

JOHNSON MUCHECHESI
versus
KEVIN MUSIMWA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 26 October 2022, 10 January 2023,
18 May 2023, 25 September 2023 and 9 February 2024

Civil Trial

Mr *T Nyamuchera*, for the plaintiff
Advocate Hashiti, for the defendant

MHURI J: As a result of a motor vehicles accident that happened between plaintiff and defendant on 27 June 2008, plaintiff caused the issuance of summons against defendant claiming:

- (a) US\$52 000.00 being damages for bodily injury and US\$2 000.00 for medical expenses.
- (b) Interest at the prescribed rate on the sum claimed from the date of the summons to the date of full payment.
- (c) Costs of suit.

As per the plaintiff's declaration, the general damages are broken down as follows:

1. Pain and suffering	-	US\$15 000.00
2. Loss of amenities of life	-	US\$10 000.00
3. Permanent disability	-	US\$25 000.00
4. Future medical expenses	-	<u>US\$ 2 000.00</u>
Total		<u>US\$52 000.00</u>

The basis of the claim was that defendant drove his motor vehicle, Toyota Surf registration number AAB 3342, negligently in that he drove without due care and attention as a result he hit into plaintiff's motor vehicle Mazda 626 registration number 543-1407. As a result of the accident, plaintiff sustained a broken femur leading to permanent disability.

In his plea, defendant contests plaintiff's claim.

The matter went to pre-trial conference before a Judge and the issues that were referred to trial were –

1. whether or not the plaintiff is entitled to the damages being claimed in the summons?
2. whether or not the plaintiff is entitled to costs at a punitive scale?
3. whether or not plaintiff or defendant was negligent?

To prove plaintiff's case, two (2) witnesses were called to adduce evidence. These are, the plaintiff himself and Doctor S Masamha an Orthopedic Surgeon.

First to give evidence was the plaintiff. His evidence was that on 27 June 2008 he was driving along Mazowe Road towards Westgate roundabout when he was 30 metres out of the roundabout, defendant encroached into his lane and the two vehicles collided. When he was trapped in his motor vehicle, defendant tried to push his motor vehicle backwards. He was trapped in the motor vehicle for about 45 minutes. The Police from Mabelreign Police Station came to attend the scene and he was taken out of the motor vehicle. He testified further that defendant admitted to the Police that he drove his motor vehicle without due care and attention and paid a deposit fine of US\$20.00. He produced the Police report which was admitted as Exhibit 1. It was his evidence that after the Police arrived, he was then taken to Parirenyatwa Hospital where he was admitted in the Intensive Care Unit (ICU) for the injuries sustained. His knee and hip got injured and fractured. He stayed in hospital as from 27 June 2008 to 1st September 2008 when he was discharged.

He stated further that he was 39 years old then and had four (4) children whom he failed to send to school because of his health, neither could he afford to pay for their health because he was unable to work. He produced and were admitted as Exhibit 2 series, x-rays taken and the amounts paid and the hospital bills \$105 billion and \$2.5 trillion dollars. He stated that there were other amounts which were to be paid for the surgery he was to undergo for the hip and knee. For the knee operation an amount of US\$5 000.00 and for the hip replacement an amount of US\$25 000.00 were going to be required. This was as per the Doctor's assessment who put his injuries and disability at 65% permanent disability. He produced and was admitted in evidence the Doctor's letter as Exhibit 3.

Plaintiff stated that he still goes for reviews at Parirenyatwa Hospital where he was told to go and have costs done for the items required for the hip replacement. He got a quotation for US\$2 000.00 and US\$500.00 which amounts exclude bedding at Parirenyatwa. He produced these quotations and were admitted in evidence as exhibits 4 series. He concluded

his evidence by stating that he is no longer sticking to these amounts but that US\$30 000.00 will be appropriate basing on the letter by Doctor Gova Exhibit 3. He said he is in pain and has been in pain for the past 14 years and he does not think he will be able to live normally again. His wife divorced him because he could no longer be intimate with her.

