CIV APP 54/2005

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

SALINI CONSTRUCTION SPA - APPELLANT

AND

SIERRA LEONE ROAD TRANSPORT CORPORATION - RESPONDENT

COUNSEL:

N D TEJAN-COLE ESQ for the Appellant

ELVIS KARGBO ESQ for the Respondent

CORAM:

THE HONOURABLE MR JUSTICE S A ADEMOSU, JUSTICE OF APPEAL (NOW DECEASED)

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 27th DAY OF MARCH,2014.

1. This is an Appeal brought by the Appellant, Salini Construction SPA, otherwise known as SALCOST, against the Judgement of the late RASCHID,J, delivered on 21 July,2005.
2. The Grounds of Appeal as amended, are to be found at page 138 of the Record, and in the Notice of Additional Grounds of Appeal dated 16 September,2009. They are, as follows:
   i. General Damages and special damages are distinct types of damages. The latter must be specifically pleaded and strictly proves; and the Learned Trial Judge erred in law when he awarded the sums of Le46,167,094 as the value of the Plaintiff's bus on 29th November,1993 and loss of revenue of Le41,359,000 from date of accident for eight months thereafter respectively, as general damages when these amounts were pleaded as special damages. The special damages were not proved at all as no evidence was led.
   ii. Notwithstanding the demise of the Defendant's driver at the scene of the accident and the absence of the whereabouts of the only eye-witness for the Defendants because of the 10 years war in Sierra Leone, the defence in its cross-examinations raised series

of issues of law, facts and mixed law and facts relating to the road accidents at main road, junctions, cross- roads, wrong side of road, side roads, stopping and parking, rule of the road, speeding and error of Judgment and yet none of these was reflected in the Judgment.

iii. The writ of summons alleges that the accident occurred on the 26th November,1993 yet the evidence of the Plaintiff and the Judgment deal with incident on the 29th November,1993. No amendment was sought or obtained..

iv. The Learned Trial Judge did not consider adequately or at all the defence.

v. The Learned Trial Judge failed to evaluate the evidence adduced before it and further, failed to resolve facts in issue and also failed to assign reasons for accepting one version of the evidence against the other.

vi. It was the duty of the Trial Judge to reject inadmissible evidence which had been received, with or without objection, during the trial when he came to consider his judgment.

vii. The Judgment included preliminary finding of facts which were not supported by evidence and the Judge also took into account matters that were irrelevant in law and excluded matters which were necessary.

viii. The Judgment was against the weight of evidence.

3. Counsel on both sides filed their respective synopses of arguments, and they relied on them during the oral hearing.

4. The case is about an accident which occurred on 29 November,1993 at an area known as Limba Corner on the Freetown/ Masiaka Road. One of the Appellant's Grounds of Appeal is that the writ referred to the 26th of November,1993 and not to the 29th, and that the writ was never amended until the trial was concluded. We do not think this was material. There was never any contention raised by the Appellant at the trial as to the date of the accident. The Appellant has not disputed the occurrence of the accident, be it on the 26th or the 29th of the month. This Ground therefore fails.

5. There were two trials. The first one was conducted by the late EBUN THOMAS,J. The trial had got to the stage of addresses, when it aborted

on 21 May,1997, whilst Ms Yasmin Jusu-Sheriff, then Counsel for the Defendant was addressing, EBUN THOMAS,J - page 65 of the Record. As we would all recall, there was a coup d'etat a few days later, and a hiatus of over nine months, followed.

