



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY NUMBER OF 468 2016



BETWEEN:

ENELESI RITCHMAN.....PLAINTIFF

-AND-

BLESSINGS KAMANGA.....1st DEFENDANT

ZOONA NETWORKS LIMITED.....2nd DEFENDANT

CORAM: HON. JUSTICE M.L KAMWAMBE
Mr. Masanje of Counsel for the Plaintiff
Mr. J. Chiume of Counsel for the Defendants
Mr. Amos, Official Interpreter

JUDGMENT

Kamwambe J

On 26th day of March, 2015 the plaintiff's husband (now deceased) was hit by a motor vehicle Toyota Corolla registration No. ALR 9118. He sustained multiple fractures with internal injuries and he later died. She is now claiming damages for loss of expectation of life, loss of dependence, costs for funeral expenses, costs of death and police reports and costs of this action.



At the outset, the court reminds itself that this being a civil proceeding, the required standard of proof is on a balance of probabilities. It is a lesser standard than that required in criminal proceedings which is beyond a reasonable doubt. The court also bears in mind that as a general rule on evidential burden of proof, it is the party that alleges the existence of certain facts on who the burden of proof rests. In all, the court heard evidence from four witnesses, that is, two on the plaintiff's side and two on the defendant's side. The plaintiff is [PW2] and the deceased nephew is [PW1]. The 1st defendant is [DW1] and Sergeant Chipi is [DW2].

The main issue to be determined in this matter is whether or not the 1st defendant negligently caused the accident and whether or not there was contributory negligence on the part of the deceased. Negligence is the breach of duty to take care by a person which results in damage being suffered by another person or property.

The position of the law is that it is the duty of every person who drives a vehicle on the highway to use reasonable care to avoid causing injury to persons, vehicles or property of any kind on or adjoining the highway (see **Charlesworth on Negligence 5th Edition page 488 par 812**). The duty of care expected of a driver is reasonable care which a competent driver would use in the circumstances and there is a litany of case authority on this proposition among them [**Mponda v Air Malawi and Another [1997] MLR 131**]. Such a driver is expected to avoid excessive speed, keep a good outlook and observe traffic signs and signals (see **Dilla v Ragan**) 12 MLR 358.

Whether or not the driver of the vehicle was negligent would depend on which version between that of the plaintiff and that of the defendant the court would believe regarding how the accident occurred. As the saying goes, it is a case of the story of one person against that of the other. The court is therefore enjoined to carefully weigh and examine the evidence before it in order to come to a position as to what must have possibly happened , of course, bearing in mind the law on the burden and standard of proof as stated earlier.

A pedestrian too has a duty to take reasonable care so that he does not contribute by any degree to the injuries he suffers.

It is on record that the plaintiff's [PW2] allegation on the negligence of the defendant is merely on hearsay. She stated in **par 7** of her witness statement that she received a message that her husband was involved in a road accident at Nyungwe bus stop and was taken to hospital where he died. When asked whether her husband [the deceased] was drunk, she told the court that he was not drunk since they were together on that fateful day. In cross examination she stated that it was possible that the deceased might have stopped somewhere since the time he was going to the bus stop, she remained at home. In re-examination, she told the court that she was not present when the accident happened.

PW1 told the court that he was with the deceased at the time of the accident. He explained that they were standing on the bus stop curve when a car at high speed hit the deceased. The car did not stop but turned to the

opposite direction. He stated that there were no onlookers at the time the accident occurred. He called for help and they were taken to a medical facility where he was told that the deceased was brought in dead. In both cross examination and re- examination, he insisted that the deceased was not drunk.

According to the defence, **DW1** told the court that he was travelling from Zomba to Blantyre when he was involved in a road traffic accident at Nyungwe. He explained in his witness statement that he was travelling at a speed of around 65 kilometers per hour and that after passing the bus stop, he saw the deceased crossing the road in front of him. He tried to swerve the car to avoid hitting the deceased but unfortunately the deceased went where the vehicle was swerved and he got hit. At the time of the accident the deceased was alone. In cross examination he told the court that he did not immediately see the deceased in front of him but when he saw the deceased afterwards, he tried all he could to avoid hitting the deceased but to no avail. He stated that he applied emergency breaks while swerving the car. He indicated that when all this was happening, the car had not stopped. He stated that he heard from people that the deceased was drunk. In re-examination he stated that he did not see the deceased immediately because he was driving in dim light as some other car was overtaking him.

