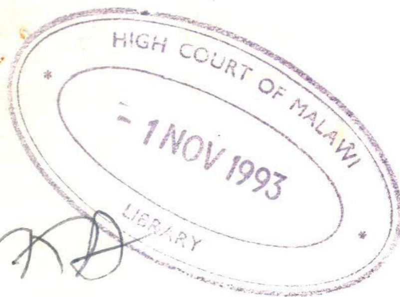
27 Mar 1992



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.1033 OF 1990

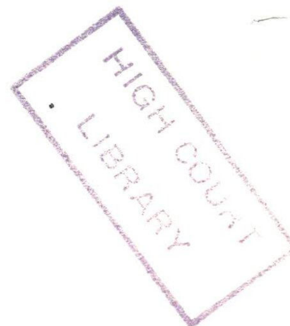
BETWEEN:

B.J. KHAMISA .... PLAINTIFF

AND

M.F. MIA .... DEFENDANT

CORAM: CHATSIKA, J.
Matupi, Counsel for the Plaintiff
Nakanga, Counsel for the Defendant
Kalimbuka Gama, Official Interpreter
Phiri, Senior Court Reporter



JUDGMENT

The Plaintiff claims from the Defendant the sum of K25,895.87 as damages arising from the damage allegedly caused by the Defendant to the Plaintiff's motor vehicle which is alleged to have been driven and taken away by the Defendant, without the Plaintiff's permission and involved in an accident. The amount claimed as damages is the figure which was quoted by a commercial garage as the cost of repairing the damaged vehicle. In his statement of claim, the Plaintiff also claims damages for loss of use of the car and costs of the action.

The vehicle in question, a Toyota Corolla, Registration number BF 8045, was registered in the name of the Plaintiff's wife, Mrs. A. Khamisa. The Defendant is the Plaintiff's wife's brother and he lives with his parents (the Plaintiff's wife's parents) in Limbe within the City of Blantyre. The Plaintiff's children attend school at the Central High School in Limbe and evidence was adduced to the effect that the children frequently visited their grand-parents' home in Limbe. This is the home of the Defendant, who is an uncle to the Plaintiff's children. The plaintiff lives in Luchenza with his family. He is a businessman. He buys and sells agricultural produce and also operates a transport business. There was evidence to show that

the car, which was registered in the Plaintiff's wife's name, was exclusively used by the Plaintiff's wife. It was the wife's duty to drive the children from their home in Luchenza to school in Limbe and to drive them back home after school. The husband stated in his evidence that he sometimes used the car to go and buy spare parts for his transport business and also to meet his buyers who were employed to buy produce for his produce business but as the Plaintiff further stated in his evidence that at the material time he owned three cars it would appear that with regard to the Plaintiff's use of this particular car, Toyota Corolla, Registration number BF 8045, the Plaintiff's use of it was very sparingly and only occasionally. It would appear that the word "sometimes" was very operative when he stated that he sometimes used the car to go and buy spare parts and to meet his buyers. In cross-examination, the Plaintiff emphasised the point that he had given specific instructions to his wife not to allow anyone to drive the car except herself. This evidence was emphasised in order to drive the point home that the driving by the Defendant was unauthorised and wrongful.

With the foregoing as a background, I now proceed to give the facts of the present case.

On the 24th April 1990, Mrs. A. Khamisa, wife of the Plaintiff, left her home in Luchenza in the morning and drove the car, Toyota Corolla, Registration number BF 8045 carrying her children to the Central High School in Limbe. After leaving the children at school and most probably as a result of some information which came into her possession, Mrs. Khamisa decided to proceed on to Balaka to attend a funeral. After speaking to her husband on the telephone about her intention to proceed to Balaka, she drove to her parents home at Mpingwe where she found the Defendant who is her brother. She asked the Defendant to accompany her in the car to the Wenela Bus Station where she would board the bus for Balaka in order that the Defendant would drive the car back to her parents' house, the Mias, at Mpingwe. The Defendant accompanied his sister, Mrs. A. Khamisa, to Blantyre Wenela Bus Station and returned with the car to the Mia's home at Mpingwe. This far, the facts are not in dispute.

April 24th was Ramadan period in 1990 and the Mias and the Khamisas, who are Moslems, were fasting during the day. In the evening before breaking the fast, the Defendant and Fariz Khamisa, one of the Plaintiff's children who was brought from Luchenza in the morning by their mother, went to the Mosque for prayers. After prayers the Defendant and Fariz Khamisa decided to go to the Cream Centre in Blantyre to buy some ice cream. They went there in the Toyota Corolla, BF 8045 which was driven by the Defendant. At the Queen Elizabeth Hospital traffic lights on the Kamuzu Highway the car was involved in an accident when it collided with another car which came from the side of the Universal Industries factory and crossing the

Kamuzu Highway. In the accident BF 8045 was extensively damaged. It is the accident which resulted in the damage to the car which is the basis of the Plaintiff's claim.

