

IN THE HIGH COURT FOR ZAMBIA

2022/HP/0803

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

BUCHIZYA TEMBO

PLAINTIFF

AND

GLORIA KALENGO

DEFENDANT

BEFORE HON. JUSTICE E. P. MWIKISA

For the Plaintiff: Ms. M. Monga- Messrs Tembo Ngulube and Associates.

For the Defendants: Mr. JF.M. Kachanba-Messrs EBM Chambers.

JUDGMENT

Cases referred to:

- 1. Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Vol. 1 Z.R. 287 (S.C)*
- 2. Naomi Malama v Edwin Chinda Chisenga - Appeal No. 135/2017;*
- 3. Aaron Nyangu vs. Pulse Financial Services Limited Appeal No. 234 of 2022*

Legislation referred to:

- 1) The Road Traffic Act No. 11 of 2002*

Other works referred to:

- 1) *Phipson on Evidence 17'11 Edition, (Thomson Reuters (Legal) Limited 201 OJ*
- 2) *Winfield and Jolowicz on Tort, 13th Edition*
- 3) *Halsbury's Laws of England 4th Edition*

1. Introduction and Background.

1.1 On 26th March 2022, the Plaintiff commenced an action through a Writ of Summons and Statement of Claim against the Defendant. The Plaintiff was claiming for the following reliefs;

- a) An order for payment of the replacement value of the motor vehicle which is approximately estimated at the price of ZMW150,000.00;**
- b) Alternatively, an order for repair and restoration of the motor vehicle to the state and condition it was prior to the collision;**
- c) Damages for loss of use of the motor vehicle;**
- d) Damages for mental distress and inconvenience;**
- e) Interests on all sums found due and payable; and**
- f) Costs of and incidental to this action.**

1.2 The Defendant contested this action and filed her memorandum of appearance, defence and counterclaim on 10th June 2022.

1.3 The Plaintiff filed his reply and defence to the counterclaim on 2nd August 2022.

- 1.4 Trial commenced on 14th August 2023, and was concluded on 14th August 2024.
- 1.5 The Defendant filed her final submissions on 24th September 2024, a perusal of the record shows that the Plaintiff did not file his final submissions.

2. The Plaintiff's Statement of Claim.

- 2.1 The Plaintiff asserted that he is the registered owner of motor vehicle known as Audi 4 with registration No. BAV 4559ZM. That on 1st March 2022, at about 07:10 Hours at the junction of access road and Tokyo way in Lusaka, uninsured motor vehicle owned and driven by the Defendant known as Mazda BT, registration No. ACB 2668 collided with his motor vehicle.
- 2.2 That the collision occurred when the Defendant was overtaking improperly a motor vehicle in front of her and in order to avoid colliding with the oncoming motor vehicle on the right hand, she abruptly swerved back into her left lane consequently hitting into the Plaintiff's motor vehicle which was at the material time joining at the junction after it had been given the right of way by the motor vehicle in

front of the Defendant. That the said collision was caused by the negligence of the Defendant.

Particulars of the Negligence are:

- a) Failing to keep a proper look out for on coming motor vehicle on the overtaking lane;**
- b) Failing to take evasive action in the circumstances;**
- c) Failing to apply the brakes on her vehicle to avoid the collision; and**
- d) Improperly overtaking near a junction at an excessive speed.**

2.3 Furthermore, due to the collision, the Plaintiff suffered loss and damage. That the particulars of Loss and Damage are:

- a) Damage to both the front system and rear right doors of the motor vehicle;**
- b) Damage to the ignition system and the rear fender; and**
- c) Damages to the screen multimedia system and the rear bumper.**

2.4 Consequently, the Defendant was charged by the Zambian Police for the offence of careless driving. The Defendant admitted the charge and paid the admission of guilt fee.

2.5 The said collision resulted in the Plaintiff's motor vehicle being extensively damaged, thus depriving him of the use of the motor vehicle which he was using both for

professional and social activities, thereby, causing him severe mental distress and inconvenience.

2.6 The Plaintiff asserted that, despite repeated demands and reminders for the Defendant to either repair or replace the motor vehicle, the Defendant has refused, failed and or neglected to do so, alleging that she has no money.

3. The Defendant's Defence and Counterclaim.

3.1 The Defendant traversed that she was in the motor vehicle when the Plaintiff's motor vehicle suddenly appeared from a side way into the highway, and that this was what caused the collision, as the Defendant hit into the doors of the Plaintiff's motor vehicle.