Under cross-examination, plaintiff's responses were that it took him two (2) years to issue summons because he had no evidence and defendant was being looked for. He was only found after 2 years. He got his medical reports after his legal practitioner had written a letter to the doctor. He insisted defendant encroached into his lane thereby causing the accident and that he admitted to driving without due care and attention to the Police. His claim is based on the defendant's negligence as a result of the accident. He insisted that the injuries he sustained in 2008 are the same injuries he needs operation for despite the accident having happened 14 years ago. He has been going for reviews and still does. He also maintained his position that as a result of the injuries sustained, he cannot carry out normal work, have conjugal rights and requires money to send his children to school.

Plaintiff gave his evidence well. He was composed and was not shaken under cross-examination. He did not exaggerate the events. Even though he was not really certain about the exact place where the accident occurred, it is common cause that an accident happened between plaintiff and defendant's motor vehicles on the 27 June 2008. The exact spot is not material in my view. It is also not in doubt that plaintiff sustained injuries as a result of the accident and was hospitalized for almost three (3) months. He walks with a limp and with the aid of clutches. I find no reason for him to lie about the injuries he sustained and that he requires hip replacement and surgery on his knee. This is supported by the medical reports he submitted. Further his testimony that defendant caused the accident is corroborated by the police report that defendant paid a deposit fine of US\$20.00 for driving without due care and attention. I find plaintiff's evidence to be credible and I believe him.

The next witness to testify on behalf of plaintiff was Doctor S. Masamha. He testified that he is an Orthopedic Surgeon holding a Bachelor's Degree in Medicine and Surgery 2010 from the University of Zimbabwe, holds a fellowship with the College of Surgeons East, Central and Southern Africa.

He gave his evidence as an expert witness and testified that in October 2022, he together with his Senior Doctor Mageza attended to the plaintiff who had presented at Parirenyatwa Hospital with a letter from his lawyers requesting an assessment. Upon examining plaintiff, their findings were that plaintiff had post-traumatic osteoarthritis of the right hip with limited

range of motion of the right hip, he also has non-union of the right patella with weakness on trying to extend his right knee. It was their conclusion that the cause was a high energy traumatic event. The remedial action is operative management, he needs total hip replacement for the right hip, needs open reduction internal fixation of right patella and lengthening of the quadriceps.

He testified further that after explaining to plaintiff what the operations entailed, he referred plaintiff to the Accounts department to get quotations of the cost of the procedures to be done. He also advised him that the implants required for his management have to be sourced from private companies as Parirenyatwa Hospital did not have them.

He confirmed that the contents of exhibit 4 series (pages 47-50) i.e. quotations of the items listed thereon are in keeping with the management plaintiff requires. He further stated that after the operations, plaintiff will need sessions of physiotherapy, follow up x-rays to assess if the injuries are healing well after the operation. All these are an extra cost which can only be ascertained at the time.

Under cross-examination the witness explained why the medical report was authored not by him but by Doctor Mageza. He stated that, he was not aware that each doctor had to write so Doctor Mageza as the senior to him had to write the report. The witness explained that high energy events include road traffic accidents and falling from a height of 10 metres and above. Despite the accident having happened fourteen (14) years before, there were no other things he could link to the extent of the injuries beyond the high energy traumatic events. His findings are in keeping with injuries that occurred a long time ago. He would not know how plaintiff was treated as from 27 June 2008 at Parirenyatwa Hospital as by then he was not part of the Parirenyatwa family. Further that the fact that plaintiff kept presenting himself at Parirenyatwa could be because, after treatment and having been stabilized and discharged he was awaiting the day for surgery.

The witness also explained the difference in amounts between Doctor Gova's quotation (US\$25 000) and Parirenyatwa Hospital's quotation (US\$2 000.00) for the same procedure saying that Doctor Gova is a private doctor, one goes there as a private patient and Parirenyatwa is a government hospital and the difference in the disability percentage, he explained that he is not sure what Doctor Gova used but they used the NASSA assessment and their assessment was done in 2022 and Doctor Gova's was done a long time ago.

