JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO 473 OF 2013

BETWEEN

MIKE MATIYA ..... 1ST PLAINTIFF

FANNY CHIMBALANGA ..... 2ND PLAINTIFF

AND

PRIME INSURANCE COMPANY LIMITED ..... 1ST DEFENDANT

GILBERT MISACHE ..... 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Khan, of Counsel, for the Plaintiffs
Mr. Tandwe, of Counsel, for the Defendants
Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

The Plaintiffs commenced this action claiming damages for personal injuries that they sustained in a road traffic accident involving motor vehicle registration number BQ 3769 Toyota Dyna Pick-up [hereinafter referred to as the "Toyota Dyna"]. The Defendants deny liability.

Pleadings

The case of the Plaintiffs, as set out in the Statement of Claim, is as follows. The Plaintiffs were at all material times lawful passengers in the Toyota Dyna which was insured by the 1st Defendant under certificate of insurance number 10475597 for the period from 4th January 2012 to 3rd April 2012. The 1st Defendant is being

sued pursuant to section 148 of the Road Traffic Act as the insurer of the Toyota Dyna. The 2nd Defendant was at all material times the driver and/or owner of the Toyota Dyna.

On or about 17th March 2012, the Toyota Dyna was being driven by the 1st Defendant from the direction of Liwonde heading towards Ntaja and upon arrival at or near Machinga Trading Centre it overturned once.

It is alleged that the accident was solely caused by the negligence of the 2nd Defendant. The alleged negligence has been particularized as follows:

> *"a. Driving at an excessive speed in the circumstances.*
>
> *b. Driving without due care and attention.*
>
> *c. Failing to have any or sufficient regard of the safety of the Plaintiffs.*
>
> *d. Failing to slow down or stop or in any way control the said motor vehicle so as to avoid the accident herein.*
>
> *e. Generally, failing to observe road traffic rules and regulations.".*

It is further alleged that, as a result of the accident, the Plaintiffs sustained injuries and suffered loss and damage as particularized in the Statement of Claim. The Statement of Claim concludes with a prayer wherein the Plaintiffs claim (a) damages for pain and suffering, (b) damages for loss of amenities of life, (c) damages for disfigurement, (d) special damages in the sum of K12,000.00 for procuring police and medical reports and (e) costs of the action.

By its Statement of Defence, the Defendants admit that the Toyota Dyna was insured with the 1st Defendant and that the 2nd Defendant was driver and/or owner of the Toyota Dyna. Save for the foregoing admissions, the Defendants traversed all other allegations of fact contained in the Statement of Claim. The 1st Defendant further pleads that its liability, if any, is limited to indemnifying the owner of the Toyota Dyna to the maximum liability contained in the contract of insurance between itself and the said owner.

Burden and Standard of Proof

It is trite that a plaintiff has the burden of proving the elements of his or her lawsuit: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA).** It is also commonplace that the standard of proof is that on a balance of probabilities. In **Miller v. Minister of Pensions [1947] 2 All ER 372**, Denning J. said:

> *"That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say; 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."*

In short, this means that a plaintiff must prove a fact by showing that something is more likely so than not: See also the cases of **B. Sacranie v. ESCOM, Civil Cause No. 717 of 1991 [unreported], Mr. Lipenga (Administrator of the Estate of Janet George) v. Prime Insurance Company Ltd, Civil Cause No. 1386 of 2005** and **Alfred Pensulo and Hastings Mawerenga v. United General Insurance Company Ltd, HC/PR Civil Cause No. 592 of 2015**.

It, therefore, follows that in the present case the burden of proof is on the Plaintiffs as the parties who have asserted the affirmative to prove on a balance of probabilities that they sustained injuries and suffered damage as a result of the accident which was caused by negligence of the Defendant: see **B. Sacranie v. ESCOM**, supra, 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"*

Evidence

The 1st Plaintiff testified on behalf of the Plaintiffs. He adopted his witness statement as his evidence in chief. The witness statement is reproduced below:

> *"2. I am one of the plaintiffs in this matter and I make this statement on my own behalf and on behalf of FANNY CHIMBALANGA, the 2nd plaintiff herein.*
>
> *3. On or about 17th March 2012 at about 09:00 hours we were on board of motor vehicle registration number BQ 3769 Toyota Dyna Pick-up which was being driven from the direction of Liwonde heading towards Ntaja when upon arrival at or near Machinga Trading Centre the driver of the said vehicle negligently drove the said vehicle consequent which he failed to negotiate a corner which resulted in the said motor vehicle swerving to the left hand side and went back to the right hand side where it overturned once.*
>
> *4. Police investigations reveals that the said accident was caused by the negligence of the driver of the said vehicle by driving at an excessive speed. I exhibit hereto a copy of the police report marked as "MM 1".*
>
> *5. I repeat paragraph 5 hereof and state that I also believe that the said accident was solely caused by the negligence of the driver of the said vehicle in that he was indeed driving the said vehicle at a speed excessive in the circumstances, that is*

why he failed to negotiate a corner. Thus, if he was driving at a reasonable speed he could have managed to negotiate the said corner and avoid the accident herein.

6. *Further, I believe that the said driver had no regard for our safety that is why he was driving the said vehicle without due care and attention and in total wanton disregard of road traffic rules and regulations. There is, therefore, no doubt that the said accident was caused by the driver of the said vehicle.*

7. *The said motor vehicle was insured by the 2nd defendant at the material time of the accident.*

8. *As a result of the said accident, I sustained personal injuries, to wit, multiple bruises, deep cut on the upper lip, cut on the ear lobe and orbiting process of right eye. Consequently, I was taken to Machinga District Hospital where I received treatment of suturing and debridement of the said wounds, blood transfusion and I was also given antibiotics and analgesics. On the other hand, Fanny Chimbalanga sustained deep cut on the foot, multiple bruises on the posterior right forearm, massive bruises on the whole right leg and dislocation of the ankle. She was also taken to the same hospital where she received treatment of debridement, suturing and back slab. I exhibit hereto copies of our medical reports marked as "MM 2 (a)" and "MM 2 (b)" respectively.*

9. *I repeat paragraph 8 hereof and state that we are in this predicament due to the accident herein which was caused by the negligent driving of the driver of the defendant's insured motor vehicle. It is against this background that we commenced the present proceedings against the defendants claiming compensation for personal injuries we sustained herein and we had to incur the sum of MK 12, 000.00 to procure the police and medical reports.*

10. *I therefore ask this Honourable Court to find in our favour and award us damages as sought in the statement of claim."*

The 1st Plaintiff tendered the police report and the two medical reports and these were marked as Exhibits P1, P2 and P3 respectively.

During cross-examination, the 1st Plaintiff stated that he could not remember the exact number of people who were in the Toyota Dyna but they could have been around five or six people. Upon Counsel Tandwe drawing the witness's attention to Exhibit P1 which shows that there were twelve people in the Toyota Dyna, the 1st Plaintiff stated that he would go by the number stated in the Exhibit. He further stated that he did not personally know all the passengers in the Toyota Dyna. It just happened that he was with them in the Toyota Dyna.

When asked to give details about his trip, the 1st Plaintiff stated that is he boarded the Toyota Dyna at Liwonde. The Q and A that ensued thereafter is relevant and it is necessary that it be set out in full:

*"**Q**: What were you going to do in Ntaja?*

***A**: I was going to see my friend at Ntaja*

***Q**: The other passengers were also going to Ntaja market to do business?*

***A**: Yes*

***Q**: You were all fee-paying passengers?*

***A**: No!*

***Q**: Was it a fare paying car?*

***A**: I only requested to be given a lift and I did not pay any fare*

***Q**: How about the other passengers?*

***A**: I do not know. I can only talk about what I did*

***Q**: The Police Report states that there were also 20 bags of rice*

***A**: That is correct"*

The Defendant paraded one witness, Tamikani Mhone, the Defendant's Claims Officer. He adopted his witness statement as his evidence in chief. The witness statement is very brief and the substantive part thereof reads as follows:

"6. The defendant is an insurance company whose main business is to provide insurance cover to its customers.

7. On or around 8th May 2013 the plaintiffs commenced this action against the defendants for damages for personal injuries as a result of an alleged road accident involving motor vehicle registration number BQ 3769 Toyota Dyna Pick up on the alleged basis that the said motor vehicle was insured by Prime Insurance.

8. At the time of the accident, the motor vehicle in question was insured by Prime Insurance but the policy did not cover passenger liability. I exhibit hereto marked "TM 1" a policy document from our records attesting to this arrangement.

9 In the circumstances, we have no basis for confirming the allegations of the accident put by the plaintiffs and the defendant denies liability as claimed by the plaintiffs."

Mr. Mhone tendered the policy document in respect of Toyota Dyna and it was marked as Exhibit D.

During cross-examination, Mr. Mhone stated that his duties as a Claims Officer are to process claims, among other things. He also stated that his primary interest is to serve the company and the policy holder but his primary obligation is to maximize profits for the company.

Turning to the accident, Mr. Mhone confirmed that he was not present at the scene of the accident when the accident took place and that he does not know the cause of the accident. He also confirmed that the Toyota Dyna was insured with the Defendant at the time of the accident.

When questioned about the accident report form, Mr. Mhone stated that the form contains the details of how the accident occurred and it is filled by the policy holder or the driver. Mr. Mhone confirmed that he had not brought the accident report form to court.

Mr. Mhone's testimony regarding Exhibit D was that it only excludes liability for passengers for hire or reward, meaning that not all passengers are covered. When quizzed by Counsel Khan on his understanding of the term "passenger for hire or reward", he stated that a passenger for hire is a fee-paying passenger whereas a passenger for reward is a passenger who is conveyed without paying a fare. He explained that the primary cover under the Exhibit D is carriage of goods.

Mr. Mhone was not re-examined.

Determination

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**, Banda, J, as he then was, stated the duty of care owed by a driver 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 skillful driver would have exercised under all the circumstances. A reasonably skillful driver has been defined as one who avoids excessive speed, keeps a good look-out, observes traffic signs and signals."*

I have carefully considered the evidenced adduced by the two witnesses. The unchallenged evidence is that the 2nd Defendant was at the material time driving the Toyota Dyna at an excessive speed such that he failed to negotiate a corner and this resulted in the Toyota Dyna swerving from the right-hand side to the left-hand side and then back to the right-hand side where it overturned. Had it been that the 2nd Defendant had driven the Toyota Dyna at a reasonable speed, as is expected of a reasonable skillful driver, he would have managed to negotiate the said corner and avoided the accident. Clearly, the 2nd Defendant was negligent in his driving. It is, therefore, my finding that the accident was caused as a result of want of care on the part of the 2nd Defendant. Accordingly, the 2nd Defendant must be held liable.

In his evidence, the 1st Plaintiff testified that as a result of the accident he and the 2nd Plaintiff sustained injuries and Exhibits P2 and P3 were tendered as proof thereof. The fact that the Plaintiffs sustained injuries as a result of the accident went unchallenged. It is, therefore, my finding that the Plaintiffs sustained injuries as a result of the accident.

I now turn to the liability or otherwise of the 1st Defendant. There is no dispute that the Toyota Dyna was at the time of the accident insured by the 1st Defendant. The 1st Defendant, however, contends that paragraph (c) of the "Limitation as to Use" clause in Exhibit D [Hereinafter referred to as the "limitation clause"] excluded passenger liability. The limitation clause provides as follows:

> *"Limitation as to use:*
>
> *(c) Use as a goods carrying vehicle excluding the carriage of passengers for hire or reward."*

Counsel Khan submitted that considering that the limitation clause relates to passengers for hire or reward only, then it cannot be said that Exhibit D excludes liability in respect of passengers generally. He further argued that as the Plaintiffs were only accorded a lift by the 2nd Defendant, they do not fall within the meaning

of passengers for hire or reward. In the circumstances, Counsel Khan contended that the Plaintiffs were covered under Exhibit D and the limitation clause does not affect their claim.

On his part, Counsel Tandwe submitted that the Plaintiffs boarded the Toyota Dyna as passengers for hire or reward as was stated in the police report and liability for such passengers was excluded under Exhibit D by the limitation clause. His argument on this issue was put as follows:

> *"The policy of insurance accorded to motor vehicle registration number BQ 3769 Toyota Dyna Pick Up excluded liability for passengers. Passenger for hire or reward has been defined as any passenger who makes any payment either in cash or kind which gives a person the right to be carried on the vehicle, regardless of whether or not that right is exercised. Hire or reward takes place if the journey is organized in a way that goes beyond the bounds of mere social kindness. See Albert v Motor Insurer's Bureau (1972) AC 301."*

