AUGUSTINE KAPEMBWA v DANNY MAIMBOLWA AND ATTORNEY-GENERAL (1981) Z.R. 127 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BRUCE-LYLE JS AND CULLINAN, AG. J.S.
11TH MARCH, 1980 AND 10TH MARCH, 1981
(S.C.Z. JUDGMENT NO. 4 OF 1981)

Flynote
Evidence - Material evidence - Motor accident - Necessity to put before court all material evidence
Civil procedure - Pleadings - Reference to evidence not pleaded - Proper course to take
Civil procedure - Adjournment - Necessity to grant to enable party to produce material evidence in motor accident cases.
Civil procedure - Appeal - Finding on facts - When Appellate court can interfere with finding.
Damages - Appeal - Likelihood of appeal - Necessity for trial court to assess even where claim dismissed.
Damages - Loss of use of property - Assessment of damages.
Damages - Personal injuries - Injury to skull, rib, knee and tooth - Quantum

Headnote
This was an appeal by the plaintiff against a judgment of the High Court dismissing his claim for damages for negligence against the defendants. The claim was based on a motor accident in which his vanette was so badly damaged that it had to be sold as a write-off.

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During the trial a sketch plan was never produced on objection by counsel for the plaintiff that it had not been disclosed on discovery. Counsel for the plaintiff objected to the second defendant's allegation that the first defendant was dazzled because the plaintiff had not dipped his lights since this was not pleaded. He contended that since this allegation was only raised during his final submission it should be excluded. In commenting on his apparent acceptance of this evidence the Commissioner said that this evidence had not been challenged. However the Supreme Court decided to interfere with the Commissioner's findings on the facts on the ground that the reason given for arriving at that conclusion were not supported by the evidence on record.

As regards the damages claimed, the Commissioner made no assessment because the claim was dismissed. The plaintiff had claimed damages for the loss of use of his car, special damages and damages for injury to his skull, rib, knee and tooth.

Held:
(i) When a case concerns a motor accident, all possible material evidence should be put before the court and in a case where the material evidence had not been disclosed on discovery, the court should offer an adjournment, if counsel has been taken by surprise, the costs to be paid

by the defendant and then allow the production of this evidence.

(ii) Where a party refers to evidence not pleaded, the proper course is for the other party to object immediately to this reference, thereupon it would be the duty of the court to decide whether or not it is necessary to grant an adjournment to the other party and whether to allow an amendment of the pleadings subject to an order for costs against the defendant and where it is necessary to cross-examine a witness on this issue, it is for the party affected to apply to recall the witness to rebut the unexpected evidence.

(iii) Where a defence not pleaded is let in evidence and not objected to by the other side, the rule is not one that excludes from consideration of the court the relevant subject matter for decision simply on the ground that it had not been pleaded. It leaves the party in mercy and the court will deal with him as is just.

(iv) The appellate court would be slow to interefere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing the witnesses but in discounting such evidence the following principles should be followed: That:

> "(a) by reason of some non-direction or mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or
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> (b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to

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> have taken into account, or failed to take into account some matter which he ought to have taken into account; or
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> (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
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> (d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

(v) Where there is a likelihood of an appeal it is proper for a trial court to assess the damages which would have been awarded had judgment been found in favour of the plaintiff.

(vi) A person whose car is so damaged that it is beyond repair cannot claim loss of use forever, and in default of any other evidence it is quite impossible for any court to make an assessment of damages.

(vii) Where a man is deprived of the use of his property by the wrongful act of another, a claim for damages may be sustained and damages in such a case are real and not merely nominal even though no actual pecuniary loss is proved.

(viii) A sum of K500 was awarded for personal injuries.

Cases cited:

(1) Jere v Shamayuwa & Attorney-General (1978) Z.R. 204.
(2) Re Robinson Settlement, Grant v Hobbs (1912) 1 Ch. D. 728.
(3) Waghorn v Geo. Wimpey & Co. Ltd., [1969] 1 W.L.R. 1764.
(4) Nkhata & Ors v Attorney-General (1966) Z.R. 124.

