JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 2707 OF 2004

BETWEEN:

CHRISSIE HAJI ……PLAINTIFF

- AND -

NEW BUILDING SOCIETY BANK …….DEFENDANT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Absent, of the Counsel for the plaintiff
Absent, of the Counsel for the defendant

J U D G M E N T

Twea, J

The plaintiff brought this action claiming damages for loss of expectations of life and dependency for herself and on behalf of the estate of Late Timothy Haji. The defendant is a Commercial Bank.

It was claimed by the plaintiff that her late husband, Timothy Haji, died after he was hit by a motor vehicle Registration number BM 5265, belonging to the defendant, which was being driven by a servant of the defendants. She alleged that the said servant negligently managed the vehicle and, as result, hit the deceased. The defendant in its defence denied that the car was being

driven by their servant in the course of his employment and further or in the alternative alleged that the accident was caused or contributed to by the deceased.

When the case was called the plaintiff gave her evidence and did not call any other witness. I must mention at the outset that in cross – examination, the plaintiff told this court that she did not witness the accident and that everything that she told the court on the accident was relayed to her by third parties.

The defendant on the other hand called two witnesses: their employee, who was driving the motor vehicle and his brother who was a passenger therein. Suffice it to say that this is the only evidence on what happened on that day.

I have examined the evidence and I find that the only thing that is not disputed is that following the accident, the deceased was taken to the Queen Elizabeth Central Hospital in Blantyre where he died after a few days. What caused his death was not called in issue. In the circumstances, I therefore hold that the deceased died following the road accident.

The issues that need to be established are whether the defendant's employee was negligent in the management of the motor vehicle and whether the defendant is vicariously liable for such negligence.

This is a civil case. The standard of prove is on a balance of probabilities. Be this as it may the burden of proof still lies on the one who alleges, in this case the plaintiff. This principle comes out clearly in the cases of

Chimanda Vs Maldeco Fisheries Ltd, 12 MLR, 51; Banda and Others Vs ADMARC and Another (1990) 13 MLR 59. I need not emphasise this any more. This principle is settled.

I have perused the submission by both parties. It comes out clearly, that the plaintiff Counsel was aware that the plaintiffs evidence is all hearsay and would not have been admissible had it not been for the adoption of the statement by the plaintiff in the plaintiff's court bundles. He was also aware that although the hearsay evidence was admitted, it is of no value to the plaintiff's case. I wish to reproduce the submission by the plaintiff on this issue. It was submitted as follows:

> "6.0 Arguments
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> 6.1. It is important to remember that in this case there was no direct witness for the plaintiff to give evidence on how the accident happened. It is important for the court to consider the evidence of the defendant with careful scrutiny to ensure that no advantage is being taken from the absence of any witness on the plaintiff side. The court should constantly bear in mind the possibility of the defence witnesses exaggerating their evidence in order to reinforce the defence case."

Clearly this argument is based on the wrong premises. The duty to prove the case lies on the plaintiff. It is never the duty of the court to create a case for the plaintiff by contradicting the defendant's case. Where the plaintiff has

no evidence on the matter in issue the court has to analyse the evidence of the defendant and make a finding one way or the other, and then decide the case on the merit of the evidence available.

The evidence of the defendant was that DW1 had been working on the material morning. Later be went to his home intending to return to the office to finalise the work with his colleagues that he left behind. He failed to return to the office however, because he received some visitors.

At about 6:00 p.m. He decided to leave for his office. He had with him his brother, DW2 whom he was giving a lift to Blantyre City Centre. It was in the evidence that as DW1 drove along the main road then was a group of people walking on the nearside. When he was about 5 meters away, one man, now the deceased, broke from the group to cross the road. DW1, hooted and swerved to the offside to avoid colliding into the group. Unfortunately, the deceased decided to run to the offside to avoid the vehicle and he was hit. The impact lifted him and he hit the windscreen. DW1 and DW2 with two other eye witnesses picked the deceased to the hospital. The deceased died a few days later.

This evidence is not controverted. What the plaintiff attempted to do in cross – examination and submissions was to build opinions and hypothesis to back the case for the plaintiff for negligence and over speeding. Unfortunately, the plaintiffs case cannot be built on opinions and hypotheses. In the absence of evidence, the plaintiffs case is not tenable. Following the findings of ***Banda and Others Vs ADMArc and Another***

(supra), I find that the evidence of the defendant is credible and has not been contradicted in any material particular. I dismiss the plaintiff's case.

Be this as it may, I wish to make observations on two issues.

Firstly, I noted that in submissions the plaintiff referred to the evidence of a Police Report. There was in fact no Police Report. What was shown in court was a Police Report abstract. Be this as it may, this was only produced during the defence case and identified by DW1. It was never tendered in evidence by the plaintiff. The document therefore was not part of the plaintiff's case. It does not matter that it may have been part of documents disclosed during discovery and inspection. As long as it is not tendered it is not part of the evidence. It was therefore irregular for the plaintiff to attempt to build a case in submission based on a document that did not form part of plaintiff's evidence.

Secondly, I noted that the defendant, in attempt to disown vicarious liability, edited the evidence of their witness to exclude the part where the witness said DW1 was going back to his work place at the time the accident occurred. It was quiet clear from the witnesses' evidence that DW1 gave a lift to DW2 to Blantyre City Centre since this was along the way to his work place. Through out the submission, the defendant avoids this evidence in order to disown vicarious liability. This is irregular. A party should not exclude or misrepresent its own evidence where it does not support the legal point in issue. The proper thing to do is to distinguish the legal point from the evidential point of view, and not to suppress the evidence. Had I found the case for the plaintiff. I would have found that DW1 was going to his

work place to work and the mere fact that he gave a lift to his brother in the office vehicle would not have defeated the authorised use of the vehicle by defendant. This is clear from the case cited by the defendant: ***Nakanga Vs Automative Products Lts 11 MLR 79 at page 82 and Masika Vs ADMARC 10 MLR 244 at***. The defendant would have been vicariously liable for the negligence of DW1.

It is my finding therefore that the plaintiff has not established the case against the defendant and I dismiss the case with costs.

Pronounced in Open Court this 25th day of January 2008 at Blantyre.

E. B. Twea
JUDGE