MANFRED KABANDA AND KAJEMA CONSTRUCTION v JOSEPH KASANGA (1992) S.J. 15 (S.C.)

SUPREME COURT
GARDNER, A.J.S., SAKALA, AND CHAILA, JJ.S.
S.C.Z JUDGMENT NO. 2 OF 1992
S.C.Z. APPEAL NO.9 OF 1992

Flynote

Negligent driving - Liability of - Damages - Method of allocating - quantum of

Headnote

The first appellant was driving a vehicle belonging to his employer, the second appellant, at Kashitu on the Ndola-Kapiri Mposhi road. When the scene of the accident was investigated by the police, it was found that the vehicle driven by the first appellant had driven into the back of a truck in front of it at night. The driver, that is the first appellant, was alive at the scene but four of his passengers were dead. One of these was the deceased. In an action for damages against the appellants, the court awarded K35, 000.00 to the claimant. The appellants appealed against the award.

Held:
(i) The second appellant was equally liable for the death of the deceased because the deceased gave authority to the first appellant to carry passengers on the vehicle that caused the deceased's death.

Cases referred to:
(1) Hamilton v. Farmers Limited (1953 D.L.R 382 (N.S.C.A.)
(2) Co-operators Insurance Association v. Kearney (1965) S.C.R. 106; 48 D.L.E. (20)
(3) Twine v. Beans Express Limited (19440 62 T.L.R. 450
(4) Kabwe Transport Limited v. Press Transport (1975) Ltd (1984) Z.R. 43.
(5) Litana and Another v. The Attorney-General (1987) Z.R. 26 (S.C.)

For the Appellants: S. Akalutu of Z.S.I.C. Ltd.
For the Respondent: Mr. E.M. Mukuka of M/s. E.M. Mukuka & Company

Judgment

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

This is an appeal against a judgment of the High Court awarding K35, 000.00 against the first and second appellants for damages suffered by the deceased Margaret Nangabo as a result of the negligent driving by the first appellant of the second appellant's motor vehicle.

The facts of the case were that the first appellant was driving a vehicle belong to his employer, the second appellant, at Kashitu on the Ndola-Kapri Mposhi road. When the scene of the accident was investigated by the police, it was found that the vehicle driven by the first appellant had driven into the back of a truck in front of it at night. The driver, that is the first appellant, was alive at the scene but four of his passengers were dead. One of these was the deceased.

DW1 gave evidence that he was called to the scene of the accident and he found that the vehicle of the second appellant's company had been involved in an accident and was damaged beyond repair. He said that one of the passengers who had been killed was the senior buyer of the second appellant company which is one of the subsidiary companies of the holding company of which he was the Transport operations Manager. He said that the deceased in this case was not a member of staff of the second appellant company and that the drivers of that company were not allowed to carry passengers, which instruction was written on the doors of the vehicle on the driver's side. He confirmed that the driver was on duty returning from a buying expedition and that authority for carrying passengers could be obtained from the second appellant company.

The learned trial judge found that in the absence of evidence from the first appellant, it was clear that the first appellant had collided with the truck in front of him at night as a result of his own negligence. He referred to the fact that the first appellant had appeared before him as a trial judge in a case of causing of death by dangerous driving and that due to the intricacies of the criminal law the charge was reduced to careless driving which the first appellant had readily admitted. The learned trial judge then found that there had been no evidence from representative of the second appellant company that the deceased was not authorised to travel as a passenger in the vehicle. However, he went on to discuss the question of the law relating to vicarious liability and found that he would follow if necessary the case of Hamilton v. Farmers Limited (1) which decision was followed in the case of Co-operators Insurance Association v. Kearney (2), in those two cases the courts had found that the decision in the case of Twine v. Beans Express Limited (3), should not be followed, on the ground that the prohibition against giving lifts to unauthorised persons did not limit the servants employment, which was to drive of the truck, but merely a direction as to the method of so doing. Consequently, the learned trial judge found that the first appellant was negligent in causing the death of the deceased, that he was driving in the course of his employment by the second appellant who was liable and that the respondent, had suffered damages in the sum of K35, 000.00. He then ordered that the first appellant should pay 15,000.00 of such damages and the second appellant should pay K20, 000.00.

Mr. Akaluta on behalf of the second appellant argued a number of grounds of appeal. The first was that the damages should not have been awarded as a global figure but should have been apportioned between the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Acts, and further that, that having been done, the damages awarded under the law Reform (Miscellaneous Provisions) Act should be subtracted from the damages awarded under the Fatal Accidents Acts. Mr. Mukuka on behalf of the respondent did not contest these grounds of appeal and we also agree that it is improper in such cases to award a global figure damages. It is better for the benefit of the parties, and, indeed, of this court, to allocate the damages between the Acts which we have mentioned.

As to whether damages under the Law Reform (Miscellaneous Provisions) Act should be deducted from an award under the Fatal Accident Act, there was, in this case, no evidence that the beneficiaries of the estate of the deceased were the same as the dependants so the question does not arise.

Mr. Akaluta then argued that reference to the outcome of the criminal case against the first appellant should not have been used to support the finding of negligence. We agree that, in accordance with our judgment in Kabwe Transport Limited v. Press Transport (1975) Limited (4), although there has been a change in the law in England, that change does not affect the law in this country and the results of criminal cases may not be referred to in support of findings of negligence in a civil case. However, in this particular case, as we have indicted, the evidence of the respondent and of the police office was that, at the time when the first appellant was interviewed by the police in the first instance, the first appellant had admitted that he had run into the back of the vehicle in front of him because he had not seen it until he was too close, and when the first appellant was charged with a criminal offence by the police he admitted the charge of dangerous driving. That evidence was admissible although it related to a criminal case, and the learned trial judge's finding based on that evidence cannot be disturbed.

As to the learned trial judge's discussion of the law relating to vicarious liability, in view of the findings in this judgment, there is no need for us to discuss the cases referred to by the learned trial judge. We are quite satisfied, despite the arguments of Mr. Akaluta, that the senior buyer, who was unfortunately killed in the accident, had authority. As the most senior person in charge of the vehicle belonging to the second appellant, to authorise the driver to give lifts. We appreciate that Mr. Akaluta argued that only the Managing Director of the second appellant company could give such authority but we find such an argument to be unrealistic in the circumstances of this case and indeed in the circumstances of the normal conduct of the running of the company. We also agree with the learned trial judge that the onus was on the second appellant to prove that the deceased in this case had not been authorised. In the event no evidence was called that the second appellant had not authorised the driver to carry the deceased as a passenger, and, on the facts, it is most unlikely that the driver of the vehicle would have given a loft to anyone who did not have the approval of the senior buyer. For the reasons we have given the appeal against the findings that the second appellant was liable in damages cannot succeed.

As to the question of damages, as we have said, we agree with the comments made by Mr. Akaluta as to the improper method used in this case for the allocation of damages. We would also point out that both appellants are equally liable for the whole of the damages and it was wrong for the learned trial judge to allocate damages to be paid partly by one defendant and partly by another in the circumstances of this case. As to the quantum of damages which had not been argued, we take this opportunity to indicate what we consider to be the effect of inflation since the case of Litana and Another v. The Attorney-General (5). That judgment related to a case where a High Court assessment of damages had been made on the 12th of July, 1987, and this court said that damages for loss of expectation of life at that date should be K3, 000.00 regardless of the age of the deceased. The assessment of damages in this case was on the 27th March, 1991, by which time the rate of exchange relating to hard currencies and the Kwacha has increased to a very great extent. Based on the increase in inflation between the date of the Litana case and the date of this case, we would award damages of K25, 000.00 for loss of expectation of life at the later date. Despite the fact that there was no evidence relating to the exact damages suffered by the dependants as a result of the death of the deceased, we appreciate that there must be such damages and we would award a nominal sum in that respect of K10, 000.00 under the Fatal Accident Acts making a total award of K35, 000.00.

For the reasons we have given, the appeal is dismissed with costs to the respondent