IN THE HIGH COURT FOR ZAMBIA 2016/HP/0069

AT THE PRINCIPAL REGISTRY

LUSAKA

(Civil Jurisdiction)

BETWEEN:

DERRICK BWALYA PLAINTIFF

AND

BORNFACE SICHINGA DEFENDANT

BEFORE HONOURABLE LADY JUSTICE M. CHANDA THIS 21ST DAY OF FEBRUARY, 2020

APPEARANCES:

For the Plaintiff	:	Ms. S. Sichalwe of Mulenga, Mundashi, Kasonde Legal Practitioners
For the Defendant	:	Mr. C. M. Besa appearing with Mr. P. Chileshe of Besa Legal Practitioners

J U D G M E N T

LEGISLATION REFERRED TO:

ROAD TRAFFIC ACT NO. 11 OF 2002

AUTHORITIES REFERRED TO:

1. THE BLACK'S LAW DICTIONARY (2004) 8TH EDITION USA: THOMSON WEST
2. HEAVEN V PENDER (1883) QBD 503B
3. AUGUSTINE KAPEMBWA V DANNY MAIMBOLWA AND THE ATTORNEY GENERAL (1981) ZR 127
4. DUNCAN SICHULA AND MUZI TRANSPORT FREIGHT AND FORWARDING LIMITED V CATHERINE MULENGA CHEWE (2000) ZR 56
5. PHILLIP MHANGO V DOROTHY NGULUBE AND OTHER (1983) ZR 61

On 18th January, 2016, the plaintiff **Derrick Bwalya** issued a writ of summon against **Bornface Sichinga**, the defendant herein. The plaintiff alleged that on 23rd August, 2015 he was driving his Mercedes Benz registration number BAA 2169 along Los Angeles Boulevard when he was involved in a road accident caused by the defendant. The plaintiff's writ of summons was endorsed with a claim for the following:-

1. Damages for negligence;
2. Payment of the sum of **ZMW98, 758.47** being the cost for repairs at Top Gear Motors as at 15th September, 2015 needed to undertake repairs to the plaintiff Mercedes Benz registration number BAA 2169;
3. ZMW800.00 per month effective from 7th September, 2015 to date being the cost of use of a hired taxi owing to loss of use of car;
4. Interest on the above sums;
5. Cost of and occasioned by this action; and
6. Further or other relief that the Court may deem fit.

As regards the particulars of the negligence, the plaintiff listed them as:-

i. Failing to keep any or any proper lookout;
ii. Driving too fast
iii. Failing to observe or heed the presence of the plaintiff's vehicle
iv. Failing to steer or control the motor vehicle adequately or at all so as to avoid colliding with the plaintiff's vehicle;
v. Failing to apply brakes timeously or at tall so as to avoid colliding with the plaintiff's vehicle and

vi. Failing to sound his horn in time or at all.

The defendant filed his defence and counterclaim on 25th January, 2016 wherein he contended that the accident was caused by the gross negligence of a third party and that it was the plaintiff who negligently hit into the defendant's Mercedez Benz registration number ALM 6332. The particulars of negligence set out by the defendant in the counterclaim were as follows:

i. Driving too fast in the circumstances;
ii. Failing to keep any proper look out or to have any or sufficient regard for other motor vehicles;
iii. Failing to heed the presence of the defendant's motor vehicle;
iv. Failing to steer a safe or proper course; and
v. Failing to apply brakes or at all so as to avoid colliding with the defendant's vehicle.

The defendant's counterclaim was for the following:

1. Damages for negligence;
2. Payment of the sum of K25,000 used by the defendant to repair his motor vehicle;
3. Interest on the sums due and payable;
4. Costs of and occasioned by this action; and
5. Any other relief the Court may deem fit.

When the matter came up for hearing both parties were before Court. The plaintiff called two witness while the defendant called one witness.

The plaintiff gave evidence as the first witness (**PW1**). His testimony was that on 23rd August, 2015 at around 00:30 hours he was driving in the outer lane of Los Angeles Boulevard heading eastwards. PW1 explained that when he reached the roundabout the defendant's vehicle registration number BAA 2169 was in the inner lane heading in the same direction. He narrated that as they approached the entrance of Lusaka Sport Club, he saw a vehicle leaving the premises through the entrance. He said the vehicle crossed the plaintiff's lane and went into the defendant's lane. The witness went on to state that the defendant's vehicle immediately swerved into the plaintiff's lane. PW1 asserted that although he applied the brakes, his vehicle's front right fender hit into the rear left fender of the defendant's vehicle and forced the plaintiff's vehicle off the road. He narrated that all the three vehicles stopped and the defendant immediately approached the plaintiff's car to confront him. The plaintiff said he clarified that it was actually the defendant who had caused the accident by changing lanes suddenly. He said during their altercation, he noticed the third car drive away from the scene.

