

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 507 OF 2002

BETWEEN:

MR PHILLIP BANDA

PLAINTIFF

and

MR ALFRRED MHONE

DEFENDANT

CORAM: HON JUSTICE KATSALA

Mr J. M. Chirwa, of Counsel for the Plaintiff

Mr T. Nyirenda, Senior Counsel, for the Defendant

Mr C. Jere, Official Interpreter

Mrs Pindani, Court Reporter

J U D G M E N T

Katsala J

By a writ dated 12th February 2002, the plaintiff claims from the defendant damages for loss of dependency following the death of his daughter Mrs Hope Makwinja on 23rd February 2001 in a collision with the defendant's motor vehicle. The plaintiff alleges that the collision was caused by the defendant's negligence in the manner of his driving. The particulars of negligence are set out in the statement of claim. The defendant denies being negligent as alleged and or particularized and alleges that the accident was solely caused or contributed to by the deceased's negligence in that she failed to keep any or proper look out, and that she attempted to cross the road when it was not safe to do so.

The following facts are agreed between the parties. On 23rd February 2001 a collision occurred at Mbayani market in the City of Blantyre, along the Blantyre-Zalewa road, between the deceased and the defendant's motor vehicle registration number BL 8496 a Ford Laser sedan. The deceased fell on to the tarmac road following the accident. She sustained serious injuries to the head. The defendant, PW2 (the deceased's friend) and a third person whose identity is not known took the deceased to Queen Elizabeth Central Hospital. She died soon after arriving at the hospital. At the time of her death the deceased was married and had 3 children aged between 3 and 10 years. She was a businesswoman. She used to go to Tanzania, Zimbabwe and The Republic of South Africa to buy assorted items, which she sold here.

The main question to be answered is who is to blame for the accident? Is it the defendant as is alleged by the plaintiff or is it the deceased as is alleged by the defendant? Only 3 witnesses testified before the Court, the plaintiff and Mrs. Judith Banda, a friend to the deceased, in support of the plaintiff's case, and the defendant himself.

The testimony relating to how the accident occurred came from Mrs Judith Banda (PW 2) and the defendant. They did not agree on how the accident occurred. Mrs Banda told the Court that the deceased was her personal friend. On the material day 23rd February 2001 it was a market day at Mbayani. She went to sell second hand clothes. Vendors used to display their merchandise along the Blantyre-Zalewa road. It was early in the morning and the market had just started. There were a lot of people on both sides of the road. She met the deceased. They chatted for a

few minutes at her (PW 2's) stall. And then the deceased said she was going to collect her debts across the road. The deceased stood on the dirt verge of the road waiting for traffic to pass before she could cross the road. But whilst so waiting she was hit by the defendant's motor vehicle, which was coming from Blantyre, heading towards Zalewa. Pw2 said the deceased was hit on the dirt verge of the road as the defendant's motor vehicle tried to avoid colliding with a minibus which was coming from the opposite direction. The deceased was flown into the air and fell almost on the middle of the road. She sustained serious wounds in the head. The defendant's motor vehicle was moving at an excessive speed, PW2 said.

The defendant on the other hand told the court that on the material day he was driving his motor vehicle along the Blantyre-Zalewa road going to Chileka. At Mbayani market he saw scores of people on both sides of the road. Some were seated on the ground, others standing and still others were walking along the road. As he approached the market the deceased appeared from the left side of the road and stepped into the road at a distance of within five steps from his motor vehicle. He tried to brake to avoid hitting her but the distance was too short. He said he could not swerve to the right or left because doing so would have meant injuring more people. He therefore collided with the deceased. He said he was driving at a speed of about 30 Kilometers per hour. He took the deceased to the hospital in the company of her friend. He reported the matter to the police who never charged him with any offence. He also reported the accident to his insurers and also prepared a sketch showing the point of impact. This report was also tendered in evidence before this court.

This is the evidence on which the court has to determine who is to blame for the collision between the deceased and the defendant's motor vehicle.

The plaintiff's action is founded in negligence. In *Blythe 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 or indeed the defendant has proved on a balance of probabilities that the defendant or the deceased, respectively, was negligent.

I have looked at the evidence before me critically and have considered the submissions made by the parties. My duty in a case like this one where the issue is the evidence of PW 2 as against that of the defendant, 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.

It is agreed that Mrs Judith Banda (PW2) was about the scene of the accident at the time the accident occurred. The defendant told the court that this witness and another unknown young man came to the scene immediately after the deceased was knocked down and accompanied him (the defendant) to the hospital. PW 2 said the deceased was about 4 metres away from her when she was knocked down. From the evidence before me I have no doubt in my mind that PW 2 indeed witnessed the accident. She was able to describe in detail what happened on that particular day. Despite rigorous and skilful cross examination, in my view she remained consistent on the material aspects of her testimony. I am therefore in no doubt at all that she told the court the truth.

PW2 said the defendant was driving at an excessive speed at the time of the accident. The defendant said he was driving at a speed of between 30 and 40 kilometers per hour. Now if it were accepted that indeed the defendant was driving at the speed he alleges then one wonders how and why he failed to stop the motor vehicle upon seeing that the deceased was attempting to cross the road. I am saying this because a speed of between 30 and 40 Kilometers per hour is a very slow speed and if one applied emergency brakes a motor vehicle, at least of the defendant's size, would stop in no time at all if not immediately. In my judgment if the defendant had been driving at the speed he alleges, then he would have been able to stop and avoid the collision even though he noticed the deceased about 5 steps away. On the evidence before me I find that the defendant was driving at an excessive speed at the time of the collision. I am fortified in this finding by the defendant himself who in his testimony said, "since it was not possible to safelyswerve or brake to avoid hitting the deceased, she collided with the vehicle." (Emphasis supplied). It is my view that it was the excessive speed that made it unsafe to swerve or apply brakes. Further it is clear from this statement I have quoted that since the defendant did not swerve or apply the brakes, he did not make any attempt at avoiding the collision.

