

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

APPEAL NO. 182 OF 2005

B E T W E E N:

JOHN BROWN HANNA
TURNER CONSTRUCTION LIMITED

1ST APPELLANT
2ND APPELLANT

AND

NELSON MITI

RESPONDENT

CORAM: SAKALA, CJ., MUMBA AND SILOMBA, JJS
On 22nd June, 2006 and 21st May, 2007

For the Appellants: Mr. B. Bwalya of Sharpe, Howard and Mwenye
Legal Practitioners

For the Respondents: Mr. L.C. Zulu of Central Chambers

J U D G M E N T

Sakala, CJ., delivered the judgment of the Court.

Case referred to:

1. Victor Koni v. The Attorney-General (1990/1992) ZR 20

At the outset, we must express our deep regret for the delay it has taken to deliver judgment in this appeal. The reason for the delay was that the record had been inadvertently misplaced; and hence not among the records of pending judgments.

This is an appeal from the ruling of the Deputy Registrar on assessment of damages. For convenience, we shall refer to the appellants as the 1st and 2nd defendants, and the respondent as the plaintiff, which designations they were in the court below. The brief history of the case leading to this appeal is that on 13th July, 2002, a motor vehicle Toyota Hiace, registration No. AAV 7386, a registered Minibus, belonging to the plaintiff, was damaged in an accident involving a motor vehicle registration No. AAT 3517, belonging to the 2nd defendant; but being driven by the 1st defendant at the material time.

On the 20th November, 2002, the plaintiff commenced an action against the defendants by way of a writ of summons claiming for: damages occasioned to his motor vehicle, loss of business at the rate of K150,000 per day from 13th July, 2002, interest and costs.

On the 20th February, 2003, a consent judgment was entered in favour of the plaintiffs for damages occasioned to his motor vehicle; and for loss of business to be assessed by the Deputy Registrar and costs to be taxed in default of agreement.

On 28th February 2003, the plaintiff took out a summons for assessment of damages. The summons was supported by two affidavits. There was also an affidavit in opposition. The parties also adduced oral evidence.

The upshot of the affidavit evidence on behalf of the plaintiff was that the defendant did not deny liability; that they could not agree on the quantum of damages; that the vehicle was a public service minibus which was acquired from Tokyo Overseas Corporation, Zambia Office, at the value of US\$7,7000=; that at the time of the accident the value was USS5,3990= which amount he was claiming; that the second claim was for loss of business calculated at K150,000 daily cashing multiplied by six months; and that he was claiming interest at the current bank lending rate from 13th July, 2002 to date of judgment and costs.

In his further affidavit evidence, the plaintiff deposed that he took the trouble to have his motor vehicle valued to ascertain the pre-accident value which was put at K25,000,000.

The further affidavit evidence in opposition, which was the only affidavit on record on behalf of the defendants, was that about 4th August 2003, various quotations were sourced for the purchase of a second-hand minibus vehicle from

different drivers and owners of minibuses; and that quotations from five different minibuses were obtained.

The upshot of the plaintiffs oral evidence was that the plaintiffs vehicle was a 1988 model valued, before the accident, at K25,000,000 at May, 2003; that loss of business was claimed for a period of six months; that attempts to settle the matter were not successful; that the defendants paid K12,000,000 through the lawyers; that the vehicle is beyond repair; that the bus used to make K150,000 per day; that no receipts are given to minibus passengers; and that the plaintiff had no bank statement to support the claim and that he did not pay tax to Zambia Revenue Authority to support the income.

Further oral evidence from the plaintiff came from the driver of the minibus. He testified that he used to cash K140,000,000 daily on week days and K80,000 on Sundays after all the expenses had been taken care of. Suffice it to mention that the plaintiff produced documents showing his daily cashing.

The gist of the evidence of the defendants was that the minibus was assessed on 16th August, 2002; that the findings were that the cost of the vehicle on labour and expenses exceeded the accident value of K12,000,000; that it was

recommended that the vehicle was beyond economical repair; and that K12,000,000 was a fair value for the whole vehicle.

Further oral evidence on behalf of the defendants was that the plaintiff refused the K12,000,000 as assessed, and that on the day the writ was issued, a cheque of K12,000,000 was sent to the plaintiff's lawyers, which has since not been returned.

The learned Deputy Registrar considered the affidavit and oral evidence. He awarded K12,000,000 as the reasonable pre accident value of the minibus. On loss of business, he awarded K130,000 for six days in a week for a duration of five months. The amount awarded was to attract interest at the short term Bank of Zambia deposit rate from the date of the writ to the date of judgment and thereafter at the current bank lending rate until actual satisfaction of the judgment debt.

The defendants appealed against the whole ruling.

The appeal was based on four grounds; namely: that the learned Deputy Registrar erred in law and fact when he failed to appreciate that the respondent could have mitigated his damages in July, 2005, when he was offered K12,000,000 as compensation; that the learned Deputy Registrar erred in law

and fact when he found that the respondent was entitled to K130,000.00 per day for six days in a week for a duration of five months when there was no evidence to support the finding; that the learned Deputy Registrar misdirected himself when he ordered interest and costs to the respondent after he had made a finding that the motor vehicle had a pre-accident value of K12,000,000 and that this is the amount which had been offered to the respondent before the action was commenced and which the respondent unreasonably refused to accept; and that the learned Deputy Registrar misdirected himself in law and fact when he failed to take into account the fact that the respondent retained the motor vehicle after the accident and that the value of the motor vehicle should have been taken into account when assessing the damages.

The parties filed written heads of argument augmented by oral submissions based on the four grounds of appeal.

We have difficulties in the manner ground one was framed. Ground one as drafted does not make sense to us. This observation is supported by the very written heads of argument on this ground in which state that the Deputy Registrar misdirected himself when he ordered loss of business without considering that the plaintiff could have mitigated his loss. Damages to a motor vehicle and damages for loss of business are two different issues. Our

understanding of the facts and the ruling of the Deputy Registrar is that the sum of K12,000,000 was awarded as damages occasioned to the plaintiff's vehicle. K12,000,000 was the value of the vehicle at the time of the accident. The issue of mitigating the value of the vehicle did not arise when the court was considering the amount to be awarded for the damage caused to a vehicle. K12,000,000 was awarded as replacement value. It is not the law that replacement value must be mitigated. You mitigate loss of business and not replacement value of the motor vehicle.

We are satisfied that ground one and all the arguments based on this ground in so far as they center on mitigating replacement value were misconceived and the same are dismissed.

The summary of the written heads of argument on ground two, relating to the award of K130,000 per day for six days in a week for the duration of five months, is that the evidence of the defendants was that they had gone round and gathered information from minibus drivers to the effect that the likely profit for a minibus driver per day was K50,000; that the plaintiff in his evidence alleged that his drivers used to cash K150,000 every day and the driver used to make entries in the book; and that the driver gave evidence that he used to cash about

K140,000 on some days and K80,000 on Sundays and the plaintiff used to make entries in the book.

It was submitted that there were material contradictions in the evidence of the plaintiff and his witness. It was also submitted that the documents were unreliable and that the Deputy Registrar misapprehended the facts when he made a finding that the daily cashing was K130,000.

The oral arguments on ground two were a repetition of the written heads of argument.

The gist of the plaintiff's response to arguments on ground two is that there is evidence on record from the plaintiff and his driver regarding the income that was earned from operating the minibus, which evidence was qualified. It was submitted that on the basis of the evidence, the Deputy Registrar could not be faulted in awarding the plaintiff K130,000 for six days in a week for a duration of five months.

We have considered the arguments and submissions on ground two. We accept that there were contradictions in the evidence of the plaintiff in relation to the daily cashings from the minibus. However, it was common cause that this

minibus was a registered passenger vehicle. In other words, the plaintiff used to run a minibus business. There was evidence from both the plaintiff and the defendants that the motor vehicle was, as a result of the accident, damaged beyond economical repair. There was also oral evidence of loss of profit. According to the plaintiff, it is not customary to give receipts to passengers in minibuses.

Although there were contradictions in the plaintiff's evidence regarding the income earned from operating the minibus; we accept the evidence of loss of business. In the case of **Victor Koni v. the Attorney-General**,⁽¹⁾ a case cited by counsel for the plaintiff, this court, among others, held that **“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”**. The plaintiff claimed loss of business at K150,000 per day. The Deputy Registrar awarded K130,000 per day for six days in a week for a duration of five months. On the evidence on record the Deputy Registrar cannot be faulted. We, therefore, dismiss ground two of appeal.

