

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(CIVIL JURISDICTION)

BETWEEN: -

ZAMBEZI PAPER MILLS LTD.

APPELLANT

AND

FREDERICK TAPFUMANEYI MUBAIWA

RESPONDENT

CORAM:

Bweupe, D.C.J., Chirwa and Muzyamba, JJS.

On 7th December 1999 and 7th September 2000

For the Appellant:

Mr. G.S. Chimanga, G.S. Chimanga & Co.

Mr. J.B. Sakala, J.B. Sakala & Co.

For the Respondent:

Mr. H.B. Mbushi, Ndola Chambers

J U D G M E N T

Chirwa, J.S. delivered the judgment of the Court: -

This is an appeal and cross-appeal against the High Court judgment in which the appellant was found guilty of negligence that led to a traffic

accident and was held to be 50% liable for damages which amounted to K14,000,000-00 (fourteen million kwacha) and also K1,200,000-00 (one million, two hundred thousand kwacha) as loss of business. The facts of the case are very simple. The respondents lorry registration No. EW 5325 was hired by Everline Chanda, PW2 in the Court below, to carry her bags of potatoes and onions from Lusaka to Ndola. Somewhere between Lusaka and Kabwe the lorry was involved in a traffic accident with the appellant's lorry registration number ACD 551 which was coming from the opposite direction. The appellant's lorry left its correct side of the road and came to the side of the road where the respondent's lorry was correctly driving. The cause of the mishap, as found by the learned trial judge, was the front tyre burst on the appellant's lorry causing the driver to lose control.

In arguing this appeal, two grounds of appeal were argued by Mr. Chimanga and Mr. Sakala supplemented on these and added two more grounds. In the first ground it was argued that the learned trial judge erred in law and fact in finding that the respondent had proved his case when the evidence, which he accepted, showed that the accident happened because of a tyre bust. Further there was no evidence to show that the appellant was negligent in purchasing a new tyre from Dunlop, as it never knew that the tyre was defective. It was argued that there was no evidence that the tyre was defective so as to make the appellant 50% liable.

In reply Mr. Mbushi submitted that the evidence was overwhelming that the appellant's vehicle left its correct side and came to collide with the respondent's vehicle on its correct side. Further the defence of tyre bust was

never pleaded and in fact this was never supported by the Police Officer who visited the scene.

We have considered this ground of appeal and this appeal succeeds or fails on this ground. We agreed that the defence of tyre bust, thereby rendering the accident inevitable, was never pleaded. But this is settled law that if the defence is not pleaded but evidence is being led to support that defence and there is no objection from the other side, the Court has to consider the evidence on the totality of the same. In the case of JERE V SHAMAYUWA AND ATTORNEY-GENERAL [1978] Z.R. 204 quoting with approval the decision in the case of re ROBINSON'S SETTLEMENT, GRANT V HOBBS [1912] 1 Ch. D. 725 this Court had this to say: -

“It is one of the cardinal rules of pleadings for the party to tell his opponent what he is coming to court to prove and to avoid taking his opponent by surprise. If he does not do that, the court will deal with it in one of two ways. It may say that it is not open to him, that he has not previously raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it and protect the other party if necessary by letting the case stand down. When a defence not pleaded is let in by evidence and not objected to by the other side, the court is not precluded from considering it. This is emphasized in the case of re Robinson's Settlement, Grant V Hobbs: -

‘The rule is not one that excludes from consideration of the court, the relevant subject matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the court will deal with him as is just’.

In the present case, the defence put forward in evidence was not pleaded, but when the defendant led evidence to put forward that defence no objection was raised by the plaintiff and the evidence

was therefore let in. In the circumstances, the learned trial judge in my view did not err in considering that defence.”

The JERE case was followed by this Court in the case of KAPEMBWA V MAIMBOLWA AND ATTORNEY-GENERAL [1981] Z.R. 127 where at page 132 Gardner Acting Deputy Chief Justice as he was then said: -

“In my view, the proper course for the plaintiff’s advocate to have taken would have been to object immediately to the first defendant’s reference to his being dazzled. Thereupon it would be the duty of the Court to decide whether or not it was necessary to grant an adjournment to the plaintiff, and whether to allow an amendment of the pleadings subject to an order for costs against the defendant The proper course for the plaintiff’s advocate to have taken in the circumstance was to apply to recall the plaintiff to rebut the unexpected evidence of the first defendant. This course was not taken and, in my view evidence was let in and fell for consideration under the principles set out by Bruce-Lyle, J.S. in the JERE case.”

Indeed, the principles in the JERE case have continued to be applied by this Court; see ZAMBIA ELECTRICITY SUPPLY CORPORATION LTD. V REDLINE HAULAGE LTD [1990-92] Z.R. 170, 174.

Coming to the case at the bar, as already stated the defence of tyre burst leading to an inevitable accident was not pleaded but evidence was led on it and no objection was raised by counsel for the plaintiff. This evidence was brought out even by the plaintiff’s own witnesses. PW2 in examination in Chief where she says the appellant’s driver said that he had a tyre burst. PW1 also was told the same and he believed what the appellant’s driver said

about the tyre burst. If it had been an oversight when the plaintiff's witnesses were giving evidence, but when the appellant's driver was giving evidence this was the main defence raised right from the beginning of his evidence in Chief. The evidence of the Police Officer who visited the scene does not add everything to the respondent's case for this witness says he did not find the burst tyre at the scene, he does not say no tyre burst.

Having let in evidence of a defence not pleaded, the Court had to consider it under the principle expounded in the JERE case and in fact did consider it and accepted the defence of a tyre burst and says at J3: -

"... .. and I do find that the accident could not have happened had there been no tyre burst on the defendant's truck. There is no way the defendant's driver could be expected to properly control the truck after the front tyre burst. However, it is apparent that the defendant was negligent in purchasing a defective tyre, which was fitted, to its truck. I hold the defendant to have 50% contributed to the occurrence of the accident for fitting a defective tyre to its truck in issue. I accordingly, find that the plaintiff has proved his claim against the defendant on the balance of probability and do grant the plaintiff damages to the tune of K14,000,000-00 (fourteen million kwacha)"

Having accepted that there was a tyre burst and that after this tyre burst the appellant's driver could not control the vehicle, the learned trial judge misdirected himself in attaching 50% liability to the appellant's driver on the basis that they fitted a defective tyre when there is no evidence that the tyre was defective. Tyre bursts are not caused by defective in them only. Having found and accepted inevitable accident, judgment should have been entered in favour of the appellant. It is unfortunate that this is a no fault situation and damages must lie where they fell. We therefore allow this

: J6 :

appeal with costs and dismiss the cross appeal as having no merit in it as there is no liability for the matter to go for assessment of damages. Costs are to the appellant both in this Court and in the Court below to be agreed and in default to be taxed.

B.K. BWEUPE
DEPUTY CHIEF JUSTICE

D.K. CHIRWA
SUPREME COURT JUDGE

W.M. MUZYAMBA
SUPREME COURT JUDGE