JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO 592 OF 2015

BETWEEN

ALFRED PENSULO ..... 1ST PLAINTIFF

HASTINGS MAWERENGA ..... 2ND PLAINTIFF

AND

UNITED GENERAL INSURANCE COMPANY LIMITED ... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Mwaungulu, of Counsel, for the Plaintiffs
Mr. Masanje, of Counsel, for the Defendant
Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

The Plaintiffs are claiming damages for personal injuries that they sustained in a road accident involving motor vehicle registration number RU 5403 Toyota Belta [hereinafter referred to as "Toyota Belta"] and a bicycle. The bicycle was being ridden by 1st Plaintiff and the 2nd Plaintiff was a pillion passenger thereon.

The injuries are alleged to have sustained as a result of negligence on the part of Marion Mbolembole, the driver of the Toyota Belta [hereinafter called the "driver"]. The Defendant is being sued in its capacity as the insurer of Toyota Belta.

Pleadings

The case of the Plaintiffs, as set out in the Statement of Claim, is as follows. On or about 24th May 2015, Toyota Belta was being driven from the direction of Zalewa Police Roadblock heading towards Chisi Trading Centre road when at or near Masinde Village the driver so negligently drove Toyota Belta that she caused or permitted the same to hit the Plaintiffs in the course of overtaking them.

It is alleged that the accident was caused by the negligence of the driver. The alleged negligence has been particularized as follows:

> *"a. Driving too fast under the circumstances;*
>
> *b. Failing to exercise or maintain proper or effective control of the motor vehicle;*
>
> *c. Driving without due care and attention to other road users;*
>
> *d. Failing to see the cyclist and the Plaintiffs in sufficient time to avoid hitting them;*
>
> *e. Colliding with the plaintiffs;*
>
> *f Failing to keep any or any proper lookout;*
>
> *g. So far as may be necessary the Plaintiffs shall rely on the res ipsa loquitor;*
>
> *h. Failing to stop, slow down or in any other way as so as to manage or control the said motor vehicle;*
>
> *i. Overtaking and continuing to overtake the Plaintiffs when it was not safe so to do.".*

It is further alleged that, as a result of the accident, the Plaintiffs sustained injuries and suffered loss and damage, as follows:

> ***"Particulars of injuries 1st Plaintiff***
>
> *a. Fracture of collar bone;*
> *b. Deep cut wound on the right thigh, left arm, on the elbow joint and the back heel;*
>
> ***Particulars of injuries 2nd Plaintiff***
>
> *a. Deep cut wound on the left arm*
> *b. Cut wound on the face above right eye;*
>
> ***Particulars of special damage***
>
> *a. MK3, 000.00 cost of police report each Plaintiff;*
> *b. MK2, 500.00 cost of medical report each Plaintiff;*
> c. *Damages to bicycle;"*

The Plaintiffs also plead that the Defendant is liable to compensate the Plaintiff on indemnity basis as insurer of Toyota Belta.

The Statement of Claim concludes with a prayer wherein the Plaintiffs claim (a) damages for pain, suffering and loss of amenities of life, (b) damaged bicycle to be assessed, (c) K3,000 being the cost of police report, (d) K2,500 being the cost of medical report and (e) costs of the action.

By its Defence, the Defendant traversed the allegations of fact contained in the statement of claim. It is further averred that if the accident did occur, the same was caused by the reckless manner of cycling by the 1st Plaintiff, which has been particularized as follows:

> *"a. Suddenly joining the road from the dirty verge without taking heed of the motor vehicle and at too close a range that the collision was inevitable.*
>
> *b. Having no regard for other road users.*
>
> *c. Failing to take heed of the presence of the said motor vehicle on the road."*

The Defendant pleads, in the alternative, that its liability is dependent upon proof that it is insurers of Toyota Belta and further on its insured being found liable.