3.2 The Defendant denied colliding with the Plaintiff's motor vehicle and traversed that she hit onto the doors of the Plaintiff's motor vehicle as he failed to stop and check for oncoming vehicles on the highway because he was speaking on the phone.

3.3 She stated that she was exercising her right to overtake on the highway as there was no motor vehicle coming in front of her as alleged by the Plaintiff. Furthermore, she stated

that the accident was caused by the Plaintiff's failure to observe the common road rules which are to give way to vehicles on the highway.

3.4 The Defendant traversed that whilst at the accident scene, a woman who happened to be the Plaintiff's mother and Deputy Speaker of the National Assembly, came in a government vehicle with a driver and a policewoman who said that the Defendant was in the wrong and ordered her to pay a fine. That additionally, the Defendant was intimidated by the Plaintiff's team which came in the Ministerial Land Cruiser and as such, felt compelled to pay the admission of guilt fine.

3.5 It was further stated that the Defendant has pictorial evidence to show the damage that was caused to the Plaintiff's motor vehicle and that there was an attempt in repairing the said vehicle but the Plaintiff did not agree to it. Furthermore, the Defendant stated that if the Plaintiff had given way to traffic on the highway, he would have been using his motor vehicle but because of his actions,

the Defendant was made to suffer damages and she counterclaims as follows:

Particulars of Counterclaim

- a) **Damage to the front of the Defendant's vehicle which included fog lights, the grill, the headlamps, the bumper and the bonnet and including anything inside that the Defendant may not as yet identified.**
- b) **Fee incurred to source expert to asses damage to Plaintiff's vehicle.**
- c) **Damages for mental distress and inconvenience.**
- d) **Costs incidental to this action.**

4. The Reply and Defence to the Counterclaim.

4.1 It was stated that the Plaintiff did not suddenly appear from a side way into the highway instead the motor vehicle which was in front of the Defendant stopped and gave the Plaintiff way on to the main road, but because of the Defendant's negligent driving, she refused or failed to stop but defendant simply overtook the motor vehicle in front of her and that's how she collided with the Plaintiff's motor vehicle. Furthermore, the Plaintiff denied using his mobile phone while driving.

4.2 That it is not true that the Defendant was coerced into admitting liability for the motor vehicle accident. That after the accident, both the Plaintiff and Defendant gave a

statement at the police station where the Defendant readily and voluntarily admitted being in the wrong. Thus, the Plaintiff's only came to the scene to check on his wellbeing following the accident and she was not accompanied by any policewoman.

- 4.3 Furthermore, the Plaintiff stated that the damage to his motor vehicle was extensive and therefore could not be repaired by merely replacing the doors. That the Plaintiff has never refused the Defendant to have the motor vehicle assessed by an expert agreed upon by both parties especially that the Defendant was driving uninsured motor vehicle at the time of the accident.

Defence to the counterclaim.

- 4.4 The Plaintiff traversed that the accident was caused by the negligence of the Defendant and this is the reason why she readily and voluntarily admitted liability.
- 4.5 The Plaintiff denies having caused the damage to the Defendant's motor vehicle as the damages was caused as a result of her own negligence.

5. Trial.

5.1 The matter was called for trial on 14th August 2023 and was concluded on 14th August 2024. Counsel for all parties were in attendance. Reason for delayed continuation of trial is because the matter was dismissed for want of prosecution, the matter was then restored to active cause list on the 19th March 2024.

6. The Plaintiff's Case.

6.1 I shall not recast the Plaintiff's witness statement dated 1st March 2023 as it was produced and admitted as "BT1" into Court as part of PW1's evidence.

Cross-examination

6.2 PW1 informed the Court that according to his statement of claim, he is claiming for an order for the replacement value of his motor vehicle as well as the repair of the vehicle.

6.3 That his vehicle was damaged beyond repair and that he admitted into Court pictorial evidence of the damaged vehicle. Furthermore, he showed the Court through pictorial evidence of how his vehicle was prior to the accident.

- 6.4 PW1 was referred to page 5 of his bundle of documents, he informed the Court that it contains two extensively damaged doors, a broken back window, the fender underneath the doors extensively damaged. The pictorial evidence in question was in black and white version. He informed the Court that he has the color version although it was present before the Court.
- 6.5 PW1 was referred to the Defendant's bundle of documents, he informed the Court that he does not concede that the pictorial evidence adduced by the Defendant is much clearer than his. He told the Court that his windscreen is not damaged and that the impact is from the back tyres up to the front tyre.
- 6.6 He told the Court that the Defendant was not driving a truck. That she was driving a Mazda BT50 which is wider than the front of the pictorial evidence at page 6 of his bundle of documents. He told the Court that the damage covered the back wheel to the front wheel.
- 6.7 PW1 was referred to page 5 of his bundle of documents, he informed the Court that he did not know as to why the side

view mirror was damaged. That he can see from the evidence before Court that the back window is damaged. He told the Court that he did not overturn at the time of the accident, only that, the Defendant collided with him.

