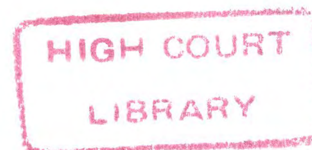
HIGH COURT
LIBRARY

REPUBLIC OF MALAWI
MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

SITTING AT LILONGWE

CIVIL CAUSE NUMBER 49 OF 2017

BETWEEN:

WILFORD CHILIPSYA .... CLAIMANT

AND

THE ATTORNEY GENERAL ....DEFENDANT

CORAM : **MWALE, J.**
: Dalla, of Counsel for the Claimant
: Mulenga, of Counsel for the Defendant
: Mbewe, Court Reporter
: Kaferaanthu, Court Clerk

Mwale, J

JUDGMENT

A. Introduction

1. The claimant retired from the Malawi Police Service in February of 2015. His last posting was at Kamwendo Police Unit. Upon his retirement, the Malawi Police Service arranged for transportation to ferry the claimant, his family and personal belongings to his retirement home in Dedza. The transport, an enclosed lorry van arrived at the claimant's residence on or about 23rd June 2015. Another officer who was being transferred to Zomba was already in the van together with his family and personal belongings. The claimant's personal belongings were loaded onto the van and within two hours of leaving Mchinji, a

fire broke out at the back of the van around the claimant's possessions, burning them all to ashes.

2. At the trial, the claimant gave evidence and called one witness. The defendant called two witnesses. The trial was concluded on 17th January 2019. Both parties were asked to submit final written submissions within 14 days at the expiry of which the Court would proceed to judgment. The parties both filed their final submissions late, with the claimant filing on 12th March 2019 and the defendant on 26th February 2019.

B. The claimant's case

3. It is the claimant's claim that his property was destroyed as a result of the defendant's negligence as particularized in his Statement of Case as follows:
   (a) Failure (by the defendant) to ensure that the vehicle was safe to transfer the claimant and his property.
   (b) Failure (by the defendant) to ensure the vehicle had fire extinguishers to put out the fire in good time.
   (c) Failure (by the defendant) to provide safe transport for a retired officer.

   In the alternative, the claimant argues *res ipsa loquitor*.

4. As a result of the said negligence, the claimant is claiming:
   (a) Special damages for the loss of the property in the sum of K5,334,000.00.
   (b) General damages for the loss of use of the property.
   (c) General damages for inconvenience.
   (d) General damages for psychological trauma.
   (e) Costs of the action.

C. The defence case

5. The defendant denies liability and contends that the fire occurred as a result of the claimant's own negligence. According to the Defence, the claimant's wife (now deceased)

loaded a hot mini-cooker into the van without the defendant's knowledge and this is what caused the fire. In the alternative, should the defendant be found to be negligent, the defence pleads contributory negligence. The defence particularizes the claimant's negligence as follows:

(a) Loading a hot mini cooker onto the motor vehicle.
(b) Failure (by the claimant) to advise his wife not to load a hot cooker into the vehicle.
(c) Failure (by the claimant) to advise his wife to put the mini cooker in an isolated place to avoid a possible fire accident.

6. The defence also denies the application of *res ipsa loquior* as it contends that the cause of the fire is known. Further, the defence has also denied that the claimant owned or loaded all the items listed in the Statement of Case, emphasizing the claimant's duty to prove their loss in this regard.

D. The law

i. Negligence

7. Our courts have unanimously approved the definition of "negligence" set out in the case of ***Blyth v Birmingham Waterworks Co.*** (1856) 11 Ex. 781 at p 784 (see ***Eliza Felix v Sam Chirwa and General Alliance Insurance Company***, Personal Injury cause No. 467 of 2016, Principal Registry (unreported)), as follows: -

> *"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*".

In order for a claim in negligence to succeed, the claimant must therefore prove that:

(a) the defendant (in this case, the Malawi Police Service) owed the claimant a duty of care in safe transportation of his property to Dedza;
(b) by acts or omissions of the defendant, the defendant, was in breach of that duty; and
(c) the damages for loss being claimed, were suffered as a result of that breach and that such loss were reasonably foreseeable.

(*See* ***Kadawire v. Ziligone & Another*** [1997] 2 MLR 139 at 144 and Makala ***v The Attorney General*** (1998) MLR 187). All three requirements must be proved to the requisite standard (on a balance of probabilities) by the claimant in order for him or her to succeed. The requirements are indivisible (*see* ***Miller v. Minister of Pensions*** [1947] 2 All ER 372).

8. The defendant bears the burden of proving of contributory negligence.

ii. Res Ipsa Loquitor

9. For *res ipsa loquitor* the claimant must prove that: -
   (a) the vehicle and the claimant's property were under the exclusive management and control of the defendant or of someone for whom he has a right to control;
   (b) the fire was an accident would not have happened without negligence;
   (c) there is no other explanation for the fire's occurrence.

   Again, all of the three requirements must be proved on a balance of probabilities by the claimant in order for the claimant to succeed.

E. Court's reasoned determination

10. It is fair to state that the parties are in agreement that a fire broke out at the back of the defendant's lorry van which was at the time carrying the claimant's property from Mchinji to Lilongwe, on or about the 22nd of May 2017. It is also clear from the evidence that the fire originated from and was confined to the claimant's property. All the other property in the van belonging to another police officer who was also being transferred was intact.

11. In the context of the retiree/employer relationship between the claimant and the defendant, it is trite law that the defendant owed the claimant a duty of care in transporting not only the claimant's property but also the lives of the claimant's family members who accompanied him on that journey. What must engage the Court is the extent of this duty and what it entailed. The claimant has argued that as a reasonable employer, the defendant should have provided a vehicle that was safe to transport the claimant and his property and one that was equipped with fire extinguishers. This line of argument presupposes a defect

or fault in the vehicle that caused the fire and caused damage to property and that the damage caused by this defective vehicle was exacerbated by the lack of a fire extinguisher.

12. Principally therefore, the first task for this court is to determine whether the fire was in fact caused by a faulty vehicle or some other circumstance within the defendant's control, that rendered the vehicle unsafe to convey the claimant and his belongings. The evidence on this issue is as follows. The claimant in his evidence has stated that he noted the smell of fire some two hours later, when the van was passing the Malawi Revenue Authority roundabout in Lilongwe. The smoke appeared to emanate from the right side of the vehicle and the passengers in the back of the lorry thought it was the tyre that was producing the smoke. A few minutes later, a fierce fire broke out in the back of the vehicle as though there was fuel inside. During cross examination, the claimant revealed that when the van came to load his property, it was already loaded half way with the other police officer's property. He performed a cursory inspection before he loaded his belongings and noted nothing that could have caused the fire. Being a layman when it comes to vehicles and safety inspections his assessment was therefore limited. He however conceded that the source of the fire was his property although he denied that his wife loaded a hot mini cooker onto the vehicle. In fact, he maintained that as officer-in-charge (at the time of retirement) he would not have been the one loading the van, his subordinates were the ones who loaded it.

13. The claimant's son (CW2) gave evidence along the similar lines to his father. During the trip, upon noting smoke in the back of the van, he phoned his mother who was with the driver in the front cabin to ask him to stop but the driver did not stop. It took CW2 coming out of the van and banging on the side whilst clinging on, for the driver to stop. His evidence also shows that the fire was deep inside their household items. However, he clarified during cross examination that this did not mean that the fire originated from his father's property. He was unable to state what the cause of the fire was, although the fire was confined to his father's property. In his last remarks during cross examination, he intimated that only a fireman would have been able to state what the cause was.

14. This far, at the end of the claimant's case after the two witnesses had testified, the strength of the claimant's case rested on the fact that the claimant's property was burnt to ashes in a van that belonged to the defendant and the no explanation as to how the fire was a direct result of the defendant's action or omission was put forward by these witnesses.

15. The defence called 2 witnesses, the driver of the vehicle DW1, and the other officer who was also being transported that day, DW2. DW1's evidence in chief is that when he arrived at the claimant's house, he found most of the property had been taken outside. As he does not travel with an assistant driver to help him load or offload, the owners of the property he transports are responsible for these tasks. It was his testimony that when he went into the house to see if there was any property remaining in the house, the claimant's wife was busy cooking on an electric mini-cooker. At this point the claimant himself was busy loading the van as his wife cooked. After she finished cooking, she loaded the cooker into a carton and placed in the van next to a couch with covered with cotton fabric.

16. DW1 admitted during cross-examination that he was in a better position to know about the condition or safety of the vehicle than the claimant was, being the driver considering that looking after the roadworthiness of the vehicle is part of his job. To this end, he stated during cross-examination that he had inspected the vehicle prior to departure, but he did not inspect the contents of the cartons that were loaded. He also conceded that avoiding accidents and not exposing the vehicle to fire is also part of his job. Whilst he does not do the actual loading onto the vehicle, he supervises where things go. He further conceded that he would not allow anyone to load onto the vehicle anything which was was hot. As the responsible or supervisory officer, he would direct them to let it cool first.

17. Contrary to what DW1 stated in his evidence in chief that he had seen the deceased's wife pack the hot oven in a carton and place it in the van next to a fabric couch, in cross-examination he stated that although he saw the claimant's wife cooking, he did not see happened thereafter. He did not see that the mini-cooker had been packed. But, cross-examination revealed that before setting off, he neither checked whether it had cooled down nor saw where in the van it had been packed. The only reason he knew the mini-

cooker had been packed was that he asked the claimant and his family after the van stopped to put out the fire and they told him it had been packed. Having examined his demeanor, I dismiss the latter part of his testimony.

18. DW2, the other police officer whose property had already half-filled the van by the time it got to the claimant's house, confirmed in his evidence in chief that the claimant's wife was cooking on a mini cooker when they got there. As he was stationed at Police Headquarters in Lilongwe, he travelled in the van with his family and belongings all the way to Mchinji with no mishap. He also like DW1 testified that that the claimant's family and neighbours loaded their belongings on the van, whilst the claimant's wife was still cooking on the mini cooker. It was further his evidence that the smoke emanated from the left side of the van, where the mini-cooker was placed. According to his evidence, the

> "*source of the fire was ascertained to be the mini-cooker. Had the claimant's wife allowed the cooker to cool off before loading it into the motor vehicle the fire accident would not have occurred*".

19. During cross examination DW2 admitted that he did not touch the cooker to see if it was hot, he saw it being loaded but neither alerted the driver nor the claimant. When asked if an unplugged mini-cooker would still be hot enough to cause fire in the distance it took to take from Mchinji to Lilongwe, his response was that he did not know. DW2 had trouble reconciling some of his statements in cross-examination with those in his evidence in chief and when confronted to read his witness statement, he suddenly developed an inability to read despite have a Junior Certificate of Education. His ability to read was, it would seem, limited to reading writing outside a court room setting. I must dismiss this part of his testimony as an antic aimed at bolstering his evidence.

20. In analyzing the evidence before me, the first port of call would be to dismiss the application of *res ipsa loquitor*. There is indisputable evidence that the claimant's wife was cooking immediately prior to the journey and that is a possibility as to what may have caused the fire. Further, although the van was indeed under the control of the defendant

but the claimant's neighbours and family loaded it. This act of loading was out of the defendant's control. If a hot mini cooker in a cardboard container was loaded onto the van, it could very well have maintained a low heat that slowly burned the cardboard. Under these circumstances just stating that a fire occurred does not satisfy the maxim of *res ipsa loquitor* when there is another plausible explanation and in addition, the defendant was not physical in control of the content of the boxes.

21. The claimant must prove on a balance of probabilities that the defendant was guilty of some negligent act. The most obvious act would be that the vehicle was not road worthy. The claimant gave evidence that he inspected the vehicle and saw it was loaded halfway with DW2's belongings. The claimant also stated that he did not see anything that could have caused the accident. I will accept that the claimant is a layman incapable of verifying whether the vehicle was roadworthy and safe for travel on that particular day. However, according to DW1's testimony, he had inspected the motor vehicle and concluded that there was nothing that could have caused a fire. Although there may have been latent defects not visible to the naked eye, DW1 drove the vehicle from the National Police Headquarters and DW2's residence to the claimant's residence in Mchinji with no issue.

22. I am not satisfied that the burden of proof has been met showing the defendant failed to provide safe transportation to the claimant and his property as it relates to the condition of the vehicle. Despite the fact that a fire did occur, there is no evidence that the fire was a result of the vehicle roadworthiness or lack thereof.

23. The claimant and CW2 testified that they believed the smell of smoke had come from a tyre of the van before the fire broke out. There is no evidence that the fire was a result of a tyre or any mechanical part of the vehicle. Photographic exhibited, marked CW2A and CW2B, show no evidence of fire coming from any tyre or any mechanical part of the vehicle. Further, there are no burn marks on the lower side or at the bottom of the vehicle. The burn marks in the picture move in a downward motion, proving that the fire likely came from a higher rather than a lower position on the van. The testimony of DW2 and CW2 provide evidence that the fire had started somewhere in the middle left side of the

vehicle as supported by the photographic evidence. Had the fire started from the tyre or a mechanical part of the vehicle the burn marks would likely provide such evidence. This is not the case here.

24. Further, it was well within the remit of the claimant to adduce evidence of the roadworthiness or lack thereof of the vehicle with reference to its service history or any such evidence. Counsel for the claimant neither pleaded nor argued along these lines and it is difficult to imagine how in the absence of evidence to that effect the Court can be asked to return a finding that the vehicle was unsafe. Further, there was no effort to call the fireman who put out the fire even though DW2 conceded that the fireman would have been in a better position to determine the cause of the fire. He who alleges must prove and the claimant has failed to prove the crucial points pleaded. In the circumstances, considering that evidence of DW1 the driver was that this van was used frequently for the purpose of transporting Malawi Police Service staff and the fact that it had been driven from Lilongwe to Mchinji with DW2 and his property on board with no incidence, the likelihood that the vehicle was faulty and thus caused the fire is too minimal to even be considered. This is more so considering that the fire was confined to the claimant's property.

25. I therefore find that the claimant has not proved to the satisfaction of this Court that the fire was caused as a result of the condition of the vehicle. There is evidence however that once the fire started, the defendant's driver failed to heed the call to stop immediately and further that he did not have a fire extinguisher on board and therefore the fire continued to rage unabated. The defendant owed the claimant a duty of care to ensure the safety of his person and belongings and carrying a fire extinguisher in case of eventualities is part of this duty. Failing to heed instructions to stop timeously is also a failure of this duty. The defendant is therefore liable in negligence for failing to carry a fire extinguisher and for failure to stop in time.

26. Further, DW1 admits that he was overseeing the loading of the vehicle. DW1 also admits he did not see first-hand the claimant's wife load the cooker into the vehicle and he did not

follow up to ask her what happened to the cooker. It would be unreasonable to say that any individual supervising a move has a duty to look inside each and every box to determine the safety of transportation. However, when a person in a supervisory role is placed on notice of potentially dangerous items in their care, he or she must make sure that those dangerous items do not pose a risk to the transportation. DW1 who was in control was fully aware I have already noted the inconsistency in his testimony on this issue and have concluded that DW1 was not only aware that a hot mini-cooker had been loaded onto the van but also that it had been placed in a cardboard box and then next to a fabric sofa. Although DW1 in cross-examination tried to distance himself from his own statement in chief during cross examination, I find that he was aware that a hot mini cooker had been placed in the van and he did nothing about it. This too constitutes a negligent omission and loss to property in the fire that ensued was therefore a reasonably foreseeable consequence of the defendant's (*see* ***Martin v. Malamulo Hospital*** [2005] MLR at 243).

27. The defendant's liability is however limited in this case as there is ample evidence that the claimant was contributorily negligent as a hot mini cooker was loaded on to the van and the probability that this was the cause of the fire is very high. Contributory negligence breaks the chain of causation in that the claimant fails to take reasonable care of their own safety (see ***Nance v. British Columbia Electric Railway Company Ltd*** [1951] AC 601).

28. The claimant has argued that the mini cooker could not possibly be the root of the fire because the fire did not occur until two hours after the van had left claimant's home. I must dismiss this argument because it is very likely for a hot mini cooker placed within a cardboard carton shortly after cooking, to start a fire. There is no doubt that whatever caused the fire was amongst the claimant's belongings and I am satisfied that there is evidence that a hot mini cooker was placed in the van. Although as was revealed by DW1 during cross examination that, a mini cooker cools off as soon as it is unplugged, if the cooker was placed in a carboard cartoon and closed in the aftermath of cooking it is possible that the cooker could have burned the cardboard causing a smoldering effect. Smoldering occurs when low heat is insulated and deprived of oxygen. If the cooker was placed with in a carton and shut, it could yield a burning effect on the cartoon that could maintain a low

heat for hours. Fire requires heat, oxygen, and fuel to ignite. The cooker could have reasonably provided the heat necessary to ignite the cardboard. The claimant, PW2, and DW2 have stated that the back door of the van was left open as they traveled. Traveling at a high-speeds down the road could very well have allowed for the oxygen necessary to fan the smoke over a two-hour period, resulting in the cardboard and the belongings of the claimant to serve as the necessary fuel for a fire to start. The evidence at hand, coupled with realities of combustion support this conclusion.

29. Counsel for the claimant failed to lead a line of questioning during examination of CW1 and CW2 to show for certain that the wife of the claimant did not cause a hot mini cooker to be loaded on the van. The claimant does not deny that there was a mini cooker or that his wife was cooking prior to the van's arrival. The evidence of the claimant is simply that his wife did not place the cooker onto the vehicle. This does not contradict the claim that claimant's wife placed the mini cooker into a carton. At which point, even if it was not the wife who loaded the cooker onto the truck, a cooker was still loaded. Considering that the wife was seen cooking whilst other property was being loaded (which the claimant has never denied), it is safe to infer that the cooker must have been still hot when it was loaded.

30. The last limb required in order for one to succeed in a claim for negligence is whether the complainant suffered the loss or damage for which he or she is claiming as a result of the accident. There is no dispute that the fire destroyed claimant's property. Photographic evidence has been provided that shows both the fire and its aftermath. The damage to the property has been specifically tied to the fire. The only question to be settled is therefore to what extent the defendant is liable for the loss or damage that occurred.

31. For all I have reasoned, I find the defendant liable to 20 per cent of the damage caused as a result of their negligence and the claimant contributorily negligent at 80 per cent.

32. With regard to the claim for special damages in the amount of MK5,334,000.00, the law on special damages is very clear. Special damages must be specifically pleaded and must also be strictly proved (***Govati v Monica Freight Services (Mal) Limited*** [1993] 16(2) MLR 521 (HC)). A Plaintiff who claims special damages must therefore adduce evidence

or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. The only reference to the special damages being claimed has been in the pleadings and there has been no evidence adduced other than that the claimant's property was destroyed in a fire. There is no evidence proving that the destroyed property is the property that has been set out in the pleadings and that the destroyed property was worth what is being claimed in special damages. In the ***Govati*** case cited above, the plaintiff's property was lost after it was shipped to Malawi from South Africa. He not only pleaded the lost items in his Statement of Claim, but at the trial he also tendered a list of the items and their prices as proof that he not only owned, but that he also transported those items. Even though there was no concrete proof that this list had been compiled in South Africa when the items were purchased, the belief of the defence being that it was compiled in Malawi after they were discovered missing, Chatsika J., as he was then, found that the special damages were proved because the list was tendered in evidence at trial. Further, since the list had been on the defendant's List of Documents which must have been deemed to have been inspected by the defendant and they had not raised any application for Further and Better Particulars, they were deemed to have accepted that the plaintiff owned and transported the property on that list. The point to emphasize is that evidence of the property to which special damages were being sought was made available to the defendants before trial and at the trial itself. There has been no such evidence led at the trial in this case nor has counsel for the claimant explained this glaring omission in her submissions. As liquidated damages must strictly be proved, I must hold, as did the judge in ***Wood Industries Corporation Ltd v Malawi Railways Ltd*** [1991] 14 MLR 516 that the claim for special damages in this case must fail.

33. The claimant has further led no evidence for any psychological trauma that he may have suffered. Psychological trauma is different form damages for loss of use or inconvenience because these types of damages can be inferred from the damage occasioned whereas psychological trauma is a medical condition and some medical evidence must be adduced.

34. The claimant is therefore only entitled to 20% of nominal damages for the loss of the property, general damages for the loss of use of the property, general damages for

inconvenience. These damages are to be assessed by the Assistant Registrar at a date to be fixed by her. Each party is to bear their own costs.

I so order.

Made at Lilongwe this 20th day of June, 2019.

The Honourable Justice Fiona Atupele Mwale

JUDGE