Burden and Standard of Proof

It is trite that a claimant has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**

It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities that she sustained injuries and suffered damage as a result of the accident which was caused by negligence of the Defendant: see **B. Sacranie v ESCOM, HC/PR Civil Cause No. 717 of 1991 [unreported]** wherein Villiera J had this to say:

> *"It is important to observe that the burden of proof never shifts from the Plaintiff to the Defendant except perhaps where the Defendant has pleaded contributory negligence. It is, therefore, not sufficient for the Plaintiff merely to prove that the Defendant was*

negligent. He must prove further that it was that negligence which caused the harm or loss suffered"

Evidence

The Plaintiff called two witnesses in support of his claim. PW1 was the 1st Plaintiff. He adopted his Witness Statement and the material part of the Witness Statement is reproduced below:

> *"7. I am a bicycle operator.*
>
> *8. I recall on 24th May 2015, I had picked up a passenger at Zalewa Roadblock, Mr. Hastings Mawerenga, who was travelling from Zalewa to Blantyre. Upon reaching Masinde Village we were hit by a motor vehicle from behind. The vehicle had veered to the extreme left hand side of the road where I was cycling. I hereby exhibit a police report marked **"AP 1"** to substantiate the occurrence of the accident.*
>
> *9. As a result of the accident I fell off the bike and sustained fracture of the collar bone, deep cut wound on the right thigh, deep cut wound on the left arm on the elbow joint, a wound on back heel, and bruises on the left leg. I hereby exhibit a medical report marked **"AP 2"** to substantiate the injury.*
>
> *10. I was treated at Lisungwi Community Hospital where I was admitted from 24th May, 2015 to the 27th May 2015.*
>
> *11. I was given pain killers and had my left hand bandaged, I could not hold or lift things using my left hand because of the injuries I sustained.*
>
> *12. As a result of the injuries I sustained I can no longer do my bicycle operating business.*
>
> *13. I processed a police report at a cost of MK3, 000.00 and a medical report at a cost of MK10, 346.00.*
>
> *14. I, therefore claim damages for personal injuries and MK3, 000.00 and MK10, 346.00 being costs for police report and medical report respectively."*

During cross-examination, PW1 stated that after the accident they went to Zalewa Road Block Police Post where they gave their respective statements and it is on the basis of those statements that the police report was written. He agreed that the police report reflected the correct state of affairs as to what happened and anything else contrary to what the police report says is not true. PW1 said when the bicycle was hit, he fell on the ground with the head hitting the road surface. He fell about 7 metres from where he was hit. His body fell on the dirt verge and his head rested on the tarmac.

In re-examination, PW1 was emphatic that he gave an oral statement at the police post which was reduced into writing. The written statement was read over to him by the policeman and he confirmed the contents thereof. He denied swerving into the road. He said that after the Toyota Belta hit him, his body lay on the dusty surface. When asked what the Court should believe between the contents of his witness statement and those of the police report, PW1 stated that the Court should believe the contents of the police report.

PW2 was Mr. Hastings Mawerenga. He adopted his witness statement as his evidence in chief. His testimony almost echoes that of PW1. He testified that on 24th May 2015, he was a pillion passenger on the PW1's bicycle. At or near Masinde village, they were hit by Toyota Belta which was in the process of overtaking them. As a result of the accident, he sustained deep cut wounds on left arm, painful back, painful legs. He was treated at Lisungwi Community Hospital where he was admitted and then discharged the following day. He tendered a police report and his medical report.

In cross-examination, PW 2 confirmed that he had not tendered any proof of payment for the police and medical reports. He said that it was true that Toyota Belta was in the process of overtaking them. As a result of the accident, he fell on the side of the road.

