



MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1570 OF 2010

BETWEEN:

DENMARK WATSON.....PLAINTIFF

AND

NICO GENERAL INSURANCE..... DEFENDANT

CORAM: THE HON JUSTICE H.S.B. POTANI

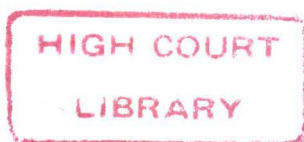
Mr. Kalua, Counsel for the Plaintiff

Mr. Kauka, Counsel for the Defendants

Mr. Mathanda, Court Clerk

JUDGEMENT

By an amended statement of claim, the plaintiff alleges that he suffered bodily injuries after being hit by motor vehicle registration number MG686AD which was negligently driven by the defendant's insured or its agent. The particulars of the alleged negligence are set out in paragraph 2 of the statement of claim. He claims



against the defendant damages for pain and suffering and loss of amenities of life, special damages and costs of the action. Upon being served with the statement of claim, the defendant served and filed a defence and in the defence, as amended, the allegations and claims by the plaintiff are denied in their entirety.

At the outset, it has to be pointed out that these being civil proceedings, the required standard of proof is proof on a balance of probabilities. It is a lesser standard than that required in criminal proceedings which is proof beyond reasonable doubt. The court also bears in mind that as a general rule on evidential burden of proof, it is the party that alleges the existence of certain facts on which burden of proof rests.

The evidence that is before the court is only from two witnesses on the plaintiffs' side, the defendant having abandoned its earlier intimation to call one defence witness.

In his evidence in-chief as contained in his witness statement, the plaintiff [PW1] stated that on June 13, 2010, at around 7 o'clock in the evening he was on his way home from an entertainment place within Chirimba in the city of Blantyre at which he had been watching some World Cup soccer match. Upon reaching Zalewa Road he checked on both sides and having satisfied himself that the road was clear he proceeded to cross but while in the process of crossing he was hit by a vehicle registration number MG 686AD Nissan Civilian Coaster which was travelling towards the Blantyre direction. According to the plaintiff the accident happened because the vehicle was moving at a high speed as such the driver failed to control or manage it to avoid hitting him. It is his evidence that he lost consciousness on the accident spot and only regained it in the night while at Queen Elizabeth Central Hospital. He discovered that he had injuries in the head, in the mouth with one tooth loosened which had to be removed, cut on the right leg and soft tissue injuries in the

chest area. The plaintiff also has it that presently he has hearing problems, experiences pains in the chest and finds it difficult to run.

The second witness on the plaintiff side happens to be Traffic Constable Maclord Dzinga [PW2] of Blantyre Police. According to his witness statement, on June 13, 2010, while on duty, Mr. M. Chikafa Lewis, who was driving motor vehicle registration number MG686 AD brought to him a person whom he said he had hit while the person was crossing the Zalewa road at Chirimba stage. He accompanied the driver and the victim to Queen Elizabeth Central Hospital and later went to the scene of the accident together with Traffic Sergeant Chiromo at which he noted sketch marks on the road and the point of impact. It is his evidence that the driver produced a driving licence and certificate of insurance. The certificate of insurance was issued by NICO General Insurance Company Limited under cover number 10013140 covering the period from March 5 to June 30 2010. According to the witness, from his investigations he formed the opinion that the driver influenced the accident by over speeding as such he charged him with the offence of inconsiderate driving which he admitted and paid a fine of K2,000.00. Later, at the request of the victim, he issued an abstract report of the accident being exhibit **DW1**.

At this juncture, it has to be recalled, as earlier pointed out, that in the defence, the defendant join issue with the plaintiff on all the material allegations of fact averred in the statement of claim. Therefore, the state of the pleadings is such that the burden lies on the plaintiff to prove all material allegations on which his case against the defendant rests. This position of the law was duly reiterated by Villiera J in **Somanje v ESCOM** Civil Cause No. 717 of 1991 as follows:

“It 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.”

From the pleadings, the plaintiff has to prove not only that the alleged accident occurred, but also that it occurred due to the negligence of the driver of the vehicle, and further that he suffered bodily injuries as a result. In addition, the plaintiff has to prove that the vehicle was insured by the defendant.

As the pleadings reveal, that the defendant is being sued allegedly for being the insurer of the vehicle alleged to have been involved in the accident. It would therefore be logical to first consider whether the plaintiff has proved that indeed the vehicle was insured by the defendant. It is the undisputed evidence of Traffic Constable Dzinga that when he interviewed the driver of the vehicle about the accident the driver, among others, produced a certificate of insurance issued by NICO General Insurance Company Limited, the defendant herein, under cover number 10013140 covering the period from March 5 to June 30 2010. The accident happened on June 13, 2010, within the validity period of the insurance cover. The court would therefore, without much ado, find and hold that the plaintiff has sufficiently proved that the vehicle allegedly involved in the accident was insured by the defendant.

The next aspect the court has to consider is whether the alleged accident indeed occurred. The evidence of the plaintiff about the occurrence of the accident is not at all disputed neither through cross examination or by evidence to the contrary from another witness. The defendant in cross examination of the plaintiff mainly took issue with how the accident occurred. This leads to the question whether the plaintiff has proved that the accident occurred due to the negligence of the driver.

Negligence, simply defined, is the breach of duty to take care by a person which results in damage being suffered by another person. See **Osborn's Concise Law Dictionary, 8th Ed. Page 227**. Thus for a party to be liable for negligence, three

essential elements must be satisfied. It must be shown firstly that the party was under a duty of care, secondly that the party, by acts or omissions, was in breach of that duty and thirdly that as a result of such breach damage was suffered by another party.

With regard to road users, the position of the law is that it is the duty of every person who drives a vehicle on the highway to use reasonable care to avoid causing damage to other persons. See **Charlesworth on Negligence 5th Edition page 488 paragraph 812**. The standard of care expected of a driver is reasonable care which a competent driver would use in the circumstances and there is a litany of case authority on this proposition among them **Mponda v Air Malawi and Another** [1997] MLR 131. In **Dilla v Rajan** 12MLR 358 it was held that such a driver is expected to keep a good look out and observe traffic signs and signals. In **Southern Bottlers Limited and another v Commercial Union Assurance Company Plc** [2004] MLR 364 it was held 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 skilful driver would have exercised under all circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look out, and observes traffic signs and signals.

Statutory law also imposes a duty of care on drivers and relevant to this case is section 126 which is as follows:

(1) No person shall drive a vehicle on a public road recklessly or negligently.

(2) Without restricting the ordinary meaning of the word “reckless” any person who drives a vehicle in wilful or want on disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly.

It should be noted that the duty to take care on the road is not only on drivers but also pedestrians like the plaintiff. Relevant to the present case is section 117 (3), (4), and (5) of the Road Traffic Act quoted as follows:

(3) No pedestrian shall cross a public road without satisfying himself that the roadway is sufficiently free from oncoming traffic to permit him to cross the road in safety.

(4) A pedestrian, when crossing a public road by means of a pedestrian crossing or in any other manner, shall not linger on such road but shall proceed with due despatch.

(5) No pedestrian on a public road shall conduct himself in such a manner as to or as is likely to constitute a source of danger to himself or to other traffic which is or may be on such road.

As the law places a duty of care on both drivers and pedestrians, a word of caution should be sounded that there is no presumption of blameworthiness on the part of a driver whenever a vehicle hits a pedestrian and by the same token no presumption of innocence, for lack of a better word, on the part of the pedestrian. Again there is no strict liability on the part of the driver. The point being made is that the court must objectively consider the the conduct of both the pedestrian and the driver as revealed by the evidence in deciding whether or not the driver was negligent.

In the present case, in paragraph 2 of the statement of claim, the plaintiff particularizes the following five acts and omissions to have constituted the alleged negligence on the part of the driver:

- a) Driving at excessive speed in the circumstances*
- b) Driving without reasonable care*
- c) Failing to any or any proper look-out*
- d) Failure to have any or any sufficient regard to other road users*
- e) Failing to stop, to slow down, to swerve or in any other way so to manage or control the motor vehicle as to avoid the collision.*

As pointed out earlier, the court has to objectively consider the available evidence in deciding whether indeed the driver of the vehicle was negligent as alleged. According to the plaintiff's own evidence-in-chief, before embarking on crossing the road, he checked on both sides of the road and having satisfied himself that the road was clear he proceeded to cross but while in the process of crossing he was hit by a vehicle. It is also his evidence that the vehicle hit him because it was over-speeding otherwise it could not have hit him as the road was clear when he started crossing the road.

In considering the evidence before it, the court curiously notes that in cross examination, the plaintiff said that when he checked on both sides of the road before crossing, he was able to see, by estimation, a distance of about 200 metres away. Surely, as pointed out by counsel for the defendant, one would tend to wonder as to what a terrific speed the vehicle was moving at as to get to hit the plaintiff while still crossing the road when it was over 200 metres away when he started crossing the road. Conversely, one would equally wonder as at what a snail's pace was the plaintiff crossing the road for him to be hit by a vehicle which was not seen 200 metres away when he started crossing the road. The court notes and is mindful that in cross examination and re-examination, the plaintiff changed tune and said he was hit as he was finishing crossing the road. This was in an attempt to show that although the vehicle was not in sight 200 metres away when he started crossing the road but because of its alleged over speeding it caught up with him and that the driver failed to control or manage it resulting in hitting him. In the court's estimation, what the evidence reveals is that it is more probable than not that the plaintiff recklessly crossed the road in such a manner as to constitute a source of danger to himself. In

the circumstances the driver of the vehicle cannot be held liable in negligence and the end result is that the plaintiff's action cannot succeed. It is accordingly dismissed.

Regarding costs of the action, on the principle that costs normally follow the event, they are awarded to the defendant, the plaintiff's action being abortive.

Made this day of February 28, 2017, at Blantyre in the Republic of Malawi.



**H.S.B. POTANI
JUDGE**