

IN THE HIGH COURT FOR ZAMBIA

2017/HP/1891

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ROZA MUSONDA

AND

VICTOR MWACHINDALO

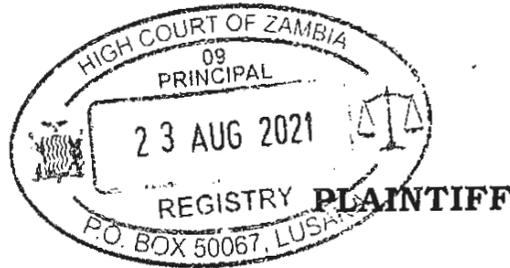
STEPHEN SIANDWAZI

**DIAMON GENERAL INSURANCE
LIMITED**

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT



**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,
IN OPEN COURT, ON 23RD AUGUST, 2021.**

For the Plaintiff:

*Mr. F.S. Kachamba – Messrs. EBM
Chambers.*

For the 1st Defendant:

No Appearance.

For the 2nd Defendant:

*Mr. M. Kabesha – Messrs. Kabesha
and Co.*

For the 3rd Defendant:

No Appearance.

JUDGMENT

CASES REFERRED TO:

1. *Robert Simeza and 3 others v Elizabeth Mzyece – S.C.Z Judgment No. 23 of 2011;*
2. *Yewens v Noakes (1880) 6 QBD 530;*
3. *Khalid Mohammed v Attorney General (1982) Z.R. 49;*
4. *Wilson Masauso v Avondale Housing Project Limited (1982) Z.R. 172;*
5. *Elijah Bob Litana v Bernard Chimba and The Attorney General (1987) Z.R. 26;*
6. *Kabwe Transport Limited v Press Transport (1975) Limited (1984) Z.R. 4;*

7. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Vol. 1 Z.R. 287 (S.C);*
8. *Blyth v Birmingham Water Works Company (1856) 11 Ex 781;*
9. *Naomi Malama v Edwin Chinda Chisenga – Appeal No. 135/2017;*
10. *Donoghue v Stevenson (1932) A.C 562; and*
11. *U-rest Foams Limited v Puma Botswana (PTY) Limited – Selected Judgement No. 27 of 2018.*

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia; and*
2. *The Road Traffic Act No. 11 of 2002.*

WORKS REFERRED TO:

1. *Heuston, R.E.V., Buckley, R.A., Salmond and Heuston on the Law of Torts, Sweet and Maxwell, 1996;*
2. *Phipson on Evidence 17th Edition, (Thomson Reuters (Legal) Limited 2010); and*
3. *R.A. Percy, Charlesworth on Negligence, 6th Edition, (London, Sweet and Maxwell, 1997).*

1 INTRODUCTION

1.1 The delay in delivering this Judgment is regretted and is due to the Court being indisposed the earlier part of this year.

1.2 This Judgment is in respect of the Plaintiff's claims for damages arising out of personal injuries sustained in an accident that the Plaintiff alleges was negligently caused by the 1st Defendant, who was driving the 2nd Defendant's motor vehicle, which vehicle was insured by the 3rd Defendant.

2 BACKGROUND

2.1 The history of this matter is that the Plaintiff was a passenger in the 2nd Defendant's motor vehicle Toyota Hiace, Registration Number AHB 806, which was

driven by the 1st Defendant. The said motor vehicle, which was comprehensively insured by the 3rd Defendant, was involved in a road traffic accident in which the Plaintiff was severely injured and underwent an open reduction and fixation of the right humerus.

2.2 Following this road traffic accident, the Plaintiff commenced this action by Writ of Summons on 2nd November, 2017, under which she claimed the following reliefs from the Defendants: -

- i) *Damages for personal injuries from an accident caused by the negligent driving of the 1st Defendant, of a motor vehicle registration number ABH 806 belonging to the 2nd Defendant, which motor vehicle was insured by the 3rd Defendant, and which accident occurred on the 7th of November, 2013, at Kuanshimba Area, along Great North Road, between Kapiri Mposhi and Kabwe;*
- ii) *A claim under the insurance policy for the injuries caused to the Plaintiff;*
- iii) *Interest on the above claims; and*
- iv) *Legal Costs.*

3 PLEADINGS

3.1 By her Statement of Claim filed on the 2nd November, 2017, the Plaintiff averred that she was a passenger in a motor vehicle registration number AHB 806 belonging to the 2nd Defendant that was being driven by the 1st Defendant who is and was at all material times an employee of the 2nd Defendant.

