



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 467 OF 2016**

BETWEEN:

**ELIZA FELIX (a minor suing Through her mother and
Next friend ETHEL FELIX)..... PLAINTIFF**

-And-

SAM CHIRWA1ST DEFENDANT

**GENERAL ALLIANCE INSURANCE COMPANY
LIMITED.....2ND DEFENDANT**

**CORAM: THE HONOURABLE MR JUSTICE CHIRWA
Mr. Mwaungulu of Counsel, for the Plaintiff
Counsel for the Defendants and the Defendants not
present
Mr M. Manda, Official Court Interpreter**

JUDGEMENT

By a Writ of Summons, Specially Endorsed, issued on the 22nd day of June 2016, the Plaintiff commenced this action against the Defendants claiming (a) damages for pain and suffering and loss of amenities of life, (b) special damages in the sums of K3,000.00 and K10, 346.00, being the costs of obtaining the Police Report and the Medical Report, respectively, and (c) costs of this action.



It is the Plaintiff's case that on or about the 20th of April, 2016, the 1st Defendant was driving motor vehicle, Toyota Hilux Pick up, registration number KK3 1 90 from the direction of Milepa Trading Centre heading towards Limbe on the Phalombe – Chiradzulu Road when at or near Chiradzulu Boma he so negligently drove the said motor vehicle that he caused or permitted the same to hit her when she was crossing the road from the left to the right. The particulars of negligence have been provided as follows:-

- (a) Driving too fast under the circumstances;
- (b) Driving without due care and attention to other road users;
- (c) Failing to keep any or any look out or to have any sufficient regard for pedestrians in the said road;
- (d) Colliding with the Plaintiff;
- (e) Failing to see the Plaintiff in sufficient time;
- (f) Veering off the road and hitting the Plaintiff;
- (g) Failing to stop or in any other way so to manage or control the said motor vehicle or to avoid the collision.

It is the Plaintiff's case further that by reason of the accident, she sustained injuries and has suffered loss and damage. The particulars of the alleged injuries and damage have been provided as follows:

Particulars of Injuries:

- (a) fracture of the tibia and fibula;
- (b) painful lower limbs.

Particulars of Special damage:

- (a) Mk 3,000.00, cost of police report;
- (b) Mk 10,346.00, cost of medical report.

By their joint Defence dated the 30th day of June, 2016, the Defendants, while admitting that the 1st and the 2nd Defendants were at all material times the driver and the insurer of the said motor vehicle, deny the assertion that the 1st Defendant was negligent and that the accident happened in the manner alleged by the Plaintiff. It is the case of the Defendant that the Plaintiff wholly caused or contributed to the said accident. The particulars of the Plaintiff's alleged negligence have been provided as follows:

Particulars:

- (a) Failing to keep or any proper look out;
- (b) Abruptly entering the road without checking if there were any approaching motor vehicles;
- (c) Playing on a busy road; and
- (d) Generally failing to observe traffic rules and regulations.

The Defendants have otherwise joined issue with the Plaintiff on the injuries, loss and damage, allegedly, suffered by the Plaintiff.

The 2nd Defendant on its part contends that its liability, if any, is limited to indemnity of the owner of the motor vehicle herein to the extent of the maximum liability limit contained in the contract to insurance between itself and the owner of the said motor vehicle.

The Defendants have otherwise closed their defence with the general traverse in the following words:

"9. Save as herein specifically admitted, if at all, the Defendants den[y] each and every allegation of fact contained in the Statement of Claim as if the same were herein set forth and traversed seriatim,"

And prayed that this action be dismissed in its entirety with costs.

When this action was called for trial on the 9th day of March, 2017 only the Plaintiff and his Counsel were present. The Defendants and their Counsel did not appear nor did they proffer any excuse for their absence to this Court. This Court being satisfied that the Notice of Hearing had been duly served on the Defendants' Legal Practitioners proceeded to hear the Plaintiff's case in terms of Order 35 Rule 1 (2) of the Rules of the Supreme Court.

The Burden and Standard of proof:

This Court is mindful that the burden of proof in a civil action like the present action rests on the party who asserts the affirmative hence the latin maxim: *ei qui affirmat non ei qui negat incumbit probatio*. This Court is also mindful that the standard of proof in civil cases is merely on a balance of probabilities. And the Plaintiff having alleged that the accident was caused by the 1st Defendant's negligent driving of the said motor vehicle, as particularised, thus shoulders the primary burden of proving the alleged negligence. The Defendants, on the other hand, having also alleged that the accident was wholly caused by or contributed to by the negligence of the Plaintiff also bear the burden of proving the alleged negligence or contributory negligence on the part of the Plaintiff.

Issues for Determination:

- (1) Was the accident caused by the negligent driving of the 1st Defendant, as alleged?
- (2) Did the Plaintiff suffer any injuries, loss or damage, as alleged, as a result of the said negligence?

Evidence:

To prove her case the Plaintiff called two witnesses, namely, Ethel Felix (PW1) and Lydia Banda (PW2). PW1 adopted her written statement and went on to produce exhibit P1, the Malawi Police Abstract Report dated the 5th of May, 2016, and exhibit P2, the Medical Report dated the 11th of June, 2016, as her evidence in chief. She was not cross examined. PW2 also adopted her written statement as her evidence in chief in this action. She was also not cross examined. As earlier in this judgment stated, the Defendants did not appear at the trial of this action and thus did not adduce any evidence to prove their case.

This Court will refer to the evidence of the Plaintiff's two witnesses in the determination of the issues in this action.

The Law:

The definition of "negligence" by **Anderson B.** in **Blyth v Birmingham Waterworks Co.** (1856) 11Ex. 781 at p 784, in the following words, is generally regarded as classic:-

"Negligence is 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 and reasonable man would not do".

And this being an action founded in negligence, for both the Plaintiff and the Defendants to succeed in their respective allegations, they must prove the following:

- (a) That there was a duty of care owed by the one party to the other party,
- (b) That there was a breach of that duty by the other party; and
- (c) That damage resulted from that breach of duty, - See **Donoghue v Stevenson** [1932] A.C. 562 quoted with approval in the case of **Kadawire v Ziligone and Another** [1997] 2 M.L.R. 139 p 144.

The authorities abound that "a driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicle and property of anyone on or adjoining the road". See: **Banda & Others v ADMARC & Another** [1990] 13 M.L.R. 59 at 63 and **Kachingwe & Kachingwe & Company v Mangwi Transport Motor ways Company Limited** 11 M.L.R. 362 at 367.

On the duty of care which a driver of a motor vehicle owes to other road users **Mtegha J** (as he then was) in the case of **Kachingwe & Kachingwe & Company v Mngwi Transport Motor -Ways Company Limited** (*supra*) quoting with approval the following words of **Lord Mac Millan in Hay or Bourhill v Young** [1943] A.C. 92 at 104:

““What duty then was incumbent on him?..... [T]he duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on

There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree,'"

then, went on to say as follows:-

"It is the duty of a person who drives a motor vehicle on a highway to use reasonable care to avoid causing damage to persons and other vehicles on or adjoining the road. It has been further stated that reasonable care means care which an ordinary skilful driver would have exercised under all the circumstances"

Determination:

Was the accident caused by the negligent driving of the 1st Defendant?

The evidence of PW2, the person who witnessed the happening of the accident before this Court, which remained uncontroverted, is that she recalls that it was on or about the 20th of April, 2016 whilst she was carrying out her business of selling fried ground nuts at or near Chiradzulu Boma Trading Centre when she saw school children, after knocking off from their classes, attempting to cross the Phalombe - Chiradzulu road from the left hand side to the right hand side of the road at or near the zebra crossing. As they started crossing the road, suddenly a motor vehicle moving at a high speed, coming from the direction of Milepa Trading Centre heading towards Limbe on the same road, hit one of the school children when they were about to finish crossing. She rushed to see the victim and found that she was

unconscious. They took her to Chiradzulu District Hospital from where she was referred to Queen Elizabeth Central Hospital. She later learned that the victim's name was Eliza Felix.

