



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 3178 OF 1998**

BETWEEN:

**BENJAMIN KAPINGA, ANGELLA KAPINGA
AND FATS SELEMANI.....PLAINTIFF**

- AND -

MOSES KAIMFA.....DEFENDANT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA

Absent, of the Counsel for the plaintiff

Absent, of the Counsel for the defendant

Mrs V Nkhoma – Official Interpreter

J U D G M E N T

Twea, J

By writ of summons the plaintiffs brought this action for damages for personal injury and costs against the defendants.

The plaintiffs, who were a father and his minor daughter and a third party were passengers in a mini bus driven by a servant of the first defendant. The second defendant was the insurer of the first defendants mini bus.

In the course of the pleadings, the second defendant was struck off. It was determined that the first defendants servant did not have a valid or any driving licence at all and that the suit was brought after the expiration of two

years and was therefore statute barred as against the second defendant. The suit proceeded against the first defendant only.

On the day appointed for hearing the defendant did not appear. The plaintiffs were allowed to proceed with their case.

It was the evidence of the first plaintiff that on 6th August 1996 he and his daughter the second plaintiff, then aged four years, boarded the defendants Ndirande bound mini bus at ESCOM bus stop down town Blantyre. He told this court that the mini bus made two stops to allow passengers to embark and disembark. It was his evidence that from the last stop the next stop was at Ndirande market. As they were travelling towards the next stop, Ndirande Market, the mini bus engine ceased and it stopped at a place called Somanje. The passengers requested to disembark but the conductor refused. The conductor then disembarked he went in front of the bus to push start it down hill. The mini bus failed to push start and started rolling down hill. The mini bus rolled down hill backwards for a distance until it fell into a ditch, and stopped. The first plaintiff told this court that he and his daughter, the second plaintiff, were both injured. He tendered the medical reports in respect of the injuries sustained by him and the second plaintiff. These were PEX 1 and PEX 2 respectively. He also tendered the police report as PEX 3.

After the first plaintiffs evidence the case was adjourned for the evidence of the third plaintiff and the defence. The parties never caused an appearance despite several other adjournments. The first and second plaintiff then closed their case. The matter was reserved for judgment.

The plaintiffs case was not controverted and I accept this evidence.

This notwithstanding, it is the duty of this court to determine whether a case of negligence has been made out against the defendant. The cause of the accident was not disclosed in the evidence “viva voce”. The cause can only be discovered from the police report PEX 3. According to PEX3, the police conducted that:

“enquiries revealed that the accident was influenced by mechanical fault of the vehicle as the brake pipe got burst. Therefore there was no offence disclosed to prosecute the driver.”

Would the fact that the police enquiries reveal a mechanical fault absolve the defendant? To begin with the defendant was carrier for hire. It was submitted, and it is trite law the owners of buses owe a duty to take reasonable care towards their passengers: *Barkway Vs South Wales Transport (1950) A. S. 185, Mitchel Vs Mason [1966] 1 WLR 26.* The duty is to take reasonable care not to cause injury to passengers or their property. It is the duty of minibus owners to ensure that the vehicle is in a fit and proper condition for the carriage of passengers and their goods (property) and that it is driven by fit and properly trained persons. These being the contents of the duty, the owner can only be exonerated if he can show that he did all that was necessary to fulfil the duty. For a vehicle to be in a fit proper condition, it must be serviced regularly by skilled persons and tested for use on the road, that is that it is roadworthy: *Riverstone Meat Co. Pty. Ltd Vs. Lancashire Shipping Co. Ltd (I.H.L.) 1 961 A.C. 807 1All E. R. 495.*

In the case of *Barkway Vs. South Wales Transport* (supra) a bus ran off the road due to a burst tyre which, it was determined, was due to a pre – existing impact fracture. Lord Porter said:

“Omnibuses, it is said, which are properly serviced do not burst tyres without cause, nor do they leave the road along which they are driven.”

Along this reasoning, one can say that mini buses that are properly serviced and maintained do not have their engines cease, or do they have their brake pipes bursting without a cause. The plaintiffs have testified as to what happened for the accident to happen and the apparent cause of the same. The minibus driver and conductor incompetently thought they could push start it down hill. They refused passengers to disembark. Lastly the driver had no driving licence. The defendant made a general denial in his defence and elected not to cause any appearance at all, during the trial.

I therefore find that that the defendants minibus was not properly maintained so as to be fit and proper for service on the road. I find that the defendant was in breach of his duty to take reasonable care of the passengers and their property. The plaintiff, therefore, have proved the negligence of the defendant. I therefore enter judgment for the plaintiffs with costs.

I remit the case to the Registrar for the assessment of damages.

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

E. B. Twea
JUDGE