6.8 He informed the Court that he does not have any pictorial evidence of the motor vehicle after the accident. That the fender is near the back wheel and it appears to be damaged. That the front fender is also damaged, the front doors and the fender underneath the front door. That the damage to the front wheel is at the bottom and the damage is also near the back wheel, the two doors and the fender near the front door.

6.9 He told the Court that there is a damage at the back window as that is the window where it received contact with the Defendant's window.

6.10 PW1 claimed that there was damage to both his ignition and multimedia system, this was not substantiated with evidence.

6.11 PW1 told the Court that a mechanic or panel beater can fix the vehicle and that there where discussions of

repairing the vehicle. That it was agreed that the Defendant would get quotations and an assessment of the damage of the vehicle should have been conducted. That it is not true that the second assessor was not allowed on the premises.

6.12 PW1 informed the Court that his mother did not help him in the negotiations. He admitted to the Court that negotiations took place at the Defendant's house. He told the Court that his mother came at the scene of the accident and was concerned about the outcome of the negotiations.

6.13 Furthermore, PW1 informed the Court that he did allow the Defendant to repair the vehicle and get quotations from their preferred companies. That indeed it is true that the Defendant admitted being the causer of the accident as she paid the admission of guilt fee.

6.14 PW1 was referred to page 3 of the Defendant's defence, he told the Court that the Defendant is attributing the cause of the accident to him although, the police woman was of the view that the Defendant was in the wrong. He told the

Court that the Defendant was on the highway when the accident happened. That he entered into the highway because he was given way although they were cut white lines on the road which authorized the Defendant to overtake.

6.15 Furthermore, he informed the Court that he could not recall a stop sign on the highway road. PW1 maintained his position as to the Defendant violating a rule on the highway code by improperly overtaking without exercising caution. That the Defendant was overtaking at high speed as there was a motor vehicle in front of her. He told the Court that the Defendant wanted to avoid colliding with the oncoming vehicle and that she had turned on the hazard lights.

6.16 PW1 told the Court that he has the duty to exercise caution in spite of other drivers giving him way. That he did not see the Defendant's vehicle coming and that he was not on the phone at the time.

6.17 PW1 went further to inform the Court that he has no report to confirm what he is telling the Court other than the

police statement of the Defendant. He told the Court that the police woman was not at the scene when the accident happened as she came after the accident. That his mother also came to the scene, who later took PW1 to the hospital. That later on, he went to the police station to give a statement.

Re-Examination

- 6.18 PW1 informed the Court that he had stopped at the Tokyo highway and was given way by the vehicle in front of the lane in which the Defendant was driving and was then hit on the right side by the Defendant.
- 6.19 That the Defendant gave him her phone to talk to her husband who insisted that PW1 should not report the accident to the police as they would repair the vehicle.
- 6.20 That the police came on the scene and the Defendant left the scene with the police officer in her car. PW1 informed the Court that the police officer told him that the Defendant was at fault. He told the Court that both of his doors were extensively damaged as well as the door airbag, the electric system. He reiterated that his mother was

never part of the negotiations he had with the Defendant as the only reason she came to the scene was to take him to the hospital, as she was concerned about his health.

7. The Defendant's Case.

7.1 The Defendant called two (2) witnesses to prove her case.

Testimony of Joseph Monde, the husband of the Defendant, (DW1)

7.2 I shall not recast his witness statement dated 20th December 2022 as this suffices as his evidence in chief which was admitted into Court as part of DW1's evidence.

Cross examination

7.3 DW1 informed the Court that he is a user of the road where the accident happened from. He was addressed to page 5 of the Defendant's bundle of documents and he informed the Court that he took the picture in question. That according to the pictorial evidence, the screen is intact, there is no damage to the front right tyre, and that the only damage that's visible is the one from the rear right door.

7.4 DW1 informed the Court that he was ready to repair the vehicle in question, but that this was not attainable because the Plaintiff's mother insisted that the Defendant purchases a new one.