It was the plaintiff's further testimony that they reported the accident to Woodlands Police Station where a police officer examined both cars and concluded that it was the defendant who had been at fault. He

said a police report was issued the following day and he produced it on pages 12 and 13 of his bundles of documents. PW1 stated that when the police officer asked the defendant if he would pay for the repair of the plaintiff's car, he agreed. PW1 informed the Court that the defendant also said he would obtain quotation for the cost of repairing from different garages but that afterwards he became elusive. He went on to narrate that when the defendant did not obtain quotations, the police officer advised the plaintiff to get them himself. The plaintiff proceeded to obtain quotations from three companies which specialised in repairing Mercedez Benz vehicles and he decided to take it to Top Gear because they could repair the vehicle in the shortest period because he needed to use it. He said that he spent eighty kwacha (K80) on taxi fares every day to transport his daughter to school from the time that the vehicle was down.

In cross-examination, the plaintiff stated that his vehicle was insured but that he had not explored the option of having it repaired under his insurance cover. PW1 confirmed that the third driver drove into the defendant's lane and the defendant changed lanes to avoid a head-on collision. He said the third driver ran away while they were engaged in the dispute. When asked why his pleadings did not indicate that there was an undertaking by the defendant to repair his vehicle, the plaintiff's response was that it was because the undertaking was not made to him but to the police officer. He said that the defendant was not charged with any offence by the police. With regards to the damaged caused to his vehicle, the plaintiff told

the Court that it had been extensively damaged on the right side. He stated that although the vehicle was able to move, he had been advised that the damage would be aggravated if he continued to drive it.

In re-examination, the plaintiff clarified that his vehicle's insurance cover was third-party insurance which did not cover its own repair.

The plaintiff's second witness (**PW2**) was **Osward Sakatema**, the police officer on duty at Woodlands Police Station when the accident was reported by the plaintiff and the defendant. PW2 recounted that he visited the accident scene and drew a sketch plan of it. According to the witness, the parties informed him that they were heading towards the same direction along Los Angeles Boulevard with the plaintiff's vehicle on the inner lane while the defendant's vehicle was in the outer lane. PW2 said the parties' explanation was that another vehicle which joined the road from a wrong place ignited the incident. The vehicle went into the defendant's lane and the defendant, in trying to avoid a head-on collision with that vehicle, swerved into the plaintiff's lane and hit into the plaintiff's vehicle. PW2 testified that from the parties' narration of the incident, he concluded that it was the defendant who had been in the wrong and he proceeded to issue a police report. The witness informed the Court that he did not charge the defendant with careless driving because the accident was caused by the third vehicle. PW2 stated that he took note of the visible

damage that had been caused to the vehicle and referred it for professional assessment.

He said that after conducting investigation his conclusion was that the defendant had caused the accident.

There were no issues raised in cross examination as the defendant and has counsel were absent for unexplained reasons. This marked the close of the plaintiff's case and the matter was accordingly adjourned for the defendant's case.

The defendant **Bornface Sichinga** gave evidence on his own behalf as the first witness (**DW1**). His evidence was that on 23rd August, 2015 he was driving in the inner lane of Los Angeles Boulevard going towards the golf club while the plaintiff was in the outer lane. He testified that as he approached the entrance of the club, he saw an oncoming vehicle in his lane. He said the vehicle was moving at a high speed with full beam headlights. DW1 stated that he applied the brakes and hounded the horn so as to prevent colliding with the oncoming vehicle. The witness further stated that fearing a collision with the other car, he veered his vehicle into the outer lane. DW1 informed the Court that he had not seen the plaintiff's car in the outer lane when he was changing lanes and it hit into his car from behind. He said that when the other driver realised what had happened, he fled the scene. DW1 recalled that the plaintiff appeared drunk at the time of the accident and that this was the reason he had

hit into his vehicle. He went on to say that the accident was reported to Woodlands Police Station.

DW1 narrated that he informed the plaintiff about his third-party insurance cover but the plaintiff refused to use it to repair his vehicle.

In cross-examination, the witness stated that he moved to his lane to avoid hitting into the oncoming vehicle. He said the third driver fled the scene as he was confronting the plaintiff. DW1 affirmed that the plaintiff was driving correctly in his lane. He confirmed that he caused the damage to the plaintiff's car. DW1 conceded that it was improper of him to join the plaintiff's lane the way he did. He also conceded that he did not dispute the police report which indicated that he was the cause of the accident. He said he recalled that the plaintiff appeared to have been drunk when they spoke at the scene of the accident.

