

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.285 OF 1986

BETWEEN:

ORIS BELLO (MALE) PLAINTIFF

AND

WILLIE H.C. PHIRI (MALE) DEFENDANT

CORAM: UNYOLO, J.

Nampota, Counsel for the Plaintiff
Nyirenda, Counsel for the Defendant
Nkhoma, Official Interpreter
Phiri, Court Reporter

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 so negligently drove his motor vehicle that he knocked down the plaintiff causing him injury in the process. The particulars of the alleged negligence and the injury sustained are set out. In his defence the defendant denies he was negligent in the manner he drove the motor vehicle. He pleads that the accident was caused or contributed to by the negligence of the plaintiff. The particulars of the alleged negligence are also set out in the said defence.

The plaintiff was brief in his evidence. He said that he was on the material day travelling from his house at Chinamwali going to his place of work at Securicor office in the Municipality of Zomba where he was employed as a guard. He told the court that he was walking on the right hand side of the road on the dirty verge facing Zomba. Further, the plaintiff said he was able to remember that he was so walking, going past the Geological Survey Offices, but next noticed that he was lying in the Zomba General Hospital injured. He learnt that he had been involved in a road accident. Asked in cross-examination, the plaintiff said that he did not see the motor vehicle which knocked him down. He denied having attempted to cross the road from the right to the left. He stressed that the motor vehicle must have hit him out there on the dirty verge on the right hand side of the road where he was walking. It was his evidence that the accident occurred at about 4.15 p.m. and that it was clear at the time.

I pause here to turn to the defence evidence on this aspect. The defendant told the court that he was on the material day driving his car from Liwonde going to Blantyre.

He said that when he got to Zomba C.C.A.P. where there is a bend, he suddenly saw the plaintiff running across the road from the right hand side to the left. He stated that he applied brakes but because the plaintiff was so close he, the plaintiff, run into the car and fell down. According to the defendant this took place on the left hand side of the road immediately after the plaintiff had crossed the centre line. The defendant denied having run down the plaintiff on the right hand side of the road as contended by the plaintiff. According to the defendant the accident occurred between 6.15 p.m. and 6.30 p.m. In cross-examination the defendant told the court that he was in 3rd gear the time the accident happened and that he was then doing 25 to 30 kilometres an hour. He said that the plaintiff was some 5 to 10 yards away when he first saw him.

With the greatest respect, I would prefer the plaintiff's evidence to that given by the defendant. To start with, the plaintiff appeared to me to be a truthful witness and he emerged unscathed in his evidence. There was also another witness, PW4, who said that he actually saw the accident happen. He was travelling some 15 metres behind the plaintiff, when the defendant's car went past him at a speed and went to hit the plaintiff where he was, the plaintiff was walking on the dirty verge of the right hand side of the road. The witness denied vehemently that the plaintiff was run down as he tried to cross the road or on the left hand side of the road. He said that he actually helped put the plaintiff into a motor vehicle which appeared on the scene and accompanied him to the hospital. This witness too, it is observed, emerged unshaken in his testimony and I actually gained the impression that he was a witness of truth. It was suggested that this witness had just been conveniently picked up to bolster the plaintiff's evidence and that he did not witness the accident as he would have the court believe. With respect I am unable to share in this comment.

I would go on. First, it is to be noted that the defendant was contradicted in his evidence here and there by his own witness, DW2, a traffic police officer. As indicated earlier, the defendant's evidence was that the accident occurred at between 6.15 p.m. and 6.30 p.m. DW2 however said that he got the report about the accident at about 4.15 p.m. Secondly, the defendant said that after the accident he remained at the scene until the police came. DW2 on the other hand said that it was the defendant himself who reported the accident at the Police Station and that it was the defendant who drove the police party to the scene of the accident. Perhaps I should mention here that the witness, DW2, was called so he could support the defendant that the plaintiff was knocked down on the left side of the road. It is to be observed, however, that much of the witness' evidence was hearsay. It related to what the defendant told him in the absence of the plaintiff and the witness did not try to verify or check the information with the plaintiff. The sketch plan the witness drew at the scene and tendered in evidence as exhibit D1 is based upon such hearsay evidence and I would place very little weight upon it.

