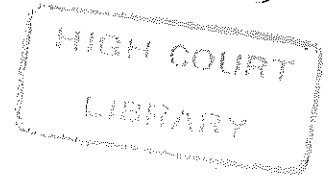


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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CASE NUMBER 146 OF 2019

BETWEEN

JOSEPH MAKHULUDZU..... CLAIMANT

AND

ELECTRICITY SUPPLY CORPORATION OF
MALAWI..... 1ST DEFENDANT

AND

NICO general INSURANCE COMPANY
LIMITED..... 2ND DEFENDANT

Coram Hon Judge Jack Nriwa, judge
Mr Mapemphero Manda for the claimant
Mr Alinane Kauka for the defendant

JUDGMENT

An accident happened on 25th November, 2018 at Dyeratu in Chikwawa on the M1 Road. There was a collision between a bicycle and motor vehicle Toyota Hilux BS 528. The claimant, who was cycling, suffered injuries. The first defendant is the owner of the vehicle. The second is the insurer. The first defendant's vehicle was damaged. The claimant avers that the accident happened due to negligence on the part of the first defendant's driver. The driver, he alleged, drove without due care

and attention, failed to keep to the nearside and drove with excessive speed; he failed to keep a proper look out.

In evidence, the claimant claimed that the vehicle hit him from behind. It left its lane and hit him on the dirt verge.

In cross-examination, he was asked whether the vehicle left its lane and hit him or the collision happened immediately after joining the road. His answer was unclear except to say that he was on his side of the road. In other words, he was evasive and incoherent on the point concerning the point of impact. He was merely insisting that he was on his side of the road. However, he accepted that the accident happened upon joining the road. Later, however, he said, he was already on the main road when the accident happened. Perhaps, it would be apt to reproduce this part of the cross-examination:

Q: ...from Kasisi, you joined the road?

A: Yes, I was going to Dyeratu.

Q: Ok. So the road from Kasisi connects with the tarmac road at the same spot the accident happened, right?

A: The road.... went all the way to connect to the road to town via Dyeratu.

Q: So you confirm, therefore, that from Kasisi, it's dirt road and the dirt road joins the tarred road right where the accident happened?

A: It's an earth road.

Q: And it connects at the same spot where the accident happened?

A: Yes.

Q: ...you also confirm that the moment you to the tarred road you turned right in order to turn to Dyeratu?

A:

Q: When you got to the junction you turned right to join the tarred road, that's where the accident happened?

A: I was on my side, the left.

Q: No sir. This is the question.....

A: Kufumbi kwenikweni kudothi,

Q: We will get there.....

A: No it was not immediately after entering the road...I was not entering the road. I was already in the road.

Q: I will take you back to the evidence you have already given.

You said the road from kasisi joins the tarmac at the place the accident happened. Not so?

A: Yes.

Q: Thank you. Meaning, therefore, that the accident happened before you started cycling in the direction from which the vehicle was coming?

A: I was cycling on my side going to the rank at Dyeratu. The vehicle was behind me and hit me.....

It was further unclear, in his answer, that he apologised to the police. He further denied the assertion that he was drunk.

The first defendant's driver's evidence was that the vehicle hit the claimant while he was coming from the earth road and joining the Chikwawa-Blantyre Road. This is also reflected in the report of the police that the claimant himself filed. The only time issues about the police report arose was in cross-examination of the witnesses. During cross-examination of the claimant, an issue arose why he paid a fine. During the cross-examination of the defence witness, the issue was whether the police visited the scene.

The police report faulted the claimant for the accident. The police imposed a fine of him. Seemingly, the claimant is attacking the report as hearsay.

I must point out that it is not in dispute that the collision took place.

Neither is it in dispute that the claimant suffered injuries.

The question in dispute is whether the driver of the vehicle was negligent. Put narrowly, the question is whether the driver hit the motor vehicle at the dirt verge or whether the impact took place as the claimant was adjoining the main road. This is an important question because it has a bearing on whether the claimant has proved that the driver was negligent. If the driver left the road and hit the cyclist on the dirt verge, I believe, a presumption of negligence may be raised. If the collision took place as the cyclist was coming from the left side in the earth road, the cyclist himself or both the cyclist and the driver might have been negligent.

The law on negligence is premised on the prerequisite that one must owe another a duty of care toward another, not to do acts or omissions that would harm the other. One commits the tort of negligence when the person breaches that duty and the breach results into an injury on the other. Negligence is said to doing something which a reasonable man would not have done or omitting to do something which a reasonable man would not have omitted to do- *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, *Kadawire v Ziligone* [1997] 2 MLR 14. One must do acts or omit to do acts that would lead to injury of another. The injury must be foreseeable to the person on whom the duty is imposed: *Caparo Industrial v Dickman* [1990] 1 All ER 668.

It is commonplace that it is incumbent on a part that makes an allegation to prove the allegation on a balance of probabilities. What does a balance of probabilities mean in terms of evidential burden? The claimant must convince the Court and the Court must find from the evidence that the collision took place due to the driver's negligence. It must be a question of 'he was negligent' and not 'he might have been negligent'. The evidence must be more probable than not. If the probability is lower, proof has not been made. If probabilities are equal, proof has not been made out.

In *Re B* [2008] UKHL 35, Lord Hoffman said

"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 *In re H (Minors)* [1996] AC 563 at 586, Lord Nicholls said that the balance of probability standard means that a Court is satisfied an event occurred and that on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

In *Miller v Minister of Pensions* [1947] 2 All ER 372) Denning J said:

"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."

From the evidence, it does not appear that the driver of the first defendant left the road and hit the claimant. The claimant merely alleged that position but hardly proved it. It is more probable that the collision took place as the claimant was joining the main road. To attribute the collision to the claimant would not be ideal. If anything, it does not appear that the claimant acted himself properly when joining the road. Drivers of vehicles owe other road users a duty of care- *Banda and others v ADMARC and another* [1990] 13 MLR 59; other road users, too, have a duty of care when using the road. As Potani J, as he then was, said in *Watson v Nico General Insurance Co Ltd* Civil Cause No 570 of 2010, the law places a duty of care on both drivers and pedestrians. Cyclists also have a duty of care.

Since the action is rooted in negligence, the burden lied on the claimant to prove that the driver of the vehicle was negligent.

The claimant has failed.

I dismiss the claim. I would have ordered costs. However, I have doubts if the claimant can pay costs to the defendants.

DELIVERED this 18th day of June, 2021

J N'RIVA
JUDGE