

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 158/2008
SCZ/8/186/2008

BETWEEN:

CUTHBERT CHINDINDINDI
AND

JUDITH NCUBE (*Suing as Administrator of the Estate
Of the late Titus Ncube*)



APPELLANT

RESPONDENT

CORAM: Chirwa, Mwanamwambwa, Chibomba, J.J.S.
On the 20TH July, 2010 and 4TH July 2014

For the Appellant:

Mr K. Simbao, Messrs Mulungushi Chambers.

For the Respondent:

Ms. Bwalya, National Legal Aid Clinic for Women.

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

Cases referred to:

1. Wilson Masauso Zulu V. Avondale Housing Project (1982) Z.R. 172 (SC).
2. The Attorney General V. Marcus Kapumpe Achiume (1983) Z.R. 1 (SC).
3. The Attorney General V. D.G. Mphundu (1984) Z.R. 6 (SC).
4. The Susquehanna [1926] A.C. 655.

When we heard this Appeal, Hon. Mr. Justice D. K. Chirwa, was part of the Court. He has since retired. Therefore, this Judgment is by the majority.

This is an appeal against the Judgment of the High Court, dated the 17th day of July, 2008. By that Judgment, the trial court awarded the Respondent damages for loss of expectation of life and funeral expenses.

The brief facts of the case are that the Appellant was driving a Fuso truck along Kafue Road. The Appellant then decided to turn into the road leading to Freedom Compound in Chilanga. The Appellant was moving from the southern to the northern direction and the deceased was moving in the same direction as well. As the Appellant turned, the deceased, Titus Ncube, hit into the truck and he was crashed by the rear wheel of the same truck and died. The Appellant was charged with the offence of causing death by dangerous driving.

The evidence on record showed that the deceased was 23 years old at the time of his death. He was in employment and earning K250,000.00 (unrebased) per month and that he had two children aged five and eleven.

After the burial of the deceased, the Appellant offered to pay the Respondent K2.5 million (unrebased) as compensation but she refused stating that the money was not enough. The insurer of the Appellant's vehicle, the Zambia State Insurance Company Limited, offered the Respondent K2.8 million (unrebased) as compensation but she refused to get this compensation as well stating that the money was not enough.

On the 30th of November, 2006, the Respondent took out an action in the High Court, for:

1. Damages for negligence, mental anguish and loss suffered;
2. Compensation for loss of future earnings;

3. Interest on the above sums;
4. Costs; and
5. Any other relief.

After evaluating the evidence and considering the submissions on both sides, the learned trial Judge stated the following:

"I observed the demeanour of the administratrix as unsophisticated individual who could not concoct the story. However, she was not a perception witness as to how the accident occurred, but did visit the scene and saw the point of impact. The defendant was being evasive by saying he did not check or see the point of impact and yet he was the driver. He admits he was charged with causing death by dangerous driving, which he agrees with the police report. His family and his insurer offered compensation to the administratrix in the sums of K2.5m and K2.8m respectively.

I find it as a fact that the defendant drove dangerously on the material day, by not taking into account the presence of the deceased as a road-user and this resulted in the accident. The Administratrix has proved her case beyond the balance of probability and I so find. However, sadly for the plaintiff, Fatal Accidents Acts, 1846 to 1908 were not pleaded under which substantial sums are claimable. I, therefore, have to proceed under the Law Reform (Miscellaneous Provisions) Act, Section 2.

I therefore order that K6m damages be awarded for loss expectation of life and K3 for funeral expenses total K9m which will attract long-term deposit rate from issuance of the writ until judgment thereafter short-term deposit rate until payment both rates have to be Bank of Zambia determined..."

Dissatisfied with the decision, the Appellant has appealed to this Court. There are two (2) grounds of appeal. These read as follows:

Ground one:

The Learned trial Judge misdirected himself in fact and law in finding negligence on the part of the Appellant when none was proven as pleaded or at all.

Ground two:

The Learned trial Judge misdirected himself in fact and law when he awarded a sum of K3 million for funeral expenses when the same were not specifically pleaded nor proved.

On behalf of the Appellant, Mr Simbao submitted that paragraph 6 of the Respondent's statement of claim shows that the particulars of negligence alleged were that:

- (a) **Appellant was driving under the influence of alcohol;**
- (b) **Appellant was over speeding; and**
- (c) **Appellant failed to observe traffic rules.**

He stated that none of the above allegations were proven at trial. That the only witness called by the Respondent was not at the scene at the time of the accident. He stated that no policeman, Doctor or bystander was called to give evidence. He argued that there was no proof for the Judge to hold that the Appellant was driving dangerously on the material day. He went on to state that as to the actual accident, the Police Report stated that the cyclist hit into the truck.