- 3.2 The Plaintiff further averred that the motor vehicle was involved in an accident on 7th November, 2013, at Kuanshimba area along Great North Road between Kapiri Mposhi and Kabwe. At the time of the accident the motor vehicle was insured under a comprehensive insurance cover with the 3rd Defendant to cover bodily injuries, death and damage to property resulting from any motor vehicle accident for the period between 1st April, 2013 to 31st March, 2014.
- 3.3 The cause of the accident was alleged to be due to the negligence of the 1st Defendant who was driving the motor vehicle at the time of the accident and the negligence of the 2nd Defendant who was the employer of the 1st Defendant. The particulars of negligence were itemised as follows:-

Particulars of Negligence of the 1st Defendant

- i) Driving at excessive speed;*
- ii) Failing to keep the motor vehicle under proper control; and*
- iii) Failing to take evasive action when the accident seemed eminent.*

Particulars of Negligence by the 2nd Defendant

- i) Failing to employ or engage a competent driver/agent and therefore vicariously liable for the actions of the 1st Defendant.*

3.4 Furthermore, the Plaintiff averred that by reason of the foregoing, the Plaintiff suffered serious personal injuries, consequential loss and damages as indicated below: -

- i) *Sustained a right fracture humerus*
- ii) *Underwent an open reduction and fixation of the right Humerus*
- iii) *Injuries indicated in the medical certificate which the Plaintiff would produce at trial.*

3.5 The Plaintiff asserted that it was wrong, unfair and unlawful for the 1st and 2nd Defendant to have caused such an accident in which the Plaintiff sustained injuries and damages and for the Defendants to refuse, neglect and make good of the injuries by paying damages to the Plaintiff.

3.6 The 1st Defendant did not file a Defence to this action.

3.7 By the 2nd Defendant's Defence filed on 29th December, 2017, the 2nd Defendant denied that he had been negligent but admitted that the Plaintiff suffered serious injuries as outlined in her Statement of Claim. The 2nd Defendant further denied that he caused the accident and that he refused, neglected and did not make good of the injuries. The 2nd Defendant also averred that notwithstanding his innocence and on without prejudice basis he paid the Plaintiff a sum of K2,000.00.

3.8 By the 3rd Defendant's Defence filed on 10th May, 2018, the 3rd Defendant admitted that the 2nd Defendant had insurance cover with it at the time of the accident. The 3rd Defendant averred that its liability could only arise where the insured has admitted liability or is found liable but that the insured herein had denied liability thereby rendering the 3rd Defendant's liability unfounded.

4 EVIDENCE AT TRIAL

4.1 PW1 was the Plaintiff, Roza Musonda, aged 46 years old, who testified that on 7th of November, 2013, she and two of her children boarded a bus to Mkushi at Mandevu station in Lusaka. When the bus started off, the 1st Defendant who was the driver was speeding. PW1 told the 1st Defendant to slow down but that he continued to drive at excessive speed. During the journey, the 1st Defendant kept over taking other motorists but PW1 could not say anything as she was afraid that the 1st Defendant would shout at her.

4.2 According to PW1, she never arrived at her destination and only recalled waking up in a hospital bed, where she discovered that five days had elapsed since she was admitted into hospital. PW1 was informed by her aunt that she had been involved in an accident and that it occurred near Kabwe. The accident was reported to the Police and a Police Report was issued. According to the Police Report the accident happened

on 7th November, 2013 and that the owner of the bus is the 2nd Defendant herein.

4.3 PW1 referred the Court to the Police Report on page 1 of the Plaintiff's Bundle of Documents and testified that the driver of the bus was the 1st Defendant herein. She testified that according to the report, the cause of the accident was overtaking and the bus was severely damaged.

