



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO.659 OF 2013

BETWEEN

GRACE CHIBWANA (Suing on her own behalf
and on behalf of the beneficiaries of the Estate of
SHERIFA TAINGA, Deceased).....PLAINTIFF

AND

S.B. PHIRI.....DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Khan, of Counsel, for the Plaintiff Mr. Manda, of Counsel, for
the Defendant
Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

In the present action, the Plaintiff seeks damages for loss of dependency, damages for expectation of life, special damages and costs of this action. The Defendant denies liability.

The Statement of Claim is brief and it provides as follows:

- “1. *The Plaintiff is the mother of Sherifa Tainga, deceased and brings this action on her own behalf and on behalf of the beneficiaries of the estate of the said Sharifa Tainga, deceased.*
2. *The Defendant was at all material times owner of motor vehicle registration number MZ9078 Toyota Hiace Minibus and is being sued in such capacity.*

3. *On or about 15th August 2011 at around 15:30 hours the said Sherifa Tainga deceased was a lawful pedestrian along Zomba road when upon arrival at or near Njuli Quarry she was hit by the said motor vehicle registration number MZ 9078 Toyota Hiace which was being driven by Mr Gibson Kaloloksha from the direction of Zomba heading towards Limbe.*
4. *The said accident was solely caused by the negligence of the driver of the said motor vehicle registration number MZ 9078 Toyota Hiace Minibus.*

Particulars of Negligence

- a. *Driving at an excessive speed in the circumstances*
 - b. *Driving without due care and attention*
 - c. *Failing to take any or any proper look out*
 - d. *Failing to have any or any sufficient regard of other road users particularly the deceased*
 - e. *Failing to accord precedence to the deceased who was crossing the road.*
 - f. *Failing to stop or slow down or manoeuvre and/or control the said motor vehicle so as to avoid the accident herein*
 - g. *Generally, failing to observe road traffic rules and regulations*
5. *As a result of the said accident they said Sherifa Tainga died on the spot age 5 years consequent to which her estate and beneficiaries suffered loss and damage.*

Particulars of loss

- a. *Loss of expectation of life*
- b. *Loss of dependency*

Particulars of Special Damages

- a. *The sum of MK6, 000.00 for procuring police reports and death report*
6. *The deceased left the following dependents;*
 - a. *Grace Chibwana, mother*
 - b. *Mphatso Kachere sister*
 - c. *Suzan Kachere, sister*

7. *And now the Plaintiff claims:*
 - a. *Damages for loss of dependency*
 - b. *Damages for loss of expectation of life*
 - c. *The sum of K6,000.00 for procuring a police report and death certificates.*
 - d. *Costs of the action. ”*

The Statement of Defence is also brief and it reads as follows:

- “1. *Paragraph 1 of the Statement of Claim is not admitted.*
2. *The defendant admits paragraph 2 of the Statement of Claim.*
3. *The Defendant refers to paragraph 2 of the Statement of Claim and denies having used the plaintiffs house in any advertising billboards or any advertising material at all.*
4. *The defendant refers to paragraph 3 of the Statement of Claim and states that if the deceased was hit by the motor vehicle particularized therein, the accident was wholly caused by the negligence on the part of the deceased.*

Particulars of Negligence

- (i) *Failing to pay due care and attention to traffic on a busy road*
 - (ii) *Failing to keep any or any proper look out*
 - (iii) *Crossing or attempting to cross the road without first ascertaining if it was safe to do so*
 - (iv) *Crossing or attempting to cross the road when it was clearly unsafe to do so*
5. *The negligence alleged and particularised in paragraph 4 of the Statement of Claim is denied and the plaintiff is put to strict proof*
6. *Paragraphs 5, 6 and 7 of the Statement of Claim including the loss and damage alleged therein are denied and the defendant puts the plaintiff to the strictest proof.*
7. *Save as herein specifically admitted, every allegation of fact contained in the statement of claim is denied as if the same were herein set out and traversed seriatim. ”*

It is trite that the burden of proof lies upon the party who substantially asserts the affirmative of the issue. The rule means that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on the party: see Phipson on Evidence (T6th Edition), 127, *Commercial Bank of Malawi v. Mhango* [2002-2003] MLR 43 (SCA) and *Milner v. Minister of Pensions* [1974] 2 All E.R. 372.

It is also well settled that the standard of proof in civil cases is on balance of probabilities. In *Msachi v. Attorney General* [1991] 14 MLR 287, at 290, Tambala J (Rtd) put the point thus:

“This is a civil action and the duty of the plaintiff in a civil case, is to prove his case on a balance of probabilities. ’ - See also Phipson, infra, 154. A balance of probabilities simply means that a Court is entitled to say that, based on the evidence led before it, it is of the view that ‘it is more probable than not ’ that the fact asserted is made out”

It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities that the Deceased died as a result of the accident which was caused by negligence of the Defendant's agent or servant: see *B. Sacranie v. ESCOM*, HC/PR Civil Cause No. 717 of 1991(unreported) wherein Villiera, J. had this to say:

‘7/ is important to observe that the burden of proof never shifts from the Plaintiff to the Defendant except perhaps where the Defendant has pleaded contributory negligence. It is, therefore, not sufficient for the Plaintiff merely to prove that the Defendant was negligent. He must prove further that it was that negligence which caused the harm or loss suffered’.

The Plaintiff paraded two witnesses in support of his claim, namely, Stafford Scattar (PW1)and the Plaintiff herself (PW2).PW 1 adopted his witness statement dated 7th April 2017 and this formed his evidence in chief. The material part of the witness statement is reproduced below:

“7. I am aged 24 years

2. I hail from Njuli in Zomba District

3. I do business of selling sugarcane at Mziwika bus stage at Njuli, in Zomba District

4. On or about 15th August 2011 at around 15:30 hours whilst I was at my place of business I saw, at a far distance, motor vehicle registration number MZ 9078

Toyota Hiace coming from the direction of Zomba heading towards Limbe. The said motor vehicle was driving at a very high speed.

5. *There was also a child, Sharifa Tainga, Deceased, who was crossing the road from the right-hand side to the left hand side.*
6. *By the time the Deceased begun to cross the road the said motor vehicle was at a far distance. However, due to the fact that the motor vehicle herein was speeding it hit the Deceased in the middle of the road.*
7. *Consequently, the Deceased fell down and sustained severe head injuries due to the impact. The Deceased died on the spot.*
8. *Subsequently, the driver of the said motor vehicle took the Deceased to Queen Elizabeth Central Hospital.*
9. *I verily believe that the accident herein was caused by the negligence of the driver of the said motor vehicle in that he was driving the said motor vehicle at an excessive speed. Further, the said driver did not take a proper look out otherwise he could have seen the Deceased crossing the road and stop the said motor vehicle or swerve to the other side so as to avoid hitting the Deceased.*
10. *Had it been that the driver was driving the said motor vehicle at a reasonable speed he could have avoided the accident herein.*
11. *Besides, the said driver was found guilty of the offence of causing death by Reckless/Negligent driving by the Limbe Magistrate Court under case number 924 of 2011. He paid a fine of the sum of MK 25, 000.00 under General Receipt Number 346830. ”*

During cross-examination, PW1 stated that on the material day, he was selling sugarcane by the road side. He was on the left-hand side of the road from the direction of Zomba to Limbe and it is from this place that he witnessed the accident.

Counsel Manda asked PW1 to explain in clear terms his account of how the accident happened and the following Q and A ensued:

Q: You saw the minibus pass?

A: Yes

Q: That was its registration number

A: MZ 9078

Q: You say it was speeding?

A: Yes

Q: What was the speed?

A: About 120 KPH

Q: Do you drive?

A: I do not know how to drive a motor vehicle but I have been travelling in minibuses and I know how drivers drive and I could tell the speed at which the said motor vehicle was moving based on this experience.

Q: How far were you from the impact spot?

A: The distance from where I was to the point of impact was about 7 metres.

Q: You saw the Deceased crossing the road with no adult companion.

A: Yes

Q: You say you were very close to the Deceased, why did you not try to help her?

A: I could not help her cross the road because I was busy with my customers

Q: Did you see the Deceased?

A: Yes I saw her but I did not take steps to help her

Q: You saw the car from far

A: Yes, the car was far when she started crossing the road

Q: At what point of the road did the car hit the Deceased?

A: Near the middle of the road

Q: So the car moved from the left to the middle of the road?

A: Yes

Finally, PW1 conceded that he does not know if at all there is a speed limit prescribed for that part of the road. He also admitted that he was not at the hearing of the criminal case at which the driver was tried for a traffic offence and ordered to pay a fine.

Counsel Khan opted not to re-examine PW1

PW2 adopted her witness statement as his evidence in chief which is in the following terms:

- “2. I am also an administrator with limited grant of the Estate of Sharifa Tainga, Deceased.*
- 3. I work at Sable Farm as a casual laborer.*
- 4. On or about 15th August 2011 at around 15:30hours the Deceased was hit to death at or near Njuli Quarry by motor vehicle registration number MZ 9078 Toyota Hiace which was being driven by Mr Gibson Kalolokesha from the direction of Zomba heading towards Limbe. I exhibit hereto a copy of the Police Report marked GC1.*
- 5. I did not witness the said accident since I was at work at this particular time. I only received a message that the Deceased was involved in an accident and that she was taken to Queen Elizabeth Central Hospital.*
- 6. Consequently, I travelled to Blantyre and when I reached at Queen Elizabeth Central Hospital I was told that the Deceased was brought to the hospital whilst already dead and that the body of the Deceased was in the mortuary.*
- 7. The Deceased died due to severe head injury. I exhibit hereto a copy of the Death Certificate marked as GC 2.*
- 8. The Deceased died aged 5 and was enjoying a vibrant healthy life but for the wrongful death herein.*
- 9. I miss my child so much and it pains me a lot when I think of her. She used to help me do some of the household chores. She was also very bright at school.*
- 10. If it was not for the wrongful death herein my child would have still been alive today.*
- 11. I therefore humbly pray that this Honorable Court finds in my favour and enter judgment for;*

1. Damages for;
 - i) Loss of dependency
 - ii) Loss of expectation of life
2. The sum of **MK 6, 000.00** for procuring Police and Medical Reports.
3. Costs of the action. ”

PW2 tendered the Limited Letters of Administration, Police Report and the Death Report and the same were marked as Exhibits PI, P2 and P3 respectively.

During cross-examination, the PW2 stated that he was not present when the accident occurred. She further stated that she inquired of what happened and she was told that the Deceased was with her friends of similar ages. It was also her testimony that her house is close to the main road, about 200 meters there from. She concluded by saying that there are other houses on the other side of the road and the Deceased went there to chat with her friends.

There was no re-examination of PW2 by Counsel Khan...

The Defendant paraded one witness, Gibson Kalolokesya, the defendant's driver (DW). DW adopted his witness statement as his evidence in chief. In his witness statement, DW states as follows:

- “5. I am the above named Gibson Kalolokesya. I was the driver of the motor vehicle which was involved in the accident leading to these proceedings.
6. I was at all material times employed by the defendant as a minibus driver. I started driving minibuses in or around 1998 and I have been on the Limbe-Zomba route for a good number of years.
7. On or about 15 August 2011, I was in the course of my employment driving from Zomba, heading to Limbe at an average speed of 60 Kilometers per hour. I had about 13 passengers on board at the time.
8. Upon reaching a place known as Ziwika, there was a woman walking along with a child (who I later came to know to be the deceased) along the left side of road, beside the lane on which I was driving. On the right side of the road were children who were around the same age as the deceased.
9. In front of me was a big lorry heavily loaded with bags of what I later came to note to be pigeon peas (Nandolo) which was coming from Limbe heading towards Zomba. One of the Nandolo bags suddenly fell off the lorry and fell on the other

side of the road. The children on the other side of the road ran over to fight over the contents of the bag. The deceased, upon seeing his peers rushing towards the road abruptly and without warning ran across the road towards the melee, ostensibly to join in.

10. *Upon seeing the deceased jump onto the road, I frantically attempted to swerve the vehicle towards right lane in an attempt to avoid hitting him but since I was too close to the deceased, I collide with him on the middle of the said road.*
11. *The deceased's sudden dash into the road, at such close range, placed me in an extremely difficult situation which made the accident avoidable.*
12. *I quickly got down from the car and we rushed to Queen Elizabeth Central Hospital.*
13. *I verily believe that the accident occurred due to the negligence on the part of the plaintiff or whoever was in charge of the child for her for failing to keep proper, firm and careful watch over the deceased. There was absolutely no negligence on my part. ”*

During cross-examination, he reiterated that he is a driver by profession and he has been driving motor vehicles since 1998. He had driven on the Zomba/Limbe road for about 3 years prior to the accident and he is well conversant with road traffic rules and regulations. He agreed that on approaching a trading centre or a busy place, a driver is supposed to slow down and drive at a speed between 40 to 50 kilometers per hour (KPH). He, however, stated that the accident occurred at Ziwiki, a place past Njule bus stage, which is not a trading centre. At the time, he was driving at 60 KPH.

DW was asked by Counsel Khan to explain how the accident happened and he gave the following account in his response:

“The road is straight and I was able to see everything in front of me. /saw the Deceased at a distance, that is, from here (the witness box) to that door (Court gallery exit door). I can confirm that when I saw her I just swerved. I also pressed the brakes and the vehicle swerved. I wouldn't know whether the woman who was walking with the deceased along the road was together with the deceased.

I can confirm that I am the one who hit the deceased. If I was driving at a speed of 40 Kilometers per hour I would have been able to stop and avoid the accident. ”

DW also confirmed that he was taken to Limbe Magistrate Court, but he denied being found liable for the accident. He explained that he paid a fine of K 25,

000.00 to simply redeem his driving licence. He further stated that he was aware that when a person is acquitted of a traffic offence, the person does not pay any fine but he was fined.

During re-examination, he confirmed that his driving licence was confiscated by the Police. He stated that no police officer witnessed the accident happening. He also said that he tried to avoid hitting the Deceased by swerving the motor vehicle and he thought that she would run back, that is, go to the side of the road from which she had come from.

Regarding emergency brakes, he stated that he did not apply them because he feared that applying them would have caused the motor vehicle to overturn: the motor vehicle simply swerved after he had tried to avoid hitting the Deceased. DW concluded by stating that the only busy place near the place where the accident occurred is Njuli and not Ziwika.

The case of Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781

is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence:

“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. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done ”

For an action in negligence to succeed, the plaintiff must show that (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage: see **Donoghue v. Stevenson [1932] A.C. 562** quoted with approval by Ndovi, J, as he then was, in **Kadawire v. Ziligone and Another [1997] 2 MLR 139** at 144.

Having considered the evidence in the present case, I wish to start by observing that the fact that the accident occurred is not in question. The respective testimonies of the three witnesses are to that effect. In the same vein, the Defendant led no evidence to challenge the fact that the Plaintiff sustained injuries as, and to the extent, recorded in the medical report.

This means that the all-important question to address is whether or not the accident was caused by the negligent driving of the motor vehicle. It is trite that a driver of a motor vehicle owes a duty of care to other road users not to cause damage to

persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skillful driver would have in all circumstances. A reasonable skillful driver has been defined as one who avoids excessive speed, keeps a good look-out and observes traffic signs and signals. In addition to the duty incumbent to all road users comprises, *inter alia*, keeping a proper look-out and not going at an excessive speed. See **Banda and Others v. ADMARC [1990] 13 MLR 59, Malida v. Chiona [1990] 3 MLR 427 and Southern Bottlers Limited & another v. Charles Chimdzeka MSCA Civil Appeal No. 41 of 1997 (unreported).**

Again, a driver of a motor vehicle should usually drive at a speed that will permit him to stop or deflect his course within the distance he can see clearly though it is not conclusive proof of negligence to exceed that speed. But if the driver strikes a person or object without seeing that person or object he may be placed in the dilemma that either he was not keeping a sufficient look-out or that he was driving too fast having regard to the limited look that could be kept: See **Evans v. Downer & Co Ltd (1933) AC 149 and Morris v. Luton Corporation (1946) KB 114.**

Besides, decided cases abound with statements to the effect that drivers are not entitled to drive on the footing that other users of the road, whether drivers or pedestrians, will exercise reasonable care. Further, 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 reasonably foreseeable, whether negligent or not. See **Burgess v. Aisha Osman and Jimu (1964-66) 3 ALR Mai 475.**

Time is now ripe to apply the above-mentioned law to the facts in the present case. On one hand, there is the testimony of DW who alleges that he was driving at about 60 KPH at the time of the accident. However, when he saw the Deceased he failed to stop but swerved to the middle of the road where he eventually hit the Deceased. On the other hand, PW 1 testified that the accident occurred because DW 1 was speeding. In the opinion of PW1, the vehicle was moving at around 120 KPH.

To my mind, if indeed DW was driving the said vehicle at 60 Kilometers per hour he could have managed to stop the vehicle upon seeing the Deceased crossing the said road. However, the fact that he failed to stop the said vehicle is *prima facie* evidence that he was speeding. A reasonable driver driving at the alleged speed of 60 KPH cannot fail to stop well within a short distance. Thus, he was driving at a speed above the said 60 kilometers per hour and that is why he failed to stop after he saw the deceased crossing the road.

Besides, if indeed DW was driving the said vehicle at 60 KPH, he could have properly applied the brakes without the said vehicle swerving or having the effect of endangering the lives of the passengers he was conveying. Thus, DW failed to apply the said brakes because he was speeding and that is why he was afraid to apply the said brakes since it could have endangered the lives of the said passengers. The evidence herein thus point to one conclusion, to wit, DW was speeding at the time of the accident herein otherwise he could have avoided the said accident.

On the other hand, if we were to accept DW's version that he was driving at 60 KPH then it is obvious that he did not keep a proper look-out. DW as a skillful driver, most importantly with a lot of experience, was required to keep a proper look out and anticipate that anything can happen on the road. In his evidence, he told the Court that he saw children fighting for pigeon peas along the road. He, therefore, ought to have had it in his contemplation that the children might enter the road as this is what a reasonable person would expect. Consequently, DW had a duty to keep a proper look-out and of course reduce speed and drive the said vehicle at a speed that could have allowed him to stop well within a short distance. But it is obvious, from the evidence herein, that DW failed so to do. He simply did not keep any proper look-out or even contemplate the occurrence of the incident herein. I, therefore, find that DW failed in his duty as a reasonable skillful driver in that regard.

All in all, it is my finding that the accident was caused by want of care on the part of the DW. He drove the motor vehicle without due care and attention and at a speed which was excessive in the circumstances. It is also my finding that the motor vehicle was driven in such manner that DW failed to stop, to slow down, to swerve or in any other way to so manage or control the motor vehicle. I, accordingly, enter judgment in favour of the Plaintiff against Defendant and order that the collateral issue of assessment of damages be dealt with by the Registrar.

Pronounced in Court this 26th day of September 2017 at Blantyre in the Republic of

Malawi.



Kenyatta Nyirenda

JUDGE