

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

APPEAL NO. 189 OF 2004

(CIVIL JURISDICTION)

BETWEEN:

ZAMBIA RAILWAYS LIMITED

APPELLANT

AND

PAULINE S MUNDIA

1ST RESPONDENT

BRIAN SIALUMBA

2ND RESPONDENT

Coram: Lewanika, DCJ, Chitengi and Silomba, JJS

On 2nd August, 2006 and 17th April, 2008

For the Appellant : Mr. M. Nsefu (now deceased), In-house Counsel

For the Respondent : Mr. M. Muyawala, Dzekedzeke & Co.

J U D G M E N T

SILOMBA, JS, delivered the judgment of the Court.

We regret the delay in the delivery of the judgment, which was due to the heavy work schedule.

When we heard the appeal, the Honourable Deputy Chief Justice, Mr Justice David Lewanika, was a member of the panel but passed on before the judgment was ready. This judgment is, therefore, by the majority.

This appeal is against the judgment of the High Court dated the 29th October, 2002 in which the respondents (as plaintiffs in the Court below) claimed damages caused to their motor vehicle, as well as, damages for the

injuries sustained and loss of business while in the hospital following a collision with the appellants' train at the shikoswe road/railway crossing in Kafue. The Respondents alleged that the accident was caused by the negligence of the appellant. The appellant denied the claims and the allegations and counter-claimed, in its defence, for special damages caused to the train as a result of the negligent driving by PW 2.

The evidence in support of the claim was that on the 4th of December 1995 the Respondents were in a motor vehicle, namely, a BMW 520 model, registration No. 239T and were driving on the great North Road towards Lusaka. The driver of the vehicle was the 2nd Respondent (PW2), the brother of the 1st Respondent (PW1). They drove past Kafue town and as they reached the road/rail crossing at shikoswe in Kafue the vehicle stopped. The time was between 19 hours and 19 30 hours.

According to the evidence of PW 1, Mrs Pauline Mundia, there were no lights, no robots or any signal of light at the road/railway crossing to show that the train was coming. As her young brother (PW 2) started off to cross the railway line, she heard a bang. Instead of the vehicle going forward they were pulled to the left up to 100 meters away when they stopped. It was at this point that PW 1 heard the noise of the train and realised that they had been moved by the train.

The motor vehicle was suspended and when she came out it was as if she was jumping out from a truck; she pulled out PW 2 who could not come out on his own. After pulling her brother out, that was when she felt the pain and injury to her body. The two of them (PW 1 and PW 2) were later rushed to Kafue clinic.

The further evidence of PW 1 was that when they stopped , there was a truck from Lusaka going to Kafue which also stopped on the other side of the railway line. When the truck crossed, they also crossed at the same time and heard a bang. As far as she could recall, that was not her first time to cross the railway line. By the nature of her mining business in Kalomo District, she used to cross the railway line every after two weeks. Even if it was dark and there was no light she knew that she was approaching the railway crossing and that was why they stopped. Apart from the injuries they sustained, the motor vehicle was extensively damaged and was completely written off.

Her evidence in cross-examination was that when they approached the railway crossing there was no any other vehicle in front of them and that they had to stop because they were obliged to do so before crossing a level crossing. She denied that they over-took other vehicles before crossing the railway line but admitted that they stopped for a short time and then took off. She also denied that PW 2 was in a hurry and that was why he did not observe what was happening around. According to PW 1, they were hit on the driver's side when they were between the two railway tracks.

The evidence of PW 2, the driver of the BMW, was that he stopped at the railway crossing to check on both sides of the railway line, then he decided to cross. Soon after wards, he heard a bang on the right hand side of the vehicle and that was all he could recall. He later found himself in hospital at UTH after being unconscious for three days. He, however, recalled that as he approached the railway crossing he could not see any sign, such as, warning light or someone waving a light. He denied that he

was tired after driving from Harare to Kafue. PW 2 was later prosecuted and acquitted of the charge of failing to give way to a locomotive train.

In cross-examination, PW 2 told the trial Court that there were humps before the railway crossing and that after going over those humps he stopped just before the crossing. He recalled that there was a truck from the opposite direction which crossed, he then crossed but was hit by the train while he was on the railway track.

