IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 87/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

PASTER C. CHIBANDA *(Sued as Chairman of Mpongwe Baptist Association)* **1ST APPELLANT**

ELIJAH KAUSENI **2ND APPELLANT**

AND

JULIUS BAIDON **RESPONDENT**

Coram: Wood, Musonda and Mutuna JJS.

On 5th March, 2019 and 7th March, 2019.

For the 1st and 2nd Appellant: *Mrs L.K. Mbaluku – Messrs L.K. Mbaluku & Company*

For the Respondent: *Mrs E. I. Banda – Senior Legal Aid Counsel- Legal Aid Board*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases Referred to:

1. *Parsh v Judd (1960) 3 All ER 33*
2. *Hill-Venning v Beszant (1950) All ER 1151*

3. *Frank Bwalya v Attorney General, Katele Kalumba, William Banda (2008) Z.R. 354*
4. *Nyambe Mukelabai v Gunther Widmaier SCZ Appeal 116/1999*
5. *Nyimba Investments Limited v Nico Insurance Limited SCZ Appeal No. 130/2016*
6. *Mohammed Itowala v Variety Bureau de Change SCZ 15/2001*
7. *Siulapwa v Fales Namusika (1985) Z.R. 21*
8. *Mutwale v Professional Services Ltd (1984) Z.R. 74*
9. *Valsamos Koufou v Anthony Greenberg (1982) Z.R. 30*
10. *Chilanga Cement Plc v Ali Transport and another (2008) Z.R. 168*

Legislation Referred to:

1. *The Section 102 (1) of the Road Traffic Act No. 11 of 2002*

Other Works Referred to:

1. *Order 18/8/28 of the Rules of the Supreme Court 1999*
2. *Halsburys Laws of England 4th Edition Volume 25 Paragraph 607*

This appeal arises out of a road traffic accident which occurred on 4th October, 2008 along the Mpongwe-Luanshya road.

The facts are fairly simple to discern. The respondent who was the plaintiff in the court below entered into a sale and purchase agreement with one Flannel Kalesu on 23rd August, 2008 relating to the latter's Toyota Hiace minibus registration No. ACH 7226 for K50,000.00. The money was duly paid to the seller and the motor vehicle handed over to the respondent. The parties did not, however, conclude the change of ownership formalities. The

respondent wanted, in the interim, to ply his trade as a transporter, so on 29th September, 2008 he paid for the insurance of the motor vehicle with Madison General Insurance Company Zambia Limited in the name of Flannel Kalesu. The parties also went ahead with making the requisite applications to Zambia Police and the Ministry of Power Transport and Telecommunication on 25th September, 2008 for change of ownership. Flannel Kalesu applied to the Road Transport and Safety Agency on 21st December, 2009 for registration of the motor vehicle.

It is quite evident from the record of appeal that the respondent after buying the motor vehicle started using it as a minibus on 1st October, 2008. Three days later, that is, on 4th October, 2008 at 19.30 hours while carrying passengers along the Mpongwe–Luanshya road, the minibus hit into a tractor which had no tail lights, no brake lights, no chevron or rear reflectors, causing one fatality. The bus itself was a total write off. The first appellant's driver who was driving the tractor and is the second appellant in this appeal, paid admission of guilt fines for permitting the use of an uninsured vehicle and using an uninsured trailer.

The respondent shortly thereafter commenced this action against the first appellant claiming compensation for the minibus which was damaged beyond repair, loss of business and costs. The respondent in his amended statement of claim alleged that the accident was caused by the negligence of the second appellant as servant or agent of the first appellant. The particulars given in support of the negligence were that the appellants had failed to light or mark the obstruction sufficiently or at all, by driving a tractor which had no tail lights, chevron and rear reflectors. Further or in the alternative the obstruction was at all material times a nuisance which had been created and or permitted by the appellants and as a consequence, the accident occurred.

