

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.311 OF 1987

BETWEEN:

J.M. MBWE.....PLAINTIFF

- and -

UNITED TRANSPORT (M) LTD......DEFENDANT

Coram: UNYOLO, J.

Saidi of counsel for the plaintiff
Mbendera of counsel for the defendant
Longwe, Court Reporter
Namvenya, Court Clerk

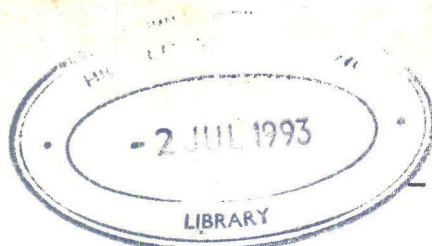


JUDGMENT

By his writ of summons and statement of claim served therewith the plaintiff claims damages against the defendant for negligence. It is pleaded that the defendant's bus violently collided with the plaintiff's car thereby causing extensive damage to the plaintiff's car. It is pleaded further that the said collision was the result of negligent driving on the part of the defendant's servant. The particulars of the alleged negligence are set out.

In its defence the defendant admits that its bus did collide with the plaintiff's car but denies that the collision was caused by any negligence on the part of its servant as alleged by the plaintiff. The defendant pleads that the collision was caused or contributed to by the negligence of a cyclist whose name and identity are unknown to it. Further or in the alternative the defendant pleads that the collision was caused or contributed to by the negligence of the plaintiff's driver. The particulars of the alleged negligence are also set out.

The plaintiff's evidence was that on the material day he was travelling in his car registration No. CA 1262, a mercedes benz, along Kamuzu Highway from Blantyre towards Limbe. The mercedes benz was being driven by his colleague, PW2, and he himself sat in the passenger's seat. They were going to Chipiku, not far from Maselema Post Office. This shop is off the Kamuzu Highway on the right hand side facing Limbe. The plaintiff testified that immediately they came out of the round-about at the said Post Office, PW2 switched on the indicator showing that he was moving to the right lane. He said that immediately thereafter PW2 did indeed cross the white, centre line, and took the right lane. They then came to the junction to Chipiku. There they stopped in order to give way to another motor vehicle coming from the opposite direction on the Limbe-Blantyre carriageway but which was coming to join the Blantyre-Limbe



carriageway. The evidence shows that motorists on the Limbe-Blantyre carriageway also use the same junction if they want to come into the Blantyre-Limbe carriageway and go back to Limbe - they simply make some kind of u-turn. The plaintiff said that then and there the plaintiff's bus, registration No. BC 8717, hereinafter referred to as "the bus" came from behind and violently collided with the mercedes benz causing it to be extensively damaged. It was the plaintiff's evidence that it was clear and dry on the material day. He denied it was raining. Finally, the plaintiff said that he did not see any cyclist at that point. He said that there was none actually.

PW2's evidence was supportive of the plaintiff's in all material particular. He, too, said that he had moved into the right lane completely and stopped when the bus came along and hit the mercedes benz. He also denied it was wet on the material day and denied there was any cyclist at the place.

I now turn to the defendant's case. The key witness for the defendant was the driver of the bus. He said that he was, on the material day, assigned the Makwasa route. He drove the bus to Wenela bus depot in Blantyre and after picking some passengers there he started off for Limbe on his way to Makwasa. Referring to the events immediately before the collision between the bus and the mercedes benz the witness said that when he emerged from the roundabout at Maselema Post Office he saw the mercedes benz in front. He continued to drive on and noticed that the mercedes benz had its right indicator on. He said that the mercedes benz was then on the centre of the carriageway with the bigger part thereof on the left lane. The witness went on to say that at first he thought the driver of the mercedes benz wanted to move into the right lane. That did not however happen. The mercedes benz continued on the centre of the carriageway. He then thought that the driver had forgotten to cancel the indicator. So he continued driving behind the mercedes benz, driving on the left lane, when suddenly the driver of the mercedes benz moved to the right and stopped. It was this witness' evidence that concurrently with this episode a cyclist jetted into the road from close range in front. He then reacted to all this by jumping on the brake. He said that since it was wet the bus skidded and went on to hit the mercedes benz which had, as things turned out, stopped at an angle. He contended that he could neither swerve to the right because that was where the mercedes benz was nor to the left for fear of knocking down the cyclist. The witness denied that impact occurred when the mercedes benz had completely moved into the right lane. He said that the collision occurred in the centre of the carriageway. He denied having been driving at a fast speed or having been in any way negligent in the manner of his driving as alleged by the plaintiff.

