



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2680/2011

In the matter between:

SACKEY VIV TUNEEKO

PLAINTIFF

and

E KAFUNGA

DEFENDANT

Neutral citation: *Tuneeke v Kafunga* (I 2680/2011) [2017] NAHCMD 207
(4 August 2017)

Coram: OOSTHUIZEN J

Heard: 6 – 9 December 2017

Oral Submissions: 6 March 2017

Delivered: 4 August 2017

Flynote: Motor vehicle accident – damages – defendant deny being the driver of his motor vehicle during the accident, alleging it was stolen shortly before the accident.

Summary: Plaintiff instituted action for damages caused to his motor vehicle during a motor vehicle collision. Plaintiff drove on his side of the road from east to west. Defendant's vehicle was driven from west to east and then attempts a U-turn right in front of plaintiff, blocking the lane plaintiff was travelling in. Plaintiff took evasive action, swerving to the right (wrong side) in order to pass at the rear of the U-turning vehicle. Defendant's vehicle could not complete U-turn and had to reverse before completing U-turn. When reversing it blocked the gap which plaintiff took to evade collision. Defendant pleaded and testified that his Volkswagen Kombi (Minibus) was stolen from a service station shortly before the accident happened where he left it unattended with a running engine in order to buy bread. Consequently defendant denied being the driver of his vehicle during the collision. Defendant counterclaimed for the damages to his vehicle and pleaded contributory negligence on the part of the plaintiff and an apportionment of damages.

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. Defendant shall pay the amount of N\$ 296 170.21 to the plaintiff.
 2. Defendant is liable for the interest on the aforesaid amount at the rate of 20% per annum *a tempore morae* from 4 August 2017 to date of final payment.
 3. Defendant shall pay the costs of suit of the plaintiff.
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JUDGMENT

OOSTHUIZEN J:

[1] Plaintiff instituted a claim for damages arising from a motor collision between plaintiff's Audi bearing registration N92W and defendant's Volkswagen Minibus bearing registration N91232W on the 11th of September 2009 on the Monte Christo Road, Windhoek.

[2] Plaintiff was the driver of his Audi around 21h00 on the said date, travelling in a western direction. Defendant's Volkswagen Minibus was stationery at the side of the same road facing in an eastern direction, then moved onto Monte Christo road in an eastern direction and executed an unexpected U-turn right into/onto the lane in which plaintiff was travelling, blocking the road.

[3] Defendant deny that he was driving his vehicle at the stage because, according to defendant, his vehicle was stolen from Okuryangava Service Station shortly before where he, defendant, left his vehicle with a running engine unattended for a short while to buy bread at the Quick Shop. Defendant said that only on the day of the accident his Volkswagen Minibus experienced starter problems and he could not switch it off upon risk it would not start again.

[4] Defendant testified that after realising that his Volkswagen Minibus got stolen he ran behind it for a short distance and then took a taxi home to tell his children and fetch another vehicle to report his Minibus stolen at the Wanaheda Police Station.

[5] Defendant's corroborating witness came on duty at 22h00 hours and was approached by defendant to report his vehicle as stolen round about 22h00.

[6] Both plaintiff and his witness, Mr Nehongo positively identified the defendant as the driver of the Volkswagen Minibus at the time of the accident.¹

¹ Record pp 23, 40, 42, 48 and 50.

[7] During the trial the plaintiff and defendant admitted each other's damages to their respective vehicles.²

[8] Firstly, the Court must make a finding as to whether defendant was the driver of his vehicle at the time of the collision.

[9] It is plaintiff's case that defendant was indeed the driver of his vehicle at the time of the collision. Plaintiff thus bore the onus of proof of this fact.

[10] Concerning the question of the identity of the driver of defendant's vehicle at the time of the collision, the Court is faced with two mutually destructive versions.

[11] Plaintiff "can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities".³

[12] In casu, the general probabilities are limited to whether defendant was the driver of his own vehicle when the accident occurred. Plaintiff bearing the onus to prove that the defendant was the driver when the accident occurred, presented evidence that it was indeed the defendant driving the Volkswagen Minibus when the collision occurred.⁴ Cross-examination of the plaintiff and his witness strengthened the case of the plaintiff. Defendant did not convince with his defence if measured against the quality of plaintiff's evidence on point. If the Court should accept that the defendant reported his vehicle as stolen after the accident occurred, it is still not an adequate rebuttal by defendant. The Court thus finds that the evidence of the defendant that he was not the driver of his vehicle when the accident occurred, is therefore false or mistaken.

² Record pp 60 and 61.

³ *Josea v Ahrens and Another* 2015 (4) NR 1200 (HC) at 1203 D- H.

⁴ See paragraph [6] supra and the references in the footnote.

[13] Defendant's negligent driving (unexpected or sudden U-turn) obstructing the right of way of plaintiff is the main cause of the collision and the resultant damages.

[14] Plaintiff's evasive action which caused him to collide with the left rear end of defendant's vehicle, was reasonable in the circumstances.

[15] The fact that plaintiff only braked his vehicle upon impact (after defendant reversed his vehicle, closing the open gap), in the prevailing circumstances, did not constitute negligent driving by the plaintiff.

[16] The evidence of plaintiff and his witness made it clear that the U-turn attempt by defendant was unexpected and caused a situation of an imminent collision which could not be prevented by applying only brakes.

[17] Defendant was in no position to gainsay the evidence tendered on behalf of the plaintiff, due to his election to maintain that he was not the driver of his vehicle at the time of the collision and thus not present when the accident occurred.

[18] In the result, the following order is made:

1. Defendant shall pay the amount of N\$ 296 170.21 to the plaintiff.
2. Defendant is liable for the interest on the aforesaid amount at the rate of 20% per annum *a tempore morae* from 4 August 2017 to date of final payment.
3. Defendant shall pay the costs of suit of the plaintiff.

GH Oosthuizen
Judge

APPEARANCES

PLAINTIFF: Ms Angula
Of Dr Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANT: Ms Shikale
Of Shikale & Associates, Windhoek