IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
PERSONAL INJURY CASE NUMBER 277 OF 2020

BETWEEN

DAVIE MTALIMANJA..... CLAIMANT

AND

INNOCENT SANI.....FIRST DEFENDANT

AND

BRITAM INSURANCE COMPANY LIMITED.....SECOND DEFENDANT

Before Justice Jack Nriva
Mr A Mussa of counsel for the claimant
Mr F Chipembere of counsel for the defendant
Ms D Nkangala Court Clerk

JUDGMENT

The claimant commenced this action claiming that the first defendant, who was driving motor vehicle registration number RU 1198 Scania lorry insured by the 2nd defendant, drove the vehicle negligently. As a result, he alleged, the vehicle hit him while he was cycling.

The accident took place on 7th August 2019 at around 11:30 hours. He was cycling from the direction of Mudi heading to Tsiranana roundabout along Maselema Road. As a result of the accident, the claimant suffered fracture of the distal radius and osteophyte, a bruised swollen and tender wrist, a sprained and swollen shoulder, bruised right knee and broken incisor tooth. He, therefore, commenced this action claiming damages for pain and suffering, loss of amenities of life and disfigurement. The defendant denied the claim of negligence and put the blame on the claimant for the accident

There were four witnesses during the hearing. Two were the claimant and the other two were for the defendants.

In his witness statement, the claimant stated that on the day in question he was cycling at the stated area. He said that he was cycling on the extreme far left side of the road. He said that this was a dual-carriage tarmac road. He said that whilst on his way, he was suddenly hit by a motor vehicle on his right shoulder. He said that the motor vehicle came from behind and was heading the same direction. He said that it hit him while its body was passing him. As a result, he said he fell down on the road. The driver picked him up and went with him to his workplace Rab Processors which was nearby. Later, they went to Limbe Police where the police took statements and gave him a referral letter to go to hospital. He said he went to Limbe Health Centre where he was treated as an outpatient. He said that 11th August 2019, he went to Queen Elizabeth Central Hospital because he was not feeling alright. He said that by then his wrist was swollen and he was in pain.

He said that he an went to Kasungu and he continued feeling pain from his shoulder and wrist. Then he went to hospital at Kasungu where the doctor recommended that he should go for an x-ray filming. He went to Madisi Hospital where the x-ray showed that he had a hairline fracture on the distal radius. He said that apart from the fracture he also suffered dislocation on the right shoulder, bruises on the right forearm, bruises on the right knee and broken incisor tooth.

He said that the fault was on the driver of the vehicle (the first defendant) because he was cycling on his lawful path. He said the driver swerved and hit him whilst passing by him.

In cross-examination, he said that the place of the impact was the left-hand side corner of the motor vehicles body. He said that when that part hit him, he fell down. He said the driver wanted to overtake. He said the driver followed him to his side. He said he was hit by the front side of the vehicle not the rear. He said the driver swerved and hit his right shoulder. He said it hit his shoulder and not the bicycle. He said the bicycle and the vehicle were not damaged.

The second witness for the claimant was number B 1020 Traffic Sergeant John Matika of Limbe Police Station. He said that on the date, he received a report of motor vehicle accident concerning the matter in this matter. He said he recorded statement from the driver and the pedal cyclist. He said that he gave an opinion that the driver of the motor vehicle influenced the accident. He said that the driver

admitted to have influenced the accident and he issued him with a notification of a traffic offence. He said that he paid the fine and he issued him a police report.

In cross-examination, he said that he did not come to the scene of the accident. He said that the driver told him that he was overtaking the pedal cyclist. He said that the driver said that in his statement. He said that the driver said that the rear of the vehicle collided with a cyclist. He also said that the cyclist said that the rear side collided with him. He said that after analysing the evidence, he formed the opinion that the driver was in the wrong. He accepted that that that was merely his opinion. He said that the defendant voluntarily admitted and paid a fine. He said that if one pays a fine voluntarily, they are accepting ability. He said that his opinion was not changing.

The first defence witness was the first defendant. He adopted his witness statement as his evidence.

In his written statement he said that on the date in question he was driving the motor vehicle and when he was approaching MTL, he saw the claimant riding his bicycle in front of him. He said that there were two other persons in the motor vehicle. He said that he hooted and the cyclist cycled to the left hand of the road but immediately cycled back to the road and turned to his path and hit the rear of the motor vehicle. He said he immediately stopped to check the claimant.

He said the claimant admitted that he was in the wrong and that he was disturbed throughout the day and he was rushing to see a patient at the hospital.

At police, he said the claimant said he was in the wrong and explained to the police what actually happened and the claimant admitted that he was the one that hit the motorcycle. He said, however, the traffic police officer told him that the pedestrian or cyclist could never wrong on the road and he proceeded to charge him with the offence of negligent driving and ordered him to pay a fine which he said he paid under protest.

He said that he believed that the accident took place due to negligence of the claimant by failing to keep proper look out and to have sufficient regard for his own safety. He said that the cyclist cycled on the wrong portion of the road and cycled into his path.

Testifying at the scene, he said that he saw a pedal cyclist from a corner.

He said the cyclist was not cycling properly. He said that on the first gate he hooted and passed over him. He said he checked on his mirror. He said his

shoulder leaned on his vehicle's tarpaulin. He said he slowed down and went to the other lane. The claimant fell down. He said he asked him what was wrong; he said that he was sorry. He said he said that he had a patient at the hospital and was not thinking properly. He said that he said that he was alright but the witness insisted that they should go to the hospital. He said they went to the police where they were referred the hospital.

In cross-examination, he said that the part of the vehicle that hit the claimant was the body. He said that he saw him 20 metres away.

He said he hooted 15 or 17 metres away.

He said he proceeded to drive. He said that the claimant was on the left-hand side. He said that it was not collision but the claimant leaned on his vehicle. He said that the claimant leaned on the vehicle for five to seven minutes. He said he did not stop within that distance. He said he saw him throughout that distance. He said that he was trying to pass through the pedal cyclist. He said he was in his lane meaning the he and the cyclist were on the same lane. He said that if he was on the other lane, there would have been more space. He said there was no other vehicle on the other side. He said there was space reserved for cycles. He said cyclists use yellow line. He said that if there is no yellow line, they just give them some space. He also said that he was aware of zigzag lines.

In re-examination he said that on cross-examination, he was trying to say that if he could have stopped by applying the brakes, he could have thrown the cyclists away and there would have been a big impact. The question, in cross-examination, was why he did not stop. He said he had to go with him so that he could not be injured.

The second defence witness was Crescent Mwase, the defendant's legal associate.

He raised two issues in defence in his witness statement.

The first one was that the claimant commenced another action at Limbe Resident Magistrate's Court. The matter was on the same facts as the one in this matter and against the very defendants in this matter. He said later that the claimant withdrew the said action without notice to the defendants.

The second issue was that the second defendant insured the motorcycle under an insurance policy to indemnity the insured for any claim of damages for bodily injuries against a third party for any amount not exceeding K5,000,000. It was K10,000,000.

During the hearing of the matter the defence witness said he wanted to amend two parts of his witness.

The first one was that the claimant withdrew the matter in the court below without notice to the defendant. The second issue was about the policy limit to say that it was not K5,000,000.

The witness amended the witness statement to reflect those two changes.

Suffice to say that counsel for the claimant chose not to cross-examine this witness.

As to the rest of evidence in the matter, the claimant testified that the truck hit him on the right shoulder as the vehicle's body was passing through him. He said the driver of the vehicle intended to overtake him. Then he said the vehicle followed him to his side; the driver swerved. He said neither his bicycle nor the truck was damaged.

The first defendant testified that he noticed the cyclist was cycling improperly. He passed over him. On checking on the mirror, he saw that the cyclist swerved into the road and that he clung to the tarpaulin of the vehicle for some time. He said that when the cyclist fell off, he stopped and asked him what was wrong. He said that the claimant apologised and said was absent-minded because he had a patient at the hospital. He said the claimant told him that he was alright. However, he insisted that they should go to police. Then they went to hospital.

The police officer testified that after getting the information of the accident, he formed the opinion that the driver of the truck was in the wrong; he said he notified the driver of a traffic offence.

In cross-examination, the witness said he was not present during the accident and that he did not visit the scene. He agreed that what he said was his opinion. He said he was sticking to that opinion.

The burden is on the claimant to prove the claim on a balance of probabilities. By "balance of probabilities" the probability of the claim must be high. If not, the allegation is not proved. If the probability is lower, the allegation is not proved. Likewise, if the probabilities are equal, as it were, the claim is not made out. There is no room for "perhaps it is probable" or "it may be probable". It must be "it is probable" or "it is more probable than not". In *Miller v Minister of Pensions* [1947] 2 All ER 372 (King's Bench) Denning J said:

> The case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determine conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say: "we think it is more probable than not," the burden is discharged, but if the probabilities are equal, it is not.

The allegation in this matter is that the first caused the accident due to negligent driving. Therefore, the question is whether the claimant has proved that the accident in the matter was due to negligent driving by the driver.

It was in evidence that the collision in this matter took place on the sides of the truck. It is not the case that the truck hit the claimant from behind. The witnesses, the claimant and the first defendant, pointed the point on the road at which the accident took place. The claimant argued that the truck hit him as the driver was trying to overtake him. The defendant argued that the claimant, put in other words, lost balance and swerved into the road and leaned on the vehicle's tarpaulin.

It is a question of which version on preponderance of probability was more credible. That the truck driver caused the impact whilst trying to overtake the claimant may make sense but would also be problematic in the circumstances. This is the case considering the point on the vehicle where the convergence of the vehicle and the claimant was. I say this taking into the evidence that was adduced at the scene of the accident. The story of the claimant swerving to the side of the road, in my judgment, makes more sense. I find that it might be more probable that the claimant hit the vehicle and not the other way round. The police officer who inquired into the accident told the Court that his opinion was that the driver of the truck hit the cyclist. That, however, seems not to be supported by the evidence. It is well to note that the officer testified that he did not visit the scene of the impact. All the witness told the Court was his opinion. It is also the case that the first defendant suggested that the police officer they found at the station suggested that a cyclist and a pedestrian could not be in the wrong. This was not challenged. Since the issue in this Court is of negligence, such suggestions would not be of help. The question is whether the defendant was negligent. The issue is whether that is proved. I believe each case should be dealt with based on its facts

and not pre-conceived ideas. Some pre-conceived judgments might end up in unjust results.

Form the evidence, the impact between the claimant and the vehicle was on the side of the body of the vehicle. To any reasonable user or observer, a vehicle having overtaken another road user, and there is an impact on the body, as it happened in this matter, it is more likely that the other road user caused the impact. The case would have been different where the impact on the other road user was from behind, or that the vehicle swerved to the side of the road where the other road user was. The driver was have driven as would not be expected of a reasonable driver. The claimant asserted that the vehicle wanted to overtake him. However, for the evidence, the vehicle had already overtaken him. Overtaking, in this sense, is in the understanding that the vehicle was passing by him.

I do not find it more probable that the vehicle followed him on his side.

Either the claimant or the defendant was negligent. Either the driver hit the cyclist or the other way round. However, on the facts before the Court, it is more likely that the claimant hit the truck. On that point, it is quite unlikely that the impact was due to the driver's negligence. Assuming that both parties were to blame, or played a role in the negligence, it then becomes difficult for the Court to find that the allegation more probable than not. The burden is not discharged.

The legal rule on evidence requires the claimant to establish that the driver was negligent. The Judge must decide whether or not the driver was negligent. There is no room for a finding that he might have been negligent. If 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, the fact is treated as not having happened. See *Re B (Children)* [2008] UKHL 35

In this matter, doubt still lingers, from the evidence, on negligence on the part of the driver, the first defendant.

I, therefore, dismiss the claim of negligence against the defendants.

On costs, each party shall meet their costs.

MADE the 26th day of May, 2022

J N'RIVA

JUDGE