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**IN THE SUPREME COURT OF ZAMBIA Appeal No. 51/2009**

**HOLDEN AT LUSAKA/NDOLA SCZ JUDGMENT NO. 3 OF 2012**

**(Civil Jurisdiction)**

**B E T W E E N:**

**MIDLANDS BREWERIES (PVT) LIMITED APPELLANT**

**AND**

**DAVID MUNYENYEMBE RESPONDENT**

***Coram: Sakala, CJ., Silomba and Chibomba JJS.***

 ***On 3rd November, 2009 and on 18th January 2012.***

*For the Appellant: Mr. G. Nyirongo of Nyirongo & Co, Kitwe.*

*For the Respondent: Mr. D. Mazumba of Douglous and Partners.*

**J U D G M E N T**

**Chibomba, JS, delivered the Judgment of the Court**.

**Cases referred to:-**

1. Attorney General vs. Peter Ndhlovu (1986) Z.R. 12

2. Attorney General vs. Achiume (1983) Z. R. 1

3. Mary Musambo Kunda vs. The Attorney General (1993-94) Z. R. 1

4. Kafue District Council vs. Chipulu (1995-97) Z. R. 190

5. Victor Koni vs. The Attorney General 1990-92 Z. R. 20

6. Livingstone vs. Rawyards Company (1880) 5 A. C. 25

7. Duncan Sichula and Muzi Freight Forwarding Limited vs. Catherine Chewe (2000) Appeal 123 S.C.Z.

 When we heard this appeal, Mr. Justice Silomba sat with us. He has since retired. This Judgment is, therefore, by the majority.

 This appeal is against the decision of the Deputy Registrar at assessment. The learned Deputy Registrar awarded the sums of

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K6,500,000 as towing charges, K26,000,000 as repair costs of the respondent’s minibus and K349,600,000 as loss of business for 184 days, the period under which the minibus was not operational. He also awarded interest at short term deposit rate from the date of the Writ up to the date of Judgment and thereafter at current lending rate determined by the Bank of Zambia and costs.

The facts leading to this appeal are that the respondent, a business man, was running a fleet of minibuses. He was the owner of a Mitsubishi Rosa minibus, Registration No. ACH 1442, which used to operate on a daily route of Kitwe/Lusaka/Kitwe. On 16th August 2008, the minibus was involved in a road traffic accident with the appellant’s motor vehicle, a Mitsubishi Fuso Fighter, Registration No. ABG 2822. The respondent’s minibus was damaged and it was off the road for a number of days. The respondent commenced an action in the High Court at Kitwe, claiming damages for loss of use of the mini-bus, repair costs and towing charges.

By Consent Order dated 7th October 2008, the parties agreed that Judgment be entered in favour of the respondent against the

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appellant for damages to be assessed by the Deputy Registrar and costs. The learned Deputy Registrar, at assessment, awarded the sums mentioned above to the respondent.

Dissatisfied with the awards, the appellant appealed to this Court advancing three grounds of appeal as follows:-

**“1. That the learned Deputy Registrar erred at law and facts when he awarded K6,500,000.00 for towing charges without documentary proof and or receipts.**

**2. The learned Deputy Registrar erred at law and facts in awarding the Respondent the sums of K349,600,000.00 loss of business and K26,000,000.00 repair costs without any documentary proof and or books of accounts for the Respondent.**

**3. The learned Deputy Registrar erred at law and facts in completely disregarding the appellant’s evidence at the hearing.”**

The learned Counsel for the appellant, Mr. Nyirongo, relied on the Heads of Argument filed. He also augmented the Heads of Argument with oral submissions. The three grounds of appeal were argued together. It was argued, in the said grounds of appeal, that the learned Deputy Registrar misdirected himself when he awarded the above sums as repair costs, towing costs and loss of business. Our attention was drawn to the learned Deputy Registrar’s ratio decedendi which is couched as follows:-

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“**There is no documentary evidence to prove how much was being made per day and how much was spent on towing the minibus from Lusaka to Kitwe. In this case, the Respondent will be awarded his profit which he has lost as a result of accident from 16th August, 2007 to 15th February, 2008 when the bus left the garage….1st Defendant is also under the obligation to refund towing expenses. It is the 1st Defendant who made the respondent incur that one. The booking fee is not supported by any document. However, the Court has awarded the whole of K6,500,000.00 in that there is no fixed rate of towing charges. Each one charges his/her own rates.”**

It was argued that this decision is wrong as there was no evidence to support these findings. Further that this also shows that the Deputy Registrar did not analyse the evidence adduced by the appellant as he merely found for the respondent. We were, accordingly, urged to reverse these findings on the basis of our decisions in the cases of **Attorney General vs. Peter Ndhlovu1**, **Attorney General vs. Achiume2**, **Mary Musambo Kunda vs. The Attorney General3** and **Kafue District Council vs. Chipulu4**.