The evidence in rebuttal was spearheaded by DW1, DW 2 and DW 3. DW 1 was the freight train guard and was in charge of the train that was involved in the accident on the 4th December 1995 at the Shikoswe (Kafue) level crossing. The train was bound for Lusaka and on the way it developed a mechanical fault and so they had to go back to Kafue station in reverse so that the engine could be attended to. DW 1 was on the last wagon of the train.

According to the evidence of DW 1, he signalled the train driver to stop when the train was fifty metres away from the level crossing and the train stopped. DW 1 disembarked and went to the level crossing to stop motor vehicles from crossing the railway line. The witness had a hand lamp signal which displayed a red light to the motorists who were approaching the level crossing from either side. He stood in the middle of the two railway tracks to make himself visible to the on-coming motorists.

Besides the hand lamp of DW 1, the level crossing was marked by St. Andrews Cross, the cross which was painted in reflective material to caution motorists that they were approaching the level crossing. There were also crush barriers in steel on the either side of the level crossing that were

painted in reflective colours to warn motorists that they were approaching the level crossing.

While at the level crossing, DW 1 saw five motor vehicles stop in response to the signals he gave. The vehicles were from Kafue and were going to Lusaka. According to DW 1, the car driven by PW 2 was not in front of the five vehicles that had stopped. The witness later saw a truck from Kafue and behind the truck was a red saloon car. The truck did not stop and so did the red saloon car. They both ignored the red signal DW 1 had displayed in front of them. The truck crossed the level crossing but the red car hit into the train.

The further evidence of DW 1 was that after the red car hit into the train it swerved on the side and got hooked to the centre of the train and was dragged for about 20 metres when DW 1 signalled the train driver to stop. His evidence was that the train had the right of way and that there was no way it could have left the rails to go and hit into someone's car. He blamed the respondents for causing the accident by ignoring the signals.

When DW 1 was cross-examined, he told the learned trial judge that the flash lights were not working from sunset to sunrise and that, that was why he held the red light to protect motorists and the train that was crossing the road. He testified that the red light could be seen about 800 metres away.

The further evidence of the appellant was that in the absence of flash lights there were, in terms of the Operating Rules of 1974, two types of signals for day and night time. As for the day time, the red flag was used to tell the motorists that they were required to stop while at night the hand lamp signal with the red light is used to stop motorists. The second witness,

Gilbert Mutale, Senior Safety Inspector, based in Kabwe, supported the evidence of DW 1. His evidence was based on a report compiled after the accident.

At the end of the trial, the learned trial judge went through the evidence, the written submissions and the cases cited by the parties. On the evidence, the learned trial Judge found that the flash signals at Shikoswe level crossing were defective with the full knowledge of the appellant. As for the use of make shift torch by the train guard on that fateful evening of the accident, the learned trial Judge found that the torch could not adequately illuminate the level crossing.

The learned trial Judge agreed with the law in Section 203 of the Roads and Road Traffic Act, Chapter 464 of the Laws, which requires all vehicles on the road to give way to any railway locomotive or rolling stock which is approaching or crossing such road by means of a railway line. Despite the mandatory provision in the foregoing section, the learned trial Judge thought that the appellant was bound, first and foremost, to comply with the provision of flash lights at the level crossing before the blame could shift to the travelling public.

Taking into consideration the failure by the appellant to provide road precautions at the level crossing and the breach of the general duty of the respondents to look out and stop at the level crossing to ascertain whether it was safe to cross, the learned trial Judge found both the appellant and the respondent liable in negligence in the following proportions. The appellant was ordered to pay 70 % of the respondent's assessed damages while the respondents were ordered to pay 30% of the appellant's assessed special damages it counter-claimed.

The appellant, not being satisfied with the outcome of the proceedings in the Court below, has appealed to this Court by filing three grounds of appeal. These are as follows:-

1. **All vehicles on the road have a statutory duty to give way to railway rolling stock which is approaching or crossing such road by means of a railway line. The lower Court erred in law in refusing to agree with the provisions of Section 203 of Chapter 464 of the Roads and Road Traffic Act.**
2. **The appellant should not be held negligent where the accident was due solely to the negligence of the car driver in failing to stop before the level crossing.**
3. **The lower Court erred in finding the appellant liable.**

Both parties to the appeal filed heads of argument on which they relied upon. The heads of argument were augmented with oral submissions. In his submission, Counsel for the appellant indicated to us that he would argue ground one separately while grounds two and three were to be argued together. On our part, we found the filed heads of argument of the appellant to be too brief than is usually the case. As such, we shall simply reproduce them in their entirety instead of summarising them.

