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IN THE HIGH COURT OF MALAWI AT PLANTYRE

CIVIL CAUSE No.206 of 1979



B E T W E E N:

<u>J.F. MWENECHANYA</u>	PLAINTIFF
	and		
<u>ATTORNEY GENERAL</u>	DEFENDANT

Coram: JERE, Ag.C.J.
Mhango of Counsel for the Plaintiff
Munlo of Counsel for the Defendant
Mpalika: Official Interpreter
Caffyn: Court Reporter

J U D G M E N T

In this action the plaintiff sues the Attorney General by virtue of section 3(1) of the Civil Procedure (Suits by or against Government or Public Officers) Act, Cap. 6:01.

The plaintiff was at all material times an Agricultural Officer working for the Karonga Development Project (hereafter referred to as K.I.P.). His main duties were to advise farmers covered in the above project. In the course of his field work K.I.P. hired for his use vehicles from Plant & Vehicle Hire Organisation (P.V.H.O). P.V.H.O. would provide a driver to take the plaintiff wherever he was required to perform his professional services.

The plaintiff claims against the defendant damages arising out of an alleged negligent driving by the defendant of motor vehicle MG 8868 causing the overturning of the said vehicle, whereby the plaintiff suffered a large lacerated wound across the inner palm of the left hand and also fractures of the fingers. The defendant denies negligence and avers that the overturning of the vehicle was caused by accident which was inevitable. I remind myself about the burden of proof in civil cases.

On the 12th of January 1978 the plaintiff and the Assistant District Commissioner Karonga were travelling from Karonga to Lupembe in MG 8868 driven by one Oscar Mwaungulu, a distance of 12 miles. The time was around 4 p.m. The three of them sat in the cab of the vehicle, this was a Landrover pick-up. The driver, Oscar Mwaungulu, was familiar with the road; he was born and bred in this area.

It is the evidence of the complainant that the driver was travelling at a fast speed, he said that from Karonga Boma to a grocery shop he was doing 50 m.p.h. and after a short stop-over he was back to 50 m.p.h. It is to be observed that there is no

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speed limit on this particular road. However the speed limit on our roads is 50 m.p.h. It is perhaps helpful to digress a little - The road takes a gentle bend as almost to be unnoticeable, there is a narrow bridge and across the bridge there are cattle structures where herdsboys are allowed to cross the animals from one side of the road to the other, after cattle structures there is a model full primary school. These features of the road are well-known to both the driver of the vehicle and the complainant. The other known factor in this case is the general habit of cattle in this area; the animals come down from hills and go down to the lake to drink water during the afternoon hours. In so doing the animals do not move in an orderly fashion, they scatter over the place. Having digressed a little, I return to the evidence of the complainant, he said the driver reduced his speed while crossing the bridge to 30 m.p.h, at the time he saw a large herd of cattle scattered all over the official gate. The driver picked up speed to 45 m.p.h. The driver hooted and he saw a young boy going from the East to the West, the big herdsman was still on the road, the driver wanted to filter through the animals, the driver did not reduce his speed, a second boy came again from East to West following the other boy, the driver then braked, as a result the vehicle overturned. The complainant broke his left palm, he was bleeding profusely. A Landrover came from the opposite direction and they were all rushed to Karonga District Hospital. The complainant identified the sketch plan and told the court that he had drawn it. He elaborated the features on the plan. He explained that the cattle structures were not completed, they were not yet wire-fenced although poles were there. At the Karonga District Hospital the complainant was operated upon, he was later sent to Rumphi District Hospital and finally to Kamuzu Central Hospital, Lilongwe. He produced a medical report and all the expenses he has incurred as a result of this accident. The total expenses according to the complainant are K185:80t. He claims this amount as special damages.