In further cross-examination, he informed the Court that despite both cars having been insured with Goldman Insurance, the plaintiff refused to make a claim. He said that his third-party insurance was limited to thirty thousand kwacha (K30,000.00) and the plaintiff wanted to claim an amount much higher than the limit.

DW1 also stated that the plaintiff had obtained three quotations; two from top Gear for ninety-six thousand one hundred and forty kwacha and eighty ngwee (K96,140.80) and ninety-eight thousand seven

hundred and fifty-eight kwacha (K98,758.00) and another one from Southern Cross Motors to the tune of eighty-six thousand kwacha three hundred and twenty-six kwacha (K86,326). DW1 informed the Court that he did not know the reason why Goldman Insurance had not paid the plaintiff the thirty thousand-kwacha (K30, 000) insurance limit. The witness said despite the plaintiff being his neighbour, he was not cooperating whenever he went to see him to try and sort out the issue.

In re-examination, the defendant read out the second last paragraph on page 13 of the plaintiff's bundle of documents which stated that he moved to the outer lane to avoid a head-on collision with another vehicle.

After the close of the case, counsel for both parties filed written submissions for which I am greatly indebted. I shall not restate the submissions but will only refer to them as may be necessary.

I have considered all the evidence in the matter and I have found that it is not in dispute that the accident in which the plaintiff's vehicle registration number BAA 2169 was involved occurred along Los Angeles Boulevard on 23rd August, 2015. It is also not in dispute that before the accident, the defendant was driving his motor vehicle registration number ALM 6332 in the inner lane of the road while the plaintiff was driving in the outer lane. It is common cause that an unknown motorist joined the defendant's lane and was driving in the

opposite direction of the defendant. It is also common cause that to avoid a head-on collision, the defendant changed from the inner lane to the outer lane. I find that when he quickly changed lanes, his vehicle went in front of the plaintiff and the plaintiff's vehicle hit into its left rear fender. It is also my finding that as a result of the accident, the rear left fender and bumper of the plaintiff's motor vehicle were damaged.

I have analysed the evidence on record and the submissions by counsel and the issue to be resolved in this matter is whether or not the accident which occurred on 23rd August, 2015 in which the plaintiff's vehicle was damaged was caused by the negligence of the defendant. Before I make any determination in this matter, it is convenient to first make general observations about the law relating to negligence and the elements that constitute it. In **Black's Law Dictionary**[1], the term negligence is defined as:

> **"The failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unforeseeable risk of harm, except for conduct that is intentionally, wantonly or wilfully disregardful of others rights. The term denotes culpable carelessness."**

In the case of **Heaven v Pender**[2], negligence was defined as:

"The neglect of the use of care of skill towards a person to whom the defendant owes the duty of observing ordinary care or skill."

To establish an action in negligence, a claimant is required to prove the existence of the following three elements:

1. That the defendant owed the plaintiff a duty of care;
2. That the duty of care was breached by the defendant's action or failure to act; and
3. That there was resultant damage from the breach of the duty of care.

With regard to motorists, the *Road Traffic Act No. 11 of 2002* makes it an offence for a motorist to drive without due care. Under *Section 154(1)*, the Act provides that:

> *"if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, that person commits an offence and shall be liable upon conviction, in the case of a first offender, to a fine not exceeding seven hundred and fifty penalty units and in the case of a second or subsequent offence, to a fine not exceeding one thousand five hundred penalty units."*

This section imposes criminal liability on a motorist who fails to take reasonable care towards other road users. In addition, it creates a statutory duty on every motorist to adhere to a standard of reasonable care while driving. And where the motorist breaches this duty, they are liable to pay damages to the person injured by the

breach. The duty of care on the part of a motorist is owed to his fellow motorists as well as pedestrians.

Having outlined the law on negligence, I will now consider the evidence on record concerning what transpired on the material date. Counsel for the plaintiff submitted that the accident was caused by the negligent driving of the defendant. He contended that the defendant would have avoided hitting the plaintiff as well as colliding with the unknown motorist if he climbed on the pavement that is said to have been used by the third motorist when he fled the scene.

On the other hand, counsel for the defendant submitted that the defendant changed lanes in an attempt to avoid a head-on-collision with the unknown motorist. This is supported by the police report which was filed in the plaintiff's bundle of documents. Counsel also submitted that the person who was negligent was the third party who is not a party to the proceedings.