Under ground one, Counsel argued in his heads of argument that the lower court erred in law by refusing to find that Section 203 (1) of Chapter 464 of the Roads and Road Traffic Act (hereafter to be called “the Act”) makes it mandatory that all vehicles on the road have a statutory duty to give way to railway locomotive or rolling stock which is approaching or crossing such road by means of a railway line.

In his oral submission, Counsel submitted that the learned trial Judge found that the Act placed on the appellant the duty to provide flashing lights at railway crossings and that the flashing lights must always be functioning. However, in the face of so much evidence that there was alternative mode of dealing with motorists approaching the level crossing the learned trial Judge completely ignored all the evidence before him and in consequence came to a wrong decision.

Counsel contended that the question the learned trial Judge asked himself as to who was responsible for ensuring that there were flashing lights at the railway crossing was wrong. According to Counsel, the question should have been: Did the appellant take due care and diligence to indicate to approaching motorists that there was a railway crossing? Counsel submitted that the learned trial Judge did not address himself to the issue in contention but simply made a finding that the absence of flashing lights at Shikoswe level crossing amounted to negligence. It was a misdirection, Counsel contended, for the learned trial Judge to conclude that there was negligence because there were no flashing lights when the appellant's Operating Rules made by the Minister were so clear. We shall revert to the Operating Rules of 1974 later.

On grounds two and three, Counsel submitted in his heads of argument that the lower Court erred and misdirected itself by disregarding the evidence of DW 1 who testified that at the time of the accident in issue he was at the level crossing with a hand lamp signal displaying a red light to stop approaching motorists from crossing the line of rail. By not addressing the material evidence of DW 1 and proceeding to find the appellant

negligent, the learned trial Judge failed to deliver a reasoned judgment, it was argued.

In his oral submission, Counsel contended that it was a misdirection for the learned trial Judge to disregard the evidence of the appellant's witness, DW 1, who was the only witness at the scene of the accident without stating why he disregarded his evidence. Counsel submitted that DW 1 was the witness who testified in the court below that he signalled and five cars stopped while the respondents overtook all these cars and collided with the train. What the trial court characterised as a make-shift torch was in fact the standard equipment for DW1, Counsel submitted.

In response and in relation to ground one, Counsel for the respondent submitted from the heads of argument that the mandatory provision in Section 203 of the Act was subject to the proviso thereof. In particular, it was pointed out that for Section 203(1) to apply, the proviso must be complied with in full, which was not the case in the case at hand. We shall revert to the proviso later.

Counsel submitted that on the day of the accident the specified safety devices were absent; that in the absence of working safety devices to show that the train was approaching the road crossing, the appellant was negligent. Counsel submitted that in the case of Shikoswe level crossing the appellant failed to prevent the accident from happening because of the faulty safety devices at the crossing.

With regard to the second ground of Appeal, Counsel submitted in the respondents' heads of argument that the learned trial Judge did not disregard the evidence of DW1. According to Counsel, this was the witness (DW1) who stopped the train 50 metres away instead of the prescribed 100 metres

(see **Rule 44 of Operation Rules of the appellant**), came and stood at the level crossing briefly to warn approaching motorists by flashing the red signal lights and went away to talk to the locomotive driver to reverse the train back to Kafue station leaving the crossing unmanned. Counsel submitted that the conduct of DW1 was dangerous to approaching motorists, especially that there were no flashing lights at the level crossing. We were urged not to accept the argument that DW1 acted properly on the date of the accident.

On ground three, Counsel submitted that the learned trial Judge did not fail to deliver a reasoned judgement. Counsel submitted that the learned Judge made his finding of negligence based on the evidence before him and as far as he was concerned the position could not be changed. Counsel argued that as an appellate court we could not reverse a finding of fact unless we were satisfied that the finding in question was either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings, which on a proper evaluation of the evidence no trial court, acting correctly could reasonably make. The case of *The Attorney-General vs. Marcus Achiume* was cited in aid.

In his oral submission, Counsel covered all the three grounds together merely to emphasise what was contained in the heads of argument.