The only other witness called on the part of the defendant was the police officer who visited the scene after the accident and took measurements. The Officer tendered in evidence exhibit D1, viz. a rough sketch plan showing the position of both the bus and the mercedes benz and the physical measurements of the road at the scene. The witness said that although the sketch plan was not drawn to scale the positions and directions are depicted correctly. He said that the point of impact was in the middle of the road and that the bigger part of the mercedes benz was in the right lane.

Such was the evidence on this aspect.

There are several issues upon which the parties are in dispute and it is only proper that I deal with those matters at this juncture. The first is the weather condition on the material day. As already indicated the plaintiff is supported by PW2 that it was not raining on the material day and that the road was dry. The bus driver is, on the other hand, supported by the police officer, DW2, that it was wet at the time. With respect I am inclined to accept the defendant's contention. DW2 was an independent witness and I can see no reason to think that he could tell an untruth on this point. Indeed he impressed me as a witness of truth. It is also to be noted that the accident occurred during the month of January and it is common knowledge this is when we have downpours of rain in this part of the world. I am satisfied therefore and I find as a fact that it was raining and the road was wet on the material day.

The next issue concerns the cyclist. As I have indicated the plaintiff denies there was a cyclist at the scene of the accident as alleged by the defendant's driver. In this, he is supported by PW2, the driver of the mercedes benz. Here, it is to be observed that the bus driver has been persistent in his contention on this aspect. That was the story he told the police immediately after the accident. It is also significant in my judgment that the defendant's story that cyclists join the Highway at the scene of the accident was not challenged by the plaintiff. The bus driver explained away why cyclists leave their track at this point and join the Highway. Indeed it is, speaking from common knowledge, a prevalent occurrence that cyclists want to travel on the Highway itself alongside motor vehicles. Indeed it can be appreciated why both the plaintiff and PW2 did not see the cyclist since the mercedes benz was further away to the right at the material time. All in all, I am inclined to believe the defendant's story and I find as a fact that there came on the scene the cyclist mentioned by the bus driver. It is however significant to note that the cyclist in question was pedalling up the cycle track, going in the same direction as the bus, before he joined the Highway. As far as I understand the evidence he must have been ascending the road necessitating hard pedalling. He must therefore have been going slowly. It is further significant that the cyclist was not crossing and did not cross the Highway at that point. According to the bus driver he simply came into the Highway and continued cycling by the side of the Highway. On these facts I cannot accept that the cyclist dashed into the road as the bus driver would have the Court believe.

The other dispute relates to the manner in which the mercedes benz stopped. According to the bus driver the mercedes benz suddenly moved to the right and stopped. With respect, I am unable to assent to this story. It is to be noted that the plaintiff and his witness, PW2, were not shaken in their evidence that they were going to Chipiku. And then the evidence shows that PW2 put on the indicator much earlier before the collision. There can be no doubt PW2 knew full well he was going to turn right and cross the Limbe-Blantyre carriageway to go to Chipiku. I am therefore unable to believe that the mercedes benz turned and/or stopped suddenly.

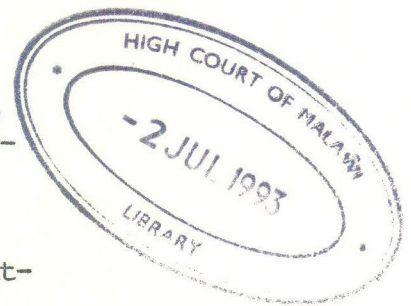
The matter does not however end there. The next and most important issue concerns the positions of the bus and the mercedes benz in relation to the said carriageway at the time of impact. Here, I find the sketch plan in exhibit D1 of some assistance. DW2, the police officer, emerged firm in his evidence that although this document was not drawn to scale the positions of the bus and the mercedes benz are correct as are the measurements of the road indicated thereon. Indeed as stated earlier I have no reason to doubt the evidence of the police officer who was strictly speaking an outsider, as it were, in this matter. On the

evidence I am inclined to believe that at the time of impact the mercedes benz had not completely and fully got into the right lane - the whole of it, I mean. I find that a smaller part thereof at the rear was still in the centre of the carriageway at the time of the collision.

