

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

**2016/HP/1764**

*(Civil Jurisdiction)*

**BETWEEN:**



**WENDY KABOBO**

**PLAINTIFF**

**AND**

**LASTON LWANGA**

**1<sup>ST</sup> DEFENDANT**

**PELLIAS ILUNGA**

**2<sup>ND</sup> DEFENDANT**

***Before: Hon. Judge Betty Majula-Mung'omba on this 25<sup>th</sup> day of October, 2017.***

*For the Plaintiff:*

*In Person*

*For the 1<sup>st</sup> Defendant:*

*In Person*

*For the 2<sup>nd</sup> Defendant:*

*2<sup>nd</sup> defendant deceased*

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**JUDGMENT**

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**Cases referred to:**

- 1. Donoghue vs Stevenson (1932) AC. 562.61***
- 2. Khalid Mohammed vs Attorney-General (1982) ZR.49***
- 3. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR. 172.***

**Works referred to:**

1. *LB Curson – Dictionary of Law.*
2. *Charlesworth & Percy on Negligence, Sweet and Maxwell 2010.*

On 9<sup>th</sup> September, 2016, the plaintiff filed a writ of summons and a statement of claim, claiming damages for permanent injuries inflicted on the plaintiff by the negligent driving of motor vehicle bearing registration number ALG 264 on 13<sup>th</sup> of February, 2016. In addition she claimed for refund of monies used for medical expenses and transportation to and from the hospital, any other reliefs the court would deem fit, interest and costs.

The 1<sup>st</sup> and 2<sup>nd</sup> defendant filed a joint defence on 17<sup>th</sup> October, 2016 wherein they admitted that the 2<sup>nd</sup> defendant hit the plaintiff accidentally when he had slightly swerved the vehicle in a bid to avoid hitting other pedestrians on the left side of the vehicle. However, the defendant denied that the plaintiff sustained any bruises or any noticeable physical injuries on her body.

The defendants deny that they were negligent. Trial commenced on 3<sup>rd</sup> August, 2017 and the plaintiff gave sworn evidence on her own behalf. She narrated to the court the events that occurred on 13<sup>th</sup> February, 2016 when she was involved in an accident with the 2<sup>nd</sup> defendant.

It was her evidence that on the material day whilst on her way to church at a place called Madzimoyo in Mtendere around 14.00

hours as she was walking she was hit by a motor vehicle, a Toyota Noah. She was hit from behind and lost consciousness. Good Samaritans rushed her to Levy Mwanawasa hospital where she was admitted and regained consciousness.

PW1 went on to explain that as a result of the accident she sustained injuries and was subsequently operated on. Among the injuries sustained was a broken collar bone and fractured ribs. Further, she has had to undergo physiotherapy.

According to PW1 the injuries she sustained as a result of the accident has affected her capacity to perform certain duties. She implored the court to grant her reliefs endorsed on her statement of claim.

In cross-examination, she told the court that upon her discharge she had been advised to employ a maid in order to assist her. PW1 went on to explain that her elder sister used to take her to the hospital for review and not a person called Danny.

She denied calling a person known as 'Uncle Danny' and went on to state that was too sick to call him in any event.

She admitted that there were attempts at settling the matter out of court but these attempts did not yield any fruit. When asked whether she had received K1,000.00 from a person called Perias she categorically denied.



Laston Lwanga, a 53 year old ZAF retired officer was called as the witness for the defendant (DW1). He gave an account of what had transpired regarding the accident in which the plaintiff was involved.

He testified that his vehicle had an electrical problem and was being repaired in Chilenje. Upon receiving a report that his vehicle had been spotted at a place called Mikes with people drinking from it, and being, unhappy with this report the following day he sent Pelias Ilunga to retrieve the vehicle. He was later informed that Pelias Ilunga had been involved in an accident with the same vehicle and had hit into the plaintiff. DW1 did not have any knowledge as to what actually transpired regarding the accident.

When DW1 came back from operations a meeting was convened with Pelias and other relatives where it was established that Pelias was wrong. It was then agreed that they would assist in taking the plaintiff for all her reviews and in fact on two occasions 16<sup>th</sup> and 23<sup>rd</sup> March, she was taken by 'Uncle Danny'. On another occasion the plaintiff's sister declined to go to the hospital and indicated a different preference which was St. Johns. At St. Johns, rest was recommended for the plaintiff, however, she was dissatisfied with this advice and proceeded to Premium Clinic where an X-ray was taken.

According to DW1 they were waiting for the next steps to be taken. As a family, DW1, his wife, Pelias and Ilunga's uncle decided to pay the plaintiff a visit with a view of resolving the matter but to no avail.

I have taken into consideration all the evidence on record. It is not in dispute that on the 13<sup>th</sup> August, 2016, the plaintiff while walking along Mtendere Clinic road, near Madzimoyo bar, the 2<sup>nd</sup> defendant, Pelias Ilunga who was driving a motor vehicle Toyota Noah registration no. ALG 264 drove into and hit the Plaintiff from behind.

