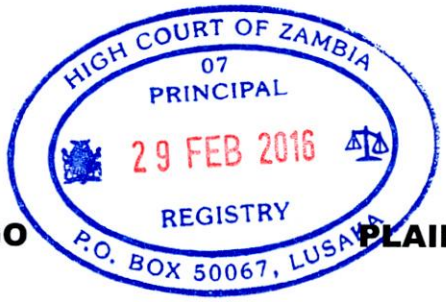
IN THE HIGH COURT FOR ZAMBIA **2014/HP/729**
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)



BETWEEN:

HECTOR BEENE HAMAZONGO **PLAINTIFF**
AND
DAVID NONDE **DEFENDANT**

BEFORE HON. MRS. JUSTICE M.S. MULENGA ON THE 29TH DAY OF FEBRUARY, 2016

FOR THE PLAINTIFF : IN PERSON
FOR THE DEFENDANTS : IN PERSON

J U D G M E N T

Case cited:

1. **Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 vol. 1 (S.C)**
2. **Miller vs Minister of Pensions [1947] 2 ALL ER 372**
3. **Mohamed and Alantra Transport Ltd v Chumbu SCZ Judgment No. 3 of 1993**

Works referred to:

1. **Mcgregor on Damages 16th Edition 1999 Sweet and Maxwell, London**

The Plaintiff commenced these proceedings by Writ of Summons dated 13th May, 2014 claiming the following reliefs:

i. *Immediate payment of K56,700.00 being money owed to the Plaintiff by the Defendant herein based on an agreement dated the 28th day of February 2014*
ii. *Interest on all monies found due*
iii. *Costs*
iv. *Any relief the court may deem fit*

The Plaintiff states in his Statement of Claim of even date that he was at all material times the owner of the vehicle namely Toyota Corolla registration number ALB 4995 and the Defendant was sued in his capacity as the person who was driving a Toyota Chaser at Nationalist - Chilumbulu cross roads junction and cut in front of the said Toyota Corolla belonging to the Plaintiff. The said accident occurred on the 10th January, 2014 at 04:30 and it was reported the very day at Kabwata Police Station. The Defendant was formally charged for careless driving but did not produce any document for the Toyota Chaser. The front part of the Plaintiff's vehicle was extensively damaged and that on 16th January it was collected for full repair and inspection.

That the Defendant, since the expiry of the agreement on 10th February, 2014, has either refused or neglected to repair the Plaintiff's car. That the value of the car at the time of purchase was K30,000.00. Further the parties herein entered into another agreement on 28th February, 2014 to the effect that the Defendant was to make payments on account number 62450892734 held with FNB in the Plaintiff's name herein. It was also agreed that the Defendant would handover the car by 4th March, 2014 and failure to do so the matter would proceed to the courts of law. That despite several reminders, the Defendant has failed to honour the second agreement and that the amount has accumulated to K56,000.00 which the Plaintiff claims herein.

The Defendant in his Defence dated 21st May, 2014 admits that there was an accident on 10th January, 2014 and that he was charged for careless driving and did not produce document for the Toyota Chaser he was driving. He further states that the vehicle was not extensively damaged but merely scratched which scratch did not require substantial attention to be repaired but that it merely took one week to be repaired. That he has never refused to reconcile save for the difficult position which has been taken by the Plaintiff.

The Defendant denies the alleged value of K30,000.00 for the Plaintiff's vehicle as there was no documentation to support the claim or assertion. He admits that the parties entered into a second agreement but states that it was entered into through duress. He denies that the several reminders issued to him had failed and states that the case and the material facts have been exaggerated and quoted out of context.

At the hearing, PW1 was the Plaintiff herein who testified that around the end of November, 2014 he obtained a loan from Investrust Bank for purposes of purchasing a vehicle which he so purchased on 25th November, 2014, namely Toyota Corolla registration number ALB 4995 valued at K30,000.00. The purchase price was K28,000.00 as shown in his bundle of documents at page 13. The registration certificate is also exhibited to that effect at page 14.

