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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.218 OF 1988

BETWEEN:

FRANK MAERESA PLAINTIFF

AND

ELECTRICITY SUPPLY COMMISSION OF MALAWI DEFENDANT

CORAM: BANDA, J.
Nyirenda, Counsel for the Plaintiff
Msaka, Counsel for the Defendant
Manondo (Mrs), Official Interpreter
Phiri, Senior Court Reporter

JUDGMENT

This action arises from a road accident which occurred on the 11th day of December, 1987 along Midima Road towards Bangwe. The accident involved the plaintiff, who was riding a motor cycle registration number BE 9656 and the defendants' vehicle registration number 2 SC 144.

The evidence of the plaintiff was that on the material day he was riding his motor cycle along the Midima Road going towards Bangwe. He stated that when he reached Mr. Wilson's gate, between Midima Road Resident Magistrate's Court and MACOHA building, he saw a vehicle approaching from the opposite direction. He stated that the vehicle was going towards Limbe and that the time was soon after 5.00 p.m. His evidence was that he was riding on his correct side of the road when he saw this vehicle which, according to him, was running very fast suddenly come to his side of the road. He stated that he tried to swerve his motor cycle further to the left but was nevertheless hit. He stated that from that moment he did not know what had happened.

The other piece of evidence came from three other witnesses. One such witness was a Mr. James Petro who is a Securicor guard and was on duty at Mr. Wilson's gate. He stated that whilst he was on duty he saw a motor cyclist who was in front of a car in which Mr. Whitelock's son was driving. Apparently Mr. Whitelock uses the same gate as

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Mr. Wilson to go to their respective houses. He stated that immediately Mr. Whitelock's son went through the gate, the cyclist went past him and that immediately after that he saw a truck coming from Bangwe side towards Limbe. He said it was an ESCOM Bedford vehicle, white in colour. The evidence of this witness was that the vehicle was travelling fast and that it was travelling on the middle of the road. He stated that the cyclist was on the left-hand side of the road going towards Bangwe. He stated that it was the Bedford vehicle which came to the side of the cyclist and hit him. The witness stated that he saw the cyclist falling down after he was hit. He stated that he went to the scene of the accident and found that the motor cyclist was badly injured, with injuries on his fingers and that four of his fingers were cut off. He also noticed that the plaintiff had injuries on his arms and that the handles and front mudguard of his motor cycle were broken. The evidence of this witness was that the motor cyclist was riding on the left-hand side of the road towards Bangwe. It was also this witness who pointed out the various spots when the Court adjourned to the scene of the accident. There was some rain on the material day although there is some difference on whether the rain was merely showering or whether it was heavy.

The next witness was a lady by the name of Mrs. Jean Biziwiki. This lady was one of the three ladies who had gone into the guard's shelter to escape from the rain that was falling. She stated that the accident occurred on the Midima Road near the gate of Mr. Wilson. She said it involved a motor vehicle and a motor cycle and that the motor cycle was going towards Bangwe while the lorry was going towards Limbe. She stated that she witnessed the actual collision. Her evidence was that after they had gone to the shelter they heard a noise as if some things had collided and that when she looked outside the guard's shelter she saw that there was indeed a collision between a motor vehicle and a motor cycle. They went outside where they saw that the accident had happened on the left side of the road, going towards Bangwe. She said that she saw the cyclist on the ground and that he was lying on the left side of the road and that the motor vehicle was near the middle of the road near the white line. Her evidence was that the white line was in the middle and that the tyres of the motor vehicle were on either side of the line. It was also the evidence of this witness that the accident happened on the Bangwe lane of the road and that the rain was heavy. The next witness was another lady by the name of Mrs. Rose Naisoni. Her evidence was similar to that of the previous witness.

