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**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 60 OF 2017**

BETWEEN:

FISKANI KAYIRA.....CLAIMANT

AND

GOODSON MOLANDE.....1st RESPONDENT

PRIME INSURANCE COMPANY LIMITED.....2nd RESPONDENT

CORAM: THE HONOURABLE JUSTICE CHINANGWA

Chinula, Counsel for the Claimant

Dollosi, Counsel for the 1st Respondent

Nyirenda Ms, Court Clerk

JUDGEMENT

1. Introduction

The plaintiff claims damages for pain and suffering; permanent deformities to the spine; chronic muscular skeletal pains; loss of amenities of life; emotional shock and psychological pain and costs of the action. These claim arise out of alleged negligence in a road accident. Initially, the 2nd respondents represented both respondents. In their defence they denied the

claimants claims. Later, the 2nd defendants withdrew from representing both defendants on account that the insurance policy covering the vehicle in question did not cover fee paying passengers. The matter proceeded against the 1st respondent only and legal representation was provided by the Legal Aid Bureau.

The claimant and respondent were the only witnesses in this matter. Their witness statements were short and they have been reproduced below.

2. The Evidence

a) Claimants Evidence

The claimant stated as follows: 'On or about 5th may 2014, I was a lawful passenger in a Toyota Passo Registration Number BS 4423 driven by the 1st defendant along the Blantyre Lilongwe Road. The 1st defendant was the driver of the said vehicle aforesaid. On reaching Kangamkudi Village in Balaka, the right tyre burst and the driver, that is, the 1st defendant, lost control of the said motor vehicle, making it swerve and overturn before resting into an embankment. He was driving at an excessive speed and failed to slow down in the face of emergency. The car was not roadworthy. I attach the Police report marked 'FK1'. Consequent to the accident, I suffered the following injuries for which I attach and exhibit medical reports marked FK2 (a) and (b): chest pains, spine injury, permanent deformities to the spine and chronic muscular skeletal pains. I have since been facing challenges with active management.

Out of the several questions that came out of cross examination the court the following responses to be relevant: that after the claimant was picked up from tank, at or around Nanjiri the car wanted to leave the road but the respondent managed to steer the car back into the road; that at Ntcheu, after passing a school, the respondent was stopped by traffic police officer who had a speed camera. The respondent met the police officer and the claimant was not privy to their discussion.

b) Respondents Evidence

The respondent stated as follows: 'On or about 5th June 2014 I was driving to Blantyre for a workshop with my colleague, Florence Mzwiti in my motor vehicle registration number BS 4423, Toyota Passo Saloon. Upon arrival at Area 22 tank, my colleague saw a neighbor on the stage and asked me to give him a lift. The neighbor was travelling with 2 friends and I gave them all a lift. Upon arrival at Senzani in Balaka, the cars rear tyre burst and the motor vehicle overturned. The accident was due to a mechanical fault. Attached is a copy of the police report marked GM1. The claimant indeed sustained some injuries and is claiming damages under negligence. I deny that I was negligent and that the accident occurred because of the mechanical fault'.

In cross examination the respondent stated that on the material day, the weather was clear and the tyre burst due to a mechanical fault not due to over speeding.

3. Issue for Determination

This court has to determine whether the respondent was negligent in his driving and whether the claimant is entitled to reliefs sought.

4. Analysis of Law and Evidence

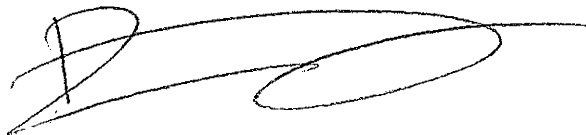
In **Kamwendo v Re-Union Insurance** [2011] MLR 128 (HC), that for an action in negligence to succeed the plaintiff must show that there was a duty of care owed to him, that that duty has been breached and that as a result of that breach he has suffered loss and damage. The court further held that a driver of a motor vehicle owes a duty of care to other road users not to cause damage to vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skillful driver would have exercised under all the circumstances. A reasonable driver has been defined as one who avoids excessive speed, keeps a good lookout,

observes traffic signs and signals. In this case it is not in dispute that the respondent was the driver of the motor vehicle in question; that the claimant was in the car; that the vehicle tyre burst and overturned. The dispute is regards the cause of the accident. The respondent states the accident was caused due to a mechanical fault, a cause beyond his control. The claimant states that the respondent was over speeding. The claimant did not see the vehicles speedometer having sat at the back seat of the car. However, the events he describes which were not contradicted by the respondent do show that the claimant was over speeding. These are the vehicle having swayed off the road at the start of the journey and the respondent having been stopped by a traffic officer who had a speed camera. This court fails to appreciate how in the circumstances narrated by the respondent that the tyre burst because of a mechanical fault. The respondent has relied on a police report to prove the same. It is this courts view that for one to prove a mechanical fault there would be need for an expert report. The police report apart from being hearsay evidence, was not authored by an expert. This court finds that the respondent was negligent by over speeding and thereby caused the accident.

5. Finding

The applicants claim succeeds. The matter proceeds for assessment before the Assistant Registrar.

Pronounced this 17th March 2021 at LILONGWE



R.M CHINANGWA

JUDGE