

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2011/HP/0330

(Civil Jurisdiction)

BETWEEN:

KEGWIN MUSONDA SICHILYA

PLAINTIFF

AND

LUKACHI INVESTMENTS LIMITED

1ST

DEFENDANT

LLOYD KASEBA

2ND DEFENDANT

ROBERT PHIRI

3RD DEFENDANT

Before the Hon. Mrs. Justice A. M. Sitali on the 2nd day of April, 2014

***For the Plaintiff : Mr A. Chizu of
Messrs Chanda Chizu and Associates***

For the Defendants : No Appearance

J U D G M E N T

Cases referred to:

- 1. Khalid Mohamed v. Attorney-General (1982) ZR 49**
- 2. Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172**
- 3. Galaunia Farms Limited v. National Milling Company Limited and Another (2004) ZR 1**
- 4. The Attorney-General v. Sam Amos Mumba (1984) ZR 16**
- 5. Kabwe Transport Company Limited v. Press Transport (1975 Limited) (1984) ZR 51**

6. Florence Munthali v. Attorney General (1980) ZR 157

7. Regina v. Chunga [1962] ALR 247

Legislation referred to:

The Road Traffic Act No. 11 of 2002, sections 173 (1) and 174 (1) and (2).

Works referred to:

Halsbury's Laws of England Fourth Edition, Volume 34, paragraph 54

Bryan A. Garner, Black's Law Dictionary, Eighth Edition, (St Paul, Thomson West, 2004)

By amended writ of summons issued out of the Principal Registry, the plaintiff claims for damages for negligence; compensation for loss of use of motor vehicle Toyota Lite Ace ABE 3854 in business; an order for replacement of the motor vehicle or payment of money equivalent to the value of the motor vehicle; special damages in the sum of K102,000,000.00; damages for inconvenience caused; interest on money found due; costs and any other relief the court may deem fit.

On 2nd April, 2013 interlocutory judgment was entered against the 1st and 3rd defendants following their failure to enter appearance and file a defence and the matter proceeded to trial against the 2nd defendant who had filed a defence on 2nd August, 2011.

At the trial of the action the plaintiff Kegwin Musonda Sichilya (PW1) gave oral evidence and called one witness. He testified that he is the registered owner of the Toyota Liteace No. ABE 3854 and that on 16th February 2010 he received a phone call from his brother Reuben Musonda Sichilya (PW2) who

said he had been involved in a road traffic accident whilst driving the said Toyota Lite Ace along Lumumba road and that the driver of a Mitsubishi Canter No. ABD 7479 had hit into his motor vehicle. PW1 said he went to the scene of the accident and found that the Toyota Liteace No. ABE 3854 was extensively damaged as a result of the accident. PW1 further said he later reported the accident at Matero Police Station. A police officer, sergeant Sikalumbi visited the scene of the accident and made the traffic accident report on page 3 of the plaintiff's bundle of documents.

It was PW1's further testimony that he asked the 2nd defendant who was the owner of the Mitsubishi Canter No. ABD 7479 how the damage to the Toyota Lite Ace would be repaired and the 2nd defendant said he would inform the insurers of the Mitsubishi Canter No. ABD 7479 to deal with the matter. PW1 said he hired a tow truck to tow his motor vehicle from the scene of the accident to a garage and paid a tow charge of K450,000.00 in old currency. He identified the receipt for the tow charge on page 15 of the plaintiff's bundle of documents. PW1 said the Toyota Liteace was ordinarily used for his business operations and that he suffered loss after the accident because he resorted to hiring private motor vehicles to operate his business from February, 2010 to February, 2011.

PW1 said he also paid K1,000,000.00 in old currency for the medical expenses incurred for the treatment of his brother (PW2) after the accident.

PW2 was Reuben Musonda Sichilya, the plaintiff's brother. He testified that on 16th February, 2010, he was involved in a road traffic accident whilst driving the Toyota Liteace motor vehicle No. ABE 3854, along Lumumba road. PW2 explained that the 3rd defendant who was driving the Mitsubishi Canter No. ABD 7479 from the opposite direction lost control of the motor vehicle and crossed the dividing pavement and hit into the Toyota Liteace No. ABE 3854 driven by PW2 on the opposite side of the road.