The driver of the ESCOM lorry gave evidence and he stated that he was travelling between 10-15 kilometres per hour because it was raining and that it was getting dark. He stated that the time of the accident was after sunset. He was coming from Bangwe where he had gone to work. He stated that

after going past the toilet sited along the road, and before MACOHA, he saw someone coming from the opposite direction on a motor cycle. He said that the showers were heavy and that water was running on the road. He said it was a bit dark and that he was using his side lights. He was able to see properly on the windscreen because he was using wipers. It was windy on the particular day. He said that the wind was blowing from Bangwe direction towards Limbe direction. He said he saw the cyclist coming towards him and that although he wore a helmet, the cyclist did not have a windshield and that he saw that the motor cyclist was having difficulties in driving. It was the evidence of the driver that the cyclist did not put on his lights and that he was "just driving like that". He further stated that because the cyclist did not have a windshield, he was looking downwards as he could not look in front because of the rain which was hitting him in the face. The driver's evidence was that he was driving on his correct left side of the road but he saw the cyclist coming towards the white line and crossing it and going to the side of the driver's lane. The driver stated that the cyclist hit him on the rear mudguard and that the motor cyclist fell on the middle of the road. His evidence was that the motor cyclist actually fell across the white line.

That, briefly, is the material evidence in this case on how the accident was caused. The law is that a driver of a motor vehicle, which includes motor cyclists, owes a duty of care to the other road users not to cause damage to persons, vehicles and property of anyone on the road. He must use reasonable care which an ordinary competent driver would have exercised under all the circumstances. A reasonably competent driver has been defined as one who avoids excessive speed, keeps a good look-out, observes traffic signs and signals. Collisions frequently occur between vehicles going in opposite directions. The negligence in such cases is always a question of fact. If the highway is wide enough for the two cars to pass each other in safety and if each driver keeps to his side of the road, no collision should normally happen. It follows, therefore, that a driver who is on the wrong side of the highway in violation of the rule of the road is generally the cause of the collision and therefore responsible for the damage sustained by the one driving on the proper side. It is important, therefore, to consider what faults were there in the present case and which fault caused the accident.

Mr. Msaka has submitted, and rightly so, that the issue before this Court is who is the author of this accident and everything else flows from that. Mr. Msaka contended that if the Court finds that the plaintiff was the author of the accident then there will be no need for the Court to determine the issue of injuries suffered. He submitted that the issue will have to be determined upon the evidence given in Court. Mr. Msaka contended that the evidence given on behalf of the plaintiff was rehearsed and that the Court should put little

weight on it. He attacked the evidence of the security guard and the evidence of the two women who had gone to his shelter for cover from the rain. Mr. Msaka contended that it was impossible for the security guard to have witnessed the accident at the same time as he was opening the gate for Mr. Whitelock's son. It was also Mr. Msaka's contention that it was not possible for the two ladies, too, to have witnessed the collision. Mr. Msaka referred to the evidence of the witnesses who indicated the distance the defendants truck travelled after the collision. It was agreed by both sides that the distance travelled after the impact was about 20-22 metres which shows, in his submission, that the truck could not have been travelling at a speed of 70 m.p.h. as stated by the plaintiff.

It is important, in my view, to examine carefully what the witnesses actually said. If we take the evidence of the two women first: although, indeed, they seem to suggest that they actually saw the two vehicles colliding, but when their evidence is examined one will see that what in fact they were saying is that they heard a bang and when they looked and went outside they discovered that a truck and a motor cycle had collided. It is also important to remember that the gate is only a few metres away from the road and while it is true that the guard was opening the gate for Mr. Whitelock's son, it is not difficult to imagine, in view of where the gate is located in relation to the road, that in opening the gate he must have faced towards the road and it is not impossible for him to have seen the two vehicles colliding.

But, even if the evidence of the witnesses which suggests that they actually saw the two vehicles collide is disregarded, there is circumstantial evidence which can show how the accident happened. Firstly, there is evidence that soon after the accident happened, the plaintiff and his motor cycle were lying on the left side of the road towards Bangwe. There is also the evidence of one of the witnesses who stated that the collision occurred on the lane going to Bangwe. There is also the further evidence of one of the witnesses who stated that immediately after the accident, the defendants truck was standing over the white line and stated further that the wheels of the truck were on either side of the white line. The evidence of the driver was that he saw the plaintiff slowly coming towards him until he saw him cross the white line and come to his side of the road. And yet the driver states that the collision happened at the rear of his truck. If, indeed, the plaintiff had crossed the white line and had gone to the driver's side of the road, what should have occurred should have been a head-on collision or if he had tried to swerve to his left then the collision would probably have happened on the far side of the lorry. There is no evidence, if his version of the story is correct, that when he saw the motor cyclist come towards him the driver swerved to avoid hitting the cyclist. However, if the version of the

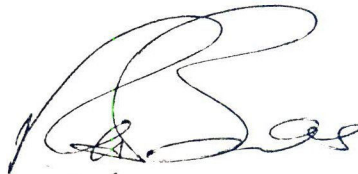
driver is the correct story then the impact of this accident would have happened on the middle of the road or to his side of the road. The plaintiff was found lying on the left side of the road towards Bangwe.

The driver and his passenger both said that they saw the cyclist coming towards them. And the passenger further stated that the motor cyclist was riding on his correct side of the road. Clearly the defendant's witnesses themselves contradicted each other. Indeed, contrary to the overwhelming evidence of other witnesses, the driver alone states that the accident occurred across the white line. I have carefully reviewed the evidence in this case and there can be no doubt, in my judgment, that it was the defendant's driver who was at fault. He was, therefore, the author of the accident. I am satisfied that the plaintiff was riding on his correct side of the road and that the accident occurred because the defendant's driver had moved to the plaintiff's side. The driver was coming from duty at Bangwe and he was acting within the employment of the defendant and the defendant is therefore vicariously liable.

I must now consider the issue of damages. The plaintiff suffered very serious injuries. Some of these injuries have resulted in paralysis of the right arm which now is always placed in a sling. The plaintiff's right arm had two fractures, on the upper and the lower parts and he has lost four fingers which were cut off in the accident. He had a fracture on his right leg and at the centre of his leg. On the left arm, the index finger was dislocated and there is pain on his left thumb. There was a cut on the index finger and it is now out of line with the others. There is a scar at the top where the fingers had been but now the fracture is healed but it causes other problems on his hand. He stated that when he moves the bones appear to be touching each other. His left arm fractures have not fully healed and the upper arm is now joined together by a steel-plate and although the lower part is healed, he states that he still suffers severe pain. The plaintiff is still working as an auditor for Malawi Railways although he is now having to learn how to use his left hand. There is a claim for special damages in the sum of K4,236.76. The largest item of the special damages is one relating to repair of the motor cycle. The amount is K3,487.22. Mr. Nyirenda has conceded that the motor cycle was not repaired; the sum claimed was only the amount of a quotation if the motor cycle was to be repaired. It was, however, sold only for K600.00. Mr. Nyirenda conceded that it had not been proved that a Police report was paid for for K5.00 and neither was it proved, in my view, that a wrist-watch valued K55.00 and cash valued K53.00 were lost in the accident. Special damages must be specifically pleaded and must be strictly proved. The motor cycle was bought in 1982.

In assessing general damages I must consider the issue of pain and suffering and loss of amenities, if any. And there can be no doubt, in my judgment, in view of the injuries suffered by the plaintiff, that there is a shortened expectation of life. And in determining the general damages in a case of this nature, I must consider the injury itself; the seriousness and what it has done to the plaintiff himself. And, as I have said before, the injuries which the plaintiff has described have been very disabling indeed. In awarding the damages I am about to give I have had the advantage of looking at the guidance provided on the illustrations of quantum of damages given in Munkman Damages for Personal Injuries and Death, 7th Edition. I have borne in mind that the illustrations given only provide a general guidance. In view of the serious injuries suffered by the plaintiff, and injuries which have occasioned permanent disability in one arm and have seriously disabled his movements, I would award a sum of K10,000.00 as general damages. There will therefore be judgment for the plaintiff in the sum of K10,000.00 and costs of this action.

PRONOUNCED in open Court this 14th day of November, 1991
at Blantyre.

A handwritten signature in black ink, appearing to read 'R.A. Banda', with a large, stylized flourish above the name.

R.A. Banda
JUDGE