Banda J.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.163 OF 1988

BETWEEN:

M.I. JUSSAB ..... PLAINTIFF

AND

ZALINA MUSSA AND A. MUSSA ..... DEFENDANTS

CORAM: BANDA, J.
Nyirenda, Counsel for the Plaintiff
Msiska, Counsel for the Defendants
Chigaru, Official Interpreter
Gausi (Mrs)/Maore/Phiri, Court Reporters

JUDGMENT

This action arose from a fatal accident which occured on the 12th day of December, 1987 between 10.30 and 11.30 p.m. along the Blantyre/Chileka Road. There were two fatalities one being the wife of the plaintiff in this action and the other being a Mrs. L. Mussa who was allegedly the driver of the other vehicle involved in the accident. Originally there were two actions, Civil Cause No.163 of 1987 and 174 of 1988 but by an order of the learned Registrar at the hearing of the Summons for Directions, the two actions have now been consolidated.

The evidence of the plaintiff is that he was travelling from Citilimits, which is a social club commonly known as the Flamingo situated on the Blantyre/Chileka Road. He said that there was a social function which was organised to celebrate the opening of the club under new management. He had, as a passenger, his wife. He stated that they had decided to leave early because they had left, at home, two young children one of them only 5 months old. It was his evidence that as he approached Ndirande Police he suddendly saw a vehicle from the opposite direction coming straight to his lane with full headlights on and that it was travelling fast. He dipped his lights but the car from the opposite direction continued to come to his side of the road with full lights on and that when he realised that the car was coming towards his side he told his wife that they were heading for an accident. He stated that in order to avoid a head-on collision he decided to veer to his right and that as he did that there was a collision and his vehicle caught fire on impact. He stated that as a result of the impact his vehicle was turned round facing the direction from which it had come.

After he managed to get out of the car he noticed that his wife had collapsed on the front passenger seat with her lower part of the body in the seat and that the upper part of the body had reclined towards the back seat. He managed to remove his wife out of the vehicle and that at that point in time she was still conscious. A taxi arrived at the scene and it carried the plaintiff and his wife to the Seventh Day Adventist Hospital in Blantyre. While at the hospital, as he was receiving treatment for the injuries he had suffered, a doctor told him that his wife had died as a result of multiple injuries from the accident. He did not go back to the scene of the accident until two days later. He did not find his car at the scene which, apparently, had been towed away to Autocraft. It was his evidence that almost a quarter of the left side of his vehicle was damaged due to the impact it had taken. The whole vehicle from front to rear was gutted in fire. The vehicle was damaged beyond repair. It was, in his own words, 'a total wreck'.

There were two other witnesses who were called for the plaintiff and these are Fire Officers working for the City of Blantyre who were called to the scene to extinguish a fire which had started as a result of the car accident. The first of these witnesses was Mr. Gilbert Gibbs Chinsima, who is the Chief Fire Officer. He remembered the 12th of December 1987 when he received a call during the night calling him to go to his office. According to him the time was 11.30 p.m. He was advised that two vehicles with registration numbers BT 3555 and ZA 2571 had been involved in a car accident along the Blantyre/Chileka Road. He said he went to the scene of the accident where he arrived at 11.39 p.m. He saw that the vehicle with registration number ZA 2571 was burning and no other vehicle could pass by. He said that it took them 51 minutes to put out the fire. At that time both victims had already been taken to hospital. It was Mr. Chinsima's evidence that they did two things during that night. He said that they marked the positions of the two vehicles and that after that he went to Queen Elizabeth Central Hospital and his colleague went to Seventh Day Adventist Hospital. He said that he prepared a sketch plan of the scene of the accident. The sketch plan was produced in evidence as Exhibit 21 and it shows the relative positions of the two vehicles after the accident. The plan also shows that there is an embankment on the right side of the road as you go to Chileka and that on the left, on the Nyambadwe side, there is no embankment.

The second witness from the City of Blantyre was Mr. Davis Ramsey Chinsanje He too remembers 12th December 1987 and that he was on night-duty on that particular day and that about 11.30 p.m. he received a call for a car fire at Nyambadwe along the Blantyre/Chileka Road. He said he arranged to have a major fire engine to go to the scene with a crew of four men. He accompanied the fire engine as he was the duty officer on that day. He said on arrival at the

scene he found that one vehicle, with registration number ZA 2571, was burning furiously. He said this particular car was facing Chileka direction and that the other car, with registration number BT 3555, was in the lane going to Blantyre; three quarters of the vehicle was off the road facing the west side. He stated that the fire was very extensive because the tyres had burst and had melted into a liquid. He said that the bodywork and the cushions of ZA 2571 were all burned down. He stated that the positions of the vehicles were marked and he agreed with the positions of the vehicles as shown on Exhibit 21. He said that there were marks on the road and he thought they had been made by the rim of the tyre which had punctured and had dug into the tarmac. He stated that there were broken pieces of glass on the road and that the broken pieces of glass were in front of ZA 2571 on the lane going to Blantyre. It is important to remember that the Court, during the evidence of this witness, visited the scene where the witness pointed out the spot where he saw the pieces of glass and the rim-marks on the tarmac and he also demonstrated the positions of the vehicles.