7.5 He informed the Court that he was not at the scene of the accident when it happened and that he is not a mechanic nor an expert. DW1 then informed the Court he did not have any proof of the meeting he had with the Plaintiff's mother.

The testimony of Gloria Kalengo, the Defendant herein (DW2)

7.6 I shall not recast her witness statement dated 20th December 2022 as it was admitted as part of her evidence in Court.

Cross- Examination

7.7 DW2 informed the Court that there was no car in front of her at the scene of the accident although her witness statement says otherwise. That she paid a fine at the police station because her car was not insured. That she did not read the police report. DW2 informed the Court that the

police officer went to her home to fine her over something she did not do.

7.8 Furthermore, DW2 told the Court that it was the Plaintiff's mother who refused to allow her and DW1 to repair the said vehicle. DW2, informed the Court that she has no proof to prove that the Plaintiff was on the phone while driving.

7.9 DW2 informed the Court that the car in front of her indicated left where the Plaintiff was coming from. This created way for DW2 to drive, and that when she did, she noticed that the Plaintiff also continued driving, hence the accident.

8. The Final Submissions.

8.1 I have taken note of the Defendant's final submissions dated 24th September 2024, which I will not recast here save for emphasis as necessary

9. Consideration and Determination.

9.1 I have meticulously examined the Writ of Summons and Statement of Claim. The evidence and the oral

submissions by both parties as well as the written submissions by the Defendant.

9.2 The Plaintiff claims *inter alia* an order for payment of the replacement value of the motor vehicle which is approximately estimated at the price of ZMW150,000.00; alternatively an order for repair and restoration of the motor vehicle to the state and condition it was prior to the collision; damages for loss of use of the motor vehicle; and damages for mental distress and inconvenience caused by the negligent driving of the Defendant. This Court is mindful that the burden of proof in a civil action like the present action rests on the party who asserts the affirmative hence the Latin maxim: ***ei qui affirmat non ei qui negat incumbit probatio***. This Court is also mindful that the standard of proof in civil cases is merely on a balance of probabilities. The Plaintiff having alleged that the accident was caused by the Defendant's negligent driving of the said motor vehicle, as particularized in his Statement of Claim, thus, places the primary burden of proving the alleged negligence. To that effect, the **learned**

authors of Phipson on Evidence 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 issued. If, when the evidence is adduced by all parties, the party who has the burden has not discharged it, the decision must be against him.”

9.3 Additionally, the standard to which a Plaintiff should prove his case was discussed by the Supreme Court in **Zambia Railways Limited v Pauline S Mundia, Brian Sialumba**¹

were it was held as follows;

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable ...”

9.4 From the record, the undisputed facts are that on 1st March 2022 at about 07:10 Hours, the Plaintiff’s motor vehicle an Audi A4 registration No. BAV 4559ZM was involved in a road traffic accident along junction of Access Road and Tokyo way which are public roads; that the

accident occurred when the Defendant pulled out of the main way and switched to the right lane and overtook the motor vehicle in front of her. That as the Defendant tried to swerve back into her left lane, she consequently hit into the Plaintiff's motor vehicle which was joining at the junction. That the Defendant's vehicle was uninsured and she paid an admission of guilt fine to the offence of careless driving.

9.5 It has been contended by the Defendant that she was not negligent as she is of the view that the Plaintiff failed to adhere to road signs before joining the main road.

9.6 On my analysis of the evidence before me, the following is the point for determination before this Court;

a) Whether the Defendant was negligent in the manner that she drove the motor-vehicle and thereby liable to pay damages to the Plaintiff for loss of use of the motor-vehicle.

b) Whether the Defendant has provided sufficient evidence to prove her counterclaim.

9.7 In order to address the various issues raised by the parties, it is necessary to provide context to what amounts to negligence. The **learned authors of Winfield and Jolowicz on Tort, 13th Edition at page 45** state as follows:

“... Negligence as a tort is a breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. The ingredients necessary to prove negligence are stated as: (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty; (b) breach of that duty; (c) consequential damage to B. The three ingredients on the tort of negligence must be established:

- 1) There must be a duty of care owed by the defendant to the plaintiff;**
- 2) There must be a breach of the duty of care owed to the plaintiff by the defendant;**
- 3) and the plaintiff must suffer damages as a result of such breach by the defendant.”**

9.8 Further, the Court of Appeal in the case of **Naomi Malama vs. Edwin Chinda Chisenga²** stated as follows;

“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.” (Court's emphasis)

9.9 The burden to prove that a Defendant owes the Plaintiff a duty of care and that there is breach of that duty lies on the Plaintiff. Once proved, it is the duty of the Defendant

to compensate the Plaintiff for the injury caused as a result of the breach of that duty.

