

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

2014/HP/1168

(Civil Jurisdiction)

BETWEEN:

VINCENT B. MALAMBO
CHIPO MALAMBO

1ST PLAINTIFF

2ND PLAINTIFF

AND

DR. HUJA G. NJIE
MUZAMBA COLLINS



1ST DEFENDANT

2ND DEFENDANT

Before the Honourable Ms. Justice S. Chocho, in Chambers, on the 2nd day of February, 2024.

For the Plaintiff(s): Mrs. M. S. Tembo and Mr. K. Phiri of Messrs Malambo and Company.

For the Defendant(s): Mr. B. Mweemba of Messrs Keith Mweemba advocates.
Mr. C. K. Simukonda of Messrs Kagombe and Associates.

JUDGMENT

Cases referred to:

1. *Ahmed Wandu and Smart Transport V Kostic Investment Limited selected Judgment No. 30 of 2019*
2. *Nyumann – Jorgensen V Gosai (1973) ZR.61(H.C)*
3. *Chanda V The People (1975)*
4. *DPP V Chilombo (1975) Z.R. 248 (S.C.)*
5. *Kapembwa V Maimbolwa and Attorney General (1981) ZR 127*
6. *Attorney General V D.G. Mpundu (1984) ZR 6 (S.C)*

7. *Finance Bank (Z) Limited and others V Simata Simata selected Judgment No. 21 of 217*
8. *China Sate Construction and Engineering Corporation (Z) Limited V Mwape Kaimba Appeal No. 64 of 2019.*
9. *Zambia Railways Limited V Pauline S Mundia, Brian Sialumba (2008) IZR 287*
10. *Attorney General V Kakoma (1975) ZR 212*
11. *Silungwe V The People (1974) ZR 130*
12. *Madison General Insurance Company Limited V Anvill Cornhill and Another Appeal number 19/2017*
13. *Khalid Mohamed V the Attorney General (1982) ZR 49*
14. *Silungwe V The People (1974) ZR 130 (H.C)*
15. *Blake v The People (1973) ZR 157*
16. *Zambia Railways Limited V Pauline S. Mundia*

Legislation referred to:

1. *Section 158(1) Road Traffic Act no. 11 2002*

1. INTRODUCTION

- 1.1. This Judgment is in respect of claims for damages occasioned to property and person (injury) allegedly due to the negligence of the Defendants. The Parties were involved in a Road Traffic Accident.
- 1.2. The 1st Plaintiff is the legal owner of the motor vehicle, Mercedes Benz registration number ABA 6316 and was driven at material time by the 2nd Plaintiff Chipo Malambo.
- 1.3. The 1st Defendant is Dr. Huja G. Njie, is the registered and legal owner of the second motor vehicle registration number 50CD26, which motor vehicle was driven by the 2nd Defendant Collins Muzamba.

- 1.4. The 2nd Plaintiff pleaded that 2nd Defendant negligently drove the second motor vehicle causing a head on collision with the first motor vehicle.
- 1.5. By Writ of Summons and Statement of Claim dated 29th July, 2023 the Plaintiffs claim that the collision was caused by the negligence of the 2nd Defendant.

Particulars of Negligence

- a) The 2nd Defendant failed to keep to his side;
- b) Driving at an excessive speed when it was unsafe to do so and or/without regard to the traffic on the other side of the road;
- c) Failing to give any or any proper warning of his approach or his intention to drive on the other side of the road;
- d) Failing to keep any or nay proper look out/or to observe or heed the presence or approach of the 1st Plaintiff;
- e) Failing to apply his brakes in time or at all and/or so to steer or control his vehicle as to avoid the said collision;
- f) As a result of the 1st Defendant's said negligence, the 1st Plaintiff has sustained severe personal injuries, pain and has suffered loss and damages.

Particulars of Injuries

- i) Right medial malleolar fracture
- ii) Stiffness and pain

Particulars of Special Damages

- | | |
|-------------------------------|------------|
| a) Medical fees | K11,200.00 |
| b) Taxis to and from hospital | K 3,000.00 |

c) Special shoe as the result of injury

| | |
|--------------|---------------------------|
| Pounds | 83.16.00 |
| Total | K14,200.00 |
| | & Pounds 83.16 |

By the reason stated above the Plaintiffs have suffered loss, damages and pain.

And the Plaintiffs Claim

- i. General damages;
- ii. Exemplary and aggravated damages;
- iii. Special damages;
- iv. Mental anguish;
- v. Damages for physical disability;
- vi. Damages for susceptibility to diseases as a result of the accident;
- vii. Replacement of the vehicle;
- viii. Loss of use;
- ix. Any relief the Court may deem just; and
- x. Costs.

1.6. In response, the Defendant entered appearance and filed a defence into Court on the 13th August, 2014. By that defence the Defendants denied the Plaintiffs claims alleging that no negligence was attributable to the 2nd Defendant but rather claimed Negligence/contributory Negligence on the part of the 2nd Plaintiff and that the 1st Plaintiff motor vehicle was not insured.

Particulars of Absence of Negligence on the part of the Defendants.

- a) The 2nd Defendant kept his side;
- b) The 2nd Defendant drove at a reasonable speed as circumstances permitted at the point in time and took regard of the traffic on the other side of the road;
- c) The 2nd Defendant gave proper warning of his approach and /or intention to drive on the other side of the road;
- d) The 2nd Defendant observed the presence and/or approach of the 2nd Plaintiff;
- e) The 2nd Defendant applied his brakes in time so as to control his vehicle and avoid the said collision.
- f) That the said accident was wholly caused by the negligence of the 2nd Plaintiff and further in the alternative the 2nd Plaintiff contributed immensely by way of negligence to the accident,
- g) The Defendants denied the alleged injuries, pain, loss and damages under paragraphs 8 and 9 of the Statement of Claim by the Defendants.

Particulars of Negligence and/or Contributory Negligence on the part of the Plaintiffs.

- a) The 2nd Plaintiff was under the influence of alcohol and/or intoxicated on the road and paid no attention to other road users or vehicles.
 - b) Failing to have or to keep any proper control of himself and/or his motor vehicle due to intoxication.
 - c) Failing to keep any proper look out or to have any sufficient regard for other traffic, particularly on-coming traffic on the said road.
 - d) Failing to pay any sufficient heed to the signal given by the driver, the 2nd Defendant herein.
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e) Failing to see the Defendant's motor vehicle in sufficient time to avoid the alleged accident.

1.7. The Plaintiffs pleaded by Reply dated 20th August, 2014 denies being under the influence of alcohol nor contributing negligently to the accident/collision. The Plaintiffs claimed the motor vehicle driven by the 2nd Plaintiff was duly insured.

2. **TRIAL COURSE**

2.1. Matter was scheduled for trial on 3rd August, 2023, 22nd August, 2023 and September 1st 2023. I must however, place on record that though these three dates were scheduled for trial, this Court only heard and received testimony from the Plaintiff's witness. The Defendants absconded/absented themselves from Court on all three (3) occasions even though dates were agreed by all Parties.

The Defendants' Counsel, surprisingly adjourned the matter on all three occasion on what I shall term unconvincing excuses. On the 1st September, 2023, this Court refused the Defendants' application to adjourn. The adjournment this time was sought on basis that the 2nd Defendant the only witness for the defence was on a business trip in Nakonde. The Defendants Counsel was given option to either have the elusive witness brought to Court by bench warrant or adjourn for submissions. They left it to the Court's discretion. I adjourned the matter for submission.

I take this chance to warn the Defendants Counsel that their first duty as an Officer of the Court is to the Court and adherence to Court Orders and Rules of the Court.

2.2. The 2nd Plaintiff Chipu Malambo testified as the only Prosecution Witness. His evidence was that he was driving motor vehicle Mercedes Benz registration Number ABA 6316 on 14th March, 2014 around midnight, from a party in Kabulonga Lusaka.

- 2.3. PW testified that as he drove on Thabo Mbeki Road, approaching a curve on the said road near Falls Way Villas, a motor vehicle a Jaguar Registration Number 50CD27 driven by the 2nd Defendant came into his lane. PW tried to avoid the 2nd Defendant but failed and found himself in a drainage.
 - 2.4. PW further testified that he gave a statement to the Police that attended at the scene of the accident and both motor vehicles were towed from the scene of the accident.
 - 2.5. PW further testifies that he presented himself to St Johns Medical Centre as he was in severe pain. He was attended to and advised to return the next morning for an X-ray.
 - 2.6. PW further testified that after the X-ray he was advised that he had a fractured bone in his ankle. An emergency procedure was performed to stabilise the ankle and that he was to return after two weeks for a procedure to insert a screw to stabilise the bone.
 - 2.7. PW testified that the motor vehicle belonging to 1st Plaintiff was extensively damaged from the head on collision caused by the negligent driving of the 2nd Defendant. The repair costs were pegged at K353,000.00.
 - 2.8. PW further testified that the procedure to insert the screw was successfully undertaken but he was in severe pain and spent six weeks at home in recovery from the accident injuries.
 - 2.9. PW further testified that he attended physiotherapy sessions in bid to regain use of his leg so he could walk again. He was advised that he would most likely suffer from arthritis in future.
 - 2.10. PW testified that as a result of the accident injury, he continues to experience pain and discomfort in his ankle, with reduced mobility that he could no longer play social soccer with his friends.
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- 2.11. PW further testified that he claims as against the Plaintiffs damages to the motor vehicle, his medical expenses and for mental anguish and severe pain he suffered.
- 2.12. PW testified that 2nd Defendant was responsible for the accident and produced Police Report at page 1 – 2 of the Plaintiff's bundle of documents filed on 8th October, 2018. PW testified that the Police Report stipulates that the 2nd defendant was charged with careless driving and paid K135.00 Admission of Guilty fine.
- 2.13. PW testified that documents at Page 21 – 24 of the Plaintiffs bundle of documents in aid of his case and testimony on the injuries sustained. That the Defendants have not paid anything for the damages to the motor vehicle.
- 2.14. PW requested this Court to consider the Plaintiff's bundle of documents and the supplementary bundle of documents as part of his evidence.
- 2.15. In Cross Examination by the Defendants PW testified as follows;
- 2.16. That 1st Defendant, the motor vehicle, and the 2nd Defendant driver would be immune to civil suit in the presence of particular circumstances (Official duties).
- 2.17. That the receipt for Admission of Guilty Report and receipt for fine would have been given to the Party that admitted the charge and made payment. He further testified that he did not have copies of the Admission of Guilt Form/receipt.

That the Police Report at page 1 -2 of the Plaintiff's bundles was clear and evidence that the 2nd Defendant admitted guilt and made payment of fine.
- 2.18. That he was on material date coming from a party in Kabulonga and he had not been drinking, was not under the influence of alcohol nor did the Police carry out an alcohol test on him.

- 2.19. That he could not remember the speed at which he was driving but ordinarily drove between 50/60 Km/h.
- 2.20. That the motor vehicle he drove had Third Party Insurance and the 1st Defendant's motor vehicle had full Comprehensive Insurance. The Defendant's insurance paid a portion of the medical claims but amount not sufficient for repair of Plaintiff's car and other medical bills. Further testified that he only got one car repair quotation from Southern Cross.
- 2.21. That some receipts in the Plaintiffs Bundle of Documents did not have his name, specify the motor vehicle towed.
- 2.22. That he spent three / four nights in hospital though he did not have before Court admission and discharge slip.
- 2.23. There was no Re-Examination of the PW. That marked the close of the Plaintiff's case.

3. LAW AND SUBMISSIONS.

- 3.1 Both parties field their written submissions. The Plaintiff filed on 14th September, 2023 and Defendants on 26th September. I am grateful to counsel for filing the submissions on time.
- 3.2 Principally the Plaintiff submits that the 2nd Defendant caused the road traffic accident of 15th March 2014 and caused great damage to the 1st Plaintiff's motor vehicle and injury to the 2nd Plaintiff.
- 3.3 The Plaintiffs relied on the authority in the case of **AHMED WANDI AND SMART TRANSPORT V KOSTIC INVESTMENT LIMITED Selected Judgment No. 30 of 2019¹**, where the Supreme Court stated: -

“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 attached 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 causal 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 and demonstrate by evidence: duty owed him by the Defendant; how the defendant’s action 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 suffers were foreseeable.”

- 3.4 The Plaintiff submit that the 2nd Defendant breached his duty of care when he negligently drove the 1st Defendants car, thereby colliding with the 1st Plaintiff’s car and causing damage to the 1st Plaintiff’s car and injury to the 2nd Plaintiff.
- 3.5 The Plaintiffs’ refer the Court to a number of authorities including **NYUMANN – JORGENSEN V GOSAI (1973) ZR.61(H.C)², CHANDA V THE PEOPLE (1975)³, THE DPP V CHILOMBO (1975) Z.R. 248 (S.C.)⁴, KAPEMBWA V MAIMBOLWA AND ATTORNEY GENERAL (1981) ZR 127⁵, THE ATTORNEY GENERAL V D.G. MPUNDU (1984) ZR 6 (S.C)⁶, FINANCE BANK (Z) LIMITED AND OTHERS V SIMATA SIMATA Selected Judgment No. 21 OF 217⁷ AND CHINA SATE**

**CONSTRUCTION AND ENGINEERING CORPORATION (Z) LIMITED
V MWAPE KAIMBA Appeal No. 64 of 2019⁸.**

- 3.6 The Plaintiff submits that the Defendants are liable and the actions of the 2nd Defendant were not during course of official business and thereby exempted from defence /claim of Diplomatic Immunity.
- 3.7 The Plaintiff invites this Court to find in its favour as the accident was caused by the 2nd Defendant, due to his breach of duty of care on the road and negligence. The Plaintiff submit that on the balance of probability the Defendants are liable and should be responsible for the damage caused and injury to the 2nd Defendant.
- 3.8 The Defendants submit that the Plaintiff have failed to prove on a balance of probability that the 2nd Defendant was negligent nor caused the accident. The Defendants refer to authorities in case **ZAMBIA RAILWAYS LIMITED V PAULINE S MUNDIA, BRIAN SIALUMBA (2008) IZR 287⁹** the Supreme Court stated that: -
- “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.”***
- 3.9 The Defendant submit that the accident was caused by the 2nd Defendant as he was operating/driving motor vehicle whilst intoxicated.
- 3.10 The Defendants submits that the documents at pages 1 and 2 of the Plaintiff’s bundle of documents do not suffice as evidence of negligence and goes to great lengths to submit on need for Original Admission of Guilt Form.
- 3.11 The Defendants further submit that no evidence was provided to show payment of the fine of K135.00.
- 3.12** The Defendants invite the Court to consider authorities some of which are **ATTORNEY GENERAL V KAKOMA (1975) ZR 212¹⁰, SILUNGWE**