4.4 PW1 testified that she had gone to Kamwala at Muyuni House in 2014, where she was introduced to the owner of the motor vehicle, who is the 2nd Defendant. PW1 referred the Court to page 3 of the Plaintiff's Bundle of Documents containing the White Book and testified that it indicated that 2nd Defendant, was the owner of the motor vehicle.

4.5 Furthermore, PW1 testified that due to the accident, she sustained a fractured arm, which resulted in an iron bar being inserted in her arm and two of her fingers became deformed. PW1 referred the Court to pages 5 and 6 of the Plaintiff's Bundle of Documents and testified that it showed that she was the person being treated and that it was a doctor that signed the Medical Certificate at the University Teaching Hospital.

4.6 It was PW1's testimony that the bus that was involved in the accident was insured. PW1 referred the Court to page 7 of the Plaintiff's Bundle of Documents and

testified that the name of the insurer is Diamond General Insurance Limited, the 3rd Defendant. Additionally, PW1 testified that she was aware that when a person is injured in an accident, they needed to be compensated.

4.7 During cross examination, PW1 testified that she was aware that all buses are fitted with speedometers and that there are speed signs on the road but that they are not followed. Further, she stated that during the journey she slept before the bus entered Kabwe and that she could not remember the name of the place where the accident occurred as she was dozing. She conceded that in her Statement of Claim she had stated that the accident occurred at Kuanshimba.

4.8 Furthermore, PW1 testified that she followed up with the 2nd Defendant's Insurance Company but that she was not paid anything. She conceded that she had agreed with the 2nd Defendant over this matter and he gave her the sum of K2000.00.

4.9 There was no re-examination conducted and that marked the close of the Plaintiff's case.

4.10 Though the 2nd Defendant was present at trial, he opted not to call any witnesses and closed his case.

4.11 The 1st and 3rd Defendants were absent at trial without advancing any reasons, despite being aware of the date of hearing. It is trite law that where a party does

not appear for a hearing, in the absence of sufficient reason justifying their non-appearance, a Court may proceed to hear the matter and give Judgment on the basis of the evidence adduced by the Plaintiff. This is as provided by **Order XXXV, Rule 3 of The High Court Rules**¹, which is couched as follows: -

“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.” (Court's emphasis)

4.12 Consequently, this Court closed the case. My decision to close the matter herein is further fortified by the case of **Robert Simeza and 3 others v Elizabeth Mzyece**¹ where the Supreme Court stated that: -

“There is no procedural injustice occasioned when a party who is aware of proceedings does not turn up.”

4.13 The parties were given an opportunity to file their written submissions within a stated period, but only the Plaintiff and 2nd Defendant filed their submissions.

5 SUBMISSIONS

5.1 By the Plaintiff's submissions filed on 29th December, 2020, it was submitted that in the absence of the 1st

Defendant's Defence, the 1st Defendant should be deemed to have been negligent and must compensate the Plaintiff. The Plaintiff's Counsel contended that the 2nd Defendant was sued as the 1st Defendant's employer and that the law on vicarious liability allows a master or employer to be sued for the torts committed by his servant or employee in the course of employment.

5.2 It was further contended that it was not in dispute that the 1st Defendant caused the accident subject of this case nor that the 2nd Defendant was the owner of the minibus which was driven by the 1st Defendant at the time of the accident or that the 2nd Defendant gave some money in acknowledgment of the accident. On the foregoing, it was submitted that the facts gave a presumption that the 2nd Defendant was the employer of the 1st Defendant. Counsel submitted that the test on whether a person is an employee or not was considered in the case of ***Yewens v Noakes***² where Bramwell L.J stated as follows: -

"...a servant is a person who is subject to the command of his master as to the manner in which he shall do his work."

5.3 It was Counsel's contention that in this case, the 1st Defendant did not speak for himself but that the 2nd Defendant had the opportunity to object to being sued as a master of the 1st Defendant or to disclose by

evidence the sort of relationship that was between him and the 1st Defendant but that he opted not to.