PW2 stated that the plaintiff's Toyota Liteace No. ABE 3854 was extensively damaged in the accident. He identified the traffic accident report on page 4 of the plaintiff's bundle documents. He testified that he had a valid driving licence a copy of which is exhibited on page 5 of the plaintiff's bundle of documents and was authorised by the plaintiff to drive the Toyota Liteace No. ABE 3854 at the time of the accident.

That was the plaintiff's case.

The 2nd defendant was not present at the trial of the action although he was notified of the hearing dates by notices of hearing which were served on the Legal Aid Board who had placed themselves on record as advocates for the 1st, 2nd and 3rd defendants. The 2nd defendant, therefore, did not adduce any evidence in his defence. That notwithstanding, the defence filed by the 2nd defendant on 2nd August, 2011, is on record. In that defence, the 2nd defendant averred that the 1st defendant's motor vehicle namely Mitsubishi Canter No. ABD 7479 was properly insured by Diamond General Insurance Limited and that the cover ran from 5th February, 2010 to 4th February 2011. The 2nd defendant further averred that since the accident occurred on 16th February 2010 which was within the insurance period it was only proper for the plaintiff to pursue compensation for any damage caused to his motor vehicle as a result of the accident from the 1st defendant's insurance company.

The 2nd defendant stated that when the accident occurred he and the plaintiff approached Diamond General Insurance Limited for compensation and that Diamond General Insurance Limited assured the plaintiff in his presence that he would be adequately compensated for the damage to his motor vehicle within the insurance cover. The 2nd defendant contended that he allowed the 3rd defendant to drive the Mitsubishi Canter No. ABD 7479 because he had a

valid driving licence and that the said motor vehicle was road worthy and fit to be driven on a public road.

The parties did not file any written submissions.

I have carefully considered the evidence adduced by the plaintiff. I have also considered the 2nd defendant's defence which I have set out above. I should state at the outset that although the 2nd defendant did not adduce any oral evidence in his defence, the plaintiff must nonetheless prove his case against the 2nd defendant on a balance of probabilities if judgment is to be entered in his favour. It is trite law that a person who initiates civil proceedings must prove his case in order to succeed in his claim. The learned authors of Phipson on Evidence, 17th edition in paragraph 6-06 at page 151 state the following regarding the burden of proof in civil cases:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

It will be observed from the foregoing quotation that the plaintiff must prove his case against the defendant on a balance of probabilities if judgment is to be entered in his favour. There is a plethora of decisions in which it was held that the mere failure of a defendant's case does not automatically entitle the plaintiff to judgement if he fails to prove his claim against the defendant: see Khalid Mohamed v Attorney-General (1), Wilson Masauso Zulu v Avondale Housing Project Limited (2) and Galaunia Farms Limited v National Milling Company Limited and Another (3).

From the evidence on record I find that the following facts are not in dispute: that on 16th February 2010, the plaintiff's motor vehicle a Toyota Liteace No. ABE 3854 driven by PW2 was involved in a road traffic accident along Lumumba Road which is a public road; that the accident occurred when the 3rd Defendant lost control of the Mitsubishi Canter No. ABD 7479 which he was driving, and collided with the Toyota Liteace No. ABE 3854 on the right side of Lumumba road and that the Toyota Liteace was extensively damaged in the accident. It is further common cause that the 1st defendant company is the registered owner of the Mitsubishi Canter ABD 7479 while the 2nd defendant is a director and shareholder in the 1st defendant company and had care and control of the said Mitsubishi Canter at the material time. The 3rd defendant who was driving the Mitsubishi Canter No. ABD 7479 was an employee of the 1st and 2nd defendants on the material date. It is further common cause that the 2nd defendant has not compensated the plaintiff for the damages caused to the Toyota Liteace No. ABE 3854 as a result of the accident despite being requested to do so.