In his evidence the Plaintiff stated that on the morning of the 25th April 1990 acting on information which he received, he came to Limbe where he saw the car, BF 8045 at Limbe Garage where it had been towed to after the accident. The car was later towed to his father-in-law's house at Mpingwe where his mother-in-law promised him that she would cause the same to be repaired. After four months he went to the house and found that the car was still lying where it had been left four months previously and that no effort was being made to have it repaired. He stated further that when he enquired from his father-in-law as to what was being done about the repairs to the car, his father-in-law chased him away rudely and challenged him to go and report the matter anywhere he liked. Thereafter he obtained a quotation of the cost of repairing the car from a commercial garage and a quotation of K25,895.87 was made. This forms the base of his first head of the claim. The Plaintiff told the Court that as he could not afford to raise the money quoted for the repairs and as his father-in-law had impliedly refused to repair the car, he sold it as a scrap for K6,000.00 and then commenced this action.

The next witness for the Plaintiff was Fariz Khamisa, the Plaintiff's son who was one of the children who were brought from Luchenza to Limbe on the morning of the 24th April 1990. With regard to the events immediately preceding the accident the witness stated that after prayers at the Mosque he and his uncle Mohamed Firoz Mia, the Defendant, decided to go to the Cream Centre in Blantyre and that at the Queen Elizabeth traffic lights they were involved in an accident.

At this juncture the Plaintiff's case closed.

In his defence the Defendant stated that he lives at Mpingwe with his father and mother and that he assists his father in the latter's transport business. He stated that on the 24th April his sister, Mrs. A. Khamisa, the Plaintiff's wife, came to their house after leaving the children at school. She asked him to accompany her in the car to Wenela Bus Station where she was to board a bus to proceed to Balaka. The witness further stated that at Wenela Bus Station, Mrs. Khamisa gave him the car keys and told him to drive the car back and that he should drive it to take the children to and from school until she came back. He then drove the car to their house at Mpingwe. He stated further that because he was away in the afternoon on some business, the children were collected from school in his father's car which was driven by the family's driver. With regard to the events leading to the accident, the witness stated that in the evening after prayers at the Mosque, Fariz Khamisa, the Plaintiff's son, wanted to go to the Cream Centre in Blantyre and he drove the car to take him there and that on

the way they were involved in an accident. In his evidence the Defendant stated that his sister expressly told him not to allow Fariz Khamisa to drive the car because the latter did not have a driving licence.

I observed from the pleadings that the gravamen of the statement of claim was that the Defendant drove the car without the Plaintiff's authority, express or implied, and that such driving was wrongful. In his defence, the Defendant pleads general authority to drive the car. Fariz Khamisa, PW2, had difficulties in stating as to whether or not he had asked the Defendant to drive him to the Cream Centre. He was evasive and tended to prevaricate on this point. In reply to a question as to who had decided to go to the Cream Centre, at first he said "I accompanied my uncle since he was going to the Cream Centre". When Counsel pressed him for a more direct answer to the point he stated "I also wanted to go to the Cream Centre, so we went". Since the witness was giving evidence in the presence of his father who, as we have observed wanted to prove that the Defendant drove the vehicle without permission, the witness's difficulties became understandable.

There are a number of legal issues which have to be determined in this case. The first point which the Court has to determine is whether the Plaintiff had a proprietory interest in the car which was damaged to entitle him to sue the Defendant and claim damages; (b) whether, on the evidence, the Defendant could be said to have driven the car without the Plaintiff's permission and thereby to have committed a tort either of conversion or trespass to goods; (c) whether, under the head of liquidated damages, the damages have been satisfactorily proved.

With regard to the question as to whether the Plaintiff is the right person to sue as plaintiff, it is to be observed that in his evidence the Plaintiff stated that he bought the car in question. He decided to register the car in his wife's name. All the insurance documents are in his wife's name. He stated that this was done only for convenience and to show affection to his wife but he regarded the car as his property. He had full control of and access to the car. Mr. Nakanga, in his submission, conceded that the question of possession is not an easy one to decide in these circumstances. Order 15 rule 6 of the Rules of the Supreme Court provides that no cause or matter shall be defeated by the misjoinder or non-joinder of any party. The court may therefore proceed to decide the real issues in the matter despite any apparent misjoinder. However, having regard to the evidence which has been adduced by the Plaintiff, I find that he has asserted a sufficient proprietory interest in the car to justify him to claim damage for its damage or destruction.

I now come to the question of whether or not the Defendant is tortiously liable to the Plaintiff for the damage

to the car. The Plaintiff bases his claim on the allegation that the Defendant, immediately before the accident, took and drove away the vehicle without the Plaintiff's permission either express or implied and that in doing so he committed a tort of either conversion or trespass to goods. It would be a trespass to goods if the Defendant's acts would be viewed as having constituted an interference with the Plaintifff's possession of the car. On the other hand it would be conversion in any of the forms of that tort if the Defendant's act in relation to the car would constitute an unjustifiable denial of the Plaintiff's title to the car.

