DUNCAN SICHULA AND MUZI TRANSPORT FREIGHT AND FORWARDING LIMITED v CATHERINE MULENGA CHEWE (MARRIED WOMAN)

Supreme Court
Ngulube, CJ, Sakala and Lewanika, JJS
7th December, 1999 and 8th March, 2000
(SCZ Judgment No. 8 of 2000)

Flynote

Tort – Act of God – Effect.
Tort – Joint tortfeasors – Contributions by.
Contract – Release agreement – Accord and satisfaction – Conditions to be fulfilled.
Damages – Measure of damages – Principles of calculation of.

Headnote

On 3rd December 1997, the respondent was travelling as a passenger in a mini bus belonging to the second appellant and driven by the first appellant, when it was involved in a road traffic accident in which the respondent suffered very serious injuries which left her paraplegic. The learned trial judge held that the appellants were liable in negligence and that the first appellant's evidence only served to confirm his negligence. The appellants appealed.
Held:

(i) A man made situation cannot be an act of God. There was no direct, violent, sudden and irresistible act of nature which could not by any reasonable care have been foreseen or resisted.

(iii) A plaintiff is entitled to recover fully from one or two or more possible joint tortfeasors and it would be up to the wrongdoers to take steps to recover contributions from each other.

(iv) It is an essential element of a valid accord and satisfaction that the agreement which constitutes the accord should itself be binding in law. Such agreement can be binding if it is either made under seal or supported by consideration. There was no valuable consideration to render the release agreement binding (*Zambia State Insurance Corporation Limited and Another* v*. Chanda* (1990-1992) Z.R 175 followed

(v) An appellate court should not interfere with an award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misapprehended or because it is so inordinately high or so low that it is plainly a wrong estimate of the damages to which a claimant was entitled.

Cases referred to:

1 *Zambia State Insurance Corporation Limited and Another* v *Chanda* (1990-1992) Z.R 175.
2. *Bank of Zambia* v *Anderson and Another* (1993-1994) Z.R 47.
3. *Harrison* v *Attorney-General* (1993-1994) Z.R 68.
4. *Nugent* v *Smith 1* C.P.D. 423. *I.C.T. Chali, of Chali Chama and Company* for the

appellant. *W. Mwale of Mwale Musonda and Associates* for the respondent.

Judgment

NGULUBE, CJ, delivered the judgment of the court.

For convenience, we will refer to the respondent as the plaintiff and the appellants as the defendants, which was their designation at the trial. On 3rd December 1997, the plaintiff was travelling as a passenger in a mini-bus belonging to the second defendant and driven by the first defendant when it was involved in a road traffic accident in which the plaintiff suffered very serious injuries which left her paraplegic. According to the plaintiff in the pleadings and the evidence, the accident was caused by the driver's negligence when, after increasing speed in a bid to overtake a truck which was travelling ahead of him, he started to swerve, lost control and overturned. In their own pleading, the defendants said that the accident was caused by an act of God or sudden mechanical fault. In his evidence, the driver explained that, as he was about to overtake the truck, it obstructed him; he applied emergency brakes and swerved to the left lane, whereupon he lost control and overturned. The learned trial Judge held that the defendants were liable in negligence when the first defendant lost control of the mini-bus while attempting to overtake a truck and that the driver's evidence only served to confirm his negligence.

One ground of appeal on the question of liability alleged error on the part of the learned trial judge in finding the defendants liable in negligence. The plaintiff had given the particulars of negligence in the statement of claim as comprising driving too fast; overtaking when it was not safe to do so; failure to stop or to slow down so as to prevent the vehicle from careering off the road; failing to control or to steer the vehicle so as to avoid overturning; and failing to observe road traffic rules on overtaking. It was argued that the evidence of the plaintiff did not support the particulars given. This submission flew in the teeth of the events that did take place from which the particulars alleged could quite legitimately be distilled. It was argued further that the learned trial judge ought to have accepted the plea of act of God or sudden fault. The evidence even of the driver himself made no reference whatsoever to any act of God or any sudden mechanical or other fault. If the truck driver had swerved and created an obstruction, that would not have been an act of God. A man-made situation, we would have thought to be self-evident, can not be an act of God even by the most generous and most fertile stretch of the imagination. There was here, no direct, violent, sudden and irresistible act of nature which could not by any reasonable care have been foreseen or resisted – see, *Nugent* v *Smith (4)*. The act of God should be an operation of natural forces – for instance winds, storms, excessive rains, lightning – so unexpected that no human foresight can provide against it and no human prudence is expected to recognize the possibility. We are reciting language from the cases and from the text books and reference books.