The plaintiff alleges that the accident occurred due to the negligence of the 3rd defendant and that the 1st and 2nd defendants are vicariously liable as owners of the Mitsubishi Canter No. ABD 7479 and employers of the 3rd defendant. The particulars of negligence given with respect to the 1st and 2nd defendants is that they allowed the 3rd defendant to drive the motor vehicle on a public road without a driver's licence; that they failed to take control of or to secure the motor vehicle so that it was not driven by an unlicensed driver on a public road; and that they failed to maintain the motor vehicle in good condition and to properly insure the motor vehicle.

The plaintiff claims that as a result of the negligence of the defendants, he suffered loss and damage with respect to Toyota Liteace No. ABE 3854 which he used in his business operations. The plaintiff, therefore, claims damages for negligence.

In order to succeed in an action based on the tort of negligence, a plaintiff must establish three elements, namely (a) that the defendant owed him a duty of care in the circumstances; (b) that the defendant or his servant or agent breached that duty by failing to conform to the required standard of conduct; and (c) that the plaintiff had suffered damage as a consequence of that breach: See Halsbury's Laws of England, Fourth Edition, volume 34, paragraph 54 on page 46. Black's Law Dictionary defines negligence as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; or any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregarding of others' rights. A person has acted negligently if he has departed from the conduct expected of a reasonably prudent person acting under similar circumstances.

Thus the question which I have to determine is whether the 2nd defendant's driver was negligent in his manner of driving at the material time. The evidence which was adduced by PW2 and which is supported by the traffic accident report issued by the police is that the accident occurred when the 2nd defendant's driver lost control of the Mitsubishi Canter No. ABD 7479 and went over the pavement dividing the road to the opposite side of the road where he collided with three motor vehicles including the plaintiff's Toyota Liteace No. ABE 3854. The traffic accident report issued by the police to that effect is on page 4 of the plaintiff's bundle of documents. The traffic accident report also confirms the plaintiff's and PW2's testimony that the cabin and trailer of the said Toyota Ace were extensively damaged.

The 2nd defendant has not rebutted the evidence adduced by PW1 and PW2 that the 2nd defendant's driver was found by the police to have caused the accident and was charged with the offence of dangerous driving and

unlicensed driving. The traffic accident report states that the driver of the Mitsubishi Canter No. ABD 7479 was charged with dangerous driving and unlicensed driving and that he admitted the charges and paid the admission of guilt fine. While I am alive to the fact that a conviction in a criminal trial cannot be referred to or taken note of in a civil trial to establish liability as held in the case of *Kabwe Transport Company Limited v. Press Transport (1975) Limited* (5), this is not the case here as the 2nd defendant's driver accepted responsibility for the accident when he paid the admission of guilt fine for the charges of dangerous driving and unlicensed driving.

Further, it is clear from the circumstances in which the accident occurred which reveal that the 2nd defendant's driver lost control of the Mitsubishi Canter which he was driving at the material time and crossed the dividing pavement between the lanes for motor vehicles travelling in opposite directions on Lumumba Road and collided with the plaintiff's motor vehicle, among others, on the right side of the road, that he was negligent in the manner that he drove the Mitsubishi Canter at the material time. It will be noted that section 173 (1) of the Road Traffic Act No. 11 of 2002 (hereinafter referred to as the Act) imposes a duty on a person driving a motor vehicle to drive on the left side of the carriage way and not to encroach on the half of the carriage way to that person's right. To that effect section 173 (1) of the Act, as is relevant to this case, reads as follows:

"173. (1) Any person driving a vehicle on a public road shall drive on the left side of the carriageway and, where such carriage way is of the sufficient width, as in such manner as not to encroach on that half of the carriage way to that person's right..."

