



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 379 OF 2010



BETWEEN:

FADSON JERE.....PLAINTIFF

AND

PRIME INSURANCE COMPANY LIMITED.....DEFENDANT

CORAM: THE HONOURABLE JUSTICE MR. S.A. KALEMBERA

Mr Katuya, of Counsel for the Plaintiff

Mrs Mangison, Official Interpreter

JUDGMENT

Kalembera J

INTRODUCTION

The Plaintiff commenced this action against the Defendant by writ of summons and statement of claim dated 10th February 2010 claiming damages for personal injuries and costs. The claim arises from injuries suffered by the Plaintiff as a result of a road accident which occurred on or about the 14th day of March 2009 involving a minibus Toyota Hiace Registration No. BP 2252 and a Mercedes Benz articulated truck Registration No. NE 668/BH 6242. The accident was allegedly caused by the negligent driving of minibus driver.

PLEADINGS

The Plaintiff's statement of claim alleges as follows:



1. The plaintiff is a Malawian citizen resident in the City of Blantyre. He carries on business of buying and selling of various agricultural and non-agricultural products.
2. The defendant is a limited company carrying on insurance business throughout Malawi.
3. At all material times, the defendant was insurer of minibus, Toyota Hiace Registration Number BP 2252.
4. On or about 14th March 2009, the plaintiff was travelling in the aforesaid minibus along the Chipembere Highway in the direction of Limbe when near Chichiri Museum the driver of the said minibus so negligently drove the minibus that it collided with a Mercedes Benz truck and trailer Registration Number NE 668/BH 6242 at the rear of the truck and trailer which was moving in front of the minibus in the same direction as the minibus.

Particulars of Negligence

- (i) Driving without due care and attention.
 - (ii) Driving at a speed which was excessive in the circumstances.
 - (iii) Failing to keep any or any proper look-out or to have any or any sufficient regard for the other users of the road.
 - (iv) Driving too close to the truck and trailer.
 - (v) Failing to pull clear of the truck and trailer when overtaking the truck.
 - (vi) Running into the rear of the truck and trailer.
 - (vii) Failing to stop, to slow down, to swerve or in any other way so to manage or control the minibus as to prevent the collision.
5. Further, the driver of the said minibus was charged with the offence of reckless driving contrary to section 126 of the Road Traffic Act and he pleaded guilty and paid a spot fine of K2,000.00 under GR Number 218254. The said admission of guilt is relevant to the issue of negligence and the plaintiff intends to rely on it as evidence in this action.
 6. By reason of these matters, the plaintiff was thrown from his seat and hit the internal fixtures of the minibus and sustained injuries and has suffered loss and damage.

Particulars of injuries

(see attached medical report)

Particulars of special damage

- (i) K2,000 for police report
- (ii) K2,500 for medical report

And the plaintiff claims:

- (i) Damages for pain and suffering.
- (ii) Damages for disfigurement.
- (iii) Damages for loss of income/business during the period he was unable to carry on his business due to the injuries.
- (iv) Special damages as pleaded above.
- (v) Costs of the action.

DEFENCE

1. The Defendant makes no admission to paragraph 1 of the plaintiff's statement of claim.
2. The Defendants make no admission to the contents of paragraph 2 of the plaintiff's statement of claim and puts the plaintiff to strict proof.
3. The Defendant deny paragraph 3 of the plaintiff's statement of claim and puts the plaintiff to strict proof thereof. The particular of negligence and damages contained therein are denied in their entirety.
4. The Defendants denies paragraph 4 of the statement of claim and out the plaintiff to strict proof thereof.
5. **WHEREFORE** the Defendants prays that the plaintiff's action be dismissed with costs.
6. Without prejudice to the foregoing, the Defendants plead that its liability is subject to the owner of the motor vehicle herein being found liable in respect of the within accident.
7. The Defendant pleads that its liability, if any, is limited to indemnify the owner of the motor vehicle herein to the maximum liability contained in

the contract of insurance between itself and the owner of the motor vehicle herein.

8. **SAVE** as hereinbefore admitted the defendant denies each and every allegation of fact contained in the statement of claim as if the same were herein traversed seriatim.

EVIDENCE

The defendant did not attend the trial despite being served. Therefore, there was only one witness, the plaintiff, himself who testified.

PW 1 was Fadson Grayson Jere (S/S in chichewa). During his testimony he adopted his witness statement. It was his evidence that he is a watchman at Cargill Cotton Malawi Limited. He comes from Mponda Village, T/A Nkanda, Mulanje and that currently he lives in Mbayani Township, Blantyre. On the 14th March 2009 at around 6am as he was travelling in a minibus registration number BP 2252 Toyota Hiace, from Blantyre town to Limbe and driven by one Banet Nyumbi and insured by the defendant. He was sitting behind the driver. The minibus was going at a very high speed and in front of the minibus was an articulated truck. It was heavily loaded and going very slowly. As they were passing through the museum on the Masauko Chipembere Highway, he just saw that the minibus had crashed onto the trailer.