It is important to remember in this case that there were no direct witnesses for the defendant to give evidence on how the accident happened as the driver of the other vehicle died as a result of the accident. It is important, therefore, for the Court to consider the evidence of the plaintiff with careful scrutiny to ensure that no advantage is being taken from the absence of any witness on the defence side. I have constantly borne in mind the possibility of the plaintiff exaggerating his evidence in order to reinforce his case.

The only witness who was called for the defence was a daughter of the late Mrs. Mussa. The daughter now lives in the United Kingdom. She stated that she was in the country at the time of the accident and she confirmed that she is one of the executors of the estate of the late Mrs. Mussa. She said that she had visited her mother on that fateful day shortly before her death. She said that she learned of her mother's death between 10.30 and 10.45 p.m. as she was on her way home to pick up her cousin. She said she rushed to the scene of the accident. She confirmed, in her evidence, that her mother's vehicle was standing on the lane to Blantyre.

The fourth witness for the plaintiff was only called in order to prove the value of the deceased's vehicle as he apparently had shown some interest in wanting to buy it. He stated that the plaintiff had offered him the car at a price of K8,000.00.

Mr. Msiska, who appeared for the defendant, has submitted that the plaintiff was the sole cause of the accident and that Mrs. Mussa was not negligent. Mr. Msiska

contended that the plaintiff did not tell the whole truth to the Court. He referred to the position of the road which he stated was straight for a long distance and that the weather was fine and that, therefore, visibility was good. He submitted that both drivers could have seen each other long before they collided. He contended that the plaintiff was at fault in that he swerved to his right. He submitted that both drivers, Mrs. Mussa and the plaintiff, had a duty to each other to use reasonable care to avoid injury to each other. Mr. Msiska contended that the plaintiff could have seen Mrs. Mussa at a long distance and that a prudent driver ought to have swerved to the plaintiff's left or should have stopped to allow the other driver to pass. He submitted that the plaintiff did neither of these things and he did not therefore exercise due care and attention. He contended that if the plaintiff had swerved to his left the accident could not have happened. He submitted, accordingly, that the plaintiff was negligent and was the sole cause of the accident.

Mr. Msiska urged the Court to place little weight on the evidence of the Fire Officers. He submitted that what they said to the Court had no evidential value since they were not eye-witnesses to the accident and that they had only gone to the scene after the accident had already occured. He contended that the evidence of the Police, who were not called in this case, would have been of more evidential value than the evidence of the two Fire Officers. With due respect to Mr. Msiska, I find the distinction he sought to make difficult to understand. I would imagine that the Police officers would also have gone to the scene of the accident after the accident had already occured and, presumably, after they had been summoned to go to the scene. In those circumstances, I find it difficult to see how the evidence of the Police would have been of more evedential value than that of the Fire Officers.

A driver of a motor vehicle 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 lookout, observes traffic signs and signals. Collisions frequently occur between vehicles going in the opposite directions. The negligence in such cases is 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 happen. Consequently, it follows that the 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. I must, therefore, consider what faults were there which caused the accident in this case.

As I said earlier in this judgment, one of the unfortunate things in this case is that the driver of the other car involved in the accident died and there is, therefore, only one version of the story on how the accident happened. I have already directed myself to the dangers inherent in evidence coming only from one side. I carefully watched the plaintiff as he gave his evidence and I am satisfied that he told the Court the truth. I did not gain the impression that he is a man who was exaggerating the events of that fateful day in order to bolster his case. On the contrary he impressed me as a man who was telling the truth, trying his best to recollect the events of that fateful evening. The events, as narrated by the plaintiff and more particularly on the way the accident happened, have been corroborated by other circumstantial facts. It would appear from the sketch plan that the impact of the accident took place on the lane going to Blantyre. The positions of the two vehicles on the road soon after the accident were also confirmed by the daughter of Mrs. Mussa. She stated that her mother's vehicle was standing on the lane to Blantyre. If that is true, and it would appear there is no evidence to the contrary, it would support the plaintiff's contention that the car coming from the opposite direction had veered to the lane going to Blantyre.