The Defendant called one witness only, namely, Mrs. Marion Mbolemole (DW). She adopted her witness statement as her examination in chief. In brief, DW testified that on 24th May 2015, she was driving Toyota Belta from Dedza to Blantyre and she was involved in an accident at Masinde Village. Her narration of how the accident happened is as follows:

> *"4. After driving some distance towards Blantyre (from Zalewa road block), at a place that I later was informed was within Masinde village, I saw a pedal cyclist on the very edge of, but outside, the road cycling towards Blantyre also but with a pillion passenger on his carrier.*
>
> *5. It was safe for me to overtake them and for that reason I did not sound the hooter believing there was no danger to them and to us since there was no oncoming vehicle from the opposite direction. It was possible for me to pass without making him change the course. There was a motor vehicle in front of mine that had just overtaken them.*
>
> *6. When I was just about to start overtaking the bicycle the cyclist swerved into the tarmac road at such very short distance that voiding him was not possible.*

7. *I tried to swerve to the extreme left to try to avoid hitting them but I ended up hitting the right side of the rear tyre with the right front angle of my vehicle. The Plaintiffs who were the cyclist and the passenger fell onto the road surface and I stopped at a distance.*

8. *At the place it is an ascending gradient and my speed was not high. I should think it was about 60 kilometers per hour.*

9. *The Plaintiffs and I went to the Roadblock police where we all gave our statements and a report was produced which the Plaintiffs have already exhibited.*

10. *My motor vehicle was insured by United General Insurance Company Limited."*

In cross-examination, DW said she gave a statement at the police on the same day of the accident but the police report came out days later. She was the first one to report the accident at the police since the Plaintiffs had gone to hospital. Thus she gave her statement in the absence of the Plaintiffs. She testified that she was in agreement with the contents of the police report as to how the accident happened.

DW 1 testified that it was an ascending gradient where the accident occurred. She testified that she was coming from low area and going up the road. She denied to have started overtaking the Plaintiffs. She emphasized it was the Plaintiffs who just swerved into the road when she was about 5 to 6 metres from them. As a result, the right edge of Toyota Belta hit the bicycle's rear tyre. She went into the bush.

She further explained that the accident happened soon after another car had just passed the Toyota Belta and the bicycle. The Plaintiffs wanted to get back into the tarmac. She said she was driving at about 60 km per hour and the accident did not occur at a trading centre.

She confirmed having paid a fine of K3,000.00 for overtaking improperly but did not know what she was paying for as she was just told to pay the fine as it was the normal course of events. She also testified that she was told to pay another K3,000 for the police report. She testified that she did not contest the fine. She further testified that she was told to pay K6,000.00 to the police for assistance to the plaintiffs at the hospital.

In re-examination, DW testified that Toyota Belta hit at the back of the bicycle's rear tyre.

In a nutshell, this was the evidence before the Court.

Submissions

Counsel Mwaungulu submitted DW was clearly negligent in that she is the one who caused Toyota Belta to veer to the extreme left side of the road and as a result Toyota Belta hit the Plaintiffs who were cycling outside the yellow line of the road.

It was also the contention of Counsel Mwaungulu that DW was driving at a very high speed in the circumstances. He invited the Court to note that the evidence of PW 1 was that when his bicycle was hit (a) he was thrown into the air and landed about 6-7 metres from the point of impact, (b) he sustained a fracture of the collar bone and (c) his bicycle got damaged. He also submitted that PW 1's evidence regarding speed is consistent with the evidence of DW to the effect that:

> *"she said after the impact the vehicle went into the bush and got extensively damaged and "inakathera konko" i.e. a write off. By this statement, she confirmed that she went off the road and right into the bush. This is not indicative of a speed of 60 kilometres per hour."*

Counsel placed heavy reliance on the following dicta by Justice Unyolo, as he then was, in **Mandiwa and others v. Star International Haulage Company Limited and another [1991] 14MLR 217 (HC)**:

