EASTERN CO-OPERATIVE UNION LIMITED v YAMENE TRANSPORT LIMITED (1989) S.J. (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, AJ. S. AND CHAILA, J.S.
2ND MARCH, 1989
(S.C.Z. JUDGMENT NO. 3 OF 1989)

Flynote
Tort - Negligence - Credibility of the witnesses.
Damages - Quantum of damages - Assessment of damages.

Headnote
The facts of the case were that on the night in question, the appellant's driver was driving a truck along the Great East Road towards Chipata while the respondent's driver was driving a passenger omnibus on the same road in the opposite direction. A High Court Commissioner found that the appellant was liable in negligence arising out of the accident. On appeal, the issues raised were whether the learned trial commissioner was correct in resolving the question of liability and in finding that the appellant's driver was wholly to blame and, secondly, whether the damages awarded were excessive or not.

Held:
(i) The learned trial commissioner, who had the advantage of seeing and hearing the witnesses, was entitled to assess the credibility of the parties with reference to the consistency or otherwise of their evidence on other points.
(ii) A plaintiff who has a profit-making chattel damaged beyond economic repair is under obligation to replace that chattel and, in this regard, the poverty or otherwise of the plaintiff is quite irrelevant. The damages must be assessed, therefore, on the basis that a prudent plaintiff would have taken steps to replace the chattel which has been damaged.
(iii) When a chattel has not been so completely destroyed that it is utterly valueless, credit should be given for any salvage value that a plaintiff was likely to recover from the damaged chattel.

For the Appellant: R. M. A. Chongwe, of Roger Chongwe and Company
For the Respondent: J. Naik, Messrs Solly Patel Hamir and Lawrence

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Judgment
NGULUBE, D.C.J.: delivered the judgment of the court.

This is an appeal against the judgment of a High Court Commissioner who found that the appellant was liable in negligence arising out of a road traffic accident. The issues raised on the appeal are whether the learned trial commissioner was correct in resolving the question of liability and in finding that the appellant's driver was wholly to blame and, secondly, whether the damages awarded were excessive or not. The facts of the case were that on the night in question, the appellant's driver was driving a truck along the Great East Road towards Chipata while the respondent's driver was driving a passenger omnibus on the same road in the opposite direction. According to the bus driver, who was supported by a number of witnesses called by the plaintiff, the accident happened because when the vehicles were about to pass each other, the truck driver was seen to be crossing the whiteline on to the respondent's side of the road.

The bus driver stated that he had swerved to the left, with the two nearside wheels leaving the tarmac and moving on the verge of the road, when the truck driver nonetheless drove his vehicle over the whiteline so that the truck ripped open the offside of the bus. The bus driver was supported by two passengers who were in the bus but even more conclusively by an independent police witness who came to the scene of the accident the next morning and who deposed that there were broken glasses in the middle of the lane on which the bus was being driven.

On behalf of the appellant, Mr. Chongwe advanced a number of arguments one of which dealt with the question whether or not both drivers had dimmed their lights before the collision. We have considered that point and we find that, although the issue was dealt with at some length in the court below, it was immaterial and irrelevant since neither driver had at any time suggested that the accident was occasioned because he had been dazzled. The other point raised by Mr. Chongwe, in support of an argument contending for contributory negligence, was that, in the circumstances of this particular case, the learned trial court should have found that the collision occurred in the middle of the road and that both drivers were equally to blame for the accident.

We have considered the evidence which was given by the truck driver and note that he did not at any time suggest how the accident happened so as to support a claim for contributory negligence. On the contrary, the only suggestion that he made was that, the next day, he had observed that the bus's tyre marks had crossed the white line onto his side of the road and, by necessary implication, this indicated that it was the bus driver who had driven to the wrong side of the road. This claim by the truck driver was not supported by any other evidence and was specifically contradicted by the evidence given on behalf of the plaintiff which was to the effect that an independent police officer who came to the scene the next day did not see the marks referred to but actually found that the debris was on the bus driver's side. This clearly indicated that the point of impact must have been on the bus driver's correct side, and the truck driver's wrong side of the road.

