

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**



CIVIL CAUSE NO 441 OF 2015

BETWEEN

ELLINA MANJOMO PLAINTIFF

AND

PRIME INSURANCE COMPANY LIMITED DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Mumba, of Counsel, for the Plaintiff

Defendant, absent

Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

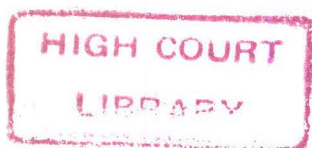
The Plaintiff is claiming damages for personal injuries that she sustained in a road accident. The Defendants resist the action.

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

- “1. *The Defendant is being sued pursuant to the provisions of the Road Traffic Act as the insurer at the material time of motor vehicle registration number BR 7156 Toyota Hiace Minibus.*
2. *On 14 March 2014, the Plaintiff was lawfully crossing the road at Nazarene Church road junction along the Robert Mugabe Highway when the defendant's insured or his servant/agent one Gideon Masekesa negligently drove motor vehicle registration number BR 7156 Toyota Hiace Minibus that it collided with the plaintiff and knocked her to the ground.*

Particulars of Negligence

- a) *Driving at an excessive speed in the circumstances;*



- b) *Failing to keep any or any proper lookout,*
 - c) *Failing to have any sufficient regard to other road users;*
 - d) *Failing to stop, to slow down, to swerve or in any other way so to manage or control the motor vehicle to avoid colliding with the plaintiff*
3. *By reason of these matters, the plaintiff sustained injuries and has suffered loss and damage.*

Particulars of Injuries

- a) *Fracture of the right leg*
- b) *Severe pain on both hands*
- c) *Numbness of the left hand*
- d) *Internal injuries involving the whole body*
- e) *Swelling and painful left leg*

Particulars of Special Damages

- a) *Cost of the police report K3,000.00*
- b) *Cost of the medical report K10,350.00*

WHEREFOR the plaintiff claims:

- a) *Damages for pain, suffering, loss of amenities and disfigurement;*
- b) *Special damages as pleaded*
- c) *Costs of this action"*

The Defendant contests the action and, accordingly, a defence was filed. The Defendant denies each and every allegation of fact contained in the Statement of Claim. The Defendant specifically denies that the accident was caused by the alleged or any negligence on the part of the Defendant. Further or in the alternative, the Defendant pleads that the accident was caused or contributed to by the negligence of the Plaintiff.

The particulars of the negligence on the part of the Plaintiff have been stated as being (a) failure to heed the presence of the motor vehicle and (b) failure to take proper look out when walking along the road.

It is trite that a claimant has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case

on a balance of probabilities: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**

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 she sustained injuries and suffered damage as a result of the accident which was caused by negligence of the Defendant: see **B. Sacranie v ESCOM, HC/PR Civil Cause No. 717 of 1991 [unreported]** wherein Villiera J had this to say:

“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. 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 one and only witness for the Plaintiff's case was the Plaintiff herself. She adopted her Witness Statement wherein she explains that the accident happened as follows:

- “2. *I recall that I was in a road accident March 14 2014. The accident occurred at a near Nazarene Church road junction along the Robert Mugabe Highway. It involved motor vehicle registration number BR 7156 Toyota Hiace Minibus and myself.*
3. *On the material day I was crossing the Robert Mugabe Highway at Nazarene Church from right to left hand side of the road as we are coming from Bangwe Direction heading Nguludi.*
4. *Before I started crossing I checked both sides of the road and there was no motor vehicle coming. Then I started crossing the road. As I was crossing, I was hit by the said motor vehicle registration number BR 7156 Toyota Hiace Minibus. The accident occurred because the driver of the said vehicle was overspeeding, if it was not so, I could have seen the vehicle before I started crossing the road.*
5. *I was taken by the same vehicle which had hit me to Queen Elizabeth Central hospital. Upon arrival at the hospital they took me to x-ray where it was discovered that I sustained fracture of the right leg. As part of treatment they inserted metal rods on the leg and they were giving me medicine. I was admitted for almost 2 months because I was discharged on 26 May 2014.*
6. *After being discharge I was visiting Queen Elizabeth Central Hospital for further checkups until in November 2014 when I was told that I should stop going there for checkups. During the checkup time I was telling the doctors that I was feeling severe pain on my hands but they were telling me that it was because of the clutches which I was using to walk.*

7. *After I stopped using the clutches, I discovered that my hands were very painful. Due to severance of the pains on the hands, and after discovering that I was experiencing numbness of the left hand, I was forced to go to Monjeza Private Clinic...*"

The Plaintiff tendered the medical report and the police report and the same were marked as Exhibits P1 and P2 respectively. The Defendants being absent, this marked the Plaintiff's case.

The Law and Determination

Liability of the 1st Defendant

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] AC 562** quoted with approval by Ndovi J., as he then was, in **Kadawire v. Ziligone and Another [1997] 2 MLR 139** at 144.

In **Banda and Others v. ADMARC and Another [1990] 13 MLR 59**, Justice Banda, as he then was, stated the duty of care owed by a driver of a motor vehicle to other road users as follows:

"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 the 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."


Further, the case of **Mhango v. Positi and National Insurance Company Ltd [1995] 2 MLR 402** is for the proposition that a driver of a motor vehicle has a duty to always keep a proper look out and to drive at such speed as would allow him to stop well within the distance he can see to be clear. This means that a driver of a motor vehicle must, among other matters, observe traffic signs and signals and

avoid driving at excessive speed: see **Mponda v. Air Malawi Limited and another** [1997] 2 MLR 131. Furthermore, it is a driver's duty to drive at a speed which will allow him to stop in case of sudden emergency. In deciding reasonable speed, the courts will have regard to the nature, condition and use of the road in question, the amount of traffic on the road at the material time or which might be expected to be on it: see **Kadawire v. Ziligone and another, supra**.

I have considered the evidence herein and it is my finding that the driver of the motor vehicle breached duty of care in that he was over-speeding and he did not keep proper lookout and, consequently, he failed in his duty of having due regard for other road users.

There being no evidence from the Defendant, the Plaintiff has, on a balance of probabilities, succeeded in her claims for damages and costs of this action. I thus find the Defendant wholly liable. I, accordingly, enter judgment in favour of the Plaintiff and order that the collateral issue of assessment of damages be dealt with by the Registrar.

Pronounced in Chambers this 28th day of February 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE