IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.283 OF 1988

BETWEEN:

OSORIO GEDES ..... PLAINTIFF

AND

YASIN S. OSMAN ..... DEFENDANT

CORAM: UNYOLO, J.

Nakanga, Counsel for the Plaintiff
Mbendera, Counsel for the Defendant
Chigaru, Official Interpreter
Maore, Court Reporter

JUDGMENT

The Plaintiff in this action claims damages against the Defendant for negligence. He avers in his statement of claim that he was driving his motor vehicle Registration No. BE 356, a Mazda 929, along the Thyolo-Limbe road in the direction of Limbe when he collided with another motor vehicle Registration No. CA 7198, Opel Rekord, belonging to and being driven at the time by the Defendant. The plaintiff also avers that as a result of the collision he suffered personal injuries, loss and damage, particulars whereof are pleaded. He further avers that all this was the result of negligent driving on the part of the Defendant, and the particulars of the alleged negligence are also pleaded.

In his defence, the Defendant denies liability. He asserts that the collision was caused solely or, alternatively, was contributed to, by the negligence of the Plaintiff. He avers that the Plaintiff was negligent in his driving and the particulars of the alleged negligence are set out there. The Defendant avers that by reason of the collision, he too suffered personal injuries, loss and damage, and counter-claims against the Plaintiff for special damages in the sum of K7,390.00. In his reply the Plaintiff denies he was negligent as alleged, or at all.

I now turn to the evidence. It is common case that the accident in this matter occurred at about 8.30 p.m. on 23rd March, 1986, near Chigumula market, along the Limbe-Thyolo

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road. The Plaintiff had just come on to the said road from a nearby bottle store, referred to in the evidence as "Itimu's Bottle Store", and was driving in the direction of Limbe at that time. He was accompanied by four others in the car. The Defendant, on the other hand, was at the time coming from Mangochi and was driving to his house situated further on in Chigumula, in the direction of Thyolo. He was accompanied in the car by his wife and two small children. It is common case further that the collision between the two cars occurred on the lefthand side of the road facing Limbe. To this extent, the facts are not in dispute.

The Plaintiff testified that he spent a greater part of the afternoon on the material day servicing his car hereinbefore mentioned at his house in company of one Paul Shrotell, now deceased. He said that they completed the job at about 5.30 p.m. and then drove to the bottle store, arriving there just after 6.00 p.m. It was the Plaintiff's evidence that he had some drinks there up to about 8.30 p.m. when he decided to call it a day. He said that the deceased joined him in the car, as did the deceased's brother, one Patrick, and two others, namely Sharma and Timm. The bottle store is by the roadside, the Limbe-Thyolo road; so, from there he drove the car and joined the said road. He said that he was lawfully driving on his correct side, the lefthand side of the road, when he saw the Defendant's car coming in the opposite direction. It was his evidence that as the Defendant's car approached, he noticed that it was travelling on his side. He said that at that point he quickly put on his hazard lights to warn the driver of the on-coming car, the Defendant, that he was driving on the wrong side. The Plaintiff testified that the Defendant did not seem to heed the warning and seeing that the car was still coming headon he swung to the extreme left, with a view to avoiding a collision. That did not work, the Plaintiff said. The other car came on and hit his car near the driver's door. He was injured, as were the four passengers and they were all rushed to the Queen Elizabeth Central Hospital, where he was admitted for some four weeks. In brief, the foregoing was the Plaintiff's version of the accident. I now turn at this juncture to the Defendant's version.

The Defendant said that as he approached the Chigumula market, he saw the Plaintiff's car at some distance coming into the road from the bottle store. He said that thereafter the Plaintiff drove properly on the left and he thought that all was well when suddenly, as the two cars were some 50 metres or so apart, the Plaintiff crossed to the right. It was the Defedant's evidence that all this happened so quickly and unexpectedly that he felt rather instinctively that the only way to avoid a collision was to swing to his right, which he did. He said that unfortunately, just then, the Plaintiff also swung back, with the result that the two cars then collided

in the process on the other side of the road. It was the Defendant's evidence further that the Plaintiff's car had only one light, spotlight, at the time. He said that as a result of the collision, his car was so badly smashed that it was rendered a write-off. He also told the Court that his wife sustained some injuries in the crash. Finally the Defendant testified that he was subsequently arraigned before the Central Traffic Court on a charge of careless driving in connection with the very accident. He said that he was no-cased and a copy of the criminal proceedings in question was tendered in evidence. This, in the main, was the Defendant's evidence. In the final analysis then, the all-important question is who, as between the Plaintiff and the Defendant, should the Court believe.

Several witnesses were called. The Plaintiff, on the one hand, called three. These were: the Medical Doctor who attended to him at the Queen Elizabeth Central Hospital, then the Police Officer who visited the scene of the accident and investigated the matter, and then one of the passengers in the car. The Defendant, on his part, called four witnesses, namely, his wife, two of the passengers in the Plaintiff's car, and then a Court Clerk at Blantyre Magistrate's Court. I will have occasion here and there to deal with the testimony of the said witnesses in the course of this judgment. What I think I must mention here is that I have reviewed the total evidence before the Court and subjected it to a thorough and careful scrutiny.

One of the relevant points I must make a finding on relates to sobriety or otherwise of the Plaintiff at the time of the accident. As earlier indicated, the Plaintiff had admittedly been at a bottle store before the accident. The Plaintiff said that he only took soft drinks throughout the time he was at the bottle store. He called a witness who, to some extent, supported him on this point. However, two of the witnesses called by the Defendant disputed this assertion by the Plaintiff. Both these witnesses who were in the company of the Plaintiff at all material times said that the Plaintiff was in fact drinking Carlsberg Green throughout the time he was in the bottle store. They both went on to say that the Plaintiff was actually drunk the time they left the bottle store, this was after all the beers in the bottle store had been cleaned out, the witnesses said. Learned Counsel for the Plaintiff urged me not to accept the evidence of these two witnesses on the ground that both of them are related to the Defendant. It is to be noted, however, that these were competent witnesses, both of them, who gave their evidence in the usual manner on oath and subjected to cross-examination. Indeed, according

to the facts, the two witnesses are related, not to the Defendant as such, but to his wife, and even then, not closely. Both these witnesses were subjected to rigorous cross-examination at the able hands of learned Counsel for the Plaintiff, but stood their ground. I also watched the two witnesses as they testified and I gained the impression that they were credible witnesses. The same is, however, not true of the Plaintiff's witness. Learned Counsel for the Defendant was able to show that the witness had on a previous occasion made statements which were counter to, and inconsistent with, the evidence he gave in Court on this point. The witness also contradicted himself in his evidence in several other material respects. In short, his evidence appeared to me suspect. It is also to be observed that the two witnesses were supported in their testimony on the question of the Plaintiff's drunken condition by the Police Officer the Plaintiff called as a witness, and by the Defendant's wife, both of whom said that the Plaintiff appeared drunk the time they saw him at the hospital immediately after the accident. I appreciate that medical evidence would have carried greater weight in proving the Plaintiff's drunkenness. It is, however, trite that drunkenness is a question of fact which can be proved by evidence aliunde, such as the evidence of the four witnesses who told the Court that they actually saw the Plaintiff and were able to say that he was indeed drunk. To put it briefly, I find on the evidence that the Plaintiff was drunk at the material time.

This leads me now to what happened at the actual scene of the accident. As I have indicated earlier, each party is blaming the other for the accident. Again, the issue here turns, by and large, on the credibility of the witnesses. It is conceded, pausing here, that the accident occurred on the Defendant's wrong side. The Defendant, however, explained how he found himself on that part of the road. Here again, the Defendant was supported in all material particular by his wife who witnessed the accident from beginning to end. Further support of the defence evidence came from the Defendant's two witnesses above-mentioned, both of whom as I have indicated already, were passengers in the Plaintiff's car at the relevant time. It was the evidence of both these witnesses that just before the collision, the Plaintiff had turned back to Paul shrotell, the deceased, who was in the back seat at the time, commending him for having done a good job in servicing the car earlier that afternoon. Apparently, the Plaintiff was pleased with the car's performance and he thought that he should give credit where it was due. According to the two witnesses, when the Plaintiff so turned, the car went to the right. The witnesses went on to say that the Plaintiff was immediately told that he was driving on the wrong side and that there was a car coming in the opposite direction. Although the two

witnesses' testimony diverged as to who precisely shouted to the Plaintiff warning him of the dangerous situation that had arisen, they nevertheless agreed that the Plaintiff did go to the righthand side of the road into the path of the Defendant's on-coming car and that when the shout was made, the Plaintiff quickly corrected himself by going back to the left, where the collision occurred, unfortunately. To my mind all this is quite within the realm of possibility. After weighing the evidence up and for the reasons I have given earlier, I am disposed to believe the Defendant and would prefer his version of the accident to that given by the Plaintiff. Indeed, there are several pointers in the evidence which go to support the witnesses' testimony on this point. For example, it is not disputed that the Plaintiff's car had earlier on been serviced by the deceased, the Plaintiff turned back to talk to, just before the accident. Equally it is not disputed the deceased was in the said car and that he sat in the back. As to why the Plaintiff did not just talk without turning back, it must be appreciated that according to the evidence, he was "high" at the time. In short, I find that the Plaintiff did suddenly cross the righthand side of the road into the path of the Defendant and that the Defendant swerved to his right on the spur of the moment to try and head-off a collision. I find further that the collision nonetheless occurred because at that critical moment the Plaintiff went back to his correct side where, as he did so, the two cars met and collided. Learned Counsel for the Plaintiff urged the Court to pay no attention to the Defendant's evidence on this point, on the ground that the matters raised had not been pleaded by the Defendant in his defence. Learned Counsel argued that the Defendant should have specifically and clearly pleaded that the plaintiff "drove on the wrong side of the road" and that he "acted on the agony of the moment". Counsel referred the Court to the particulars of negligence set out by the Defendant in his defence and observed that no such assertions are made there. He submitted that it would be wrong for the Court to deal with issues which are not pleaded. With respect, the point taken by learned Counsel is by no means unimportant. However, this is a matter he should usefully have taken up much earlier on as the Defendant sought to adduce evidence on these issues by objecting to the evidence being given in the first place. It is, I think, useful at this juncture that I reproduce the particulars of negligence pleaded by the Defendant in his defence. These are:

"a) Driving too fast in the circumstances.

b) Failing to keep any or any proper look-out or to have any or any sufficient regard for other vehicular traffic on the said road.

c) Failing to steer a safe or proper course.

d) Driving the said motor vehicle along the said road when he knew or ought to have known that it was unsafe and dangerous so to do by reason of his drunkenness.

e) Driving the said motor vehicle along the said road when he knew or ought to have known that it was unsafe or dangerous so to do by reason of the unroadworthy condition of the said motor vehicle at the material time.

f) Driving the said motor vehicle along the said road at night without ensuring that it was safe so to do and when he knew or ought to have known that it was unsafe so to do by reason of the faulty lighting system on the said motor vehicle.

g) Failing to give any or any adequate warning of his approach.

h) Failing to keep any or any sufficient regard for his own safety when driving along the said road.

i) Failing to stop, to slow down, to swerve or in any other way to so manage or control the said motor vehicle as to avoid the said collision."

Clearly, the specific statements suggested by learned Counsel for the Plaintiff do not appear in the Defendant's particulars just reproduced above. I have carefully considered the forceful argument learned Counsel for the Plaintiff put up. All in all, I am, however, of the firm view that the averments made in paragraphs b), c), g) and i) effectively embrace the evidence adduced by the Defendant on this aspect. Definitely, I can't say that there is any fundamental departure from the evidence allowed to what the Defendant specified in his pleadings. I accordingly reject learned Counsel's argument.

I have considered with particular care the Defendant's manner of driving , in particular his speed at the material time. According to the Defendant he was doing about 70 kilometres per hour just before the accident. It must be appreciated that this was after dark and he had in ample time seen the Plaintiff's car approaching. Observably, a driver is under a duty to drive at a proper speed. All of course must depend on the particular facts of each case. Reverting to the present case, I doubt very much the speed of the Defendant or his manner of driving generally can be said to have caused or contributed to the accident and I also doubt that a collision could have been averted even at a lower speed considering, inter alia, that it was all suddenly and unexpectedly that

the Plaintiff crossed to the right and then back again. I have considered the matter long and hard in the course of which my opinion wavered but in the end I have come to the conclusion that it was the Plaintiff's own negligent driving which was the cause of the accident in this matter. Accordingly the Plaintiff's action must fail and it is dismissed. The Defendant succeeds.

I now turn to the damages claimed by the Defendant in his counter-claim. He claims, as I have already indicated, a total sum of K7390.00, made up as follows:

a)	Loss of car	:	K7,000.00
b)	Towing expenses	:	K90.00
c)	Medical expenses	:	K300.00

With regard to the claim under item a), it will be recalled that the defence evidence was that his car ended being written-off as a result of the accident. The Defendant said that the K7,000.00 represents the value of the car. He disclosed, however, that he has since been paid the amount herein by his insurers. Frankly, I was initially of the view that having already got the K7,000.00, this claim was untenable in view of the general rule that a Plaintiff cannot recover more than he has lost. Learned Counsel for the Defendant submitted that the claim here is still payable inspite of the fact that the Defendant has already received the K7,000.00 from his insurers. Counsel referred the Court to a House of Lords decision in Parry vs Cleaver (1970) AC 1, where it was held that money received by a Plaintiff under a contract of insurance is not to be taken into account in awarding damages since it would be unjust that money spent by an injured man on premiums should enure to the benefit of a tortfeasor. I have read the case very carefully. It is noted that their Lordships addressed their minds to the universal rule I have stated above, namely, that damages are compensatory so that a plaintiff cannot, in general, recover more than what he has lost. Their Lordships were, however, unanimously of the view that insurance cases are an exception to this rule.

Lord Denning, in Browning v War Office (1963) 1QB 750, a case involving insurance benefits as in the present case, also took the view that these were exceptional cases and at p. 759 the learned Master of the Rolls had this to say:

> "It would obviously not be fair to reduce his (the Plaintiff's) damages by reason of charitable gifts made to him ..... or by reason of insurance benefits which he has bought with his own money."

More than a dozen other cases are discussed in the Parry's case abovementioned and the dominant principle common to all of them is that in such cases, it is not the accident but a contract wholly independent of the relation between the Plaintiff and the Defendant which gives the Plaintiff his advantage.

It is noted that a similar issue was presented before Banda J. in Sharma vs National Bank of Malawi, Civil Cause No.874 of 1980 (unreported). The learned Judge held there that such insurance monies were claimable. There can be no doubt that there is an element of unjust enrichment in such cases. Be that as it may the law, as I have endeavoured to show, takes a different view. I find, therefore, that the Defendant in the present case is entitled to the K7,000.00 claimed for the loss of the car.

I next turn to the two claims for towing and medical expenses. These claims, I hasten to say, must fail for lack of supportive evidence. The Defendant failed to adduce the relevant documentary evidence on this point. Notably, these were claims for special damages as I have already indicated and, in accordance with practice, they had to be proved strictly. Accordingly, the Defendant fails on this aspect. In the result, I enter judgment for the Defendant in the sum of K7,000.00 and costs, both on the claim and the counter-claim.

PRONOUNCED in open Court this 18th day of February, 1991, at Blantyre.

L.E. UNYOLO
JUDGE