On 10th January 2015, his friend by the name of Moyo was driving the vehicle in issue along Chilumbulu road when the accident occurred as

evidenced by the police report. The Defendant admitted having been in the wrong. He then pledged to repair the car. This was on 16th January and they both agreed that he could repair it within a period of one month as per agreement at page 20 of the Plaintiff's bundle of documents. A month later, the vehicle was not handed over thus another agreement was signed on 28th February which appears in the bundle of documents. The Defendant went to the Plaintiff's office in Kalingalinga and read through the agreement, however he protested the clause indicating that handing over of the vehicle was to be on 4th March, he requested for four (4) additional days. The Plaintiff then amended the agreement to 8th March.

On 8th March, the Plaintiff pressured the Defendant to show him the vehicle which he did, the former noticed that some things had been repaired but the headlamps were tied with wires and the Defendant promised to repair them. That at one point the Plaintiff did not find the car at the Defendant's place but was informed it was in the garage. He decided to go to the Defendant's place of work and found him with the car. He noticed that the mileage was at 300km when it was at 60km when the Defendant initially took it. Thus the Plaintiff decided to collect the car as the Defendant was using it for personal errands. Consequently the Plaintiff commenced these proceedings. As regards the exaggeration of the value of the vehicle, the Plaintiff commented that he had produced the relevant documents.

Under cross examination, the Plaintiff stated that the person driving his car was a taxi driver but at the time he was not working as a taxi

driver. The Plaintiff had merely asked him to pick someone from town. The Plaintiff also stated that he told the Defendant to change the front part which was extensively damaged and to bring it to the way it was before. The things were not aligned properly, the radiator was not there and the bumper was the same as the old one. The Plaintiff then proposed that the Defendant gets or sells the car and give him the K30,000.00. The Defendant did not inform the Plaintiff that selling the car would take long. The Plaintiff stated that when a car is repaired it cannot be in the same condition as before. That is why they agreed that it would be taken for valuation and that the Defendant would pay the difference. That the difference of 400km in mileage did not show advertising but abuse to the car. The car could have been stationed when being advertised.

PW2 was Khumalo Moyo Mpanza who testified that he was the one driving the Plaintiff's vehicle on the material day when the Defendant came speeding and caused the accident. The police went to the scene and took statements from both PW2 and the Defendant at Kabwata Police Station. The Plaintiff's vehicle had fitness, road licence and insurance certificate and his drivers' licence was produced. It was however discovered that the Defendant had no similar documents. The Defendant accepted the charge and promised to repair the vehicle. He took the vehicle to the garage. There was an agreement to the effect that the Defendant would buy new parts to replace the ones that were damaged. PW2 used to go to the garage to check on the car. No new

parts were replaced but the damaged ones were maintained. In short what was agreed did not happen.

Under cross examination PW2 stated that he used to get the vehicle from time to time as he was an acquaintance of the Plaintiff. That the old or damaged parts which were repaired instead of being replaced were headlamps, bonnet and radiator. The corner lamps were tied with wires as well as the headlamps. It was not the same damaged corner lamps but second hand ones. He found them repairing or straightening the bonnet at the garage thus he was not sure whether or not they got a second hand one or it was the same damaged bonnet. The only new thing the Defendant replaced was the windscreen. The airbags were also the same and they used glue mixed with soil to pull them back together. Even the fender was merely repaired. When DW2 asked why they were replacing old things, the people at the garage said that the Defendant was difficult to pay or buy new ones so they were replacing the old ones.

The Defendant testified that the Plaintiff had given the correct events except for the agreements that were done. That after the accident he agreed to repair the vehicle and they entered into an agreement and he collected the vehicle and took it to the garage. He engaged a panel beater to work on it. The radiator was extensively damaged as well as the right corner lamp and he sourced second hand radiator, headlamp and corner lamp which were fitted. The bonnet was very badly damaged and they could not work on it as it had wrinkles. It took him a week to buy a bonnet from a car which was not working and replaced

the bonnet. The vehicle was painted and the windscreen replaced except for air bags which are difficult to replace once they explode.

