PHILLIP CHINOFURA
versus
KUKURA KURERWA BUS SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 30 June 2017 and 19 July 2017 & 18 October 2017

Trial

C N Midzi, for the plaintiff
J Zindi, for the defendant

DUBE J: The plaintiff brings a dilictual claim for injuries he sustained as a result of the road traffic accident involving a bus.

Just after midnight on 10 January 2011, the plaintiff set off from his rural home in Kafura in Mrewa intending to travel to Harare. He boarded a bus and trusted that he would arrive at his destination safely. Little did he know that tragedy awaited him at the Chiwake River Bridge. As the bus approached Chiwake River, the driver lost control of the bus, left the road and it rolled. The plaintiff sustained a fractured right forearm. The plaintiff claims that the bus he boarded is a Kukura Kurerwa, [KK] bus and that the accident was caused by the negligence of the driver of the bus who failed to keep proper control of the bus and was driving at an excessive speed.

The defendant defends the claim and asserts that the defendant has failed to identify the bus which he claims is owned by the defendant and on which he allegedly was travelling on when he was involved in an accident and suffered injuries. It denies that the injuries suffered by plaintiff were due to the negligence of the driver. The defendant denies that the plaintiff incurred medical expenses and damages in the amounts claimed.

The following issues were referred to trial,

1. Whether or not plaintiff was a passenger on the date alleged in a bus owned by the defendant.
2. If so whether the bus was involved in an accident.
3. Whether if an accident did occur, this was due to the negligence of the driver.
4. Whether plaintiff suffered the injuries alleged as a result of being involved in the accident alleged.
5. Whether the plaintiff suffered general damages in the amount claimed or at all.

The Evidence

The plaintiff testified in his own case, his evidence is as follows. He was aboard a KK bus on 10 January 2011 coming from his rural home when the bus was involved in an accident at Chiwake River Bridge near St Pauls Mission, Mrewa around 4 am in the morning. He had boarded the same bus when he went to his rural home on the Friday before and boarded it again when it was coming back to Harare. He produced a passenger ticket given to him upon boarding the bus which he retained. He knows the bus as a KK bus as he used to use it regularly. He knew the driver well. His name was Tobias, Tobaiwa or Muheza. The bus is painted green and grey and is inscribed Kukura Kurerwa Buses. There was also another bus belonging to Musami Buses that plied the same route and was travelling on the same route that night. The buses were chasing each other.

He was seated three seats from the back of the bus. He first saw that the driver of the bus was tired and dozing whilst driving as soon as he boarded the bus and when he veered off the road whilst they were still near Mrewa. The other passengers said that he was dozing. He stood up, got to the passage of the bus and saw the driver leaning on the steering and he called to the driver from the back to stop the bus so that he could sleep and proceed later. He indicated that he would manage to drive and so they proceeded. Although the driver was in some sort of cage he could see him through the cage and see what was happening. There is a fence, but you can see him through the gap above the fence.

The driver was speeding. As they approached the bridge, he heard other passengers scream that '*atanga futi kurara'* (he is sleeping again). Soon after crossing the Chiwake River, the bus went into the bush and rolled. The driver tried to control the bus and bring it back onto the road but he failed and the bus landed on its side. The driver died as a result of the accident. No other vehicle was involved in the accident. He got out of the bus through a window. He fractured bones on his forearm. The police attended the scene of the accident after he had been taken to hospital. He has since obtained a report of the accident from the police which he produced. He

was first treated at St Pauls Mission and later referred to Baines Avenues Hospital and Parirenyatwa Hospital where he was operated on.

He has been a gardener for the past 20 years. Before the accident he did painting, plumbing, moulded bricks, trimmed hedges, dug and cleaned the garden. He is unable to carry out these activities anymore after the accident. He can only sweep. He feels pain when he tries to lift heavy things. He claims US $2000.00 as general damages having reduced the claim at pre-trial conference stage from US 10 000.00. He also claims US $3076.61 for medical expenses he incurred.

The witness maintained his story and insisted under cross-examination that he boarded a KK bus and that the driver of the bus was dozing whilst driving and further that he was negligent in that he was over speeding and failed to control the bus.

The plaintiff's second witness is Dr Mhishi, an orthopaedic surgeon. He testified as follows. The plaintiff came with a displaced radius and ulna. Both were broken. There were 3 fragments on the ulna. The injuries are likely to have been caused by a high velocity crash like a vehicle accident. He opened the plaintiff's hand and put plates and screws on the bones for 12 months. He had to operate him again to remove the plates after the healing process. He has 10% impairment. It is probable his condition can worsen. He did not examine him to see if he could perform gardening duties as he was not asked to do so. The wrist function can in the future be limited where the joint was damaged. It can also be painful when he lifts heavy objects.

