to do any work. He informed the court that he still goes to Levy Mwanawansa for reviews.

He further informed this court that he was claiming special damages for transport to and from the hospital as the K2000 he was given by the Defendant was only for medicals and did not cover transport money for his reviews. The Plaintiff referred to page 3,4 and 5 of his bundles of documents which shows the receipts as proof of the money he spent for his reviews at the hospital.

In cross examination, PW1 testified that maintained that he was shot at by the Defendant Mr. Simon Gondo and that was no one who went to damage the Defendant's property or steal money. He testified how he was never arrested or charged by police regarding Mr. Simon Gondo damaged properties.

PW2 was Grace Nyangu who testified that she saw Defendant, Mr. Simon Gondo shot her husband, the Plaintiff, Mr. Alex Maliwa. She informed the court that there was no riot the time they left with the Plaintiff for the hospital.

In cross examination, PW2 stated that the Plaintiff was her husband and that she was present during the time of the incident. She told this court that she saw the Defendant with a gun and saw him shoot the plaintiff. She informed the court that she had evidence of the clothes the Plaintiff was wearing during the shooting. She maintained that there was no riot and that the time they left with the Plaintiff for the hospital there was still no riot. She indicated that the Defendant is the father to Daniel Gondo and that she went with the Plaintiff to the hospital after he was shot.

That was the Plaintiff's evidence.

When the matter came up for defence, the Defendant did not call any witnesses. DW1 was Simon Gondo and testified that on 18<sup>th</sup> February 1017 around 19:00 to 20:00hours his Scania truck came from town and entered his gate. When the truck came in, he testified how he stopped his driver and told him to off load the upright fridge that was brought. He informed the Court that two minutes later he got a phone call that his employee Gaston had been murdered. He further informed the court that when he went to the gate, he found the deceased lying on the ground and called Chalimbana Police. He informed the court that he later called Chongwe Police because Chalimbana Police delayed. He informed

the court that Chongwe police told him to take the body to the police with his vehicle, which he refused to do and instead told the police to come and see what had happened. He informed the court that the police called him and told him that the vehicle they were using was struck. He testified how he went to Chalimbana Christian Centre to get the police. He further testified how he got his vehicle to go to where the deceased was and about 120 meters, he saw the Plaintiff with a huge stick.

DW1 went on to testify that one Elisha Gondo told him his motor vehicle back as there was a riot. He informed the court that he hid his car while the people began to break his houses. He also informed the court that later the police came and took the body of the deceased. He further informed the court that the police discovered that he had lost K63,000. He testified how the police advised him to take all his cars to the police. DW1 recalled how he later went to the police station and heard that someone had been shot at his house and taken to Levy Mwanawasa hospital. He testified how he had later learnt that Alex Maliwa had been shot. DW1 informed the court that on Monday he learnt that it was Daniel who shot the Plaintiff and referred the court to page 1 of the Defendant's Bundle of Document which was a police bond issued to Daniel for his arrest. He also informed the court that he had filed a counter-claim for compensation for the damages.

In cross examination, DW3 testified that he had received a phone call from Joan Gondo, his young brother, who told him that Gaston



had been killed. He informed the court that he owned two firearms which he has documentation for. He further informed the court that he did know whether the firearm used was his or not because he only learnt of the shooting at the police station. He informed the court that his firearm was taken by the police. When asked who he saw with a stick, DW1 said it was the Plaintiff who had the stick about 6 meters from his motor vehicle. He testified how they were more than 200 people emerging from bars and how the Plaintiff was the only who had a stick. He denied shooting the Plaintiff as he had only come to know of the shooting at the police that it was his son Daniel Gondo. DW1 was referred to page 1 of the Defendant's Bundle of Document and asked if the document shows that the Plaintiff was shot by Daniel Gondo, DW1 told the court that the document did not show. DW1 told the court that he paid the sum of K2000 as acknowledged. DW1 was referred to page 3 of the Defendant's Bundle of Document and asked if he was the one that reported that the Plaintiff had been shot, DW1 informed the court that it was the police that were writing and that he did not report that the Plaintiff was shot. When asked if the Plaintiff was ever arrested or charged for riotous behaviour or any other offence, DW1 informed the court that the Plaintiff went to the counsellor and pleaded for the matter be discussed for a reconciliation. When asked if he knew who stole the K63, 000, DW1 told the court that it was the Plaintiff and his group.

In re-examination DW1 clarified that he took a report of the person who had died and only heard about the shooting at the police.

That was the defendant's evidence.

I have carefully considered the evidence adduced by the plaintiff and defendant. I have also considered the written submissions and the authorities cited therein. From the evidence on record I find that the following facts are not disputed: that Gaston Banda was a former employee of the Defendant and was bashed by a vehicle which the defendant's son one Daniel Gondo was driving and as result of that, the Plaintiff upon hearing noises of people crying did go to the Defendant's property to request the Defendant to take the body of a deceased Gaston Banda to the mortuary, an act which the Defendant refused to do. That Mr. Alex Maliwa, the Plaintiff sustained personal injuries from which a gun shot.