The defence raised by the appellants in the court below was essentially that the respondent's own driver was driving dangerously by over speeding without regard to other road users as a result of which he hit behind an ongoing tractor when he failed to adjust his speed to overtake the tractor. Further, the respondent had failed to produce his insurance and requisite licenses to be on the road to operate a minibus as a public vehicle. The appellants

stated in their defence that since the respondent did not have the necessary insurance and authorization to be on the road, the respondent was on the road illegally and as such he could not claim any compensation. The whole claim was accordingly denied.

The learned Judge reviewed a number of authorities on negligence on the road in similar circumstances such as the case of *Parsh v Judd (1960)*[1] and *Hill-Venning v Beszant*[2] and came to the conclusion that these authorities suggest that a driver who has taken the care which a reasonably prudent owner could be expected to take in maintaining his vehicle may successfully rebut the presumption of negligence when his unlit vehicle is found on the road at night. She accepted the appellant's driver's testimony that he saw the trailer two to three metres away and hit into it as a result, as it was too near. This finding was premised on the fact that there were no lights or reflectors on the trailer to enable one travelling behind the tractor at night to observe the trailer so as to avoid hitting into it. She held that no explanation had been offered as to why the unlit trailer was on the road. She therefore inferred that the second appellant had deliberately set out to drive an unlit

trailer on the road. That being the case, the second appellant was negligent in that he drove an unlit trailer in the dark, on the road, when it was obvious that the trailer could not be seen by the respondent's driver. The judge found that the second appellant owed a duty of care to the respondent's driver, and ultimately the respondent, not to do any act that would result in harm to his neighbor at law, nor to omit to do anything the omission of which would inflict damage on those in the vicinity. She therefore came to the conclusion that the respondent had proved his claim. She also held that since contributory negligence had not been pleaded, she had no jurisdiction to consider it. The Judge dismissed the respondent's claim for damages as the respondent was ferrying passengers illegally contrary to section 102 (1) of the Road Traffic Act No. 11 of 2002. She was however of the view that the respondent could recover for the damage inflicted on his motor vehicle. He was entitled to do so, as the issues of ownership of the motor vehicle and the duty of care owed to him were distinct from the use to which the motor vehicle was put. She also dismissed the argument that since the motor vehicle was uninsured, the respondent was liable as this position had no effect on the

appellant's liability. She accordingly entered judgment in favour of the respondent for damages but dismissed his other claims.

The appellants have now appealed to this court against the judgment raising seven grounds of appeal.

The first ground of appeal is that the court below erred in law and fact when it granted damages to the respondent without considering that the minibus was registered in the name of Flannel Kalesu as the legal owner who was not a party to the proceedings and as such the respondent on his own had no capacity to recover. The appellants have argued in respect of this ground that the respondent was not supposed to succeed in the recovery of something that did not legally speaking belong to him. They have however conceded that the respondent could have sued in conjunction with Flannel Kalesu but certainly not alone. For this proposition they have relied on the case of *Frank Bwalya v Attorney General, Katele Kalumba, William Banda*[3] in which it was held that a plaintiff should show that a court has power to determine an issue and that he is entitled to bring the matter before court. They

have also relied on the case of *Nyambe Mukelabai v Gunther Widmaier*[4] in which this court held that a plaintiff hardly has *locus standi* to complain about land which is not his. The appellants have therefore argued that the court below should not have granted damages to the respondent without considering that the minibus was registered in the name of Flannel Kalesu who was not a party to these proceedings as the respondent on his own had no legal capacity to recover that which legally speaking did not belong to him.

The respondent's response to this argument is that the trial court had reached the right decision when it distinguished the duty of care and the ownership of the vehicle. The respondent has relied on the case of *Nyimba Investments Limited v Nico Insurance Limited*[5] in support of the argument that the court was in any event not precluded when determining a claim of an interest in the property and capacity of bringing an action from looking at anything else that would evince ownership. The respondent has also relied on paragraph 607 of Halsbury's Laws of England Volume 25, 4th Edition which states that:

"The precise nature and extent or value of the insurable interest in a contract of insurance is irrelevant. As interest is not restricted to ownership it may arise under a contract relating to the subject matter or it may be founded upon lawful possession."