It was Mr. Msiska's contention, as I have already shown above, that the plaintiff was wrong in veering to his right and that what he should have done should have been either to stop or to have veered to his left and that, according to Mr. Msiska, would have avoided the accident. By the same token, it was also Mr. Nyirenda's contention for the plaintiff that it was equally true for Mrs. Mussa having seen the plaintiff veering to her side of the road should either have stopped or veered to her left side. If the events which led to the accident are those to which the plaintiff testified, is it possible to say, as a matter of fact, that in swerving to his right the plaintiff was at fault and that it was that fault which caused the accident?

Mr. Msiska has also invited this Court to find that the plaintiff was guilty of contributory negligence and has contended that if the Court finds that the plaintiff contributed to negligence to the extent of 50%, the plaintiff's action should be dismissed. Mr. Msiska cited, as authority for that proposition, the case of S. Mtuma & C Maliro v. Southern Bottlers & G. Ndingo (Unreported) Civil Cause No.124 of 1987. That case came before Mtegha, J. and I have looked at it and certainly the last paragraph of that judgment seems to support the proposition which Mr. Msiska is putting forward. The learned Judge in that case found that each party was at fault to the extent of 50% and he therefore stated that the action could not succeed on that basis. With due deference to my learned brother Judge, I take a different view of what the law is on the issue of contributory negligence. As I understand it, where a court

finds that parties to an action on negligence are equally to blame to the extent of 50% each, the thing to do is to assess damages suffered by each party and reduce the damages so found to the extent of their blameworthiness. Contributory negligence is not a full defence to an action in negligence and where it is proved it should not lead to a dismissal of a plaintiff's claim: vide Mlamwa v. Kamwendo (1961-63) 2 ALR M.565. Contributory negligence of the plaintiff only reduces the damages recoverable by him in proportion to the degree of his fault. In other words, it only affects measure of damages.

I have reviewed the evidence in this case with careful scrutiny. If, indeed, Mrs. Mussa was driving in the wrong lane, can it be said that the plaintiff was wrong in veering to his right? In my view, there would have been no alternative course of action open to the plaintiff because a dangerous situation would have been created by Mrs. Mussa by moving on the wrong side of the road. And, if in a moment's suddenness the plaintiff took a course of action which was the only proper and reasonable to take, the law, as I understand it, is that a plaintiff would not be liable in those circumstances. It must be remembered that the evidence is that there was an embankment on the plaintiff's left side and there was more room on his right. It is clear, therefore, that there was more room on the Nyambadwe side of the road where the plaintiff veered. In my judgment what the plaintiff did, faced with a dangerous situation as created by Mrs. Mussa was, under those conditions, the only and proper thing to do because the plaintiff was placed, by the negligence of Mrs. Mussa, in a position in which he acted under a reasonable apprehension of danger. In the case of Brandon v. Osborne Garrett & Co. (1924) 1 KB 548 there is the following dicta which I find instructive.

> "If a person is not to be held guilty of contributory negligence because he, acting instinctively for his own preservation, does that which a reasonable person under the conditions would do, I cannot see why he should be any more held guilty of contributory negligence if he does his instinctive act for the preservation of his wife or child or even a friend or stranger."

That case was followed in Matapila v. R. (1971-72) 6 ALR M.142.

I am satisfied, on the evidence before me, that the cause of the accident was the negligence of Mrs. Mussa by driving her vehicle on her wrong side of the road. I am also satisfied that the plaintiff was not guilty of contributory negligence.

I have now to consider the issue of damages. Mr. Msiska has conceded special damages in the sum of K72.20

but he has vigorously disputed the special damages in the sum of K23,165.45. He submitted, and quite rightly, that special damages must be specifically pleaded and that they must also be strictly proved. I will consider each item of the special damages claimed. The basis of the K8,000.00 claimed as value of the motor vehicle was based on what the plaintiff and Mr. Kansungwi said, namely that the vehicle was going to be sold at a price of K8,000.00. The vehicle, when it was bought, was valued at a price of K4,900.00. The plaintiff stated that the car had undergone some extensive refurbishment but, apart from his word, there is no other evidence to show what refurbishment was made to the vehicle and at what cost. I am not satisfied that it has been proved that the value of the vehicle, at the time it was involved in the accident, was K8,000.00. I find, however, that the vehicle had some value but it was five or six years old at the time of the accident. There is no evidence to show that it was new when it was bought except that it was first registered in 1979. Consequently after taking into account a depreciation which it must have suffered in that period, I consider a sum of K3,000.00 as the appropriate value. The cost of air tickets claimed is put at K7,100.00. Mr. Msiska has strongly submitted that it was not necessary to send the remains of the plaintiff's wife to Uganda. He contended that since the deceased was lawfully married to the plaintiff, her remains should have been buried in Malawi. However, it was the plaintiff's evidence that his wife's death was the first in her family and that it was important that the remains should be taken to Uganda where the burial rites are different. There can be no doubt in my judgment that burial is a natural consequence of death and if the victim happens to be a foreigner it should not make any difference. The victim should be taken as found. I am therefore satisfied that the costs of taking the remains of the plaintiff's wife to Uganda are not remote. It has, however, been conceded that the value of the tickets was only K3,500.00 and I would allow that amount as the cost of air tickets to Uganda and return. I would also allow the airport tax for one person at Lilongwe and Nairobi Airports totalling K40.00. Similarly I will only allow K1,240.50 as travel allowance because the other person involved was a Ugandan national who was already due to go to Uganda on leave. His expenses cannot, therefore, be said to have arisen from the death of the plaintiff's wife. The cost of airfreighting the remains to Uganda is allowed together with the cost of airfreighting an empty coffin from Zimbabwe. The cost of putting an obituary in the Daily Times has been conceded by Mr. Msiska and I will allow that together with the expenses of the embalmment which have also been conceded by Mr. Msiska. It was not shown to me by the plaintiff why it was necessary to phone to Zambia and Kenya. The necessity to phone Uganda, where the relatives of the plaintiff's wife are, was clearly proved so too was the necessity to phone Zimbabwe for an embalmer and for a special coffin. I will therefore only allow K236.00 as the

cost of telephones. The total amount allowed in special damages will be K13,633.00.

The principle for general damages, in cases like the one before this Court, is that I must assess damages on the basis of pecuniary value of the services which Mrs. Jussab, now deceased, rendered as wife and mother. No damages are recoverable in respect of the bereavement and suffering caused by the loss of the wife and mother. See the case of Mehmet v. Perry (1977) 2 All E.R. page 529. The most important heading under which general damages are claimed is in respect of loss of a wife's services in looking after the home, like cleaning, shopping and cooking. The measure of these damages is the cost of employing a house-keeper and this cost must be a reasonable cost; whether it was reasonable to employ another house-keeper or house-maid. Children are entitled to recover damages on the death of their mother for the services they received from her. The mother's personal attention to child upbringing, morals, education and psychological, which services a house-keeper cannot provide, has a financial value. See the case of Reagan v. Williamson (1976) 2 All E.R. page 241.

The other head of claim which I must consider in this case is the plaintiff's own loss. By the death of his wife, the plaintiff himself has lost the care and attention of his wife but this head of claim usually overlaps with the head of claim in respect of loss of his wife's services in looking after the home. I will therefore combine my assessment of damages in these two heads of damages. It is also normal practice in assessing damages to make a reduction in respect of the wife's own living expenses. In making these assessments of general damages, I must also consider that the children's dependency might cease earlier than majority age, or indeed the possibility that they might not live up to majority age. These are the vicissitudes of life which I must consider. I must also consider the possibility or, indeed, the probability that the plaintiff might re-marry; after all he is only 36 now.

The wife's gross salary per month was K364.00. After the deductions for income tax and motor vehicle advance there was a net balance of K203.95 and if on that we take an amount equivalent to one third which was spent on herself, it will leave us with K135.07 which will be available for the family. But she was also paying rent for the flat in which the family lived at the rate of 10% of her gross salary which works out at K36.40. So the wife's contribution to the family was to the extent of K172.37 per month and that gives us an annuity of K2068.00.

Mr. Nyirenda has invited this Court to use a multiplier either of 14 years purchase or 15 years purchase. I have already referred to some factors which I must take into account in assessing these damages. The number of years

purchase is always fluid and will vary according to the deceased's expectation of working life as it was at the time of death. I must also consider the probable duration of the dependency of the dependents. The deceased was 30 years at the time of her death and all things being equal she would have worked for 20 years before retiring at 50 years which is the Government retiring age. At 15 years purchase, the amount of damages awarded, according to the working chart of Mr. Nyirenda and which he has made available to the Court, would be exhausted after year 23 and Nina, who is the older of the children, would be 28 years whereas Laura, the younger of the two children, would be 26 years of age, well over the age of majority. That, in my view, would be over-compensation. Similarly, at 14 years purchase, the damages awarded would be exhausted at year 22; that again would be over-compensation. I am satisfied that a reasonable years of purchase would be 12 years and that would give us an award of K24,820.00. The plaintiff suffered some injuries and although they were not trivial they certainly were not grave injuries. They have left some superficial scars on his forehead. I would award K500.00 for pain and suffering. Therefore on the head of general damages I would award K25,320.00 plus special damages of K13,633.00. There will, therefore, be judgment in round figures for the plaintiff in the sum of K38,953.00 and costs of this action.

PRONOUNCED in open Court this 23rd day of July, 1991 at Blantyre.

R.A. Banda
JUDGE