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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 640 OF 2019

BETWEEN:

INNOCENT JOSEPH.....CLAIMANT

AND

MAXWELL RICHARD MJATHU..... FIRST DEFENDANT

AND

ELECTRICITY SUPPLY CORPORATION OF MALAWI
LTD.....SECOND DEFENDANT

AND

NICO GENERAL INSURANCE COMPANY
LIMITED..... THIRD DEFENDANT

BEFORE Hon Justice Jack N'riva
Mr Mwantisi, for the claimant
Mr Kondowe, for the defendant
Ms D Nkangala, Court Clerk

JUDGMENT

BACKGROUND

On or about 30th April, 2019, the claimant was riding a motor cycle from the direction of Limbe heading towards Zomba along the John Chilembwe Highway close to Central Poultry (Mapanga), he was suddenly hit from behind by a motor vehicle, driven by the first defendant which was going in the same direction and injuring the claimant in the process.

As a result of the accident, the claimant sustained some injuries. The claimant avers that the motor vehicle was being driven at a high speed under the circumstances. He further alleged that the first defendant further failed to exercise or maintain proper or effective control of the motor vehicle, and failed to see the claimant in sufficient time to avoid colliding with him.

The further allegation that the first defendant failed to control the motor vehicle and drove without due care and regard to the presence of the motorist on the said road. The defendants denied the allegation.

ISSUES FOR DETERMINATION

Thus, it is incumbent on the Court to determine:

Whether the first defendant was negligent in the driving and management of the said motor vehicle;

Whether the claimant suffered loss and damage;

Whether as a result thereof the first defendant as the driver of the vehicle, the second defendant as the registered owner of the vehicle, and the third defendant as the insurer of the vehicle are liable to pay damages to the claimant;

CLAIMANT'S EVIDENCE IN COURT

The claimant paraded two witnesses, the claimant and Traffic Sub Inspector Paul Mose.

In examination-in-chief, the first witness adopted his witness statement in examination-in-chief. His testimony was that he was the claimant in the matter.

He stated that on 30th April, 2019, he was lawfully riding a motor cycle from the direction of Limbe heading towards Zomba along the John Chilembwe Highway when at or near Central Poultry (Mapanga) he slowed down and indicated that he was turning right in order to take a junction when he was suddenly hit from behind by a motor vehicle, driven by the first defendant, which was travelling at a high speed and was going in the same direction and injuring him the process. He tendered a police report to substantiate the accident.

As a result of the accident, he sustained a fracture of the ulna, fracture of the medial malleolus of the left upper limb, fracture of malleolus (ankle bone) of the left leg, cut wound on the head, bleeding and he lost consciousness. Since the accident he has post-traumatic pain of the injured parts, he is deformed, he has permanent multiple scars, is unable to walk long distances as he used to do before the accident. He was taken to Chiradzulu District Hospital where he was admitted. The claimant's leg was cast in a plaster of Paris for six weeks. He tendered a medical report to substantiate his claim.

According to the police report, the motor vehicle that injured the claimant was a Toyota Hilux Double Cabin motor vehicle registration number BT 9505 which was being driven by Maxwell Richard Mjathu and was owned by Electricity Supply Corporation of Malawi Limited and was insured by Nico General Insurance Company Limited.

The witness stated that he paid MK3, 000.00 for the police report as endorsed on the police report and MK21,000.00 for the medical report. He, therefore, claim damages for pain, suffering and loss of amenities of life, damages for deformity and disfigurement, as well as MK3,000.00 and MK21,000.00 for police report and medical report respectively.

Further to that the witness reacted to the testimony of the defendants as filed in the Court.

He stated that he stopped near the white line to take a turn at a junction to his working place and he was putting on a reflector. He further stated that he had been riding the motorcycle for close to 15 years and that he was thus an experienced rider. He said he had been working at Central Poultry where he was going when taking the junction for 4 years and this was his usual routine for the said 4 years.

According to the witness the accident happened because the motor vehicle was being driven at a high speed under the circumstances. He asserted that the first defendant further failed to exercise or maintain proper or effective control of the motor vehicle, and failed to see him in sufficient time to avoid colliding with him. He averred that the first defendant failed to control the motor vehicle and drove without due care and regard to the presence of the motorist on the said road. He stated that the fact that he did not have a licence or the motor cycle was not registered did not in any way influence or contributed to the accident.

in cross-examination, the claimant admitted that he did not have a driving licence at the time of the accident. He said he was driving on the white line. Asked when he knew that he stopped on the white line, he said he knew that on 30 April 2019. Asked if he put that in the written statement, he said he did so in paragraph 7 of his statement. He said the road was 4 metres wide. He agreed that with that distance a vehicle would pass without a collision. He said he was injured on the left arm and left leg. He said the car got him on the left not behind. He said he lost consciousness. He said he did not scream. He said he did not remember if he screamed. He said he heard at the hospital that his friends asked the driver to take him to Chiradzulu Hospital. He said he put on a jacket under, not over, a reflector. He repeated that he had no driver's licence arguing that he was operating in a village. He accepted that a driver's licence is an indication that one knows the traffic rules. He, however, insisted that he knew the road regulations.

In re-examination, he said that, according to onlookers, the first defendant was speeding and did not wait for him. He said that lack of licence was not an issue because he had been cycling for a long time. He further said the driver overtook on the left side instead of the right. He said the driver had to wait until he turned.

He insisted that he was putting on a reflector at the time of the accident and the reflector was on top of the jacket.

The second witness adopted his witness statement in examination-in-chief. His testimony was that he was at all material times working as a Traffic Officer based at Chiradzulu Police station.

He testified that on 30th April, 2019, he was assigned to assess a road accident that occurred at or near Central Poultry (Mapanga) in which motor vehicle registration

number BT 9505 Toyota Hilux Double Cabin had hit a motor cyclist along the John Chilembwe Highway.

He stated that he visited the scene of the accident and took particulars of the driver, driving licence of the driver, registration number of the motor vehicle, as well as particulars of the victim. He proceeded to prepare police report for the victim in respect of the said accident which he tendered.

The witness testified that he interviewed the driver of the motor vehicle who produced his driving licence. The driver also produced a Certificate of Insurance for the motor vehicle. The witness said he interviewed other persons on the scene of the accident.

He said that according to his assessment, the driver of the motor vehicle aforesaid influenced the accident by speeding and furthermore he misjudged clearance and he was clearly to blame. He was hence fined for the offence of inconsiderate driving.

During cross examination, the witness confirmed that he went to the scene of the accident the next day and he interviewed the driver.

He said that the driver told him that the rider had stopped in the middle of the road. He said he measured the distance from the yellow line and to the other yellow line at about 7.1 metres. He said to determine the distance to the white line, one has to divide that (7.1 metres) by 2. He said he measured from the yellow line to where the driver stopped but he could not remember the distance. He agreed that distance was important in this matter. However, he said he did not know that distance was crucial in the matter. He said that if the cyclist stopped at the white line, there would have been enough space to pass through. He agreed that the driver did not have enough space to pass through. He said he did not remember that the claimant was putting on a jacket over the reflector. He said the cyclist had no driver's licence. He said the cycle had lights. He said he could not state how the cyclist got hit because he was not present. He, however, said he found the driver in the wrong. He said since he was coming from behind, he had to have ample time to see what was happening and had to slow down. He said that if it was true that the claimant was in the middle of the road, he had to stop.

In re-examination, the witness stated that he made a decision that the first defendant was in the wrong based on several factors for instance that he was coming from behind, he was over speeding, he misjudged clearance, and he was overtaking the motor cycle on the left-hand side instead of the right-hand side.

The witness also confirmed that the motor cycle had lights and it was duly examined by a motor examiner as being roadworthy. He said at the scene, he only interviewed the first defendant because the claimant was in the hospital. He said that that was why he was not conversant with the distance.

DEFENCE EVIDENCE

The defendants paraded one witness, the first defendant. The witness adopted his witness statement in examination-in-chief. His testimony was that he works for ESCOM as Malawi Rural Electrification Program (MAREP) Manager and he is the first defendant in the matter

He testified that on 30th April, 2019 at around 7 pm, he was driving motor vehicle registration number BT 9505 Toyota Hilux Raider, belonging to ESCOM, from the direction of Limbe along John Chilembwe Highway heading towards Mapanga. As he was approaching Chiradzulu Turn-Off, he saw some vehicles coming from the opposite direction. He was driving at around 50 kilometres per hour, which is the prescribed speed limit marked on the road.

After the vehicles from the opposite direction had passed, he put on full lights as he was approaching Central Poultry Turn-off. Immediately when he turned on full lights, he saw the claimant, a motorcyclist, who had stopped in the middle of the road, apparently intending to turn to the right. He stopped in the middle of the road rather than near the white line. He was about 1.5 metres from the edge of the road.

The witness told the court that noting that he might be turning right, he went to the left edge of the road with the intention of avoiding him. Unfortunately, due to the little space between the left edge of the road and where the claimant had stopped, he hit him with the front right-hand side of his vehicle.

He stated that he stopped about two metres away from the point of impact and picked up the claimant to Chiradzulu police where he reported the accident. They thereafter

went to Chiradzulu District Hospital together with the police, where the claimant was treated. He was conscious all along.

The witness stated that the claimant's motorcycle had no registration number, no lights and no reflectors. The claimant was wearing a reflector jacket but he had put it inside of the coat he was putting on making it difficult for him to clearly see him. He only saw the reflector jacket at the time he was picking the claimant up after the collision. The claimant had no licence to authorise him to ride a motor cycle on the road.

During cross-examination, the witness confirmed that his motor vehicle was behind and the claimant with his motor cycle was in front of him.

The witness confirmed that he had full control of the motor vehicle and that he could have either have stopped, slowed down or swerve or do anything to avoid the accident. He said it was 7 p.m. and it was dark.

He confirmed that the claimant being in front of him he had no such control of his motor cycle so as to stop, slow down, swerve or do anything to avoid the accident in the heat of the moment.

He further confirmed that he had put full lights immediately before the accident because vehicles coming from the other had passed. He said if the claimant was on the white line, he would have had enough space to pass through. He said that he was the only one interviewed. He said that he paid a K 5,000 fine. He said he paid the fine because that was the opinion of the police. He said he did not admit wrongdoing. He said there was duress because his car, which he was using as an official vehicle, was detained. So, he had to pay the fine to have the vehicle released.

In re-examination, he stated that when overtaking one uses the right-hand side. He said, in the case, the claimant was turning right. Therefore, he had to go to the left in accordance with defensive driving. On the issue of being the only one interviewed, he said it was not his responsibility to interview the claimant.

LAW

Burden and Standard of Proof

The law on the burden of proof in civil matters is that he who alleges in the affirmative must prove, and the standard of proof is on the balance of probabilities. See *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA).

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. Whichever story is more probable and the tribunal is convinced that this is it, must carry the day. See: *Rashid Tayub et al v The Attorney General et al*, Civil Cause No. 326 of 2018 (HC) (unreported).

It is well settled that the standard of proof in civil cases is the balance of probabilities. If only to provide a single authority for this firmly and long settled proposition, in *Msachi v Attorney General* [1991] 14 MLR 287, at 290, Tambala J (as he then was) stated that '[t]his is a civil action and the duty of the claimant, in a civil case, is to prove his case on a balance of probabilities.' In *Re H (minors)*, [1996] A.C. 563, offers a lucid exposition of the principles governing the weight of evidence required to discharge the legal burden and satisfy the standard of proof. In that case Lord Nicholls of Birkenhead stated as follows: -

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. ... It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred.” – at 586D-H.

The law on negligence

In *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781 Baron Alderson defined 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 prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to

do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

A driver of a motor vehicle owes a duty of care to all other road users. The driver breaches that duty of care if he acts below the standard of a reasonable driver. *Olesi Mazingo v Prime Insurance Company Limited*, Personal Injury Cause No. 766 of 2011 (HC) (unreported).

In *Banda v Agricultural Development and Marketing Corporation and another*, Civil cause no. 273 of 1987 (unreported) (Cited in *Kawala and others v ADMARC and another* [1992] 15MLR 184)

“A driver of a 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 skilful driver would have exercised under all the circumstances. A reasonable and skilful driver has been described as one who avoids excessive speed, keeps a good lookout, observes traffic lights and signals. A pedestrian also owes a duty of care to other road users to move with due care. Although a pedestrian is entitled to walk on the carriage-way, he is only entitled to the exercise of reasonable care on the part of drivers of motor vehicle.”

In *Kadawire v Ziligone and another* [1997] 2 MLR 139, Ndovi J opined as thus on page 145:

“The fact that the driver failed to stop in time to avert the accident is also in consonance with the fact that he was speeding. In the case of *Rep v Sinambali* 4 ALR (Mal) 191, it was held that it is the driver’s duty to drive at a speed which will allow him to stop in case of sudden emergency.”

Thus, a driver of a motor vehicle is required to drive at a speed that will permit him to stop or deflect his course within the distance he can see clearly and if a driver strikes a 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, *Chibwana v Phiri* Personal Injury Cause No. 659 of 2013 (unreported)

ANALYSIS AND APPLICATION OF THE LAW TO THE EVIDENCE IN THE MATTER

The claimant avers that the motor vehicle was being driven at a high speed under the circumstances. He asserts that the first defendant further failed to exercise or maintain proper or effective control of the motor vehicle, and failed to see the claimant in sufficient time to avoid colliding with him.

The claimant further avers that the first defendant failed to control the motor vehicle and drove without due care and regard to the presence of the motorist on the said road. He argued that the motor vehicle was being driven too fast under the circumstances otherwise the first defendant would have been able to stop, slow down or in any other way so as to manage or control the vehicle in order to avoid the accident.

I find the story as told by the claimant through the two witnesses to be more probable in the circumstances. It may be possible, although I do not believe the story, that the rider may have stopped in the middle of the road. However, the first defendant was coming from behind and the claimant was in front of him. Instead of stopping or slowing down to let the claimant take the junction, the first defendant started overtaking on the left. This was dangerous and clearly wrong and contrary to the road traffic rules and regulations. The first defendant was just supposed to stop in the circumstances. Thus, he might actually have been speeding. The first defendant would have stopped, swerve or slowed down to avoid the accident.

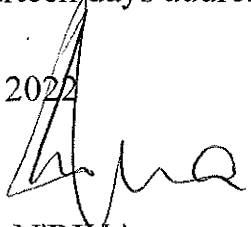
The Court finds it more probable than not that the defendant drove in a negligent manner.

I fail to appreciate that the first defendant paid the fine under duress.

The Court, therefore, finds in favour of the claimant. I find the first defendant liable as a tortfeasor and the third defendant as an insurer. I am not convinced why the second defendant should be liable.

The parties should within the next fourteen days address the Court on damages.

DELIVERED the 30th day of August, 2022

A handwritten signature in black ink, appearing to read 'J. N'RIVA', is written over the printed name.

J. N'RIVA
JUDGE