SELECTED JUDGMENT NO. 30 OF 2019

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IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 207/2016**

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

AHMED WANDI	**1ST APPELLANT**
SMART TRANSPORT	**2ND APPELLANT**
AND	
KOSTIC INVESTMENT LIMITED	**RESPONDENT**

Coram : Malila, Kajimanga and Mutuna, JJS

On 5th November 2019 and 27th November 2019

For the Appellants : N/A

For the Respondent : Mr. M. Cheelo of Messrs MAK Partners

J U D G M E N T

MUTUNA JS, delivered the judgment of the Court.

Cases referred to:

1) **Zambia Railways Limited v Pauline S Mundia (2008) ZR vol 1, 287**
2) **R v Turner (1975) Q B 834**
3) **Kabwe Transport Limited v Press Transport Limited (1984) ZR 43**
4) **Byrne v Boadle (1863) 2 Hurt and C.722**

5) **Manfred Kabanda and Kajema Construction v Joseph Kasanga (1990/1992) ZR 145**
6) **U-Rest Foams Limited v Puma Botswana (PTY) Limited and Colourfast Textile (PVT) Limited, SCZ judgment No. 27 of 2018**

Works referred to:

1) **Winfield and Jolowicz On Tort by John Anthony Jolowicz, Percy Henry Winfield and W.V.H. Rogers Tenth edition, Sweet and Maxwell London**
2) **Halsbury's Laws of England, Fourth edition, volume 33, by Lord Hailsham of St. Marylebone, Sweet and Maxwell, London**
3) **Clerk and Lindsell on Torts, by Anthony M. Dugdale, 19th edition Thomson Sweet and Maxwell, London**

Introduction

1) This appeal contests the finding by the Learned High Court Judge (Mukulwamutiyo J., now retired), that the First Appellant was negligent in the manner he drove a truck resulting in an accident and loss of property and profit by the Respondent.

2) The basis upon which the finding of negligence is contested is that the Learned High Court Judge shifted the burden of proof to the Appellants who were defendants in the Court below.

3) The appeal also considers the extent to which a Court in a civil matter can refer to evidence tendered in a criminal case and the application of the principle of *res ipsa loquitur* in proving negligence.

Background

4) The facts of this case are that the Respondent and the Second Appellant entered into a memorandum of understanding (MOU) in terms of which, the Second Appellant as transporter was to transport the Respondent's construction material from Tanzania to Zimbabwe.

5) The First Appellant was the driver of the truck in which the Respondent's construction material was being transported and he drove through Zambia to get to his final destination, Zimbabwe.

6) Whilst the construction material was in transit, at a point between Mpika and Serenje, the First Appellant was

involved in a motor vehicle accident, resulting in loss of some of the Respondent's construction material.

7) After the accident, the First Appellant was charged with the offence of careless driving. He admitted the charge and was fined the sum of K300.00 by the police.

8) As a consequence of the accident and loss by the Respondent of its construction material, it took out an action against the two Appellants in the High Court.

The Respondent's claim against the Appellants and Appellants' defence in the High Court

9) The Respondent issued a writ of summons and statement of claim in the High Court and claimed special damages for negligence. The particulars of the negligence were that the accident happened as a result of the First Appellant's excessive speed and inattentiveness.

10) The particulars of the special damages were as follows:

10.1 USD 24,000.00 being the value of the damaged goods;

10.2 USD 12,000.00 being the cost of clearing the goods including other expenses;

10.3 USD 58,000.00 loss of business, being the expected profit from the delivery of the goods.

11) In their defence, the Appellants denied the particulars of negligence and contested the value and extent of damage to the construction material. They also denied the claim for special damages for loss of business and contended that the Respondent, as a prudent businessman, importing goods by road and across borders, ought to have secured the construction material by insuring it.

The evidence led by the parties in the High Court

12) The Respondent called three witnesses. PW1 was Ashley Mukosha who is the proprietor of the Respondent. His testimony gave a background to the Memorandum of Understanding (MOU) the Respondent and Second Appellant entered into for the delivery of the construction material by the Second Appellant to Zimbabwe, for and

on behalf of the Respondent. The witness gave a description of the construction material, its value, and costs and expenses he incurred in transporting it.

13) In addition, the witness described how he came to learn about the accident and that the police had informed him that it was as a result of the excessive speed and inattentiveness on the part of the First Appellant as he drove the truck. He concluded by explaining the basis of the special damages claimed by the Respondent.