- 5.4 Counsel submitted that the 1st Defendant could either have been an employee or an independent contractor of the 2nd Defendant. It was further submitted that as the 2nd Defendant opted not to throw light into the kind of contract he had with the 1st Defendant, the 2nd Defendant should be found to be the master of the 1st Defendant in the absence of evidence to the contrary and held to be vicariously liable for the torts committed by the 1st Defendant.
- 5.5 Further it was submitted that the 3rd Defendant as insurer should pay the insured amount arising out of the accident in issue as per the contract of insurance with the 2nd Defendant.
- 5.6 Furthermore, Counsel submitted that with regards to the issue of whether an employer could be held vicariously liable for actions of an employee which were committed in the process of committing an offence, a test was formulated by John William Salmond as stated by the learned authors of ***Salmond and Heuston on the Law of Torts***¹ at **page 443** that an employer would be held liable for either a wrongful act they authorised or a wrongful and unauthorised mode of an act that was authorised. It was contended that the 1st Defendant was furthering the profits of the 2nd Defendant by accepting bus fares in return for

ferrying the Plaintiff with others to their various destinations. This Court was asked to take Judicial Notice of the fact that the more trips a bus makes, the more money that is made for the owner of the bus.

5.7 It was Counsel's submission that the accident occurred as a result of the 1st Defendant doing what he was authorised to do by the 2nd Defendant, which he did in an unauthorised way by over speeding and that therefore, the 2nd Defendant should be held liable for the torts committed by the 1st Defendant in the course of employment.

5.8 With respect to the 3rd Defendant, it was contended that by virtue of its contract with the 2nd Defendant, the 3rd Defendant was to indemnify the 2nd Defendant against accidents occasioned to third parties.

5.9 By the 2nd Defendant's submissions filed on 22nd December, 2020, the 2nd Defendant's Counsel submitted that with regards to the 2nd Defendant, there is a total absence of evidence led to prove the particulars of his negligence. It was contended that by the Plaintiff's evidence, there was completely no evidence that the 2nd Defendant was negligent in employing the 1st Defendant. The cases of ***Khalid Mohammed v Attorney General***³ and ***Wilson Masauso v Avondale Housing Project Limited***⁴ were cited in support of the foregoing.

5.10 It was Counsel's contention that as the Plaintiff conceded that she was asleep before the accident occurred and only woke up in a hospital, she could not allege negligence on the part of the 1st Defendant as she was not privy to what happened prior to the accident. Counsel submitted that it was not enough to allege that the driver was negligent because he was driving at excessive speed. It was further contended by Counsel that in the absence of expert evidence as to the speed of the driver, it is not competent for a trial Court to come to the conclusion about speed. The case of ***Elijah Bob Litana v Bernard Chimba***⁵ was cited in support of the foregoing contention.

5.11 Counsel alluded to the Police Report on page 1 and 2 of the Plaintiff's Bundle of Document and contended that it was not conclusive, as it stated that the matter would be forwarded to the Court for further proceedings and that after that, a full comprehensive report would be issued which had not been produced before Court. It was Counsel's final submission that in the event that the police report concluded that the 1st Defendant was negligent, it is settled law that the results of Criminal cases may not be referred to in support of findings of negligence in a Civil case. The case of ***Kabwe Transport Limited v Press Transport Limited***⁶ was cited in support of the foregoing submission.

6 DECISION OF THE COURT

6.1 I have considered the Pleadings, the evidence adduced before me, as well as the submissions of the parties hereto. I have also considered the list of authorities cited, for which I am grateful to Counsel. As earlier stated in this Judgment, when this action was called for trial on 1st December, 2020, only the Plaintiff, his Counsel and the 2nd Defendant's Counsel were present. The 1st and 3rd Defendants and their Counsel did not appear nor did they proffer any excuse for their absence to this Court. This Court being satisfied that the Notice of Hearing had been duly served on the 1st and 3rd Defendants proceeded to hear the Plaintiff's case and the 2nd Defendant opted not to call any witnesses. Accordingly, none of the Defendants adduced any evidence to prove their case. This Court will refer to the evidence of the Plaintiff's one witness in the determination of the issues in this action.

6.2 The Plaintiff claims *inter alia* for damages for personal injuries from an accident caused by the negligent driving of the 1st Defendant and damages from the 2nd Defendant for failing to employ a competent driver. She also claims under the insurance policy issued by the 3rd Defendant to the 2nd Defendant for injuries caused to the Plaintiff.

