



**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CIVIL CAUSE NUMBER 1298 OF 2015**

**BLESSINGS BANDA ..... CLAIMANT**

**AND**

**THE ATTORNEY GENERAL ..... DEFENDANT**

**CORAM : HON. JUSTICE F.A. MWALE.**  
: **Chapo, of Counsel for the Claimant**  
: **Mahonga, of Counsel for the Defendants**  
: **Mpandaguta, Court Interpreter**

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**Mwale, J.**

**JUDGMENT**

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**Introduction**

1. This is a claim for personal injuries in which the claimant is seeking damages for pain, suffering, loss of amenities of life, disfigurement and special damages following an accident that occurred in August 2014.
  
2. At the time of the accident, the claimant was serving a prison sentence with the Malawi Prison Services and was a passenger in a vehicle owned by the said Malawi Prison Services. The claimant claims that the vehicle was driven negligently such that he was thrown out of the body of the vehicle onto the tarmac road and suffered serious injury and special damage. Particulars of the negligence alleged, are as follows:
  - (1) Over-speeding and failure to slow down at junction or corner.
  - (2) Failure to keep a proper lookout.
  - (3) Failure to manage and control the vehicle so as to avoid an accident.

Particulars of the serious injury and special damage are as follows:

- (1) Serious injury to the spinal cord.

- (2) Loss of sensation and motion of limbs.
  - (3) Numbness of limbs.
  - (4) Chest complications.
  - (5) Fracture of the ribs.
  - (6) Pressure sores.
  - (7) Muscle atrophy.
  - (8) Faecal and urinary incontinence.
  - (9) Hip and knee flexion contractures on both left and right limb.
  - (10) Dislocation
  - (11) Mild mental incapacity.
  - (12) Cost of medical report – K3,000.00
  - (13) Cost of Police Report – K3,000.00
3. The suit is contested, and the defendant denies negligence and pleads contributory negligence maintaining that the claimant was not an authorized passenger who further compounded his fate by riding recklessly in the vehicle.
  4. At the trial, the claimant gave evidence and called one witness. The defendant called two witnesses. The trial was concluded on 26<sup>th</sup> February 2019 and both parties were asked to submit final written submissions within 14 days at the expiry of which the Court would proceed to judgment without further recourse to the parties. At the date of judgment some two months later, no party has submitted final written submissions.
  5. By way of background I took over this matter after the claimant's witnesses had already testified as the judge seized of the matter had already testified. I did not rehear the claimant's witnesses and have proceeded on the record of the judge who originally handled the matter for the early part of the proceedings.

### **The Issues**

6. The issues raised from the pleadings of the parties are as follows:
  - (i) Was the vehicle was driven negligently?
  - (ii) Did the claimant contribute to his fate (i.e. is there a case for contributory negligence)?
  - (iii) Was the claimant was authorized to be in the vehicle and therefore owed a duty of care?

### **Court's reasoned determination**

**(a) Negligence**

7. In order for a claim in negligence to succeed, the claimant must satisfy the court that:
  - (i) he was under the defendant's (in this case, the Malawi Prison Service's) duty of care;
  - (ii) by acts or omissions of the defendant, the defendant (the Malawi Prison Service's driver, the Malawi Prison Service) was in breach of that duty; and
  - (iii) the damages for injuries being claimed, were suffered as a result of that breach (See **Makala v the Attorney General (1998) MLR 187, Kadawire v Ziligone and Another [1997] 2 MLR 139 at 144**), in other words there must be proof that the injuries being claimed occurred as a result of the accident and not any other and not as a result of any intervening act.

All three requirements must be proved by to the requisite standard (on a balance of probabilities), by the claimant in order for him or her to succeed. The requirements are indivisible.

**(i) Was the claimant under the defendant's duty of care?**

8. Starting with the first of the requirements for negligence, in order for the claimant to prove that he was owed a duty of care, it has been argued before me that the claimant must show that he was authorized to be in the vehicle in question at the time of the accident. It is of course the claimant's case that he was instructed to be on the vehicle and was therefore authorized to be in it.
9. The driver of the vehicle who gave evidence as DW1 is a Prison Officer at Maula Prison where the claimant was serving his sentence at the time of the accident. On the day in question, DW1 was in the course of his employment instructed to ferry another Prison Officer who was moving house from the Maula Prison Staff Houses to Area 36 in Lilongwe. He was accompanied by another Prison Officer who has given evidence as DW2. The assignment involved loading, and subsequently offloading, the personal effects and house hold items of the Prison Officer who was moving house and thus required labour. DW1 therefore ordered a number of prisoners to join them for this purpose. The vehicle in question is a lorry, registration number PS046. The prisoners including the claimant were therefore positioned in the back of the lorry together with the items they were ferrying. The mission was accomplished, and the accident happened

upon their return at the St. John's junction around Biwi and the claimant was injured because he was dancing and chanting at the back of the vehicle at the time.

10. I am satisfied from the testimony of the claimant as PW1 and his second witness PW2, that the claimant, being a serving prisoner at the time, was under the defendant's duty of care. The defence has raised the argument that unauthorized passengers are not owed a duty of care. Despite testimony by the defendant's witnesses that the claimant had sneaked into the vehicle without authorization, in the context of the current circumstances, this position is untenable. I find it impossible to envisage a situation in which a serving prisoner, even one who is a day away from the end of his sentence, would make his way onto a vehicle and evade the checks that a secure institution such as a prison imposes on the exit of serving prisoners.
11. Thus, PW2 who though not an eye witness to the accident in question is an ex-prisoner who gave evidence on the exit formalities for prisoners before they leave the prison. It was his evidence that prisoners who are assigned duties outside the Prison are organized into gangs by a prisoner leader popularly known as a '*Nyapala*'. The names of these prisoners are recorded and when these prisoners are supposed to go out and work, the Prison Officer at the first gate, known as the "cell gate" calls out the names of that particular gang to come to the gate.
12. The Prison Officer in charge of the gang then informs the Prison Officer at the cell gate how many prisoners he has taken, and they pass through the cell gate. The Prison Officer then takes the gang through a second gate where Prison Officers confirm that only those belonging to that gang can pass through. These officers have the names and numbers of the prisoners authorized for work leave. The Prison Officer in charge of the gang then leads the gang to the assigned vehicle.
13. Finally, the prisoners pass through the main gate where Prison Officers posted there record the number of prisoners going out and the work they have been assigned to perform. The Prison Officer in charge of the gang would facilitate the process and the driver signs for the prisoners taken out. During examination by the Court, PW2 made it clear that the Prison Officer and the "*Nyapala*" give orders to the prisoners which if

disobeyed, the prisoner gets disciplined. PW2 also testified that it didn't matter whether a prisoner was at the end of his sentence or not as he had himself been assigned outside duties the day before he was released.

14. It emerged during cross-examination that DW1 actually signed for the claimant's exit at the prison gate and that the claimant was actually selected by DW2 to be a part of this particular assignment. The evidence of both PW1 and PW2 withstood cross-examination. I therefore find that this being a secure institution, a prison, the claimant could not have passed through its gates without permission and since he was in a prison vehicle being overseen by prison officers, they were all very aware of his presence and continued on with him to the point of destination. DW2 is clear in his testimony that he noticed that the claimant had managed to sneak onto the vehicle. Having noted this, DW2 did nothing, his explanation is therefore implausible and I accordingly disregard it.

**ii. By acts or omissions of the defendant, was the defendant was in breach of the duty of care?**

15. I now move on to discuss whether the driver of the vehicle drove it negligently as set out in the pleadings by over speeding, failing to keep a proper lookout and failing to control the vehicle so as to prevent an accident. He who alleges must prove and the claimant must therefore show evidence for these claims in order to succeed. DW1, the driver, has however disputed the claim that he was over speeding by testifying that the vehicle was being driven at about 5km an hour. According to his testimony, in the course of the trip, DW1 heard DW2 ordering the prisoners to sit down for their safety as some had started dancing and chanting at the back. DW2 in his testimony confirmed that he noted that the claimant was chanting and dancing and waving at people. He advised him to not to sit at the edge, but the claimant refused to take advice as he was about to finish his sentence. It is not clear to me whether the claimant was sitting at the edge or dancing up and down the vehicle as DW2's evidence is inconsistent. On account of these actions, the defence case is that the claimant should be found contributorily negligent. To the contrary, the claimant has testified that the vehicle was being driven very fast and that the driver made an unexpected turn at Biwi because he wanted to drop off burglar bars.



He admitted during cross-examination that he could not see the speedometer, but he just sensed the speed. It was further, his evidence that all the 7 prisoners stood up at the hanger and that he was the only one who fell.

16. It is very difficult to gauge speed as a passenger, especially when one is seated at the back of a goods carrying vehicle. Over speeding would depend on the speed limit, the condition of the road and the vehicle load as well as other factors which would make traveling over a certain speed under those circumstances unsafe. I am therefore not satisfied that there is evidence that the driver was over speeding, failed to keep a proper lookout and failed to control the vehicle, especially considering that the claimant was the only one who fell out of the vehicle when there were 6 other prisoners “standing” at the back with him. Under the circumstances one person falling out would not give satisfy the maxim of “*res ipsa loquitur*” when the others managed to stay on at the same speed in the same conditions. More evidence would be required to actually prove negligence in these circumstances.
17. The counsel for the claimant led a line of questioning during cross-examination of the defendant’s witnesses that that the vehicle which the claimant was transported in, is a goods carrying vehicle and not a passenger vehicle. Under the Road Traffic (Construction Equipment and Use) Regulations to the Road Traffic Act, a “goods vehicle” is defined in regulation 2 as:
- a motor vehicle other than a motorcycle, motor tricycle, motor quadricycle, motor car, minibus or bus, designed or adapted for the conveyance of goods on a public road and includes a truck-tractor, adaptor dolly, converter dolly and breakdown vehicle;
- and under regulation 2 of the Road Traffic (Registration and Licensing) Regulations to the Road Traffic Act as:
- a motor vehicle constructed or adapted primarily for the carriage or haulage of goods;
- DW 2 admitted during cross examination that the vehicle he was driving was a goods carrying one and had not been adapted for passenger use. Further DWI admitted during cross examination that the vehicle had not been modified to carry passengers and none of the passengers were wearing seat belts.
18. Regulation 36 of the Road Traffic (Construction Equipment and Use) Regulations to the Road Traffic Act further provides for situations in which goods vehicle can convey

passengers as follows:

No person shall operate on a public road a goods vehicle conveying persons unless that portion of the vehicle in which such persons are being conveyed is enclosed to a height of—

- (a) at least 350 millimetres above the surface upon which such person is seated; or
- (b) at least 900 millimetres above the surface on which such person is standing, in a manner and with a material of sufficient strength to prevent such person from falling from such vehicle when it is in motion:

Provided that this regulation shall not apply in the case of employees being carried in the course of their employment.

The claimant is not an employee and the exemption in this regulation does not apply to him. During the proceedings, I asked DW2 to draw a diagram of the vehicle in question and the position of the passengers. He drew an open lorry which was entered into evidence as exhibit DW2a. The vehicle in question was not enclosed in any and therefore was not adapted in compliance with the law to carry passengers. Counsel for the plaintiff did not cite these provisions before the Court. Therefore, from my own perusal of the statutory provisions, there is no doubt that the defendant was in breach of some statutory obligations. What is however crucial to these proceedings is whether the said breach of statutory obligations gives rise to a claim in negligence or is indeed proof of negligence.

19. There was evidence before me that the vehicle from which the claimant fell was not insured. DW1 admitted during cross examination that the vehicle was not insured and added further that it had no certificate of fitness.

Regulation 16 of Road Traffic (Insurance) Regulations to Road Traffic Act.

16. Failure to produce certificate of insurance

No person operating a motor vehicle on a public road shall fail to produce a certificate of insurance when required for inspection by a Police Officer or by any person authorized to inspect certificates of insurance by the Director in accordance with section 151 (3) of the Act.

Section 151(2) of the Road Traffic Act provides:

- (2) A certificate of insurance referred to in subsection (1), shall at all times be in the motor vehicle concerned while it is operated on a public road.

Again, counsel for the claimant did not cite these provisions, I merely cite them as I did the provisions above to acknowledge that there was a breach of statutory duty on the

part of the defendant.

20. However, the issue of breach of statutory duty on the part of the defendant is only of concern to this Court if there is proffered proof that carrying passengers in a goods carrying vehicle, the lack of insurance and the lack of certification of fitness are proof that the driver was negligent in the way set out in the pleadings (namely that the defendant was over speeding, failed to keep a proper lookout and failed to control the vehicle).
21. The police report referred to as providing evidence that the vehicle was not insured was never tendered in evidence. Besides there are evidential implications on police reports that need to be discussed as the police report was never tendered in evidence by the officer who made it (although **Jimu v NICO General Insurance Company Limited Civil Cause number 984 of 2007** (High Court) (unreported) held that a police report is admissible when tendered by someone who did not author it since it is a public document, **Bauleni and other v Siku Transport and Another Personal Injury Cause Number 299 of 2010 (High Court) (unreported)** holds that a police report cannot be accepted to convey the truth of its contents if not tendered by its maker).
22. In the absence of written final submissions arguing whether a breach of statutory obligation as was plainly the evident in these proceedings amounts to negligence or not, I am at pains as to go outside the submissions and delve into areas that the parties have not addressed. The statutory provisions I have referred to and gone out of my way to cite may have had some bearing in this case if counsel for the claimant had taken the time to address his duty to his client with seriousness. A person or body in breach of a statutory duty is liable to any criminal penalty imposed by the statute but may also be liable to pay damages to the person injured by the breach if he belongs to the class for whose protection the statute was passed. The pleadings and arguments of the parties should have made it expressly clear whether the particular statutory breach before me was proof that the defendant had been negligent as alleged. More needed to have been done than to simply raise the issue in cross-examination without directing the Court on what to make of it.



**iii Were the injuries suffered by the claimant caused by the negligence of the defendant?**

23. The last limb required in order for one to succeed in a claim for negligence is whether the claimant suffered the injuries for which he or she is claiming as a result of the accident. There is no dispute that in the immediate aftermath of the accident the claimant was conveyed in the same vehicle he fell from, to Kamuzu Central Hospital for treatment. During his testimony, the claimant testified that he spent 18 months at Kamuzu Central Hospital and has since been rendered a quadriplegic as a result of his injuries. According to his testimony he has no feeling, use or sensation in the lower part of his body. He further stated that since the accident, the only function that has not been affected is speech. He has to urinate through a catheter and has to use a colostomy bag for defecation. The claimant has also been unable to achieve an erection since the accident. The claimant was wheel chair bound during the proceedings.
24. The claimant in any case is supposed to prove that the injuries for which he or she is claiming damages occurred as a result of the negligence that has been alleged. There must be a causative link between the injuries and the accident as otherwise, claimants could simply bring old injuries to court to claim for injuries not sustained in the accident that is the subject of the proceedings. These are very specific injuries that must be tied down in time and extent, to the accident at hand. Thus, there has been no medical report tendered to prove that the injuries are in consequence to the accident in question and not some other intervening act. The claimant's testimony that he suffered injury is uncontroverted but medical evidence is vital in cases such as this. It is the sole reason parties seek medical reports and claim them for their expenses as special damages. The Claimant's witness statement in this case refers to an exhibit referred to as "BB1" which was never actually attached to the witness statement nor was it tendered in evidence at the hearing. Considering the claimant is claiming special damages for a police report and a medical report, I cannot even begin to guess which of these two documents "BB1" was supposed to be.
25. Although the claimant has given evidence that he was served his prison discharge papers whilst in hospital, he has not given evidence of medical records showing how long he

was in hospital for thereafter as this could have been an indicator of how serious the injuries were if he stayed in hospital for long. The injuries that the claimant is claiming as a result of this accident are quite severe and some require regular hospital management. He must have in his possession medical documentation that supports the nature and extent of his injuries and that chronologically connects the injuries suffered to the accident that he is claiming caused them. The claimant has also as I have alluded to earlier, claimed special damages for the medical report and police report. Having claimed damages for them, he must have intended to use them. These medical reports are crucial in a claim of negligence where proving causation is imperative to succeeding in such an action. Counsel for the claimant has a lot of explaining to do in justifying why, he failed to adduce evidence that was obviously not only within his reach, but also prepared for trial.

26. In view of all I have reasoned, this action for damages in negligence must fail as the claimant has failed to satisfy the Court on all three limbs required for an action in negligence. Counsel for the claimant could have managed this action better and produced arguments setting out claimant's case for negligence as pleaded and in providing medical proof that the injuries suffered and presented before the court where the causative effect of the accident in question.

27. Each party is to bear their own costs.

I so order.

**MADE** in open court this **23<sup>rd</sup>** day of **May 2019**.

Fiona Atipele Mwale

**JUDGE**