PHILIP MHANGO v DOROTHY NGULUBE AND ORS (1983) Z.R. 61 (S.C.)

SUPREME COURT
NGULUBE ,AG. C.J., GARDNER, AG. D.C.J., AND MUWO, J.S.
2ND FEBRUARY AND 24TH MARCH, 1983
(S.C.Z. JUDGMENT NO. 5 of 1983)
APPEAL NO. 8 OF 1982

Flynote
Civil Procedure - Appeal - Lower courts findings - Interference with - Justification for.
Damages - Award of - Assessment of special loss - Proof required.
Damages - Car wreck - Salvage value - Deduction from award.

Headnote
The appellant (Defendant) appealed against an award of K3,500 to the respondent (Plaintiff), for the total loss of her car after an accident in which the appellant allegedly crashed into the plaintiff. The trial judge elected to believe the story of the respondent as against that of the appellant and found the latter liable. There was no expert evidence called to prove the value of the respondent's car.

Held:
(i) The court will not reverse findings of fact made by a trial judge, unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trials court acting correctly could reasonably make.

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(ii) Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the court to determine the value of that loss with fair amount of certainty.
(iii) Salvage value is deductible from the amount of damages awarded.

Cases cited:
(1) Zulu v Avondale Housing Project Ltd. (1982) Z.R. 172.
(2) Egomu v Guardian Assurance Co. Ltd. (1972) Z.R. 76.

For the appellant: S.D. Zulu, and Co.
For the respondents: A.M. Hamir, Solly Patel, Hamir and Lawrence.

Judgment
NGULUBE, AG. C.J.: delivered the judgment of the court.

For convenience we will refer to the parties by their designations in the court below. Thus, the appellant will be referred to as the defendant and the respondents as the first, second and third

plaintiffs respectively.

On 21st November, 1976, the first plaintiff was driving her Fiat motor car along the Great North Road in a northerly direction. The second and third plaintiffs were passengers in that car. On the same occasion, the defendant was driving his Mazda saloon along the same road in the opposite direction. His witness, DW .2, was his passenger. At a point near Liteta hospital, the two vehicles met in a violent collision. The three plaintiffs and the defendant all sustained injuries of varying degrees, and both vehicles were damaged beyond economic repair. The plaintiffs contended that the collision had recurred wholly due to the negligence of the defendant. The defendant countered by saying that it was in fact the first plaintiff who was entirely to blame for the accident which was due to her negligence.

According to the first plaintiff, she was approaching a side road leading to a farm where the plaintiffs were going. She indicated turning left. She slowed down to about 5 km/ph and actually left half of her side of the road so that her near side wheels were off to tarmac. Two vehicles were approaching from the opposite direction, the one behind the other, when, suddenly the defendant started to overtake that other, and in the process, came to the plaintiff``s sides of the road and collided with her car. The vehicles became coupled and her car was dragged backwards and, when uncoupled, with a jerk, came to rust across the white middle line facing in a generally southerly direction. The defendants' vehicle went further ahead and stopped on its proper lane facing southwards. The second plaintiff was otherwise occupied picking up a child's shoes from the floor boards and did not see how the accident happened. The third plaintiff had also occupied herself with other matters but had looked up at the last moment and had seen a yellow vehicle come to hit into their vehicle. She did not say who was on the correct side of the road.

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On the other hand, the defendant's side of the story was this. He was travelling at about 80 km/ph but could not estimate the speed of the plaintiff's car as he was travelling a bit fast. He was neither following nor overtaking another vehicle. There was no such other vehicle and the first plaintiff was not in the process of turning left, as she alleged. Instead, she had suddenly come to his side of the road. He had swerved to his left but the first plaintiff's car nevertheless came and hit his door. After the collision the vehicles came to rest more or less in the positions described by the first plaintiff. DW. 2 also stated that they were neither following nor overtaking another car but that the first plaintiff's car had suddenly come to their side of the road and hit, not the door, but the front part of their car. According to DW. 2, the defendant did not swerve to the left since the accident was sudden.