DW2 was Sergeant Chipi who investigated the accident and he told the court that he was experienced in road traffic accidents. In his witness statement, he explained that after the defendant reported the accident, he went on the scene together with his colleague to investigate. He stated that

he drew a sketch plan and according to his observation the accident happened about 29 meters from the bus stop. He explained that he drew the sketch plan according to his experience. In cross examination he explained that he first heard from the people that the deceased was drunk and that after he examined the dead body, he confirmed that the deceased was really drunk because he was smelling of alcohol. He stated that it was not possible for him to estimate how much alcohol the deceased might have consumed.

Firstly the court is of the view that the evidence of the plaintiff [PW2] does not carry much weight because she relied much on hearsay evidence and her evidence does not really prove the negligence of the defendant. The evidence of PW2 might be necessary when it comes to proving whether or not the deceased negligently contributed to the accident. In her own statement, PW2 stated that the deceased was not drunk at the time they were together but when he left for the bus stop they were no longer together, it was possible that he stopped somewhere to drink. PW1 as well explained that the deceased did not consume any alcohol. This evidence was disputed by the defence in that DW2 [the police officer] explained that the deceased was smelling of alcohol at the time he examined the dead body.

Secondly, the court needs to analyse the evidence by PW1 which dealt with the issues of the exact place where the accident happened and the absence of onlookers. PW1 claimed that at the time the accident happened there was no onlooker and that the car hit the deceased at the bus curve. This evidence has been disputed by the defence. DW1 told the court that the accident happened a few meters after the bus stop. According to the sketch

plan drawn by DW2, there is evidence that the accident did happen after the bus stop. The police report contains names of two onlookers who surprisingly were not in court to testify. Their presence in court would have carried more weight since they would have been neutral. This court is of the view that the accident did not happen at the bus curve as claimed by the plaintiff's witness but a few meters after the bus stop. Both parties were at liberty to produce independent witnesses to substantiate their claims about the presence or absence of onlookers. Since there is no much proof on the issue of onlookers, this evidence should not be entertained.

In an earlier judgment [**Malipa v Kalichero and Prime Insurance Company Limited Personal Injury No. 619 of 2013**] this court was of the view and I quote that:

'the mere fact that you have hit someone with a vehicle does not necessarily mean that you failed to control the vehicle. Circumstances may be such that it was impossible to suddenly control the car or avoid hitting the victim. It is dangerous to assume always that the driver must have seen me and therefore should have controlled the vehicle, even if I suddenly went into the road at short distance of the oncoming vehicle. Circumstances of failure to control a vehicle should come clearly by way of evidence. It should not be taken as a mere standard practice to allege it without supporting evidence. The duty to take care and not to cause a mischief on the road placed on the driver also applies to other road users, pedestrians inclusive'.

This court strongly believes that the evidence presented by the plaintiff and her witness was manufactured in order to beef up their case. It is strongly clear that the accident did not happen the way the plaintiff is alleging. Unless the contrary can be proven, the plaintiff's evidence should not be put into much consideration.

The accident occurred in the highway from Zomba to Blantyre. The defendant was entitled to travel at a fast speed. There is no evidence of excessive speed at all. It is not enough to say he was driving fast, because after an accident, any speed may seem fast and excessive. How did PW2 come to determine that the driver was driving at an excessive speed? What indicators were there? Just being fast does not constitute negligence.

As stated from the above quoted case, circumstances of failure to control a vehicle should be clearly supported with evidence. However in this case there is no sufficient evidence to prove that the 1st defendant failed to control the vehicle.

In view of what has been stated above, this case fails with costs.

Pronounced in this court this 31st day of January, 2017



M.L. Kamwambe
JUDGE