(5) Mbavu, & Ors v The People (1963-64) Z. & N.R.L.R. 164.
(6) Mediana (Owners) v Comet (Owners) The Mediana, [1900-1903] All E.R. 126
(7) Sharod v Bowles 1974 C.L.Y. 906.
(8) United Bus Co. of Zambia Ltd. v Shanzi (1977) Z.R. 397.

For the appellant: L. P. Mwanawasa, Mwanawasa & Co.
For the respondent: A. S. Masiye, State Advocate.

Judgment
GARDNER, AG. D.C.J.:

This is an appeal by the appellant (to whom I shall refer hereafter as the plaintiff) against a judgment of the High Court dismissing a claim for damages for negligence against the first and second respondents (to whom I shall refer as the first and second defendants respectively).

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The plaintiff signed judgment in default of appearance against the first defendant and the trial was between the plaintiff and the second defendant sued as representative of the Government of the Republic of Zambia, the employers of the first defendant.

The facts of the case as adduced by the evidence were that the plaintiff was driving along Kawama Road in Ndola in the direction of Chifubu and the first defendant, who was a soldier in the Zambia National Defence Force, was driving an Army Land - Rover in the opposite direction. On the plaintiff's left there was what was described as a bus terminal, that is a lay-by at the side of the road where buses parked. Shortly after the plaintiff passed this bus terminal there was a collision between the Land - Rover driven by the first defendant and the vanette driven by the plaintiff, as a result of which the plaintiff's vanette was so badly damaged that it had to be sold as a write-off, and he suffered some injuries, though fortunately not serious.

The plaintiff in his evidence said that he passed a bus which was parked at the bus terminal off the road and he then saw a motor vehicle coming from the opposite direction. The time was 1915 hours. The other motor vehicle left its correct side of the road and came towards the plaintiff's side hitting his vehicle and continuing so that it landed in a ditch which was on the plaintiff's side of the road. The second witness for the plaintiff, Henry Tembo, a salesman, said that he had known the plaintiff for a number of years, and on the night in question he received information as a result of which he went to the scene of the accident. He found the two vehicles on the left-hand side of the road facing Chifubu, and he said that the Army vehicle was in the ditch whilst the plaintiff's vehicle was facing away from the road. He confirmed that the bus terminal was approximately forty yards away. In cross-examination he said that he saw pieces of broken glass almost in the middle of the road but on the left side of the middle line facing Chifubu.

The first defendant gave evidence that he was driving along the Kawama Road away from Chifubu, and before he reached a bus terminal on the other side of the road he saw a vanette, which was coming in the opposite direction, overtake a stationary bus. The lights of the vehicle dazzled him. There was a ditch on his left and he swerved towards the middle of the road. The other vehicle was still coming so he decided to stop and he did not know what happened next. In cross-examination

he said that he did not lose control of his vehicle but he did not know where he was going because he was dazzled. He also said that the front part of the bus at the terminal was in the road. The defence called one witness, Inspector Wiseman Kalonga of the Zambia Police, who said that he went to the scene of the accident at 2000 hours and found the Army vehicle was off the road and the vanette belonging to the plaintiff was on the road. He observed broken glass almost on the centre of the road but he did not say on which side of the centre line the glass was found. He reasoned that this was the point of impact. This witness said that he had prepared a sketch plan and was prepared to produce it in court, but Mr

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Mwanawasa for the plaintiff objected that it had not been disclosed on discovery. The court upheld the objection and the sketch plan was never produced to the court. We should mention here that, as we have said many times in the past, when a case concerns a motor accident all possible material evidence should be put before the court, and in this **5** case the proper course, after Mr Mwanawasa's objection, would have been to offer him an adjournment if he was taken by surprise, the costs to be paid by the defendant, and then to allow the sketch plan to be produced.

