



REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
**IN THE HIGH COURT OF MALAWI**  
**MZUZU DISTRICT REGISTRY**  
**CIVIL CAUSE NO. 208 OF 2011**

**BETWEEN**

**DINA LAPOZO .....** **PLAINTIFF**

-and-

**JULIOUS MWENEKONDO .....** **1<sup>ST</sup> DEFENDANT**

**NICO GENERAL INSURANCE CO. LTD .....** **2<sup>ND</sup> DEFENDANT**

**Coram :** **Honorable Mr. Justice D.T.K. Madise**  
Mr. G.J. Kadzipatike Counsel for the Plaintiff  
Defendants/Absent Unrepresented  
Mr. C. Chawinga Official Interpreter  
Mrs. F. Silavwe Court Reporter

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**Madise, J**

**JUDGMENT**

## **1.0 Introduction**

**1.1** On 25 October 2011 the Plaintiff in this matter took out a writ of summons under Order 6 RSC claiming damages for negligence against the 1<sup>st</sup> Defendant being a driver of a motor vehicle insured by the 2<sup>nd</sup> Defendant. The Defendants denied the claim and put the Plaintiff to strict proof.

## **2.0 The Statement of Claim**

**2.1** Accompanying the writ of summons was a statement of claim filed by the Plaintiff which we reproduce as filed.

1. The 1<sup>st</sup> Defendant was driver of a motor vehicle registration number BQ 4139, Scania bus and the 2<sup>nd</sup> Defendant was the insurer of the said vehicle.
2. On or about 18 July 2011 the 1<sup>st</sup> Defendant was driving the said motor vehicle from the direction Zomba towards Blantyre.
3. The 1<sup>st</sup> Defendant so negligently drove the said vehicle that upon arrival at Pamakala in Thondwe, he failed to control it and hit a Toyota Hiace registration number NU 5119 in which the Plaintiff was lawfully on board which Toyota Hiace got extensively damaged, and the Plaintiff got seriously injured.
4. Due to the negligence of the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant, the Plaintiff has suffered loss and damage for which the 1<sup>st</sup> Defendant, 2<sup>nd</sup> Defendant and/or the 2<sup>nd</sup> Defendant is/are liable.

## **2.2 Particulars of Loss and Damage**

**2.2.1** The Plaintiff suffered two deep wounds on the left leg, suffered severe injuries on her jaw resulting in the removal of five teeth with two teeth in very serious condition. The Plaintiff further sustained several soft tissue and other injuries.

### **2.3 Particulars of Negligence**

1. Driving at an excessive speed in the circumstances.
2. Failure by the 1<sup>st</sup> Defendant to handle, stop or otherwise handle the vehicle so as to avoid hitting the said Toyota Hiace in which the Plaintiff was aboard.
3. Failure to have any or any proper look-out on the road.

### **2.4 Wherefore the Plaintiff claims:**

1. MK3,000 cost of the police report to be assessed.
2. Special damages to be assessed.
3. Damages for pain and suffering.
4. Damages for disfigurement.
5. Damages for loss of amenities of life; and
6. Costs of this action.

### **3.0 The Defence**

**3.1** The Defendants filed a defence denying the allegations in the statement of claim which we reproduce as filed.

1. The 2<sup>nd</sup> Defendant denies to have been at the material time, or any other at all, the insurer of motor vehicle registration BQ 4139, a Scania bus, and puts the Plaintiff to strict proof of that allegation.
2. Further, or in the alternative, the allegations of negligence or injury or other loss are denied and the Plaintiff is put to strict proof thereof.
3. Save as hereinbefore specifically admitted, the Defendants deny each and every allegation contained in the statement of claim as though the same were herein set out and *traversed seriatim*.

And the Defendants pray that the Plaintiff's action be dismissed with costs.

#### **4.0 The Evidence**

**4.1** Hearing was set for the 17<sup>th</sup> of January 2013. Only the Plaintiff and her Lawyer appeared. There was no word as to why the Defendants did not show up. The Plaintiff through his Lawyer presented to court an affidavit of service sworn by Wellan Nsomba of Messrs Jivason & Company who deponed that on 20 December 2012 he had served the Defendants with copies of the notice of hearing dated 7 December 2012 and hearing was on 17 January 2013.

**4.2** The Court allowed the Plaintiff to proceed. There was only one witness Dina Lapozo the Plaintiff in this matter. She took oath and presented her witness statement which we reproduce as filed.