> *"I start with the settled principle that a driver is under an obligation to approach a potential danger at a speed which will allow him to stop in time if a sudden emergency arises. See **Rep v Sinambale** (1966–68) 4 ALR (Mal) 191. Decided cases abound with statements to the effect that drivers are not entitled to drive on the footing that other users of the road, whether drivers or pedestrians, will exercise reasonable care. Further, that although a driver is not bound to foresee every extremity of folly which occurs on the road, he is bound, nevertheless, to anticipate any act on the part of any road user which is reasonably foreseeable, whether negligent or not. See **Burgess v Osman** (1964–66) 3 ALR (Mal) 475.*
>
> *It is also to be observed that the Highway Code exhorts drivers to use the horn to inform other users of the road of their presence and to do so in plenty of time. (Rule 67 of the Code refers)."*

On his part, Counsel Masanje submitted that there is no material before the Court to support the allegation that DW was driving too fast:

> *"My Lord, there was no evidence of how fast the driver was. There was no evidence as to the speed limit for the area. The court therefore has not been given material from which to gauge what "too fast" means and what circumstances necessitated what speed. The allegation of the driver driving too fast cannot therefore stand.*
>
> *Further my Lord, the Plaintiffs allege in paragraph 4 (e) that since the driver's vehicle collided with the Plaintiffs, then the driver was negligent. This is unsustainable my Lord.*

> *It does not mean that whenever an accident occurs between a motor vehicle and a pedestrian or a cyclist, then the motorist is in the wrong. We have cited the* ***Enelesi Ritchman case*** *to the effect that any road user must also take care of their own safety. So an accident may occur due to lack of care by the cyclist. We will show shortly that this was the case with the herein accident. This allegation too must fail. So too with the claim for reliance on res ipsa loquitor. This maximum cannot apply where the accident is being explained by way of other possible causes.*

Counsel Masanje then proceeds to analyse the evidence to see if the other particulars of negligence have been proved:

> *"My Lord you will note that between the two Plaintiffs it was the 1st Plaintiff who attempted to explain how the accident happened. In his witness statement he alleged that they were hit from behind. The vehicle had veered to the extreme left hand side of the road where he was cycling. In cross-examination, as well as re-examination the plaintiff said this statement is not true. The court should believe what is in the police report as being what happened for the accident to happen. The police report was made from their own statement to the police. The report was read over to him and he was in agreement with its contents. The 1st Plaintiff maintained his stand despite his counsel's attempt to sway him from that position. My Lord, there is no reason why the court should disregard this testimony. The police report, which the Plaintiff themselves tendered says the cyclist swerved into the road when the vehicle was overtaking. The 2nd Plaintiff only confirmed that the vehicle was overtaking but did not say what happened for the collision to occur. The court should take the 1st Plaintiff's evidence during trial as the cause of the accident. He swerved into the road and collided with the car."*

Counsel Masanje submitted that the Court not to be unduly influenced by the opinion in the police report to the effect that *"the accident was much influenced by the driver of M/vehicle Reg. No. RU5403 Toyota Belta Mrs Marion Mbolembole by overtaking improperly"*. To buttress his submission that the opinion of the traffic officer is not conclusive, Counsel Masanje cited the cases of **Masquerade Music Limited v. Spring Steen [2001] EWCA 563,** [hereinafter referred to as "**Spring Steen Case**"] and **Olive Mtaila v. National Bus Company and NICO General Insurance, HC/PR Personal Injury Cause Number 295 of 2011 (unreported)** [hereinafter referred to as "**Olive Mtaila Case**"]. **Spring Steen Case** was cited for the following principle, at page 595:

> *"It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."*

In **Olive Mtaila Case**, Mwaungulu J, as he then was, observed that:

> " *...that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it (" the trial judge") and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have good regard."*

Counsel Masanje contended that on the authority of **Spring Steen Case** and **Olive Mtaila Case**, the opinion of the police officers in the Police Report that DW was improperly overtaking is irrelevant, because that is what this Court is called upon to decide.

Determination

At the material time, Toyota Belta was insured by the Defendant. In this regard, Section 148(1) of the Road Traffic Act is relevant and it provides as follows:

> *"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 for the purposes of this Part 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 is liable to the person having the claim."*

The case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence:

> *"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. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done"*

For an action in negligence to succeed, the plaintiff must show that (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result

of that breach he or she has suffered loss and damage: see **Donoghue v. Stevenson [1932] AC 562** quoted with approval by Ndovi, J, as he then was, in **Kadawire v. Ziligone and Another [1997] 2 MLR 139** at 144.

In **Banda and Others v. ADMARC and Another [1990] 13 MLR 59**, Banda, J, as he then was, stated the duty of care owed by a driver to other road users 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."*

The dicta by Banda J, was cited with approval by the Supreme Court of Appeal in **Southern Bottlers Limited & another v. Charles Chimdzeka MSCA Civil Appeal No. 41 of 1997 (unreported)**.

Having observed and heard all the witnesses in Court, it seems more probable to me that DW is the witness of who is telling the truth. Her version of how the accident happened makes a lot of sense. It will be recalled that on the material day there was clear visibility and neither the bicycle nor Toyota Belta burst on the scene like a bolt from the blue. DW saw the Plaintiffs on the very edge of the road cycling towards Blantyre. The Plaintiffs were also aware of the presence of Toyota Belta. Soon after the motor vehicle that was in front of Toyota Belta had just overtaken the Plaintiffs, the bicycle went back into the tarmac road and, although DW tried to avoid colliding with the bicycle by swerving to the extreme left, the right front tyre of the Toyota Belta hit at the right side of the bicycle's rear tyre.

I momentarily pause to observe that the submission by Counsel Mwaungulu that DW testified that *"after the impact the vehicle went into the bush and got extensively damaged and "inakathera konko"* is not supported by evidence on record. As a matter of fact, both PW 1 and PW2 confirmed that after the impact, they respectively fell onto the road surface. That testimony is not consistent with the submission being made by Counsel Mwaungulu.

To my mind, both DW and PW1 are equally to blame. It is common knowledge that when bicycles are being ridden on the road and it happens that motor vehicles are overtaking each other, the riders more often than not get the bicycles off the tarmac to the dirt verge but get them back into tarmac immediately after the motor vehicles have overtaken each other. In the premises, DW ought to have anticipated the high likelihood of PW1 riding into the tarmac immediately after the bicycle had

been overtaken by the other motor vehicle. Such an act on the part of PW1 was reasonably foreseeable. Of course, the act by PW1 was also negligent in that he should not have gone back into the tarmac road without first determining if it was safe to do so. In short, PW1 failed to take heed of the presence of Toyota Belta: See **Rep v. Sinambale**, supra, and **Burgess v. Osman**, supra.

On the totality of the evidence before the Court, I hold that, much as the DW was negligent, PW1was also negligent. He acted in sheer disregard of his safety and that of PW2. If PW1 had acted as a reasonable man and properly considered his actions, he could have clearly foreseen that his actions would cause harm or injury to himself and PW2. It is a settled principle of law that a cyclist also owes a duty of care to other road users to move with due care.

The law on contributory negligence was tersely put by Lord Denning in **Jones v. Livox Quarries Limited [1952] 2 QB 608** at p. 615 as follows:

> *"A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might hurt himself; and in his reckonings he must take into account the possibility of others being careless."*

In view of the foregoing, I find that the PW1 was guilty of contributory negligence to the extent of one-half. I, therefore, hold that the Plaintiff was to the extent of one-fifth responsible for the cause of the accident giving rise to the claims in this action.

Conclusion

All in all, I find that (a) DW was responsible for the occurrence of this accident to the extent of one-half, and (b) PW1 was guilty of contributory negligence to the extent of one-half. I, accordingly, enter judgment in favour of the Plaintiffs against the Defendant, with costs, to the extent of one-half of their claims and order that damages be assessed by the Registrar.

Pronounced in Court this 13th day of March 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE