FELICITUS MWABA AND QUEEN MWABA (SUING BY HER FATHER AND NEXT FRIEND LEONARD MWABA) AND ANGELA MWABA (SUING BY HER FATHER AND NEXT FRIEND), v MWABABU MACHISA AND CHARALAMBOUS TRANSPORT (1987) Z.R. 114 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND SAKALA, JJ.S.
11TH MARCH, 1987 AND 14TH SEPTEMBER, 1987.
(S.C.Z. JUDGMENT NO. 21 OF 1987)

Flynote

Tort - Road Traffic - Contributory Negligence - Vehicle placed unlit on road in darkness without any warning lights - Whether road user should anticipate such obstruction.

Headnote

The appellants appealed against a judgment of the High Court in a running down action dismissing the plaintiff's claim. The 1st appellant collided into a vehicle parked unlit on a road in darkness without any warning lights) and the 1st plaintiff did not anticipate the obstruction.

Held:

(i) Where there is room at the side of the road for a vehicle to pull over off the road so that it does not obstruct vehicles travelling on the tarmac, a driver who fails to observe the law and parks his vehicle on the tarmac, without warning lights and/or warning triangles, is a menace to other road users, who are entitled to drive within the speed limit at night without being held responsible for failing to anticipate that some other person will place an unlighted, obstacle in their way. Baker v Longhurst (1) distinguished and Morris v Luton Corporation (2) followed.

Cases cited:

(1) Baker v E.Longhurst & Sons Ltd. [1932] All E.R. 102.
(2) Morris v Luton Corporation [1946] 1 All E.R. 1.

For the appellant: F.C.T. Chali, Messrs Mwanawasa & Co.
For the Respondents: B.C. Mutale, Messrs Mutale & Co.

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal from judgment of the High Court in a running down action dismissing the plaintiffs claim. In this judgment we will refer to the 1st, 2nd and 3rd appellants as the 1st, 2nd and 3rd plaintiffs and the 1st and 2nd respondents as the 1st and 2nd defendants respectively.

The facts of this case are that the first plaintiff was driving a car from Luanshya to Ndola carrying her four children, including the 2nd and 3rd plaintiff as passengers. On the journey she collided with the back of a truck and trailer driven by the 1st defendant and belonging to the 2nd defendant.

There was evidence on behalf of the plaintiff that before the accident there was a car with its headlights on approaching from the opposite direction. The 1st plaintiff said that at the time of the accident it was dark and the driver of the approaching vehicle flashed the headlights of that vehicle.

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The witness said that she suddenly discovered that there was a vehicle in front of her and she was unable to overtake it because of the vehicle which was coming towards her. She, therefore, swerved to her left and collided with the vehicle in front of her which was stationary. She said that when she first saw the stationary vehicle in front of her she was approximately fifty yards away from it. This witness said that there were no lights or reflective triangles to show that there was a stationary vehicle in front of her and that she only saw the reflectors built in to the rear of the truck just before the collision. This witness gave her speed as being about 100 kilometres per hour before the accident.

The second appellant, who was a passenger in the mother's motor car was a sixteen year old school girl. She gave evidence that she first saw the unlit vehicle in front of her mother's car when it was ten yards away from her. She confirmed that there was another vehicle coming from the opposite direction at the time of the accident, and she said her mother was travelling at a normal speed, neither too fast nor too slow. The plaintiffs' second witness was the elder brother of the first plaintiff. He gave evidence that on the night in question he had seen his sister and her children off on their journey to Ndola. At approximately 2030 hours, he received a telephone call from Ndola hospital to inform him that his sister and two of the children had been injured in an accident. He immediately set off for Ndola hospital and on the way he saw his sister's car which was rammed into the back of a truck and trailer. He stopped and examined the vehicle and noticed that there were skid marks about one hundred yards before the point of impact. He said that there were no waning triangles either in front of or behind the stationary truck, and that all the wheels of the buck and trailer were on the tarmac. This witness further said that the following day, early in the morning, he went back to Ndola hospital, and, on his return from the hospital, he stopped to take pictures of the scene of the accident with his camera. These pictures were produced in court and accepted as evidence by the defendants' counsel.

The 1st defendant gave evidence that, on the day in question, he left Luanshya with a truck and trailer carrying a heavy load of copper concentrates to Mufulira, via Ndola. He said that he left Luanshya at 1700 hours and because of the weight this load he was travelling at no more than 10 miles per hour. In cross-examination, he changed this evidence to say that at times he was travelling at 60 miles per hour and that on level parts of the road his speed was at least 40 miles per hour. This witness said that on the way between Luanshya and Ndola he heard a noise behind him of another vehicle ramming into his trailer. He said that he stopped and found the 1st plaintiffs vehicle rammed into the rear of the trailer. After helping the injured people, according to this witness, he then placed warning triangles behind the vehicle, and thereafter obtained a lift to Ndola where he reported to the police. The witness maintained that he did not stop on the way before the accident and that all his lights, both front and rear, on his truck and trailer were working and on at the time of the accident. A police officer from Ndola Police Station gave evidence that the accident was not reported by the 1st defendant until 1200 hours the following day, that he had checked the occurrence book for the previous day, and that there was no entry of a report by the 1st defendant on that date, which there

would have been had he reported as he alleged.