6. The case was then re-assigned first, to the late NYLANDER,J, before whom, no proceedings were taken; and then to the late RASCHID,J, who started the trial de novo. At page 67 of the Record, the Learned Trial Judge, RASCHID, J noted on 5 April,2000: "*D G Thompson for Plaintiff. Mr V Horton - P A to Master and registrar. The exhibits in this case have not been brought to Court. Jongopie my Registrar alleges that at the inception of the case, he received the exhibits from Jenkins the exhibits clerk. This was corroborated by D G Thompson, Counsel for the plaintiff. Jongopie said that at the end of the day's proceedings, he returned the exhibits to Jenkins. Jenkins denies this. He says he never set eyes on the exhibits. Please investigate. Adjourned to 17/4/2000.*" We have quoted this minute in full, as one of the grounds of appeal, is that the Learned Trial Judge relied on evidence which was inadmissible. Mr Tejan-Cole has argued that the Learned Trial Judge, in coming to his decision of Special Damages, relied on evidence which had not been tendered during the trial before, but which was indeed tendered in evidence at the first trial.
7. Our view is, and this is confirmed by the practice, that when a trial starts de novo before a second Judge, all the evidence has to be taken afresh. It is of course open to Counsel, when a trial is stopped before Judgment, to agree before the second Judge, to adopt the evidence which has been led in the first trial. When this is done, there is in effect, a continuation of the trial. But where the trial starts de novo, and the evidence already given at the first trial is not adopted by the second Judge, then the second Judge and Counsel can only utilise and rely on the evidence led and tendered before him. He cannot, in his Judgment, rely on evidence which was not led, nor tendered before him. Counsel for the Respondent should have ensured that all the documentary evidence tendered before EBUN THOMA,J was re-tendered before RASCHID,J. The Judge's minutes at page 67 of the Record, quoted above, show that he was aware of the absence of the exhibits. His duty therefore, was to have called witnesses afresh, who would, as it where, re-tender these same documents. Going through the Record, we have found out that

exhibits B, C & D respectively, which deal with the value of the bus damaged, were not re-tendered before RASCHID,J. Also, Hudson Lennox Sesay, the Respondent's then Corporation Secretary, who testified before EBUN THOMAS,J as PW 5 - see pages 46-48 of the Record, was not re-called to testify before RASCHID,J. There was therefore, no evidence before RASCHID,J relating to any special damage, the Respondent may have suffered and he ought not to have awarded special damages. Mr Tejan-Cole, has set out correctly what we believe is the true state of the law on special damages at page 6 of his synopsis, "*.....where the Plaintiff in a claim for special damages succeeded in proving both the subject matter and the value, he was entitled to be awarded the value he claimed. However, where he succeeded only in proving the subject matter but failed to prove its value, the Plaintiff would be entitled to nominal damages which should be a reasonably fair approximation of the pre-damage value of the property. Therefore, where it was only proved that the vehicle was destroyed beyond repairs, the nominal damages to which the Plaintiff is entitled was the market or replacement value of the vehicle..... The value or replacement value cannot be determined by this Court now when the special damage has not been strictly proved.....*"

8. Counsel on both sides have accurately quoted the Law: Special Damages must be specifically pleaded, and specifically proved. They cannot be inferred from the evidence led. Failure to prove these damages specifically, will result in the claim for the same failing. The Appellant therefore succeeds on this Ground of Appeal.
9. In order to deal with the finding made by the Court below as to whether the Appellant was liable in Negligence to the Respondent, we must examine the facts as found by the Learned Trial Judge. On 29 November,1993 Santigie Sesay, PW1 was the driver in control of the Respondent's Mercedes Benz bus, WR23879. He was detailed to take passengers to Kabala. He had 18 passengers on board, including Julius Ayo Peters, PW2, and Alusine Sesay, PW3. When he got to Mile 42, the road was being rehabilitated by the Respondent company. A linesman directed him to stop. While his vehicle was in a stationery position, he saw the Respondent's Dumper truck coming from the opposite direction at high speed. The linesman jumped aside. His vehicle was hit on the left hand side. He fell unconscious. He regained consciousness at the Connaught

hospital. Sometime thereafter, he returned to the scene of the accident in the company of Police Officers, and Respondent's employees. He made indications to the Police which were incorporated into a sketch plan drawn by PW4, Inspector Mohamed Gbassay Fofana.

10. The other two, so-called eye witnesses, PW2 and PW3, corroborated PW1's evidence that the Respondent's bus was in a stationery position when it was hit by the Appellant's Dumper. Both of them also suffered injuries, and fell unconscious after the accident. These were the only three persons who testified as to the occurrence of the accident. DW1, Jerry Kumba Mbayo, Appellant's Personnel Manager only went to the scene after the accident, and was not an eye-witness to the accident. He could not therefore assist the Court in coming to a finding as to which of the two drivers was responsible for the accident. The Learned Trial Judge was therefore right in dismissing the Appellant's counterclaim. There was no evidence to support it.
11. PW4 Inspector Fofana, who drew the sketch plan of the accident , was grilled in cross-examination by Respondent's Counsel, Mr Tejan-Cole about the accuracy of his sketch plan. We have gone through the evidence led and tendered, including this sketch plan, and we are of the view, and so hold, that there was ample evidence before the Learned Trial Judge, that the Respondent's driver, who, unfortunately died as a result of the accident was the cause of the accident. He must have been driving at such a speed, and without keeping a look-out for other vehicles parked or using the intersecting roads, that he ran into the Respondent's vehicle. At pages 129-130 of the record, the Learned Trial Judge had this to say: "*It is clear from the evidence of both the Plaintiffs' witnesses and the Defendant's witness that the appearance of the road and its environs indicated that construction and repairs on the road were in progress. That is evidence upon which I have to decide whether the defendant's driver was negligent. The general rule in cases of this kind is that the burden of proving the negligence is on the plaintiff. In certain cases however, there may be evidence from which negligence may be assumed and then the burden is on the defendant of disproving the negligence. The evidence of PW1 was that he was halted by the flagman and that while in this stationary position the defendant's vehicle coming from the opposite direction at high speed hit his vehicle on the left hand side and*

that he became unconscious. Looking at exhibit N a photograph taken by DW1 and exhibits H1, H2, H3 and H4, the opinion I am able to form is that the driver of the Defendants was blameworthy for the accident and therefore negligent." We agree with this finding of fact made by the Learned Trial Judge, and see no reason to interfere with the same. The pictures, exhibits H1-6 tendered at page 80 of the Record by PW5, Junisa Koroma, show that the accident was quite gruesome, and that the RTC bus was a mangled wreck. As is stated in CHARLESWORTH AMD PERCY ON NEGLIGENCE, 9th Edition at paragraph 9-147, "*Liability for a collision on the highway depends on proof of Negligence of those in charge of the vehicles involved.....*" The Learned Trial Judge had come to the conclusion, based on the evidence, that the Appellant's driver had been negligent, and his negligence had been the cause of the accident.

12. He also set out the law relating to Negligence, succinctly at page 124 of the Record. There, he said: "*In an action for Negligence it is for the plaintiff to state all the particulars. That is facts on which he relies, and that he has to prove: (a) that the defendant owed to the plaintiff a duty to exercise due care; (b) that the defendant failed to exercise that care; (c) that the defendant's failure was the cause of the accident. The defendant owes to all and sundry the common law duty of reasonable care in the use of the highway....*" We can find no fault with this direction. CHARLESWORTH AND PERCY ON NEGLIGENCE, opera citato, at paragraph 9-187, the Learned Authors state the Law on highway users and collisions, as such: "As Lord Du Parq pointed out, "an under-lying principle of the Law of the Highway is that all those lawfully using the highway.....must show mutual respect and forbearance." Hence, the duty of a person who either drives or rides a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the highway. In this connection, reasonable care means the care which an ordinarily skilful driver or rider would have exercised, under all the circumstances, and connotes an "avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on....." Clearly, on the facts, the Learned Trial Judge had come to the conclusion that the Appellant's driver had not exercised the required degree of reasonable care in all the circumstances of the case. We agree with him.

13. Mr Tejan-Cole has complained that the Learned Trial Judge had not stated anywhere in his judgment why he gave preference to the Respondent's case as against the Appellant's case. He contends that "*..reasons are necessary to be given to enable the losing party to examine them and formulate grounds of appeal from such reasons if erroneous.*" The reasons for His Lordship coming to the conclusion that the Appellant's deceased driver was responsible for the accident, and in this respect, giving preference to the Respondent's case as against the Appellant's case, are to be found in the passage quoted in paragraph 11 supra, culled from pages 129-130 of the Record. As we have stated above, there was no direct evidence of the accident coming from the Defendant at the trial. At page 69 of the Record, PW1 Santigie Sesay, the only eye-witness to the accident, said, "*.... The linesman stopped me and I parked. I used my hand brake. I waited for instructions to proceed. While there, I saw a Salcost dumper coming from the opposite end at high speed. I saw the linesman jump. The vehicle was coming from a place called Limba corner. It hit me on the left hand side of the vehicle.....*" We are of the view that this was evidence, which, on a balance of probabilities, the Learned Trial Judge was entitled to rely on in coming to the conclusion that the Appellant's deceased driver was driving at some inordinate speed. There was no evidence to the contrary before him. DW1, the Appellant's Personnel Manager testified on the Appellant's behalf. The Appellant's linesman that was Alhassan Kamara. DW1 said he could not be traced. He could have been the only other person who could have testified as the occurrence of the accident.

14. Mr Tejan-Cole cross-examined PW1 extensively at the trial, as is recorded at pages 71-72 of the Record, but PW1's evidence remained unshaken in this respect. That PW1 indeed stopped his vehicle when flagged down by the linesman, is confirmed by the evidence of PW2, Julius Ayo Peters, who was also on the bus that day, as is recorded at page 73 of the Record: "*...As we were approaching Mile 42 there I saw a Salcost traffic controller holding a red flag. He flagged us down. PW1 parked on the right hand side of the road in order to wait on coming vehicles. Whilst waiting, I suddenly heard a "bang" by PW1's side.....*" This version of the accident was also confirmed by PW3, Alusine Sesay who was also on the bus that fateful day.

15. Another complaint of Mr Tejan-Cole, is that the Learned Trial Judge failed to reject inadmissible evidence, e.g the so-called excessive speed at which the Appellant's driver was supposed to have driven. He has argued that this was opinion evidence. The Learned Editors of CHARLESWORTH & PERCY, op. Cit, have stated at paragraph 9-211 that: "*It is the duty of the driver....to travel at a speed which is reasonable under the circumstances. In determining what is reasonable, the nature, condition, and use of the road in question, and the amount of traffic which is usually on it at the time, or which might reasonably be expected on it, are all important matters to be taken into consideration....*" The Record discloses that the Learned Trial Judge took cognisance of these matters in coming to the conclusion that the Appellant's driver must have been driving with excessive speed.
16. The regrettable feature of this appeal is that there was no claim for General Damages, there was merely a claim for special damages as appears at page 3 of the Record. The Respondent's Solicitors must have been extremely confident that they would be able to prove the Respondent's right to the same; and they were able to do so at the trial before THOMAS,J. Sadly, they failed to do so at the trial before RASCHID,J which went on to judgment. This Court cannot grant them what they did not seek in the first place, and which they did not prove in the second place.
17. We therefore uphold the Learned Trial Judge's Judgment that the Appellant's driver was indeed Negligent, and was the cause of the accident. Such a finding would have entitled the Respondent to an award of General Damages, but there has been no cross-appeal, seeking such an Order. We cannot therefore grant such a relief. Ground 1 of the appeal succeeds. The other Grounds of Appeal fail. As the Respondent was successful at the trial on the issue of liability for Negligence, we do not find it necessary to interfere with the Costs Order made by the Learned Trial Judge, though the same consideration will not apply to the outcome of this appeal.

18. The Order of this Court is as follows: The Judgment of the High Court dated 21st July,2005 awarding Special Damages to the respondent totalling Le87,527,094 is set aside, but the Order as to Costs is affirmed. Each party shall bear its own Costs.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HONOURABLE MR JUSTICE E. E. ROBERTS, JUSTCE OF APPEAL.