The learned trial Commissioner in his judgment said:

> "If as suggested by the plaintiff that defendant left his side of the road then I fail to understand how the point of impact could have been in the middle of the road. Moreover, the defence evidence that the defendant was dazzled by the plaintiff's headlights has not been challenged and that is why he had to swerve to the middle of the road. Of course it can be argued that if the driver is dazzled the proper course to take is to stop. However, the mere fact that one fails to stop when dazzled does not necessarily mean negligence, it depends on the facts of each case. In my view, when the driver swerved he was merely trying to avoid a head on collision and his action would have been taken by any driver in the defendant's situation. The evidence of the point of impact does not conclusively indicate on which side of the road the defendant's car was when the collision occurred."

The learned trial Commissioner then found that the plaintiff had not adduced enough evidence to show that the collision occurred because of the defendant's negligent driving and he dismissed the plaintiff's claim.

On behalf of the plaintiff Mr Mwanawasa argued before this court that, in his defence, the second defendant had not pleaded the allegation that the first defendant was dazzled because the plaintiff had not dipped his lights. He argued that he had raised this matter in his final submission to the trial court and that the evidence as to being dazzled by lights should be excluded. He cited the case of *Jere v Shamayuwa and Attorney-General* (1), in which, at page 206, Bruce - Lyle, J.S., quoting from *Re Robinson Settlement, Grant v Hobbs* (2), and commenting on a situation where a defence not pleaded is let in by evidence and not objected to by the other side said:

> "The rule is not one that excludes from the consideration of the court the relevant subject matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy

and the court will deal with him as is just."

This conclusion was criticised by Mr Mwanawasa, and this court was referred to a number of cases in which the absence of pleadings were fatal to a plaintiff's case. In particular, we were referred to the case of *Waghorn v Geo. Wimpey & Co. Ltd.* (3), in which Lane, J., held that where a plaintiff's version of the facts was not just a variation of the pleadings but was something new, separate and distinct and not merely a technicality, there had been so radical a departure from the pleaded case as

to disentitle the plaintiff to succeed. I have considered the application of that case to the case at present before this court and note that the facts of that case were that the plaintiff first of all claimed that an earth bank near which a caravan was parked was unsafe and this had caused him to slip. In his evidence the plaintiff said that in fact he slipped on a path on the other side of the caravan. In considering whether this was a new allegation or a mere variation of the original pleading the learned judge had this to say at p. 1771:

> "One must test the plaintiff's submissions in this way: If these allegations had been made upon the pleadings in the first place, namely allegations based upon the facts as they have now emerged, would the defendants' preparation of the case, and conduct of the trial, have been any different? The answer to that is undoubtedly 'Yes'. Evidence would have been sought as to the safety of the pathway alongside the caravan . . ."

In my view, the *Waghorn* case (3) is distinguishable from the present one in that the answer to the question put by Lane, J., would undoubtedly be "No". No evidence other than that of the plaintiff himself could have been led to support an allegation one way or the other as to whether he had failed to dip his headlights, and the plaintiff's conduct of his case could have been no different. In my view, the proper course for the plaintiff's advocate to have taken would have been to object immediately to the first defendant's reference to his being dazzled. Thereupon it would be the duty of the court to decide whether or not it was necessary to grant an adjournment to the plaintiff, and whether to allow an amendment of the pleadings subject to an order for costs against the defendant. Mr Mwanawasa also argued that, as the plaintiff was not cross-examined as to the dipping of his headlights, this is another reason for excluding the evidence of the first defendant about this aspect of the matter. The proper course for the plaintiff's advocate to have taken in the circumstances was to apply to recall the plaintiff to rebut the unexpected evidence of the first defendant. This course was not taken and, in my view, the evidence was let in and fell for consideration under the principles set out by Bruce - Lyle, J.S., in the *Jere* case (1). The matter does not stop there however. In considering the credibility of the witnesses the learned trial Commissioner should have taken into account the fact that the alleged dazzling not having been pleaded, and the plaintiff not having been cross-examined thereon, it was apparent that the first defendant had never referred to this allegation before when he must have been interviewed by the State Advocate. The learned trial Commissioner should have taken this into account when assessing the credibility of the first defendant. When cross-examined the first defendant said that he had seen the bus before the plaintiff's vehicle came on the scene. Having regard to the act that the accident occurred some forty to sixty yards from the bus it is difficult to believe that the plaintiff's vehicle was not already at the scene when the first