Both PW2 and the defendant agree that it was a market day at Mbayani on this date as a result there were a lot of people on both sides of the road. In the defendant's own words there were "scores of people" on both sides of the road. Surely, the presence of so many people created a potentially dangerous situation. In *Rep v. Sinambale*(1966 – 68) 4 ALR Mal. 191 it was held that a driver is under an obligation to approach a potential danger at a speed which will allow him to stop in time if a sudden emergency arises. And in *Mandiwa and others v. Star International Haulage Co. Ltd. and another*[1991] 14 MLR 217 it was held that drivers are not entitled to drive on the footing that other users of the road, whether drivers or pedestrians, will exercise reasonable care. The defendant said that as he approached the market he saw the possibility of people crossing the road as such he was prepared to drive slowly. However the evidence before me shows that he did not drive slowly. At any rate he did not drive at a speed which would have allowed him to stop in time when, as he alleges, the deceased suddenly stepped into the road.

In *Burgess v. Osman*(1964 – 66) 3 ALR Mal. 475 it was held that although a driver is not bound to foresee every extremity of folly which occurs on the road, he is bound, nevertheless, to anticipate any act on the part of any road user which is reasonable, whether negligent or not. In my view the defendant, having foreseen that some people may attempt to cross the road, should have proceeded with extra care. As I have already said, he should have driven at a speed which would have allowed him to stop in time.

Let me add that in my view the extent of the injury sustained by the deceased and her death within an hour or two since the accident, though in itself is not conclusive, suggests that the collision between the deceased and the defendant's motor vehicle must have been violent. And according to the circumstances of this case the collision could only have been violent due to the high speed at which the defendant's motor vehicle was moving.

Let me also briefly comment on the accident report form, which the defendant says he submitted to his insurers. I note that this report was made on 21st March 2002, more than a year after the accident. The court record shows that this was after the writ of summons herein had already been issued and served on him. What he said in this report is almost the same as what he told this

court. It appears to me that being aware that an action had been commenced against him the defendant was most likely inclined to blame the accident on the deceased. In other words, the report would have carried more weight if it had been made soon after the accident.

It was said in evidence that the police have not brought any charges against the defendant in respect of the accident implying that the police must have found the defendant faultless. Well, it may be so or it may not. We do not have full facts on this point. But all I can say is that it is settled that civil liability can be established in a road traffic case by a lesser degree of negligence than would be required to prove a punishable offence under the Road Traffic laws. See *Osman's case supra*. So even if I were to accept that piece of evidence I would still find, as I now do, that the defendant was negligent in his driving at the material time.

I now turn to the question whether the deceased is guilty of contributory negligence. It has been alleged that the deceased was negligent at the material time because she stepped into the road when it was not safe to do so. The evidence before the court on this point is conflicting. As already stated earlier in this judgment PW 2 said the deceased stood on the dirt verge waiting for traffic to pass before she could cross the road. On the other hand the defendant said the deceased just stepped into the road without checking if it was clear of traffic. I have considered this issue critically and given it a lot of thought. The defendant told the court that he hit the deceased with the left front part of his motor vehicle. The front left hand headlamp and indicator lens were damaged in the process. In my considered view, this piece of evidence from the defendant supports PW2's allegation that the defendant's motor vehicle swerved to its left side in a bid to avoid colliding with a minibus and in the process hit the deceased who was standing on the dirt verge of the road. In my considered view PW 2's explanation sounds more probable than the defendant's. It also explains why the defendant did not swerve to his right to avoid hitting the deceased, if it were accepted that the deceased suddenly stepped into the road. Further, the defendant told the court that swerving either side would have meant colliding with other people. On the evidence before me I am satisfied that the deceased was hit whilst on the dirt verge. I do not believe that she had stepped into the road as alleged by the defendant. I therefore find that the deceased is not guilty of contributory negligence, and the plaintiff's case succeeds.

I now turn to the issue of damages.

The plaintiff told the court that the deceased was making a profit of between K50, 000.00 and K60, 000.00 a month in her business. He did not produce any evidence to support him on this. And in a contradictory stand, the plaintiff said at no time did the deceased inform him of the money she was making. He was emphatic that she never mentioned any figures to him. This clearly shows that the figures of K50, 000.00 and K60, 000.00 per month mentioned by the plaintiff as the profit were mere guess work. This court cannot use them in computing loss of dependency. In *Bonham-Carter v. Hyde Park Hotel*(1948) 64 T.L.R. 178 at 179 Lord Goddard C.J. said:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, through them at the head of the Court ...They have to prove it”.

It was therefore incumbent upon the plaintiff to prove the extent of loss of dependency by presenting credible evidence in support of his claim. It was not sufficient for the plaintiff to simply guess figures.

However, it cannot be denied that there is some loss of dependency. The court must therefore find some way of compensating the dependants. In this respect I wish to adopt the approach taken by the Registrar in *Vincent Mwakamo v. Flexer Ngomacivil* cause number 1519 of 1997 (unreported). He used half the annual industrial wage as the multiplicand. The industrial wage at the material time was K1, 500.00 per month so that half of the annual industrial wage is K9, 000.00. The deceased's was 26 years old at the time of her death. Life expectancy in Malawi is currently at 38 years. Therefore 12 years would be the multiplier. But I reduce it to 11 years taking into account contingencies of life and that money will be paid up front.

In the result I enter judgment for the plaintiff and award the sum of K99, 000.00 as damages for loss of dependency. The defendant is condemned in costs.

Pronounced open court this 16th day of March 2005 at Blantyre.

J. Katsala

JUDGE