The proceedings before the trial court, as contained in the record of appeal, as well as the judgement appealed against, have been evaluated in detail by the appellate Court. Also evaluated are the heads of argument and oral submissions of Counsel made before us. The issue in contention is the finding by the trial court that the appellant was liable in negligence when the train collided with the car belonging to the respondents at Shikoswe level

crossing at Kafue and all the three grounds of appeal are challenging that finding and the subsequent awards. In the circumstances, we have decided to deal with the three grounds of appeal together.

Arising from the record of appeal, the filed heads of argument, the authorities cited to us and the oral submissions of counsel, it is common cause that on the 4th December, 1995, between 19.30 and 20.00 hours there was an accident involving a BMW 520 salon car, red in colour and the train at Shikoswe (Kafue) level crossing. In the accident, the vehicle and the train were damaged and PW1 and PW2 were injured.

According to the statement of claim of the respondents, the cause of the accident was negligence on the part of the appellant for failing to install adequate lighting and sign post the road/railway crossing, as well as, make the traffic lights function properly. In its defence, the appellant denied the allegations of negligence and instead counter claimed K613,793:40 as special damages, alleging negligence on the part of the respondents as the cause of the accident. The defence further alleged, inter alia, that the 2nd respondent failed to observe traffic signs and failed to give way to the train as he approached the Shikoswe (Kafue) level crossing.

From the evidence of the respondents, it would appear that the 2nd respondent (PW2) briefly stopped the motor vehicle at the road/railway crossing, checked on both sides of the railway line for any approaching train and decided to cross the railway line. Soon afterwards he heard a bang on the right hand side of the driver's seat and he fainted. He remained unconscious for the next three days. The evidence of PW1, the passenger in the car and sister to PW2, was that there were no lights, robots or any other

signal of light at the level crossing to indicate or show that the train was coming or approaching the road.

PW1 was very familiar with the level crossing because she had been there several times. Even though there were no traffic signs, they stopped because she knew the level crossing well. According to her evidence, there was a truck on the other side of the railway line going to Kafue town. It had stopped at the time they had also stopped. When the truck started to cross, they also started off. It would appear the truck crossed without an incident but luck was not with them because soon after they had started to cross she heard a bang.

On the other hand, the main evidence of the appellant through DW1, the eye-witness and at the same time the train guard, was that the train was on its way to Lusaka and after crossing the road at Shikoswe (Kafue) crossing, it developed some fault and had to reverse back to Kafue railway station for the fault to be worked on. He signalled the train driver to stop and he, accordingly, stopped the train some 50 metres away from the road railway crossing.

DW1 then walked to the level crossing to stop motor vehicles from both sides of the railway line from crossing the railway line. He stood in the middle of the two rail tracks and held two lamps, which displayed red reflective lights to approaching motorists to caution them that they were approaching the railway line. As he waved the lamps, five motorists from Kafue going to Lusaka stopped at the crossing. Besides the red lamp signals, there were crash barriers and the St Andrews Cross, in reflective material or colours, which were erected on both sides of the level crossing to warn approaching motorists.

While DW1 was on the level crossing and because some cars had stopped he signalled the train driver to start moving in reverse. According to the evidence of DW1, he then saw a truck from Kafue, followed by a red salon car, overtake the five cars that had stopped. The truck was lucky to cross the rail line but the same luck was not with the driver of the red salon car who ended up hitting into the train. As far as DW1 was concerned , the respondents' car never stopped before crossing.

This was the evidence in context that was before the learned trial Judge. On our part we shall, as a first step, deal with the argument of Counsel both in their heads of argument and oral submissions on substantive law as contained in Section 203(1) of the Act. The law in the aforesaid section makes it mandatory for all vehicles to give way to any railway locomotive or rolling stock approaching or crossing such roads by means of a railway line.

Under the proviso, the mandatory provision in sub-section (1) of Section 203 can only apply when all reasonable steps have been taken to clearly and properly indicate the railway crossing by means of appropriate traffic signs. In the case of a level crossing specified by the Minister by gazette notice, as is the case with Shikoswe level crossing, all reasonable steps must be taken, between sunset and sunrise, to illuminate such level crossing so that rolling stock on such level crossing is clearly visible at a distance of 100 metres. The law, in sub-section (2) of section 203 of the Act, makes it a criminal offence for any person who fails to comply with the provisions of subsection (1).

