

19/5. A.F. Musangwa

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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.580 OF 1991

BETWEEN:

I.M. KADZANJA PLAINTIFF

- and -

UNITED TRANSPORT (MALAWI) LIMITED DEFENDANT

CORAM: TAMBALA, J.

Kumange, Counsel for the Plaintiff
Msaka, Counsel for the Defendant
Kaundama, Official Interpreter
Maore, Court Reporter

JUDGMENT

This is a plaintiff's claim for damages. The claim arises out of a road accident involving the plaintiff's truck, a leyland registration number ZA 2376 and the defendants' bus, a daff, registration number BG 3408. The plaintiff alleges negligence on the part of the driver of the defendant's bus. He consequently claims K14,859.64 being the cost of repairing the truck and loss of profit. He then claims general damages for loss of use and enjoyment; and also damages for discomfort and inconvenience. The defendants resist the claim. They deny that their driver was negligent during the accident. They allege that the accident occurred due to the negligence or contributory negligence on the part of the plaintiff. They counterclaim a sum of K28,464.05 being the cost of repairing their bus and a sum of K87,954.05 being loss of profit. I now turn to the evidence.

The plaintiff is an owner of a 7 tons leyland truck registration No. ZA 2376. He uses it for hire to transport tobacco, bricks, sand and firewood. He does the business of selling firewood within the City of Lilongwe. He uses his truck to collect the firewood from different places and bring it to various selling points in the City of Lilongwe.

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During the night of 19th August, 1986, at about 9.00 p.m., the plaintiff was driving his truck along the M1 Kasungu-Lilongwe road. At that time he was a holder of a provisional driving licence. He displayed "L plates" both in front and rear of the truck. A competent driver Mr. Wyson Nsonthi, PW2, sat beside him in the cab. He was travelling from Mvera in Dowa District. The truck carried a full load of firewood.

He reached a junction where a road branches towards Area 25 in the City of Lilongwe. Before this junction there is a depression. He intended to turn right into the road going to Area 25. He said that he used indicators and a hand signal to show that he was turning right. He stopped to give way to a vehicle travelling in the opposite direction. Before he turned he was hit by a bus which was travelling towards Lilongwe. The truck was hit in the rear. The impact pushed it for a distance of about 120 metres and it rested after it hit a tree. The bus swerved and entered the road going towards Area 25. When it stopped part of it was at the mouth of the road going to Area 25 while the other part was on the M1 road.

The plaintiff's truck was damaged both in front and in the rear. The rear lights were smashed. The body was bashed inside and the chassis was bent.

It was the defendant's bus, a daff registration No. BG 3408 which hit the plaintiff's truck. It was at the time of accident driven by Summit Kampaliro Mwale, DW1. It was travelling, as an express bus, from Mzuzu to Lilongwe. It also suffered extensive damage. The whole front was squeezed inside. The chassis was bent. The engine, gearbox, propeller shaft and the seats were seriously damaged. It was later pushed further into the road going to Area 25 to a safe place.

The driver of the bus was seriously injured. He was unconscious at the scene of accident. He was taken to hospital during the same night. He remained unconscious for about one month. He stayed in hospital for 8 months. He subsequently recovered. Some 14 passengers in the bus were also injured. They were taken to Kamuzu Central Hospital where they were admitted.

It was the evidence of Kampaliro Mwale, DW1, that as he approached the scene of the accident he was travelling at a speed of 40-45 kilometres per hour. He reduced this speed when he saw the sign of a road junction. When he was 15 metres from the junction he saw a lot of black smoke. He applied brakes and switched on full lights. He tried to see what was in front but he could not see anything till he was about 10 paces from the junction. He then saw the shape of a vehicle. He said that he applied brakes but that did not help. He hit the vehicle. He was trapped in the bus. He cried out for help. He was rescued while in a state of unconsciousness.

He said that there was nothing to indicate the presence of the vehicle at the scene. It had no reflector. It had no tail lights. There were no indicators.

He was subsequently tried for careless driving in connection with the accident. He was eventually acquitted by the First Grade Magistrate at Lilongwe on 9th May, 1988. The record of Court proceedings relating to that trial was tendered in this Court as Exhibit D1. Mrs Olice Chidambo PW1 and Mr. Moyo PW3 told the First Grade Magistrate that they boarded the defendants' bus BG 3408 at Mzuzu at 12.35 p.m. When they reached Ekwendeni the bus began speeding. They said that at a place between Kafukule and Mzimba the bus collided with a small car; but the bus did not stop. PW3 told the Magistrate that he was surprised and worried.

It was the evidence of PW3 in the Magistrate Court that after they left Mzimba his suitcase fell off the bus; the driver stopped the bus far away from the place where the suitcase fell. He said that the driver appeared drunk. The two witnesses told the Court that at Champira and Nkhamenya some passengers dropped from the bus before they reached their destinations because they were scared by the manner in which the bus was driven and were not sure of their safety.

I bear in mind that it is the duty of the plaintiff to prove negligence on the part of the defendant. The standard of proof is that of proof on the balance of probabilities.

The evidence of Kampaliro Mwale DW1 supported by that of Roy Muwawa DW2 was that the plaintiff's vehicle had no tail lights and indicators. It had no reflector and reflector band at the rear. It was also the evidence of DW1 that the vehicle of the plaintiff was covered with thick black smoke at the scene. The evidence of the plaintiff and Wyson Nsonthi PW2 was that their vehicle had tail lights and indicators. It had also red warning lights and a reflector band at the rear.

I had the clear impression that the plaintiff and PW2 were telling the Court the truth. I believed their evidence. I was satisfied that during the time of the accident the plaintiff's vehicle had tail lights and indicators and that these were working properly. I also find that the truck had red warning lights which were functioning at the time of the accident. It had a reflector band at the rear. This can still be seen on photos marked S.4 and S.5. These photos were taken by the defendants. I am further of the view that the plaintiff's vehicle was not smoking at the scene. It must be appreciated that the plaintiff's vehicle was stationary when it was hit by the defendants' bus. I am of the view that a stationary vehicle could not produce so much smoke that its presence on the road could be concealed from a vehicle following it.

The evidence shows that there were street lights at the scene. The driver of the bus should have been able to see the truck at the scene even if it was emitting some smoke. Then the driver of the bus said that he saw the black smoke about 15 metres away. An experienced driver should have suspected a truck running on diesel if he suddenly saw black smoke on the road at night; he should have immediately taken necessary precaution to avoid colliding with the object producing the smoke. I am however not satisfied that the plaintiff's truck was producing so much smoke as to conceal it from a vehicle following it.

From the evidence before me I am satisfied that the plaintiff gave the required signal by hand and indicators that he was turning right into the road going to Area 25 just before the defendants' bus came and hit him. After considering the evidence as a whole I have a distinct feeling that the defendants' driver was probably speeding and failed to stop in sufficient time to avoid hitting the bus from the rear.

Regarding negligence by a driver of a motor vehicle MTEGHA, J., in the case of S.B. Zidana v Professor B.B. Chimphamba, Civil Cause No.440 of 1987 said at p.7:

"The duty of a motorist is to take reasonable care such as keeping a good lookout, avoiding excessive speed, proper control of his vehicle and observing road signals".

After carefully examining the total evidence before me I am satisfied that the driver of the defendants' bus failed to exercise the duty of care described by MTEGHA, J., in the above quoted case. I find that the accident was caused by the negligent driving of the defendant's driver. I hold the defendants liable in negligence. I am unable to find any conduct on the part of the plaintiff which would constitute contributory negligence on his part. The plaintiff's action based on negligence succeeds. The defendants' counterclaim is dismissed with costs.

I must now consider damages. The plaintiff claims K7,284.64 as cost of repairs. These are special damages. The plaintiff in his correspondence with the defendant's insurers claimed this sum of money as representing the cost of repairs done to his truck. In a letter dated 5th December, 1986 addressed to the defendants' insurers he stated that he was sending them invoices and cash sales showing the total of the sum claimed. Those invoices and cash sales were not presented before this Court. It is probable that the plaintiff did not keep copies of all the cash sales and invoices mentioned in the letter of 5th December. The invoices presented before this Court showed a total of K6338.57. The plaintiff did not give oral evidence regarding the details of the missing invoices and cash sales. The defendants had, therefore,

no opportunity to cross-examine him on the missing invoices and cash sales. I shall, therefore, take into account only those invoices and cash sales which were produced in Court.


In his evidence the motor vehicle examiner testified that he found all the tyres of the truck in good condition when he examined the truck. There is an invoice dated 20th September, 1986 showing K520.00 as the cost of 1 tyre. There is also another invoice dated 12th November, 1986 showing K2100 being the cost of 4 tyres. I shall deduct the K2620 from the K6338.57. The plaintiff shall be entitled to K3718.57 being cost of repairs done to his truck.

The evidence showed that the plaintiff's truck was in the garage undergoing repairs between the time of the accident and 27th November, 1986. He said that he used to make profit of K75.00 daily when he used his truck to carry firewood, sand, bricks and some produce on behalf of Admarc. He claimed a total of K7,575.00 being loss of profit for 100 days. He produced in evidence Exhibits 15 and 16 which showed his collections when he used his truck for business. Absent from Exhibits 15 and 16 were items of expenditure relating to cost of labour, fuel and the usual wear and tear of the vehicle. There was no indication of expenses relating to repairs done to the vehicle during the relevant period. I thought that the profit claimed was not properly computed. I found the claim misleading and I reject it.

Then the plaintiff claimed general damages for loss of use and enjoyment of the truck during the time that it was in the garage. This truck was used for business purposes. It was not in my view intended to be used for ordinary pleasure and enjoyment. I do not understand this claim and I reject it. The plaintiff finally claimed general damages for discomfort and inconvenience. I am unable to find much difference between this claim and that relating to loss of use and enjoyment. My remarks relating to damages for loss of use and enjoyment apply equally to this claim which is also rejected.

I enter judgment in favour of the plaintiff for the sum of K3718.57. He shall get costs of this action.

PRONOUNCED in open Court this 16th day of June, 1992, at Lilongwe.


D.G. TAMBALA
JUDGE