14) The Second witness was Cuthbert Mumankwenga, a civil-engineer and director of Alcheus Turnery Solution Limited. His evidence revealed that his company, the Respondent and another company had entered into a joint venture for the procurement and supply of the construction material to the Civil Aviation Department of Zimbabwe which the First Appellant agreed to transport. He explained the role each of the three members of the joint venture played and the cost incurred by his

company in relation to the transportation of the construction material.

15) The third witness was Enos Mwiinga, a Police Inspector at Isoka Police. His testimony revealed how he was informed of the accident, went to the scene of the accident and assessed it for purposes of ascertaining the cause of the accident. The assessment led him to conclude that the accident was caused by the First Appellant's inattentiveness and excessive speed. He referred to the police report in support of this conclusion. As a consequence of this, he informed the First Appellant that he was guilty of careless driving and charged him accordingly. He testified further that there was no mechanical fault on the truck and for that reason he could only conclude that the accident was as a result of careless driving.

16) After the First Appellant was charged with the offence of careless driving he admitted the charge and paid an admission of guilt fine of K300.00.

17) The Appellants called one witness, Walid A. Mhamad, the director of the Second Appellant. His evidence gave the background to the MOU between the Second Appellant and the Respondent. He gave no specific details of the accident nor did he react to the allegations and contentions of negligence on the part of the Second Appellant's driver, the First Appellant.

Consideration by the Learned High Court Judge and decision

18) In his consideration of the matter, the Learned High Court Judge found as a fact that the Second Appellant and Respondent had entered into the MOU pursuant to which the former transported construction material on behalf of the latter. That it was in the course of this transportation that part of the construction material was lost following a road traffic accident involving the First Appellant as driver and agent of the Second Appellant.

19) The Learned High Court Judge then turned to consider the issue of negligence and found that when the

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Appellants undertook to transport the Respondent's construction material they undertook to do so with care. He concluded that negligence was proved because the truck transporting the construction material overturned and the Appellants failed to give a plausible explanation for the cause of the accident.

20) In addition, the Judge found that since the Appellants failed to lead evidence of any mechanical fault or defects in the truck, the accident could only have been caused by human error. He relied on the evidence of PW3, the police officer, who testified that the cause of the accident was inattentiveness and excessive speed on the part of the First Appellant. He accordingly awarded the Respondent the damages claimed, to be assessed by the District Registrar. He also awarded the Respondent costs.

Grounds of appeal to this Court and arguments by the parties

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21) The Appellants are aggrieved by the decision of the Learned High Court Judge and have appealed to this Court advancing four grounds of appeal, as follows:

21.1 The Court erred in law and fact when it held that the 1st [Appellant] ought to have offered an explanation as to what caused the accident and implying that it was his own default that caused the accident as it is trite law that the onus of proving any cause in civil proceedings is on the Plaintiff on a balance of probability and not the Defendant to offer an explanation as to how he is/not at fault;

21.2 The Court further erred in law and fact when it held that the accident was due to the 1st [Appellant's] conduct falling below the standard expected of a reasonable prudent driver without evidence imputing negligence on the part of the 1st[Appellant];

21.3 The Court erred in law and fact by reaching conclusions as though the Appellants committed a strict liability offence;

21.4 Furthermore, the Court erred in law and fact by disregarding the fact that the Respondent's neglect to insure the goods damaged amounted to

contributory negligence because goods of such magnitude ought to be insured.

22) Before the hearing counsel for the two parties filed heads of argument. The Appellants' counsel did not attend the hearing and no reasons were given for the absence. The Respondent's advocate was in attendance and relied on the heads of argument. We proceeded to hear the appeal despite the absence of counsel for the Appellant and assumed that they relied on their heads of argument in prosecuting the appeal.

23) The Appellants argued grounds 1 and 2 of the appeal, together. They submitted that in civil matters the onus of proving a defendant's negligence or liability rests on a plaintiff. Further, a plaintiff relying on negligence must prove, on a balance of probabilities, all the essential elements of the tort. They referred us to our decision in ***Zambia Railways Limited v Pauline S. Mundia***[1].

24) Taking the arguments further, they submitted that the finding by the Learned High Court Judge that negligence

was proved because the Appellants had not offered an explanation for the cause of the accident, suggests that he had shifted the onus of proof on to the Appellants.

25) The Appellants then set out three ingredients required to be established by a plaintiff if negligence is to be proved, being; the existence of a legal duty on the part of one person to another to exercise care in such conduct of the other as falls within the scope of duty; breach of such duty; and consequential damage to the other person. They referred to the Learned authors of ***Winfield and Jolowicz on Tort, Tenth edition*** and argued that the Respondent had failed to prove the second and last ingredients.