It was argued that the ratio decidendi and dicta in the above cited cases were to the effect that the appellate Court will not generally reverse the findings of facts made by the trial Judge, except where the appellate Court is satisfied that the findings of the lower Court **were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or they were findings which on a proper view of the evidence, no**

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**trial Court acting correctly can reasonably make.** (emphasis is ours).

It was pointed out that in **Mary Musambo Kunda vs. The Attorney General**3,this Court dealt with a claim for loss of profit and lamented the failures by plaintiffs to adduce evidence to quantify the net loss. We also discouraged the practice of expecting the Courts to make inspired guesses. We then went on to award a token sum of K1,000 in acknowledgment that the respondent in that case had lost something but which she did not prove. In that case, in a claim for loss of profits for a month amounting to K87,000 when the grocery shop was closed, the respondent had admitted to not keeping accounts. The respondent did not adduce evidence to quantify the net loss. We also said this failure must react against her.

 It was argued that in **Kafue District Council vs. Chipulu4,** in which we dealt with a claim of K100,000.00 as transport and up keep costs which was not supported by documentary evidence, we accepted the evidence that the respondent travelled from Chipata to Kafue with his family and then back to Chipata. We, however,

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observed that the general rule that any shortcomings in the proof of a special loss should react against the claimant. We also stated that in order to do justice notwithstanding the indifference and laxity of most litigants, the Courts have frequently been driven into making intelligent and inspired guesses as to the value of special losses on meager evidence.

It was contended that in the current case, the learned Deputy Registrar made a glossy imbalanced evaluation of the evidence as he did not evaluate the documentary evidence adduced by the appellant. That PW1’s evidence was that before the accident, he used to keep receipts but that these had been misplaced. That therefore, since no documentary proof was produced to support the claim for loss of profit and towing charge, it was wrong for the Deputy Registrar to award the said sums. Further that PW1 also testified that Receipts and accounts to show the repair costs were there but that the one who was keeping the books of accounts was dead and that the books were at his home for security reasons.

It was argued that PW1 did not, however, give reasons why he did not bring the receipts and books of accounts to Court. That,

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therefore, on the basis of the above cited cases, the respondent’s indifference and laxity should react sharply against him as his failure to provide the much needed evidence was calculated to defeat the ends of justice. That, accordingly, a token sum should be awarded as loss of business and as towing charge. Further that receipts were not produced to show that K35,000,000 claimed as repair costs was infact paid to Okavango Garage for the body works. We, were accordingly, urged to award the sum of K18,000,000 as repair costs.

In his oral submissions, Mr. Nyirongo referred to the case of **Victor Koni vs. The Attorney General5** and submitted that this case should be distinguished from the current case in that in the earlier case, the decision was based on the fact that it was not expected that taxi drivers, by the nature of their business, would keep receipts of their transactions. That, however, in the current case, the respondent’s evidence was that he used to keep records and books of accounts for the minibus except that he did not bring these documents to Court. The respondent, therefore, opted not to bring critical evidence to Court which could have assisted the Court

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below to make a reasoned award on the loss claimed and that this was an error.

On the other hand, the learned Counsel for the appellant, Mr. Mazumba, relied on the appellant’s Heads of Argument which he augmented with oral submissions. It was submitted that in this case, it is not in dispute that the accident occurred and that the appellant’s driver was in the wrong; the respondent’s motor vehicle which was operating as a public transporter between Kitwe and Lusaka was off the road from 16th August 2007 when the accident occurred up to 15th February 2008, when it came out of the garage.

It was contended that the respondent paid K35,000,000 as repair costs and that PW2, a witness from Okavango Garage, confirmed that the respondent paid K35,000,000 as repair costs. That, therefore, the learned Deputy Registrar was on firm ground when he awarded the said sums as repair costs, towing charges and loss of business.

In support of this argument, the case of **Livingstone vs. Rawyards Company6** was cited in which it was held that:-

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“**You should as nearly as possible get that sum of money which will put the party who has been injured or suffered in the same position as he would have been in if he had not sustained the wrong which he is now getting his compensation or reparation.”**

It was further argued that although the minibus was damaged in Lusaka, it had to be towed to Kitwe for repair at the instance of the respondent. And that this was so done so that the respondent could mitigate his loss. Therefore, that even though documentary evidence regarding towing charges and daily cashing was not provided, documentary evidence is not the only evidence that is accepted in the Courts of Law. Viva voce evidence is also accepted especially where the oral evidence appears to be true and where no reason is given for suspecting it to be false. Further that the charge of K55,000 per passenger from Kitwe to Lusaka was not contested as the appellant did not bring any contrary figure nor did the appellant lead evidence to this effect. In support of the above arguments, the case of **Victor Koni vs. The Attorney General5** was cited in which we held that:-