In the appeal before us, we are dealing with a civil case and not a criminal case. 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 assents a claim in a civil trial must prove on a balance of probability that the other party is liable. In these proceedings, the respondents alleged negligence against the appellant as the cause of the accident. It was, therefore, their duty to prove that the appellant was negligent for their claim for damages to succeed on a balance of probability.

According to the learned author of Winfield and Jolowicz on Tort, Tenth Edition, at Page 45, 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, according to the learned author, cannot always be kept apart in their application as they are simply three different ways of looking at one and the same problem.

Coming to the case at hand, there is no doubt that the appellant, as the then operator of the Railway System in Zambia, was under a legal duty towards the respondents and other road users to exercise care in the operation of the locomotive train or rolling stock as it approached the level crossing. On the evidence, can we say that the appellant breached that duty, resulting in the damage to the vehicle of the respondents, as well as causing injuries to the respondents?

There was evidence that was not challenged that at Shikoswe level crossing there were the St. Andrews cross and crash barriers that were

erected on both sides of the railway line warning motorists that they were approaching a railway crossing. Both the St. Andrews Cross and the crash barriers had reflective colours. The appellant admitted that there were no illuminating lights (also known as flashing lights) at Shikoswe level crossing to illuminate the rail crossing from sunset to sunrise so that the crossing is clearly visible to motorists at a distance of 100 metres.

However, in the absence of the illuminating or flashing lights, the appellant provided hand lamps with red lights, which DW 1 held and swung to warn approaching motorists. According to DW 1, five approaching motorists responded by stopping to give way to the train. This piece of evidence was also never challenged by the respondents in the cross-examination of DW1. They never called any independent witness to contradict DW 1. Even the husband of PW 1 who was following the respondents behind was never called as a witness for the respondents to contradict DW 1.

Contrary to the finding of the learned trial Judge, our view is that in the absence of flashing or illuminating lights the appellant had put in place adequate safeguards to warn motorists that they were approaching the level crossing. The additional safeguards were meant to reinforce the St. Andrews Cross and crash barriers in reflective colours.

There was a legal basis for using hand lamps in the absence of flashing or illuminating lights at the level crossing. In terms of Rule 44(a) and (g) of the Operating Rules, 1974 of the appellant, the Rules that are approved and prescribed by the Minister in charge of railway transport, in accordance with the *Zambian Railways Act*, it is provided as follows÷

- 44 (a):** When propelled train movements and all shunt movements are being made over a level crossing not provided with automatic protection devices or when such devices are not functioning properly, such crossings must be protected by a member of the train or shunt crew standing at the crossing. Under these circumstances, the speed of trains and shunt movements must not exceed 15km/h.
- 44 (g):** When an employee is to protect a level crossing he will be equipped with a red flag by day, and by night or in obscure weather a light showing RED to vehicular traffic. When providing such protection hand signal for the train or shunt movement to occupy the crossing must not be given until all road traffic has been brought to a stop.

The above Operating Rule is self explanatory. More importantly, the Rule renders support to the evidence of the appellant. On the other hand, we find, on the evidence of DW1, that the BMW car, driven by PW 2, did not stop at the railway crossing: that PW 2 overtook other cars that had stopped in obedience to the warning given by DW 1. We find also that PW 1, being familiar with Shikoswe level crossing, failed to prevail on PW 2, her young brother, to stop and wait for the train to pass.

We further find that it was not true that PW 2 was the first to stop at the railway crossing at the same time as the truck on the apposite side stopped. We say so because if they had started off to cross the rail line at the same time as the opposite truck did, it is the truck that would have been hit

first by the train, because it was slow to start and was next to the last wagon of the train. In our view, the truth appears to be that the BMW car was following the truck, which crossed first leaving the respondents' car at the mercy of the train.

In conclusion, we are satisfied that in the absence of the flashing lights at Shikoswe level crossing the appellant had provided adequate warning devices resulting in five motorists stopping to give way to the train. For the respondents to overtake the parked motor vehicles and cross the railway line was a clear act of negligence on the basis of which we find them liable. The appeal is allowed with costs to the appellant to be taxed in default of agreement. On the same evidence and findings, we uphold the counter-claim of the appellant and the issue of quantum of special damages is referred to the learned Deputy Registrar for assessment.

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D. M. LEWANIKA
DEPUTY CHIEF JUSTICE

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P. CHITENGI
SUPREME COURT JUDGE

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S. S. SILOMBA
SUPREME COURT JUDGE