defendant first saw the bus. That being the case, if the lights of the plaintiff's vehicle were not dipped and the first defendant was so dazzled that he did not know where he was going he would not have been able to see the bus and

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recognise it as a bus. It must be borne in mind that, after the accident, the first defendant said that he was unconscious and that he did not recover consciousness until he found himself in hospital, so he could not have seen the bus after the accident.

In commenting on his apparent acceptance of the first defendant's evidence as to being dazzled, the learned trial Commissioner said that the evidence in this respect had not been challenged. This was a misdirection on the facts. The record clearly shows that there was cross-examination of the first defendant about his being dazzled. In all the circumstances, although this court is slow to interfere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing the witnesses, I am quite satisfied that this is a case where the finding as to the credibility of first defendant should be discounted. In discounting such evidence I follow the principles set out in the case of *Nkhata and Others v The Attorney-General* (4), where, at p. 125, the court of Appeal said:

> "A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:
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> > (a) by reason of some non-direction or mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or
> > (b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or
> > (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
> > (d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

These principles extend the three similar principles set out by Blagden, J.A, in the case of *Mbavu and Others v The People* (5), at p.169.

As to the main issue on appeal as to whether the plaintiff adduced enough evidence to show the collision occurred because of the first defendant's negligent driving, the reasons given by the learned trial Commissioner for his arriving at this conclusion are not supported by the evidence on record. It is not pleaded nor does any of the evidence suggest that the plaintiff was anywhere but on his correct side of the road. The learned trial Commissioner however founded that the first defendant

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acted reasonably when he swerved towards the middle of the road in order to avoid a head-on collision. This conclusion cannot be supported at all. 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. As I have said, I would reject the evidence of the first defendant as to his being dazzled.

The learned trial Commissioner finally misdirected himself when he said the point of impact does not conclusively indicate on which side of the road the defendant's vehicle was when the collission occurred. In arriving at this finding he completely ignored the evidence of PW2 that he found broken glass, which would indicate a point of impact, almost in the middle of the road but on the plaintiff's side of the middle line. The defendant's witness also said that the glass was almost on the centre of the road but was not asked on which side of the centre line it lay. In the circumstances, the evidence most definitely indicated that the point of impact was on the plaintiff's correct side of the road. I have no hesitation in finding that the first defendant's conduct in swerving to the right, to the wrong side of the road from his point of view, was not that of a prudent driver, and that the evidence clearly indicates the negligence of the first defendant. In view of the fact that I have indicated that I would reject the evidence of the first defendant's being dazzled, there is no question of contributory negligence on the part of the plaintiff and I would allow this appeal and give judgment for the plaintiff.

I now come to the question of damages. As has been said in the past, when there is a likelihood of an appeal, it is proper for a trial court to assess the damages which would have been awarded had judgment been found in favour of the plaintiff. This was not done in this case and it therefore falls for this court either to send the case back to the Registrar of the High Court for an assessment of damages, or make the assessment itself from the facts adduced in the record. The plaintiff gave evidence that he purchased his vehicle in 1972 for K1,200, that it was in good running order up to the time of the collision, that he had hoped to sell it for K1,150 in 1974, and in view of the fact that the vehicle was irreparable he had to sell it as scrap for K200. No documentary evidence or independent assessor's evidence was brought to substantiate this claim by the plaintiff, and in the normal course of events his claim in respect of this damage would be dismissed or sent to the District Registrar for a assessment after hearing further evidence. However, it is appreciated that a long time has elapsed since the vehicle was available for inspection after the accident, and without in any way intending to set a precedent for relaxing the usual rule that detailed evidence must be given in support of such special damages, I feel that in equity, the plaintiff should not be deprived of such damages as can be assessed from the evidence which has already been given and not discredited. There is no reason to disbelieve the plaintiff when he said that he purchased the vehicle for K1,200 in 1972, and although he had used the vehicle for

two years before the accident, in which case in the ordinary way it should have depreciated, I would take judicial notice of the fact that, in this country, in view of the shortage of new motor vehicles, second-hand vehicles have in fact appreciated in value. The plaintiffs estimate of K1, 150 as the value that he would have hoped to have received must be compared with an estimate of K450

which he hoped to receive for the vehicle when he sold it as scrap. In fact he only received K200 for the vehicle in this condition. Doing the best I call therefore on the evidence available, I would value the vehicle at the time of the accident At K1,000, deduct from that sum of K200 obtained by selling the vehicle as scrap, leaving a balance of K800, which I would award to the plaintiff under this head.

The learned State Advocate at the trial agreed with the second two items of special damages, that was the cost of towing a motor vehicle K10, and taxi to hospital K15 making the total of special damages K825.

The plaintiff further claimed damages for loss of use of his vehicle and said that he started spending K20 per month in January 1977 when one of his children went to Form I, and continued to spend money on transport for four children. In view of the fact that the plaintiff's vehicle was beyond repair there was no question of assessing damages for a period whilst it was being repaired. There was no evidence that no similar car was available immediately to replace the plaintiff's vehicle, and no evidence on which any court could ascertain whether or not the plaintiff did anything to mitigate his damages under this head. It is quite obvious that a person whose car is so damaged that it is beyond repair cannot claim loss of use forever, and in default of any other evidence it is quite impossible for any court to make an assessment of damages. Under this head I would award nominal damages of K10 under the principle set out in the case of *Mediana (Owners) v Comet (Owners)*. The *Mediana* (6), that is to say, that where a man is deprived of the use of his property by the wrongful act of another a claim for damages may be sustained and damages in such a case are real and not merely nominal even though no actual pecuniary lose is proved. In awarding the nominal sum to which I have referred I am assuming that it would have taken some time - I cannot hazard a guess as to what length of time - for another similar vehicle to be found on the second-hand market.

As to general damages the plaintiff called a doctor who gave evidence that the plaintiff suffered a lacerated wound on the left parietal area of the skull about one inch in length and skin-deep; another laceration of the lower rib and left knee; a fracture of the fourth rib, one tooth had fallen out and two others were broken, and the plaintiff was treated as an out-patient at the hospital from the 2nd of June (the day of the accident) until the 10th of June, 1974. The doctor gave as his opinion that the plaintiff must have been feeling pain while eating for the first five to six days and pain for a few days because of the broken rib which had healed. In a cross-examination the doctor agreed that the injuries were minor. Mr Mwanawasa referred the trial court to a number of cases dealing with

similar injuries, and in particular the case of *Sharod v Bowles* (7). Having considered these cases and others I would award as general damages for personal injuries the sum of K500.

I would allow this appeal, set aside the judgment of the learned High Court Commissioner, and award to the plaintiff a sum of K825 special damages and K510 general damages, being K500 for personal injuries and K10 for loss of use.

Following the principles set out in the case of *The United Bus Co. of Zambia Ltd. v Shanzi* (8), at p.

421, I would award interest at the rate of seven per cent on the general damages of K510 from the date of service of the writ to the date of this judgment, and interest at the rate of three-and-a-half per cent on the special damages of K825 from the date of the accident (the 2nd of June, 1974,) to date of this judgment.

Costs should follow the event, that is to say, the second respondent is to pay the costs in this court and the court below.

Judgment
BRUCE-LYLE, J.S.: I concur.

Judgment
CULLINAN, J.S.: I also concur.

Appeal allowed