When the car was released from the garage, the Plaintiff and his mother went to inspect it and said the job was substandard. The Plaintiff thus proposed that Defendant retains the car and pay the Plaintiff K30,000.00 or sell it and give him the money. It was not easy to sell the car. After some time the Plaintiff went to demand for it at the Defendant's office and threatened to issue court process. As regards mileage, when the car was in the garage, the mechanic moved it and drove it with the view of finding someone interested in buying it.

Under cross examination, the Defendant stated that it took some time to repair the vehicle as the bonnet was difficult to find. It took a month and some weeks from the time he took it to the garage. The bonnet was in good state but it was a different colour. The work was to scratch it so that the paint could hold. The corner lamp and headlamp were replaced and the grill was also worked on. The fender was worked on and not replaced. The agreement was to replace with a new one. The Defendant could not say that the vehicle was perfect after repairs as he was not a professional. As regards the repair of the airbag he stated that that is how they are repaired with sand and glue.

The Defendant also stated that despite the police indicating 05:00am as the time of the accident it actually happened around 03:00 am as at 04:30 am he was at the hospital. He also stated that he did not pay K700.00 for the towing as he had other expenses. Further that he had

not paid for the damaged security system as it had not been analyzed. That he has not paid the K100.00 per day for transport to work and back.

I have duly considered both the pleadings and the evidence on record. The Plaintiff claims for K56,700.00 as money owed based on the agreement dated 28th February, 2014, interest and costs. The burden of proof is on the Plaintiff to prove his claims to the required standard.

The Supreme Court in **Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 vol. 1 (S.C)** held that:

> **"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 asserts a claim in a civil trial must prove on a balance of probability that the other party is liable....**

Lord Denning in **Miller vs Minister of Pensions [1947] 2 ALL ER 372 at 373 -374** also stated that:

> **"That degree is well settled. it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."**

The indisputable facts in this matter are that on 10th January, 2014 PW2 was driving a vehicle namely Toyota Corolla registration number ALB 4995 which was involved in an accident caused by the Defendant herein at the Nationalist/Chilimbulu roads cross junction. The said vehicle was extensively damaged in front as per the photo at page 7 of the Plaintiff's bundle of documents.. The parties herein agreed by way of two written agreements dated 16th January, 2014 and 28th

February, 2014 wherein the vehicle was to be repaired by the Defendant.

The Defendant repaired the vehicle but the Plaintiff was not satisfied with the repairs as he alleged that the parts used were either second hand or the same that were affected by the accident. I note that the Plaintiff has not produced evidence to help me ascertain the alleged substandard work. Further the parties at some point agreed that the Defendant sells the vehicle so as to pay the Plaintiff the amount of money he had used to purchase the vehicle being K28,000.00. The Defendant failed to sell the vehicle.

When negligence is proved, the Plaintiff is generally entitled to damages. In the case of **Mohamed and Alantra Transport Ltd v Chumbu SCZ Judgment No. 3 of 1993** the Supreme Court held that:

> **"The general rule as to the normal measure of damages for tort, is the value of the chattel at the time of the loss."**

This applies where the chattel or vehicle is completely destroyed and even in such cases the salvage value of the destroyed vehicle has to be taken into account or deducted from the damages to be awarded. This case does not apply to the matter in issue as the damage was only to the front part of the vehicle. What the Plaintiff was entitled to was the cost of repair and other relevant attendant issues. The learned authors of Mcgregor on Damages (16th Edition) 1999 state at paragraph 1326 as follows:

> **"In the case of goods other than ships the cost of repair has now become established as prima facie the correct measure of the Plaintiff's costs. This has been accepted in a number of cases at first instance, and is confirmed by**

Darbishire v Warran [1963] 1 WLR 1067 CA where it was said by Harman L.J that "it has come to be settled that in general the measure of damages is the cost of repairing the damaged article. Moreover if, despite the repairs, the market value of the goods is less than before, the Plaintiff should be entitled to such diminution in value in addition to the cost of repair."