**“(i) Where in the case of a business it is not customary to give receipts and where the oral evidence of loss of profit is not challenged it is not necessary for the claim to be supported by independent or documentary evidence.**

**(ii) Where as in the case of a taxi driver, to employ a driver to run the taxi whilst the appellant is incapacitated there is a real risk of the loss of the taxi; there is no duty to employ such a driver to mitigate the loss.”**   **(63)**

The case of **Kafue District Council vs. Chipulu**3 was also cited in which we stated that despite lack of evidence to support the claim for transport and upkeep costs, the claim of K100,000.00 was an intelligent and inspired guess of the special loss.

The case of **Duncan Sichula and Muzi Freight Forwarding Limited vs. Catherine Chewe**7, was cited in which we stated that an appellate Court should not interfere with an award unless it was clearly wrong in some ways such as because a wrong principle had been used or the facts were misapprehended or because it is so inordinately high or so low that it is plainly a wrong establishment of the damage to which the claimant was entitled.

It was contended that the record shows that the respondent initially claimed K3,000,000 per day as loss of business but that the Deputy Registrar reduced the sum to K1,900,000 per day after removing the expenses which the respondent could have incurred.

In augmenting his written submissions, Mr. Mazumba argued that the respondent called a witness from the Okavango Garage

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who confirmed that the respondent paid the sum of K35, 000,000.00 as repair costs.

In response to the claim that no evidence was adduced to support the claim for loss of business, Mr. Mazumba submitted that the respondent’s evidence was that although he did not bank the money from cashing, he had some proof and that the driver and the conductor can confirm how much he used to get per day. He also said that he used to spend K800,000 on fuel and K3,000,000 on personnel. And that the sum of K1,100,000 was an expense which was deducted by the Deputy Registrar. That the respondent also stated that he used to keep receipts before the accident but that he had misplaced them.

Counsel argued that although it was conceded that the Court below did not take into account days for service of the minibus and public holidays, the appellant did not challenge the respondent’s evidence on what was being made per day.

On the towing charge, Mr. Mazumba countered that the appellant was asked where the motor vehicle should be taken for repair but that the appellant’s witness said he did not know.

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Hence, the respondent towed the motor vehicle to Kitwe for repair where he used to take it before the accident.

Counsel argued that although no document for towing fees was produced, if the towing was done by professionals, it could have even cost more. Therefore, that, the sum awarded is a reasonable amount.

We have seriously considered this appeal together with the arguments advanced in the respective Heads of Argument, the authorities cited, the oral submissions by the learned Counsel for the parties and the Judgment by the learned Deputy Registrar at assessment.

In resolving this appeal, we intend to begin with the third ground of appeal. The major contention under this head is that the learned Deputy Registrar did not take into account the viva voce and documentary evidence on record as he only made sweeping findings. For this reason, this is a proper case for this Court to reverse the findings of fact on the basis of the above cited authorities. It was argued that the findings were not supported by the evidence on record.

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We have considered this ground. On perusal of the record and indeed, the Ruling by the learned Deputy Registrar, it is agreed that to a certain extent, the learned Deputy Registrar did not adequately analyze all the evidence before him as evidenced by the manner in which he couched the Ruling in question. The effect of this is that we are at large and we shall do the assessment ourselves. Although grounds one and two were argued together, we shall deal with each ground separately.

With respect to the first ground of appeal concerning the award of K6,500,000.00 as towing charge, the major contention by the appellant is that the award of this sum is not supported by any documentary proof or receipts to show that indeed, the respondent paid this sum as towing charges. We agree with the appellant’s submission that this being a special damage, the respondent should have produced receipts or some other documentary proof to show that this sum was paid as towing charges.

However, it is a fact that the respondent’s motor vehicle was a passenger transporter operating the route Kitwe/Lusaka/Kitwe. It is also a fact that after the motor vehicle was involved in a road

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traffic accident with the appellant’s motor vehicle, the minibus was off the road for some time. It is also a fact that the motor vehicle had to be towed from Lusaka to Kitwe for repair and where the respondent resides.

 It is a fact that the respondent incurred some cost for towing his motor vehicle from Lusaka to Kitwe. Therefore, although a receipt was not produced to support the claim under this head and considering the distance between Lusaka and Kitwe, we do not find the sum of K6,500,000 awarded under this head to be excessive or extravagant. Therefore, on the basis of the principle in **Kafue District Council vs. Chipulu**3, we confirm the sum of K6,500,000 awarded as towing charge under this head. The first ground of appeal therefore fails.

