



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 719 OF 2009

BETWEEN:

BERI LAYTON (ON BEHALF OF FUNDO HAMBANDA).....PLAINTIFF

AND

PRIME INSURANCE COMPANY LTD.....DEFENDANT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Wame, of Counsel for the Plaintiff

Miss Ngoma, Official Interpreter

JUDGMENT

Kalembera J

The Plaintiff commenced this action by way of writ of summons and statement of claim dated 7th March 2009 against the Defendant claiming general damages for loss of expectation of life; general damages for loss of dependency; special damages as pleaded; and costs of this action from the Defendant as insurer of motor vehicle registration number ZA 9158, Toyota Hiace Minibus. This claim arises from a road accident which occurred on or about the 12th day of May 2007 when the said motor vehicle, at Lizulu Trading Centre, hit a stationery ox-cart resulting in the death of the deceased.

The Defendant denies any liability, if at all.

The main issues for the court's determination are the following:

1. Whether the said car accident occurred due to the negligence of the driver of the Defendant's insured motor vehicle.
2. Whether the Plaintiff is entitled to the reliefs sought.

Despite being served, the Defendant was never present at the hearing. The court proceeded to hear the Plaintiff's case. The Plaintiff was the only witness.

PW I was Beri Layton who adopted his witness statement. It was his testimony that he is a businessman who lives in Ntcheu District. On 12th May 2007, Mr Chambuleni Joseph Abiele while driving motor vehicle Registration No. ZA 9158 from the direction of Lilongwe heading towards Ntcheu, upon arrival at Lizulu Trading Centre, he drove so negligently and he hit the deceased who sustained injuries culminating into his death. The accident was reported to the police. It occurred due to the negligence of the said driver who produced an insurance policy issued by the Defendant.

I am mindful that in a civil matter like this one, the Plaintiff as the one who alleges or asserts, bears the burden of proof. And the standard of proof in civil proceedings is proof on a balance of probabilities. In the case of **Miller v Minister of Pensions [1947] ALL ER 372** at pages 373 and 374 Denning J had this to say:

"If the burden is such that the tribunal can say; we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not."

And in the case of **Mike Mlombwa t/a Countrywide Car Hire v Oxfam, Civil Cause No. 2343 of 2003**, Manyungwa J had this to say:

"A well settled law of ancient application is 'ei incumbit probatio qui dicit non qui negat.'" This essentially means that the burden of proof lies on the party alleging a fact of which correlative rule is that he who asserts a matter of fact must prove it but he who denies need not prove it..."

In the matter at hand, the Plaintiff bears the responsibility and burden of proving, through evidence, that which they allege, that is, that the accident was caused by the negligence of the vehicle insured by the Defendant.

It is paramount that we reiterate from the outset that *'it is trite law that an action founded upon negligence is based on the conception of duty of care which one*

person owes to the other person' -Tembo JA in **Southern Bottlers Limited and another v Commercial Union Assurance Company Plc** [2004] MLR 364 at p. 370. As regards a driver of a motor vehicle the Honorable JA quoted with approval Banda J in **Banda and others v ADMARC and another** [1990] 13 MLR 59 at 63 where he put that duty 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 skilful driver would have exercised under all the circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look -out , observes traffic signs and signals."

And the learned authors of Charlesworth and Percy on Negligence, Ed, at page 698 state as follows:

"The owner of the vehicle must take such steps as a prudent owner would take to keep his vehicle in proper repair. If he fails to take such care so that the vehicle is defective, for example, if the steering wheel of a motor-car becomes so worn that the driver cannot control the car, it is evidence of negligence on his part. (Hutchinis v Maurer (1920) 3 T.L.R 72 where the Defendant was held liable, although he was not negligent in failing to discover the defect)".

And further it was held in the case of **Wing v London General Omnibus Company (1909) 2 K.B. 652** by Fletcher-Moulton, L.J. that:

"If a man places on the streets a vehicle so wholly unmanageable as necessary to be a continuing danger to other vehicles, either at all times or under special conditions of weather, I have no doubt he does it at his peril, and that he is responsible for injuries arising therefrom, even though there has been no negligence in the management of his vehicle".

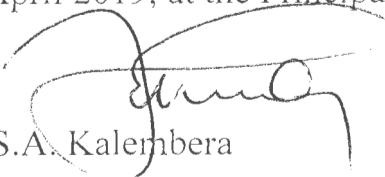
In the matter at hand, the Plaintiff has further relied on the Police Report (Ex "BL 1") and the Death Report (EX "BL 2"), as part of his evidence. There have been conflicting decisions within our jurisdiction as to the admissibility or non-admissibility of police accidents reports. I am inclined though, towards the view that the police accident reports are admissible even if tendered by an officer who

did not author them. I am further persuaded by the decision of the Court of Appeal of England and Wales, led by Lord Justice Clarke, in **Hoyle v Rodgers and Another [2014] EWCA CIV. 257** delivered on 15th January 2014 where it was heard that *"in so far as the report consists of statements or reported statements of fact, it is, prima facie, admissible. It is immaterial that it constitutes hearsay, whether primary or secondary."*

In the matter at hand, the fact that the Defendant did not attend the hearing, does not even help the Defendant. The testimony of the Plaintiff goes unchallenged. It is clear from the police accident report that *" Mr Chambuleni Joseph Abiele, the driver of the said vehicle contributed to the accident by overtaking an ox-cart improperly hence killed an innocent person. It was worth charging him with Causing Death by Reckless Negligent Driving contrary to section 126 of the Road Traffic Act."* Thus, it is clear from the Police accident Report that the driver of the vehicle insured by the Defendant negligently drove the vehicle leading to the accident which caused the deceased's death.

All in all, it is clear that the vehicle in question was insured by the Defendant. It was driven negligently by the driver, Mr Chambuleni Joseph Abiele, and his negligent driving caused the accident which led to the death of deceased, Fundo Hamba, on whose behalf this claim was brought. The death of the deceased was therefore caused by the road accident which was caused by the driver of the motor vehicle insured by the Defendant. The Defendant, is therefore found liable as the insurer of the said motor vehicle. The Plaintiff's claim therefore succeeds in its entirety with costs. The damages to be assessed by the Registrar.

PRONOUNCED this 1st day of April 2019, at the Principal Registry, Blantyre.



S.A. Kalembera

JUDGE