6.3 This Court is mindful that the burden of proof in a civil action like the present action rests on the party who asserts the affirmative hence the Latin maxim: *ei qui affirmat non ei qui negat incumbit probatio*. This

Court is also mindful that the standard of proof in civil cases is merely on a balance of probabilities. The Plaintiff having alleged that the accident was caused by the 1st Defendant's negligent driving of the said motor vehicle, as particularised, thus shoulders the primary burden of proving the alleged negligence. To that effect, the learned authors of ***Phipson on Evidence***² in **paragraph 6-06** at **page 151** state the following regarding the burden of proof in civil cases:-

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

- 6.4 Additionally, the standard to which a Plaintiff should prove his case was discussed by the Supreme Court in ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***⁷ where it was held as follows: -

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...”

- 6.5 The undisputed facts in this matter are that on 7th November, 2013, the Plaintiff who was a passenger on

board a motor vehicle registration number ABH 806, being driven by the 1st Defendant and belonging to the 2nd Defendant was involved in a road traffic accident. The Plaintiff sustained personal injuries as a consequence of the said accident. The motor vehicle in question was insured with the 3rd Defendant under a comprehensive insurance policy.

6.6 It has been contended by the 2nd Defendant that he and the 1st Defendant were not negligent and as a consequence of the 2nd Defendant's denial of liability, the 3rd Defendant who is the 2nd Defendant's insurer has denied liability to compensate the Plaintiff for her injuries under the 2nd Defendant's insurance policy.

6.7 On my analysis of the evidence before me, the following are the points for determination before this Court: -

1. Whether the 1st Defendant was negligent in the manner that he drove the motor-vehicle and thereby liable to pay damages for the Plaintiff's personal injuries;
2. Whether the 2nd Defendant was negligent in employing the 1st Defendant; and
3. Whether the 3rd Defendant is liable to compensate the Plaintiff under the 2nd Defendant's insurance policy.

6.8 I will begin by considering the first issue outlined above of whether the Plaintiff has proved on a balance of probability that the 1st Defendant was negligent in the manner that he was driving the motor-vehicle. I must make mention that by the Plaintiff's submissions, Counsel for the Plaintiff sought to establish that the 1st Defendant herein was an employee of the 2nd Defendant. On my analysis of the 2nd Defendant's Defence and submissions filed here, I noted that this issue was not in contention as the 2nd Defendant in his Defence had admitted that the 1st Defendant herein was his employee and therefore the principle of vicarious liability is applicable to the 2nd Defendant.

6.9 As alluded to in the foregoing authorities, the burden to prove the allegation of negligence against the 1st and 2nd Defendant lies with the Plaintiff who must adduce evidence to prove the facts on which she bases her claims for damages. In order to address the various issues raised by the parties, it is necessary to provide context to what amounts to negligence. In the case of ***Blyth v Birmingham Water Works Company***⁸, negligence was defined in the following terms: -

“Negligence is the 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.”

6.10 Further, the Court of Appeal in the case of **Naomi Malama v Edwin Chinda Chisenga**⁹ stated as follows: -

“There are four elements of negligence, namely duty of care, breach, causation and damages. Each is an essential component of a legal claim that must be established.” (Court’s emphasis)

6.11 Thus, the issue that I must determine is whether the 1st Defendant is liable for negligence in the manner he drove the motor vehicle resulting in the accident in which the Plaintiff was injured. I should state from the onset that although the 1st Defendant was absent at trial and was not called to testify, pursuant to **Order XXXV, Rule 3 of The High Court Rules**¹ cited above, the Plaintiff still bears the burden to prove her case of negligence against the 1st Defendant. This being an action founded in negligence, for the Plaintiff to succeed in her allegations, she must prove the following: -

- (a) That there was a duty of care owed by the one party to the other party;
- (b) That there was a breach of that duty by the other party; and
- (c) That damage resulted from that breach of duty - See the case of **Donoghue v Stevenson**¹⁰.

