



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 447 OF 2020

BETWEEN

JACQUELINE KALENGA AND HANNAH MLONGERA (As
Joint Administrators of Estate of HOSEA MLONGERA.....CLAIMANT

AND

RICHARD KUNTELERA.....1ST DEFENDANT
MALAWI POSTAL CORPORATION.....2ND DEFENDANT
COOPERATIVES GENERAL INSURANCE LIMITED....3RD DEFENDANT

CORAM: THE HONOURABLE JUSTICE WILLIAM Y. MSISKA

Mr. Nthewa, of Counsel, for the Claimant

Mr. Silungwe, of Counsel, for the Defendants

Mr. Matope, Court Clerk

RULING

This is my ruling on the application by the Claimant for summary judgment. The application was brought under Order 12 rule 23 of the Court (High Court) (Civil Procedure) Rules, 2017 (Hereinafter referred to as "CPR, 2017).

The Claimants commenced this action against the Defendants, claiming damages for loss of expectation of life, loss of dependency and special damages as set out in the statement of claim. The Claimants have sued the Defendants in the capacity of Administrators of the estate of late Hosea Mlongera. The deceased, Hosea Mlongera was a fee paying passenger on a motor vehicle Higer Bus registration number BW 7919 owned by the 2nd Defendant and insured by the 3rd Defendant. The 1st Defendant was on 2nd November, 2019 on duty driving the bus from the direction of Kasungu heading towards Mzimba along the Kasungu-Mzimba part of the M1 Road. It is averred that upon arrival at a place called Yosefe Village near Kawinama Primary School, he lost control of the vehicle due to speeding and fatigue leading the vehicle to swerve to the extreme offside and then to the nearside where it overturned and rested on its left side. As a result of the accident, Hosea Mlongera died on the spot.

It is alleged the accident was caused by the negligence of the 1st Defendant who:

- (a) Drove the vehicle at an excessive speed;
- (b) Drove without due care and attention to the passengers;
- (c) Failed to make sure at all times that he is fit to drive;
- (d) Failed to exercise reasonable care, skill and diligence as a competent driver;
- (e) Failed to stop, steer, control or otherwise manage the said motor vehicle so as to avoid the accident;
- (f) Drove the said motor vehicle without reasonable care and concern for the passengers and in particular the deceased.

In response, the Defendants filed a defence in which they declined to comment on the following facts: the Claimants are joint administrators of the estate of Hosea Mlongera and are suing pursuant to the law of negligence and section 4 of the Statute Law (Miscellaneous Provisions) Act as well as the Road Traffic Act; the 1st

Defendant, 2nd Defendant and 3rd Defendant are being sued as driver, owner and insurer of the vehicle, respectively. The Defendants admit that the 1st Defendant was driving the vehicle at the material time but deny that the deceased and 25 other passengers were on board the vehicle from the direction of Kasungu heading to Mzimba.

The Defendants, in their defence, also denied the manner in which the accident occurred and averred that the 1st Defendant drove the vehicle at the right speed and that he was energetic and in the right state of mind. According to the Defendants, the 1st Defendant did all what he could to avoid the occurrence of the accident therefore the accident was inevitable.

Further, the Defendants plead that the deceased contributed to the occurrence of the accident and or suffering of any injuries because he did not wear a seat belt and that he was impatient and disturbed the 1st Defendant to duly operate the vehicle. It is the further allegation by the Defendants that if indeed loss and damage occurred, such loss and damage would have avoided and /or minimized by the deceased own actions. Furthermore, the 3rd Defendant pleaded that its liability, if any, is subject to the insured being found liable based on the merit of the evidence and also subject to indemnify the owner of the motor vehicle to the extent of the maximum liability contained in the policy of insurance between the 3rd Defendant and the 2nd Defendant.

The application for summary judgment is supported by a sworn statement by Counsel Robert Nthewa wherein, and to a great extent he has reproduced what is contained in the statement of claim. Parts of the sworn statement relevant to this application are reproduced below as follows:

5. *THAT the Defendants served their defence on the Claimants on 17th June, 2020.*
6. *THAT in paragraph 1 of the defence, the Defendants refer to paragraphs 1,2,3 and 4 of the statement of claim and make no comment thereof as the facts thereof were beyond the Defendants' knowledge at the time of filing the defence.*
7. *THAT the Defendants lack of knowledge of the basic facts that the 1st Defendant was the driver of the motor vehicle, the 2nd Defendant was the owner of the motor said motor vehicle and the 3rd Defendant the insurer of the said motor vehicle in question, creates an impression that the defence is a mere sham only calculated to delay the course of justice in this matter.*
8. *THAT in paragraph 5 of the defence, the Defendants deny that the deceased was at all the passenger in the motor vehicle in question and if at all the deceased was a passenger, the cause of the accident was independent of the accident. This is clear that the defence is evasive.*
9. *THAT in paragraph 6 of the defence, the Defendants contend that in the alternative, the deceased contributed to the occurrence of the accident and suffering of injuries, if any and pleaded particulars of contributory negligence as follows:*
 - a) *Not wearing a seat belt; and*
 - b) *Impatience and disturbing the 1st Defendant to duly operate the vehicle.*

10. THAT the Defendants defence and particulars of contributory negligence on the part of the deceased are clearly a sham as follows:

- a) The Defendant's denial that the deceased was not a passenger in the motor vehicle in question herein is mere bare denial without substance;*
- b) The defence is evasive in that in one breadth it is denying that the deceased was a passenger and in another breadth it pleads that the deceased contributed to the occurrence of the accident;*
- c) The particulars of contributory negligence as pleaded are on the face of it a sham and/or embarrassing.*

11. THAT in view of the foregoing, I believe that the Defendants do not have any real prospect of defending the Claimant's claim and there is no relevant dispute between the parties about a fact or an arguable question of law.

12. THAT in the circumstances, it would be just and fair that a summary judgment be granted against the Defendants. "

The application is opposed by the Defendants and reliance is placed on the sworn statement filed by Mr. Donovan Silungwe of which the relevant part states:

- 2. THAT among other issues raised, the defendants have raised the issue of contributory negligence by the deceased*

in that he did not put on a seat belt, which contributed to his death.

3. *THAT this is a legitimate factual and legal issue that has to be tried as it goes to the issue of liability.*
4. *THAT, therefore, we pray that summary judgment should not be granted."*

According to O. 12 rule 23 CPR, 2017, a claimant may apply to Court for summary judgment where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claim. However, rule 26 is also clear that the Court shall not enter summary judgment against a defendant where the Court is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law.

The statement of case, in particular, the defence is the genesis of an application under O. 12 rule 23. O. 7 rules 6,7,8,9 and 14 CPR, 2017 deal with how a defendant in his statement of defence should respond to the allegations contained in the claim. Put differently, these rules spell out the requirements to be met when formulating a defence. The defendant should deal with each fact in the claim and not to deny any claim generally. In circumstances, where the defendant does not agree with a fact that the claimant has stated in the claim, it is required of the defendant to file and serve a defence that denies the fact and states what the defendant alleges happened. Failure by the defendant to deny a particular fact is detrimental as the law holds him to have admitted that which he has not specifically denied. The other requirement when formulating a defence or reply is that a party should specifically mention a matter that makes another party's claim

or defence untenable; shows a transaction is void or voidable; or raises a question of fact not arising out of a previous statement of case.

In the present case, I have considered the statement of defence in light of the requirements on how it should be formulated. I have also perused the skeleton arguments filed by both parties and attentively listened to the oral submissions from both counsel. Much as the statement of defence may not have been properly drafted, it is not a sham as suggested by the Claimants. On the contrary, it raises a defence in that the deceased was also at fault by failing to look after his own safety. It is not in dispute that according to substantive law, contributory negligence is a defence to a claim arising out of negligence. I am therefore convinced that this is not a case in which summary judgment should be granted as there is a relevant dispute between the parties regarding, among other matters, the question whether or not it was the deceased or the 1st Defendant who was negligent in the circumstances of the present case. This is a dispute that can only be resolved by trial.

It is for that reason that I decline to enter summary judgment. The result is that the application is dismissed with costs to the Defendants.

PRONOUNCED in Chambers this 23rd day of July 2021 at Lilongwe in the Republic of Malawi.



W.Y. Msiska

JUDGE