The Plaintiff filed into court written submissions on 27<sup>th</sup> May 2019 which I do agree with at paragraph 3.2 where the learned authors of *Halsbury laws of England/Negligence (Volume 78 (2010) 5<sup>th</sup> Edition) 1 General Principles of the Law of Negligence* defines negligence as a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts each particular case. It may consist in omitting to do something which ought to be done or doing something which ought to be done either in a different manner or not at all. Therefore, the specific question that has to be determined in this case is whether DW1 was negligent or not.

In order to succeed in an action based on the tort of negligence, a plaintiff must establish three elements, namely (a)

that the defendant owed him a duty of care in the circumstances; (b) that the defendant or his servant or agent breached that duty by failing to conform to the required standard of conduct; and (c) that the Plaintiff had suffered damage as a consequence of that breach as was stated in the case of ***Faindani Daka v. Attorney General***.

In the present case the plaintiff alleges that the defendant was negligent when he fired his gun in the direction of the Plaintiff and that it was due to his negligence that the incident occurred. The defendant denies any negligence on his part and asserts that he is not responsible for the shooting nor the injury caused to the Plaintiff. It is the defendant's contention that it was an individual by the name of Daniel Gondo who had shot the Plaintiff and caused him grievous bodily harm and was appearing before a Court of Law at the designated time and date.

That being the case, the questions that I have to determine at the outset is whether the defendant owed the Plaintiff any duty of care in these particular circumstances and if so, whether the defendant or its servants breached the duty by failing to conform to the required standard of conduct.

It is an established fact in negligence that if your actions are reasonably likely to affect someone else, then you owe a duty of care. This means that you have to take reasonable care to ensure that those people are not harmed or injured as a result of the things you do. Therefore, duty of care is reasonably foreseeable that you might suffer some sort of harm or loss because of something

someone else does. According to **Black's Law Dictionary**, negligence is defined as ***the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; or any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, or wilfully disregarding of others' rights. A person has acted negligently if he has departed from the conduct expected of a reasonably prudent person acting under similar circumstances.***

In the case of ***Blyth v Birmingham Waterworks Company*** [1856] 11 Ex 781 Alderson, B, negligence is defined as: -

***“an omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”***

The learned author of **Charlesworth and Percy on Negligence** (London, Sweet and Maxwell, 2010) observes in paragraph 1, at page 3, that the term negligence can have three meanings: -

1. *In referring to a state of mind when it is distinguished in particular from intention;*
2. *In describing conduct of a careless type; and*

3. *As a breach of a duty to take care imposed by either common law or statute.*

In some circumstances, the three meanings can overlap. The learned author also observes in paragraph 1, at page 4, that: -

***“...careless conduct does not necessarily give rise to breach of a duty of care, the defining characteristic of the tort of negligence. The extent of a duty of care and the standard of care required in performance of that duty are both relevant in considering whether, on any given facts, conduct which can be characterized as careless is actionable in law.”***

Applying the law to the present case, it is clear that the defendant, owed the Plaintiff a duty to take reasonable steps to ensure that the Plaintiff was not physically injured or killed whilst on the property of Defendant. There is clear evidence on record adduced by PW2 that the incident occurred because the defendant shot the Plaintiff. The defendant did testify that it was his son who actually shot the Plaintiff but did not make further effort to suppose his claim.

I therefore find that the defendant did owe a duty of care to all the villagers that were on his property and should have taken the requisite steps to protect the villagers from risk. If these precautions were taken, it is reasonable to conclude that the risk of accident caused by the shooting would have been sensibly reduced,

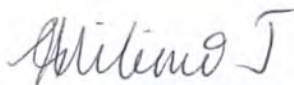
or avoided. In the circumstances, I therefore find that on the evidence adduced, it has been proved that the incident may have been an act of negligence.

It is worth noting, that after the shooting, the Plaintiff was paid K2000 for medical expenses by the Defendant Simon Gondo. The logic explanation would be that the Defendant did cause injury to the Plaintiff if he felt the need to pay for the Plaintiff's medical expenses.

Therefore, the position is that the Defendant failed to perform the duty of care incumbent on him, and as a result, his responsible for the personal injuries, losses, and expenses suffered by the Plaintiff. I have come to this conclusion because the Defendant has failed to establish that he had observed an adequate standard of care. In the circumstances, the Defendant is therefore vicariously liable. This is a conclusion which entitles the Plaintiff to damages; both general and special, to be assessed by the Deputy Registrar.

Leave to appeal is hereby granted.

**Delivered at Lusaka this 20<sup>th</sup> day of July, 2020**



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**HON. JUSTICE G. MILIMO- SALASINI**  
**HIGH COURT JUDGE**