The defendant called its human resources manager, Insurance Dandara as its sole witness. His evidence may be summarised as follows. He was based in Mutare as the company's branch manager at the time of the supposed accident but is now based in Harare since 2014. Where an accident befalls one of their buses, the defendant is given a police report and a traffic accident book with diagrams and the cause of the accident. No such reports were sent to them for their records .No KK bus was involved in a road traffic accident on that date. At that time they had a bus that plied the Harare-Musami route. There was also a Musami bus plying the same route. The buses would leave at the same time and compete for customers. They would leave at 2 am. The Musami bus has dark blue and light blue colours. The defendant's buses are dark green on top. In the middle they are light green and dark green underneath. If a passenger is seated at the back of the bus, he cannot see the driver as the driver will be giving the passengers his back. One cannot see that the driver is dozing from the back. Only a person who is entering the bus who is on the steps of the bus can see the face of the driver. If you are at the back you cannot

see that the driver is slumped on the steering wheel or see the road ahead. He discounted the ticket produced by the plaintiff on the basis that the ticket has no name of the passenger. He accepted that the ticket looks the same as theirs. The fare charged is supposed to be written in both figures and letters and not just in figures as in this case.

Identity of the bus

The defendant did not seriously dispute that the plaintiff got injured as a result of the accident or that the accident occurred. The defendant's main contention is simply that the said bus does not belong to defendant and that in any event, the driver of the said bus was not shown to have been negligent.

The police attended the scene of the accident.. Their report includes the name of the driver, the place of occurrence of the accident, registration number of the bus, insurer, its make and the registered owner. The report serves to identify the bus involved in the accident and confirm that the plaintiff had been on the bus. These details were obtained in the absence of the plaintiff who had been taken to hospital. He was only able to get the police report at pre-trial stage. The possibility of connivance with the police is out of the question. The defendant did not directly challenge these registration numbers as belonging to one of its buses, choosing to simply say that they were not advised of any accident involving their bus and they kept a list of their buses. The registration number was not shown to have been verified with the vehicle registration department by either party. The bus involved was reportedly insured by Zimnat Insurance which fact the defendant did not dispute.

Evidence reveals that two buses were travelling along the same route on that day and at the same time. The defendant does not deny that it had a bus that plied that route at the relevant time. It accepted that its bus would travel that route at the times alluded to by the plaintiff. The said bus was not identified by the defendant and deliberately so. The plaintiff told the court that he knew the KK bus that he boarded on that day as he regularly boarded the same bus to and from his rural home. He also knew the driver of the bus by name and very well too as a driver of the KK bus. The driver has thus been linked to the defendant and was shown to be driving the bus in the course of his duties.

The colour description of the bus given by the plaintiff was not disputed by the defendant. The plaintiff was unable to identify the registration number of the bus and its make. It is not realistic to expect an ordinary passenger to note the make of a bus, its registration numbers and other minute details when one boards a bus. Mr Dandara was in cross examination asked to identify the registration numbers of the bus he recently boarded and he failed to do so.

The plaintiff cannot be faulted for failing to identify the registration number. This is the sort of information that one expects to get from the police after an accident. The witness had this information in a police report in front of him as he testified. If he had wanted to lie, he could have looked at the details and given them in his testimony. He did not give the impression that he was bent on falsely incriminating the defendant. He maintained that he boarded a KK Bus. I found him to be credible in this respect.

The plaintiff's evidence on the identity of the bus was simple and straightforward and is supported by documentary evidence. The bus ticket produced by the plaintiff confirms that he boarded a KK bus. The ticket has no name of the passenger endorsed on the face of it. The defence witness conceded that it was not their practice to endorse passengers' names on the tickets. The defence witness did not deny that the ticket is similar to their usual ticket. The defendant's witness testified that the '6' being the fare should have been written in words. He argued that when they endorse fares paid by a customer, they write the amounts in both figures and letters. The witness conceded that their conductors were not trained to write out tickets in this fashion. It certainly cannot be the passenger's fault that the ticket was not properly written out. The tickets are said to be ordinarily kept by the conductors and issued out on the bus upon payment of the fare . The suggestion that the plaintiff could have picked up the ticket does not find favour with the court. This proposal is not supported by the evidence led. I see no reason why the plaintiff would insist that he boarded a KK bus if he boarded another bus. I am satisfied that the plaintiff boarded the defendant's bus on the fateful day and that the ticket produced is the ticket that he was given when he boarded the bus.

Did an accident occur?

The evidence led shows that an accident occurred. That evidence comes from the plaintiff himself and is confirmed by the injuries he sustained which are consistent with an accident having occurred .The police were called to attend to the accident and their report confirms that an accident involving a KK bus occurred on that day. I see no reason why the police would report that a KK bus was involved in an accident if it was another bus altogether that was involved in the accident. Although the plaintiff did not produce a traffic accident book to show the findings and investigations of the police, the evidence available discloses without doubt that an accident occurred and involving a KK bus.

The defendant challenged production of the police report on the basis that it does not state the cause of the accident and that it was produced as an original of a public document. It argued that it should have been produced as a copy or an extract from a public document as set out in

section 12 (2) of the Civil evidence Act [*Chapter 8:01*], [hereinafter referred to as the Act] and ought to have been certified.

Section 12 (1) of the Act defines a public officer as a person who holds office or acts in the service of the state or local authority. A police officer qualifies as a public officer. Sections 12 (2) and (3) govern the production of public documents and reads as follows,

> "12 (2) defines a public document as a document made by a public officer pursuant to duty. It is made to ascertain the truth of the matters stated in the document. The purpose of making such a document is to make an accurate record of the matters stated therein for public purposes. The public have a right of access to it. Section 12 (3) deals with production in court of a copy or extract of a document which is not a public document and is not relevant for purposes of this judgment. A document becomes a public document in terms of s 12 (2) if it was made by a public officer in the course of his duties to ascertain the truth of the matters stated in the document and if the document is meant to be used for public use. It must also be shown that the public have a right of access to the document."

The questioned document is a traffic accident police report compiled by Mrewa Traffic Police. In practice, where a road traffic accident has occurred, a docket is complied, in this case a sudden death docket. Any party may approach the police at any stage to get a report of the accident for any purpose. This is such a report. It is not a traffic accident book, TAB. It was not disputed that such a report was s compiled from documents available. What the plaintiff tendered is an original copy of the police report written in ink and issued by a police officer. The report is an extract from a public document, being the docket and is not a copy of a public document. The requirement to certify a document arises only when the document is a copy and not an original copy. The requirement for certification falls away.

The facts of this case are distinguishable from those in the case *Anuenyiangu* v *Chief Immigration Officer & Others* 2012 (2) ZLR (1) where photocopies of immigration and prison records were produced. The facts of this case are therefore distinguishable. The police report suffices as a public document. A document described in s 12 may be produced by any person in terms of s 12 (2).There was no legal requirement that the police produce this report in court. The document suffices to be produced as *prima facie* proof of the facts contained in the report by any person. The document is admissible and serves to confirm that the accident occurred.

Negligence

The police report does not deal with the cause of the accident. The applicant relies on his own observations of the accident to support his assertions of negligence. The plaintiff claimed that he was sitting at the back of the bus when the accident occurred. He claims that the driver

had been dozing along the way and swerved in his manner of driving. The witness stated that he heard other passengers shouting that the driver was sleeping just before the accident. That is what alerted him to what was happening. He later saw the driver from the back slumped on the driving wheel.

The evidence led also demonstrates the following. As the bus approached the river, the driver was racing with a Musami owned bus. The defence witness accepted that there was another bus belonging to Musami Bus Services that plied the same route at the same times and that the two buses would compete for customers. This indication gives credence to the plaintiff's version that the buses were chasing each other. From the plaintiff's assessment, the driver was speeding. He said that the bus was in competition with another bus which had overtaken tithe driver was irresponsible in his manner of driving . The act of competing for passengers coupled with chasing another bus does on its own constitute negligent driving.

Although no specific speed at which the driver was travelling was given by the plaintiff, the suggestion is that the driver was over speeding. Investigations of the police and sketch plans of the scene of the accident would have greatly assisted the court. What the court has is direct evidence of a witness who was present in the bus which is the subject of this trial and this evidence was not meaningfully challenged. Unfortunately the court was unable to test the evidence of the driver of the bus as he died as a result of the accident. We are not told of any other vehicle being involved in the accident. The probabilities of the case favour the plaintiff's version that the driver of the bus was negligent in his manner of driving in that he was speeding and chasing another bus resulting in him failing to control the bus and an accident ensuring.

Quantification of damages.