It is quite clear from the record of appeal that the respondent had paid Flannel Kalesu the sum of K50, 000.00 and had taken possession of the motor vehicle and was in fact using it to ferry passengers. It is also quite clear from the record of appeal that the parties had not completed the change of ownership formalities. The evidence therefore shows that the respondent had an inchoate right in the motor vehicle giving rise to a right to litigate in respect of the motor vehicle. He cannot possibly be equated to somebody who has no *locus standi* in a matter. He had sufficient interest to commence these proceedings without necessarily joining Flannel Kalesu to the proceedings. We therefore dismiss the first ground of appeal.

The second ground of appeal is that the respondent did not insure the motor vehicle, carried passengers without a Public Service Vehicle Licence and had no road tax or a valid fitness certificate. He could not therefore benefit from the law which he

was breaking in the first place. For this proposition, the appellants have referred us to the case of *Mohammed Itowala v Variety Bureau*[6] in which this Court held that:

> *"A party cannot sue upon a contract if both knew that the purpose, the manner of performance and participation in the performance of the contract necessarily involved the commission of an act which to their knowledge is legally objectionable."*

They have argued that the loss of the bus was as a result of the illegal movement of the bus on a public road and illegally carrying passengers without a Public Service Licence authorizing him to do so. Therefore, the court should not have granted the plaintiff damages for the loss of the bus whose damage occurred in the commission of illegalities.

The respondent on the other hand has supported the court's reasoning to the effect that even though the motor vehicle was uninsured and unlicenced, it did not preclude the respondent from claiming damages for negligence from the appellants. We are inclined to agree with lower court's decision because the statutory infractions by the respondent did not obliterate his right to claim for

damages for the loss of his motor vehicle. We also agree with the judge when she dismissed the respondent's claim for loss of business because he was conducting his business illegally. A distinction needs to be drawn with the cases *of Siulapwa v Fales Namusika*[7] *Mutwale v Professional Services Ltd*[8] and *Valsamos Koufou v Anthony Greenberg*[9] cited by the appellants in support of the argument that these cases point to the fact that one cannot enforce a contract where there is an illegality or agreement to commit a crime or perpetrate a tort.

In this appeal there is no doubt that the respondent was using an unlicensed and uninsured motor vehicle on a public road. The second appellant was using an unregistered tractor and trailer which was defective. There is no correlation between a breach of a statute and liability for damages. While we do not condone the breach of statutory obligations, we do not accept the argument that because the respondent's driver was driving an uninsured and unlicensed motor vehicle his claim for damages was untenable. There is no merit in this ground of appeal and we dismiss it accordingly.

The third and fourth grounds of appeal relate to the court's consideration of the police report which, according to the appellants, supported the appellants' witnesses and also generally to the appellants' witnesses who supported the police report which was consistent with their evidence and revealed that it was the reckless driving of the respondent's own driver which caused the accident. The other peripheral issue which was raised was that the court failed to consider that the action of the respondent's own driver who upon causing the accident ran away from the scene and the police had to look for him.

The appellants have argued that all the evidence tendered in court should be evaluated and considered and given some form of weight in accordance with the court's evaluation. The appellants argued that the contents of the police report supported the appellants' case and discarding it because it omitted to mention a fatality prejudiced the appellants and was therefore a misdirection on the part of the court.

We do not think that the judge can be faulted in the manner she evaluated the evidence from all the parties. The police report on its own was not of much help to the appellants in the absence of pleading contributory negligence. The judge in her judgment lamented at the fact that she had no jurisdiction to deal with contributory negligence as it had not been pleaded. Even though the police report states that the accident happened because of the excessive speed of the minibus when it went to hit into the tractor and trailer, the appellants simply alleged in their amended defence that the respondent's own driver was driving dangerously by over speeding without regard to other road users. This was not enough on its own as Order 18/8/28 of the Rules of the Supreme Court 1999 requires a party to specifically plead contributory negligence. The appellants should have pleaded contributory negligence and led evidence to that effect instead of simply relying on the evidence without any pleading alleging contributory negligence.

