

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 975 OF 1994



BETWEEN:

DICKSON KANTANDE ..... PLAINTIFF

- and -

SUCOMA ..... ST. DEFENDANT

- and -

CLAIMS MANAGER (NICO) ..... 2ND DEFENDANT

CORAM: MSOSA, J.

Chafuwa, Counsel for the Plaintiff

Mtundu, Counsel for the Defendant

Kamanga, Official Interpreter

Kanjira (Mrs), Recording Officer

JUDGMENT

The plaintiff claims damages for personal injuries and loss of amenities. The plaintiff, by his statement of claim, pleads that on or about 11th December, 1993 he was riding his bicycle along the Blantyre/Chikwawa road, when he was hit by motor vehicle registration number BJ 3205. The vehicle was being driven by Catilos Wellias Maseya who was employed as a driver by the defendant. The plaintiff further pleads that the accident occurred when the driver so negligently drove, managed and controlled the



vehicle that he caused or permitted it to hit him. He, consequently, sustained a fracture on his left arm.

The defendant denies that the collision took place or that he was negligent as alleged by the plaintiff.

The plaintiff testified that he was riding his bicycle along the Blantyre/Chikwawa road on 11th December, 1993 going to Mpemba, his home. At a place near Stella Maris Secondary School he was hit by motor vehicle registration number BJ 3202 belonging to SUCOMA, the first defendant. The vehicle was being driven by Mr Maseya an employee of the defendant. The accident occurred at about 5:45 pm.

The plaintiff further testified that he recognised the motor vehicle and its driver because he once worked for SUCOMA. It was his evidence that he was riding his bicycle on the dirty verge of the road away from the tarmac. The vehicle left the tarmac road when it was giving way to another vehicle that was overtaking it. The vehicle hit him. He sustained a fracture on his right arm. The vehicle did not stop. He woke up and took his bicycle to Stella Maris Secondary School for safe keeping. Thereafter, he proceeded to Queen Elizabeth Central Hospital for treatment.

He was admitted in hospital for three weeks. After his discharge, he attended Mpemba dispensary as an out patient on three occasions. He tendered a medical report as part of his evidence. The report states that he was in hospital for three weeks. He suffered a fracture on the elbow of his right arm and cannot lift heavy objects, nor do any manual work. The report also states that he has a stiff elbow and is likely to suffer traumatic arthritis in future.

The plaintiff confirmed in his evidence that he has difficulties in using his arm because of the injuries he sustained in the accident. He further testified that he can not cannot therefore work in his garden.

Mr Catilos Wellias Maseya the driver, testified that on the material day he was driving the vehicle along the Blantyre/Chikwawa road going to Nchalo. He was carrying SUCOMA Football players and their supporters. He passed Stella Maris Secondary School between 5:30 pm and 6:00 pm. The visibility was good. He was able to see in front without putting the lights of the vehicle on. He denied that he hit the plaintiff, or collided with him. He said he did not see the plaintiff. He further testified that it was after three months that he was called by the Police who asked him about the accident. He denied that he was involved in any accident.

Two witnesses who were passengers in the vehicle gave evidence for the defendant. They confirmed that the vehicle was driven along the Blantyre/Chikwawa road on the material day and that it passed Stella Maris between 5:00 pm and 6:00 pm. According to them, the vehicle did not hit the plaintiff nor was it involved in any accident. They further said that the vehicle was being driven carefully.

It is clear from the available evidence that the vehicle was driven along the Blantyre/Chikwawa road within the time which the plaintiff claims to have been hit by the defendant's vehicle. The plaintiff sustained a fracture on his left arm for which injury he was admitted in hospital for three weeks.

The main issue is whether he was hit by the vehicle belonging to the defendant and if so, whether the driver was negligent. I have noted that after the accident, the plaintiff was able to push his bicycle from the scene of the accident to Stella Maris where he left it for safe keeping. He was also able to walk to hospital. I am mindful of the fact that there was a Police report which was tendered in evidence. In that report he told the Police that he was taken to hospital by a vehicle that found him on the scene of the accident. I do not intend to attach much value to this report because the Police Officer who compiled the report did not testify in this Court. The plaintiff was insistent all through that he walked to the hospital. I am of the view that he was saying the truth. I accept the fact that he walked to the hospital.

There is undisputed evidence that at the time the vehicle passed Stella Maris, the driver could see clearly in front of him as the visibility was good. I also note that the vehicle was a lorry,. The plaintiff states that he was hit by the left side corner of the body of the lorry. The lorry did not stop. He was conscious after the accident. He was able to walk to Stella Maris and to hospital unaided. I am satisfied that, in the circumstances, he was able to recognise the vehicle that hit him and identify the person who was driving it. I do not think that it was by mere coincidence that the time within which the plaintiff and the defendant's vehicle passed Stella Maris were almost the same.

I find on the evidence before me that the plaintiff has proved, on the balance of probability that he was hit by the defendant's motor vehicle and that the vehicle did not stop after hitting him.

The duty of a person who drives or rides a vehicle on the road is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the road. Reasonable care in this connection means the care which an ordinarily skillful driver or rider would have exercised under all the circumstances. The driver or rider of a vehicle is also under a duty to keep a good look out for other traffic which is or may be expected to be on the road whether in front of him or alongside of him. Failure to keep a proper look out is negligence. Proper care means avoidance of excessive speed, keeping a good look out, and observing traffic rules and signals - See *Charlesworthy* on negligence, fifth Edition, paragraphs 812 and 823.

The driver testified that he did not see the plaintiff. It is, therefore, not surprising that in the circumstance he hit the plaintiff who was cycling along the dirty verge of the road. If the driver had been on the look out for other road users like the plaintiff, he would have seen him and avoided hitting him. The failure to see him and avoiding to hit him can not be anything else, other than an act of negligence. I find, in the circumstances that the driver was negligent and that the defendant is vicariously liable for

the negligence of its driver.

The plaintiff sustained a fractured arm. He was in hospital for three weeks and thereafter attended the hospital as an out patient on at least three occasions. In 1993 I awarded K9,000 for pain, suffering and loss of amenities to the plaintiff who had suffered a fractured leg - Civil cause No. 1336 of 1991, *Namwiyo -vs- Jackson Semu*. I award the plaintiff in the present case K10,000 for pain, suffering and loss of amenities. The defendant is condemned in costs.

**PRONOUNCED** in Open Court this 23rd day of October, 1996 at Blantyre.



Mrs A S E Msosa

**JUDGE**