HH 168-2004
HC 3886/01

GETRUDE USHEHWEKUNZE
and
SHEPHERD GAMBURA

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE, 13 October, 2004

CIVIL TRIAL

Mr *Vasco Shamu*, for the plaintiff
Mr *D Muskwe*, for the defendant

HLATSHWAYO J: The plaintiff seeks compensation by way of damages in the sum of $836 646.82 and interest thereon together with costs of suit from the defendant, arising from a motor vehicle accident on 26 February 2000 at Kuwadzana Township, Harare. The plaintiff has attributed the cause of the accident to the sole negligence of the defendant which the defendant in turn totally denies.

In her narration the plaintiff said she had alighted from a commuter omnibus at about 1900 hours at Kuwadzana Three Shopping Centre and crossed over northwards to the other side of the main road where she was in the process of securing her minor child who she was carrying on her back when the accident occurred. The minor child subsequently died whilst the plaintiff sustained serious injuries detailed in Exhibit 'A'. She could not recollect exactly how the accident happened as she was knocked unconscious and only awoke in hospital, but remembers crossing the main road with a bag in one hand and a child on her back. She maintained having properly checked both sides of the road to ensure that it was safe to cross. According to her the traffic was not heavy, it was dusk and vehicles had their lights on. Her description of the volume of traffic and the time of

the accident tallies with that of the defendant and the attending police officer. The plaintiff's description, in the record of proceedings of the magistrates court where the defendant was tried and acquitted of culpable homicide, Exhibit H, which was admitted into these proceedings, gives a succinct impression of the sequence of events according to the plaintiff:

> "Q. What did you do before you crossed the road?
> A. I disembarked from the combi with the baby in my hands. I then secured the baby on my back and checked whether it was safe to cross the road and I proceeded to cross the road.
> Q. What then happened?
> A. I crossed the road and I wanted to pass a slope which was there. The baby had loosened on my back and I decided to tighten it." At page 3.

There were no eye witnesses who attributed any negligence to her. The state witness in the court *a quo*, Magdalene Mary Mudimu, who was not called to testify in these proceedings, but whose testimony was incorporated into these proceedings, did not see the plaintiff before she was hit, but "after the motor vehicle had just passed I noticed the woman still in the air before falling". Page 12. According to her, the defendant's vehicle "was a bit speeding". In the opinion of defendant's witness, Sergeant Cephas Matoro, who did not actually witness the events, but drew up a sketch plan from defendant's indications after the accident, the pedestrian caused the accident by crossing in front of a bus. He says the traffic was not heavy at the time he arrived at the scene about thirty minutes after the accident.

Two witnesses testified for the plaintiff, the brothers Patrick and Chamunorwa Chivaku. They are vegetable vendors who were manning their stall close to the scene of the accident. There are slight differences in their testimonies pertaining to the time of the accident with one brother putting it at "around 5 pm" (Chamunorwa) and the other at "six or after six in the evening" (Patrick), and Chamunorwa only noticing the power coach bus and not the combi before the accident, while Patrick says he observed

both vehicles. According to Chamunorwa, whose evidence is not materially different from that of his brother Patrice in other respect, there was a Power Coach bus which was stationary in front of their vegetable stall, partly on and partly off the road. The defendant's car drove past the bus at an excessive speed, and as it did so, he heard a bang. Both vehicles proceeded. He rushed across the road and was the first to hold the child who was still trying to breathe, took the child to he mother who had fainted and had a broken right leg. After about 30 minutes defendant returned in his motor vehicle together with a police officer, but the police officer did not talk to nor record any statement from him or any person at the scene. The accident occurred "around 5 pm, when the road starts getting busy; it was about to get dark, but vehicle lights were not yet on". The defendant did not stop to render assistance. He was not threatened by the crowd.

The defendant testified that he was traveling at 15 to 20 Km/h at around 7 pm, that it was dusk and the vehicles had lights on, the flow of traffic was "slow, not busy", that he saw only the Power Coach bus, with passengers disembarking and he adhered to his statement in the Traffic Accident Book (Exhibit 'G') and denied driving negligently.

In submissions, it was argued on behalf of the defendant that he had exercised all due skill and attention expected of a reasonable driver and the accident was due to sudden emergency; viz., that the Power Coach bus had stopped in his lane of travel and that in overtaking the plaintiff had suddenly appeared crossing in front of the bus making it impossible for him to avoid her. Reliance was placed on the authority of *Olivier N.O. v Rondalia Assurance Company of South Africa Ltd* 1979 (3) SA 20 (A) whose following opinion was quoted with approval in *Ronald McClean v The State* SC 104/2000:

> "It cannot, in my opinion, be expected of the reasonably careful driver that he should without more, be alive to the possibility that there may be a pedestrian concealed behind the front of each and every stationary motor vehicle who could suddenly appear in front of him in the road."

In the *Ronald McClean* case, the appellant was driving a Pick-Up truck when he saw a commuter omnibus ahead of him which was stationary at a bus stop on the left hand side of the road. As he drove past the bus, he struck the deceased, a sixteen year old boy. He immediately stopped and rendered assistance, but the boy died later in hospital. It was held that the appellant did not see any pedestrian at the rear or on the side or front of the bus who might have presented some danger and he was therefore entitled to assume that there were no pedestrians in the vicinity of the bus and that if any pedestrian intended crossing the road he would do so only after making sure that such a move was safe.

In my considered view, the circumstances of the present case differ from the sudden emergency scenarios I was referred to. The defendant saw a stationary bus in front of him with passengers disembarking and must have been put on his guard to exercise extreme caution as he attempted to overtake. The point of impact as attested by both the attending police detail and eye witnesses was well within the lane of the on-coming traffic. In other words, the plaintiff had successfully crossed the defendant's lane of travel and was now within or about to cross the next lane. Now, a pedestrian who in trying to cross the road finds himself or herself unable to complete the manouvre would be entitled to safely stop on the center line, and complete his/her crossing once the danger has abetted. Had there been an on-coming vehicle, the defendant would have been expected to stop behind the Power Coach bus, and give way to on-coming traffic before overtaking the bus.

The plaintiff testified that she did not see the Power Coach bus. That may well be so. She had alighted from a commuter omnibus that arrived earlier, had re-arranged her luggage, checked that the road was clear and proceeded to cross over. When the Power Coach bus arrived, in all probability she was no longer concerned about traffic from her right, at the time. She had successfully crossed that lane. She was now focusing on

traffic from her left, and there was none. Then suddenly, she was hit by defendant's car.

The defendant was clearly traveling at an excessively high speed, otherwise he could have stopped or avoided the accident or the extent of the injuries to the pedestrian or damage to the car would not have been so severe or so extensive. In a proper case of sudden emergency the pedestrian would have been very close to the stationary vehicle; just emerging from in front of it, and thus giving the overtaking driver no opportunity to prevent the accident.

Much was made, both in evidence and in submissions, of the damage to the vehicle being on the left side, but this fact does not count for much or may even be damning if taken together with the point of impact, for, if the defendant hit the plaintiff with the left side of his vehicle when the plaintiff was already well within the lane of on-coming traffic, then that shows that the defendant had moved a considerable way out of his own lane, much more than if the impact had been on the right side. Moving so much into the on-coming lane is a manouvre the defendant would have been expected to carry out only with the greatest of care. However, in this case he failed to exercise the ordinary care of an average driver. In his evidence, the defendant failed to indicate what measures he took to avoid the accident once it appeared imminent. He did not stop to render assistance, but claims that he feared for his life as the crowd was threatening to assault him. The credible evidence of the Chivaku brothers clearly proves that no such threats were ever made. At any rate, the uncontroverted evidence is that the defendant never stopped at all; no crowd had gathered, much less formed an opinion to assault him, as he continued driving away. These could only have been images formed by his own guilty mind. The opinion of the lower court which acquitted him on the charge of culpable homicide may be persuasive, but is certainly not binding on this court, more so because this court has had the advantage of hearing

evidence of two credible witnesses who were not available to the court a quo, the Chivaku brothers, who have testified that the defendant was never threatened by the crowd and that the point of impact was well into the next lane and that the defendant was over speeding.

It was submitted that because the plaintiff's medical bills were paid directly by the War Veterans Association, she had no right to claim monies paid on her behalf in the absence of proof of the amount having been advanced as a loan. The plaintiff gave credible evidence that the amount was advanced as a loan, and that deductions were being made from her pension as repayment. In the light of this evidence and in the absence of proof that the Association had acted like an insurer, this submission could not be sustained.

I have therefore arrived at the conclusion that it was defendant's sole negligence which caused the accident, that the plaintiff is entitled to the damages claimed and that such damages are reasonable and appropriate in the circumstances and that the plaintiff is entitled to her full costs in the light of her success.

Accordingly, judgment be and is hereby entered in favour of the plaintiff for the sum of $836 646.82 with interest and cost of suit.

Vasco Shamu and Associates, the plaintiff's legal practitioners
Muskwe and Associates, the defendant's legal practitioners