We have looked at the evidence and considered the submissions filed by the Appellant. The Respondent did not file

any submissions. On the evidence, we agree with the finding by the trial Judge that the deceased died as a result of the accident involving the Fuso Truck registration number AGA 3704 driven by the Appellant.

In an action for negligence, the particulars of the negligence need to be proved in the Court below before damages are awarded. In the present case, there is no evidence on record to show that the Appellant was driving under the influence of alcohol. There is also no evidence on record to show that the Appellant was over speeding. However, there is evidence on record to show that the Appellant failed to observe traffic rules. The Police Report at page 24 of the Record of Appeal shows that there was evidence of negligence on the part of the Appellant. The Police Report states as follows:

"ACCIDENT OCCURRED WHEN-

The Fuso truck driver turned to the right from the main road without observing due care when turning to the right, hence the cyclist hit onto the truck and crashed by same truck by the rear right wheel."

ACCIDENT WAS FINALISED AS FOLLOWS-

The Fuso truck driver was charged for causing death by dangerous driving C/Sec 199(1) Cap 464 of the Laws of Zambia and the case would be forwarded to court soon for proceedings."

In our view, the Police Report constitutes evidence of negligence even though a Police Officer was not called to testify. The documentary evidence in form of the Police Report is good evidence. There is also no indication that there were eye witnesses in this case whom the Respondent could have called. The Police Officer could have only repeated the contents of the Police Report if called. One cannot only be negligent when driving under the influence of alcohol. Therefore, we are of the view that the claim for negligence succeeds due to the Appellant's failure to observe traffic rules as supported by the Police Report.

Further, we are of the view that the offer of K2.5 million by the Appellant to the Respondent is a clear admission of negligence on the part of the Appellant.

Therefore, we are of the opinion that the Appellant drove negligently. On the authority of Wilson Masauso Zulu V. Avondale Housing Project ⁽¹⁾ and the Attorney General V. Marcus Kampumba Achiume ⁽²⁾, we do not find it justifiable to interfere with the learned trial Judge's findings of fact on negligence. We, therefore, do not find merit in ground one of the appeal and we dismiss it. We uphold the learned trial Judge's decision on this issue and confirm the award of K6 million (*unrebased*) as damages. Since the Respondent had refused to get the K2.5 million offered by the Appellant, we award interest only from the date of Judgment to date of payment. The interest awarded will be at the at the Bank of Zambia current lending rate.

In ground two, Mr. Simbao submitted that the Respondent was represented and that the law is clear when it comes to special damages.

The Court below awarded the Respondent, K3 million (*unrebased currency*) as funeral expenses. These are what are termed as special damages. Special damages are based on measurable amounts of actual loss. They must be specifically pleaded. And at trial, they should be proved by evidence that the loss was incurred and that it was the direct result of the Defendant's conduct. "*Special damages are exceptional in their character, and, therefore, they must claimed specifically and proved strictly*": **See:-**

1. A.G. v Mpundu ⁽³⁾

2. The Susquehanna ⁽⁴⁾

The normal way of proving damages is by production of documents, such as receipts, invoices, valuation reports, etc.

In the present case, no special damages were pleaded. There was no evidence laid to prove the funeral expenses that were ordered to be paid by the learned trial Judge. However, there is no doubt that the Respondent incurred funeral expenses. It is our view that this court can and has in the past awarded a nominal amount as special damages in circumstances where the damages are not proved but where there is no doubt that they were incurred. We award the Respondent a nominal figure of K2

million as special damages. For the reasons we have given in ground one, we award interest only from the date of Judgment to date of payment. The interest awarded will be at the Bank of Zambia current lending rate.

We set aside the learned trial Judge award of K3 million (unrebased), special damages and substitute it with a nominal amount of K2 million (unrebased).

Therefore, we dismiss the second ground of appeal for the reasons we have given.

All in all, we dismiss this appeal and make no order as to costs.

RETIRED

.....
D.K. CHIRWA
ACTING DEPUTY CHIEF JUSTICE


.....
M.S. MWANAMWAMBWA
SUPREME COURT JUDGE


.....
H. CHIBOMBA
SUPREME COURT JUDGE