My task, and it is a herculean task, is to decide whether or not the facts establish negligence on the part of the bus driver. The other question is whether, should I answer the first question in the affirmative, the driver of the mercedes benz was contributorily negligent in the matter.

The particulars of negligence set out by the plaintiff in his statement of claim are as follows:

- "(a) Driving at an excessive speed.
- (b) Overtaking on the wrongside of the road.
- (c) Failing to keep any or any proper look out or to have any sufficient regard for other traffic particularly traffic on the other lane of the road.
- (d) Driving on the wrongside of the road.
- (e) Failing to have or to keep any or any proper control of the said bus.
- (f) Failing to stop or slow down or swerve onto the right side of the road so as to avoid the said collision.
- (g) Failing to give any or any adequate warning of his approach."



I have recounted the evidence proffered by the parties in this case and I can thereupon say at once, in agreement with learned counsel for the defendant, that there is absolutely no evidence to substantiate the matters alleged under paragraphs (b), (c), (d) and (g). Upon the evidence there is no question that the bus driver was trying to overtake the mercedes benz or that he was, strictly speaking, driving on the wrong side of the road before the collision. There was further no evidence that the bus driver failed to give any or any adequate warning of his approach or that he was for that matter required so to do. These allegations accordingly fail in their entirety.

I now turn to the allegations made under paragraphs (a) and (f). With regard to these matters, it is to be observed that what is "excessive speed" is a question of fact and depends on all the circumstances of a particular case. A driver is required to drive at a speed which would enable him to stop safely in the event of a car in front stopping suddenly. Referring to the facts of the present case it is, in my judgment, significant that the bus driver saw in ample time that the mercedes benz had its right hand side indicator on. It was the bus driver's own evidence that he noticed that the mercedes benz was actually being driven somewhere along the centre of the road. He said that he knew this might have meant the driver of the mercedes benz wanted to turn to the right. He also said that he knew there was a junction ahead. The bus driver conceded that he was put on guard in all the circumstances. There is no evidence that he slowed down. It was also the bus driver's own evidence that it had been raining all morning and the road was wet. Yet he continued to drive at the same speed in those circumstances. I have

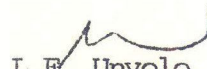
already said that in my assessment of the facts the cyclist could not and did not come into the road suddenly like a shot. From these facts I come to the conclusion that the bus driver was negligent in not slowing down and continuing to drive at the same speed. He should have slowed down and if he had, there is no doubt, in my mind, that the accident here could have been averted. There would, in other words, have been no need to apply sudden brakes and even if he had he would have applied them at some safe distance to be able to pull up without hitting the mercedes benz. Indeed, it also appears to me from the total facts that had the bus driver not braked he would, most likely, have steered through without running down the cyclist at all.

But I do not think that the driver of the mercedes benz was without fault. I find that he too was negligent in that he did not take a safe course by completely turning into the right lane in good time. I was, at first, inclined to take the view that it was the driver of the mercedes benz who was more negligent than the bus driver but on serious reflection I think that they bear the blame equally. I find therefore that both the plaintiff and the defendant in this case have, in this context, proved their respective cases on the balance of probabilities.

I now turn to the question of damages. The only item of claim which bothered me was that relating to headlamps considering that these were situated in front of the mercedes benz whileas the impact occurred in the rear. The plaintiff was however unshaken in his evidence that the motor vehicle was in good condition before the accident. Indeed the plaintiff was using it on the material day. PW3 said that it was possible for these two headlamps to get damaged in the impact. Considering all the evidence, I am inclined to accept the plaintiff's story that the headlamps got damaged in the accident. The other damages as well as the hire charges were, in my view, amply substantiated.

I, therefore, enter judgment for the plaintiff for half the sum claimed namely, for the sum of K2,221.53, with costs on the subordinate court scale.

Pronounced in open Court this 29th day of June, 1988 at Blantyre.


L.E. Unyolo
JUDGE