The gist of the written heads of argument on ground three, which is essentially a complaint against the award of interest and costs, is that the

defendants' insurers had the motor vehicle assessed and the pre-accident value was found to be K12,000,000; that this amount was immediately offered to the plaintiff; that the plaintiff was allowed to keep the salvage of the minibus; that the plaintiff unreasonably refused to accept the offer and that immediately upon receipt of the writ of summons from the plaintiff's advocates, the 1st defendant made the payment of K12,000,000 to the advocates.

The short written response to the written heads of argument on ground three is that from the ruling, it will be noted that the Deputy Registrar dealt with the issues under two headings namely: "Damages to Motor Vehicle" and "Loss of Business"; and that under "Damages to Motor Vehicle" K12,000,000 was awarded as the reasonable pre accident value of the motor vehicle and made no award of interest on K12,000,000. It was contended that it goes without saying that since the defendants had already paid the amount of K12,000,000 soon after commencement of the action, no damages are due as damages to the motor vehicle.

It was submitted that the award of interest was in respect of loss of business against which the Deputy Registrar made a finding and that the costs followed the event.

We have examined the ruling of the Deputy Registrar. We agree that he dealt with the issues under two headings namely “Damages to Motor Vehicle” and Loss of Business”.

Under “Damages to Motor Vehicle” the court, after considering the evidence of valuation had this to say:

“ I have noted that the defendant do not deny liability in this case. That the defendants have paid and the plaintiff has accepted Twelve million Kwacha (12,000,000.00) was arrived at after a valuation of the minibus by an independent professional motor valuer. The plaintiff has also kept what remained of the minibus. The same has not been repaired or used in any way since the accident.” sic

Thereafter the court said:

“Considering the factors the two valuers took into account and their standing in relation to the case one can understand the difference in their valuations and to wonder how interest can cause such a difference in valuation of the same motor vehicle by people who claim to be professionals in the area specialization.

On the foregoing I will award the plaintiff the sum of Twelve million Kwacha (K12,000,000.00) as the reasonable pre-accident value of his minibus.”

We agree with the submission on behalf of the plaintiff that the Deputy Registrar did not award interest on the sum of K12,000,000. Further, the court was alive to the evidence that K12,000,000 had already been paid and accepted; and that the plaintiff had kept what remained of the minibus.

As regards the claim for “Loss of Business,” the Deputy Registrar had this to say:

“ I have considered this contention by the defendant.

In all fairness I am of the view that the plaintiff is entitled to the daily sum of K130,000.00 for six days in a week for a duration of five (5) months after which the plaintiff should have mitigated his loss by having the bus back on the road or sell off what remained of the minibus after the accident.

The amount awarded to plaintiff will attract interest at the short-term deposit rate approved by the Bank of Zambia from the date of the

writ to the date of judgment and thereafter at the current bank lending rate until actual satisfaction of the judgment debt.

The plaintiff will have his costs to be agreed in default to be taxed.”

We again agree with the submission on behalf of the plaintiff that the award of interest was in respect of the “Loss of Business”. The court was entitled to award interest having made an award on “Loss of Business”. The award of costs followed the event.

Ground three of appeal fails.

The gist of the written heads of argument on ground four which is also a complaint is that the Deputy Registrar did not take into account the fact that the plaintiff retained the motor vehicle when assessing the damages. It was pointed out that the evidence of PW1 was that the vehicle was still in good condition after the accident; and that the plaintiff retained the vehicle. It is submitted that it was material that the value of the vehicle was considered in arriving at the value of the damages because the salvage has a value.

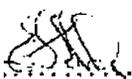
The summary of the written response to ground four on behalf of the plaintiff is that the salvage was at the disposal of the defendants; that there was no evidence before the court of the salvage value of the minibus; that the Deputy

Registrar could not have been expected to act on the salvage value of the minibus without evidence before him; and that the issue of the salvage value was not raised before the Deputy Registrar.

We have considered the arguments and the submissions on ground four. A careful reading of the ruling by the Deputy Registrar reveals that he was alive to the fact that the plaintiff retained the motor vehicle. However, a perusal of the whole record also reveals that the issue of the value of the salvage was never raised before the Deputy Registrar and there was no evidence to that effect. It is too late to raise it now.

Ground four of appeal also fails.

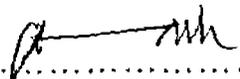
All the four grounds of appeal having been unsuccessful, the appeal is dismissed. Costs follow the event to be taxed in default of agreement.



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E.L. SAKALA
CHIEF JUSTICE



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F.N.M. MUMBA
SUPREME COURT JUDGE



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S.S. SILOMBA
SUPREME COURT JUDGE