

JAMERA PATSWAWAIRI TILTON
versus
GOODLUCKY SIMOKO
and
RM INSURANCE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 24- 26 February, 2014, 20 March 2014
& 11 June 2014

Civil Trial

S. Mahuni, for the plaintiff
K. Choga, for the defendant

MTSHIYA J: On 18 July 2011 the plaintiff issued summons against Goodlucky Simoko as first defendant and RM Insurance as second defendant. Action against RM Insurance was subsequently withdrawn through notice filed on 1 September 2011.

In this action the plaintiff seeks the following relief:

- “(a) payment in the sum of US\$5 600-00 being the cost, according to the least quotation, of bringing back the plaintiff’s vehicle to its original position.
- (b) Costs of suit”

The claim is based on allegations of negligent driving on the part of the defendant resulting in damages caused to the plaintiff’s vehicle.

It is common cause that on 11 March 2011, at the 54 km peg, along the Mvurwi-Kanyemba road, the defendant’s vehicle, a Toyota Land Cruiser registration number ABK 3379 (the Land Cruiser) hit at the back of the plaintiff’s vehicle, an unregistered Toyota Camry (the Camry). This, according to the plaintiff’s declaration, caused extensive damage to the Camry on the:-

- “8.1. left and right rear chasis, back floor left and right side rear fender, boot lid and hinges, left rear door, back screen, rear bumper and brukets, left and right side tail lamp, rear shocks, back panel, rear suspension”.

The plaintiff, through quotations obtained, estimates the cost of repairs to his vehicle to be US\$5 600-00 and hence the claim in that amount.

The defendant disputes the claim mainly on the ground that the accident was due to the negligence of the plaintiff, an unlicensed driver, who he claims to have been driving the Camry on the day in question. The plaintiff, however, states that the vehicle was being driven by his uncle, one Solomon Zirima (Zirima), a licensed driver.

The joint pre-trial conference minute filed by the parties on 25 September 2012 lists the issues for determination as:-

- “2.1. Whether or not the plaintiff’s motor vehicle was being driven by Solomon Zirima at the time of the accident.
- 2.2. Whether or not the defendant negligently caused the accident? If so how much is he liable to the plaintiff as accident damages?”

Apart from giving evidence on his own behalf the plaintiff also called two other witnesses, namely Zirima and Constable Givemore Chidembo (Chidembo).

Through submission of a Customs Clearance Certificate, the plaintiff confirmed ownership of the Camry and said he had asked his uncle Zirima to drive it from Beit Bridge to Guruve where he stays with his mother. He also confirmed that he is not a licensed driver and hence the reason for him to call on Zirima to drive the Camry for him. He had recently bought the car and was due to register it. The plaintiff said as they were approaching Guruve they saw a Euneka vehicle flicking its hazards lights. It was stationary on the left side of the road. Zirima had in turn put on hazards of the Camry and slowed down. They were then suddenly hit from the back by the defendant’s vehicle. This resulted in the damage to his Camry as detailed at p 1 of this judgment. The damage would cost him \$5 600-00 in respect of repair costs. He submitted three quotations in support of his estimation of repair costs.

The plaintiff denied that he is the one who was driving the Camry. He also denied that they had overtaken the defendant’s vehicle and that there had been an on-coming vehicle on the right of the road. The plaintiff said he had gone to report the accident at Guruve police station and Chidembo had attended at the scene of the accident. Chidembo had then recorded statements from both Zirima and the defendant.

Chidembo’s evidence was a confirmation that he indeed attended at the scene of the accident and recorded statements from both drivers, namely, Zirima and the defendant. He confirmed the damages caused to both vehicles. He submitted the report he made at the scene of the accident. He also said there was never any dispute relating to the identity of the drivers of the two vehicles. He confirmed that the defendant, whom he knew as a Catholic priest, had been charged for driving without due care and attention, resulting in him, the defendant,

paying an admission of guilt fine of US\$20-00. To that end, he submitted a traffic accident report which indeed confirmed payment of US\$20-00 by the defendant as a deposit fine.

Chidembo denied that he might have given biased evidence because his wife worked with the plaintiff's mother. Instead, he said, he knew the defendant better as his priest in the Catholic Church which he attends.

In his evidence, Zirima confirmed that he had been asked by the plaintiff to drive the Camry from Beit Bridge to Guruve. He said this was so because the plaintiff did not have a driver's licence. He denied that the plaintiff had at any point, between Beit Bridge and Guruve, driven the Camry.

Zirima's evidence was, to a large extent, also a confirmation of the plaintiff's evidence relating to how the accident occurred. He denied ever overtaking the defendant's vehicle and seeing an on-coming vehicle on the right of the road at the time of the accident. He also said there had never been any dispute as to the fact that he (Zirima) was driving the Camry.

The defendant was the only one who gave evidence for the defence case. His version was totally different from that given in support of the plaintiff's case. It was, in the main, different in the sense that:-

- (a) he claimed to have identified the plaintiff's vehicle upon reaching Marlborough, Harare, when it overtook him at high speed.
- (b) he had suspected that, as someone who was carrying valuables (i.e. engines), the plaintiff's vehicle was trailing him.
- (c) since his vehicle was higher than the plaintiff's vehicle he had managed to see that the plaintiff's vehicle had two passengers and the plaintiff was driving;
- (d) when the accident occurred the plaintiff, had alighted from the driver's side of the Camry.
- (e) he did not know that the US\$20-00 he paid was an admission of guilt fine
- (f) he had paid the said US\$20-00 on 12 March 2011 and not 18 March 2011 (the date on the receipt).
- (g) he had hit at the rear of the plaintiff's vehicle because the plaintiff's vehicle had overtaken him; and, in order to avoid an on-coming vehicle, the plaintiff had suddenly encroached on the left side of the road where he (the defendant) was driving and thus causing him to hit the plaintiff's car from the rear as he could not avoid the accident, despite applying emergency brakes;

- (h) the plaintiff had driven negligently and thus contributing to the accident; and
- (i) he was not responsible for paying the damages since it was due to the negligence of the plaintiff, an unlicensed driver, that the accident had occurred.

I have, at p 2 of this judgement, listed the two issues for determination, namely the identity of the driver of the Camry when the accident occurred and the determination of negligence on the part of the defendant and damages payable.

Whereas I found the plaintiff and his witnesses credible and convincing, the same was not the case with the defendant. I, with respect, found that the man of cloth had difficulties telling the truth.

I did not believe the defendant's story that he had identified the Camry as he left Harare. He said he had seen many cars driving on the highway but had only managed to identify one – the Camry. He said he thought that, by the way the vehicle was being driven, it may have been carrying people who were after his valuables. He did not, however, tell the court what steps he had taken to avoid the bad people in the Camry. I did not find that story to be true. He was not on a mission to monitor the Camry on that highway. There were many other people on the highway who could have been alerted.

The defendant was driving a church vehicle and was, in my view, obliged to take full particulars of the people who were in the Camry for a report to his church. However, despite claiming to have seen the person who was driving the Camry, he allowed Chidembo to record a statement from Zirima. He never protested at the scene. Apart from saying he informed his legal practitioner, he did not find it necessary to complain to the Member-in-charge at Guruve Police Station, Inspector Mutizwa, whom he knew very well. He saw Chidembo taking a statement from Zirima whom he claimed was not the driver.

It is inconceivable that a person of the defendant's standing would part with US\$20-00 without knowing why he was giving such money away. Furthermore, he went on to tell the court that he parted with the money a day after the accident yet it was a week thereafter. That only shows that he was not telling the truth and was in the main an unreliable witness.

The unchallenged documentary evidence produced in court proves that payment of admission of guilt was made on 18 March 2011. I believe that the defendant paid the fine after being convinced by Inspector Mutizwa that he had been properly charged as the erring party in the accident. He had protested to the member-charge before paying the fine, which fine the papers show, was assessed by Seargent Kunaka. Upon payment the defendant voluntarily signed the papers. I refuse to accept that he did not know what he was signing for.

It was his own evidence that the receipt he signed was given to him immediately upon payment. He obviously saw the person who receipted the money and was therefore not truthful in alleging that he gave the money to Inspector Mutizwa and never knew what it was for.

I also find it difficult to understand why the defendant failed to bring his mechanic, Mashati, to testify. Surely that witness would have corroborated his evidence of seeing a Camry being driven dangerously as they left Harare; seeing a Camry overtaking them at the scene of the accident, and seeing the plaintiff, as the driver, alighting through the driver's door of the Camry. Evidence from Mashati in my view, would, have been important for the defendant's case. I want to believe that he avoided Mashati because his lies would have been exposed.

The foregoing, in my view, shows that the plaintiff's story is credible. The plaintiff's version of events shows that:

- (a) There is no evidence to prove that the plaintiff was driving the Camry. The Camry was therefore being driven by Zirima.
- (b) It was improbable that the defendant identified the Camry and its passengers as he was leaving Harare and the allegation of a speeding Camry cannot therefore be sustained
- (c) There is no evidence to prove that Zirima overtook the defendant's vehicle at the place of accident and there was never any on-coming car from the right; and
- (d) The defendant voluntarily paid an admission of guilty fine because he knew he had driven negligently and without due care and attention. There is documentary evidence to support the fact that he paid a fine for the charge voluntarily.

The defendant, having focussed on trying to prove that it was the plaintiff who was driving the Camry, failed to attend to the issue of the quantum of damages claimed by the plaintiff. There was no challenge to the damages and I do not find the quotations to be exorbitant. Furthermore, given the fact that there were no counter proposals, it is difficult to dismiss the given quotations.

The above findings dispose of the two issues placed before the court.

Even assuming I am wrong on the identity of the driver, I would agree with the plaintiff's submission that:-

- "8. Even if for one, it is assumed that the plaintiff was the driver, still that does not absolve the defendant's liability because the accident had nothing to do

with whether or not the plaintiff's vehicle was being driven by a licensed driver. The court is referred to the case of **Bernard Vengai v Benjamin Chuma and New Donnington Farm (Pvt) Ltd SC 3/2013** which was an appeal against the decision of this court dismissing the appellant's claim for the replacement value of a Mercedes Benz motor vehicle and damages arising from a road traffic accident.

The court held that the plaintiff failed to establish how the failure to hold a driver's licence or permit affected the manner in which the first defendant drove the trailer and for that reason the appeal was dismissed. In this case the defendant was bound to ram into the plaintiff's vehicle anyway, regardless of who was driving it".

There is merit in the above submission.

The case might only have been different if the plaintiff had established contributory negligence on the part of Zirima. That was not the case *in casu*.

In view of the foregoing and on a balance of probabilities, the plaintiff's claim has been proved.

It is therefore ordered as follows:-

1. The defendant be and is hereby ordered to pay the plaintiff the sum of US\$5600-00 being repair costs for the plaintiff's vehicle; and
2. The defendant be and is hereby ordered to pay costs of suit.

Mahuni and Mutau, plaintiff's legal practitioners
Muchineripi and Associates, defendant's legal practitioners