1. That I am the Plaintiff in this matter suing on my on behalf.
2. That I claim damages emanating from personal injuries that I suffered due to the negligent conduct of the 1<sup>st</sup> Defendant, a driver of Scania bus registration number BQ 4139 and I am suing the 2<sup>nd</sup> Defendant as an insurer of the said vehicle driven by the 1<sup>st</sup> Defendant.
3. That on or about the 18<sup>th</sup> day of July 2011 the 1<sup>st</sup> Defendant was driving the said motor vehicle from the direction of Zomba heading towards Blantyre.
4. Upon arrival at Pamakala in Thondwe the 1<sup>st</sup> Defendant drove the said motor vehicle so negligently that he failed to control it resulting in the Scania bus hitting an oncoming motor vehicle, a Toyota Hiace minibus in which I was one of the passengers coming from the direction of Blantyre towards Zomba. There is now produced to me a police report exhibited and marked **DL1**.
5. That I sustained two deep wounds on the left leg, my 5 teeth got removed, and some serious tissue injuries on the neck. There is now produced to me a medical examination report exhibited and marked **DL2**.

6. That ever since the accident happened I have never received any compensation from both Defendants.

**4.3** The Plaintiff tendered in evidence a Malawi Police Abstract report which was authored by S/Supt. Kaliwo of Thondwe Police Station. He opined that according to Police investigations and evidence gathered at the scene of the accident, it was revealed that the accident was influenced by the driver of Scania bus motor vehicle registration number BQ 4139 who failed to control his motor vehicle due to over speeding and hit a minibus registration number NU 5119 which was coming from the opposite direction.

**4.4** In conclusion he stated that the driver of motor vehicle registration number BQ 4139 was charged with the offence of reckless driving and he paid a fine of K5,000 under GR number 433558.

**4.5** The Plaintiff also tendered in evidence a medical report which indicated that the Plaintiff 35 years old was admitted to hospital on 18 July 2011 and was discharged the following day. She was treated as an out-patient. The findings were that the Plaintiff had hard and soft tissue injuries. There was a deep cut around the front teeth and five teeth were completely removed and two teeth were very mobile (loose). There were also bruises on her arm and leg.

## **5.0 The Issues**

**5.1** There are basically four issues for determination before this court.

- 1) Whether the 1<sup>st</sup> Defendant was negligent
- 2) Whether the 1<sup>st</sup> Defendant owed the Plaintiff a duty of care
- 3) Whether the 2<sup>nd</sup> Defendant is liable as an insurer
- 4) Whether the damages are payable.

## **6.0 The law**

### **6.1 Burden and Standard of Proof**

**6.1.1** He who invokes the aid of the law should be the first to prove his case because in the nature of things a negative is difficult to establish than an affirmative. The burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what he claimed is true, the burden shifts to the other party who will fail unless sufficient evidence is adduced to rebut the presumption. The court makes its decision on the balance of probabilities and this is the standard of proof require in civil cases. See Constantine Line vs. Imperial Smelting Corporation (1943) AC 154, 174.

## **7.0 The Determination**

**7.1** There is no dispute that on 18 July 2011 the Plaintiff was involved in a car accident near Pamakala at Thondwe along the Zomba - Blantyre road. She was in a min bus which was hit by a bus registration number BQ 4139 Scania driven by the 1<sup>st</sup> Defendant and insured by the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant did not file a defence nor did he attend trial. The 2<sup>nd</sup> Defendant did file a defence but never turn up at trial. In their defence they denied that the 1<sup>st</sup> Defendant's bus was insured by them.

**7.2** There is no dispute that as a result of the accident the plaintiff was referred to the hospital where she was hospitalized for one day. There is no dispute that as a result of the accident the plaintiff sustained both hard and soft tissue injuries to wit she lost five teeth and two more became loose. She had injuries to her arm and leg. The Plaintiff claims the 1<sup>st</sup> Defendant was negligent a thing the 2<sup>nd</sup> Defendant has vigorously denied.

### 7.3 What is negligence?

**7.3.1** Lord Alderson, gave perhaps the best definition of negligence in the case of Blyth vs. Birmingham Water Works Company (1856) Ex. 781 at 784.

*Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.*

**7.3.2** Negligence as a tort has four elements namely:

1. The existence in law of a duty of care which the law attaches liability to carelessness.
2. Breach of the duty of care by the defendant.
3. A casual connection between the defendant's careless conduct and the damage.
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

Once this is established the next question is to consider whether the defendant is liable in damages and for how much.

