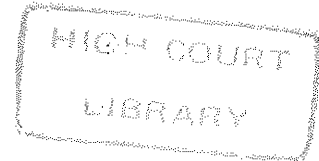


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REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
CIVIL DIVISION  
PRINCIPAL REGISTRY  
PERSONAL INJURY CAUSE NUMBER 635 OF 2019

BETWEEN

WILLARD BRIGHTON GALETA..... CLAIMANT

AND

DARREN MAXIEMILLI BRUESSON..... FIRST DEFENDANT

AND

BRITAM INSURANCE COMPANY LIMITED.....SECOND DEFENDANT

Before Hon Nriwa J

Mr L Master of counsel for the claimant

Mr Nyamwela counsel for the defendant

Ms D Nkangala Court Clerk

JUDGMENT

Introduction

The claimant commenced this matter arguing that the defendant so negligently drove his motor vehicle that he hit him while he was cycling. The incident happened on 19<sup>th</sup> July 2019 at around 4:00 o'clock PM when the claimant was cycling from Mangochi to Monkey Bay at Francis Njanji orphanage. The claimant asserted that he believed that the incident was caused by negligence on the part of the first defendant in that he drove his motor vehicle at an excessive speed and without care

and attention of other road users. The claimant claimed that, as a result of the incident, suffered some injuries.

#### Issue for determination

To all intents and purpose, the defendants deny the claimant's claim. The defendant denied every claim. They denied that there was an accident. They further denied that the claimant suffered injuries. Essentially, therefore, it was disputed that the first defendant was negligent. Thus, in dispute is whether there was an accident and if so, whether it was as due to negligence of the first defendant.

That was the issue that was contentious during the hearing of the matter.

This being a civil dispute, the burden of proof lies with the claimant. The claimant must prove, in this case, that he suffered injuries at the instance of negligence on the part of the first defendant. By negligence, the claimant must show that the first defendant acted, or omitted to act, as would be expected of a reasonable driver.

The standard of proof required from the claimant is that of balance of probabilities in civil claims. If the claimant satisfies the balance of probabilities for all of the facts that need to be proven to make out the cause of action, they will be successful in the proceedings.

In *Re B (Children)*, [2008] UKHL 35, Lord Hoffman explained the burden of proof in these terms:

If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

In civil proceedings, the standard of proof of past facts is the balance of probabilities: the standard of proof is that the fact in issue more probably occurred than not: *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, per Lord Hoffmann.

The preponderance of the evidence is all of the evidence available for assessment by a Court after the trial.

The balance of probability standard means that a court is satisfied a fact or event occurred if the Court considers that, on the evidence, the occurrence of the fact or event was more likely than not.

### Evidence

The claimant gave evidence on his behalf whereas the first defendant gave evidence on behalf of the defendants.

In his witness statement, the claimant stated that on 19<sup>th</sup> July, 2019 around 4:00 PM he was a pedal cyclist cycling from the direction of Mangochi heading to Monkey Bay when he was suddenly hit by a motor vehicle driven by a white person. He said the vehicle was coming from Mangochi heading Monkey Bay. He was in front of the vehicle which hit him by its left side. The vehicle did not stop. Another vehicle that was behind the vehicle that hit him carried him after the accident. He said at that point he was failing to move.

Then they went to Monkey Bay police where they were informed that they had impounded the vehicle and apprehended the driver. He said he was cycling at the dead verge of the road. He said the police gave him a police report and also, he went to hospital where he was given a medical report. He said as a result of the accident he sustained fracture on the right arm, facial bruises and contusion of the ribs on the right-hand side. He said he was hit while he was on his right side of the road.

In cross-examination, he stated that he on the date of the accident, he was hit by the front left mirror of the vehicle. He said the vehicle was behind him and that his eyes concentrated in front. He then agreed that he did not see the way the vehicle was speeding as his eyes focused in front. When quizzed of the time it took for the vehicle that carried him to come, he indicated that it was after three minutes. He said he did not know the number of people that were in the vehicle that hit him. He, however, indicated that it was a pickup. He then informed the Court the people that carried him after the accident called the police. He then told the Court that at the time of the accident he carried firewood in a vertical manner.

As to whether he saw the vehicle, he said he saw it at the police and that it had its front left mirror and tyre damaged. When asked the reason it was not mentioned in the police report that they front tyre was damaged, he responded that the police might have forgotten to indicate it. He said that he found the vehicle at Ntakataka and that the driver was already arrested.

In examination-in-chief, the first defendant adopted his witness statement in which he stated as follows:

He is the insured and the driver of the vehicle in dispute and a witness in this matter. On 19<sup>th</sup> July, 2019 he was driving motor vehicle registration number TO 9833 Nissan Vannette Pickup coming from the direction of Mangochi heading towards Monkey-Bay. His wife was aboard the vehicle, unfortunately she has since passed away. When he was approaching Francis Njanji Orphanage, there was a slight bend on the road. It was located about 300 metres away from a police roadblock. At this material time, there were absolutely no road users or anything at all surrounding the area. Suddenly, he heard a loud bang against the left side of his vehicle. He looked outside to check where the bang came from but again, he saw completely nothing in the road or surrounding it to justify the loud bang.