- 9.10 The **Learned authors of Halsbury's Laws of England 4th Edition page 662** explain how that duty is to be discharged in relation to key elements as follows;

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

- 9.11 Having considered the principal attendant to proving negligence, I must next consider whether the Plaintiff has discharged his duty in proving negligence on the part of the Defendant. In doing so, I shall consider the elements of negligence stated above.

- 9.12 The first element requires the Plaintiff to show that there is a duty of care owed by the Defendant to the Plaintiff. In the present case, the motor vehicle involved in the accident was an Audi A4 driven by the Plaintiff and a Mazda BT driven by the Defendant.

9.13 It is undisputable from the evidence on record that; on 1st March 2022, at about 07:10 Hours, the Plaintiff's motor vehicle an Audi A4 registration No. BAV 4559ZM, was involved in a road traffic accident along junction of Access Road and Tokyo way which are public roads; that the accident occurred when the Defendant pulled out of the main way and switched to the right lane and overtook the motor vehicle in front of her. That as the Defendant was trying to swerve back into her left lane, she consequently hit into the Plaintiff's motor vehicle, which was joining at the junction. It is common cause that they each had a duty, not only to adhere to the **Road Traffic Act 11 of 2002**, but also a duty of care to each other and other road users.

9.14 The next element is whether there was a breach of the duty owed by the Defendant to the Plaintiff. Evidence on the record shows that the Defendant was driving along Tokyo way, that she was driving on the left side of the carriageway and decided to overtake a motor vehicle in front of her, thus, she moved to the right side of the

carriageway, after which she then decided to go back to her left side and consequently hit into the Plaintiff's motor vehicle which was joining at the junction. **Sections 73 and 75 of the Road Traffic Act 11 of 2002** provides that:

“Any person driving a vehicle on a public road, shall drive on the left side of the carriageway. That in the event such a one intends to pass any other vehicle proceeding in the same direction on a public road, shall pass to the right of it at a safe distance and shall not drive on the left side of the carriageway until safely clear of the vehicle so passed”.

9.15 Furthermore, **section 77** of the above-mentioned Act provides that:

“A driver of a vehicle on a public road shall, when the driver intends to enter any public road which constitutes a junction of two public roads where vehicular traffic which is approaching from all directions, is required to stop at such junction, yield the right of way to all vehicular traffic which arrived at the junction before such driver, on a first-come first-go basis, unless the driver's entry into such junction is controlled by an instruction given or a direction conveyed by a road traffic inspector in uniform or a police officer or communicated by a traffic sign requiring the driver to act differently”.

9.16 Premised on the foregoing, it can be concluded that the Defendant's acts of overtaking were within her right as she had the right of way to do so, while on the other hand, I am of the view that the Plaintiff did not strictly adhere to

the traffic rules as highlighted above under Section 77 of the Road Traffic Act, in that, he ought to have stopped as he was joining the main road from the junction, and he should have made sure that the main road was clear for him to join. If the Plaintiff stopped and waited to be given way by the drivers who were driving in the main road, the accident in question would not have occurred.

9.17 On the totality of the evidence, I find that the Plaintiff has not proved on a balance of probability that the Defendant breached her duty of care towards the Plaintiff. Accordingly, the Plaintiff's claim for replacement or repair of his motor-vehicle and damages for loss of his motor-vehicle as a consequence of the Defendant's alleged negligence is hereby dismissed.

9.18 I now turn to consider the second legal issue outlined above of whether the Defendant has provided sufficient evidence to prove her counterclaim. I have interrogated the Defendant's submissions and counterclaim. The Defendant did not specifically plead particulars of negligence, thus, as guided by the Court of Appeal in the

case of **Aaron Nyangu vs. Pulse Financial Services Limited³**, a Court has no jurisdiction to grant a relief which is not pleaded. I therefore decline to grant the counterclaim by the defendant.

10. Conclusion.

10.1 The Plaintiff having failed to prove that the accident was caused as result of the Defendant's negligence, the Plaintiff's claim for replacement or repair of his motor-vehicle and damages for loss of his motor-vehicle is hereby dismissed.

10.2 I hereby order that each party bears the cost of repairing their own motor-vehicles.

10.3 I make no order as to costs.

Leave to appeal is granted.

Dated at Lusaka this.....th 11.....day of.....November.....2025



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ELITA P. MWIKISA
HIGH COURT JUDGE