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The learned trial found-that the evidence disclosed that the 1st plaintiff was not attentive enough to keep a proper look out for other traffic which was likely to be on the road. He found as a fact that prior to the accident the 1st plaintiff was driving faster than she was prepared to admit, and that, due to a combination of her inattention to her driving and the fast speed at which she was travelling, she was not able to see the truck until she was only about ten metres away. The learned trial commissioner came to the conclusion that the 1st plaintiff would have hit the back of the truck whether or not it was moving at the time of the collision. The learned trial commissioner disbelieved the evidence of the 2nd witness for the plaintiffs win he said that he had seen skid marks starting one hundred yards away from the truck, because this was contradicted by the evidence of both the 1st plaintiff and the 3rd witness for the plaintiffs who said that she only noticed the truck in font of them when it as ten metres away from them, and the 1st plaintiff had estimated her distance from the truck when she started braking as sixteen metres; indicated in court as the 1st plaintiffs estimate of fifty yards.

Mr Chali, on behalf of the plaintiffs drew our attention to a photograph which showed that the glass from the windscreen from the 1st plaintiff's vehicle had fallen in one place directly under the rear of the trailer. He argued that, had the truck and trailer been moving as alleged by the 1st defendant, the windscreen glass would have been found in a trail following the moving vehicle. This was argued before the learned trial commissioner but he did not comment on this evidence in his judgment.

Mr Mutale on behalf of the defendants did not reply to this particular argument put reward on behalf of the plaintiffs.

In view of the fact that the 1st defendant gave evidence that he Luanshya for Ndola at 1700 hours and that on level parts of the road he was travelling at 40 miles per hour, Mr Chali argued that the 1st defendant must have stopped his vehicle during his journey. He argued this on the ground that the distance between Luanshya and Ndola is twenty-one miles and that at the scene of the accident the road was level, both of which circumstances would mean that, had the 1st defendant not stopped on the way, he would have been in Ndola before 1900 hours, the approximate time of the accident, according to the plaintiff's witness No. 7, instead of being only part of the way. We take judicial notice of the fact the distance between Luanshya and Ndola is twenty-one miles, and we agree that the photographs indicate that the road is level at the scene of the accident. Although the learned trail commissioner said that the 1st defendant's evidence about times was contradictory, he did not consider the actual effect that such contradiction had on the evidence as to whether or not the 1st defendant's vehicle was stationary at the time of the accident.

A witness for the plaintiffs, called on behalf of the plaintiff as the 7th witness, gave evidence that he was a Workmen's Compensation Officer and that before 1900 hours in the evening, he arrived at the scene of the accident. He said that at the time, it was not very dark but, to use his own words: "we were bound to use lights." There was nothing to contradict the 1st plaintiff's evidence that the driver of the vehicle coming in the opposite direction flashed that vehicle's headlights. None of this evidence was referred to by learned trial commissioner in his judgment, although he appeared to

accept the evidence of the 1st defendant, that his vehicle was moving at the time

of the accident on the ground that what that defendant said in his evidence as to what occurred after the accident was corroborated by the other witnesses. Mr Chali argued that the driver's having told the truth about what happened after the accident was not a reason for finding that he was stating the truth as to what happened before the accident.

We agree with Mr Chali in this respect. If a witness gives evidence about matters which are uncontested, the fact that that evidence is corroborated is no criterion for accepting the truth of his other evidence which is contested.

In view of the fact that the learned trial commissioner did not consider the factual evidence of the windscreen glass and its being found in one position immediately at the rear of the defendant's trailer, nor did he consider the evidence of time and speed which would indicate that the 1st defendant stopped his vehicle during his journey, this court is in as good a position as was the trial court to draw conclusions from the evidence as it was presented.

On reviewing that evidences we are satisfied that the 1st defendant cannot have been telling the truth that he did not stop on the road between Luanshya and Ndola. We accept Mr Chali's argument that, at the speed at which the 1st defendant said he was travelling on level parts of the road, taking into account the time at which he left Luanshya he must have reached well beyond the scene of the accident, had he not stopped on the way. We are fortified in this finding by the apparent untruthfulness of the 1st defendant conceding the time he first reported to the Ndola police, and his failure to report the accident to his employers for one month.