As a result of the injuries it is not in dispute that the plaintiff sustained injuries.

Unfortunately, the 2<sup>nd</sup> defendant was deceased when the matter came for trial. The 1<sup>st</sup> defendant is the owner of the Toyota Noah in question and does not dispute the fact that he authorized the 2<sup>nd</sup> defendant to drive his motor vehicle.

The plaintiff is contending that the accident was occasioned by the negligence of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant is not disputing that the accident occasioned but is challenging the extent of the injuries allegedly suffered by the plaintiff. He also refutes the assertion that there was no assistance rendered for medical care and states that efforts at an amicable settlement were in actual fact spurned by the plaintiff's family.

The issue that falls to be determined is firstly whether or not there was negligence on the part of the defendants.

A convenient starting point is perhaps the definition of negligence. An insightful definition is that found in a book entitled Dictionary of Law authored by L.B. Curson which reads:



*"Not a state of mind, but a falling short of an objective standard of conduct and in strict legal analysis is negligence means more than heedless or careless omission or commission, it connotes the complex concept of duty breach and damages thereby suffered by the persons to whom the duty as was owing.*

In the celebrated case of **Donoghue vs Stevenson** <sup>(1)</sup>, Lord MacMillan observed that:

*"The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only when there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence...*

*The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."*

What emerges from the foregoing is that in order to found an action on negligence three elements require to be established:

1. That the Defendant owed a duty of care to the Plaintiff.
2. That the duty was breached.
3. That the said breach has led to damage.

Pertaining to the duty of care and it is important to note that in effect one owes a duty of care if they reasonably foresee that their act or omission is most likely to cause danger or injury to another person. The test is considered to be one of foreseeability.

This simply means a party must be able to foresee or anticipate the consequences of his or her actions.

Applying the law to the facts, I find as a fact that the 2<sup>nd</sup> defendant owed a duty of care to the plaintiff in the manner he drove the car on the road.

The 2<sup>nd</sup> defendant by driving off the road into a pedestrian walkway should have foreseen that there was the danger of running over pedestrians. Clearly he should have seen that the natural and probable consequences of his wrongful actions could lead to an accident.

In actual fact an accident did occur when he ran over the plaintiff.

I find as a fact that by driving in the manner the 2<sup>nd</sup> defendant did it was reasonable foreseeable that an accident could occur.

I find a fact that as a consequence of the accident, the plaintiff suffered injuries.

Having met the three requirements for negligence I have no difficulty in arriving at the finding that negligence has been established.

In his defence he has contended that there was no employee employer relationship between himself and the 2<sup>nd</sup> defendant and that the 2<sup>nd</sup> defendant was a personal friend who merely helped the 1<sup>st</sup> defendant pick the vehicle from the garage. He does not dispute the fact the 2<sup>nd</sup> defendant hit the plaintiff accidentally as he tried to swerve the vehicle in trying to avoid other pedestrians.

It begs the question what the relationship or status of the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant?

Admittedly he was not an employee but a friend authorized to drive the vehicle. He therefore falls in the category of an agent.

The learned authors of **Charlesworth and Percy on Negligence** explain who an agent is at page 208, when they state:

*"An agent is one who is authorized to act on behalf of another. It is not necessary that there should be an background of some contractual relationship, as in the case of employer and employee. Friends, a spouse and the children of the principal have on occasion, been found to be agents."*

At page 209 the learned authors further state that:

*"where the agent has authority to drive a motor car, on behalf of or for the purposes of the owner (whether wholly or partly on the owner's business or in the owner's interest), and negligently causes damage in the course of the that authority, the owner of the car will be liable, as principal, even though he was not present in the care at the time."*

The foregoing makes it abundantly clear that a principle is liable for the negligence of his agent.

In light of what I have stated in the preceding paragraphs I find as a fact that the 1<sup>st</sup> defendant is liable for the negligence of the 2<sup>nd</sup> defendant who was his agent.



All in all I find that the plaintiff has proved her case against the defendant on a balance of probability in line with the principal articulated in the cases of ***Khalid Mohammed vs The Attorney-General*** <sup>(2)</sup> and ***Wilson Masauso Zulu vs Avondale Housing Project*** <sup>(3)</sup> that the burden of proof lies on the plaintiff.

Having proved her claims, I accordingly enter judgment in her favour against the 1<sup>st</sup> and 2<sup>nd</sup> defendants for damages for personal injuries suffered on account of the negligence of the 2<sup>nd</sup> defendant.

Regarding the medical and transport expenses incurred by the plaintiff, I equally enter judgment in favour of the plaintiff.

The damages are to be assessed by the Deputy Registrar. Personal injury damages will bear interest at 18% from date of injury to date of payment whereas the special damages will bear interest at short term deposit rate from date of writ to date of judgment and thereafter at current bank rate until payment in full.

Leave to appeal to Court of Appeal is granted.

***Dated at Lusaka this 25<sup>th</sup> day of October, 2017***



**Judge Betty Majula-Mung'omba**  
**HIGH COURT**