

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 558 OF 2016**

BETWEEN

ELUFE KANJERWA CLAIMANT

-AND-

HASSAN SAIDI 1ST DEFENDANT

REUNION INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Mipande, of counsel, for the Claimant

Mr. Katuya, of counsel, for the Defendants

Mrs. Jessie Chilimapunga, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

The Plaintiff is claiming damages for personal injuries arising as a result of alleged negligence of the 1st Defendant, being the rider of a motor cycle registration number LL 1129 Sanlg insured by the 2nd Defendant. The Defendants deny liability.

The case of the Plaintiff, as set out in the Statement of Claim, is as follows. On or about 1st July 2016, the 1st Defendant was riding the motor cycle from the direction of Matawale junction heading towards Zomba Army Airwing and upon arriving at or near Village Headman Mwandakale's residence he negligently hit the Plaintiff who was crossing the road from right to left. The alleged negligence has been particularized as follows:

- “(a) Driving at an excessive speed.*
- (b) Driving without due regard to the safety of other road users, particularly the plaintiff herein.*

- (c) *Failure to control or manoeuvre the said vehicle in any way so as to avoid hitting the plaintiff.*
- (d) *Generally failing to observe road traffic rules and regulations”.*

It is further alleged that, as a result of the accident, the Plaintiff sustained the personal injuries, as particularized in Statement of Claim. The Plaintiff claims damages for pain and suffering, damages for loss of amenities, damages for disfigurement, special damages in the sum of K13,500.00 being the cost of Death Report and K10,500 being the cost of Police Report and costs of the action.

By their Defence, the Defendants deny all allegations of fact contained in the Statement of Claim. They equally deny (a) that the accident occurred in the manner alleged in the Statement of Claim or at all and (b) the alleged or any negligence on the part of the 1st Defendant either as alleged and particularized therein or at all. It has also been averred that the accident was caused solely or, alternatively, contributed to by the negligence of the 1st Plaintiff in that:

“while the 1st defendant was driving the said motor vehicle along the said road properly the plaintiff who was on the side of the road and had already seen the approaching vehicle inexplicably suddenly ran into the road in an attempt to cross the road but within a short distance from the vehicle and the 1st defendant notwithstanding the exercise of reasonable care and skill in the emergency thereby created was unable to avoid the collision.”

The Defendants also make no admission as to the alleged or any injury, loss or damage. Further, the 2nd Defendant states that its liability to indemnify the insured or an authorized driver is limited to the maximum amount stipulated in the policy of insurance issued by it in respect of the motor cycle and a third party, including the Plaintiff, cannot recover any sum above the said policy limit.

The Court reminds itself that, as these are civil proceedings, the required standard of proof is proof on a balance of probabilities. This is a lesser standard than that required in criminal proceedings which is proof beyond reasonable doubt. The Court also bears in mind that a party that alleges the existence of certain facts bears the burden of proof in respect of such facts: **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 Claimant as the party who has asserted the affirmative to prove on a balance of probabilities that he sustained injuries and suffered damage as a result of the accident which was caused by negligence of the 1st 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 Claimant to the Defendant except perhaps where the Defendant has pleaded contributory negligence. It is, therefore, not sufficient for the Claimant 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 himself. In examination in chief, he adopted his Witness Statement whose contents more or less mirror what is alleged in the Statement of Claim. In this regard, I deem it unnecessary to re-state everything therein except the Plaintiff's narration of how the accident occurred. This is to be found in paragraphs 2 to 8 which read as follows:

- “2. ...The accident occurred at Mwandakale's residence.
3. At the material time I had been crossing the road at Matawale Trading Centre from right to left as we face the direction of Airwing.
4. I had crossed the white line and I was about to finish crossing the road when the 1st defendant, driving the 2nd defendant's insured motor cycle from the direction of Matawale Junction heading towards Zomba Army Airwing hit me.
5. The said 1st defendant had been riding the said motor cycle in high speed despite that he was passing through a busy place and he did not stop, reduce speed, or in any way avoid hitting me as I was crossing the road in his plain sight.
6. After the accident, the plaintiff was taken to hospital where he was receiving treatment. Two police officers arrived at the hospital and they, among others, showed me an insurance disk for the vehicle that hit the plaintiff and I noted and recorded that the said vehicle was insured by the 2nd defendant herein under insurance number 130639311 valid from 01/02/2016 to 17/01/2017. The said police officers returned with the said insurance disk, and I only kept the said insurance details on a piece of paper as they advised me to.
7. A police report was issued for the accident. I refer to the said police report marked “EK 1”
8. I have noted that the insurance details as I quoted above are the same as indicated on the police report exhibited herein.”