In all cases Plaintiff also has to take reasonable steps within reasonable time to mitigate his loss as the court will generally take this into account and discount it appropriately.

On the facts for this case, the negligence on the part of the Defendant in causing the accident is proved and the Defendant does not dispute the same. The issue is on the amount claimed by the Plaintiff of K56,700.00 as being owed based on the agreement of 28th February, 2014. This amount is not broken down to show exactly what it comprises. The Defendant's position is that he signed the 28th February, 2014 agreement under duress but the particulars comprising the alleged duress are not provided. The issue of the difference in mileage as complained by the Plaintiff is not pleaded and is not also mentioned in the agreement of 28th February under which the Plaintiff is claiming. This issue is therefore not relevant to these proceedings.

The agreement of 28th February, 2014 outlines a number of issues including a charge of K100.00 per day as transport, an additional K300.00 per day as penalty fee if the car is not handed over by 8th March 2014, K700.00 for towing the vehicle from the accident scene to the police station and K1,500.00 for the security alarm system. The other conditions are that the car be evaluated by Toyota and the

Defendant pay the difference between the assessed value and K30,000.00 as the value at the time of purchase in November 2013, the road tax and insurance and the replacement of the bonnet, radiator, windscreen and bumper with good second hand ones.

The evidence of the Defendant is that all the listed parts were replaced by second hand ones as agreed apart from the fender which was repaired and replaced. The evidence is that the Plaintiff viewed the vehicle on or about 8th March, 2014 when it was out of the garage and was not satisfied with the repairs or state of the car. He later told the Defendant to either buy the vehicle or find a buyer so that he could recover his purchase money. The Defendant tried but did not find a buyer and that is when the Plaintiff finally retrieved the vehicle on 18th May, 2014. This shows that between 8th March, 2014 and 18th May, 2014 when the Defendant was told to sell the vehicle, the agreement of 28th February was no longer in force as regards the first two items on the claim for K100.00 transport and K300.00 penalty fee. I have taken the date of 8th March as the date of handing over because the Plaintiff did not provide the exact date he went to view the vehicle after it came out of the garage apart from stating that he insisted and went to view the vehicle at the Defendant's work place just about 8th March. This was the date when the vehicle was supposed to be handed over and the same date when the Defendant was told to either buy the car or find a buyer and the Defendant opted to find a buyer.

From these facts, it is apparent that the penalty fee of K300.00 per day could not apply due to the variation of the agreement from 8th March

when it was supposed to become applicable. Further, when the Plaintiff was not satisfied with the works, he should have taken the vehicle to Toyota Zambia for revaluation of the estimated value. This would have provided the difference between the estimated value at purchase and after the repairs. However, this was not done and there was instead a demand that the vehicle be sold. When the Defendant failed to sell the vehicle, the Plaintiff retrieved it on 18th May, 2014 and has been using it to date. This is a period of well over one year and such a revaluation cannot be ordered at this stage. In addition, the Plaintiff did not provide evidence that he had the repairs redone after his non-satisfaction with the repairs done by the Defendant.

As regards the K100.00 per day for transport from 10th February, 2014 to 8th March, 2014 when the handover was to be done, the same is proved. This is for a period of 27 days and translates into K2,700.00. The Plaintiff has also proved that he is entitled to K700.00 for towing the car from the accident scene to the police station and K1,500.00 for the alarm system as stated in the agreement signed by both parties. The other listed items of road tax and insurance are not quantified as well as car accessories in issue.

The Plaintiff has thus proved that he is entitled to payment of the total of K4,900.00 based on the agreement of 28th February, 2014. This amount will attract simple interest of 10% per annum from the date of the writ of summons to the date of Judgment and thereafter at the average Bank of Zambia lending rate from the date of Judgment to payment.

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

Leave to appeal is granted.

Dated this 29th day of February, 2016

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M.S. MULENGA
HIGH COURT JUDGE