6.12 At trial, the Plaintiff testified *inter alia* that on 7th November, 2013, she was on board a bus to Mkushi that was being driven by the 1st Defendant. The Plaintiff alleged that as a result of the 1st Defendant excessive speeding, she was involved in an accident before the bus entered Kabwe. It is the Plaintiff's contention that the 1st Defendant negligently caused the accident due to excessive speed, failing to keep the motor vehicle under proper control and failing to take evasive action when the accident seemed eminent.

6.13 The learned authors of ***Charlesworth on Negligence***² state as follows regarding the duty of a carrier: -

"A person who undertakes either for reward or gratuitously, to carry another person in a vehicle is liable to that other for damage caused by negligence... Thus the duty as to carriage is to use reasonable care and skill for the safety of passengers, during such carriage."

6.14 From the foregoing authority, it is the duty of a person who drives a motor vehicle to use reasonable care and skill to avoid causing damage to persons during such carriage. Thus it is clear that the 1st Defendant owed a duty of care to the Plaintiff to exercise reasonable care and skill in the manner that he drove the motor vehicle. In the premises, I find that the 1st Defendant as a driver of the said motor vehicle at the material time owed a duty of care to the Plaintiff as a passenger in the said motor vehicle.

6.15 Having determined that the 1st Defendant owed the Plaintiff a duty of care, I will now proceed to consider whether the Plaintiff has proved on a balance of probability that the 1st Defendant breached the said duty. At trial, the Plaintiff produced a Police Report which indicated that the cause of the accident was the driver's loss of control due to excessive speed. It has been contended by the 2nd Defendant in his submissions that the said Police Report was not conclusive and that even if it were, the said Police Report could not be referred to in support of the finding of Negligence as it was a result of a criminal case.

6.16 According to the case of ***U-rest Foams Limited v Puma Botswana (PTY) Limited***¹¹ cited in the 2nd Defendant's submissions, the Supreme Court held as follows: -

“(1) The evidential prohibition in Kabwe Transport against making reference to or introducing evidence or criminal conviction or outcomes in civil proceedings is not limited to cases of negligence but applies to all civil proceedings; and

(2) The prohibition referred to in (1) above is restricted to outcomes as opposed to the process or evidential material leading to such outcomes.” (Court's emphasis)

6.17 Fortified by the foregoing authority and on my analysis of the said Police Report, I find that the said report can be considered as evidence in support of a finding of negligence in this case as its contents were not an outcome of criminal proceedings but evidential material which could be considered in a civil matter. Accordingly, the Police Report was considered in the determination of this matter.

6.18 By the 2nd Defendant's submissions, the 2nd Defendant contended that it was not enough for the Plaintiff to allege that the 1st Defendant was negligent because he was driving at an excessive speed. Further, it was contended that in the absence of expert evidence, it was not competent for a trial Court to come to a conclusion about the speed of a vehicle.

6.19 In the case of ***Elijah Bob Litana v Bernard Chimba and the Attorney General***⁵, Gardener J.S. as he then was, stated as follows: -

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

6.20 On the strength of the foregoing authority and my analysis of the evidence before me, I find that the Plaintiff herein did not lead any expert evidence

regarding the allegation of excessive speed from which this Court could determine that the 1st Defendant was driving at excessive speed which resulted in his loss of control of the motor vehicle. The Police Report produced before this Court, in my view does not provide conclusive proof that the 1st Defendant lost control of the motor vehicle due to excessive speed in that it does not offer an explanation as to how the Police arrived at the said conclusion. Additionally, though the Police Report alludes to the preparation of a comprehensive report regarding the accident, the Plaintiff did not produce the said report before Court. I am therefore inclined to agree with the 2nd Defendant as in the absence of expert evidence, I cannot come to a conclusion that the speed at which the 1st Defendant was driving was excessive.

6.21 On the totality of the evidence, I find that the Plaintiff has not proved on a balance of probability that the 1st Defendant breached his duty of care towards the Plaintiff. Accordingly, the Plaintiff's claim for damages for personal injuries as a consequence of the 1st Defendant's negligence is hereby dismissed.

6.22 I now turn to consider the second legal issue outlined above of whether the Plaintiff has proved on a balance of probability that the 2nd Defendant was negligent in employing the 1st Defendant. On my perusal of the evidence on record, the Plaintiff has not led any evidence that proves that the 1st Defendant who was

employed by the 2nd Defendant was an incompetent driver. Accordingly, this claim by the Plaintiff is also dismissed.