This point may be settled by reviewing the evidence on the point. The Plaintiff admitted that his wife had almost an exclusive use of the car in question. It is common ground that on the 24th April 1990 his wife drove the car to Limbe. The Plaintiff is not in a position to tell the Court what happened when his wife arrived in Limbe because he was not there. His wife, who could have enlightened the Court as to what happened and what instructions, if any, she gave to the Defendant when she came to Limbe did not proffer any evidence. Having regard to the relationship between the Plaintiff and his wife on the one part and the Plaintiff's wife and the Defendant on the other, the reasons for her unwillingness to come to give evidence are not far to seek. The Plaintiff's son, Fariz Khamisa, who travelled with the Plaintiff's wife from Luchenza to Limbe on the material date was not present when the Plaintiff's wife handed over the car to the Defendant. We therefore have only the word of the Plaintiff as against that of the Defendant.

The Defendant stated that on the material date his sister, the Plaintiff's wife, came to their home in Mpingwe and asked him to accompany her to the Wenela Bus Station where the former was to board a bus to Balaka. He stated that at the bus station his sister gave him the car keys and gave him instruction to use the car to drive the children who were left at the Defendant's parents home to and from school. He further stated that the only instructions which his sister specifically gave him were not to allow Fariz Khamisa, her son, to drive the car as he did not have a driving licence. He went on to state that on the evening of the same day, after prayers at the Mosque, Fariz Khamisa wanted to go to the Cream Centre and he drove the car to take him there and that on the way they were involved in an accident.

There was no evidence to dispute what the Defendant stated in evidence. It is accepted that at the Wenela Bus Station, Mrs. Khamisa gave the Defendant permission to drive the car, at least, from the Bus Station to Mpingwe. There is no evidence to the effect that she did not give permission to the Defendant to drive the car to any other place after he took it to Mpingwe. I am entitled to act only on the available and undisputed evidence that the Plaintiff's wife gave the Defendant permission to use the car to and from school for the

convenience of the children. I have already found that Fariz Khamisa, PW2, was somewhat evasive as to whether or not he had asked the Defendant to drive him to the Cream Centre. On this point, I prefer the Defendant's evidence which fits in neatly with the rest of the evidence that he was driving to the Cream Centre in compliance with what his sister had told him namely to use the car for the convenience of the children. I therefore find that he drove the car with the permission of the Plaintiff's wife. If the Plaintiff's wife had instructions from the Plaintiff not to allow any other person to drive the car, that is a matter between the Plaintiff and his wife but it would, in no way, nullify the permission which was given to the Defendant.

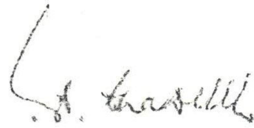
The claim for damages, according to the pleadings, was based on the allegation that the Defendant drove the vehicle in question without the permission of the Plaintiff and not on the manner in which the Defendant drove the vehicle. As I have found that the Defendant had such permission this head of the claim must fail and is hereby dismissed.

The plaintiff also claimed damages for loss of use of the motor vehicle. For this head of claim to succeed, it must be proved that the Defendant's conduct was blameworthy. There is no evidence to suggest that the accident was the result of any negligence or carelessness on the Defendant's part. No such evidence is available. The Defendant was driving the vehicle lawfully with the owner's permission. No evidence was led to show that the Defendant drove the vehicle in a manner which would have rendered him liable for the accident and its consequences. This head of claim must also fail and is hereby dismissed.

Lastly I wish to refer to the procedure which the Plaintiff adopted in assessing the liquidated damages. After the accident the Plaintiff asked a commercial garage to give him a quotation of the cost of repairing the vehicle. The quotation was tendered as Exhibit 1. The quotation gives the prices of parts of the motor vehicle which would have to be fitted to the vehicle if it had been repaired. The person who made the quotation was not called to testify. The value and the age of the motor vehicle immediately before the accident are not given. There is no evidence either as to whether the prices quoted are those of new parts or whether there was a possibility of repairing the car by using used parts. The Plaintiff sold the damaged car as a scrap for K6,000.00. This amount which the Plaintiff received has not been taken into account in assessing the amount of the damages claimed. If the Defendant had been found liable, I would not have ordered the payment of the amount claimed without further evidence. I would have found the Plaintiff to have failed in proving to the satisfaction of this Court as regards the extent of the amount of damages due to him for the loss of the car. This, however, is only obiter since liability has not been proved.

Having regard to the evidence as a whole, I find that the Plaintiff has failed to prove his claim against the Defendant. I dismiss the claims in their entirity with costs.

PRONOUNCED in open Court this 27th day of March, 1992 at Blantyre.



L.A. Chatsika
JUDGE