This evidence remained uncontroverted. After analysing the foregoing evidence and the demeanour of PW2, this Court finds the evidence credible and probable. It is inclined to believe the same.

From the authorities cited above, this Court would, in the premises, have no problems in finding that the 1st Defendant as a driver of the said motor vehicle at the material time owed a duty of care to the Plaintiff as another road user.

In the absence of any evidence on the part of the Defendants before this Court to contradict the evidence of PW2 on the manner of the 1st Defendant's driving at the material time, this Court would be inclined to find that the 1st Defendant had indeed breached his duty of care by driving at an excessive speed. Given that the 1st Defendant was approaching a zebra crossing and the fact that there were some school children crossing thereat, the 1st Defendant should thus not have driven at a speed which was excessive. Any reasonable driver would, in the circumstances, have driven at such a speed as would have allowed him to stop in good time or to swerve to the other side of the road so as to avoid hitting the Plaintiff. In other words, the 1st Defendant drove without due care and attention to other road users like the Plaintiff in this action.

In the circumstances, this Court is inclined to find that the Plaintiff has proved, on the balance of probabilities, that the 1st Defendant was negligent in manner of his driving of the said motor vehicle at the material time.

Did the Plaintiff suffer any damage as a result of the said negligence?

The evidence of PW1, which is partly corroborated by the evidence of PW2, is that as a result of the said accident her daughter sustained fracture of the tibia and fibula and painful lower limbs. She was taken to Chiradzulu District Hospital whilst unconscious from where she was referred to Queen Elizabeth Central Hospital where she was treated. She was admitted for almost one month, during which period the wound on the Plaintiff's leg was being dressed. Thereafter, the Plaintiff's leg was cast in plaster of paris for another month.

Again, the foregoing evidence remained uncontroverted. This Court has no reason to disbelieve PW1's evidence herein. Further, it cannot be disputed that as a result of the said fractures she suffered pain. In the premises, it is the finding of this Court that the Plaintiff has proved that she suffered damage as a result of the said accident.

The Plaintiff having thus satisfied this Court on the balance of probabilities that the accident was caused by the negligence of the 1st Defendant and that as a result of the said accident she suffered damage, this Court would thus proceed to find the 1st Defendant guilty of negligence. In the premises, this Court proceeds to enter a judgment for the Plaintiff against the 1st Defendant.

And since the Defendants have admitted in their defence that the 2nd Defendant was at the material time the insurer of the said motor vehicle, this Court would, in the premises, further proceed to enter a judgment against the 2nd Defendant also. The judgment against the 2nd Defendant shall, however, be limited as provided for in Section 148 of the Road Traffic Act.

The judgment entered herein is for damages for pain and suffering and loss of amenities of life only. The Registrar of this Court is directed to assess these damages in the event that the parties herein shall fail to reach an amicable settlement on the same.

As regards the claim for special damages in the sums of K3,000.00 and K10,346.00 alleged to be the costs for obtaining the Police Report (Exhibit "P1") and the Medical Report (Exhibit "P2"), respectively, the same being claims for special damages ought to have been proved strictly - see: The Registered Trustees of African International Church v The Registered Trustees of African Church [1994] MLR 271 at p280. The Plaintiff has failed to produce before this Court evidence for the alleged payments. The same cannot therefore, be sustained. They are dismissed.

Costs:

The costs of an action are in the discretion of the Court (See Section 30 of the Courts Act) and normally follow the event (See Order 62 of the Rules of the Supreme Court and also the case of **Matanda v Sales Services Limited** [1990] 13 M.L.R 216 at 218. The Plaintiff has succeeded in her action against both the Defendants and since this Court has found no basis for depriving her of the costs of this action, this Court thus proceeds to exercise its discretion on costs by awarding the same to the Plaintiff. It is so ordered.

Dated this 30th day of May, 2017.


Chirwa J
JUDGE