IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA - A.D. 2005

CORAM - **ADINYIRAH [MRS] JA, PRESIDING**
PIESARE, JA
KANYOKE, JA

CIVIL APPEAL
NO H1/126/2004
15TH JULY, 2005

JOHN S. BARNES … PLAINTIFF/RESPONDENT

V E R S U S

(1) JAMES AHALIGAH] … DEFENDANTS/APPELLANTS
(2) KOFI SAMUEL AVUSU]

2nd Defendant/appellant present, the other parties absent.

Inusah Fuseini for the appellant present.

No appearance on behalf of the respondent.

J U D G M E N T

PIESARE, JA - This is an appeal against the judgment of the Sekondi High Court, dated 8th February, 2002, delivered by Dzamefe (J).

There are three original grounds of appeal viz:

(a) The Learned Trial Judge erred in law by failing to consider the evidence of negligence.

(b) The Learned Trial Judge erred in law when he awarded an amount of ¢55 million as the replacement value of an old vehicle.

(c) That the cost awarded is too excessive.

The 2nd defendant/appellant however filed two more grounds of appeal viz:

(1) That the judgment was against the weight of evidence; and

(2) That the learned trial judge erred in accepting the evidence of a representative of the plaintiff who gave evidence in the first person as if she was the plaintiff.

In his Statement of Case, the learned Counsel for the 2nd defendant/appellant argued the Additional Grounds of appeal, together with Ground (b) of the original Grounds of appeal i.e. the ground on the replacement value of ¢55 million. The Grounds of appeal on Negligence, and the costs, appear to have been abandoned.

Now, the facts which led to the litigation at the lower court show briefly, that, on or about 29th June, 1998, the 2nd defendant /appellant's DAF Tanker vehicle No. GT 99981, driven by the 1st defendant James Ahaligah, ran into the plaintiff/respondent's Mercedes Benz Cargo Truck No. W.R. 6940 S, causing extensive damage to the plaintiff/respondent's said vehicle, and serious injuries to the plaintiff/respondent's driver Paul Afful Mensah.

The sequel to this, was that the plaintiff/respondent issued a Writ of Summons against the 2nd defendant/appellant and his driver James Ahaligah (1st defendant), claiming jointly and severally:

(1) General and special damages for negligence; and

(2) Loss of earnings.

At the trial at the Court below, the plaintiff/respondent did not appear in court, for no apparent reason; it was his wife Mrs. Rebecca Barnes, who gave evidence on his behalf, with a Power of Attorney.

At the close of the evidence, the learned judge delivered his judgment in favour of the plaintiff/respondent, and awarded the plaintiff/respondent, ¢400,000.00 a week for a period of 2 (two) years for loss of earnings; and ¢55 million for the replacement value.

In the statement of claim filed by learned counsel for the plaintiff/respondent at the court below, the plaintiff/respondent claimed a replacement value of ¢30,000,000.00.

However, when the plaintiff/respondent's Attorney was giving evidence, she said: [quote]:

"Presently that vehicle costs about ¢66 million. In 1998 it was ¢30 million.

We have not bought another vehicle to replace it because I do not have money.

I am therefore claiming as per the Writ of Summons."

The alleged current value of ¢66 million was not challenged. Under cross-examination however, the plaintiff/respondent's Attorney admitted that vehicle was bought as a second-hand vehicle, and that they had used the vehicle for about two and half years before the accident. She could not tell the age of the vehicle, because she said the vehicle was bought by her husband.

It is clear from the judgment of the trial judge, that the learned judge relied, and acted upon the unpleaded fact in respect of the alleged current replacement value of ¢66 million .

At page 99 of the Record, the judge said [quote]

"She also indicated that a similar vehicle would presently cost ¢66 million, tendered invoice to buttress her point."

Then at page 102 of the Record, the judge said: [quote]

"The plaintiff also claimed the sum ¢66 million being the replacement value of the Mercedes Cargo vehicle. Though the plaintiff claimed ¢66 million as the current cost of a second hand Mercedes truck, I think the sum ¢55,000,000.00 is fair."

