

ISAAC MADUNGWE
and
SAMUEL MADUNGWE
and
ISAAC KUPAKWASHE MADUNGWE
and
GRACE MADUNGWE
and
GRACIOUS MADUNGWE
and
BLESSED MADUNGWE
2nd, 3rd, 4th, 5th, 6th, Plaintiffs herein
Represented by the 1st Plaintiff in his capacity
As their father and guardian.
versus
KING LION MOTORWAYS (PVT) LTD t/a KING LION COACHES

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 29 July 2020, 1 June 2021 and 5 May 2022

Civil Trial

C Ndlovu, for the plaintiff
B Nyamhanza, for the defendant

WAMAMBO J: This is an application for absolution from the instance.

Tendai Madungwe (hereinafter called the deceased) died from injuries sustained in a bus accident that occurred at the 257 kilometer peg along Harare Chirundu Road. She is at the centre of this trial. First Plaintiff is deceased's husband while second to sixth Plaintiff are children born of deceased and first Plaintiff. Defendant is a bus company which owns the bus which was involved in an accident that resulted in deceased's death.

Two issues were referred for trial namely:

1. Whether or not defendant's driver negligently caused the accident
 2. Whether or not the Plaintiff suffered the damages claimed in the summons.
- Plaintiff's case comprised testimonies of two witnesses namely the first Plaintiff and Boniface Chishiku. There was an attempt at calling another witness, but that

attempt was withdrawn apparently because same could either not be located or was unable to attend trial. The long and short of it however is that Mr Ndlovu for the Plaintiffs closed his case without calling the proposed witness.

Eight exhibits were produced during the trial. They were as follows. Exhibit 1- marriage certificate between deceased and first Plaintiff (same reports that the two were married under the Marriages Act [*Chapter 5:11*] on 27 April 2012.

Exhibit 2 to 6 are birth certificates of second to sixth Plaintiffs respectively.

Exhibit 7 are two pay slips for deceased.

Exhibit 8 is deceased's death certificate.

Exhibit 8 reflects the following: the deceased died at the age of 30, she was a married woman and she was employed as a nurse. Her date of death is 7 June 2017. The place of death is given as 257 km peg along Harare Chirundu Road Hurungwe District. The cause of death is given as cervical spine fracture due to road traffic accident.

The summons reflects that the plaintiffs claim is for \$1000 being balance of funeral expenses, \$2050,00 being cash value of bag and other valuables lost during the accident \$543 924,00 being loss of support and interest at the prescribed rate and costs of suit.

Evidence by the first Plaintiff, concentrated on the quantum of the claim. The events that took place before the accident that took deceased's life and the events that caused the accident were not adverted to in first Plaintiff's evidence. The reason is that the last time he saw deceased alive was when he accompanied her to N Richards Croco Motors where she was to get transportation to Harare on her way ostensibly to Zambia.

First Plaintiff narrated how he was informed of deceased's demise, his journey to Chinhoyi hospital to collect deceased's remains and the expenses involved in the journey up to the stage of the burial of deceased. He detailed the items that were in deceased's possession and their values. He gave details of deceased's earnings at her workplace and in her business endeavours. He also narrated on the loss of support and his new sole responsibility to fend for the surviving children to the marriage.

Boniface Chishiku was the next witness. He is a Congolese national residing in Rujeko C suburb of Masvingo city. He gave the following narration;

On 7 June 2017 he proceeded from Masvingo to Harare. In Harare he bought a bus ticket at Roadport and boarded a King Lion bus bound for Zambia. Upon leaving Roadport the bus was not full. Somewhere along the journey a lot of passengers embarked onto the bus resulting in some passengers standing in the bus. He was seated two seats behind the driver on the left side. The bus was speeding to the extent that some passengers were complaining about the speed. He later heard a big noise and the bus veered into the bush.

He later awoke in confusion and found himself unable to move due to injuries caused by the impact. He was injured on the center of his head. He was rescued by the police. He was then hospitalized and was still not fully recovered at the time he testified. He narrated that his right shoulder is no longer on the same level as it was due to the accident. He gave a lot of detail regarding his injuries. He gave further evidence that people were shouting for the driver to reduce speed but the driver paid no heed but continued in a conversation with the conductor.

In cross examination counsel for defendant quizzed him about his name appearing as Boniface Musa. He does not know why his name was wrongly written. He was of the candid view that the bus was speeding although he did not manage to look at the speedometer in order to say at what speed the bus was travelling. He however did not produce proof of the injuries he incurred as a result of the accident.

In motivating the application for absolution from the instance Mr *Nyamwaza* for the defendant made the following submissions.

Boniface Chishiku the witness who was aboard the bus when the accident occurred could not tell at what speed the bus was travelling. There is no accident evaluation report. There are so many possibilities on the cause of the accident. The Plaintiffs allege negligence and should have produce evidence in support thereof. It is unclear what caused the accident. The evidence on record is such that no court can make a reasonable mistake and find for the Plaintiffs.

The law on the principles relating to an application for absolution from the instance has been explored since time immemorial

In *Supreme Service Station (1969) Pvt Ltd v Fox v Goodridge (Pvt) Ltd* 1971(1) RLR 1 (A) BEADLE CJ at p 5 said:

“The test therefore, boils down to this, is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the Plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make a definition which helps not at all.”

Also see *Gascogne v Paul and Hunter* 1917 TPP 170

Put simply has Plaintiff established a *prima facie* case?

I am not so convinced. That the deceased perished as a result of a road traffic accident appears common cause. That, the driver of the bus in which she was a passenger also perished appears to be common cause.

While Boniface Chishiku is the sole witness to prove the driver’s negligence his evidence does not amount to such on the face of it. He lays no such basis. His evidence is to a large extent speculative. He testified about seeing trees flying. He did not get a look at the speedometer. He was not even able to estimate at what speed the bus was travelling. He was not able even to venture on the cause of the accident.

It was Plaintiff’s obligation to prove *prima facie* that there was negligence on the part of the driver which negligence led to deceased’s death.

There is no evidence in the first place of what caused the accident. There is no evidence placed on record on the circumstances just before the accident. Boniface Chishiku narrated how he heard a loud sound and nothing more.

It is given that in such a case where a person or persons died the police compile accident reports and accident evaluation reports.

The police in their day to day tasks attend such accidents and compile a report or reports usually including a report by an accident evaluator. The reports will be detailed on the observations at the scene, the terrain where the accident occurred and the observations on the bus involved at the scene. It is common that the police attending the scene will give an opinion on the cause of the accident.

It is usually clear from the report the reasons why the police would reach a particular opinion.

In this case the police report on any other relevant expert's report would be illuminating. On the evidence proffered by Plaintiffs there is no such information to work on.

There is no sketch plan, no input by Traffic Police officers at all.

Before going into the question of the quantum of the claim of negligence on the part of the driver has to be proven.

At this stage no *prima facie* evidence of such has been led. I find that there is nothing on negligence which defendant is called upon to rebut. I find in the circumstances that there is no evidence upon which a reasonable court acting reasonably might make a reasonable mistake and give judgment in favour of Plaintiff. The defendant has not asked for costs. I will thus not grant that which has not been applied for.

In the circumstances I order as follows:

The application for absolution from the instance be and is hereby granted.

Ndlovu and Hwacha, Plaintiff's legal practitioners.
Nyamwanza legal practise, defendant's legal practitioners