It is not disputed that Karonga has a high density cattle population. The plaintiff reiterated in cross-examination what he told the court in examination-in-chief; he added that the school was in session and the children were out playing in the school grounds. It was his evidence in cross-examination that he saw a boy shouting with a stick commanding the animals. The witness's attention was directed to Exhibit 2 and he was asked whether he made the statement to Police. He agreed. He was asked whether he wrote the statement contained in Exhibit 3; he said that was correct. He was further shown Exhibit 3 and he agreed that it was correct. He tried to explain away the impact of Exhibits 2 and 3 in re-examination; he said that he gave the statement in response to questions by the Police Officer recording it. He said he was asked to pass judgment as to who was to blame. So he thought the child was to blame. The second witness was Mr. George Kayambo, a Senior Surgical Specialist working for Kamuzu Central Hospital, Lilongwe, he recognised the plaintiff as one of his patients. He had come as a referred patient from Karonga Hospital in 1978; he examined the patient and he acquainted himself with the case history, he decided to operate on him. He described the injuries as follows:-

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"He had old open infected injuries to his left hand. My diagnosis was a deep cut wound to the left hand with multiple fractures of the proximal phalanx of the index finger and laxation of the metatarsal joint. The thumb and middle finger were also involved and he had osteomyelitis of the bone, resulting in a claw hand, completely formed due to stiffness and contracture. Another big problem was that he had injuries to the nerves on the middle and right hand side of the fingers. These were the biggest problem because you cannot suture them. The nerve is an organ which is the most specialised in the human body. If it is cut it does not function and there is nothing you can do about it."

The doctor's evidence supports the plaintiff's story in so far as the injuries are concerned and the disability resulting from the injuries. The evidence of Mr. Thindwa, the Medical Officer at Karonga, deals with the treatment given by him to the complainant immediately after the accident. It does not add anything new to the detailed evidence by Mr. Kayambo.

The next evidence is that of Mr. Chiumya, he was an assistant District Commissioner at Karonga at all material times. He is now the District Commissioner. In examination-in-chief, he told the court that on the 12th July 1978 he accompanied the complainant in a Government Landrover and the driver was Mr. Mwaungulu, they left at 4 p.m. He told the court that the vehicle was travelling at 45-50 m.p.h., he described the physical features at the scene of the accident; his description is substantially the same as that of the complainant. It was his evidence that as the vehicle in which they were travelling reached the bridge the driver reduced the speed, he then picked up speed clocking 50-60 m.p.h., there were cattle and the driver hooted, the herdsmen started clearing the road and before the vehicle finished passing the animals he saw a boy running from East to West; the driver continued driving at 50-60 m.p.h. speed, another boy started running trying to follow the other boy. The driver tried to brake but the car overturned on the left side and there was an accident. He said Mr. Mwenechanya had a broken arm and was bleeding. In cross-examination he was asked as to whether he had made a statement to Police after the accident. He agreed that he had done so. His statement is contained in IX 2. The material part reads as follows:-

"As we crossed Phapa Bridge we approached a herd of cattle split into two groups one on either side of the road. The driver of the vehicle on which we were travelling, Landrover MG 8868, slowed down, one boy aged about 5 years crossed the road from East to West. Then from amongst the cattle another boy sprung into the road from nowhere at full speed, the driver crammed on the brakes to avoid hitting the boy. The Landrover swung to the right and rested on its left side, the boy aged about 4 years leaped and fell on tarmac thus sustaining head injuries. Mr. Mwenechanya had his left hand cut and he bled heavily...."

He tried to explain away this statement by saying that it was obtained from him by means of questioning. He further said that what he told the court agrees with the statement quoted above. He said there was no discrepancy in his view. He thought the cause of the accident was the sudden braking by the driver. In re-examination he reiterated his earlier version that the driver picked up speed after crossing the bridge.

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The next witness was Mr. Matupa a Senior Examiner of vehicles. It was his evidence that a good driver ought to slow down when approaching a narrow bridge and look for the unexpected. He was shown Exhibit 1, he recognised the place as "cattle restrictions". He was shown skid marks and after calculations he said the driver was travelling at not more than 40 m.p.h. The evidence of the driver is that as the vehicle approached Phapa bridge he slowed down near the bridge, there is a fence and path where cattle cross. There were cattle on either side of the road, he again slowed down. In front of him there were two children, they were on either side of the road. It was his evidence that he was travelling at 25-30 m.p.h., he braked to avoid hitting a child who crossed the road suddenly, the child passed and the car swerved and it overturned once only. He denied that he was doing 50 m.p.h. He said the animals were a bit far from the road. He said Mr. Mwerechanya was injured. He said there were no school-children. After the accident the three of them were taken to the hospital by the Chinese.

