

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY No. 716 OF 2013

BETWEEN:

LINGTON NDELEMA

1ST PLAINTIFF

JUNIOR NDELEMA

(a minor through his father and next friend, LINGTON NDELEMA)

2ND PLAINTIFF

AND

ISAAC DOZOLO

1ST DEFENDANT

PRIME INSURANCE COMPANY LTD

2ND DEFENDANT

JUDGMENT

The plaintiffs commenced this action by way of writ of summons which was filed on 22nd July 2013. The plaintiffs' claim is based on the tort of negligence following a road accident that occurred on 23 May 2013. The plaintiffs are suing the 1st defendant as the driver of the motor vehicle which caused the accident and the 2nd defendant is being sued in its capacity as the insurer of the motor vehicle which was driven by the 1st defendant.

In terms of the pleadings, in the statement of claim the plaintiffs pleaded that they were at all material times a pedestrian at or near Limbe Bus Stage along Dalton Road in Limbe. The plaintiffs plead that due to the 1st defendant's negligence they were hit when they were lawfully walking on the extreme nearside of the road. The plaintiffs state that as a result of the accident the 1st plaintiff sustained injuries to the left knee and the 2nd plaintiff sustained multiple bruises to both knees and forearms. The plaintiffs claim damages for pain and suffering, for loss of amenities, for disfigurement, the cost of medical and police reports and costs of the action.

The defendants served a defence contending that Lingston Ndelema has no capacity to represent the minor. The 2nd defendant also denied the fact that they are the insurers of the said vehicle and that the alleged insured motor vehicle was involved in the alleged accident. The defendants also denied all particulars of negligence, injuries and special damages and all the reliefs claimed. The defendants alternatively pleaded that the said accident was caused as a result of the contributory negligence of the plaintiffs.

The evidence

On the date of trial the evidence that was called was only that of the plaintiffs' and the defendants did not lead or tender any evidence. The 1st plaintiff adopted and tendered the witness statement as part of his evidence. The witness testified that on 23 May 2013 he was with with five years old son (the 2nd plaintiff) as he walked toward Limbe Health Centre when they were hit by a vehicle registration number ZA 326 which was being driven by the 1st defendant. The evidence of the 1st plaintiff is that the driver of the said vehicle did not blow the horn or otherwise alert the plaintiffs of his presence. According to the 1st plaintiff the 1st defendant was over speeding and failed to control the vehicle and hit the plaintiffs as they were walking on the extreme nearside of the road resulting in the plaintiffs sustaining injuries. The 1st plaintiff testified that after the accident they were taken to Limbe Health Centre by the driver of the minibus who left them there and never came back. The plaintiffs were then referred to Queen Elizabeth Central Hospital where they obtained the medical treatment and is marked as exhibit LN 2. This court finds the contents of exhibit LN2 are inadmissible as the author of the document was not called to testify. A similar decision in regard to the admissibility of documentary exhibits is made in respect of the medical report of the 2nd plaintiff marked exhibit LN3 and the police report exhibit LN1.

In cross examination the following issues were recorded: that the 1st plaintiff was walking on the left side of the road and held his son, the 2nd plaintiff. That the witness did not see where the minibus was coming from since they were hit from their backs. The witness stated that the police did not visit the scene of crime but he went to the police station to give a statement and he noted the number plate of the motor vehicle which hit him as ZA 326. The witness confirmed that he was treated at QECH on two occasion on 23 May 2013 and 7 July 2013 but it was his brother who accompanied him on the medical visits who went to collect the medical reports.

In re-examination the witness confirmed that there was a distance between where the plaintiffs were walking and the road.

The plaintiff's arguments are under the following heads:

Non-compliance with the rules

In regard to the defendant's pleading that Lington Ndelema has no capacity to represent the 2nd Plaintiff who is a minor in absence of a written certificate of consent or a filed certificate from a legal practitioner at the time the action was being commenced. The plaintiffs argue that Lington Ndelema is the father of the minor plaintiff and that the minor suffered injuries as a result of the accident in issue. That the minor was present during the trial and that he did not oppose to being represented by his father. The plaintiffs are of view that it would be unjust to deny the 2nd plaintiff of the remedy which he is entitled to under the law for a mere irregularity.

Since the defence did not lead any evidence on this pleading and the witness was not cross examined on it, it will be considered to have been abandoned. In any event this court finds it just and reasonable to exercise its discretion under Order 2 rule 1 of the Rules of the Supreme Court to cure the irregularity pointed out by the defendants so that strict adherence to the rules should not deprive the 2nd plaintiff justice in this matter.

Admissibility of the police and medical reports

The plaintiffs argue that police report and medical report which they exhibited should be admissible because they are documents prepared by public officers in performance of a public duty and the hearsay evidence rule need not apply to them. That alternatively both documents ought to be admissible as a matter of convenience as was posited in the case of *Jimu v NICO General Insurance Company Ltd* Civil Cause No. 984 of 2007. That since there was no evidence challenging them, they ought to be relied on as proof on the required balance of probability as stated in the case of *Haji v Chozi and others* Civil Cause no. 1040 of 2010.

This court finds that in this civil matter all documentary evidence for which the authors were not called are only admissible to show the processes that were taken by the parties but the contents of the documents are inadmissible.

Negligence

The plaintiff argues that the 1st defendant owed the plaintiffs a duty of care. In that he had a statutory duty not to drive negligently or recklessly and not to drive a vehicle on a public road without reasonable consideration for any person using the road under section 126 (i) and 127 (ii) of the Road Traffic Act alongside a common law duty to take reasonable care towards other road users like the plaintiffs who were pedestrians. That the 1st defendant breached his statutory and common law duty by driving negligently as the plaintiffs have proved that the 1st defendant failed to break, swerve, steer or manoeuvre the vehicle so as to avoid hitting the plaintiffs; that he failed to blow his horn or otherwise alert the plaintiffs as to his presence so that the plaintiffs could take avoiding action; that he failed to comply with road traffic regulations generally and he misjudged the distance between his vehicle and the plaintiffs and that he drove without due regard to other road users. That as a result of the accident which was caused by the 1st defendant's negligence, the plaintiffs suffered injuries as explained by the witness. That the plaintiffs also suffered the costs of obtaining the medical report and police report. That these injuries and loss would not have been suffered but for the negligence of the 1st Defendant.

The 1st Plaintiff prays that he should not be found guilty of contributory negligence as he took reasonable care for his own safety to avoid accidents in general that is why he was walking on the extreme nearside of the road. That in the circumstances, every reasonable prudent man would not have foreseen that he would be hit by a car as he was a bit far from the road.

The plaintiff argues that in the cases of *Dilla v Rajani* 11 MLR 113 and *Kalima v Kawalala and another* Civil Cause no. 34 of 2012, the court found that children of six years could not be guilty of contributory negligence. That since the 2nd plaintiff was 5 years old at the time of the accident the plaintiffs asserts that he cannot be found guilty of contributory negligence. This court agrees with the submission of the plaintiff that a child cannot be guilty of contributory negligence.

The defence arguments

Although the defendant did not analyse the evidence of the 1st plaintiff they had earlier on filed skeleton arguments raising the following statements and issues:

1. that in the case at hand, the mere happening of accident is not sufficient proof of negligence.

2. that the defendant's insured driver and the plaintiffs being road users by motor vehicle and foot, respectively, had a duty of care to exercise separately towards each other as pertinently emphasized in the case of *Donoghue vs. Stevenson* [1932] AC 569.
3. that if it can be proved that the accident occurred due to the negligence of the insured driver and that the defendant is liable to do so to the extent of the maximum liability limit contained in the contract of insurance between itself and the owner of the motor vehicle.

The law

Drivers are under a duty to use reasonable care to avoid causing damage to other persons or vehicles. According to the case of *Nicholson v Lennard* 8 MLR 364 and *Sikwese v Stage Coach (Mw) Ltd* (1995) 1 MLR 269 the care to be exercised by drivers is such care as would be used by an ordinary skillful driver in the circumstances in which the driver found himself. The case of *Burgess v Aisha Osman and Jimu* [1964–1966] ALR Mal 475 is authority for the proposition that although a driver is not bound to foresee every extremity of folly which occurs on the road, he is bound to anticipate any act on the part of another road user which is reasonably foreseeable whether negligent or not. According to the case of *Zaibunnisa Nurmahomed Malida v Chiona and others* (1964 –1966) MLR Mal 427, a driver is not entitled to drive on the assumption that other road users, whether drivers or pedestrians will behave with reasonable care.

In deciding what is reasonable speed, courts must take into consideration nature, condition, and use of the road in question, amount of traffic actually on the road at the actual time or which might be expected to be on it. Reasonable speed is that speed allowing a driver to stop in case of sudden emergency: *Kadawire v Ziligone and others* [1997] 2 MLR 139. It was held in *Banda and others v ADMARC and Another* [1990] 13 MLR 59 that pedestrians have a duty of care to other road users and a pedestrian is only entitled to the exercise of reasonable care in relation to drivers of motor vehicles.

Some of the factors in determining whether there should be a reduced amount payable to the plaintiff are the causation and blame worthiness: *Daries v Swan Motors Company (Swansea) Limited* [1949] 2 KB 326. To establish contributory negligence the defence must prove that “the injured party did not in his own interest

take reasonable care of himself and contributed, by this want of care, to his own injury": *Malida v Chiona* 3 ALR (Mal) 427. Contributory negligence does not necessarily defeat claim for damages as the principle involved is that there will be apportionment of damages where there's fault on both sides: *Mwamwa v Kamwendo* 2 ALR (Mal) 565.

The decision


The court has to determine three issues which are whether or not the 1st defendant's driver was negligent; whether or not the plaintiff was solely or contributory negligent and therefore to blame for the said accident and whether or not the defendants are liable to the plaintiff in damages for the accident in question.

The court finds that the evidence shows that the 1st defendant breached his statutory and common law by driving negligently and he drove without due regard to other road users. As a result of the accident the two plaintiffs suffered injuries as was explained by the witness. The alleged of contributory negligence on the part of the plaintiffs were not proved and are therefore dismissed.

The court finds the defendants liable for the claims of the plaintiffs and the claim for damages is successful and are to be assessed by the Registrar.

The plaintiffs are also awarded costs of this action to be taxed by the Registrar.

Delivered in open court this 7th day of September, 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Ms. Chijere,
Mr. Katsichi,
Mrs. Munthali,
Mr. Ng'ambi/ Ms. Million,

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Court Clerks