The appellant, of course, has complained that there appears to have been an unbalanced evaluation of the evidence of the respective parties and that the learned trial commissioner, while critical of the discrepancies in the defendant's case, was more sympathetic to the discrepancies of the opponent's case. We have examined the passages complained of in the judgment and we find that the learned trial commissioner, who had the advantage of seeing and hearing the witnesses, was entitled to assess the credibility of the parties with reference to the consistency or otherwise of their evidence on other points. In any case, we find that no grounds have been demonstrated to this court to enable us to interfere with the findings based on an issue of credibility. For the reasons which we have endeavoured to adumbrate, the appeal cannot succeed on the question of credibility.

With regard to the quantum of damages awarded, we do not propose to disturb the award of the sum of K10,000 plus interest as the value of the bus which was damaged beyond economic repair. Mr. Chongwe has quite fairly indicated to the court that he did not wish to dispute the assessment of the loss of use of the bus at the rate of K1,000 per month. The problem as we see it is to determine for what period the amount for loss of use should have been awarded. In this regard, we have no hesitation in setting aside the award which was made in the court below which extended from the date of the accident in December, 1980, to the date of judgment which was on 4th June, 1986. We wish to affirm that, in a case of this nature, it has been and it is always the duty of the plaintiff to minimise his loss and where the plaintiff fails to do so, he cannot expect the court to award damages which will be limitless both as to time

and extent. In this regard, we wish to respectfully quote a passage from paragraph 337 of Clerk and Lindsell on Torts, 13th Edition, which passage we find suitably describes the problem at hand:

"337. It has been pointed out that no one is answerable indefinitely for the consequences of his actions, but that at the time he may well be saddled with responsibility for greater injury than he expects. Somewhere, a line has to be drawn between the consequences for which a wrongdoer is liable and those for which he is not, but "it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but though you cannot draw the precise line, you can say on which side of the line the case is."

We find that, in keeping with the principles which require a plaintiff to mitigate his loss, a plaintiff who has a profit-making chattel damaged beyond economic repair is under obligation to replace that chattel and in this regard the poverty or otherwise of the plaintiff is quite irrelevant. The damages must be assessed, therefore, on the basis that a prudent plaintiff would have taken steps to replace the chattel which has been damaged. We take into account the economic situation which prevails in the country and which prevailed in the years 1980 and 1981 and consider that the plaintiff should have replaced the bus in this case much earlier than June, 1986 when judgment was delivered. We also take into account the further difficulty which has arisen in this case, namely, that no evidence was led, which it was the duty of the plaintiff in the action to do, to show what was the salvage value of the bus since, quite seriously, when a chattel has not been so completely destroyed that it is utterly valueless, credit should be given for any salvage value that a plaintiff was likely to recover from the damaged chattel. In this case, the respondents' bus was damaged on its offside but was nonetheless able to be driven from the scene of the accident.

Counsel also cited the case of *Eastern Co-operative & Union Ltd v Yamene Transport Ltd* (6) where the court again reminded both the litigants in general the bar in particular, that the court will not always be prepared to make inspired or intelligent guesses when the parties could have easily obtained evidence which could easily be placed before the courts. Another case cited by Mr. Matibini which also emphases the need for documentary or independent evidence is *Koni v Attorney General* (7) Counsel also referred us to a passage

in Mcgregor on Damages 15th Edition paragraph 343 and submitted that this court must interfer with the award of K100,000=00.

We have been asked by counsel on both sides to do the best we can in the circumstances and, while we have agreed to do so on this occasion, we must point out that in future we will not always be prepared to make intelligent or inspired guesses when the parties could have very easily obtained evidence which can be placed before the court. For this occasion only, we have adopted the rough and ready solution whereby the credit which should be given for the salvage value will be taken into account when limiting the period within which the respondent should have mitigated his loss by purchasing a replacement bus of similar age and value. In this connection, although Mr. Chongwe argued that loss of use should have extended for a period of not more than twelve months and although Mr. Naik countered this by suggesting a period of twenty-four months, we believe and consider that the justice of the case will be met by limiting the amount of loss of use to the period of six months. The damages awarded for loss of use in the court below are, therefore, set aside and in their place we award a sum of

K6,000 with interest at 7% representing loss to the extent indicated. With regard to the costs, we consider that ultimately, the appellant has won the appeal and costs will follow this event.

Appeal allowed.

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