For convenience, the second ground of appeal is split into two portions.

The first portion challenges the award of K26,000,000.00 as repair costs. The major contention is that there was no basis for awarding this sum as the respondent did not produce any documentary proof or receipts to show that indeed, he paid this

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sum as repair charges. Further that the respondent told the Deputy Registrar that he had the receipt and that therefore, his failure to produce the receipt should react against him. We have considered these arguments. We agree that this being a special damage, a receipt should have been produced to show that indeed, the respondent paid this sum as repair costs to Okavango Garage.

We, do not, however, agree with the contention that the respondent should have taken the motor vehicle to the appellant’s chosen garage as the evidence on record has not shown any serious commitment by the appellant to take the mini-bus to its preferred garage in Lusaka. We say so because if the appellant was serious on this, the motor vehicle could have been taken for repair before it was towed to Kitwe. The record shows that a reasonable period elapsed between the date of the accident and when the motor vehicle was towed to Kitwe without the appellant picking it up for repair.

Therefore, the respondent cannot be faulted for towing the motor vehicle and taking it to the garage in Kitwe where it was repaired, especially, in the circumstances of this case where the

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motor vehicle was involved in business. This was the respondent’s effort to mitigate his loss.

We further agree that since the motor vehicle was damaged in the accident, there can be no doubt that the respondent must have incurred repair costs. It must also be noted that the purpose for awarding damages under this head is to put the plaintiff in the position he could have been had the wrong act not been committed.

Therefore, although no receipt was produced to show that K26,000,000 was paid as repair costs, there is evidence from an officer of Okavango Garage (PW2), which was to the effect that indeed, the respondent was quoted and paid K26,000,000 as repair costs.

Further, the record shows that although the accident occurred on 16th August 2007, the appellant only wrote to the respondent on 22nd December 2007 confirming the telephone conversation of that same day requesting that the motor vehicle be surrendered for repair. There is also an Invoice from Okavango Garage which is at page 21 of the record of appeal which shows that the respondent was quoted K35 Million as repair cost. The Invoice at page 21 of

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the Record of Appeal is stamped: “PAID”. Therefore, based on the principle in the case of **Victor Koni vs. The Attorney General5**, we confirm the sum of K26,000,000 awarded as repair cost after deducting the sum of K9,000,000 paid by the Insurance Company.

The second portion of the second ground of appeal attacks the sum of K349,600,000 awarded for loss of business. The major contention is that the award was not supported by any documentary evidence as the books of accounts which the respondent said he used to keep for the motor vehicle were not produced in Court. On the other hand, the respondent’s argument was that the motor vehicle used to make K3,000,000 per day. That the Deputy Registrar, however, deducted fuel and personnel expenses which left the sum of K349,600,000 awarded in this matter.

 We have considered the above arguments. It is our considered view that it is a fact that as a result of the appellant’s conduct, the respondent’s motor vehicle was damaged and that as a result, it could not be used to carry passengers at a fee. There can be no doubt that the respondent must have incurred some loss of

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business during the period his motor vehicle was not operating.

 The evidence on record shows that although the respondent had claimed the sum of K3,000,000.00 per day as loss of business, the learned Deputy Registrar reduced this sum to K1,900,000.00 per day after deducting operational expenses for personnel and fuel costs. However, it is also a fact that the learned Deputy Registrar did not take into account the days when the motor vehicle could not have operated on account of repair and service and weekends. He ought to have taken this into account.

After all is said and done and considering the distance between Kitwe and Lusaka, we would deduct one day per month for repair and service.

The learned Deputy Registrar assessed the number of days the minibus was out of service at 184 days. If 184 days is divided by an average of 30 days per month, it gives 6 months. Therefore, the total number of days to be deducted from the 184 days for service and repair is 6 days.

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We would also deduct one day per week for weekends when the driver was resting as it is not expected that the driver would work throughout without any rest. If 184 days assessed by the Deputy Registrar is divided by 7 days, it gives 26 weeks. If one day is deducted from 26 weeks, it gives 26 days as days of rest.

If the 6 days for service and repair is added to the 26 days for days of rest, it gives a total number of 32 days to be deducted from 184 days. This gives 152 days. If 152 days is multiplied by the sum of K1,900,000 per day, this gives a total sum of K288,800,000. Therefore, we award the sum of K288,800,000 for loss of business.

The second ground of appeal also fails except to the extent reflected above.

To the extent of what we have stated, the appeal is allowed.

Costs to be taxed in default of agreement are for the respondent.

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E. L. SAKALA

**CHIEF JUSTICE**

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S. S. SILOMBA H. CHIBOMBA

**SUPREME COURT JUDGE (RTD)** **SUPREME COURT JUDGE**