We are further fortified in that finding by the photographic evidence of the windscreen glass under the rear of the trailer. When this evidence was put to the 1st defendant, he said that the person who took the photographs must have gathered all the windscreen glass together to make it appear that the truck and trailer were stationary at the time of the accident. No such suggestion was put to the witness who took the photographs, and we can only say that such an explanation is far-fetched in the extreme, especially having regard to our other findings concerning the truthfulness of the 1st defendant. We are of the view that it would be proper to accept the uncontested evidence of the 7th witness for the plaintiff that, at the time of the accident, it was dark enough to necessitate the use of headlights. This evidence corroborates the evidence of the 1st plaintiff that the driver of the approaching car flashed the headlines of that vehicle. We do not consider it necessary to decide whether or not the 2nd witness for the plaintiff was correct when he said that there were skid marks starting one hundred yards from the scene of the accident. What is important is that the 1st plaintiff estimated that she first saw the vehicle in front when she was fifty yards away (indicated as 16 metres) and the 2nd plaintiff said that she did not see the vehicle in front until they were ten metres away from it. The only question to be decided in this respect is whether the learned trial commissioner was right in saying that because the 1st plaintiff only saw the vehicle in front of her when it was such a short distance away she must have been inattentive in her driving.

As, we have said, this court is in as good a position as the learned trial commissioner to form a

conclusion from the evidence placed before the court. We are satisfied that the evidence of the 1st plaintiff is corroborated by the other evidence to which we have drawn attention.

Mr Mutale, on behalf of the defendants, agreed that the 1st plaintiff in her evidence stated that she considered the possibility of over-taking the vehicle in front of her but that she was unable to do so because of the vehicle approaching from the opposite direction. This indicated that the 1st plaintiff was attentive enough to be aware of the fact that there was a vehicle in front of her to the extent that she considered the possibility of over taking-it, and, without deciding one way or the other whether the 1st and 2nd plaintiffs are correct in their estimates of the distances at which they first saw the vehicle in front of them, or whether the 2nd witness for the plaintiff was telling the truth when he said that the skid marks started one hundred yards from the point of impact, it is quite clear from the evidence that the 1st plaintiff was faced with a sudden obstruction in front of her. The conclusion that we have come to is that the truck and trailer belonging to the 2nd defendant was stationary at the time of the accident, and all the wheels of the truck and the trailer were on the tarmac at the time. The photographs produced to the court indicated that there was ample room for the truck and trailer to be parked completely off the tarmac if there was a need for it to stop. In the circumstances, therefore, we find that the 1st defendant was negligent in parking the truck, which we find to have been unlighted at the time, on the public highway without any warning to oncoming vehicles either from the front or the rear that the obstruction was there.

We now have to consider whether the 1st plaintiff was in any way guilty of contributory negligence. When referring to the approaching vehicle, the 1st plaintiff, in her evidence said that the vehicle gave her a full blast of its lights and it was then that she saw the vehicle on her own side of the road which she tried to avoid. In this connection, Mr Mutate referred us to Bingham's Motor Claims cases (7th edition) at page 193, where, in the well known ease of *Baker v Longhurst* (1), the Court of Appeal in England held that a person driving a motor vehicle at night must drive at such a pace that he could pull up within his limits of vision, accordingly, if he collides with something, either he was riding unduly fast or he was not keeping a good lookout, that is in the absence of some other factor causative of the collision. Had the learned counsel turned the page, he would have found, at page 194, a reference to the case of *Morris v Luton Corporation* (2), where the Court of Appeal disapproved *Baker'* case and held tam there is no rule of law from a person riding or driving in the dark must be held to be negligent if he is driving at such a speed that he is not able to pull up within the limits of his vision. We confirm that in Zambia there is no such a rule of law, and, to assist us in deciding whether the 1st plaintiff should be held liable in any degree at all, we have had recourse to Bingham's Modern Cases on Negligence (2nd Edition), where, at page 199, there are illustrations of liability in circumstances where there have been collisions with other vehicles at night. We see from the examples given that where a stationary driver has parked his vehicle unlighted on a road at night, he has been held in many cases to be one hundred percent to blame. Our view is that, where there is room at the side of the road for a vehicle to pull over off the road so that it does not obstruct vehicles travelling on the tarmac, a driver who fails to observe the law and parks his vehicle on the tarmac, without lights and/or warning triangles, is a menace to other road users, who are entitled to drive within the speed limit at night without being held responsible for failing to anticipate that some other person will place an unlighted obstacle in their way.

We find that there was no justification for the finding by the learned trial commissioner that the 1st plaintiff was driving too fast and inattentively. On the facts of the case, there was no reason to reject the evidence of the 1st plaintiff that she was travelling at approximately 100 kilometres per hour, the appropriate speed limit, before the accident, and the evidence of her daughter that she was travelling normally, that is, neither too fast nor too slow. We have no hesitation in finding in this case that the 1st defendant was wholly to blame for the accident which resulted in the injuries to the plaintiffs. It is not disputed that the 1st defendant was on duty at the time of the accident and the 2nd defendant is, therefore, vicariously liable.

This appeal is allowed. The judgment of the High Court is set aside and in its place we give judgment for the plaintiffs for damages arising out of the negligence of the 1st and 2nd defendants. Such damages will be assessed by the registrar of the High Court. We award costs to the plaintiffs in this court and in the court below.

Appeal allowed.

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