26) The Appellants went on to criticize the reliance by the Court on the evidence of PW3, the Police Officer who visited the scene of the accident, because he did not witness the accident when it happened. They, in this regard, cited a passage from the English case of ***R v Turner***[2] to the effect that where facts are not personally

perceived by a witness, they must be proved by some other means or the opinion will be of no value.

27) They concluded by arguing that the Learned High Court Judge should not have treated the Police report as conclusive evidence of the First Appellant's negligence. They drew our attention to our decision in the case of ***Kabwe Transport Limited v Press Transport Limited***[3] where we said the following in *obiter dicta*:

> **"The result of a criminal trial cannot be referred to as proof of a fact which must be established in a civil court; and this applies where the criminal trial resulted in a conviction or in an acquittal."**

28) Under ground 3 of the appeal, the Appellants attacked the approach taken by the Learned High Court Judge in arriving at the finding that there was negligence. In doing so they quoted a passage from the judgment as follows:

> **"I am of the view that although on the evidence of PW3 it is not possible to estimate the speed at which the 1st Defendant drove the truck, it is clear that for the truck to overturn without any cause, then the 1st Defendant's**

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driving must have fallen below the standard expected of a reasonable prudent driver."

29) Without elaborating, the Appellants concluded by defining the phrase *res ipsa loquitur* by reference to ***Halsbury's Laws of England.*** We understood the Appellants to mean that the Judge ought not to have found that there was negligence on the basis of the principle of *res ipsa loquitur.*

30) The arguments under ground 4 of the appeal contended contributory negligence on the part of the Respondent because it did not insure the construction material whilst it was in transit. The position taken by the Appellants was that the Learned High Court Judge ought to have taken this into consideration when apportioning liability. We have not summarized the arguments in detail because contributory negligence was not specifically pleaded nor was evidence led by the Appellants in the Court below, although they did contend that the

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Respondent ought to have insured the construction material but did not raise it as a counterclaim.

31) We were urged to allow the appeal.

32) In response to ground 1 of the appeal, counsel for the Respondent, Mr. Cheelo, conceded that in civil matters the burden of proof rests on a plaintiff. However, in certain cases involving negligence and where the principle of *res ipsa loquitur* applies, a plaintiff does not need to prove the breach of duty of care. He argued that in such situations, the burden shifts to a defendant as long as the following requirements are met; the thing is under the control of the defendant; the defendant had knowledge of the accident which the plaintiff did not have; and the damage is such that it would not normally have happened if proper care had been shown by the defendant. He relied on the works by ***Keith Abbott, Norman Pendlebury and Kevin Wandman, Business Law, 8th edition***. The citation of the text was not

33) provided by counsel, as such, we are unable to verify and reproduce the passage he referred to.

34) Counsel summarized the facts which he contended proved the principle of *res ipsa loquitur*. We have not summarized this portion of counsel's submission because it is lacking in clarity. He drew an analogy of the facts of this case to those in the English case of ***Byrne v Boadle***[4] and concluded that the principle of *res ipsa loquitur* is applicable in this case. We have not reproduced the facts of this case because it has no bearing on the decision we have reached later in this judgment.

35) In response to ground 2 of the appeal, counsel relied upon the submissions he made in relation to ground 1 of the appeal. The only departure was as follows:

34.1 *Res ipsa loquitur* is not akin to strict liability because it merely invites a defendant to give an explanation. In strict liability cases explanations are generally not invited. He argued that in this case the First Appellant had the duty to explain how the accident happened but he chose not to;

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34.2 The case of ***Kabwe Transport Limited v Press Transport Limited***[3] does not aid the Appellants' case because there was no criminal trial held and the admission of careless driving was made by the First Appellant upon his being charged. Counsel referred to our decision in the case of ***Manfred Kabanda and Kajema Construction v Joseph Kabanda***[5] and argued that the evidence of the appellant in that case admitting the charge of dangerous driving was found to be admissible.

36) In respect of ground 3 of the appeal, Mr. Cheelo repeated the arguments under ground 1 of the appeal that the First Respondent had an obligation to explain how the accident happened especially that there were no eye witnesses. That the Learned High Court Judge could not be faulted for inferring negligence especially that the truck had no mechanical fault and yet it overturned.

37) Lastly, in regard to ground 4 of the appeal, counsel contended that the Appellants' arguments on contributory negligence were premature because the Learned High Court Judge did not assess the damages

and referred the assessment of damages to the District Registrar. In counsel's view, it is at assessment where the issue of contributory negligence is to be raised.

38) In response to a question posed by the Court, Mr. Cheelo conceded that the particulars of negligence were not pleaded but that nonetheless negligence was proved.