In cross-examination he told the court that he knows the area well and he further knows that cattle tend to wander and that the animals do not use the cattle crossings which are constructed there. He told the court that the animals come from the hills and go down to the lake to drink water. He further told the court that he has travelled on this road many, many times. He further said he was aware that large herds of cattle are looked after by big herdsmen. He said small children do not look after cattle. It was his evidence that he does not drive fast. He said on that particular date he slowed down and there was no need to do so because the animals were grazing and the road was clear. He explained how the accident happened. He denied that the cattle were inside the road.

The next defence witness was Constable Mithi. He said he came on the scene of the accident and saw a motor vehicle MQ 8868 resting in the middle of the road. He made enquiries and later on traffic Constable Poya came to take measurements. He also described the physical features of the scene of the accident. He said he continued with his journey and next morning recorded an ordinary statement from Mr. Mwenechanya, this was IX 1. He denied discussing anything with Mr. Mwenechanya. He handed it to T.C. Poya. He admitted that he got the statement by asking questions. He further told the court that he wrote the statement because Mr. Mwenechanya was in bed.

Traffic Constable Poya gave evidence, he said he had a report and went to the scene of the accident accompanied by T.C. Mithi. He drew a sketch plan, he returned to Karunga Boma and interrogated driver Mwaungulu. He sent to Mr. Chiumya and gave him a paper and asked him to record a statement and he tendered it in evidence as Exhibit IX 2. After studying both Mr. Mwenechanya's statement as well as that of Mr. Chiumya he did not find it necessary to institute legal proceedings; by this he means criminal proceedings. He told the court that the weather was fine and it was a bright day.

I have recounted the evidence in brief both for the plaintiff and the defendant. I remind myself about the burden of proof in civil cases. The plaintiff has to satisfy me on the balance of probabilities only. The defence in this case admits that the accident took place as alleged in the statement of claim and further admits that Mr. Mwaungulu was driving the vehicle in the course of his employment and that at that he was an employee of the defendant. Further it is admitted that the

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plaintiff suffered injuries. What is strenuously denied is that the defendant was negligent and therefore liable. Paragraph 5 of the statement of claim alleges:-

5. At the same time at Phapa Bridge along Karonga/Chilumba Road, the said servant or Agent by reason of the negligence on his part in driving, managing and controlling of the said vehicle, caused or permitted the same to overturn.

PARTICULARS OF NEGLIGENCE

- a) Driving at too fast in the circumstances
- b) Failing to keep any or any proper lookout or to have any or any sufficient regard for animals that was or might reasonably be expected to be on the road.
- c) Accelerating or speeding at the said bridge without ascertaining or ensuring that it was safe so to do
- d) Failing to have or to keep any or any proper control of the said vehicle.
- e) Failing to stop, to slow down, to swerve or in any other way so to manage or control the said vehicle as to avoid the overturn.

All this is denied by the defendant. As can be seen from the summary of the evidence, there are two versions of the story as to how the accident happened. There is the story told by the plaintiff in court, which is supported by the plaintiff's witness, Mr. Chiumya. On the other hand the evidence of the driver is supported by two statements made by both the complainant and his witness to the Police soon after the accident, to a certain extent the Police evidence seems to weigh in favour of the defendant's story. It is not true, as Mr. Mhargo has suggested, that there is no conflict between the evidence of the complainant and his witness on oath and the statements contained in DX1 and 2. Further the evidence of Mr. Matupa does not support the contention that the defendant was driving at over 40 m.p.h.

What then are the facts? It is my considered opinion that as the vehicle approached Phapa Bridge the driver reduced his speed to 30 m.p.h. Support for this finding comes from the evidence of P.W.1 himself, and P.W.2 says he reduced speed without stating the exact speed at which he was travelling. The defendant says that he had slowed to 25-30 m.p.h.

At this stage we get wide diversion as to what happened next. The complainant's story in court is that the defendant after slowing down immediately after the Bridge picked up speed to 45 m.p.h. and the driver was filtering through the animals. P.W. 4's evidence is that the driver was doing 45-50 m.p.h. immediately after the bridge. This evidence is not supported by that of the motor vehicle examiner, who said that in his opinion formed after studying the length of the skid marks, the driver was travelling at not more than 40 m.p.h. The statement to the Police by P.W.4 does not state that the defendant picked up speed after the bridge. DX1 states that at that particular time the vehicle was doing 40 to 50 m.p.h. The driver's evidence was that he was doing 25 m.p.h. I have considered the above evidence and I find as a fact that after Phapa Bridge the driver continued to slow down to roughly 25 m.p.h. I reach this finding because of the evidence of the motor vehicle examiner and I am of the view that the driver was telling the truth. The next point to settle is exactly

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what happened after crossing the Phapa bridge. I have no hesitation in accepting the evidence of the defendant that there were herds of cattle on either side of the road grazing; I make this finding because the plaintiff and P.1.4 in DX 1 and 2, specifically say so. Murmurs have been raised that these documents were obtained by question and answer and in case of IX 1 it was written by a Policeman and further the witnesses were asked to apportion blame as to who caused the accident, the driver or the young boy? - It appears to me that the court is being asked to attach no weight to DX 1 and DX 2 because they were obtained by means of questions put to the witness, in other words they were not spontaneous narratives. This argument seems to equate confessions in criminal cases with these statements. I do not agree with this line of thinking. To start with the two witnesses were not suspects in fear of being charged with a criminal offence and secondly the police officers were fairly junior men as against the witnesses who were senior men in their respective positions. It cannot be said that the policemen obtained the statements by unfair means. I think for the plaintiff to tell this court that the driver was filtering through the animals in order to pass through can only be described by two words - gross exaggeration. In these circumstances I find it as a fact that as the driver slowed down to 25 m.p.h. he continued travelling at this rate, there were animals on both sides of the road grazing. Here again we have different stories; according to the plaintiff as they were filtering through the animals he saw a young boy running from East to West crossing the road, there was a big herdsman standing on the road, and as they continued driving another boy followed the earlier boy, the driver did not see him, he came from behind the animals, the driver applied his brakes, the car swerved and there was an accident. IX 1 is as follows on this issue -

"...As we were passing the cattle and before we completed I saw a young boy on the right side of the road and on the left side I saw a tall fellow who was standing, I think they were waiting for the vehicle to pass them. As we were waiting for those two fellows, I saw a boy running from the left side crossing the road proceeding to the right. That being a sudden move by that boy in front of our Landrover, the driver applied emergency brakes..."

IX 2 is more emphatic on the suddenness with which the boy rushed into the road in a lightening speed -

"Then from amongst the cattle another boy ran into the road from nowhere..."

I have already examined the evidence of the defendant. I accept the evidence of the defendant, how can I properly reject the evidence of DX1 and 2? The defendant's evidence is supported by these two documents. The truth of the matter is that the driver slowed down, having satisfied himself that it was proper to proceed at a reduced speed, then from nowhere a boy suddenly rushed into the road; he applied emergency brakes and the vehicle overturned.

I now proceed to the law applicable. Mr. Mhango has argued his case on two legal principles (1) that there is a strict liability akin to that laid down in Hylands v. Fletcher (1865) L.R.1. Exch 265 and 279 (report not available), where the harm occurs on the road in circumstances where pedestrians cross the public road and there

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are carriageways authorising cattle to cross from one side to another side of the road. In other words no negligence or fault need be proved to ground liability. Authority for this proposition, according to Mr. Mhango, is (i) CLEFK AND LINDSELL ON TORT, 13th edn. at para.911; (ii) Mr. Mhango argues that even if the court held against him on his earlier submission he nevertheless maintained that the defendant was liable on the general principles of negligence. He has cited a number of cases in support of his submission; I will deal with these authorities later in this judgment. I return to the first submission, that is the defendant is liable under the rule in Pylands v. Fletcher (1866) L.J.1 Exch. 265 and 279, affirmed in the House of Lords (1868) L.J.3 H.L. 330. With respect to learned counsel, this rule is not applicable in the present case; for there was no escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control - see Head v. Lyons (J) Co.Ltd. (1947) A.C. 156. This disposes of the strict liability submission.

The next argument advanced by Mr. Mhango is by way of analogy, he puts it thus - here we have a cattle crossing clearly indicated by poles, albeit not completed, the duties of the road users when approaching such a structure should be equated to the controlled crossings. The motor vehicle driver is absolutely liable if in those circumstances he collides with a pedestrian and injuries result from such a collision. Cases have been cited by Mr. Mhango to support his argument and in these circumstances the argument goes; it was the duty of the driver to stop completely until all the animals had passed. I have carefully studied the provisions of the Road Traffic Act - Regulations 38 and 39 of the (Traffic Signs) Regulations. I do not think poles planted at Phapa bridge and other uncompleted structures can amount to traffic signs. This argument, in my view, is irrelevant for the protection is to pedestrians crossing and not to cattle; I think it is illogical to say that the cattle crossings should protect pedestrians. This argument also fails.

The third argument is that on the general principles of negligence the defendant is liable. The argument goes to say that he was required to exercise higher degree of care in driving the motor vehicle. He should indeed have stopped his vehicle so as to ensure perfect safety for any person who might possibly be around with the animals. Authority for this proposition, according to counsel, is Zaibunnisa Nurmahomed Malida v. Chiona (1964-66) ALR 420. In this case the plaintiff brought an action against the defendant to recover damages in respect of death of her husband in a road accident. The plaintiff's husband sustained fatal injuries when the car in which he was travelling, driven by the son of the second defendant, collided with another car driven by the first defendant. The plaintiff, a minor, brought an action through her next friend against both defendants for negligence, claiming damages for the benefit of herself, her two young children and another unborn child. She also claimed damages under the Law Reform (Miscellaneous Provisions) Act 1934 for the benefit of the deceased's estate. The evidence was that the deceased sustained fatal injuries when the car in which he was travelling as a passenger, driven by the son of the second defendant, collided with another vehicle driven by the first defendant. The circumstances were that immediately before the collision the first defendant had been discussing the question of fares with his passengers and had taken one hand off the steering-wheel to receive money from

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the passengers in the back seat. As a result his car veered to the centre of the road towards the oncoming car driven by the son of the second defendant. The latter tried unsuccessfully to avoid a collision by cutting across the road to the right. The accident occurred on a wide stretch of the road and both drivers had an opportunity to avoid a collision by driving onto the grass verge. They were both liable, the 1st defendant 75% and the 2nd 25%. The learned Judge applied the dictum of Slade, J. in Berrill v. Road Haulage Exec. (1952) 2 Lloyd's Rep. at 492:

"You are not bound to foresee every extremity of folly which occurs on the road. Equally you are certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. You are bound to anticipate any act which is reasonably foreseeable, that is to say, anything which the experience of road users teaches them that people do, albeit negligently."


It is clear from the facts in this case that this was a pure negligence case. It sets no higher standard for the motorist. The facts clearly show that the defendant was at fault, he had left the steering wheel and concentrated on other matters, the second defendant would have avoided the collision if he reacted with prudence to the danger created by the 1st defendant. In each case both drivers fell below the standard expected of them. This is the normal standard of a prudent driver, nothing higher. In the instant case the facts are vastly different for the situation looked calm. The animals were grazing and posed no danger. Equally relevant, there was no reasonable danger coming from the herdsmen; young children, according to the evidence of the defendant, do not look after cattle; I accept this evidence. The cause of the accident was the sudden rush of the boy who wanted to cross the road; he was saved but the plaintiff was injured. Upon these facts it is my considered view that the defendant driver was not negligent.

A defence of accident was pleaded and Mr. Mhango says that since there is no evidence adduced by the defendant this defence should be struck off and judgment entered for the plaintiff. This is not correct, a defence of accident in this case is a denial of negligence and no more. In these circumstances this also fails.

I am aware of the suffering that the plaintiff endured; from the evidence he has been disabled but our system demands that fault should be proved before someone can bear the responsibility. So long as this is the case, people in the plaintiff's position will be without a remedy; this is the law.

So in these circumstances the plaintiff fails.

Pronounced in open court this 9th day of January 1980 at Blantyre.


N.S. JERE
Ag. CHIEF JUSTICE