The plaintiff gave clear and straightforward medical evidence which establishes that he got injured as a result of the accident. The evidence of the doctor confirmed that the injuries are likely to have been caused by a road traffic accident. The plaintiff claims damages under two separate headings of general and special damages. The case of *Minister of Defence & Anor* v *Jackson* 1990 (2) ZLR provides a guide in assessing damages. The court held in that case that general damages are not a penalty but compensation. In *Sande v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 the court said the following on quantification of damages,

> "the amount to be awarded for compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending upon the judge's view of what is fair in all circumstances of the case."

In this case the court awarded $5000.00 to a pedestrian who was bit by a vehicle and did not sustain major injuries. The pedestrian did not sustain major injuries or suffer any permanent disfigurement. In *Judith Nyoka* v *Nyamweda Bus Service & Zimnat Lion Insurance,* HH 148/15 an award of $10 500.00 was made for pain and suffering, permanent disability, loss of amenities of life to a passenger who fractured her bones. In another case of *Abel Mkwananzi* v *Tirivavi Totamirepi and Ministry of Social Welfare,* HB 118/16, the court awarded $ 10.000 00 for pain and suffering, loss of amenities and disfigurement.

The defendant has not challenged the claim for general damages. The doctor assessed his disability at 10%. The US$2000.00 claimed for general damages is even on the lower side. The plaintiff stayed with pins on his hand for one year seven months before they were removed. He has lost use of his hand and had to endure a number of operations to correct his indisposition.

The plaintiff claims US $376.61 in special damages in his summons whilst his declaration refers to a sum of US $3076.61. No claim for interest rising from the claim is made in the summons. The defendant argued that since no application for amendment to rectify the discrepancy between the declaration and the summons was made, the plaintiff's pleadings are defective and excipiable. It contended that the plaintiff is entitled, if he succeeds in his claim to an award of only US $376.61 in special damages.

Rule 115 deals with such a state of affairs and reads as follows,

> *"115* ***Amendment in declaration of claim stated in summons***
>
> "In his declaration a plaintiff may alter, modify or extend his claim as stated in the summons and the summons shall there upon be deemed to be amended in accordance with the claim or claims made in the declaration.
> Provided that where the defendant shows that he is prejudiced by such amendment the court may make such order as to costs or otherwise as the justice of the case demands''

Rule 115 deals with a situation where a party's claim as disclosed in the summons is different from that disclosed in the declaration. The rule permits a plaintiff who has failed to disclose the full or exact extent of his claim in the summons to alter, modify or extend his claim as given in the summons in accordance with his declaration. Because of the employment of the words the summons "is deemed to be amended", the amendment is effected by operation of law. The discrepancy is deemed corrected by the declaration, without the need to apply for a formal amendment of the summons. A litigant who fails to state the correct amount claimed or make a claim for interest in his summons need not make a formal application for amendment of the summons to bring the summons in line with the declaration. A defendant who shows that

he has suffered prejudice as a result of such a course of action is entitled to an order for costs or other appropriate order.

The defect in the plaintiff's summons is deemed cured in terms of rule r115. There was no need for the plaintiff to file a formal application to amend the summons to bring it in line with the declaration. The plaintiff led evidence to prove his claim and hence there is no prejudice suffered by the defendant. It is evident that the error in the summons resulted from a typing fault.

The $108.00 paid by the plaintiff to Parerinyatwa hospital was not shown to have been charged for any particular service but was paid to clear arrears. The plaintiff has proved medical expenses totalling US$ 2962.00.No specification is made with regard to the date from which interest is to run. The defendant submitted that the plaintiff can only claim interest from the date of the judgment. The Prescribed Rate Interest Act, [Chapter 8.10], deals with charging of interest in illiquid claims. Section 6 reads as follows,

'"**6 Interest on illiquid claims**

(1) Subject to this section and unless otherwise agreed, every debt arising out of an unliquidated claim shall bear interest calculated at the prescribed rate on the amount of the debt from the date when the cause of action arose, whether or not the amount of the debt is fixed by agreement between the parties or by the judgment of a court.''

An illiquid claim bears interest at the prescribed rate of interest. The interest is to be calculated from the date when the cause of action arose. A plaintiff who claims damages for injuries sustained in a road traffic accident can only do so at the prescribed rate of interest from the date the cause of action arose. The plaintiff is entitled to claim interest at the prescribed rate from the date of the accident.

Accordingly the plaintiff is entitled to the following order,

1. The defendant is to pay to plaintiff.
   a) US $2000.00 being general damages,
   b) US $296200 being special damages

2 Interest at the rate of 5% per annum from 10 January 2011 to the date of full payment of the amounts in full.

2. Cost of suit.

Wintertons, plaintiff's legal practitioners
Nyambirai & Mtetwa defendant's legal practitioners