



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY



PERSONAL INJURY CAUSE NO. 1077 OF 2014

BETWEEN

JOSHUA KHOLOMANA.....1ST PLAINTIFF

FRANCIS KADANGWE.....2ND PLAINTIFF

-VS-

MR.RODRICK MTUWA.....1ST DEFENDANT

PRIME INSURANCE COMPANY LTD2ND DEFENDANT

CORAM: HON. JUSTICE M.L KAMWAMBE

Mr. I.Kalua Counsel for the Plaintiff

Miss. khaki Counsel for the Defendant

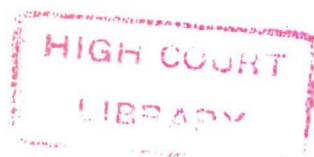
Mr. N.W. Phiri Official Interpreter

Mrs. Chipapi Court Marshal

JUDGMENT

Kamwambe J

On 7th day of January, 2013 the plaintiffs were involved in an accident being passengers in motor vehicle registration number BN 6726 Toyota Hiace Minibus which hit a truck registration number TO 5188/ TO 5407 F/Liner. The 1st Plaintiff sustained a fracture of the Tibia and Fibula on the right leg and right femur. The 2nd Plaintiff sustained



cut wound on his face right ear, and painful right ribs, multiple soft tissue injuries. The plaintiffs are now jointly claiming damages for pain and suffering, special damages, costs of obtaining medical 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 (**See Constantine Line vs. Imperial Smelting Corporation (1943) AC 154, 174**). 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. The court heard evidence from two witnesses, that is, only on the plaintiff's side. The 1st plaintiff is [PW1] and the 2nd Plaintiff is [PW2].

The main issue to be determined in this matter is whether or not the accident was caused wholly by the negligence of the 1st Defendant. Other issues to be determined are whether the 1st Defendant owed the Plaintiffs a duty of care, whether the 2nd Defendant is liable as an insurer and whether the damages are payable. 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.

In his testimony the 1st plaintiff [**PW1**] adopted a police report marked Ex P1 and a medical report marked Ex P2 as evidence before this court. The 1st plaintiff further testified that the accident occurred around 7pm, it was dark and showering. He stated that he was sitting in the front seat of the motor vehicle which is usually used by the conductors, and he was able to see the speedometer and could tell that the vehicle was traveling fast. He was however unable to see the gauge. He told the court that he had boarded the bus in Limbe and the accident occurred at Mandolo in Chigumula. He was facing the road and was able to see the road clearly and could see the truck

registration number TO 5188/ TO 5407 in front of them. He also stated that the passengers in the minibus had warned the 1st Defendant about the speed and not to follow the truck very closely, to which the 1st Defendant responded by telling the passengers to drive the vehicle themselves. **PW1** further stated that he thought the driver wanted to overtake the truck, and the truck had indicated that it was turning left to Mandolo Truck yard. Upon the truck slowing down to turn the 1st defendant failed to control the minibus and ended up hitting the truck on the trailer side on the left. In re-examination **PW1** explained that he had warned the driver that the truck was going to turn at Mandolo, as he was aware that that was a place where trucks are kept. However when he warned the driver the driver responded that as he was a driver he knew what he was doing.

PW2 was shown the police and medical reports in examination in-chief which he adopted, again it should be noted that this court does not put much weight on these documents as they the authors did not testify, as such they are admissible hearsay evidence before this court only to the level that they were made. In cross-examination **PW2** stated that he sat at the back of the said vehicle and that there were showers and a fog at the time. He further stated that he could see the truck in front but he was not able to see the registration number of the truck, but he could see the signals of the truck. There was no re-examination.

The allegations of **PW1** and **PW2** only contradict on the part where **PW1** states that he saw that the truck indicate that it was turning

and **PW2** states that he had not seen the indicators. This could however be the case considering that the plaintiffs sat on different seats in the said vehicle and **PW2** having sat at the back could not have had a clear vision of the front as did **PW1**. As such this court will rely mostly on the evidence of the **PW1** who had a clear vision as he was sitting in front.

There has not been any dispute to the allegations of **PW1** and **PW2** as the defence did not bring any witnesses. There was also no defence that was filed on the part of the 1st Defendant. The only defence that was filed was the defence of the 2nd Defendant. Counsel for the 2nd Defendant only cross examined the plaintiffs witnesses but never called any witnesses for the 2nd Defendant.

PW1 alleged that he was able to see the speedometer and could tell that the driver was traveling fast at the speed of 80Kph. This evidence has not been disputed by the defence. As matter of fact the 1st Defendant did not even provide any defence in this circumstance the court will use Order 19 rule 7(1) of the Rules of the Supreme Court for the 1st Defendant, which states;

"where the plaintiff makes against the Defendant or Defendants a claim of a description not mentioned in rule 2 to 5 then if the Defendantfails or fail to serve a defence on the plaintiff, the plaintiff may after the expiration of a period fixed by or under these rules for service of the defence apply to the court for judgment and on the

hearing of the application the court shall give such judgment as the plaintiff appears entitled to the statement of claim"

There has been no defence filed by the 1st Defendant, however the Plaintiffs have not filed an application to that regard and the court cannot argue the 1st Defendant's case. In that regard we will use the saying that let sleeping dogs lie.

The court will further consider what Lord Alderson had to say 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."

It is in evidence and it has not been disputed that the minibus hit the truck on the left side at the back. Whether or not the truck indicated that it was going to turn will not change the fact that the driver of the mini-bus ought to have used proper care of a reasonable man and kept a distance between the minibus and the truck reasonable enough to allow him to either stop or slow down and avoid hitting the truck in front of him in any circumstance. Failure on

the part of the 1st Defendant to stop or slow down to avoid hitting the truck shows negligence on his part, as he ought to have kept proper look out as he had seen the truck in front of him.

Since the 1st Defendant did not file any defence the court will consider the law in section 65 A Road Traffic Act (Cap 69:01) laws of Malawi which 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.

This court believes in the evidence presented by the plaintiffs. It is clear that the accident did happen the way the plaintiffs are alleging. Unless the contrary can be proven, as such the plaintiff's evidence has been put into much consideration.

The accident occurred along the Limbe-Bvumbwe road during the night and while it was showering, despite the time and the weather conditions the 1st Defendant was speeding. The court is of the view that the 1st Defendant ought not to have been speeding.

After noticing a truck in front of him, the 1st Defendant was entitled to keep a distance that would have enabled him to slow down or to stop should the truck decide to turn. The truck is said to have been turning to the left and it has also been indicated that the Mini-bus hit the truck on the left side. This shows that the mini-bus had not even started to overtake the truck. If the mini- bus was overtaking the truck the process of overtaking would have been done on the right side of the truck, as is normal where motor vehicles overtake the cars in front of them that take a left turn. In such a scenario the truck would have been hit by the minibus on its right side. This then tells us that the 1st Defendant just hit the truck and he was not in the process of overtaking but rather he failed to stop or to slowdown when the truck was turning as he had not kept a good distance between himself and the truck.

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

Pronounced in open court this 6th day of March, 2017


M.L. Kamwambe
JUDGE

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