V THE PEOPLE (1974) ZR 130¹¹, MADISON GENERAL INSURANCE COMPANY LIMITED V ANVRILL CORNHILL AND ANOTHER APPEAL NUMBER 19/2017¹² AND KHALID MOHAMED V THE ATTORNEY GENERAL (1982) ZR 49¹³.

3.13 The Defendants call for the Plaintiffs action to be dismissed with Costs.

4. COURT'S DECISION

4.1 The clear and undisputed fact is that there was an accident involving the 1st Plaintiff and 1st Defendant's motor vehicles which cars were operated by the 2nd Plaintiff and 2nd Defendant respectively.

4.2 It is also undisputed that damage was occasioned to the motor vehicle and 2nd Plaintiff sustained injuries as a result of the said accident.

4.3 The question to be determined is to who caused the accident on a balance of probability considering/evaluating the evidence on record.

4.4 I shall first comment on the issue/defence of diplomatic immunity as pleaded by the Defendants. This issue /question was adequately settled by Hon. Justice Lombe-Phiri in her Ruling of the 9th May, 2022, wherein she decided that diplomatic immunity is not absolute and does not extend to activates conducted by the diplomat outside his official functions I totally agree with this position. There is no evidence adduced to provide/show that the 2nd Defendant was driving during the course of employment on official embassy business.

4.5 I must also state for the record that I have considered the submissions and authorities as advanced by the parties, even though I may not directly and particularly refer or speak directly to all of them in arriving at my decision.

4.6 I shall attend to the question of whether or not the Plaintiffs have proved that the 2nd Defendant is liable for the accident.

4.7 The Plaintiff's have placed before this Court evidence in the farm of viva vocae statement from the 2nd Plaintiff who was involved in the

accident and has first hand information and also documents in the Plaintiff's bundle of documents at pages: 1,2,9,10,19,29 and 32.

- 4.8 PW under cross examination testified that the 1st Defendants insurer (A Plus General Insurance) made a payment to the Plaintiff. Document at page 29 of the Plaintiffs bundle of documents speaks to this. It is trite that an insured person cannot claim payment under their insurance policy without proof of fault or negligence. I find as a matter of fact that the Defendants insurer paid out on the policy by reason that the Plaintiff showed/proved negligence/fault by the 2nd Defendant who drove the 1st Defendant's car. Page 32 of the Plaintiff's bundle of documents shows that the insured's driver was liable for the accident. This was not disputed by either the insurance company or the Defendants. The documents at page 1 and 2 of the Plaintiffs bundle of documents appears to me to be an official document and one that the Insurance company used in paying out to the Plaintiffs.
- 4.9 The Defendants aver in this defence and submissions that the 2nd Plaintiff was operating the 1st Plaintiff motor vehicle under the influence of alcohol. The Defendants have not adduced any evidence to prove this assertion. Such evidence would need to be in the form of a medical report showing the toxicity levels in the 2nd Plaintiff's blood. I am forfeited by Section 158(1) Road Traffic Act no. 11 2002 and the case of **SILUNGWE V THE PEOPLE (1974) ZR 130 (H.C)¹⁴, BLAKE V THE PEOPLE (1973) ZR 157¹⁵**. I find that the Defendants have failed to prove on a balance of probability that the 2nd Plaintiff was intoxicated. The case of **ZAMBIA RAILWAYS LIMITED V PAULINE S. MUNDIA¹⁶**, cited above is instructive on this.
- 4.10 I am also convinced on a balance of probability that the Plaintiff led sufficient evidence to show that the 2nd sustained injuries during the accident and the amount paid by the 1st defendant's insurer did not cover all damages suffered.

5. CONCLUSION

J14

5.1. For the foregoing Judgment is entered for the Plaintiff against the 1st and 2nd Defendants as pleaded, save for claim under ix.

5.1.1 Damages to be assessed by the Registrar of the High Court.

5.1.2 Special damages in sum of ZMW 14, 200.00 Pounds Sterling 83.16.

5.2. Costs to the Plaintiff to be taxed in default of agreement.

5.3. Leave to appeal is granted.

Delivered at Lusaka on 2nd February, 2024.



**S. CHOCHO
HIGH COURT JUDGE**

