M/S J. F. Mwalwegwa

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 319 OF 1992

BETWEEN:

K W MTAMBO.....1ST PLAINTIFF

- and -

R MTAMBO.....2ND PLAINTIFF

- and -

G G WHITEHEAD.....DEFENDANT

CORAM: UNYOLO, J.
Msiska, of Counsel for the Plaintiffs
Mvula, of Counsel, for the Defendant
Mthukane, Official Interpreter
Maore, Court Reporter

J U D G M E N T

The claim in this action arises from a road accident which occurred along Glyn Jones Road, near Mount Soche Hotel, in the City of Blantyre, during the evening of 13th March 1991.

The two plaintiffs, who are a man and his wife, were at the material time travelling on a motor cycle from Bishop Mackenzie Hall near Ryalls Hotel to their house in Limbe after attending a Service of Worship at the said hall. When they were passing by Mount Soche Hotel they were involved in an accident. They collided with the defendant's car, right at the turn to the hotel. The defendant was at the time going to the hotel for dinner.

Taking first things first, I will deal first with the plaintiffs' version of the accident. Both plaintiffs said that they were following three cars as they approached Mount Soche Hotel. Incidentally, the first plaintiff was driving the motor cycle and the second plaintiff sat behind him as a pillion passenger. It was the evidence of both the plaintiffs further that at the same time they saw a car from the opposite direction stopped at the turn to the hotel with the right indicator on, showing that the driver intended to turn to the hotel. This was the defendant. The first plaintiff said that soon after the car which was immediately in front of him crossed with, or shall I say, went past the

defendant's car, suddenly the defendant shot out to cross the road, heading for the entrance to the hotel. He said it was at that moment when he collided with the car, hitting the front nearside wing as the defendant was attempting to cross.

In cross-examination, the first plaintiff admitted that he was only a learner driver at the material time. He, however, denied the accident can be contributed to incompetence on his part. He said that he was driving carefully and that indeed he has been driving motor cycles since 1983. Further, the first plaintiff denied he was driving very fast at the material time. He said that he could not have driven thus, since there were several cars in front going in the same direction.

It was also put to the first plaintiff in cross examination that the defendant did stop soon after he had started crossing, having seen the motor cycle and it was suggested that there was ample space for the first plaintiff to pass in front of the car. The first plaintiff denied this. He said that the car had completely blocked the lane in his path and that it was moving at the time of the collision.

The defendant admitted most of the facts. He admitted that when he got to the entrance to the hotel, he stopped, as there were several cars coming from the opposite direction which had the right of way. He admitted further that the collision occurred in the plaintiff's lane as he was trying to cross the same heading for the entrance to the hotel. He admitted that the plaintiffs were coming behind the said cars. His case was that he only saw the motor cycle, a light actually, when he had already started turning. He said the motor cycle was far away at the time and he reckoned he could turn into the other lane and cross over safely. Then he saw the motor cycle coming close, when he stopped, leaving ample space for the motor cycle to pass in front. It was the defendant's case that it was due to speed and incompetence on the part of the first plaintiff that the accident occurred.

I have considered the evidence with great care. On the issue of speed, I am, with respect, inclined to prefer the evidence of the first plaintiff to that of the defendant. It is to be noted that the first plaintiff came out unshaken in his evidence that he was driving at a low speed and he was on this point supported, not only by the second plaintiff, but by PW3 as well. Observably, both the second plaintiff and PW3 also emerged firm in their evidence. Indeed, PW3 is an independent witness with no personal interest in the matter. With respect, I have not been able to find any evidence in support of the defendant's contention that the first plaintiff drove the motor cyle at great speed. Indeed, considering the total evidence, I

don't think the defendant was was so placed that he would be able to tell the motor cycle was coming very fast. It appears from the defendant's own evidence that it was only as he was turning when he saw the single light of the motor cycle and then there was the accident. He must also have been looking where he was going and it must be borne in mind that this was in the evening. In short, I find that the first plaintiff was not driving fast.

Perhaps I should mention that it was further alleged, in the defence, that the first plaintiff also drove the motor cycle in "a zig-zag way". However, this allegation was not put to any of the plaintiffs or the other witness, nor was it raised by the defendant in his evidence. Consequently, this allegation simply falls through.

Referring to the issue of competence or incompetence of the first plaintiff as a driver, I am satisfied, on the available evidence, that the first plaintiff was at all material times, and is, a competent and capable driver. He emerged unshaken in his evidence that he has been driving motor cycles since 1983 and that he has driven in the City of Blantyre and on long stretches for a long time.

Referring to the law, it is well settled that a driver of a motor vehicle owes a duty of care to other road users. He must use reasonable care which an ordinary skilful driver would have exercised in all circumstances of a given case. And a reasonable and skilful driver has been defined as one who avoids excessive speed, keeps a good lookout and observes traffic signs and signals. See **Christina Banda -v- Admarc and Another, Civil Cause No. 273 of 1987** (unreported).

