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REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 122 OF 2016

BETWEEN

BASHIR RETIMAN LATIF..... CLAIMANT

AND

A.S. INVESTMENT.....RESPONDENT

Coram: Honorable Mr. Justice D. Madise

Mr. Imaan Counsel for the Claimant

Mr. Machika Counsel for the Defendants

Mr. Mathanda, Official Court Interpreter

JUDGMENT

Madise, J

Introduction

1, The claimant Bashir Retiman Latif took out a writ on 15 February 2016 against A.S. Investment seeking damages for negligence which are particularized below as follows:

- a, Failing to provide a safe working environment
- b, Failing to take reasonable care for safety of the claimant as an employee
- c, Failing to maintain the truck and
- d, generally committing such acts which showed palpable disregard for the safety of the employee and in particular the claimant.

2, As a result the claimant suffered personal injury, loss and damage. In particular the claimant stated that as a result of the accident he sustained a fracture on the left femur, fractured mandible, multiple lacerations and loss of teeth, and a left ear. That the degree of permanent incapacitation was assessed at 45%

3, The particulars of damages are as follows:

- a, Damages for pain, suffering and disfigurement
- b, Damages for loss of amenities of life
- c, Special damages for medical report
- d, Costs of action

4, In defence the defendant disputed the claim, stating that it was not true that upon arrival at Tete a pin which locked the trailer broke. In particular the defendant stated as follows: That the accident occurred due to the claimants negligence due to

- a, Over speeding

b, driving recklessly on a road at night

c, driving at night contrary to the defendants safety rules

d, failing to keep a proper look out on the road and to manage and or control the motor vehicle as to avoid the accident

The facts

5, the claimant presented his witness statement and tendered in evidence a medical report which was marked BRL. He stated that on 15 April 2015 at about, 20:30 pm while driving the defendant's motor vehicle reg No ABJ 683 CM/MB 4252, freightliner truck from Beila heading to Malawi, the steering wheel of the truck locked as he was passing through a bushy and deserted place in Gulu District in Mozambique.

6, As a result he failed to control the truck and he also failed to stop as the brakes had developed a fault. As a consequence the truck fell on the offside of the road before it overturned, injuring the claimant in the process.

7, The claimant stated that the, accident occurred due to the defendant's negligence in failing to properly maintain the truck and also making sure that the truck was road worthy and in good condition. The claimant stated that the defendant failed to take adequate care to ensure his safety as an employee.

8, The claimant in conclusion stated that he sustained injuries as particularized in the statement of case. He therefore demanded damages for negligence as particularized in the claim.

9, In cross examination the claimant stated that the Police in Mozambique did not give him a police report after the accident and that he was not aware of the two passengers who apparently died at the accident scene.

10, The claimant failed to explain why his medical report was dated 07/09/15 and the receipt for the said medical report was dated 24/11/15. The claimant insisted that the steering wheel locked while he was driving. That marked the close of the claimant's case.

11, In defence the defendant called one witness a Mr. Rafiq Anwar Sama, the workshop manager for Trans Nabia based in Tete Mozambique. He told the Court in his witness statement which he adopted that he had received communication on 15 April 2015 about the road accident involving a truck which was being driven by the claimant.

12, When he visited the scene of the accident, he noted that the claimant was over speeding while driving at night which was against company policy. The workshop manager further claimed the he had been informed by the claimant's colleagues at Changala that the driver was drunk. However, the said colleagues never came to Court to substantiate the allegation.

13, The workshop manager further presented in evidence a road safety management form which he alleged every driver had to sign at the beginning of the contract of employment (RAS1). Unfortunately the form which was presented in Court was not signed.

14, The witness further presented a trip sheet (RAS2) which stipulated that drivers were only supposed to be on the road between 5am and 5pm and up to 7pm once authority had been granted. Again the trip sheet which was presented before Court was not signed.

15, According to the workshop manager the claimant had no authority to drive at night or carry passengers in the vehicle. The witness stated that when he visited the scene of the accident, it was clear that the driver was over speeding and he failed to negotiate

a curve and lost control. He tendered in evidence pictures of the truck RAS, 4, 5, 6 and 7.

16, The witness also tendered in evidence a police report from Mozambique police (RAS3) which stated that the accident was caused when the truck hit a rock and over speeding at a curve and at night. The report stated that according to the people who saw the accident happen, the vehicle was driving at high speed. The report further stated that the two male persons on board the truck died on the spot.

17, In cross examination the witness stated that the accident happened at 20:30 hours. He however admitted that he was not present when the accident happened, but that the scene of the accident clearly showed that the driver was over speeding. The witness admitted that he had not brought the trip sheet for this particular trip and that the sheet he had brought was not signed. That marked the close of the defence case.

The issues

18, There are four main issues for determination before me

a, whether the accident was caused due to the negligence of the defendant

b, whether there was contributory negligence on the part of the driver

c, whether the driver suffered injuries, loss and damage

d, whether damages are payable

The law

19, The burden and standard of proof in civil matters is this. He/she who alleges must prove and the standard required by the civil law is on a balance/scales of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his

case as in the nature of things, a negative is more difficult to establish than an affirmative.

20, As Denning J, stated in Miller vs. Minister of Pensions [1947] 2 A II E.R. 372.

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

21, Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt.

22, The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts case. See Donnie Nkhoma vs. National Bank of Malawi civil cause No 2174 of 1996

What is Negligence?

23, The law on negligence is well settled in our jurisdiction. Negligence as a tort was well expounded by Lord Alderson in the case of Blyth vs. Birmingham Water Works Company (1856) Ex. 781 at 784.

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinary regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.

24, Negligence as a tort has four requirements namely:

1. The existence in law of a duty of care which the law attaches liability to carelessness.
2. Breach of the duty of care by the defendant.
3. A casual connection between the defendant's careless conduct and the damage.
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

25, Once this is established the next question is to consider whether the defendant is liable in damages and for how much. Lord Atkins LJ when he decided Donoghue vs. Stevenson (1932) AL 562. Stated as follows

Who then in law is my neighbor? Neighbors are people who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I'm directing my mind to the acts or omission which are called in question

26, Looking at the evidence before me, can it be said That the defendant was negligent and caused the claimant's injuries? Did the defendant owe the claimant a duty of care? Can it be said here and without doubt and hesitation that the defendant breached that duty of care which resulted in the injuries the claimant sustained? Lastly can it be said that as a result of that breach the claimant suffered pain and damage to his body and as a result lost amenities of life? Lastly are damages payable in this matter?

Finding

27, There is no dispute that the claimant was in the employment of the defendant as a truck driver. There is no dispute that on 15 April 2015 at around 20:30 hrs the claimant was involved in a road accident at Gulu in Changala district in Mozambique. As a result the vehicle was badly damaged, and the goods were looted by the people surrounding the scene of the accident. The claimant was seriously injured.

28, Looking at the evidence presented, I find as a fact that two passengers died in the said vehicle. The claimant has failed to convince me to the contrary. Counsel in his submission has similarly failed to argue that the claimant did not carry the said passengers. The question before me is what caused the accident. The driver claimed the steering wheel locked while the workshop manager reputed this assertion stating that the type of vehicle the claimant was driving, the steering wheel does not lock.

29, The police report claimed the driver was over speeding as per the witnesses at the accident scene. The said witnesses did not come to Court. The police who prepared the report did not come to Court. The so called colleagues who saw the driver drunk at Changala did not come to Court.

30, The workshop manager stated that the driver was over speeding by simply looking at the scene of the accident. That a truck driving at 30 to 40 km/hr cannot overturn. I find as a fact looking at RAS2 that although it was not signed, the driver was not supposed to drive at night.

31, However I fail to come to the conclusion that the driver was over speeding as such this counter claim cannot be substantiated. The evidence is clear that two people died in the accident and that the drive was not supposed to carry passengers. However I fail to see how those two unauthorized passengers influenced the accident.

32, In my considered view we will never know exactly what caused the accident. However I fault the driver for driving at night but I find no evidence of negligence on his part or indeed on the part of the defendant. In the within matter I fail to find the existence in law of a duty of care which the law attaches liability to carelessness on the part of the defendant. I find no breach of the duty of care by the defendant.

33, I do not find a casual connection between the defendant's actions and the damage. The vehicle was not examined after the accident to determine whether indeed the steering wheel locked or not or whether indeed the brakes failed. The fact remains that the driver suffered injury, pain and loss while on duty. He suffered damage and he is entitled to be compensated for the loss.

34, I therefore find that he must be compensated for the loss and damage he suffered while in employment. The Registrar must assess the damages to be paid to the driver at 70% less 30% for driving at night.

Each party will bear their own costs

I so order

Pronounced in open Court at Blantyre in the Republic on 9th November 2020



Dingiswayo Madise

Judge