



IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
PERSONAL INJURY CASE NUMBER 4 OF 2012

BETWEEN
CHRISTOPHER MSINJA.....1ST CLAIMANT

AND

ANNE ROZALIO.....2ND CLAIMANT

AND

RICHARD ROZALIO.....3RD CLAIMANT

AND

MICHAEL TELEKA.....4TH CLAIMANT

AND

JAMES MAHENGE.....5TH CLAIMANT

-AND-

REUNION INSURANCE COMPANY LIMITED.....DEFENDANT

Before J. N'riva, Judge
Mr Imaan for the claimants
Ms. Wasili for the defendant
Clerk: Ms Nkangala

JUDGMENT

Statement of claim

The claimants commenced this action claiming that on 24th December 2011, they boarded a mini bus from Old Town heading towards Kanengo on Lilongwe.

On arrival at area 10 intersection, the vehicle, Toyota Hiace, MZ 2913 was hit by another vehicle Mitsubishi Colt BL 6340. The latter, it is alleged, was trying to avoid hitting another motor vehicle MAN CZ 3938, which had obstructed the said Mitsubishi Colt.

The allegation

The claimants alleged that the accident was due to negligence of the driver of CZ 3928 by obstructing the road.

Particulars

The claimants claimed that the particulars of the negligence were: obstructing the road, failing to heed Mitsubishi Colt BL 6340 and failing to swerve or manage the vehicle to avoid the accident. The further particular was driving the motor vehicle without regarding other road users.

The claim against the defendant

The claim against the defendant is by virtue of being the insurer of the motor vehicle the subject matter of the claim herein.

The defence

The defendant denied the claims and argued that without prejudice, their liability would be subject to the driver of the motor vehicle being found liable.

Evidence

The claimants gave evidence that the accident was due to the fact that the driver of BL 6340 hit MZ 9213 while trying to avoid hitting CZ 3938. They said the said CZ 3938 obstructed the road.

They all said the accident was caused by the driver of CZ 3938 by obstructing the road. They all gave the extent of their injuries. They further attached medical evidence of their injuries.

Evidence not challenged

To say the least, the evidence of the claimants was not challenged.

The essence of their evidence was that the driver of CZ 3938 blocked the road thereby causing the accident.

Burden and standard of proof

The burden is on the claimants to prove the allegation against the defendant.

The one asserting must prove.

The one alleging must prove on a balance of probabilities.

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 law on negligence

Negligence is generally defined as 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. (*Blyth v Birmingham Water Works Company* (1856) 11 Ex Ch 781).

In *Donoghue v Stevenson* [1932] AC 562, Lord Atkin said:

“The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question: who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.”

In claims based on negligence, it is onerous on the claimant to show following elements: that the defendant owed a duty of care to her or him, that the defendant has breached that duty, and resultantly, the claimant has suffered injury complained of as a reasonable result of that breach.

Specific to the road, all road users have a duty to take reasonable care to avoid causing damage to persons and property. For drivers of motor vehicles, they must use reasonable care which an ordinary competent driver would exercise under all the circumstances. Mtegha Ag. J as he then was said in *Dilla v Rajani* 11 MLR 113 at 116:-

“The duty of a person who drives a motor vehicle on a public road is to use reasonable care to avoid causing damage to persons and property.”

A reasonably competent driver has been defined as a driver who avoids excessive speed, keeps a good look-out, observes traffic signs and signals, among others. See *Kingsley Chuma and Gestetner Limited v Alick India, L. Maneya and National Insurance Company* Civil Cause No. 1413 of 1992 (HC) (PR). In short, a driver of a motor vehicle must avoid acts or omissions that are likely or to cause injury, harm or damage to other road users or property.

In *Burgess v Aisha Osman and Jimu* [1964-66] 3 ALR Mal 475 at 481 Bolt J stated that a driver of a motor vehicle should travel at a speed which will allow him to stop

within the limits of his vision. See also *Banda and Others v ADMARC and Another* [1990] 13 MLR 59, and the Supreme Court of Appeal decision in *Southern Bottlers Limited & another v Charles Chimdzeka* MSCA Civil Appeal No. 41 of 1997 (unreported).

Finding and determination

On the evidence before the Court, the Court is satisfied that the cause of the accident was the obstruction of the road by the driver of the motor vehicle insured by the defendant.

Obstructing a road is something foreseeable as most likely to cause accidents on the road. According to *Lord MacMillan in Hay(or Bourhill) v Young* [1943] A.C. 92 at p. 104 quoted with approval by Mtegha J (as he then was) in *Kachingwe and Kachingwe and Company v Mangwiro Transport Motorways Company Limited* 11 M.L.R. 362, at p. 367, the duty of care which a driver of a motor vehicle owes to property adjacent to the road and to other road users is as follows:

“... [T]he duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway

... Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on...

There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree.”

By blocking the road, 1st Defendant was clearly in breach of his duty of care. That resulted in the accident in the matter when the other driver was avoiding the obstructing vehicle. It is so found. It is apparent from the available evidence that the driver of the vehicle in which the claimants boarded, was driving lawfully in his correct lane. There was no evidence to suggest any wrongdoing on the part of that driver.

Having so found, the Court finds that the defendant is liable.

After all, the defendant's defence was that, if at all, their liability would be subject to the driver of CZ 3938 being found liable.

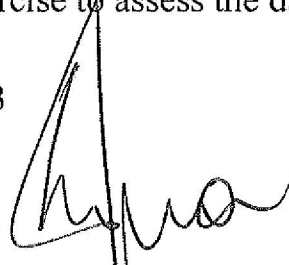
There was no evidence to rebut the assertion that the insured's driver caused the accident by obstructing the road.

The Court awards costs to the claimants.

The matter shall proceed to assessment of damages.

The Registrar shall carry out the exercise to assess the damages.

MADE the 13th day of January 2023

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

J N'RIWA
JUDGE