In the present case, as we have seen, the plaintiffs were driving through along the main road, whilst the defendant was turning from the said main road into a side road. Clearly, the plaintiffs had the right of way, not the defendant. It was suggested that the plaintiffs' right of way had not accrued at the time the defendant began crossing, in that the plaintiffs were far away then. This contention must, however, fail, for there was overwhelming evidence that the plaintiffs were at all material times driving close to the car immediately in front of them. Quite rightly, the defendant gave way to the three cars and he should also have given the plaintiffs the right of way. And it is common knowledge that a driver intending to turn to the right into a side road must have a proper lookout to ensure that it is safe to do so, bearing in mind that motorists from the opposite direction would have the right of way.

As I have earlier indicated, the defendant in the present case initially only saw the three cars and it was only when he had already started turning that he saw the

motor cycle. It is again common knowledge that we have motor cycles on the road. Indeed, there are plenty of them on our roads these days. An ordinary, skilful driver ought, therefore, to anticipate their presence on the road. In my judgment, the defendant should not have proceeded to turn immediately the third car went past. He should have checked the road to see that there was no other motorist or road user.

Another point raised by the defendant, as I have shown, was that when he saw the motor cycle he quickly stopped, leaving, so he said, enough room of about six to seven feet for the plantiffs to pass and that he was stationary at an angle of 45°, facing the hotel, when the motor cycle came and hit the car. I have said that this contention was vigorously denied by the plaintiffs, who were supported by the other witness, PW3. According to these three, the defendant's car was not stationary at the time of the collision and as I have indicated, according to the first plaintiff, the defendant's car completely blocked him, giving him no space to pass as alleged. But even assuming that the defendant stopped in the manner he says he stopped, that, in my judgment, could not advance his case. Such a sudden stop, in all the circumstances of this case, would influence or cause the first plaintiff to act on the spur of the moment. This is what is sometimes called the agony of collision, and if the first plaintiff took an unwise course, he would not be faulted or liable.

It was next argued that the first plaintiff cannot be heard to complain in this matter, since he committed an offence by carrying a pillion passenger, the second plaintiff, when he was only a learner driver. Learned Counsel further argued that the second plaintiff too cannot complain, since she willingly accepted to be carried as such pillion passenger knowing fully the first plaintiff was only a learner driver. With respect, I am unable to accept this argument, since, as I have already found, there is on the evidence nothing wrong with the first plaintiff's manner of driving.

Finally, it was suggested that the defendant could not have been negligent, considering that although the accident was reported to the Police, he has to this day not been charged with any traffic offence or prosecuted. With respect, I would hesitate to jump to such a conclusion. The Police did not testify in this case. Indeed, it is also a fair observation to make that civil cases are different from criminal cases and the standard of proof applicable in the former category of cases is different from that applicable in the latter.

Put briefly, I find that the defendant owed a duty of care to the plaintiffs and that he committed a breach of that duty and was, therefore, negligent.

Learned Counsel for the defendant addressed the Court at length arguing that the first plaintiff was guilty of contributory negligence. It is, however, to be noted that contributory negligence was not pleaded in the defendant's defence, and as was rightly argued by learned Counsel for the plaintiffs, if the defendant intended to set up the defence of contributory negligence, then he was required, under the Rules to plead the same specifically and set out the particulars thereof. See **O.18/8/17 and O.18/12/8 of the Rules of the Supreme Court**. This was not done in the present case and there is, therefore, no way the issue here can be raised only during the addresses.

I now turn to the question of damages. It is not disputed at this point that as a result of the collision both plaintiffs fell off the motor cycle and sustained physical injuries. The motor cycle also got damaged. The plaintiffs claim both special and general damages.

I will deal first with the claim for special damages. First, the first plaintiff, as per the statement of claim, claims the sum of K1,597.94 in respect of repairs carried out to the motor cycle. In his evidence, the first plantiff produced Exhibit P3, an estimate given by Stansfield Motors, dealers of the motor cycle herein, quoting a figure of K1,597.94 as their estimate to repair the motor cycle. He said that the motor cycle was actually repaired by the said dealers and that the said sum of K1,597.94 was paid as follows: a) K1,187.92 by the insurers; and b) K410.02 by himself.

It was the plaintiff's evidence that the insurers declined to pay the K410.02, because this amount represents certain parts of the motor cycle, viz, battery, fuse box and seat cover, which missed after the accident, stolen actually. The first plaintiff did not, however, produce any document to show that either the K1,187.92 or the K410.02 was indeed paid. He said that the relevant documents in this respect are being kept by his employers. Observably, I don't seem to quite understand why the first plaintiff did not bring these documents to Court to support his evidence on this point. It is to be noted, however, that it was not seriously disputed the motor cycle was indeed repaired, and, to my mind, the sum claimed doesn't appear to be inordinate or inflated in all the circumstances. However, I do not see any convincing ground upon which the defendant should also be held responsible for the items which were stolen by someone else later on after the accident. He is, however, entitled to the K1,187.92 on the authority of **Sharma -v- National Bank of Malawi, Civil Cause No. 87 of 1987** (unreported), inspite of the fact that it was the insurers, not him, who actually paid for the repairs. Accordingly, I award the plaintiff the sum of K1,187.92 on this aspect.