39) We were urged to dismiss the appeal.

Consideration by this Court and decision

40) We have considered the record of appeal and arguments by counsel. The four grounds of appeal raise the question, whether the First Appellant's negligence in respect of the accident was proved warranting the award of damages. The side issues are, did the Learned High Court Judge err when he shifted the burden of proof onto the Appellants; and, is the principle of *res ipsa loquitur* relevant in this case. These side issues are dealt with in the consideration of the sole issue.

41) The decision by the Learned High Court Judge was premised on PW3's evidence and the failure by the First

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Appellant to explain how the accident occurred. He also emphasized the fact that no evidence was led by Appellants of a mechanical fault on the truck and that it nonetheless overturned. That is to say, since there was no mechanical fault on the truck, it could only have overturned because the speed at which the First Appellant was driving was excessive.

42) The renowned authors, ***Clerk and Lindsell on Tort*** state the requirements for the tort of negligence as follows:

> **"(1) the existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of persons to which the claimant belongs by the class of persons to which the defendant belongs is actionable;**
> **(2) breach of the duty of care by the defendant, i.e. that he failed to measure up to the standard set by the law;**
> **(3) a casual connection between the defendant's careless conduct and the damage; (4) that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote."**

These are the tests that a claimant has to surmount if he is to succeed in a claim for negligence.

43) The test requires the claimant to specifically plead negligence and demonstrate by evidence: duty owed him by the defendant; how the defendant's actions fell short of the standard set by law; as a consequence of the acts (careless) by the defendant, the claimant has suffered damages; and, the damages suffered were foreseeable.

44) The Appellants have taken issue with the reception of the evidence related to the criminal investigation by the Learned High Court Judge as the basis for finding the First Appellant negligent, calling in aid our decision in ***Kabwe Transport***[3] to the effect that the results of a criminal prosecution cannot be used to prove the First Appellant's negligence. Counsel for the Respondent responded that the principle in ***Kabwe Transport***[3] bars the reception of evidence on the result of a criminal prosecution and not evidence leading up to such prosecution. That in this case, there was no criminal

prosecution and as such, the evidence relied upon by the Learned High Court Judge was not the result of a prosecution but rather investigation. He relied on our decision in the ***Manfred Kabanda and Kajema Construction***[5] case.

45) We agree with the argument advanced by counsel for the Respondent that it is the result of a criminal prosecution which we said cannot be relied upon in civil proceedings in the ***Kabwe Transport***[3] case. This was clarified in our decision in ***Manfred Kabanda and Kajema Construction***[5] case when Gardner Ag DCJ (now deceased) had the following to say at pages 147 to 148:

> **"Mr. Akalutu 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 Ltd v Press Transport Co. Ltd (1975) Ltd [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 indicated,**

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> **the evidence of the respondent and of the police officer 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 criminal case, and the learned trial judges' finding based on that evidence cannot be disturbed."**

The foregoing passage by and large attempts to explain our decision (by way of *obiter*) in the ***Kabwe Transport***[3] case. It, however, did not explain the full extent of our decision in ***Kabwe Transport***[3]**.**

46) In 2018, we had opportunity to explain the full extent of our decision in the ***Kabwe Transport***[3] case because the parties specifically requested us to explain it in the case of ***U-Rest Foams Limited v Puma Botswana (PTY) Limited and Colourfast Textile Printers (PTY) Limited***[6]. After considering the issue we concluded as follows at pages J36 to J37:

> **"(1) The evidential prohibition in Kabwe Transport against making reference to or introducing evidence of a criminal conviction or outcomes in civil proceedings is not limited to cases of negligence but applies to all civil proceedings; and**
> **(2) The prohibition referred to in (1) above is restricted to outcomes as opposed to the process or evidential material leading to such outcomes."**

It is, therefore, settled and for purposes of this appeal, that the restriction refers to outcomes in both civil and criminal cases. That is to say, there can be no reference to the outcomes of these two types of cases in proving, not only negligence but all other claims in civil proceedings. And, the restriction is with respect to the outcomes and not the process or evidence leading to the outcome.