6.23 I will now proceed to consider the third legal issue of whether the 3rd Defendant is liable to pay the Plaintiff under the 2nd Defendant's insurance policy. The basis of the Plaintiff's claim against the insurance company is the comprehensive insurance cover of the motor vehicle involved in the accident. The Plaintiff alleges that at the time of the accident the motor vehicle was insured with the 3rd Defendant, Diamond General Insurance Limited to cover bodily injuries, death and damage to property resulting from motor vehicle accident.

6.24 It has been contended by the 3rd Defendant that its liability to the Plaintiff can only arise where the insured (2nd Defendant) has admitted liability or is found liable. It was further contended that as the insured had denied liability, the 3rd Defendant's liability to the Plaintiff could not arise.

6.25 **Section 90 (1) of *The Road Traffic Act*²** provides as follows: -

“Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued for the purposes of this Part shall be entitled in that person's own name to recover directly from the insurer any amount not exceeding the amount covered by the policy, for which

the person insured is liable to the person having the claim.”

6.26 The import of the foregoing provisions is that the law gives an injured party the right to have direct recourse to the insurer with respect to any liabilities for which a policy of insurance has been issued. Therefore, the 3rd Defendant's contention that its liability would only arise upon the 2nd Defendant's admission of liability lacks merit.

6.27 A perusal of the Certificate of Insurance produced at page 7 of the Plaintiff's Bundle of Documents reveals that the 2nd Defendant comprehensively insured the motor vehicle that was involved in the accident and that with respect to accidents resulting in death and bodily injury per person per event, the insured was covered up to the sum of K250,000.00. It follows therefore that the Plaintiff and the people involved in the accident were entitled to a claim of up to K250,000.00 from the Insurance Company. Accordingly, this Court must determine the extent of the Plaintiff's injuries and how much she is entitled to in compensation.

6.28 According to the Plaintiff's testimony at trial, she sustained a fractured arm; an iron bar was inserted in her arm; and two of her fingers were deformed as a result of the accident. Further, the Police Report on record, reveals that the Plaintiff herein sustained a dislocated right arm and shoulder. The Medical

Certificate on record indicates that the Plaintiff sustained a fractured humerus and had been totally disabled from 11th November, 2013 to 27th October, 2014. Further the Medical Certificate revealed that the Plaintiff did not suffer any permanent disablement.

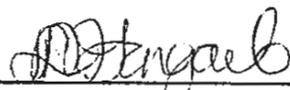
6.29 The foregoing evidence in my view, indicates that the Plaintiff sustained a fractured arm and underwent treatment to restore her hand. Therefore, the Plaintiff has proved on a balance of probability that she sustained personal injuries as a result of the accident. It follows therefore, that the 3rd Defendant is liable to compensate the Plaintiff for the personal injuries sustained as a result of the accident. The sum due and payable is to be assessed and determined by the Deputy Registrar. The sum determined shall carry interest at the short term deposit rate from the date of the Writ to the date of Judgment and thereafter at the current bank rate until full settlement.

7 CONCLUSION

7.1 The Plaintiff having failed to prove that the 1st Defendant was driving at excessive speed and thereby negligently caused the accident; and that the 2nd Defendant was negligent by employing the 1st Defendant, the Plaintiff's claims for damages for personal injuries from the 1st Defendant and 2nd Defendant are dismissed.

- 7.2 The Plaintiff having proved that she sustained injuries as a result of the accident and that the bus was comprehensively insured by the 2nd Defendant with the 3rd Defendant, is entitled to claim for compensation from the 3rd Defendant. The said compensation shall be assessed and determined by the Deputy Registrar which sum shall carry interest at the short term deposit rate from the date of the Writ to the date of Judgment and thereafter at the current bank rate until full settlement.
- 7.3 Having succeeded in her claims as against the 3rd Defendant, costs are awarded to the Plaintiff to be taxed in default of agreement.
- 7.4 Leave to Appeal is granted.

**Signed, Sealed and Delivered at Lusaka, this 23rd August,
2021.**



**P. K. YANGAILO
HIGH COURT JUDGE**