The appellants have also placed emphasis on the reason why the respondent's driver ran away from the scene of the accident as pointing to liability. This does not help them much as the

respondent's driver's alleged negligence cannot be inferred merely from the fact that he ran away from the scene of the accident. We find no merit in the appellant's third and fourth grounds of appeal.

The fifth ground of appeal is that the court below misdirected itself when it held that the appellants did not plead overtaking and discarded the evidence of DW2 and DW3. The appellants argued that the evidence of attempting to overtake was given in evidence by both DW2 and DW3 to explain how the accident happened and what amounted to reckless driving by the respondent's driver. They have further argued that even though overtaking was not specifically pleaded, it was revealed in the evidence of DW2 and DW3 as they were explaining the reckless driving which was pleaded. It was their argument based on the case of *Chilanga Cement Plc v Ali Transport and another*[10], that since the matter that was not pleaded was given in evidence without any objection, the court was not precluded from considering it. They argued that the two defence witnesses were on the tractor which was open and were able to see what was happening. To discard their evidence simply

because one issue out of their evidence was not specifically pleaded was a misdirection.

The respondent has on the other hand argued contributory negligence was not specifically pleaded, as such the court had no jurisdiction even though the evidence of DW2 and DW3 was admitted without any objection.

We agree with the respondent's argument that even though evidence was led that the respondent's driver was trying to overtake the tractor but there was an oncoming vehicle which made him hit into the right side of the trailer, this evidence could not be relied on to prove contributory negligence as it had not been pleaded. This ground of appeal is unsuccessful and is dismissed.

The sixth ground of appeal is that the learned judge erred in law and fact when she relied on the evidence of the respondent's witnesses which was highly inconsistent and contradictory. The first inconsistency was that the tractor was parked. We have looked at the pleadings and paragraph 4 of the amended statement of claim states that the tractor was being driven by the second

appellant. The evidence of the respondent's driver states that the tractor was stationary. It also states that he just saw the object 2 to 3 metres away before he hit into it. Although the point of impact on the left side of the trailer seems to corroborate the evidence of DW2 and DW3 that there was an oncoming motor vehicle and the respondent's driver retreated to the left and in the process hit into the trailer this again does not amount to contributory negligence as it was not pleaded. The appellants have referred us to a number of authorities which all state that a driver who drives into the back of another vehicle is negligent. There is a general assumption that he is and he should have been cautious while driving but a number of factors such as the absence of warning signs in the form of lights, chevrons or triangles may lead to the driver not being found liable. It all depends on the pleadings and the facts presented to the court. In this appeal as we have stated earlier, the appellants did not plead contributory negligence on the part of the respondent and cannot now raise it in their arguments. The sixth ground of appeal has no merit.

The seventh ground of appeal states that the judge erred in law and fact in not considering that the tractor had lights and since the minibus had lights, the driver of the minibus was able to see, and that is why he indicated to overtake but failed to do so due to an oncoming vehicle.

The respondent has argued that whether or not the respondent had lights was immaterial. The issue was whether the appellant's vehicle was in a roadworthy condition so as not to cause harm to other road users. To that end, the respondent argued that it cannot be a good defence by the appellants that the driver of the respondent was supposed to rely on his lights to avoid the accident. The respondent further argued that a careful driver is not bound to see an unlit obstruction in time to avoid it as there were no reflectors or lights on the trailer to avoid hitting it.

We agree with the argument advanced by the respondent because it is quite clear from the record that the trailer had no lights, reflectors or chevrons to warn other road users of its presence on the road. The judge in finding that there were no lights

was referring to the absence of lights on the trailer and not the head lights of the tractor. According to the record of appeal, the trailer was only seen when it was 2 to 3 meters away by which time it was too late to avoid a collision. It is not therefore correct, as has been suggested by the appellants, that the judge had concluded that there were no lights. There is no merit in this ground of appeal as well.

For the foregoing reasons this appeal is dismissed with costs to the respondent to be agreed or taxed in default of agreement.

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A.M WOOD
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE

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N.K MUTUNA
SUPREME COURT JUDGE