47) The evidence which was relied upon and admitted in the Court below in support of the claim for negligence did not relate to the outcome of a criminal prosecution or conviction but rather the process leading up to such prosecution. That is to say, at the point where the First Appellant was charged with the offence of careless

driving. It, to this extent, falls squarely within the permissible boundaries set by the ***Kabanda and Kajema Construction***[5] case as refined by our decision in the ***U-Rest Foam***[6] case. The matter, however, does not end here because the ingredients of negligence must not only be pleaded, but also particularized and evidence led in support thereof, if it is to be proved. In the pleadings in the Court below, the statement of claim is bereft of such particulars in that it does not specify the duty owed by the Appellants to the Respondent, how such duty was breached and the connection between such breach with the damages claimed. Although the Respondent did contend that the First Appellant's speed was excessive, no particulars of such excessive speed were given, nor did it specify the prescribed speed limit in the road which the First Appellant exceeded or the nature of the road. That is to say, was it a gravel road or slippery road requiring extra attention. The pleadings capitalized on

the fact that the First Appellant was charged with careless driving and he paid admission of guilt fine.

48) The Learned High Court Judge also relied heavily on the evidence of PW3 which did not in any way seek to satisfy the test in negligence. PW3's evidence was merely that he visited the scene of the accident after it occurred and concluded that the cause was excessive speed and inattentiveness on the part of the First Appellant. He did not state the basis of his finding and as such it comes to us as no surprise that the Learned High Court Judge discounted his finding of excessive speed as revealed by the passage of his judgment reproduced at paragraph 28 of this judgment. In that passage the Learned High Court Judge specifically states that the evidence did not enable him to reach a conclusion that the First Appellant's speed was excessive.

49) The position we have taken is having regard to the distinction we have found in the facts of this case with those in the ***Kabanda and Kajema Construction***[5] case.

In the latter case the facts show that the First Appellant in that case admitted that he *"... run into the back of the vehicle in front of him because he had not seen it until it was too close ..."*. These facts, in and of themselves, prove negligence because they show that the accident was caused by his inattentiveness and want of regard to other road users. PW3's evidence did not reach this standard for the reasons we have stated earlier.

50) We must at this point say that the Judge's findings were also not justified. He arrived at a finding that the First Appellant's driving fell short of that of a reasonable prudent driver merely because the truck overturned and there was no evidence of a mechanical failure or explanation given by the First Appellant. Mr. Cheelo supported this finding based on the principle *res ipsa loquitur*. That is that, the Judge was entitled to make the inference based on the facts presented before him.

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51) At paragraph 664, ***Halsburys Laws of England***, 4th edition, volume 33 sets out the test for the doctrine of *res ipsa loquitur* as follows:

> "**Under the doctrine *res ipsa loquitur* a plaintiff establishes a prima facie case of negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.**"

Clerk and Lindsell on Torts in a passage similar to the passage we have quoted states at pages 496 to 497 that it is not necessary to plead *res ipsa loquitur*.

52) Our understanding of the passage from ***Halsbury's*** is that in order for a judge to apply the doctrine, certain circumstances need to be presented to him by a claimant from which he can infer negligence. Therefore, although a claimant is not required to specifically plead *res ipsa*

loquitur, he must show that the circumstances of the case are such that a Judge is entitled, on the face of it, to find that negligence is proved. ***Halsbury's*** confirms this when it states, at paragraph 664 that a plaintiff cannot rely upon an inference of negligence unless he has alleged in the pleadings and proved at trial the facts from which the inference is to be drawn.

53) In this case the Judge found that there was negligence because the truck could not have overturned if the First Appellant was not driving at a standard far below that expected of a reasonable prudent driver. Further that, there was no mechanical fault, therefore, the accident was as a result of human error. The difficulty we have with this finding is that it was made in the absence of the Respondent specifically pleading or leading those facts in evidence. The Respondent in its pleadings at page 20 of the record of appeal does not refer to the truck overturning to justify the finding by the Judge, nor does it refer to the absence of mechanical error in the truck.

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54) The evidence of PW1 and PW3 that the truck had overturned says nothing more to justify the inference by the Judge.

55) In addition, the doctrine does not shift the burden of proof from a plaintiff to a defendant as contended by Mr. Cheelo. It merely *"... call[s] for a rebuttal from the defendant ..."* (***Clerk and Lindsell on Torts*** page 497). That is to say, the evidence is so overwhelming in so far as it points to negligence that a defendant requires to explain. It is our firm opinion, therefore, that the Learned High Court Judge ought not to have found that the omission by the Appellants to explain the accident confirmed the negligence.

Conclusion

56) By way of conclusion and in answer to the question posed, we are of the firm view that the Learned High Court Judge misdirected himself when he found that negligence had been proved. We are also of the firm view

that he ought not to have shifted the burden of proof onto the Appellant or considered the principle *res ipsa loquitur* relevant to the facts presented before him. The appeal, therefore, succeeds to the extent we have stated and we set aside the whole of the judgment of the Court below with costs, both in this and the Court below. These are to be taxed in default of agreement.

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M. MALILA
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE