MALAWI JUDICIARY k

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2322 OF 2010

BETWEEN:

NGULUME PHIRI.....1st CLAIMANT

DIVA ROBERT PHIRI.....2ND CLAIMANT

AND

PRIME INSURANCE COMPANY LIMITED..... DEFENDANT

CORAM: The Hon Justice Healey Potani

Mr.Kusiwa, Counsel for the Claimants

Mr. Maliwa, Counsel for the Defendant

Mr. Mathanda, Court Clerk

JUDGEMENT

The claim in this action is for damages for pain and suffering, loss of amenities of life and disfigurement. There is also a claim for costs of the action.

According to the statement of claim, as amended, the action arises from a road accident involving a motor vehicle registration number BP 5053 Fuso truck. The claimants allege negligence on the part of the driver. They further alleged that by reason of the accident, they sustained bodily injuries thereby suffered loss and damage. The particulars of the alleged injuries, loss and damage are set out in the said statement of claim. The claimants further allege in paragraph 2 of the statement of claim that the defendant was at all material times insurer of the motor vehicle hence is sued in terms of section 148 of the Road Traffic Act (RTA).

In the defence, while admitting to have insured the vehicle, defendant denies the alleged negligence and further contends that it cannot be liable for any injuries on the ground that the insurance policy in respect of the vehicle did not cover for personal accident benefits, injuries or death arising out of use of the insured vehicle, and which includes injuries sustained by passengers thereof.

At the outset, the court reminds itself that these being civil proceedings, the required standard proof is proof on a balance or 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 the claimants' side the defendant having been precluded by the court from calling witnesses because of its failure to file trial bundle within the time stipulated in the court's order for directions.

The first witness to testify (PW1) was the 2nd claimant followed by the 1st claimant (PW2). The material evidence of these two witnesses is that on November 16, 2008, in Nkhotakota district, they were among a group of about 75 people that boarded a

Fuso truck registration number BP 5053 which had been hired by a Member of Parliament. They were heading to a political rally. In the course of the journey, at a place called Luluzi, the offside gates of the truck's body in which the people were opened as a result a lot of passengers on board fell off from the body. Two people died on the spot and a lot others sustained various kinds of injuries.

According to the 1st claimant, the injuries he sustained were cuts on the left eye, nose, upper lip and toe, multiple bruises and 2 broken teeth. He was taken to Nkhotakota District Hospital at which he was admitted for close to a month. He tendered in evidence as **EX PW3** a medical report to support his testimony on the nature, extent and effects of the injuries he sustained.

In the case of the 2nd claimant, the injuries he sustained were bruises on the hands, buttocks, arms and legs which have left him with scars. He was taken to Matika Health Centre which referred him to Nkhotakota. The wounds took two months to heal during which he was treating them with medicines he was buying from Kasitu Seventh Day Adventist Clinic He tendered in evidence as **EX PW1** a medical report. He also tendered in evidence as **EX PW2,** a police report relating to the accident.

In cross examination both witnesses were asked why they allege and believe that the defendant was insurer of the truck and their answer was that they leant that from the police.

It is trite law that the purpose of pleadings is to identify issues in dispute and the real points to be discussed and decided. See **Yanu-Yanu v Mbewe (P.B.) and (M.M.) Mbewe** MSCA 10 ALR 417 at 420 per Jere J. In the instant case, from the statement

of claim and the defence, so too the evidence in totality, there is no dispute that the accident out of which the action arises indeed occurred. And from the evidence in totality, the court also has no basis to disbelieve both claimants as regards the nature, extent and effects of the injuries they sustained.

The issues in dispute and requiring the court's determination are whether the accident was due to the negligence of the truck driver and if yes whether defendant is liable as an insurer for the injuries/damages suffered by the claimants.

Was the accident caused by the negligence of the driver of the truck? In the statement of claim, the claimants plead that they rely on the doctrine of *res ipsa loquitur* on the allegation of negligence on the part of the truck driver. According to **Clerk and Lindsell on Torts,** 14 editon at paragraph 975, the doctrine of *res ipsa loquitur* is said to apply in the following manner:

It is only a convenient label to apply to a set of circumstances, in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the doctrine of res ipsa loquitur is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability.

The scope and application of the doctrine was extensively discussed by the highest court in the country, the Malawi Supreme Court of Appeal in **Phekani v Automotive Products Ltd** [1996] MLR 23 (SCA). It was held, among others, that the doctrine of *res ipsa loquitur* has no application where the cause of the accident is known. Where the cause of the accident is known, it becomes the duty of the plaintiff to prove whether, upon the facts of the case, negligence on the part of the defendant is

proved or not. Reverting to the present case, the 2nd claimant Diva Robert Phiri in paragraph 6.5 of his witness statement states as follows:

In the course of travelling, upon reaching at or around Luluzi are the rope which was tied to support the hitch of the body cut off causing the offside gates of the vehicle to open

From this evidence, it is clear that the cause of the accident is or was known by the claimants; such a cause being the cutting off of the rope used to support the hitch of the body resulting in the offside gates to open. In the circumstances of the case and on the authorities, the doctrine would not apply. It is therefore the duty of the claimants to establish or prove, on the facts, negligence on the part of the driver. Looking at the statement of claim, apart from stating that they would rely on the doctrine of *res ipsa loquitur*, the claimants have not set out or averred any particulars of alleged negligence. In **Gross v The Registered Trustees of Banja La Mtsogolo** [1998] MLR 103 (HC) the requirement to aver and prove negligence was stressed. The court stated thus:

In the pleadings I have seen no particulars of negligence and incompetence having been pleaded. No facts were adduced in evidence to show the nature of the negligence and the incompetence. At page 31 in the case of Donoghue v Stevenson [1923] All ER 1 Lord Macmillan said: "Negligence must both be averred and proved"

The claimants having not particularized the alleged negligence in the pleadings, they cannot be allowed to prove it by way of evidence. Their case has to be confined to the doctrine of *res ipsa loquitur* which they have chosen to rely on and as already found and held it does not apply to the facts of the present case. The court would, in passing, hasten to say that may be prudence would demand that reliance on the doctrine should ordinarily be a plea in the alternative. In the end result, this court would find and hold that the claimants have failed to prove negligence on the part of

the truck driver. That being the case, the claim against the defendant cannot be sustained as it is dependent on the liability of the driver.

Accordingly, the claimants' action is dismissed with costs to the defendants.

Made this day of January 12, 2018, at Blantyre in the Republic of Malawi.

HEALEY POTANI

JUDGE