He decided to approach the police roadblock ahead of him so as to seek assistance from the police. He wanted to take them to the scene where he heard the loud bang so that they could investigate its origin. However, whilst at the roadblock, he was immediately greeted with animosity from the police and community members.

They did not even give him a chance to take them to the alleged scene where he heard the loud bang. He was arrested, thrown at the back of the police vehicle and taken to Monkey-Bay Police Station where he was threatened by the police to either admit to being in the wrong or to be detained if he denied causing the occurrence of the alleged accident. He tried to tell the police the truth being that neither him or his wife saw anything in the road prior to and post the loud bang.

He said despite numerous attempts to tell the police his honest truth, they denied to release him until he admitted being in the wrong. After three to four hours under police custody, he proceeded to admit the alleged accident under police duress. He said he believed that believed the whole issue to be complete scam. He said he did not believe that he hit the claimant or that any accident took place.

He said the claimant stated that he was riding a bicycle carrying wooden roads during the occurrence of the alleged accident. However, if that was the case, he would have been very visible to him and his wife because the alleged accident took place around 16:00 hours meaning visibility around the area was very clear. He said that

neither his wife nor himself saw any person, object or anything at all surrounding the alleged scene of the accident prior to post the loud bang that they heard against the left side of his vehicle. He said he believed that the alleged injuries being claimed by the claimant and events that led to the occurrence of the alleged accident were altogether false. They are not proportional. He alleged that he was scammed by the claimant.

Further, he said he was harassed by the police who denied checking the scene of the accident with him after he asked them to. Instead of helping him, they arrested him and forced him to accept that he had caused this alleged accident when in fact he did not.

In cross-examination, he confirmed that on 19<sup>th</sup> July, 2019 he was travelling along Mangochi-Monkey-Bay Road. When asked about the period he has been driving on the said road, he indicated that he had been driving on the road for 20 years. He then confirmed that he heard a bang on the left side (passenger side) of vehicle. After hearing the bang, he did not stop, disembark from the car or physically check. When asked if he has ever met pedal cyclist along the said road for the 20 years he has been driving, he agreed. He confirmed that pedal cyclist travelling from Mangochi ought to be on the left side of the road.

He said he went to police after the accident. He then indicated that he was not warmly received at the police as he was arrested before he uttered any word and that the police did not say anything before arresting him. He then agreed that he found the police and community members waiting for him and harassed him immediately after he arrived. When interrogated if he committed any offence on his way to and from Blantyre such that the police and community members could wait for him, his response was negative. He then confessed that what had happened on this day where the police and community waited for him has never happened for the 20 years that he has been driving along the said road.

He then reiterated that he did not see anything on the road. He only realized that there was an issue involving him at the police roadblock when four to five minutes after arriving at the roadblock, he saw a five-tonner truck behind him and the passengers in the said vehicle threw timbers into his vehicle whilst displaying a bicycle but they did not say anything on the reasons they were throwing the timber

into his vehicle. When asked if he saw the claimant at the roadblock, he indicated that he did not see him. All what he saw was a bicycle in the truck which was being waived to him by the passengers, but they did not say anything.

He said that after being arrested at the roadblock he was taken to Monkey-Bay police where he paid a fine of MK 5, 000.00 and he was given a receipt for the payment. He, however, said he could not recall what was written on the receipt and that it was at his office in Blantyre. He further said that he paid the fine because it was alleged that he hit a person with his vehicle and that this allegation was laid on him when he reached at Monkey-Bay police.

He then admitted that he was aware that a person who has not committed any offence ought not to pay a fine but challenge that the matter be determined by the court. He said he took any steps to push the issue he alleged to have been scammed by the claimant. He then agreed that the accident occurred in the afternoon but refuted that there was anything physical at the scene despite indicating in his witness statement that the accident occurred near an orphanage. He then further agreed that it was good practice for drivers to stop when something abnormal has happened to their car but proceeded to say that this is Malawi and it was not proper to stop.

#### Examination of the evidence v law

The claim in this matter is of negligence.

‘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 reasonable and prudent man would not do’.

See *Blyth v Birmingham Waterworks Co.* (1856) Ex 781. In *Donoghue v Stevenson* (1932) AC 561 Lord Atkin said:

‘To establish negligence it must be shown that there was a duty of care on the part of the person sought to be made liable and that party breached that duty of care resulting in injury or damage to the plaintiff’.

Concerning negligence on the highway, in *Kachingwe v Mangwiro Transport II* MLR 362, the Court stated that the duty of a driver is to use proper care. Proper care, the Court said, connotes avoidance of excessive speed, keeping of good look out, observing traffic rules among others.

In *Banda & Others v ADMARC & Others* [1990 13 MLR 59 at 63 Justice Banda (as he was then) said:

“...a driver of motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skillful driver would have in all circumstances...”

A reasonably skillful driver has been defined as one who avoids excessive speed, keeps a good look-out and observes traffic signs and signals. See *Kingsley Chima & Gestetner v Alick India L. Mamenya & NICO*, Civil Cause Number 1413 of 1992. The duty incumbent to all road users comprises, among others, keeping a proper look-out and not going at an excessive speed. See *Malida v Chiona* 3 MLR 427.

The driver of a vehicle should usually drive at a speed that will permit him to stop or deflect his course within the distance he can see clearly though it is not conclusive proof of negligence to exceed that speed. See *Morris v Lutton Corporation* [1946] KB 114 but if the driver strikes a person or object without seeing that person or object he may be placed in the dilemma that either he was not keeping a sufficient look-out or that he was driving too fast having regard to the limited look that could be kept. See *Evans v Downer & Co. Ltd* [1933] 149 AC 264 per Scrutton LJ. *Mhango v Positi and National Insurance Company Ltd* [1995] 2 MLR 402 purposes that a driver of a motor vehicle has a duty to always keep a proper look out and to drive at such a speed as would allow him to stop well within the distance he can see to be clear. Further, a driver is under an obligation to approach a potential danger at a speed which will allow him to stop in time if sudden emergency arises: see *Alfred Amosi Gama v McPherson Charles Jere & NICO General Insurance Company*, HC/PR Civil Cause No. 2714 of 2003 (unreported), *F.A. Lambart v Baster O. Kassam*, HC/PR Civil Cause No. 120 of 1987 (unreported).

### Finding

In my appreciation of all the evidence before me, I find that all that the defendants were doing was to deny every allegation in the matter at any cost. The evidence of the first defendant did not convince this Court. It was quite obvious that he was somebody who came to the Court to deny everything. In some circumstances he was

giving incoherent and contradictory evidence. It appears to me that the defendant was somebody who chose not to cooperate.

The second defendant denied the occurrence of the accident. That is to say that he denied hitting the claimant. He, however, said that he heard some strange sound but did not stop. He further said that he went to the next road block to ask the police to assist him in relation to the sound that he heard. He denied paying a fine. However, later he accepted paying a fine but said that he did not know what he was paying for. He also seemed to suggest that he paid for the fine under duress. In the further alternative he said that he paid for an incident that did not happen. He did not specify the incident that he said did not happen. One would state that the evidence of the first defendant was quite contradictory. He seemed to suggest that there was an incident in one breath, yet in another he seemed to suggest there was no incident. He further went on to say that all the scheme was a scam against him. He said that he faced animosity when he arrived at the road block. He, however, stated that it was not his first time to drive through that route but that it was his first time to meet such animosity.

On the other hand, I find that the claimant proved that he was injured and that he was injured by the vehicle the first defendant was driving. From the totality of the evidence, I am convinced that the first defendant drove the vehicle on standards below those required of a driver.

In my judgement, the issue in this dispute can be summarised that the evidence points that the first defendant hit the claimant. After hitting him he did not stop. Another vehicle observed this and carriage the claimant to the road block. Before going to the road block, the police might have been aware of incident for they arrested the first defendant upon arrival. The first defendant denied everything, much as he alleged that he went to the road block to seek assistance in respect to the same issue. The police went on to find him in the wrong doing.

In the circumstances, I find that the claimant has, on a balance of probabilities, proved that allegation that the defendant so negligently drove his motor vehicle that he hit him. In his own evidence, he said that he heard a strange sound or abnormal sound. He did not stop after hearing that sound until the police arrested him at the road block. One wonders whether a reasonable driver would not have stopped after observing that there was some abnormal sound. Obviously, a reasonable driver would have known that he had hit something. The defendant argued that his wife



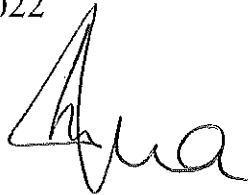
looked outside after hearing the abnormal sound but she she saw nothing. I find it hard to believe this piece of evidence. Furthermore, the defendant himself said that he looked at the rear-view mirror and saw nothing. Again, I do not believe this version of the story. It appears to me that it is a dishonest statement.

It appears to me that the first defendant might have observed the incident but chose to pay a blind eye to it. I do not even believe that he went to the roadblock to report the incident. The question is what was he going to report (since he seemed to suggest there was no incident at all)?

The total sum of this is that I find that the claimant has proved the allegation against the defendant on a balance of probabilities. I enter judgement for the claimant with costs to the defendant. The reason for my ordering of costs is that it is very apparent that the defendant never wanted to cooperate with this Court.

The Registrar shall assess damages and costs payable to the claimant.

DELIVERED the 31<sup>st</sup> day of May, 2022

A handwritten signature in black ink, appearing to read 'J N'RIVA', written in a cursive style.

J N'RIVA

JUDGE