Next, the plaintiffs claim special damages in the sum of K854.47, being cost of medical treatment received as a result of the injuries sustained in the accident. The first plaintiff tendered in evidence Exhibit P2, viz, invoices raised against the first plaintiff by the Queen Elizabeth Central Hospital, totalling the said sum of K854.47. It was the first plaintiff's evidence that this sum was paid to the said hospital by his employers under a medical scheme run by the Organisation. He said that the medical scheme is entirely run by the Organisation and that members of staff, including the first plaintiff, don't contribute anything towards the same.

Learned Counsel for the plaintiffs urged the Court to deal with the matter on this aspect on the same footing as monies paid out by insurers on behalf of the insured as in the case of the money the insurers paid for the repairs to the motor cycle in the present case. With respect, I think that there is a material difference between the two situations. In the insurers' case, the insured does pay a premium. In the non-contributory medical scheme, the employee does not suffer any financial cost. On these facts, I can see no convincing reason why a person in the latter category should be allowed to claim, as that, to my mind, would tantamount to harvesting where one did not sow. It would, I think, be different where the employee contributed towards the medical scheme. All in all, I disallow the plaintiffs' claim on this head.

I now turn to general damages. I will deal first with the first plaintiff. The evidence shows that he sustained serious injury. He actually passed out on the spot and was semi-conscious on first attendance at the hospital. The medical report, Exhibit P1 rendered, shows that the first plaintiff sustained a fracture of the tibia (in three fragments) and of the fibula; left leg. He was hospitalised for one month, during which period the leg was opened and a metal plate fitted inside and a cast was also applied. The medical report goes on to show that the first plaintiff suffered acute pain for sometime and that he would continue to suffer some pain on the leg in future. He is also likely to suffer "osteo-athritis", i.e. a degenerative condition of the leg. Permanent disability of the leg was assessed at 40%. The first plaintiff told the Court that he cannot walk normally, as he limps and this condition has affected his performance at work. He was at all material times, and still is, a depot supervisor. He said that in this position he has to walk up and down and also climb stacks of produce. It was his evidence further that he missed a promotion the time he was in hospital and he reckons that his poor condition just described is likely to affect his chances of advancement in his work.

Pausing here, there can be no doubt that the first plaintiff suffered considerable pain and that he will continue to suffer some pain on and off in future. There is also no doubt he will not be able to do certain things, such as running or walking long distances as he used to do before the accident. In short, I am satisfied that the first plaintiff is entitled to damages for pain and suffering and for loss of amenities. I am, however not so sure about the claim for promotional prospects; in other words, loss of earnings. I find the evidence to be conjectural in all the circumstances.

In **Oris Bello -v- Willie Phiri, Civil Cause No. 285/86** (unreported), the plaintiff sustained a fracture of the right fibula. He stayed in hospital for three months. No surgical operation was performed. The leg was cast in plaster of paris for ten weeks. He lost normal walking posture and the degree of permanent incapacity was assessed at 10%. I awarded the plaintiff K5,000 for pain and suffering and shock.

In **Rabson Thonje -v- Capital Hotel Ltd and Another, Civil Cause No. 365/87** (unreported), the plaintiff sustained a fracture of the right leg and abrasions of the right hand. He was operated on several times and a plate was fitted and he stayed in hospital on and off for one year. The leg in question was rendered shorter than the other and as a result, he could not walk normally. I awarded the plaintiff K6,000 for general damages.

Finally, in **Sagawa -v- City of Blantyre, Civil Cause No. 147 of 1985, Mtegha, J.** awarded the plaintiff K6,000. He observed:

> "I will now turn to the question of general damages. The medical evidence reveals that the plaintiff has a permanent disability, in that one leg is short by 1cm. He may have problems in future. I would on this evidence award general damages of K6,000."

Reverting to the present case, I have already shown that that first plaintiff suffered quite severe injury. Considering the facts and drawing guidance from the cases just cited; and considering further the incidence of the devaluation of the Malawi Kwacha, I award the first plaintiff general damages for pain and suffering and loss of amenities in the sum of K9,000.

Finally, I turn to the second plaintiff. She too suffered injury, but of very slight nature compared to that sustained by the first plaintiff. She sustained bruises of the lower limbs and a partial dislocation of the coccyx, i.e. the small triangular bone of the lower tip of the spine. She was admitted in hospital only for two days. Her medical report, Exhibit P4, states that the long-term effect

of this fact is that she would suffer pain "during giving birth". The report goes on to show that another long-term effect is arthritis. It also shows that the second plaintiff did suffer pain as a result of the injuries herein. Permanent incapacity as a result of the leg injuries is assessed at 5%.

Having considered the facts fully and carefully and doing the best I can, I award the second plaintiff general damages for pain and suffering in the sum of K1,000.

To recapitulate, I have awarded the first plaintiff the sum of K1,187.92 for special damages and K9,000 for general damages, a total of K10,187.92. I accordingly enter judgment for the first plaintiff for this sum. Finally, I enter judgment for the second plaintiff in the sum of K1,000 The defendant is to pay the costs of the proceedings.

PRONOUNCED in open Court this 19th day of March 1993, at Blantyre.

L E Unyolo
JUDGE