It is clear from the evidence adduced on record that the defendant conceded to not seeing the plaintiff's vehicle when he abruptly joined the outer lane. I have no hesitation in finding that the defendant's conduct in swerving to the outer lane without ensuring that it was safe to do so was not that of a cautious driver. This indicates that the defendant was not attentive and did not ascertain that there was no car in the lane that he intended to join. It is my view that his lack of attention amounted to a breach of his duty of care towards the

plaintiff. This breach resulted in the damage that was caused to the plaintiff's vehicle and the plaintiff has proven this beyond a balance of probabilities. I hold that because of this breach the plaintiff is entitled to damages.

I must also affirm that the defendant cannot escape liability by simply insisting that he was compelled to swerve to the plaintiff's lane in a bid to avoid a head-on collusion with an on-coming vehicle. My reasoning is guided by the Supreme Court's view in the case of **Augustine Kapembwa v Danny Maimbolwa and the Attorney General**[3] in which a defendant had swerved towards the middle of the road in order to avoid a head-on-collision. In that case the Court stated the following:

> **"Even if the first defendant had been dazzled in which event the question of contributory negligence might arise, it cannot be said that it was the action of a prudent driver to swerve to his right into the path of an oncoming vehicle on its correct side of the road."**

Similarly, in the present case the defendant's stance of blaming his abrupt change of lanes on the recklessness of the other motorist cannot justify his unreasonable actions. Simply put, the defendant's assertion imply that he attempted to avoid a negligent driver by being a heedless driver himself.

Although I sympathise with the defendant that the unknown motorist had fled the scene and that he cannot have recourse to him, it is my

view that the plaintiff is still entitled to recover damages for negligence from the defendant. This view is supported by the case of **Duncan Sichula and Muzi Transport Freight and Forwarding Limited v Catherine Mulenga Chewe**[4] in which Ngulube, CJ as he then was stated that:

> **"A plaintiff is entitled to recover fully from one or two or more joint tortfeasors and it would be up to the wrongdoers to take steps to recover contributions from each other."**

Further, I have equally noted the defendant's explanation that the plaintiff had the option of making a claim from the defendant's insurance which he chose to overlook. In my view, it was the defendant who should have started processing the claim with his insurance and informed the plaintiff about it. I do not see how he can now say that the plaintiff should have taken K30,000 from the insurance in the absence of proof that it had been made available to him.

From the foregoing, I award damages to the plaintiff for the defendant's negligence namely; failure to keep a proper lookout, failure to observe or heed the presence of the plaintiff's vehicle, failure to steer or control the motor vehicle so as to avoid colliding with the plaintiff's vehicle; failure to apply brakes to avoid colliding with the plaintiff's vehicle and failure to sound his hon in time or at all. I do not award damages for the defendant's driving at a high speed as there was no evidence led to support this claim. The damages will be

assessed by the learned Deputy Registrar and shall attract an interest of short-term deposit rate from the date of the writ to the date of judgment, thereafter at the current lending rate as determined by the Bank of Zambia until the date of full payment.

I also award the sum of K98,758.47 as the cost of repairs of the plaintiff's vehicle at Top Gear. I accept the evidence in support of the claim being the quotation from Top Gear at page 7 of the plaintiff's bundle of documents, which has not been objected to by the defendant.

With regard to the claim for the taxi fare the claim amounts to special damages and I draw guidance from the principal laid down by the Court in the case of **Phillip Mhango v Dorothy Ngulube and Other**[5] that a party claiming special loss must do so with evidence that makes it possible for the Court to determine the value of that loss with a fair amount of certainty. In this regard, although I sympathise with the plaintiff on the money he allegedly spent, I cannot award him the amount claimed because he has not produced any receipt or invoices as proof of how much was spent.

I now turn to consider the defendant's counterclaim. From the evidence on record, the defendant has not proved that there was negligence on the part of the plaintiff. I say so because the defendant conceded that he was the one who changed lanes abruptly while the plaintiff was in his correct lane. In addition, the defendant himself

stated that he did not see the plaintiff's vehicle before the accident. I therefore reject his claims that the plaintiff was driving too fast, had failed to keep a proper look-out, had failed to heed the presence of the defendant's vehicle, had failed to steer a safe course or apply brakes because he could not have observed this if he had not seen him.

Furthermore, the defendant also intimated that the plaintiff appeared drunk at the time of the accident, a vital issue which he elected not to point out at the police station or in his defence that was filed in Court. In my view, this is an afterthought to help him escape liability and I equally reject it.

The costs in this matter are awarded to the plaintiff to be taxed in default of agreement.

Dated at Lusaka this *21st* day of *February*, 2020

.....

M. CHANDA
HIGH COURT JUDGE