**7.4** Looking at the evidence before me, can it be said that the 1<sup>st</sup> Defendant was negligent? Did he owe the Plaintiff a duty of care? Can it be said that the 1<sup>st</sup> Defendant breached that duty of care? Lastly can it be said that as a result of that breach the Plaintiff suffered loss or damage? Lastly are damages payable in this matter?

**7.5** The Plaintiff tendered her witness statement. she further tendered an Abstract Police report filed by S/Supt Kaliwo who opined that according to the investigations and the evidence gathered at the scene and statements obtained from witnesses the accident was caused by the negligent driving of the 1<sup>st</sup> Defendant. The driver was charged with reckless driving and he paid a fine of K5, 000.

**7.6** The Defence has not led evidence in rebuttal to challenge the findings of the Police. The law demands of us to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Guidance in this matter has been sought from Lord Atkins LJ when he decided Donoghue vs. Stevenson (1932) AL 562.

*Who then in law is my neighbour? Neighbours are people who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I'm directing my mind to the acts or omission which are called in question*

**7.7** The Plaintiff was traveling in a mini bus on the material day. She was perfectly entitled to be there. At or near Pamakala at Thondwe the mini bus she was traveling in was involved in a car accident. The Police found that the 1<sup>st</sup> Defendant was at fault as he was over speeding. He did not challenge that accusation by refusing to pay the fine. What further evidence do I need? I find that the 1<sup>st</sup> Defendant caused the accident which occurred on 18 July 2011 due to his negligent acts to wit over speeding.

## **7.8 Liability of Insurer**

**7.8.1** The law in section 65 A Road Traffic Act (Cap 69:01) laws of Malawi gives a right to the injured party to proceed against the insurer.

*Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued.... Shall be entitled in his own name to recover directly from the insurer any amount not exceeding the amount covered by the policy for which the person insured is liable to the person having the claim.*

**7.8.2** A plaintiff claiming directly against an insurer has a good claim notwithstanding any condition in a policy which purports to restrict the insurance of the person insured.

**7.8.3** The Defence has argued that the Plaintiff must prove that the motor vehicle in question was insured by Nico General Insurance Company Ltd. I'm surprised actually why they say so. There has been tendered before this Court an Abstract Police report which clearly indicates that the motor vehicle which caused the accident was insured by Nico General Insurance Company Ltd.

**7.8.4** In particular the report stated that the certificate of insurance was No: 10144896, Policy number P/01/1002/102/08/321 issued on 3/11/2010, expiring on 4/11/2011 and issued by Nico General Insurance Company Ltd. This therefore means that if the accident happened on 18 July 2011 it was within the subsistence or life of the insurance cover. Moreover the Defence has not led evidence in rebuttal to suggest that the details in the Police report were false or that the said details do not appear in their system. They denied without any basis at law.

## **8.0 Conclusion**

**8.1** I have already found the 1<sup>st</sup> defendant liable in damages for his negligent acts which caused the plaintiff to suffer both hard and soft tissue injuries. She lost five of her teeth and the other two remained loose. I have already found the 2<sup>nd</sup> Defendant liable in claim for being the insurer of the vehicle driven by the 1<sup>st</sup> Defendant. They must compensate the Plaintiff by paying damages.

## **8.2 Damages for Personal Injury**

There are classified into pecuniary and non-pecuniary. Pecuniary damages directly translate into money terms and include loss of earnings actual and prospective, while non-pecuniary damage include such immeasurable elements as pain and suffering and loss of amenity. The latter, falls within the category of fair compensation.

**8.3** The assessment of specific damage as a particular head must be specifically pleaded. Although general damage is presumed by law to flow from the wrong complained of, it must still be averred and the court must be satisfied that such damage has been suffered.

**8.4** Special damages must be specifically pleaded in order to warn the other party so that they are not ambushed at trial, since they are over and above those that would reasonably be expected to flow from the claimant's injuries. I therefore order that the Plaintiff in this matter should be awarded damages in the following terms:

- 1) Damages for pain and suffering.
- 2) Damages for loss of amenities of life (failure to chew food properly and speak audibly)
- 3) Special damages.

4) Refund of medical bills and Police report.

The Plaintiff must file summons for assessment of damages before the Hon. Registrar within 14 days.

This action must succeed.

**9.0 Costs**

**9.1** Award of costs is the exclusive preserve of the Court. I condemn the Defendants in costs.

**Pronounced** in open Court at Mzuzu in the Republic this 25<sup>th</sup> day of March 2014.

Honorable Dingiswayo Madise

**JUDGE**