After the collision, he flew and hit metal bars that were right in front of him. He sustained a deep cut on the forehead and he was sutured six stitches. In addition he also sustained an injury on the knee where he was stitched with two stitches. He was treated at Queen Elizabeth Central Hospital. He was on his way to Limbe to buy onions for resale in Blantyre at Mbayani market. From the siad business he was able to make K3,000 profit. Usually he was able to get tomatoes twice per week from Ntcheu. On the last trip he had bought tomatoes worth K15,000. It was his further testimony that the minibus driver was driving very fast and carelessly. He was also following the truck very closely.

There was no cross-examination since the defendant was absent. After this witness the plaintiff's case was closed.

ISSUES FOR DETERMINATION

1. Whether the driver of the minibus Registration No. BP 2252, Toyota Hiace, was negligent and thereby caused the accident.
2. Whether the plaintiff is entitled to damages for the personal injuries he suffered in the accident.
3. Quantum of damages.

LAW AND ANALYSIS

I am mindful that in a civil matter like this one, the Plaintiff as the one who alleges or asserts, he bears the burden of proof. And the standard of proof in civil proceedings is proof on a balance of probabilities. In the case of **Miller v Minister of Pensions [1947] ALL ER 372** at pages 373 and 374 Denning J had this to say:

“If the burden is such that the tribunal can say; we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not.”

And in the case of **Mike Mlombwa t/a Countrywide Car Hire v Oxfam, Civil Cause No. 2343 of 2003**, Manyungwa J had this to say:

“Aw ell settled law of ancient application is ‘ei incumbit probatio qui dicit non qui negat.’ This essentially means that the burden of proof lies on the party alleging a fact of which correlative rule is that he who asserts a matter of fact must prove it but he who denies need not prove it...”

In the matter at hand, the Plaintiff bears the burden of proving, through evidence, that which he alleges, that is, that the accident was caused by the negligence of the Defendant’s insured.

It is paramount that we reiterate from the outset that ‘it is trite law that an action founded upon negligence is based on the conception of duty of care which one person owes to the other person’ -Tembo JA in **Southern Bottlers Limited and another v Commercial Union Assurance Company Plc [2004] MLR 364 at p. 370**. As regards a driver of a motor vehicle the honourable JA quoted with approval Banda J in **Banda and others v ADMARC and another [1990] 13 MLR 59 at 63** where he put that duty as follows:

“A driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skilful driver would have exercised under all the circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look –out , observes traffic signs and signals.”

In the matter at hand it is the undisputed evidence of the plaintiff that the driver of the minibus was driving at a very high speed. This was despite that there was an articulated truck in front of the minibus, which was heavily loaded and driving slowly. It has been held that the fact that the driver failed to stop in time to avert the accident is also in consonance with the fact that he was speeding –**Kadawire v Ziligone & another [1997] 2MLR 139 at p.145**. And in the case of **Rep v Sinambali 4 ALR (Mal) 191**, it was held that it is the driver’s duty to drive at a speed which will allow him stop in case of sudden emergency. In the matter at hand the driver was over speeding hence he could not stop in time. He did not consider that his acts would endanger the plaintiff. The injury to the plaintiff was a reasonable foreseeable consequence of the driver’s acts. Thus, on the facts before this court, the driver failed to meet the standard of care required by law. He was negligent and the accident occurred due to his negligent driving. The defendant is therefore liable as insurer of the said minibus.

A person who suffers damage due to the negligence of another is entitled to recover damages. As to the measure of damages, Lord Blackburn in **Livingstone v Rawyards Coal Company (1880) 5 App Cas 25 at p. 39** stated that the measure of damages is *“that sum of money that will put the party who has been injured or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.”* Thus the plaintiff herein deserves to be awarded damages for the injuries he sustained due to the negligence of the insured driver. These damages ought to be assessed by the Registrar.

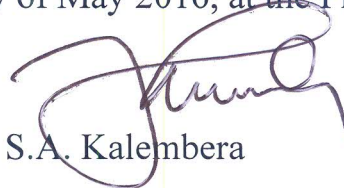
CONCLUSION

All in all, the accident herein was caused by the negligence of the insured’s driver, hence the injuries suffered by the plaintiff was caused by that driver’s negligence.

Thus, the defendant is liable for the accident and the resultant loss and damage to the plaintiff. Consequently, the plaintiff action succeeds with costs.

Damages payable to the plaintiff to be assessed by the Registrar.

PRONOUNCED this 17th day of May 2016, at the Principal Registry, Blantyre.

A handwritten signature in dark ink, appearing to read 'S.A. Kalembera', is written over the printed name.

S.A. Kalembera

JUDGE