In cross-examination, PW1 testified that he saw that the motor cycle lights were on and that it was being driven at a fast speed. Based on the said evidence, the following Q and A ensued:

Q: Being 7 pm, it was dark and there was a bike coming so you had a duty to protect yourself by waiting until the motor cycle had passed you before you could cross the road, not so?

A: No, it was far, hence I decided to cross the road.

Q: You said the motor cycle was in great speed, right?

A: Yes

Q: So you decided to cross the road knowing fully well that the motor cycle was approaching at great speed?

A: I crossed and I was hit after reaching the other side.

Q: Do you know where Matawale road is in Zomba

A: It is at a junction with Jali Road

Q: This accident happened near the junction.

A: No! It was after the junction

Q: Just after the junction

A: A little bit after the junction

Counsel Katuya then asked the Plaintiff questions about a disk and the Q and A went as follows:

Q: Did the police officers record the details of the accident?

A: Yes, two officers came to see me at the hospital and showed me a disk which they had removed from the motor cycle.

Q: What did you see from the disk?

A: I saw the registration number of the motor cycle was LL 1129 and that it was insured by Reunion Insurance Company Limited.

Q: When did they visit you at the hospital?

A: Two weeks after the accident

Q: Are you lying?

A: No I am not.

Q: Why did they visit you?

A: I do not know. But they told me that the rider of the motor cycle is Mr Hassan Saidi and he had not gone to the police station again since the accident. Hence they were asking me if the said Mr Hassan Saidi had visited me in the hospital to which I said **NO**.

Q: The motor cycle was given back to the rider a day after the accident with the insurance disk intact on the motor cycle; how would the police bring you the disk?

A: I don't know, but they brought me the disk after 2 weeks.

In re-examination, the Plaintiff was asked why, having seen the oncoming motor cycle, she decided to cross the road. In response she stated that she started to cross the road because the motor cycle was very far but suddenly the motor cycle got closer and the rider did not swerve to try and avoid hitting me.

The Defendants called one witness, namely, the 1st Defendant. He adopted his witness statement as his examination in chief and the material part is as follows:

"6. On the day of accident, I was riding the motor cycle from the office near Mulunguzi going home near Zomba – Chinamwali Army Airbase. At Matawale Junction, I turned right from the Zomba – Chinamwali M1 Road into the Malawi – Jali Road. I passed through the busy Matawale Trading Centre around 7PM. A great distance thereafter, I saw a car coming from the opposite direction on my right hand side in high speed. I also saw the claimant walking towards the road from the right hand side. As my motor cycle and the car were closing up, the claimant unexpected entered the road while running. She ran fast because of the approaching which was roughly about 10 metres away when she entered the road. The car hooted and I also sounded the horn. Because she harried across the road in high speed and the motor cycle was closer than the car she ended up hitting motor cycle along the right hand side middle of the motor cycle. She also hit my right hand elbow while my hands were still on the handles. In the same nick of time, I tried to swerve to the left where I fell down with the motor cycle. She also fell down in the road.

7. I called for a minibus and we picked her up so she could be taken to the hospital but we first had to go to the police to report the accident. One police officer escorted us to Zomba Central Hospital. Thereafter, the police officer and I visited the accident scene and I explained everything that had happened. We then took the motor cycle and went to the police station. The police officer told me that when a driver gets involved in an accident there is need for him to pay a fine

and that I also needed to pay a fine. I was asked to pay K20,000 before I could get back motor cycle. The following day I managed to find K10,000 which I paid and got the motor cycle back. One of the officers wanted to issue a receipt but another officer told her not to issue any receipt. They never asked me for the balance after this.

8. *I verily believe that the accident was caused by the claimant who ran into the road in an attempt to quickly cross the road in front of on-coming car which was coming at high speed and ended up colliding with the motor cycle which was properly on the left side of the road."*

In cross-examination, the 1st Defendant confirmed that the registration number of the motor cycle is as stated in the statement of claim, that is, LL 1129. He admitted that he is not a licensed motor cyclist.

Counsel Mipande then quizzed the 1st Defendant on the steps he took to avoid hitting the Plaintiff and the Q and A that ensued went as follows:

Q: Your statement does not say you applied emergency brakes, why did you not apply the same?

A: I applied emergency brakes.

Q: Show me in your statement where you said you applied emergency brakes.

A: [Silence - no response]

Q: Did you hoot?

A: Yes I hooted.

Q: How far were you when you saw the claimant first?

A: About 25-30 meters.

Q: What was the claimant doing?

A: She was walking towards the road.

Q: Was she running?

A: No.

- Q:** You said she was running as she crossed the road. When did she start running?
- A:** I didn't see when she started running but she was running when she was crossing the road.
- Q:** So, when you saw her 25-30 meters away, she disappeared from your eyes that you didn't see her starting to run, but she only appeared again when she was running while crossing the road?
- A:** Yes.
- Q:** Where were you looking?
- A:** In front where I was going.
- Q:** How come you did not see her starting to run?
- A:** I don't know.
- Q:** How far from her were you when you saw her running while crossing the road?
- A:** About 5 meters.
- Q:** Did you swerve in order to avoid hitting her, considering she was 5 metres away?
- A:** No I only swerved after the collision.
- Q:** What did you do when you saw her 5 meters away crossing the road while running?
- A:** I hooted.
- Q:** What else?
- A:** I applied emergency brakes.
- Q:** Do you recall what I told you earlier that your witness statement does not say that you applied emergency brakes and your witness statement is your evidence in chief in this matter?
- A:** Yes I recall.
- Q:** So, having seen the claimant too close to you on the road, you found it wise to hoot, not to swerve or apply emergency brakes is that correct?

A: [Silence – no response]

Counsel Mipande concluded his cross-examination by asking the 1st Defendant if he knows an insurance disk and his answer was in the negative. He also confirmed that he would not know if the police had removed it from the motor cycle, since he does not know it.

On being re-examined by Counsel Katuya, the 1st Defendant more or less repeated what is contained in his witness statement.

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; (b) the duty has been breached; and (c) as a result of that breach he 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 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.”

The dicta by Justice Banda was cited with approval by the Supreme Court of Appeal in **Southern Bottlers Limited & another v. Charles Chimdzeka MSCA Civil Appeal No. 41 of 1997 (unreported)**.

Looking at the evidence in the present case, I am satisfied that the 1st Defendant was reckless and negligent in the manner he rode the motor cycle at the material time having regard to the fact that the accident took place at a highly populated area. Further, by merely focusing on what was happening in front of the motor

cycle, he failed to keep a proper look-out as is demanded of a reasonably skillful driver.

Furthermore, a reasonable and prudent motor cyclist seeing a person crossing the road five meters ahead of him “and running as it were” would not decide to hoot. As was rightly submitted by Counsel Mipande:

“Hooting is intended to alert a person of the impending presence of a motor cycle/vehicle at a place where that person is or is likely to be and therefore the said person, upon being alerted, he/she must avoid being found at the said dangerous place. This obviously takes hearing of the hoot on the part of the person and then reacting to it by moving away or avoiding to be found at the said dangerous place. This is clearly a chain of events which takes time and cannot be expected to be performed when a motor cycle is five meters away from that person. The person may not have enough time to hear and react to the hooting by moving away or avoid being found at the dangerous place.

The reasonable and prudent thing to do on the part of a motor cyclist in the circumstances is to apply emergency brakes while attempting to swerve or in any way avoid colliding with the claimant.”

In the present case, it being clear that the 1st Defendant did not apply emergency brakes nor swerve or do anything to avoid colliding with the Plaintiff but rather decided to hoot when the motor cycle was only five meters away and also decided to swerve only after the collision, the 1st Defendant failed to do what a reasonable and prudent motor cyclist would do in the circumstances and hence he was negligent.

In view of the foregoing, I hold that the Plaintiff has, on a balance of probabilities, succeeded in his claim for damages for personal injuries sustained and loss suffered due to the negligent riding of the motor cycle by the 1st Defendant.

I now turn to the assertion by the Defendant that the accident was caused by the negligence of the Plaintiff. Having held that the 1st Defendant was guilty of negligence, I cannot at the same time find that the accident was wholly caused by the Plaintiff. In the premises, if anything at all, the Plaintiff can only be found to have contributed to the cause of the accident, that is to say, he is guilty of contributory negligence.

Counsel Katuya submitted that the accident was caused by the negligence of the Plaintiff. The arguments were put thus in the Final Written Submissions:

- “8. *In cross-examination, Counsel for the claimant dwelt at length on whether or not the 1st defendant was licensed to ride the motor cycle. The 1st defendant’s honest answer was no. With due respect, the issue of whether or not the 1st defendant had a license is an issue for criminal law under the Road Traffic Act. It has very*

little to do with the question as to who between the claimant and 1st defendant is to blame for the accident. It is a question of causation – cause and effect. Is the fact of the 1st defendant being a non-holder of a driving licence for motor cycles the cause of the accident? The answer is No. Using the “but for” test one cannot say with a sense of conviction that the accident would not have happened but for the absence of a driving licence on the part of the 1st defendant. If made, that would be a logically and evidentially absurd conclusion.

9. *From the totality of the evidence, it is the negligence of the claimant that caused the accident by running in front of an approaching car and attempting to cross the road in a hurry wholly oblivious to the motor cycle which was about to pass the oncoming car going in opposite directions. It is her who hit the motor cycle.*
10. *Her allegation that she saw the motor cycle at a distance and when she was crossing the road the motor cycle was far away and it was moving very fast doesn't make sense. If it was far away as alleged, how did she then collide with it? The version that makes logical and practical sense is the one given by the 1st defendant. There was a car coming from the opposite direction and the claimant who was on the same side of the road as the car, plunged into the road when the car was close in an attempt to cross the road ahead of the car and ended up colliding with the 1st defendant's motor cycle which was properly proceeding on the left side of the road. The claimant tried to conceal the fact that she ran in front of an approaching car and said that there was no any other vehicle apart from the motor bike. She was peddling a lie.”*

The law on contributory negligence was tersely put by Lord Denning in **Jones v. Livox Quarries Limited [1952] 2 QB 608** at p. 615 as follows:


“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might hurt himself; and in his reckonings he must take into account the possibility of others being careless.”

In the present case, much as the 1st Defendant was negligent, the Plaintiff was also negligent. She acted in sheer disregard of her safety and welfare by attempting to cross the road when she was aware of an approaching car whose speed she had not ascertained. If the Plaintiff had acted as a reasonable person and properly considered her actions, she could have clearly foreseen that her actions would cause harm or injury to herself. It is a settled principle of law that a pedestrian also owes a duty of care to other road users to move with due care: see s.117(5) of the Road Traffic Act.

In view of the foregoing, I find that the Plaintiff was guilty of contributory negligence to the extent of two-fifths. I, therefore, hold that the Plaintiff was to the extent of two-fifth responsible for the cause of the accident giving rise to the claims in this action.

All in all, I hold that (a) the 1st Defendant was responsible for the occurrence of the accident to the extent of three-fifths, and (b) the Plaintiff was guilty of contributory negligence to the extent of two-fifths. I, accordingly, enter judgment in favour of the Plaintiff against the Defendants, with costs, to the extent of three-fifths of her claims and order that damages be assessed by the Registrar.

Pronounced in Court this 30th day of May 2018 at Chichiri, Blantyre, in the Republic of Malawi.

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by a series of loops and a long horizontal stroke extending to the right.

Kenyatta Nyirenda
JUDGE