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**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

PERSONAL INJURY CAUSE NO. 188 OF 2013

BETWEEN:

HOLESU SUWIRI.....PLAINTIFF

AND

DERRICK BANDA.....1ST DEFENDANT

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

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr. Pearson, Counsel for the Plaintiff

Mr. Chikaonda, Counsel for the Defendants

Mr. Mathanda, Court Clerk

JUDGEMENT

This is an action commenced by the plaintiff against the two defendants herein. It alleged by the plaintiff that due to the negligence of the 1st defendant in driving a motor vehicle insured by the 2nd defendant, he suffered bodily injuries. The plaintiff therefore claims damages for pain and suffering, loss amenities of life, disfigurement and cost of obtaining a police report and medical report. He further claims the cost of obtaining a new bicycle and costs of this action. The plaintiff's action is resisted by the defendants who, in their joint defence, essentially deny all the allegations and averments in the plaintiff's statement of claim and plead in the alternative that the accident was wholly caused by the plaintiff himself.

At the outset, the court reminds itself that these being civil proceedings, the required standard proof is proof on a balance of 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.

There is only the evidence of the plaintiff himself as the defendants elected not to adduce any evidence.

According to the plaintiff, he is a farmer by occupation. On May 10, 2012, he was on his bicycle cycling on the Blantyre/Lilongwe Road from Lirangwe heading towards the Mdeka direction. As he approached Kabano village, he saw 3 cars, among them a saloon, coming from the opposite direction. As the saloon wanted to overtake the other two cars, it moved to side of the road the plaintiff was cycling and sensing danger he tried to avoid it but it ended up hitting him. It is the plaintiff's evidence that as a result of the accident, he suffered a serious fracture on the left arm which had to be amputated. He also suffered some injuries on the leg and stomach. According to the plaintiff, the 1st defendant produced an insurance policy issued by the 2nd defendant and that while in hospital both defendants came to see him. He tendered in evidence a police report pertaining to the accident being **EX HS 1** and a medical report being **EX HS 2** describing the nature, extent and effects of the injuries he sustained.

Has the plaintiff proved his case against the defendants?

This is claim founded on the tort of negligence. Negligence, simply defined, is the breach of duty to take care by a person which results in damage being suffered by another person. See **Osborn's Concise Law Dictionary, 8th Ed. Page 227**. Thus, for a party to be liable for negligence, three essential elements must be satisfied. It must be shown firstly that the party was under a duty of care, secondly

that the party, by acts or omissions, was in breach of that duty and thirdly that as a result of such breach damage was suffered by another party.

The position of the law is that it is the duty of every person who drives a vehicle on the highway to use reasonable care to avoid causing damage to other persons. See **Charlesworth on Negligence 5th Edition page 488 paragraph 812**. The standard of care expected of a driver is reasonable care which a competent driver would use in the circumstances and there is a litany of case authority on this proposition among them **Mponda v Air Malawi and Another** [1997] MLR 131. In **Dilla v Rajan** 12MLR 358 it was held that such a driver is expected to avoid excessive speed, keep a good look out and observe traffic signs and signals.

The plaintiff's evidence that while cycling he collided with a vehicle driven by the 1st defendant and insured by the 2nd defendant is not disputed. It is also not in dispute from the evidence in totality that as a result of the collision, the plaintiff suffered bodily injuries as described in the medical report **EX HS 2**. According to the plaintiff, the accident happened when the 1st defendant who was driving from the opposite direction tried to overtake two other cars and moved into the lane the plaintiff was cycling. There has been an attempt by counsel for the defendants, in the cross examination of the plaintiff, to show or suggest that it was the plaintiff who caused the accident and in this regard the plaintiff's attention was drawn to the police report **EX HS 1** that puts the blame on him. The plaintiff in answering to such an interrogation stood firm on his stand; rejecting the suggestion in the police report arguing the Police were not present when the accident occurred as such the court should take his word and not that of the police as to how it occurred. The court also had occasion to interrogate the plaintiff as to where exactly on the road did the collision occur and he said it was near the yellow line on the side of the road as he was about to get into the dirty verge trying to run away from the 1st defendant's car. In the circumstances, the court is inclined to go by the version of the plaintiff and not that in the police report

regarding how the accident occurred more so as the police officer who prepared the report did not give evidence. Therefore, in the end, what comes out is that that in executing the intended overtaking, the 1st defendant did not keep a good look out otherwise he could have seen the plaintiff in good time and avoided the collision. He fell short of the standard of care expected of a driver. The court would therefore find and hold that there was negligence on the part of the 1st defendant as result of which the plaintiff suffered bodily injuries resulting in, as the evidence shows, pain and suffering, loss amenities of life and disfigurement. Accordingly judgement is hereby entered for the plaintiff.

Then, there are the claims for the cost of medical, police report and bicycle. Observably, these fall under the regime of special damages. The rules of procedure require that such claims should be specifically pleaded and proved. In the case at hand, the plaintiff specifically pleaded and gave evidence on the loss of his bicycle but not the cost of the police and medical reports which he has simply claimed. Consequently the claim for the cost of bicycle succeeds but those for cost of medical and police reports cannot succeed.

It hereby ordered that damages recoverable by the plaintiff shall be assessed by the Registrar.

Costs of these proceedings are awarded to the plaintiff.

Pronounced this day of April 9, 2019, at Blantyre in the Republic of Malawi.


HEALEY POTANI
JUDGE