Faced with too conflicting accounts, the learned trial judge determined that the question where the truth lay would be resolved on an issue of credibility. He found that there were discrepancies and inconsistencies in the defence case on some relatively minor points relating to some events before and after the accident, and came to the conclusion that either the defendant or his witness or both of them were telling lies. In particular, he found that since the defendant had lied on minor points, it was probable he was also lying on the major issues as well. On the other hand, the learned trial judge found that the plaintiffs had given evidence in a straightforward manner, without contradictions and without attempting to testify to anything that they had not actually observed. On

this basis, the learned trial judge believed the first plaintiff's version and disbelieved that of the defendant. He found for the plaintiffs and awarded them damages.

The defendant appeals against both the finding on liability and the award in respect of the value of the first plaintiff's car.

We have been asked to reverse certain findings made by the learned trial judge and, in this, regard, Mr Zulu has advanced three grounds of appeal on the issue of liability. We propose to deal with each ground in turn, but before we do so, we think that it is useful to recall the broad guideline which is normally borne in mind whenever we have been called upon to reverse the findings of a trial judge. In *Wilson Masauso Zulu v Avondale Housing Project Ltd.* (1), we said:

> "Before this court can reverse findings of fact made by a trial judge, we should have to be satisfied that the findings in question were either perverse, or made in the absence of any relevant evidence or upon misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make".

As will shortly appear, this guideline is by no means exhaustive. Nevertheless, we think that each facet in the guideline can apply to a variety of situations which may arise in any given case.

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In his first ground of appeal Mr Zulu submits that the learned trial judge misdirected himself by finding that it was probable that the defendant was telling lies, and by failing to evaluate the evidence of the second and third plaintiff and that of DW.2. He argues that the learned trial judge's observation that the defendant had an interest to serve when giving his evidence applied equally to the first plaintiff, and that, in concluding that the defendant's evidence was not credible, no finding was made as to whether or not DW.2 was also disbelieved. As to the argument that the first appellant also had an interest to serve, we agree with counsel for the respondent that to determine a question of credibility between a plaintiff and defendant on the basis that one must be disbelieved because he has an interest of his own to serve is unrealistic. Both parties in an action have an interest to serve and the question of credibility must depend upon other factors. In this respect the learned trial judge misdirected himself and it is necessary for this court to consider the evidence on the basis of uncontested facts and other findings of fact by the learned trial judge. So for as the other reasons given by the trial court for finding on behalf of the plaintiff are concerned, there is no other way in which the learned trial judge misdirected himself. The evidence was available for the trial court and this court to arrive at the finding as to liability. The learned trial judge found that the defendant and his witness were not telling the truth because there severe discrepancies as to some minor issues dealt with in their evidence. For instance, one of them said that they had lunch before leaving Kabwe, whereas the other said they did not. In view of the fact that there is no doubt that the defendant and his witness were driving from the direction of Kabwe, the issue as to whether or not they had lunch is entirely immaterial and the contradiction suggests not untruthfulness but rather inadequate memory. The most important discrepancies must be those which relate to the circumstances surrounding the accident itself. In this respect there is a serious discrepancy in that the defendant said, just before the impact, he swerved to his left. His defence witness said he did not swerve at all. Further, there is an allegation in the defence that the plaintiff was speeding. It can

be assumed that this allegation was included because the defendant so instructed his advocates. However, in his evidence before the court, the defendant said "I could not tell the speed of the other car because I was driving a bit fast", and later in cross-examination, "It is correct that at first I could not tell whether she was driving fast or not but I am able to say so now because I have looked at the Defence". These two references indicate that there were two inconsistencies which specifically referred to the circumstances leading to the accident. There was no inconsistency in the evidence of the first plaintiff who was the only plaintiff who gave eye witness evidence of the accident, and the learned trial judge was entitled, as he did, to arrive at the conclusion that the version given by the first plaintiff was more acceptable than that given by the defendant and his witness. The argument that the learned trial judge did not state at the conclusion that the defence witness was not believed and that, therefore, the judgment is defective cannot succeed. Having discussed the evidence before him, and, having tested it, the learned trial judge came to an unequivocal conclusion which clearly indicated that he did not believe

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the defendant or his witness as to the details of the accident. There was no need for the learned trial judge to support this conclusion by saying specifically that he did not believe the defence witness.

Mr Zulu's second ground of appeal is that the learned trial judge misdirected himself by finding that the defendant was overtaking another vehicle and that the first plaintiff was indicating turning left at the time of the accident. He points out that the second and the third plaintiffs were both silent on the matter of overtaking while the defendant and his witness had stated that there was no such overtaking. If we understand correctly, Mr Zulu in effect suggests that, since the first plaintiff was alone in the assertion that there was overtaking, the defendant, who was supported by his witness, ought to have been believed. In our opinion, this ground of appeal could only succeed if the first ground had succeeded. Indeed, the same considerations apply to the third ground of appeal which attack the finding that the accident occurred on the plaintiff's correct side of the road. Having resolved the issue of credibility in the plaintiffs' favour, these other findings were inevitable. The findings complained of under the second and third grounds flowed out of the finding that the first plaintiff's account of the accident was to be accepted and that of the defendant rejected. On the first plaintiff's narrative of the events, we can see nothing inherently improbable about a collision taking place or the vehicles coming to rest in the positions described. It follows from what we have said that, in our judgment, these two grounds of appeal must also fail. The result is that we dismiss the appeal on the question of liability.

The last ground of appeal relates to the award of a sum of K3,500 as the value of the first plaintiff's car which was 'written off'. Mr Zulu submits that the learned trial judge had misdirected himself by awarding the plaintiff the sum of K3,500 in respect of her written off motor vehicle without taking into consideration the salvage value thereof and indeed whether the motor vehicle was comprehensively insured or not.

There was no argument regarding insurance and, in any event, we do not see how the question of whether or not the first plaintiff's car was insured can be relevant in these proceedings. Mr Zulu does argue, however, that the value of the vehicle was not proved. There was evidence that the first plaintiff had purchased the car in 1975 for sum of K2,500. The accident occurred on 21st

November, 1976, and the evidence from the plaintiff was that garage had offered her K50 for the wreck. The learned trial judge had taken judicial notice of the notorious and prevailing conditions on the second-hand car market. Having regard to *Egomu v Guardian Assurance Co. Ltd*. (2), he considered as realistic and reasonable the first plaintiff's own estimate of the value of the car at K3,500 As Mr Zulu correctly points out, the court in *Egomu* (2) had the benefit of evidence from reliable expert. Mr Hamir, on the other hand, argues that only the salvage value of K5O should be deducted. He submits that neither part had challenged the evidence of the other when market values of both cars were given in evidence and that, for this reason, the unchallenged market value of the first plaintiff's car should stand.

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It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant. However, we are aware that, in order to do justice, notwithstanding the indifference and laxity of most litigants, the courts have frequently been driven into making intelligent and inspired guesses as to the value of special losses on meagre evidence. In this case, it would have been the easiest thing to call an expert witness, but the first plaintiff chose not to do so. The result is that the evidence presented to the court was unsatisfactory, and, in our opinion, the learned trial judge would have been entitled either to refuse to make any award or to award much smaller sum, if not a token amount, in order to remind litigants that it is not part of the judge's duty to establish for them what their loss is. Be that as it may, the learned trial judge in this case had agreed to do the best he could on the available and unchallenged evidence. He was perfectly entitled, in his discretion, to enter into the sort of exercise to which we have already referred. In asking this court to reduce the amount, Mr Zulu is in effect inviting us to do our best and to substitute our conclusion for that of the learned trial judge. We do not think that the award made in respect of the value of this car was manifestly so high as to be utterly unreasonable, and, in any event, we can find no authority for interfering in the manner suggested.

The salvage value should, of course, have been deducted in order to arrive at the plaintiff's real loss. Once again, the evidence that this was K50 was far from satisfactory but, nevertheless, appears to have been unchallenged. We will accordingly deduct K50 from the learned trial judge's award in this respect. Save for this adjustment and to this extent only, we dismay this appeal.

Counsel for the defendant and for the plaintiffs have requested us to make a proper order for costs having regard to the overall result. We are of the view that the defendant has been largely unsuccessful and that the adjustment made to the damages is so minimal that the proper order for costs should be that costs be the plaintiffs'.

Appeal dismissed

ROGER SCOTT MILLER *v*