IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 112 OF 2006**
HOLDEN AT NDOLA

BETWEEN: TRYSON MTONGA - APPELANT

AND

WARREN NGAMBI - RESPONDENT

Coram: Sakala, CJ., Silomba and Mushabati, JJS.
On 5th December, 2006 and 6th March, 2007.

For the Appellant: W. B. Nyirenda, SC., of William Nyirenda and Company.

For the Respondent: M. Kabesha of Kabesha and Company.

JUDGMENT

Mushabati, JS., delivered the judgment of the Court.

This is an appeal against the judgment of the High Court which was passed in favour of the respondent.

The appellant was sued for recovery of US $3,500 or Kwacha equivalent following upon an agreement made between the appellant and the respondent arising of the damages occasioned to the respondent's mini bus by the appellant's son through a road traffic accident.

The respondent further claimed for damages for loss of business.

The undisputed evidence on record was that the respondent's mini bus was involved in a road traffic accident with a Toyota Cressida which was driven by one Bupe Chalwe, a 17 year old boy, who was the appellant's son. The appellant's vehicle was taken and driven away in his absence, out of

town. When the appellant heard of the accident he travelled back to Kitwe. He and his son went to Wusakile Police Station where after some discussions with the respondent; it was agreed that the appellant should pay the respondent US $3,500. This was reduced into writing and it was signed by both the appellant and the respondent and witnessed by a Police Officer. The appellant failed or neglected to pay the said sum of US $3,500 and so the respondent sued for the recovery of the same.

The learned trial judge after reviewing the evidence on record found for the respondent on all heads and ordered for assessment of damages for loss of business. It is against these findings that the appellant now appeals to this Court.

He filed three grounds of appeal namely:-

1. ***That the lower Court erred at law when it found that an agreement signed at the Police Station in the presence of a Police Officer can not be said to have been under undue influence.***
2. ***That the lower Court erred at law in awarding damages to be assessed when no negligence or at all giving rise to damage was pleaded in the Statement of claim.***
3. ***That the lower Court erred at law and facts when it failed to take into account the appellant's laybyrinth of evidence of undue influence.***

These grounds of appeal were buttressed by written heads of argument and oral submissions. The appellant's counsel argued the last ground first. In his argument, Mr. Nyirenda, SC., said the trial judge erred when he found that the agreement was freely signed without undue influence and that he was wrong to base his finding on the said agreement. He further argued that

the appellant was never charged with any offence. Neither was he sued in his capacity as the next friend of the minor who was involved in the accident because he himself was not a party to the said accident.

On the first ground which was more or less similar the third one the State Counsel argued that they pleaded undue influence because the said agreement was signed at a Police Station in the presence of a Police Officer and that he was threatened with prosecution if he did not sign it. He argued further saying the said agreement had no consideration and so it was not binding.

On the second ground of appeal Mr. Nyirenda argued that the court below erred in awarding the respondent damages when no negligence was ever pleaded in the statement of claim. The negligence that was alleged was against the driver and not the appellant.

In reply Mr. Kabesha, on behalf of respondent, relied on his written heads of argument which he augumented with oral submissions. The gist of Mr. Kabesha's written heads and submissions was to the effect that the appellant was sued on his own word because he had offered to pay the said sum. His offer to do so was reduced into writing, thus binding on him. On undue influence Mr. Kabesha argued that this could not be exerted on him since he was a third party, who was not involved in the accident. The appellant himself was in fact unknown to the respondent. He freely entered into the negotiations, that gave rise to the written agreement, upon which he was sued. The fact that the negotiations between himself and the respondent took place at a Police Station was not enough proof of undue influence because the Police Officer was not involved in the actual negotiations. He only got involved at the end, when he was asked to sign the written document as a witness.

We have considered the evidence on record, the written heads of argument and submissions by both counsel.

We are satisfied that the appellant was indeed not the tort-feaser in this case. The actual person who should have been sued was his son.

We are also satisfied that the issue of liability in this case was never an issue in the court below. The appellant was sued purely on the document that he signed at the Police Station in which he made an under-taking that he was going to pay US $3,500 as damages for the respondent's damaged mini-bus.

We must therefore, at this stage, state that in considering the appellant's second ground of appeal, we are convinced that the question of negligence is not an issue for our consideration. It is even clear from the endorsement on the writ and the statement of claim that negligence was not pleaded and rightly so because liability was already admitted by the appellant by his own conduct. The appellant was sued on his own under-taking which was construed as a contract between himself and the respondent, independently of who was to blame for the accident between the appellant's son and the respondent's driver.

The real question before us is whether the appellant was bound by that agreement. Two issues have been raised on behalf of the appellant. These were undue influence and lack of consideration for the said agreement.

We shall first consider the question of undue influence, which is the basis of the first and third grounds of appeal. We shall consider them together as one. We have read the evidence on record. We find that the negotiations which calumniated into the agreement now under review were between the appellant and the respondent. Admittedly, they took place at the Police Station or within the Police premises. There is, however, no

evidence on record proving that a police officer was actively involved in the negotiations or discussions. Neither was the appellant in Police custody. He was not the possible suspect in the case of the accident in which the two vehicles were involved. According to him, one of the factors that led him into signing the said agreement was that his son was remorseful of what he had done. We, therefore, find that the appellant did so in order to save his son from possible prosecution for a traffic offence, possibly careless or dangerous driving.

In our well considered view, we find no impropriety on the part of the police officer who merely witnessed the signing of the said document. The document was purely the parties' own. The consenting parties were both adults, so the question of undue influence did not arise. This argument has no merit and so it is dismissed.

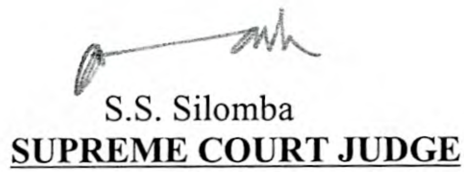
It was argued in the alternative that though the document was signed, it was not binding because it lacked consideration. The respondent did say "I have sued the defendant for not paying $ 3,500 as per agreement." This to us meant that had the appellant not offered to pay the said sum of $3,500 the respondent would not have sued him but his son. Consideration need not be measured in monetary terms. Consideration is either some detriment to the promisee or some benefit to the promisor. The respondent, who is the promisee in this case, suffered some detriment in that instead of suing Bupe Chalwe, the appellant's son, for damages to his vehicle, he did not do so because of the under-taking by the appellant. We find that there was sufficient consideration in this case that made the contract between the two binding. In fact the only defence raised in the appellant's pleadings was that the agreement, though admitting signing it, was made under undue influence

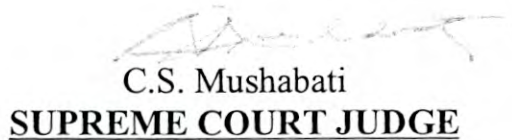
of the plaintiff. The issue of consideration was never raised as a defence in the court below. It cannot, therefore, be raised on appeal.

We have already dealt with the issue of undue influence and we said there was none that was exrted on him to enter into the said agreement. So in conclusion we must say we find no merit in the entire appeal and it is dismissed with costs.

In default of agreement the costs shall be taxed. The damages for loss of business shall be assessed by the Deputy Registrar as ordered by the trial court.

E.L. Sakala
CHIEF JUSTICE


S.S. Silomba
SUPREME COURT JUDGE


C.S. Mushabati
SUPREME COURT JUDGE