And the learned judge accordingly awarded that figure in favour of the plaintiff/respondent.

Surprisingly, I do not know how the learned judge came by the alleged invoice which he said the plaintiff/respondent's Attorney tendered in evidence. With all due respect, I think it was just a figment of his imagination, calculated, only to help the plaintiff/respondent to obtain a judgment for that enhanced figure.

In this appeal, counsel for the 2nd defendant/appellant, contends that by substituting the enhanced figure of ¢55 million for the ¢30 million claimed by the plaintiff/respondent in his pleadings, the learned trial judge substituted for the plaintiff/respondent, a case inconsistent with the plaintiff/respondent's case. He relied on **DAM VRS. ADDO** [1962] 2 GLR 200 (SC).

Now, straightaway, I reject this contention as misconceived. The case:

Amakom Saw Mill & Co. Vrs. Mansah

[1963] 1 GLR 368 (SC) at page 375 is authority for the proposition that a judge can suo motu enhance money claim as endorsed on the Writ of Summons, to a figure higher than claimed.

This power cannot however, be exercised capriciously, or arbitrarily; but only upon properly assessed or evaluated evidence on Record.

Example is the Amakom Sawmill Case (above) itself.
In that case the trial judge properly assessed loss of dependency for the dependants, that is, the wife and ten children of the deceased person who was killed in a motor accident. The judge found that the deceased's defendants were entitled to £G3,000, but because the Writ of Summons had mentioned only £G2,000, the judge awarded £G2,000.

At the Supreme Court, Akufo-Addo (J.S.C.) who delivered the opinion of the court said (at page 375 foot) [quote]:

> "There is a point of procedure to which I would like to avert. It will be observed that the learned trial judge assessed the damages of £G3,000, but felt obliged to enter judgment for £G2,000 because the respondents claimed £G2,000 on their writ. The practice in this country is that in all money claims, whether they be for liquidated or unliquidated amounts, a specific figure must, for revenue purposes, be claimed. It seems such a pity that a plaintiff in the circumstances of this case should be awarded less damages than a court has found to be due, merely because of the technicality of having claimed a lesser figure on the writ. In such circumstances the ends of justice will be much better served if the court exercises its powers under Order 28 rule 12 of the Supreme [High] Court (Civil Procedure). Rules to amend the figure claimed to coincide with the figure to which in his view the plaintiff is entitled."

Under this authority therefore the trial judge had power to enhance the figure, but in this appeal, I am satisfied that the exercised this power arbitrarily. There was no evidence supporting the plaintiff/respondent's Attorney that the current value of the damaged vehicle had risen to ¢66 million. The judge only sought to fill in the gap by "cooking" up evidence of the non-existent Invoice, The enhanced figure of ¢55 million is accordingly not acceptable, particularly, having regard to the fact that the vehicle was

bought as a second-hand vehicle, it had been used for about two and half years, and that the plaintiff/respondent's Attorney did not even know the age of that vehicle.

Now, Counsel for the plaintiff/respondent referred to the case of

EDWARD NASSER & CO.

VRS.

MC VROOM [1996-97] S.C. GLR 468

and contended that since the unpleaded fact in respect of the ¢66 million was led into evidence without objection the trial judge was justified in his judgment accepting that evidence.

In the **EDWARD NASSER** case, the Supreme Court held, that if evidence is led on unpleaded fact without objection,

"the trial court is bound to consider that evidence in the overall assessment of the merits of the case, unless the evidence is inadmissible per se."

I am of the humble opinion, that this authority does not mean that the evidence on unpleaded fact ought to be accepted without question. I, rather think that such evidence, falls into the general pool of the evidence for evaluation, and its acceptability will depend upon the cogency of that evidence.