He concluded by stating that the operations should be done as soon as possible.

My findings as regards this witness are that, he gave his evidence well. He did not shake under cross-examination nor exaggerate his evidence in order to support plaintiff's evidence. Where he was not involved, he stated so. He was a credible witness, there is no reason not to believe him and accept his testimony.

With this witness's evidence the plaintiff closed his case.

Despite having indicated that he wanted to file an application for absolution from the instance by Monday 22 May 2023, defendant never did and I then directed that the matter be set down for continuation on 14 July 2023. On 14 July 2023 defendant sought a postponement and the matter was then set down on the 22 September 2023.

On the 25 September 2023, the defence case commenced. The defendant opened his case by adducing evidence himself. He testified that he was driving along Old Mazowe Road on the day in question. He was doing 30 kilometres per hour and when he was 40 metres from the round-about, there were two cars driving on the opposite direction and a third motor vehicle which he later identified as plaintiff's was behind these two motor vehicles, tried to overtake the two motor vehicles and rammed into his motor vehicle on the right side.

He testified that plaintiff caused the accident as he was driving at high speed and wanted to overtake in front of on-coming traffic. His motor vehicle sustained damage on the suspension, tie rod end, head lamps, grill radiator, bonnet and tyres were deflated.

He was injured in the chest as he hit the steering wheel, he was assisted by other motorists, he was under shock. He was assisted to call close family and his sister came and attended. He was taken to 24 hours Medical Centre where he spent the night and released to go home to recover. He did not know what later transpired. His sister arranged for the motor vehicle to be removed from the scene.

After four (4) days he attended at Avondale Police station where he filed a report for purposes of lodging an insurance claim. The Police took his details, insurance policy and registration book. They told him that they would get in touch with plaintiff and then call him. After a week the Police informed him that they now had plaintiff's details. They however then informed him that he had not reported the accident on time and that he had removed his motor vehicle from the scene without informing the Police. The Police told him he was to be charged for a case of not reporting the accident timeously. He then paid an admission of guilt fine for not reporting the accident.

Defendant testified that the Police did not attend the scene, he did not make any indications, the sketch plan submitted by the plaintiff does not represent the correct position as

there are 4 roads and not 3 as indicated on the sketch plan which lead into the round-about. He testified that plaintiff was intoxicated hence the reason why he said Lomagundi road. He was shocked to receive summons when it was plaintiff who was solely responsible for causing the accident as he was over-speeding, did not take proper look out and overtaking in front of other motor vehicles.

He was also shocked by the document from the Police, National Traffic Avondale which shows that he paid a deposit fine of US\$20.00 for driving without due care and attention. The document contained false information that he resides at No. 179 Samora Machel Avenue which is not a residential address. It indicates he paid US\$ fine when in 2008 there was no foreign currency regime in operation. He also testified that in his plea he indicated that he paid the fine for convenience and it was for late reporting.

He denied that he was negligent stating that negligent cases are taken to court and not resolved at the Police Station and that if he was negligent in the manner stated by plaintiff, the matter ought to have been taken to court for prosecution.

This basically was the defendant's evidence-in-chief. Under cross-examination defendant maintained that he was driving along Old Mazowe Road and the accident happened 40 metres before the round-about. When asked how he ascertained that plaintiff was over-speeding, his answer was: "I said he was overtaking other cars". He maintained that the sketch plan is misleading as the roads into the roundabout are 4 and not 3. When asked about the business address on the Police report, his reply was, it is not a business address, he used to reside there. He maintained that he paid a deposit fine for reporting late and this had nothing to do with the accident as the accident was still under investigation.

With his evidence, the defendant closed his case. He decided not to call the witness he had indicated he was going to call.

My analysis of the defendant's evidence is that, he was not a credible witness. He could not state a straightforward story of what transpired before and after the accident. He stated there were 3 cars in front of him driving in the opposite direction and plaintiff tried to overtake 2 of them. How he managed to see these 3 cars at that time (early evening) is a wonder. He stated in his evidence-in-chief that plaintiff was over-speeding and when asked how, he ascertained this, he answered: "I said he was overtaking". He skirted answering this question. He tried to challenge the Police report which shows he paid a fine for driving without due care and attention and yet in his plea he indicated he paid it for convenience. He did not mention that he paid it for the charge of not reporting the accident timeously. He did not produce the

Police report he alleges he made to the Police for purposes of an insurance claim. He did not produce the medical report to support his averment that he was hospitalized for the night after the accident.

As I indicated earlier, it being common cause that there was an accident between plaintiff and defendant on the 27th of June 2008 near the Westgate round about it is not an issue where exactly the accident occurred. Neither is it an issue that the sketch plan shows 3 roads instead of 4 leading into the round-about. The totality of defendant's evidence is replete with untruths, prevarication whereas plaintiff's evidence is straight forward.

I find that the challenge of the Police report by defendant is a flimsy excuse to try and avoid the consequences of the admission he made and paid a fine for. Defendant is a registered practicing lawyer, it goes without saying he knows the law, he could not pay a fine for an offence he did not commit or accept a report which bears a totally different charge from the one he had been charged with. His challenge to the payment in US\$ in 2008 was shot down as it was noted that in December 2010 when he paid the multi-currency regime was already operational.

Having considered all the evidence placed before me by both parties, the issue of whether or not the plaintiff or defendant was negligent is resolved in favour of the plaintiff. On a balance of probabilities, the evidence showed that defendant was negligent and is the one who caused the accident. Plaintiff is therefore entitled to claim damages for the injuries sustained. Defendant did not prove any contributory negligence on the part of plaintiff. His averment is not supported by any evidence.

I now turn to the damages plaintiff is claiming as a result of the injuries he sustained from the accident.

In his declaration plaintiff claimed a total of US\$52 000.00 which he later amended to US\$82 500.00 or its equivalent in RTGS as per his amended Draft Order and broken down as follows:

- (a) Special damages for the hospital bill
- (b) Pain and suffering – US\$15 000.00
- (c) Permanent disability – US\$25 000.00
- (d) Loss of amenities of life – US\$10 000.00
- (e) Future medical expenses – US\$30 000.00

In assessing the damages to be awarded, I will be guided by the principles enunciated in the case of *Minister of Defence & Anor v Jackson* 1990(2) ZLR 1(S) to wit, that:

1. General damages are not a penalty but compensation. The award is designed to compensate the victim and not punish the wrongdoer.
2. Compensation must be assessed as to place the injured party, as far as possible, in the position he would have occupied if the wrongful act causing him the injury had not been committed.
3. Since no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest considerations.
4. No regard is to be had to the subject value of money to the injured person, for the award of damages for pain and suffering cannot depend upon or vary according to whether he be a millionaire or pauper.

See also the case of *Mugadzaweta v Commissioner of Home Affairs & Ors* 2012(2) ZLR 423(H) in which ZHOU J applied the same principles as enunciated in the *Minister of Defence & Anor v Jackson* case (*supra*).

In assessing the damages, the court is alive to the fact that it will be exercising a discretion, which should be exercised judiciously.

As for hospital bills, plaintiff submitted that he paid some money for the services done on him at Parirenyatwa Hospital. On 3 July 2008 he paid an amount of \$105,600,000,000.00 for an x-ray. On 14 August 2008 he paid \$2,500,000,000,000.00 for another x-ray. On 30 November 2010 he paid US\$10.00 for treatment.

The exchange rates of the US\$ vis-à-vis the ZWL at 3 July 2008 and 14 August 2008 was US\$1.00:ZWL14,345,060,331.82 (3 July 2008) and US\$1.00:ZWL14.52 as at 14 August 2008 as per the Reserve Bank Rates Confirmation Certificate dated 2 August 2021 filed of record. Using these rates which were applicable then, the ZWL amounts will come to: US\$179.54 plus the US\$10.00 he paid in US\$, the total costs incurred in hospital bills which were proved is US\$189.00 and plaintiff is entitled to it. I therefore award it.

As regards pain and suffering, it goes without saying that plaintiff endured and still endures pain as a result of the injuries sustained. Plaintiff was hospitalized for 3 months. He is still walking with the aid of walking crutches and with a limp. He testified that his leg is always swollen and is always in pain and has been in pain for the past 14 years. Plaintiff is claiming an amount of US\$15 000.00. Considering that the injuries were sustained 14 years

ago, I do not believe that the pain is still as excruciating as it was then. An amount of US\$10 000.00 will be justifiable and I award it.

As regards permanent disability, plaintiff averred that he suffered 65% permanent disability. He relied on the assessment done by Doctor Gova in 2011. He is claiming US\$25 000.00. He referred to the case of *Mazorodze v Matambanadzo & Anor* (HC 4787 of 2005) (2007) ZW HHC 2 stating that the court took into account the fact that plaintiff suffered a 35% permanent disability and was granted a sum of \$3,912,125.00 (in 2005).

In casu, plaintiff called Doctor Masamha to testify on his condition and speak to the report compiled by Doctor Mageza on their behalf. In their report, Doctor Masamha confirmed that their assessment was that plaintiff's disability is 25% contrary to Dr Gova's assessment of 65%. He explained the difference by stating that he does not know how Dr Gova assessed plaintiff and that this assessment was done in 2011 whereas their assessment was the latter one done in 2022. Doctor Gova was not called to testify and speak to his report. I therefore take Doctor Masamha's testimony that plaintiff's disability is at 25% and will not award US\$25 000.00 but US\$10 000.00.

As regards loss of amenities for life, plaintiff's testimony was that due to the injuries he sustained, he is unable to work, he was by then aged 39 years, he was in his prime and was able to look after his children. He is now divorced from his wife as he is unable to perform conjugal rights. Plaintiff is not paralyzed. He suffered 25% permanent disability. Indeed, he walks with a limp and with the aid of a walking crutch. Plaintiff however did not show or prove what it is that he was doing which he could not do as a result of the accident. To merely say he is not able to do anything else as he used to is not enough. He did not state where he was employed and is no longer employed, neither did he mention the earnings he was getting when he was employed which earnings he no longer gets.

It is my considered view taking the above into account that plaintiff is entitled to US\$2 000.00 instead of US\$10 000.00.

As regards future medical expenses, plaintiff relied on the quotations given by the service providers for the surgery to be done. Doctor Masamha gave evidence speaking to the report they compiled after assessing plaintiff on the 4th of October 2022. He indicated that the implants for the surgery are not available at Parirenyatwa Hospital and these have to be sourced from private companies. He also spoke to other costs being incurred after surgery. Doctor Gova in his report spoke to the operations being very expensive to wit that for hip replacement it is in the region of US\$25 000.00 and for the knee operation around US\$5 000.00. The

quotation for the implants from Octave Medical & Surgical Supplies was US\$2 000.00 for total hip replacement and US\$500.00 for patella anatomic low profileplate or low reconstruction plate. This quotation is dated 6 October 2022. A quotation from Parirenyatwa Hospital given on 5 December 2022 and which entailed admission fees, specialist fees, theatre fees, blood and blood products, investigations, physiotherapy and consumables was US\$1 236.66. This excluded prosthesis. The other quotation was RTGS 701 287.55 and was valid for one day only i.e. 6 October 2022.

Considering the evidence of Doctor Masamha on what the surgery entailed, I am of the view that an award of US\$15 000.00 will be just and fair.

All in all, plaintiff is awarded a total sum of US\$37 189.00 (US\$ Thirty-seven thousand one hundred and eighty-nine) in damages.

It is therefore, **ORDERED THAT:**

Defendant pays plaintiff a sum of US\$37 189.00 (US\$ Thirty-seven thousand one hundred and eighty-nine) or its equivalent in RTGS at the official bank rate applicable on the date of payment.

There is no order as to costs (as plaintiff was being represented *in forma pauperis*).

Lawman Law Chambers, plaintiff's legal practitioners