

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1905 OF 2002

BETWEEN:

GEORGE KANKHUNI

PLAINTIFF

and

SHIRE BUS LINES LTD

DEFENDANT

CORAM: HON. JUSTICE KATSALA
Masumbu, of Counsel for the Plaintiff
Mankhambera, of Counsel for the Defendant
Jere, Recording Officer

JUDGMENT

Katsala J.

By a writ of summons dated 11th June 2002 the plaintiff claims from the defendant damages for

personal injuries sustained in a road accident on 26th April 2001 at Lunzu along the Blantyre - Zalewa Road.

The plaintiff alleges that the accident was caused by the negligence of the defendant's servant or agent one Victor Luciano Kaluma who was driving the defendant's motor vehicle registration No. BJ 5517. The particulars of the alleged negligence have been outlined in the statement of claim. By its amended defence the defendant denies liability and also denies that its aforesaid servant or agent was negligent as alleged or otherwise. Further, the defendant pleads that the accident was caused by the plaintiff's own negligence whose particulars are also given in the amended defence.

Only two witnesses testified before this court. One on each side.

In his testimony the plaintiff told the court that on 26th April 2001 at about 18 hours he was riding his bicycle along the Blantyre - Zalewa Road going to Mlambe Hospital where he was working as a security guard. After crossing Lunzu River he signaled that he was turning right into Mlambe Hospital. As he finished turning right and was facing the gate to the hospital, he was hit by the defendant's bus which was following him. He lost consciousness and regained it at Mlambe Hospital where he was admitted. He discovered that he sustained a deep cut on the forehead and some injuries to a left finger which is now stiff and still pains. His bicycle was extensively damaged. He was in hospital for 5 days.

The defendant called Victor Luciano Kalumo as its witness. His testimony was that on the material day at around 19 hours he was driving the defendant's ERF bus registration No. BJ 5517 along the Blantyre - Zalewa Road heading away from Blantyre. As he was passing the Lunzu Bridge he saw two pedal cyclists in front of him who were heading in the same direction. They were cycling on the far left edge of the road. When he approached the Mlambe Hospital road junction one cyclist suddenly cut to the right in front of the bus without signaling that he wanted to turn right. He did not cycle in the middle of the road, as one would do when turning right. The bus was about two metres behind the cyclist at this point. He braked and turned right into the Mlambe Hospital road as well to avoid running him over. The cyclist then bumped into the body

of the bus and fell into a drain and sustained cuts on the forehead. The bus hit a rocky pavement and its right windscreen was damaged among other things. The bicycle was not damaged. It was also his testimony that the cyclist was drunk and had a bottle of kachasu on the bicycle.

This is the evidence that was before the court.

The plaintiff's action is founded in negligence. In *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781, negligence was defined as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do. The question therefore is whether the plaintiff has proved on a balance of probabilities that the defendant's servant or agent was negligent.

There is no dispute that at the material time the plaintiff was cycling along the Blantyre - Zalewa Road heading towards Lilongwe. There is also no dispute that at the same time the defendant's bus registration No. BF 5517 driven by Victor Luciano Kalumo was heading in the same direction. It is agreed that soon after the Lunzu Bridge at the turn off to Mlambe Hospital, there was a collision between the two. It is also agreed that the collision occurred as the plaintiff turned right into the road to Mlambe Hospital. However, there is no agreement as to who caused the accident. The defendant says the plaintiff who was cycling on the far left edge of the road suddenly turned right attempting to turn into the road to Mlambe Hospital thereby cutting into the path of the bus. The plaintiff never gave any indication of his intention to do so, and also he did not position himself correctly on the road before attempting to make the right turn. The plaintiff on the other hand says he gave a signal that he was turning right. He turned right and was hit by the bus just as he was approaching the gate to the Hospital. The parties agree that the gate is about 30 metres off the Blantyre - Zalewa Road.

I have looked at the evidence critically and considered the submissions made by the parties. My duty in a case like this where the issue is the evidence of the plaintiff as against that of the defendant's driver, is to determine which one of the two explanations is more probable than the other. See *Kachingwe v. Mangwiro Transport Motorways Co. Ltd.* 11 MLR 362.

As already stated, I have carefully considered the evidence before this court and it appears to me that the evidence of the plaintiff on what happened is more reliable. I find no reason to believe that he turned right without giving a signal or an indication of his intention to do so. I find it very unlikely that a cyclist in front of a big motor vehicle which most probably would be going at a speed faster than his own, would turn right without giving a signal to the driver of the motor vehicle. The defendant's driver told the court that he saw the plaintiff turning at a distance of two metres. In my view, this signifies that the defendant's driver did not maintain a safe distance between himself and the cyclist in front and or that he did not keep a proper look out. In *Thompson v. Spedding*[1973] R.T.R. 312 it was held that a driver of a vehicle following another should allow a sufficient space between the vehicles in which to deal with the ordinary exigencies of traffic but if he keeps too close to the rear of the vehicle ahead and so fails to pull up in time, should that other vehicle come to a sudden halt, he may be found liable in negligence. If the defendant's driver had allowed sufficient space between the bus and the cyclist in front and had at the same time kept a proper look out, he would have seen that the plaintiff was signaling to turn right and/or would have taken appropriate steps to avoid the collision. Therefore in my judgment the defendant's driver was negligent.

Further the parties agree that the collision occurred near the gate to Mlambe Hospital which is at a distance of 30 metres off the Blantyre - Zalewa Road. The bus driver said he swerved to the right into the road to the hospital to avoid running over the plaintiff. It would appear to me that the bus was moving at a high speed or it had faulty brakes at the material time. That is why it failed to stop despite braking and only stopped when it fell into a ditch after colliding with the plaintiff. I do not think there can be better evidence of the defendant's servant's negligence than the fact that the bus followed the plaintiff off the main road for a distance of about 30 metres and there collided with him.

The defendant alleged that the plaintiff was drunk at the material time and also that he had a bottle of kachasu on his bicycle. Let me say that I did not find it necessary to consider this allegation because it is not pleaded in the amended defence. Surely, if the defendant intended to rely on the plaintiff's drunkenness as a cause of the accident, it ought to have pleaded it. Further,

even if it had been pleaded, I do not think there is any reliable evidence which suggests that the plaintiff was indeed drunk at the time of the collision. The defendant's driver said he does not know kachasu but only heard from the people that gathered on the scene of the collision that the plaintiff was drunk and had a bottle of kachasu on his bicycle.

For these reasons I am satisfied that the plaintiff has proved his case to the requisite standard and accordingly his action succeeds.

Coming to damages the evidence is that the plaintiff sustained a deep cut on the forehead and multiple bruises. He told the court that he also sustained injury to a left finger which up to now he can not use or straighten, and which still pains a lot. Unfortunately, this injury is not supported by the medical report which he tendered in court. I therefore find it difficult to accept that he indeed sustained such injury and thus totally disregard it in my consideration of quantum of damages. The plaintiff was admitted to Mlambe Hospital from 26th to 30th April 2001. It cannot be doubted that the plaintiff suffered pain as a result of the injuries he sustained. He is therefore entitled to damages for pain and suffering. The injuries as confirmed by the medical report have since healed. The medical report states that the plaintiff has not suffered any permanent incapacity, and that he is fit for manual work and will be able to perform his previous job, that is, as a guard. Taking all these factors into consideration and bearing in mind awards made by this court in similar cases cited by the parties and many others which I do not wish to mention, it is my view that the plaintiff would be adequately compensated by an award of K35, 000.00.

The plaintiff has also claimed for the value of the bicycle which was damaged in the collision. He said he bought his bicycle at a price of K3, 095.00 and that it was 2 years old at the time of the accident. He tendered in court a quotation for a new bicycle which priced it at K6, 995.00. The law demands that the plaintiff, as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitutio in intergrum*. In the instant case, the plaintiff must therefore be given the value of a 2-year-old bicycle. In this respect I would depreciate the value of a new bicycle at a rate of 20% per annum. In my workings I find that a 2-year-old bicycle would cost K4, 476.80 which I round off to K4, 500.00. I therefore award the plaintiff the sum of K4, 500.00 as value of his damaged bicycle.

In the premises I enter judgment for the plaintiff for the sum of K39, 500.00 and costs of this action.

Pronounced open court at Blantyre this 31st day of December 2004.

J. Katsala
JUDGE