Further, section 174 (1) and (2) of the Act imposes a duty on persons driving motor vehicles on a divided public road to drive on the left side of the carriage way and prohibits driving on or over the dividing line, physical

barrier or dividing section of the road, as the case may be. To that effect section 174 (1) and (2) of the Act provides that:

“174. (1) Whenever any public road has been divided into two or more carriageways by means of a continuous white line or by a physical barrier or dividing section constructed to impede vehicular traffic, no person shall drive a vehicle upon such public road except upon the left hand carriageway unless directed or permitted by an appropriate road traffic sign or a road traffic inspector in uniform or police officer to use another carriageway.

(2) No person shall drive a vehicle on, over, across, or within any driving space, continuous white line, barrier or section referred to in subsection (1) except through an opening in such space, barrier or section at a cross-over or intersection. ”

It is clear from the provisions of section 173 (1) and 174 (1) and (2) of the Act which I have cited above that the 2nd defendant’s driver was obligated by law to drive his motor vehicle on the left side of Lumumba Road and was prohibited from crossing the dividing pavement in order not to endanger other road users. By driving over the dividing pavement of the road after he lost control of the motor vehicle, the 2nd defendant’s driver breached the provisions of section 173 (1) and 174 (1) and (2) of the Act.

In *Florence Munthali v. Attorney General* (6) it was held that *“to disobey traffic signs in the absence of an explanation for that disobedience, resulting in injury or damage to other road users amounts to negligence”*. Thus, I find that by failing to control his motor vehicle and crossing the dividing pavement and colliding with the plaintiff’s Toyota Liteace No. ABE 3854 on the right side of the road thereby causing injury to PW2 and damage to the plaintiff’s motor vehicle, the 3rd defendant was negligent.

The 2nd defendant admits that the 3rd defendant was his employee and that the Mitsubishi Canter which the 3rd defendant was driving at the time of the accident is the property of the 1st defendant Lukachi Investments Limited. The 2nd defendant further states in his defence that he permitted the 3rd defendant to drive the Mitsubishi Canter No. ABD 7479 in the course of his employment. The 2nd defendant is, therefore, vicariously liable for the 3rd defendant's negligence in the course of his duty and he is liable to pay damages to the plaintiff for the damage caused to the plaintiff's motor vehicle and the consequential loss of use of the motor vehicle as claimed in the writ of summons and the statement of claim.

In his defence the Plaintiff asserted that since the accident occurred on 16th February, 2010, which was within the insurance period of the Mitsubishi Canter, the Plaintiff should pursue compensation for the damage caused to the Toyota Liteace No. ABE 3854 from Diamond General Insurance Limited. The evidence before me is that the 3rd defendant drove the Mitsubishi Canter without a valid licence and that this fact was established by the police officer who visited the scene of the accident and made the traffic accident report on the accident. The 3rd Defendant was thereafter charged with dangerous driving and unlicensed driving, charges which he admitted and paid the relevant fines as penalty. The 2nd defendant's defence does not traverse the charges and his driver's admission of the same. The 2nd defendant merely asserts that the 3rd defendant had a valid licence and has exhibited a copy of the said licence in the 2nd defendant's bundle of documents. However, the expiry date of the exhibited driver's licence is not clear. If the 3rd defendant had a valid driving licence at the time of the accident as claimed by the 2nd defendant it is surprising that he did not challenge the charge of unlicensed driving and the penalty imposed on him. Instead he admitted the charge and paid the admission of guilt fine in respect of the charge. The only reason he did so in my view is that he did not hold a valid driving licence at the material time as stated in the traffic accident report.

With respect to insurance the Road Traffic Act, No. 11 of 2002 is clear on the obligations motor vehicle owners have to insure their motor vehicles against third party injury. The Plaintiff claims that the 2nd Defendant did not insure his Mitsubishi Canter No. ABD 7479 while the 2nd Defendant claims that his motor vehicle was properly insured from 5th February, 2010 to 4th February, 2011- a period which covered the date when the accident occurred on 16 February, 2010. The 2nd Defendant, therefore, urged the Plaintiff to claim compensation from his insurers since he had a running policy with them at the material time. A perusal of the 2nd Defendant's Bundle of Documents at page 2 indicates that the insurance cover for the Mitsubishi Canter ran from 5 February, 2010 to 4th February, 2011. This included the date on which the accident occurred.

Regarding the effect of a certificate of insurance, guidance is sought from the decision in the case of Regina v Chunga (7) where it was held that:

"A certificate of insurance is merely evidence that there is a policy in existence and its terms in no way affect the limitations imposed in the policy, which remains the only document creating any liability on the insurances....A provision in a motor vehicle insurance excluding liability of the driver of the vehicle who is unlicensed will validly exclude the insurer's liability..."

Having established that the 3rd Defendant was unlicensed to drive a motor vehicle at the date the accident occurred, it follows that there was a breach of condition No. 4 of the policy issued by Diamond General Insurance Limited, the 2nd Defendant's insurers, in respect of the Mitsubishi Canter ABD 7479. The said condition provides that:

“Only licenced drivers are covered under the insurance to which this cover note relates.”

In this regard, the 2nd Defendant’s insurers are excluded from liability since the 3rd defendant who was driving the insured motor vehicle on the day the accident occurred was unlicensed to drive. In fact there is evidence contained in the letter on page 8 of the Plaintiff’s bundle of documents that Diamond General Insurance Limited refused to settle the claim made in respect of the damages caused to the Plaintiff’s motor vehicle and referred the vehicle damage claim to the 2nd defendant.

Thus, having proved his case of negligence against the 2nd defendant, the Plaintiff can only claim compensation for the damages caused to his motor vehicle in the accident from the 1st and 2nd Defendants.

Turning to damages, the plaintiff claims for special damages in the sum of K102,000,000.00 old currency which is K102,000.00 rebased. It is settled law that special damages must not only be specifically pleaded but they must also be strictly proved: see *The Attorney-General v. Sam Amos Mumba* (4). After being pleaded there is a requirement for satisfactory proof of expenses before special damages can be awarded.

In the present case while having pleaded for special damages in the sum of K102,000,000.00 which include the value of the damaged motor vehicle which is stated as K37,000,000.00 old currency, the hire of an alternative motor vehicle for business operations from February, 2010 to February, 2011 at K5,040,000.00 per month, medical expenses incurred in the treatment of PW2 at K1,000,000.00 old currency and towing of the Toyota Lite Ace No ABE 3854 and other incidental expenses at K4,000,000.00 old currency, no satisfactory evidence has been placed before me to show how the sum of K37,000,000.00 which is claimed by the plaintiff as replacement value of the motor vehicle was arrived at. Similarly, no evidence has been produced to support the claim of K5,040,000.00 as the costs of hiring an alternative

motor vehicle per month, K1,000,000.00 as medical expenses for PW2's treatment and K4,000,000.00 as incidental expenses. There is, therefore, no basis on which I can make an award of K102,000,000.00 in old currency or K102,000.00 rebased as special damages. The plaintiff has only produced a receipt to prove that he paid a tow charge of K450,000.00 old currency for towing of the Toyota Liteace Truck No. ABE 3854 from the scene of the accident to the garage. The plaintiff is, therefore, entitled to recover the sum of K450.00 rebased from the 2nd defendant as special damages.

As I have found that the 2nd defendant's driver, the 3rd defendant in this action, was negligent and that the 2nd defendant was vicariously liable for his servant's negligence, I enter judgment in favour of the plaintiff and award damages to be assessed by the Deputy Registrar as follows:

- a) damages for the replacement value of the damaged Toyota Liteace truck ABE 3854; and
- b) damages for the loss of use of the Toyota Liteace truck from February, 2010 to February 2011.

I also award the plaintiff the sum of K450.00 rebased as special damages for the money paid in towing the motor vehicle from the scene of the accident to the garage. The damages so assessed and the sum of K450.00 shall attract interest to be determined by the learned Deputy Registrar.

The plaintiff having succeeded in his action against the 2nd defendant will have his costs to be borne by the 2nd defendant. The costs are to be taxed in default of agreement. Leave to appeal is granted.

Dated this 2nd day of April, 2014.

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A. M. SITALI

JUDGE