The truth is that there was no act of God and no sudden fault. There was no faultless accident and nothing inevitable about the loss of control and the overturning. Vehicles do not have to overturn upon applying emergency brakes or swerving. Taken at their most favourable from the defendants' point of view, the facts would simply show that a negligent

mini-bus driver attempted to overtake another negligent driver of a truck; this would not relieve the defendants of their liability. Mr Chali's submissions suggested that if the truck driver had in some way caused an obstruction, the defendants would not be liable: This was not correct. A plaintiff is entitled to recover fully from one of two or more possible joint tortfeasors and it would be up to the wrongdoers to take steps to recover contributions from each other. This ground of appeal fails.

There was another ground of appeal on the issue of liability based on a release form from the defendants' insurers. After her discharge from the hospital, the plaintiff made a claim against the second defendant for the sum of K31, 316,000.00 which the defendants referred to their insurers Zambia State Insurance Corporation. The plaintiff's husband signed a *"third party 30 release"* form for the sum of K1,350,000.00. He explained in his evidence that the claims manager of the defendants' insurers had told him that they would only pay the sum representing their own liability under the policy which they would discharge but that the rest of the plaintiff's claim would be settled by the second defendants themselves. We are surprised that the defendants have taken up such a ground of appeal in light of the clear evidence on the point from the plaintiff's husband. In addition, there was clear authority which was cited below and repeated by Mr Mwale here in the case of *Zambia State Insurance Corporation Limited and Another* v *Chanda* (1), which is so exactly on all fours on the point. There is no need to repeat what we said there. There was in fact no valid release by accord and satisfaction in the present case. The ground of appeal in this respect fails.

Finally, there is the appeal against the amount of K25 million awarded as damages which the defendants contend was excessive and not supported by the evidence and established legal principles: The learned trial Judge made reference to previous awards and after noting that there had been inflation and taking into account the severity of the injuries awarded the sum complained of. Mr Chali complained that the learned trial Judge appeared to have only paid lip service to the cases referred to, such as *Bank of Zambia* v *Anderson And Another (2) and Harrison* v *Attorney-General (3)*. He submitted that this case was of the same severity as the *Anderson* case where the major injury was a broken hip and where in 1994 a sum of K4.5 million was awarded. He suggested that a sum of K12 million would have been fairer and that even the separate award of K3 million for loss of future earnings should have been incorporated into the award of K25 million general damages. In response, Mr Mwale drew attention to the medical evidence and the fact that the plaintiff who was only 36 years old is now paraplegic and can hardly do anything at all without assistance, not even answering the call of nature. She should have been awarded more than K25 million. She was prior to the accident an industrious marketeer and that even the award of K3 million for loss of future earnings was too low, given that she is now incapable of earning any income.

We have considered the submissions. We affirm that previous decisions of the courts in the various cases often offer useful guidelines, though ultimately the facts and circumstances of each case have to determine in which broad category of similar cases the case under review should be placed. Recourse to previous decisions makes for consistence and helps parties who wish to settle cases amicably or out of court to do so. The cases, of course, range from minor injuries to those of utmost severity so that unless a case is truly similar to a previous one, the task of the court assessing the damages is far from being an exact art or an easy question of simply repeating awards or scaling them up or down. We also bear in mind that an appellate court like ours should not interfere with an award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misapprehended or because it is so inordinately high or so low that it is plainly a wrong estimate of the damages to which a claimant was entitled.

The evidence here was that the plaintiff suffered serious head injuries, fracture of the spine, fracture of the mandible and sundry other injuries. She was hospitalized for four and a half months. As she testified, she is paralysed in the leg; her hearing is impaired and she

experiences constant headaches. She said her bowels *"run at any time without control"*, that is, she is incontinent. She cannot take a bath without assistance. According to Dr Bulaya who gave evidence, she has paraplegia which is irreversible and that although she was able to walk with the help of crutches she would not be able to do even that later as her age advanced. He said the plaintiff's sex life had actually come to an end and that she and her husband were undergoing counselling.

It is clear that the plaintiff endured much pain and suffering which continued for a long time; she suffered a permanent disability. She moved from being an active marketeer to an incontinent cripple. She has lost many of the amenities and pleasures of an able-bodied life, quite apart from losing her earning capacity. Undoubtedly, paraplegia is a far more serious handicap than the pronounced limp which was one of the lasting results from the hip-injury in the *Anderson* case (2) with which Mr Chali wished to draw a parallel. Paraplegia is also listed among the injuries of utmost severity in the respected reference book of Kemp & Kemp *"The Quantum of Damages"*. Here, our plaintiff suffered a fracture of the spine at levels T9 and T10 and she is paraplegic. The greater severity of the injuries takes the case beyond comparison with the cases Mr Chali relied upon. In truth, there is no plausible excuse which we can call in aid to enable us to interfere. Certainly, the award was substantial but we can not say it was wrong in principle on its facts nor can we say it was so excessive or so extravagant that we must feel compelled to interfere. The ground of appeal against the quantum is also unsuccessful. In sum, the appeal fails and the plaintiff will have her costs, to be taxed if not agreed.

Appeal dismissed.