In the instant appeal, the judge wrongly exercised his powers. The appeal against the enhancement of the claim from ¢30 million to ¢55 million is therefore accordingly allowed. The figure ¢55 million is accordingly set aside. The plaintiff/respondent is accordingly allowed a judgment for ¢30 million instead of ¢55 million, as the replacement value.

The next Ground canvassed by the appellant is that the period for loss of earnings (i.e. 2 years) awarded by the trial judge did not conform to the law. The cases:

(1) **Borketey Vrs. Achinuvu** [1966] GLR 92 SC

(2) **West African Bakery Vrs. Mieza** [1972] 1 GLR 78 CA.

In the later case i.e. **West African Bakery** case, the Court of Appeal held:

"Where an income earning vehicle is damaged beyond economic repair, the period for which loss of profit is recoverable is a reasonable time depending on the circumstances of each case. What is a reasonable time is a question for the discretion of the court….."

In the instant appeal, the trial court awarded loss of earnings for a period of two years. Now, the plaintiff/respondent's inability to purchase a new vehicle to replace the one damaged beyond repair, was due to impecumiosity, according to the plaintiff/respondent's wife.

At the Court below Mr. E.K. Amua-Sekyi (Counsel for the plaintiff/respondent) clearly stated in his address filed on 31st August, 2001, the attitude of the courts as regards the award of loss of earnings. He said: (page 96 of the Record).

> "Normally, the courts do not want to encourage claims for long periods of loss of earnings. The owners of damaged vehicles are always encouraged to promptly repair same. Thus, in the instant case, I will respectfully ask for a period of 6 months which will reduce the loss of earnings to ¢10,000,000.00"

I must say this panel is grateful for this, from Mr. Amua Sekyi. The trial judge however went out of his way and awarded a period of two years for loss of earning. I think that a period of two years is too long. The plaintiff/respondent's poverty at that time, is not a factor to consider.

In the circumstance of this case, I think a period of six months is fair and reasonable, for loss of earnings. The period of 2 (two) years awarded by the trial judge is accordingly hereby reduced to 6 (six) months. The award of two years – period for loss of earning is accordingly hereby set aside.

Now, lastly the appellant requests that the evidence of the plaintiff/respondent's Attorney should be expunged from the Record, because, although she was representing the plaintiff/respondent, she gave evidence in the first person, that is, as if the plaintiff himself was giving evidence. He relied on the case.

NII BOI VRS. ADI [1964] GLR 410 (SC)

which held:

> "Where a person represents a party to a suit in a trial court and gives evidence in the first person in the name of the party he represents, as if it were the party himself giving evidence the whole of that evidence is inadmissible."

Now, with all due respect, this case does not apply here. In the **Nii Boi** case, the party was in court, (but handicapped) he swore the oath as a witness, the person by him assisting him, did not swear, and purported to give evidence for the party.

In the instant case, the plaintiff/respondent's Attorney tendered a Power of Attorney, and swore as a witness. I, did not see anything intrinsically wrong with her evidence. Counsel for the appellant was in court when she gave evidence, but never raised a finger. This objection is therefore rejected.

In the result, I allow the appeal to the extent as set out herein in this judgment.

The judgment of the court below is accordingly hereby set aside.

E.K. PIESARE
COURT OF APPEAL

KANYOKE, JA - I also agree that the appeal against the ¢55 million awarded by the court below as the replacement value of the respondent's damaged vehicle should be allowed and is accordingly allowed. The law is that the replacement value of a chattel like a vehicle that has been destroyed beyond economic repairs is the pre-accident value of the vehicle and not the current value of a similar chattel or vehicle.

See **Borketey Vrs. Achinuru** [1966] G.L.R. 92 S.C.

The appeal against loss of use vehicle is also allowed. I will uphold the award of ¢30 million as the replacement value of the respondent's damaged vehicle. Subject to this the appeal is dismissed.

S.E. KANYOKE
COURT OF APPEAL

I agree.

S.O.A. ADINYIRA [MRS]
COURT OF APPEAL

COUNSEL - INUSAH FUSEINI FOR APPELLANTS

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