

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CIVIL JURISDICTION)**

APPEAL NO. 87/98

B E T W E E N

AERO (ZAMBIA) LTD	APPELLANT
AND	
EDWARD MWANSA	FIRST RESPONDENT
NATIONAL AIRPORTS CORPORATION LTD	2ND RESPONDENT

CORAM: Chirwa, Lewanika and Chibesakunda, JJs on 2nd December, 1998 and
8th December 1999

For the Appellant: Mr. C. Makungu, Makungu & Co.

For the St. Respondent: Mr. N. Kapeza, N. Kapeza & Co.

For the 2nd Respondent: Nil

J U D G M E N T

Chirwa, J.S. delivered judgment of the Court:-

The appeal arises from the findings by the High Court that the appellants were liable in negligence in that they caused serious injuries to the respondent. The undisputed facts are that the appellant are transporters running an airline. The first respondent booked and bought a ticket to travel from Ndola to Lusaka on 25th January, 1996. The flight was scheduled to take off at 07.00 hours. The first respondent arrived at Ndola airport at about 06.55 hours. He presented his ticket to the appellant's servant who then presented him with a boarding ticket and told him to hurry up as the plane was about to take off. He went through the departure lounge where his luggage was screened and told to rush. He went out of the terminal building and saw that the

door to the plane was open. There was no employee of the appellant to escort him to the plane. There was one other aircraft belonging to Zambia Express whose engines were on, ready for take off. As the first respondent was walking to his plane he was hit by the rotating propeller of the Zambia Express plane and he fell down. Later some people came to his rescue and was taken to Ndola Central Hospital where his wounds were stitched and he was given some pain killers. Later his employers took him to Luanshya Mine Hospital where he was admitted for 6 days. The first respondent claimed damages for the personal injuries. He also prayed for exemplary damages. The alleged negligence of the first appellant is that they allowed the first respondent to proceed to board the plane when it was not safe to do so and misinforming the first respondent that the plane was about to take off knowing or ought to know that the plane about to take off was for Zambia Express and that their plane was parked at the end of the apron. The defence that the injuries were wholly caused by the first respondent's negligence was dismissed. The appellants appealed against the finding that the appellants were negligent and that there was no contributory negligence on the part of the first respondent.

In arguing the appeal both Counsel relied on their written heads of arguments filed in Court and also the submissions in the Court below.

In the written heads of arguments, it has been argued by the appellant that the learned trial judge erred in law and fact in finding that the appellant was liable for damages arising from negligence and that there was no contributory negligence on the part of the first respondent. Questioning what was said to be negligence in Attorney General V Landless [1970] Z.R. 1 that negligence consists of doing something which a reasonable man could not have done in that situation or omitting to do something which a reasonable man would have done in that situation, it was argued that there was nothing that the appellant's workers did or omitted to do that would amount to negligence. After checking in the first respondent was told to proceed to the departure lounge - none of the appellant's workers told him to board the plane on his own. If he waited in the departure lounge he would have been found by the appellant's workers, DW5 who would have led him to the correct plane.

On the other hand it was submitted that the first respondents conduct was careless through and through. He arrived at the airport late and therefore started panicking; failed to wait for assistance in the departure lounge; approached an aircraft with running engines when it was dangerous to do so; failing to identify which plane he was to board as he concentrated on looking at the pilot. It was submitted that this conduct was unreasonable more so that the first respondent had boarded planes before. It was argued that this conduct wholly caused the accident or greatly contributed to the accident and the Court was asked to allow the appeal.

On behalf of the first respondent it was argued that the learned trial judge did not error in finding the acts of the appellants' workers amounted to negligence. The negligent conduct starts on accepting to check in a passenger who was late; letting him to proceed to the departure lounge unescorted and without ascertaining that there was someone there to assist the respondent. The appellants' workers had all the powers to refuse to check in the respondent instead after checking him he was told to hurry as the plane was about to take off. The fact the respondent has boarded planes before cannot shift the burden of exercising the duty of care by the appellant towards the respondent. It was prayed that the appeal be dismissed. Mr. Kapeza also prayed that we award his exemplary damages which were not awarded by the learned trial judge although prayed for.

We have carefully considered the evidence on record., the judgment of the Court below and submissions both in the Court below and before us. This Court has in a number of cases from as far back as SITHOLE V STATE LOTTERIES BOARD [1975] Z.R. 106 stated that where inferences are drawn by a trial judge from facts not based on demeanour of witness e.g. physical evidence, this Court is in as good a position as the trial Court to draw the inferences and the Court is at liberty to substitute its own findings or opinion for any opinion which the trial Court have expressed.

In the case before us the facts which are not in dispute are that the respondent bought a ticket to travel on the appellants aircraft from Ndola to Lusaka on 25th of January 1996. The flight was scheduled to depart at 07.00 hours. The respondent arrived at the Ndola airport late but was checked in by the appellants' servant and told to proceed to the departure lounge.

In the departure lounge there was no employee of the appellant but the door to the apron was open and the respondent went out through the open door with the view to board the plane. Unguided he proceeded. He saw one plane with its engines on and he went to this plane and as was struck by rotating propellers and got injured by the propellers sustaining the injuries per medical report.

The learned trial judge found the appellants' negligent in that they allowed the respondent to board the plane when he was late, telling him to rush as the plane was about to go; the appellant failed to take some precautionary measures to see to it that the respondent had followed a safe way to the doors of the plane.

In looking at the evidence on which negligence was inferred or drawn by the learned trial judge we have looked at the evidence of the respondent himself. He told the Court that he had been flying for a very long time from Ndola Airport, this fact imputes on the respondent that he knew Ndola Airport set up; knew the procedures on boarding an aircraft. He knew that one has to be escorted to the plane as he says:-

"I went out through this door to the plane straight. I was not escorted by anybody as per requirement. I could see the pilot looking to my direction and I believed he was seeing me. There were two planes. One was not in motion, so I went to the one whose engine was on . I headed to the plane, I felt as if I had been struck by lightening. I fell to the ground."

From the evidence on record, could negligence on the part of the appellant be wholly or partly on their shoulders? On the evidence on record, we are unable to infer that the facts prove that the appellants' were negligent. Even if we were to accept for a while that the appellants were negligent in checking in the respondent late and allowing him to proceed without an escort, would it be reasonable for the respondent who had traveled by air before and used Ndola Airport before, an adult at that, came out of the terminal building, seeing two planes one with it engines on, and proceed to the one with engines on and walk straight into rotating propeller? That is not a conduct of a reasonable man. It is noted that the plane in motion into whose propellers the respondent walked into was not sued. From the evidence on the last chance of opportunity to

avoid the accident, the respondent was wholly responsible for the accident. The respondent saw two planes and the one he was to travel on was clearly marked "Aero Zambia" but decided to walk to unmarked plane whose engines he observed were on and walked into the path of the rotating propellers. It was a misdirection for the learned trial Judge to find on the facts, that the appellants were negligent and their negligence caused the accident. We reverse this finding. We hold on to facts that the respondent was wholly responsible for the accident. The appeal is allowed; the claim against the appellant by the respondent is dismissed. If the District Registrar assessed the damages, these are set aside and if paid, to be refunded to the appellant. Costs in this Court and in the Court below to the appellant to be agreed in default to be taxed.

D.K. CHIRWA
SUPREME COURT JUDGE

D.M. LEWANIKA
SUPREME COURT JUDGE

L. P. CHIBESAKUNDA
SUPREME COURT JUDGE