Counsel Tandwe also contended that as the Toyota Dyna had no passenger cover, the Plaintiffs were carried in contravention of section 75 (2) of the Road Traffic Act. This meant, in his opinion, that the Plaintiffs had thereby entered an illegal contract. It may not be out of place to quote the contention in full:

> *"Section 75 (2) of the Road Traffic Act stipulates that "any person who uses or causes or permits to be used on any road any vehicle which plies for hire or carries passengers for hire or reward, unless such vehicle is duly licensed as a public vehicle, and unless there is a road service permit in force authorizing such vehicle to ply for hire or to be used for the carriage of passengers for hire or reward, shall be liable for a first offence to a fine of K200.00 and to imprisonment for six months". This clearly shows that in order for a vehicle to carry passengers it has to be licensed and authorized to carry passengers and therefore had no passenger cover.*
>
> *The Plaintiffs were carried on the said vehicle in contravention to section 75 (2) of the Road Traffic Act thereby entering an illegal contract. They knew that they were boarding a vehicle that was not authorized to carry passengers. They entered into an illegal contract. In the case of Chupa vs Malawi Hotels Limited SCA 12 MLR 226 the Malawi Supreme Court made it clear that with respect to a contract prohibited by statute, no action may be brought by any party in reliance on an illegal contract."*

I have carefully considered the limitation clause. It excludes carriage of passengers for hire or reward. The expression *"passengers for hire or reward"* has not been defined by Exhibit D. In the premises, recourse has to be had to decided cases.

Despite my research into the matter, I have been unable to find an authority on this point in our local jurisdiction. My resort to English cases has proved useful but I

deem it enough to examine three of the most relevant cases, namely, **Bonham v. The Zurich General Accident & Liability Insurance Co Ltd [1944] 2 All ER 579** [Hereinafter referred to as the **"Bonham's Case"**], **Coward v. Motor Insurers Bureau [1962] 1 All ER 531** and **Albert vs. Motor Insurers' Bureau [1971] 2 All ER 1345** .

In **Bonham's Case**, the court had this to say:

> *"...The claimant contends that a man is not driving for hire or reward merely because after driving he accepts a voluntary payment. In my view, great importance attaches to the word "for". It suggests that something is being done in order to obtain reward, something which but for the reward would not be done.*
>
> *Take three cases. If A is asked to take B to a certain place and A says "I will do it if you will pay me 1s. 2d." and B agrees, there is a typical case of carrying for reward. There is an express agreement. The second case: A is asked to take B and he says "Yes, I will do it," but nothing is said as to payment, but the circumstances are such that a promise to make a reasonable payment ought to be inferred. Then there is an implied contract, and an implied contract is just as much a contract as an express contract. It creates a legal obligation. If one gets into a taxi, there is never any agreement about what is going to happen. It is understood that you agree to pay the legal fare. If A says to B "I am going into town. Can I give you a lift?" and B accepts, gets in, is taken into town, gets out, thanks A and gives him a shilling, it cannot be said that A was carrying for that shilling, for that reward. He got a reward, true. To my mind, that is not the same thing as stipulated for it and doing what he did in order to get it.*
>
> *The results of any other view would really be startling. By accepting a voluntary payment or contribution towards driving expenses, or anything of that sort, the driver would at*
>
> *once (i) step outside the cover of this policy; (ii) he would be guilty of an offence under s 35 (1) for using a car while not insured in accordance with s. 36; and (iii) he would be guilty of an offence in that he was using a motor vehicle on the road not being the holder of a public service vehicle licence, in breach of s 67 – for example, as in Tyler's case. Those are startling results of accepting a voluntary payment for giving somebody a lift."*

Bonham's Case held, among other matters, that agreement, express or implied, is the essence of carrying for hire or reward and it put its reasoning thus:

> *"There are three cases which seem to me to go far towards establishing that proposition. The first in Newell v Cross. There two ladies, a Miss Cross and Mrs Plume, separately hired taxicabs, neither of which had a road service licence as an express carriage, to drive themselves and friends to a certain destination and back for 14s in each case. Miss Cross had made an antecedent arrangement with her friends that each of them should pay her share of the fare. Mrs Plume had made no such arrangement, though some of her friends in fact subsequently offered to pay and did pay their shares. On the journey the taxi cabs were stopped by a police officer who questioned the passengers as to the*

arrangement for payment. He did not caution them. The result was the hirers were charged with causing and the drivers with permitting the taxicabs to be used as express carriages when there were not in force licences authorizing them to be so used. The justices dismissed all the summonses and expressly found that the drivers did not know, and had no reason to know, that the passengers were sharing the fares: the Divisional Court held, at p 632:

> *'...that since there was in is C.'s case antecedent contract for payment by the other passengers of their shares they were "carried in a motor vehicle in consideration of separate payments made by them," and therefore ... the vehicle was to be "deemed to be a vehicle carrying passengers for hire or reward at separate fares," and was brought within the definition of "express carriage" ... and Miss C. was therefore guilty of the offence charged. In the absence of an antecedent contract by Mrs. P. justices were right in dismissing the charge against her. Nor could it be said that they had erred in law in dismissing the charges against the drivers.*

I only want to read two or three quite short passages. The first one is in the judgment of Lord Hewart LCJ, dealing with Miss Cross's case, at p 639 ([1936] 2 All ER at p 205):

> *'Clearly, therefore, it was in her mind that she was to collect, and apparently was entitled to collect, a rateable contribution from each one of her fellow passengers. So far as she was concerned that case seems to me, as the law stands, clear.*

Then on pp 641, 642 ([1936] 2 All ER at p 206), he contrasts the position of Mrs Plume:

> *'On the other hand, by way of contrast to the case of Miss Cross, there is nothing satisfactory to indicate that contributory payments were contemplated at the outset or formed any part of a contract or bargain. Non constat with regard to each of those payments that it was not both subsequent and voluntary...*

And he approves the dismissal of the summons against her.

Du Parcq J put the point extremely clearly at p 644:

> *'In Mrs Plume's case, which is the only one presenting any difficulty, I am of opinion, looking at the findings of fact as a whole, that the justices were not satisfied that there was any agreement between Mrs. Plume and her fellow passengers before the journey started. If there was no such agreement, express or implied, and she was herself solely responsible for the payment of the fare, none of her fellow passengers being bound by contract to contribute a share, then she would not be guilty of unlawfully causing a vehicle to be used as an express carriage.'*

I have some diffidence in referring to McCarthy v British Oak Insurance Co, because it was a decision of my own, but it is some six years ago and so far as I know has not been called in question. There I was dealing with similar type of case, where a certain contribution had been made to the driver of a car. I need only refer to these words, at p 4:

> *'I think that what is intended to be excluded by this policy [the same words] is something which is genuine business contract for hiring, something which is a real hiring, a doing something for a stipulated reward, a stipulated quid pro quo. I do not think that there was any hiring here. I think one must look at all the circumstances.*

> *... Was there, in the case with which I have to deal, a carriage for hire, or were these people being carried for hire or reward? I have got these findings that they were never asked for payment, that two of them voluntarily offered money, and that the claimant would have carried them, as he did Drage, even if they had paid nothing; and the car would have been going on the particular journey in any event. Those findings negative agreement. They negative a carrying with the object of getting any payment. They affirm the voluntary nature of the payment throughout and exclude agreement, express or implied. On the particular day, what was the legal position between the parties during the driving? First, there was no agreement. That is clear. Secondly, there was no legal obligation to pay. Thirdly, the claimant was not taking either Clement or Cunningham with the object of getting any payment. The findings establish all those three propositions. The mere fact that Cunningham and Clement may have intended to make a voluntary payment when they got home at night or when they got to works does not affect the voluntary character of the carriage. That is Newell v Cross. There is a plain decision about that. What is the relevance of that having happened many times before? None, in my judgment, unless you can extract an implied promise to pay on this particular occasion:..*

In **Coward v. Motor Insurers Bureau**, supra, the Court observed as follows:

> *"The expressions "for hire" and "for reward" have been used indifferently for very may years to express the monetary consideration for which a carrier of goods or passengers undertakes either by virtue of a special contract or by reason of his common law status as a common carrier to carry goods or passengers on a journey."*

The facts in **Albert v. Motor Insurers' Bureau**, supra, were of the simplest. Q, a docker worker, regularly carried fellow dock workers to and from work in his car when they were working in the same dock as himself. It was a regular and understood arrangement that they should pay him something in cash or kind. An accident occurred in which the plaintiff's husband, a fellow docker worker who was a passenger in the car in pursuance of the arrangement, was killed. The plaintiff brought an action against Q and was awarded damages and costs. Q failed to satisfy the judgement and the plaintiff brought an action the Respondent claiming the full amount of the damages and costs.

The question was whether Q had been bound to insure against passenger liability on the basis that his car been *"a vehicle in which passengers are carried for hire or reward"* Willis J. held that Q had not been bound, on the ground that *"hire or reward"* connoted a reward payable under a legally bidding contract and that no contractual relationship had been intended to result from the arrangement between Q and his fellow dock workers. The Court of Appeal affirmed his decision.

On appeal by the plaintiff, the House of Lords, allowing the appeal, held that:

> *" 'a vehicle in which passengers are carried for hire or reward' could not be construed as meaning any vehicle in which passengers were in fact being carried for hire or reward at the time of the occurrence of an event giving rise to a claim; the phrase would not cover a vehicle carrying a passenger on some isolated occasion, nor social arrangements between friends whereby one agreed to give the other a lift in his car for a particular purpose, the other contributing towards the expenses of the journey; the test to be applied was whether there had been a systematic carrying of passengers which went beyond the bounds of mere social kindness, ie whether the carrying had become a predominantly 'business' arrangement rather than a predominantly social one..."*

What I am able to distil from the above-mentioned cases are the following principles. Firstly, the use of a vehicle even on one isolated occasion for the purposes of carrying passengers for hire or reward makes it a vehicle in which passenger are carried for hire or reward. Secondly, for someone to qualify as a passenger for hire or reward, he or she must pay a fare for being conveyed in the vehicle. Consequently, where a person is carried in a vehicle by being given a lift or on social arrangements between friends, such a person would not qualify to be called a passenger for hire or reward. Thirdly, whether a passenger is carried for hire or reward is a question of fact the answer to which does not depend on whether there is a legally binding contract

In the present case, the limitation clause only excluded liability for fee-paying passengers. The Defendants' contention that the expression *"passenger for hire or reward"* extends to all passengers cannot be sustained. If that were the intention, the limitation clause would not have gone further to define or qualify the type of passengers it was excluding. The words *"for hire or reward"* in the limitation clause are meant to define or qualify the type of passengers that are being excluded. In the premises, it would be utterly wrong to interpret the limitation clause in the manner being suggested by the Defendant. The expression can only mean one thing and one thing only, a fee-paying passenger.

In any case, if the framers of Exhibit D had intended to exclude liability for passengers generally, I have no doubt that they would have used wording to that effect with clarity and directness. To illustrate my point, you only have to compare the wording of the limitation clause with *"use as goods carrying vehicle excluding the carriage of passengers"*.

At the end of the day, the all-important question that the Court ought to ask itself is whether or not the Plaintiffs paid a fee or fare in respect of their respective carriage in the Toyota Dyna.

The 1st Plaintiffs testified that he did not pay any fare to be conveyed in the Toyota Dyna. In fact, this evidence was not challenged. It will be recalled that the only

witness for the Defence, Mr. Mhone, simply affirmed to this Court that he was not present when the Plaintiffs were boarding the Toyota Dyna and that he does not know the agreement that was there between the Plaintiffs and the 2nd Defendant.

Further, no evidence was led to establish that the carriage of the Plaintiffs in the Toyota Dyna was organized in a way that went *"beyond the bounds of mere social kindness"*. Furthermore, the assertion by Counsel Tandwe that *"the Plaintiffs boarded the Toyota Dyna as passengers for hire or reward as was stated in the police report"* is not borne out by the evidence. I have read and read Exhibit P1 (the Police Report) and searched in vain for a statement therein to the effect that the Plaintiffs or any other passenger had paid a fare. Simply put, the Defendants did not bring any evidence to show that the Plaintiffs were fee-paying passengers in the said vehicle. It is, therefore, my finding that the Plaintiffs were not "passengers for hire or reward".

All in all, having found that the accident was caused by the negligence of the 2nd Defendant and again having found that Exhibit D did not exclude liability in respect of the Plaintiffs, it goes without saying that the Defendants must be held liable to compensate the Plaintiffs for the injuries that they sustained in the accident.

Conclusion

In the premises and by reason of the foregoing, I find that the 2nd Defendant was responsible for the occurrence of this accident in that he was negligent in his driving of the Toyota Dyna. I, accordingly, enter judgment in favour of the Plaintiffs against the Defendants, with costs, and order that damages be assessed by the Registrar.

Pronounced in Court this 15th day of June 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE