

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No. 135/2017

B E T W E E N :

NAOMI MALAMA

AND

EDWIN CHINDA CHISENGA



APPELLANT

RESPONDENT

CORAM : Mchenga DJP, Chishimba and Majula, JJA
On 24th May, 2018 and 10th August, 2018

For the Appellant : Ms. C. Jere of National Legal Aid Clinic for Women
For the Respondent : No Appearance

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Reuben Nkomanga Vs. Dar Farms International Limited SCZ No. 25 of 2006**
2. **Caldwell Vs. Maguire and Fitzgerald (2002) P. I. Q. R. 45**
3. **Attorney General Vs. Marcus Achiume (1983) ZR 1**
4. **Communications Authority of Zambia Vs. Vodacom Zambia Limited (2009) Z.R. 196**
5. **Kapansa Mwansa Vs. Zambia Breweries Plc SCZ Appeal No. 153 of 2014**
6. **Bourhill vs Young (1943) AC 92**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **Munkman on Damages for personal Injuries and Death 11th Edition**
2. **Phipson on Evidence, 17th Edition**
3. **Halsbury's Laws of England 4th Edition, Volume 34**
4. **Black's Law Dictionary**

5. Charlesworth and Percy on Negligence, Sweet and Maxwell

This appeal arises from an action against the Appellant for damages for permanent injuries inflicted on the Respondent, arising from the alleged negligent driving of the Appellant on 15th March, 2015. The Respondent had also claimed special damages consisting of medical and transportation costs.

The brief facts in the Court below are that on 7th March, 2015, the Respondent whilst cycling along Commonwealth Road, in Matero, was hit by the Appellant's vehicle, which was reversing onto the road. According to the Respondent, the impact of the vehicle tossed him into the air and he fell to the ground; face down. He sustained injuries on his face and elbow. A scan at the hospital revealed that the Respondent had sustained a permanent injury on his left hand, mainly loss of extension by ten degrees. According to the Respondent, he can no longer perform physical duties well.

The Respondent stated that he incurred medical and transportation costs but he did not exhibit any evidence, such as receipts. He urged the Court to award damages for the permanent injury plus medical and transportation costs.

In her defence, The Appellant denied liability, maintaining that the Respondent merely fell off his bicycle when he tried to avoid her reversing vehicle. The Appellant did not dispute that the Respondent sustained injuries on his face and his hand falling off his bicycle.

In her testimony, the Appellant stated that she only admitted the charge of negligent driving at the police station because the officers there insisted that she admits the charge. The Appellant stated that according to her observation the Respondent did not suffer any permanent injuries save for some bruises and a swollen hip.

The Appellant's husband, (DW2), also gave evidence. His evidence was essentially a repetition of the Appellants testimony. He told the Court that the Appellant did not hit the Respondent but that he fell whilst trying to avoid the reversing car.

The learned trial Judge found that the Appellant owed a duty of care as a driver to pedestrians and other road users such as the Respondent cyclist whilst reversing or driving. The Court further found that the Appellant was negligent whilst reversing by not exercising due care to ensure that there was no one behind the vehicle. She found that the Appellant had proved the case on a balance of probabilities.

On the claim for permanent injuries suffered, the trial Judge relied on the medical report indicating loss of extension of ten degrees in the left elbow. When awarding damages for injuries to the elbow, the trial Court relied on the case of ***Reuben Nkomanga Vs. Dar Farms International Limited*** ⁽¹⁾ where the Supreme Court made reference to the learned authors of ***Munkman on Damages for personal Injuries and Death 11th Edition***. The above learned authors on the issue of damages, state that for less severe injuries the award ought to range between £8, 250 and £16, 500.

The Court below held that the Respondent's disability was at 10% and awarded a quarter ($\frac{1}{4}$) of the sum of £8, 250; working out to £2,062.5 (ZMW24, 443. 31) as damages for the injury to the elbow. The Court further awarded the sum of ZMW120 and ZMW500 as compensation for transport and medical costs respectively. The trial Court awarded the Respondent a total sum of ZMW25, 063.31.

The Appellant now appeals against the Judgment of the lower Court advancing a sole ground of appeal couched in the following terms;

"The learned Puisne Judge erred in law and fact when she found that the above named Respondent (Plaintiff in the Court below)

proved the claims of negligence against the Appellant (Defendant in the Court below) on a balance of probabilities.”

The Appellant filed into Court heads of argument dated 25th October, 2017. Reference was made to the requisite standard of proof in civil proceedings that is on a balance of probabilities. A passage from **Phipson on Evidence, 17th Edition** on the burden of proof in civil cases was referred to namely that it lies upon the party who substantially asserts the affirmative of the issues.

It was submitted that in a claim of negligence, arising from tort, a plaintiff must establish three elements; that the defendant owed him a duty of care in the circumstances; that the duty was breached and that the Plaintiff suffered damages as a consequence of that breach. The Appellant cited **Halsbury's Laws of England Volume 34** on the elements required to be proved on the tort of negligence.

The definition of negligence by **Black's Law Dictionary** was cited. Negligence is defined as the failure to exercise the standard of care that a prudent person would have exercised in a similar situation or conduct falling below the legal standard established to protect others against unreasonable risk of harm. In addition, reference was made

to the English decision in the case of **Caldwell vs Maguire and Fitzgerald**

⁽²⁾, where the Court of Appeal stated that;

“There would be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of fast moving contest. It was not possible to characterize a momentarily carelessness as negligence.”

The Appellant argued that the trial court's evaluation of the evidence in the Court below was unbalanced, resulting in a misdirection warranting the interference of the appellate court. We were referred to the cases of **Attorney General Vs. Marcus Achiume** ⁽³⁾ and **Communications Authority of Zambia Vs. Vodacom Zambia Limited** ⁽⁴⁾, where the Supreme Court discussed circumstances under which findings of fact made by a trial Judge may be interfered with by an Appellate Court. Namely, where the findings of fact are perverse or made in the absence of any relevant evidence or upon a misapprehension of facts.

The Appellant contended that the evidence by the Respondent as regards breach of duty of care was not conclusive enough for the Court to properly conclude that the Appellant was negligent. Further, that the Respondent ought to have tendered evidence indicating that he had taken measures as a prudent road user to try and avoid

contact with the Appellant's car. That the cyclist equally owed other road users a duty of care. The Appellant referred the Court to pages 14 -16 of the record of proceedings, particulars paragraph 2 of the defence.

In addition, reference was made to the testimony of the Respondent appearing at pages 78, 81 and 84 of the record. It was submitted that the lack of proper evidence by the Respondent in respect of proof of negligence, resulted in speculation on the part of the trial Judge. It was submitted that the burden of proof at all times lay with the Respondent. As authority, the case of ***Kapansa Mwansa vs Zambian Breweries PLC*** ⁽⁵⁾ was cited

In conclusion, the Appellant contended that the Respondent failed to prove its case on a balance of probabilities. We were implored to exercise our appellate jurisdiction by reversing the findings of fact made by the trial Court and to uphold the appeal.

We have considered the appeal, the arguments and authorities cited. There was no appearance by the Respondent. The appeal by the Appellant is only in respect of the finding of liability and does not address the issue of quantum. We shall restrict ourselves to the issue of liability.

The facts not in issue are that on the 7th of March, 2015, whilst the Appellant's vehicle was reversing onto the Commonwealth road in Matero, the Respondent was also cycling on the road. The Respondent alleged that he was hit by the Appellant's vehicle, causing the fall and injuries sustained. Further that the Appellant was negligent. The Appellant also contended that the Respondent was at fault.

The issue is whether the Appellant was negligent.

Negligence is defined as the failure to do an act which a reasonably careful person would not do, under the same or similar circumstances to protect oneself or others from bodily injury, death and property damage. The learned authors **Charlesworth and Percy, on Negligence**, define it as follows;

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

There are four elements of negligence, namely duty of care, breach, causation and damages. Each is an essential component of a legal claim that must be established. The duty of care arises when the law recognizes a relationship between two parties such as the duty all drivers have to exercise care towards other drivers,

pedestrians and cyclists. It is a principle of law of the Highway, that all those using the road must show mutual respect and forbearance. A person driving on the road has to use reasonable care to avoid causing damage or injury to persons or vehicles or property. Reasonable care means the care which an ordinary skilful driver would have exercised under all the circumstances. We refer to the case of ***Bourhill v Young*** ⁽⁶⁾ in which Lord Macmillian stated further that reasonable care connotes an ***“avoidance of excessive speed, keeping a good look out, observing traffic rules and signals and so on.”***

After establishing duty of care, a claimant must prove that the duty was breached. That the breach was the cause of the harm suffered by the injured person i.e actual cause. Thereafter, damages suffered.

The main issue in contention being liability, the issue to be determined is, whether the Respondent had proved that the Appellant was negligent.

In respect of the duty of care, we are of the view that the law requires motorists to be careful when encountering anyone on the road, passengers, pedestrians or cyclists. There is a duty of reasonable care imposed on motorists. This duty by a person who

drives a vehicle on the road is owed to all other road users as well as persons and property. See the cited case of ***Bourhill vs Young*** ⁽⁶⁾, where it was stated that the duty of care is owed to “**persons so placed that they may reasonably be expected to be injured by the omission to take care.**”

The issue is whether there was breach of duty by the Appellant. In determining whether there was a breach of care on the part of the motorist, comparison of the driver's conduct with the conduct of a reasonable person is undertaken. Namely, how a reasonable prudent person would have behaved in similar circumstances.

In respect of the duty of care expected whilst reversing, the learned authors **Charlesworth and Percy on Negligence** state as follows;

“A motorist, before either reversing, or turning around on the High way, should satisfy himself that it is safe to do so. The High way Code stresses the importance of checking to the rear before reversing is commenced.... Never reversing from a side into a main road.”

In this instance, the conduct expected of a reasonable prudent driver whilst reversing a car onto the main road, are

- (i) Stopping to watch through the rear and side mirrors to see whether there are any vehicles, pedestrians or cyclist coming

behind the vehicle, if so stopping or waiting until the road is clear before reversing onto the road.

The evidence adduced in the court below by the Respondent was that the vehicle driven by the Appellant was reversing when it hit into his bicycle. In cross examination, at page 80 of the record, no questions were put to him as to whether he was at fault.

DW1 testified that on the date in issue, after being picked up from work by her husband, they had stopped to see her friend at a bar along Commonwealth Road in Matero. At the place she had parked the car, there were stones. The Appellant started to reverse onto the road, whilst checking the mirrors and looking back to see people passing. The brake lights of the vehicle were on.

Thereafter, she noticed that a person had fallen. The person could have been distracted by the brake lights and fell.

In cross examination DW1 testified that though she paid the admission of guilt, the vehicle did not hit the Plaintiff as he was cycling. The husband to the Appellant (DW2) testified that;

“as my wife reversed slowly, the plaintiff was coming towards us. He lost control and wanted to hit the car and fell down”

In cross examination DW2 stated that the vehicle was parked on the side of the road. The Appellant did not hit him instead, the Respondent hit into the car.

The law requires motorists to use reasonable care to avoid harming anyone on the road. This entails driving at a reasonable speed, vigilance and keeping a proper look out whilst driving or reversing a vehicle. Would a prudent reasonable motorist in the position of the Appellant have failed to see a cyclist behind them whilst reversing onto the road?

We are of the view that a reasonable, ordinary, prudent driver would have kept a careful look out for other pedestrians, vehicles or cyclists before embarking on reversing the vehicle onto the road. Further, would have satisfied himself that it was safe to do so by checking the rear and side mirrors before proceeding to reverse on to the road. Where a driver strikes a person or object without seeing that person/object, there is inference of negligence that he was not keeping a sufficient look out whilst reversing.


We hold the view that the Appellant failed to exercise due care by failing to keep a proper look out, whilst reversing. The

Appellant therefore breached the duty of care imposed on her as a motorist. This constituted negligence on her part.

We therefore, hold that the learned trial Judge was on firm ground when she held that the Appellant was negligent and liable. As earlier stated this appeal is against the finding of liability, thus we will not proceed to delve into the issue of damages and the quantum awarded.

The appeal is accordingly dismissed. We make no order as to costs as there was no appearance or attendance by the Respondent.

Dated this 10th day of August, 2018


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C.R.F. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL


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F.M. Chishimba
COURT OF APPEAL JUDGE


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B. M. Majula
COURT OF APPEAL JUDGE