Further I find it difficult, with respect, to believe the defendant even on his own evidence. I have found that the accident occurred during day time and the defendant concedes it was clear at the time; visibility all round was good. How then did he fail to see the plaintiff in good time? And if the plaintiff was some 10 yards away when the defendant first saw him running across the road, it is difficult to appreciate how, driving as he says at about 25-30 kilometres an hour, he failed to stop in time or swerve so as to avoid the accident. And if the accident occurred on the left side of the road, on his correct side that is, it is difficult to appreciate why he quickly moved the car from the scene. One would expect that he would have left it there for the Police to see that that was the point the accident occurred as this would have been evidence in his favour. And it is to be noted here that the defendant is a clever, educated and intelligent man. Indeed the plaintiff was rushed to the hospital in another motor vehicle and it would appear that the Police Station is close to the place the accident occurred. In my judgment the defendant moved the car quickly because impact took place on his wrong side namely on the right side of the road. Indeed, I have already said that I believe the plaintiff and his witness, PW4, and would prefer their evidence to that given by the defendant. What also does come out through the evidence is that because of speed the defendant failed to negotiate the bend at the scene and lost control and went to hit down the plaintiff in the process.

The plaintiff's case on the pleadings is that the defendant was negligent in that he (a) failed to brake or stop or slow down so as to avoid striking the plaintiff; (b) drove at a speed which was excessive in the circumstances; (c) failed to keep any or any proper look out or to have any sufficient regard for traffic which was or might reasonably be expected to be on the said road; (d) failed to see the plaintiff in sufficient time and (e) failed to swerve or in any other way manage or control his said car so as to avoid hitting the plaintiff. On the total evidence before the court, I find that all these acts have been proved and that the same, either singly or cumulatively constituted negligent driving on the part of the defendant. I find, further, that these acts were the sole cause of the accident and would dismiss the defendant's allegation that the accident was caused or contributed to by negligence by the plaintiff.

I now turn to the issue of damages. The plaintiff claims first special damages for loss of earnings at K42.00 per month until retiring age. He also claims general damages for the injuries suffered and for shock. PW3, a records clerk at the Securicor head office testified that the plaintiff was at the time of the accident earning K1.36 per day. The witness said that the plaintiff's services were terminated on 31st July, 1984, after the plaintiff was reported sick for many months. The witness simply said that the plaintiff was given notice-pay but did not say whether the plaintiff was paid for the months he was away in the hospital or recovering. The plaintiff's evidence is also silent on this aspect. Further, neither the plaintiff nor PW3 said anything as regards when the plaintiff was due to retire.

Concerning the injuries sustained it was the plaintiff's evidence that he sustained a fracture of the right leg. He said that he stayed in hospital for three months. The medical reports tendered show that the plaintiff sustained a fracture of the tibia and fibula. No surgical operation was performed. He was treated conservatively, that is to say by applying plaster of Paris after manipulation under general anaesthesia. The plaster of Paris was removed after ten weeks. PW3 told the court that the fracture has left an ugly deformity due to displacement of the bones and the plaintiff has lost his normal walking posture. He put the plaintiff's permanent degree of incapacity at 10% and said that he is only fit for light work. He is not fit to work as a guard or do any work involving stress or standing for a long time.

I would deal first with the claim for special damages. The first observation to be made is that such damages are required to be proved strictly. As already indicated it is not known on the evidence before the court whether the plaintiff suffered any loss or damages on this aspect. Evidence should have been led concerning his age at the time of the accident or termination of services and age at which he would have retired. The court would have been in a position to work out his loss under this claim. There is no doubt that his career was brought to an end abruptly, but how long thereafter he would have worked on to retirement is not known. The court cannot be left to surmise.

I now turn to claim for general damages. Here there can be no doubt that the plaintiff suffered an injury of some serious magnitude and he must have suffered considerable pain for weeks on end. I have considered the cases cited in Kemp and Kemp. There are also decided cases from the local jurisdiction which I have found quite useful. These include Macheso vs. Punch Construction Equipment Supplies Co. Ltd. Civil Cause No.288/84; Sagawa vs. City of Blantyre Civil Cause No.147/85 and Thonje vs. Capital Hotel Ltd. Civil Cause No.365/87, unreported. All in all, I find that the plaintiff has, on a balance of probability, proved his case against the defendant and considering the total facts I would award him, for the injuries he sustained and for pain/suffering and shock, general damages in the sum of K5,000. I, therefore, enter judgment for the plaintiff for this sum and costs.

PRONOUNCED in open Court this 14th day of February, 1989 at Blantyre.


L.E. Unyolo
JUDGE