



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.232 OF 2015**

BETWEEN

AWALI DURBAN ISSA PLAINTIFF

-and-

MPHATSO M. BANDA..... 1ST DEFENDANT

-and-

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

**CORAM: THE HONOURABLE JUSTICE CHIRWA
Chaekha of Counsel, for the Plaintiff
The 1st and 2nd Defendants and Counsel not present
Mr O. Chitatu, Official Court Interpreter**

JUDGEMENT

By a Writ of Summons, Specially Endorsed, issued on the 23rd day of June 2015, the Plaintiff brings this action against the above named Defendants claiming (a) damages for inconvenience (b) damages for the loss of use and (d) costs of the action.

Statement of the cases for the parties:

The Plaintiff's Case: -

It is the Plaintiff's case as per his Statement of Claim that he is the owner of motor vehicle registration number DA 3759 which was hit by the 1st Defendant's motor vehicle registration number MJ3475 insured by the 2nd Defendant. It is the Plaintiff's case further that the said collision was caused by the negligent driving of the 1st Defendant's said motor vehicle. The particulars of the alleged negligence have been provided as follows:

- (a) Failing to keep any or proper look out;
- (b) Failing to control the vehicle in such a way as to avoid hitting the Plaintiff's vehicle;
- (c) Failing to stop, slow down or avoid hitting the Plaintiff's vehicle.
- (d) Driving at an excessive speed in the circumstances.

It is the Plaintiff's case still further that as a result of the accident/collision his vehicle was extensively damaged, such that he could not use the vehicle and as a result he suffered a lot of inconvenience as he was not able to attend school and other assignments. It is the Plaintiff's case further that as a consequence thereof he has suffered damages for loss of use.

The Defendant's Case:

By their joint Defence to the Statement of claim dated the 3rd day of July, 2015, the Defendants, admit being the driver and insurer of motor

vehicle registration number MJ 3457, respectively. The Defendants however, deny the alleged negligence and the particulars thereof. They further deny the alleged claims for inconvenience and loss of use. However, on a without prejudice basis, they contend that the 2nd Defendant's liability, if any, is subject to the driver of the motor vehicle being found liable and that the 2nd Defendant's liability is only to indemnify the owner of the motor vehicle to the extent of the maximum liability provided in the policy of insurance between the 2nd Defendant and the owner of the motor vehicle.

The Defendants have, otherwise, closed their Defence with a general traverse.

The Trial of the action:

When this action was called for trial on the 3rd day of July, 2018 only Counsel for the Plaintiff was present. Both the Defendants and their Counsel were not present. This Court being satisfied that the Notice of Hearing appointing the said date of hearing had been duly served on the Defendants' Counsel, Messrs Destone & Company, on the 25th day of June 2018, proceeded to hear the Plaintiff's case after striking out the Defendants' Defence in terms of Order 16 Rule 7(1) (c) of the Courts (High Court) (Civil Procedure) Rules which provides as follows:

*"7 (1) The Court may proceed with a trial in the absence of a party but-
(c) where a defendant does not attend, it may strike out his defence and dismiss his counter claim"*

The Burden and Standard of proof:

This Court bears in mind the fact that the burden of proof in a civil action rests on the party who asserts the affirmative, hence

the latin maxim: *ei qui affirmat non ei qui negat incumbit probatio*, see: **Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd** [1942] AC 154 at p.174 and **Limbe Leaf Tobacco v Chikwawa & Others** [1996] MLR 480 at p. 484.

This Court also bears in mind the fact that the standard of proof in a civil action is merely on a balance of probabilities, see: **Miller v Minister of Pensions** [1947] All E.R 372, at p 374 and **Chinyama v Land Train Haulage** [1999] MLR 99 at p. 102

Issues for determination:

The main issue for determination in this action is whether the 1st Defendant was guilty of negligence as alleged.

A determination of this issue requires the Plaintiff to answer the following questions in the affirmative:

- (a) Was there a duty of care owed by the 1st Defendant to him?
- (b) Was there a breach of that duty by the 1st Defendant? and
- (c) Was there any damage resulting from the said breach of duty?

see: **Donoghue v Stevenson** [1932] A.C 562 quoted with approval in **Kadawire v Ziligone and Another** [1997] 2 M.L.R 139 p 144.

The Evidence:

To prove his case, the Plaintiff called only one witness, the Plaintiff himself (PW1). PW1 adopted his written statement and produced Exhibits "P1" to "P5" as his evidence in-chief. There was no cross-

examination. This Court will refer to PW1's evidence whenever necessary in the determination of the various questions herein.

Determination:

The first question to be determined is: "did the 1st Defendant owe the Plaintiff a duty of care?"

The authorities abound 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- see: **Banda & Others v ADMARC & Another** [1990] 13 M.L.R. 59 at p 63 and **Kachingwe & Kachingwe & Company v Mangwiro Transport Motorways Company Limited** 11 M.L.R. 362 at p 367.

Turning to the evidence before this Court, the evidence of PW1 as per his written statement is as follows:

"5.2. I drove the vehicle with school children from home going to school at Mlodza LEA School. When I got school where I intended to drop off the children I pulled off the road and stopped along the road. The school children alighted from the car.

5.3. As the children were alighting from the car I saw a minibus registration number MJ 3475 stop behind my car dropping and picking people.

5.4. Suddenly I just heard some bashing noise and realised that the minibus had driven into my car at the back. The car was damaged."

There was no evidence before the court to contradict this evidence nor was there any cross-examination made to discredit the same.

From the authorities cited above, it would follow that the 1st Defendant as a driver of motor vehicle registration number MJ 3457 on the road at the material time owed a duty of care to the Plaintiff whose property (i.e. the motor vehicle registration number DA 3759) was at the material time also on the said road.

The answer to the question above stated is thus in the affirmative.

The second question to be determined is: "did the 1st Defendant breach the said duty of care."

On the duty of care which a driver of a motor vehicle owes to other road users Mtegha J (as he then was) in the case of Kachingwe & Kachingwe & Company v Mangwiro Transport Motorways Company Limited (*supra*) quoting with approval the following words of Lord Macmillan in Hay (or Bourhill) v Young [1943] A.C. 92 at p 104,

"What duty then was incumbent on him? [T]he duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway.... Proper care connotes an avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on

There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree".

went on to state as follows: -

"It is the duty of a person who drives a motor vehicle on a highway to use reasonable care to avoid causing damage to persons and other vehicles or property on or adjoining the road. It has been further stated that reasonable care means care which an ordinary skilful driver would have exercised under all the circumstances...."

see: also the case of **Jussab vs Mussa & Another** [1991] MLR 116 at p. 122. The general rule is that a vehicle should be driven at a speed which enables the driver to stop within the limits of his vision, see: **Burgess v Aisha Osman & Jimu** [1964 -66] ALR (Mal) 475.

In the instant case, the fact that the 1st Defendant failed to stop in time to avert the collision with the Plaintiff's motor vehicle is in consonance with the fact that the 1st Defendant was speeding, see: **Kadawire v Ziligone & Another** (*supra*) relying on the case of **Republic v Sinambale** 4 A.L.R. (Mal) 191 where it was held that it is the driver's duty to drive at a speed which will allow him to stop in case of sudden emergency.

The evidence of PW1 here is as stated in paragraphs 5.3 and 5.4 of his written statement (*supra*).

The fact that the 1st Defendant hit, from behind the Plaintiff's motor vehicle, which was at the material time stationery, is also evidence of the fact that the 1st Defendant had failed to keep any proper look out for the property of other people which may be on the road, to wit, the Plaintiff's motor vehicle herein. It further shows that the 1st Defendant had failed to control his motor vehicle in such a way as to avoid hitting the Plaintiff's vehicle which was at the material time stationery or had kept too close to the Plaintiff's said vehicle.

In the premises, this Court is inclined to find as a fact that the 1st Defendant as a driver of motor vehicle registration number MJ 3475, at the material time, breached his duty of care to the Plaintiff.

The answer to the question above stated is thus also in the affirmative.

The third and last question for determination is: "did the Plaintiff suffer damage as a result of the said breach of duty of care?"

The evidence of the PW1 on this point is in paragraphs 5.4 and 5.6 of his written statement and is as follows:

"5.4. Suddenly I first heard some bashing noise and realised that the minibus had driven into my car at the back. The car was damaged.

5.6. As the result of the damage to my vehicle I was unable to use the vehicle as it was extensively damaged. In actual fact it was declared a write off by the insurer."

This evidence also remained uncontroverted. This Court has no reason to disbelieve the Plaintiff in his evidence as regards the extent of the damage caused to his motor vehicle. This Court is thus inclined to find as a fact that the Plaintiff indeed suffered damage as a result of the breach by the 1st Defendant of his duty of care.

The answer to the question above stated is thus also in the affirmative.

Given that the Plaintiff has succeeded in answering all the above questions in the affirmative, this Court would, in the premises, not hesitate to find the 1st Defendant guilty of negligence. This Court thus proceeds to enter a judgment against the Plaintiff for damages. And since the Defendants have in their defence unequivocally admitted

that the 2nd Defendant was at the material time the insurer of the motor vehicle registration number MJ 3475, this Court would thus proceed to also enter a judgment against the 2nd Defendant for damages. The liability of the 2nd Defendant is, however, to be limited as provided for in the policy of insurance covering the 1st Defendant's said motor vehicle.

The judgment entered herein is for damages for the loss of use by the Plaintiff of his said motor vehicle for a period of 4 months. This Court has found no merit in the Plaintiff's claim for damages for inconvenience. The Plaintiff has not substantiated the same both in his pleadings and the skeleton arguments adopted at the trial of this action. It is the considered view of this Court that the claim for damages for loss of use does include the inconvenience caused as a result of the deprivation of the use of the chattel by a party to an action. It cannot therefore, be claimed separately. The case authorities also show that for the loss of use of a non- profit earning chattel the owner thereof is entitled to an award of damages for the loss of its use during the period of repair, see: **The Greta Holmes** [1897] A.C. 569. The damages are to be assessed by the Registrar in the event that the parties hereto are unable to reach at an amicable agreement on the same.

The Costs:

The costs of an action are in the discretion of the Court (see: Section 30 of the Courts Act) and normally follow the event (see: Order 31 Rule 3 (2) of the Courts (High Court) (Civil Procedure) Rules and also the case of **Matanda v Sales Services Limited** [1990] 13 M.L.R 216 at p 218. The Defendants being the unsuccessful parties in this action, this Court thus proceeds to exercise its discretion on costs by ordering the Defendants to pay the costs of this action to the Plaintiff. The costs are also to be taxed by the Registrar in the event that the parties hereto

are unable to reach at an amicable agreement on the same. It is so ordered.

Dated this 20th day of July 2018.


Chinwa J
JUDGE