

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 1397 OF 1994**



**BETWEEN :**

EPIFANIA MPONDA ..... PLAINTIFF

- and -

AIR MALAWI LIMITED ..... 1ST DEFENDANT

- and -

COMMERCIAL UNION ASSURANCE CO PLC ..... 2ND DEFENDANT

**CORAM : TEMBO, J**

Mandala, Counsel for the plaintiff  
Msisha, Counsel for the defendant  
Mikanda, Official Interpreter  
Matekenya (Mrs), Recording Officer

**JUDGMENT**

On 27th June, 1993, at about six o'clock in the evening, Mr. Mponda rode a Honda motor cycle registration number BH 7079, property of his employer Kiwi Brands, from Limbe along the Kenyatta Drive in the direction of Blantyre. Upon reaching a place commonly known as Manda bus stage, at Chitawira, Mponda's motor cycle collided with a motor vehicle registration number 11 SC 61, belonging to Air Malawi and for which Commercial Union Assurance are the insurers. The vehicle was then driven by Air Malawi's employee, a Mr. Dyson Stuart Chimasula. Arising from this accident, Mponda sustained serious personal injuries for which he was hospitalized for a long while.

By this action Mponda maintains that the accident in question was caused by the negligence of the driver of Air Malawi. Mponda is, therefore, seeking from Air Malawi and Commercial Union Assurance damages for injury, pain,



suffering and loss of amenities. He is also seeking payment to him of special damages in the sum of K3,900, being loss of earnings from August 1993 to May, 1994 at K398 per month; and costs for this action. On their part, Air Malawi and Commercial Union Assurance maintain that the accident in question was caused by the negligence of Mponda for which reason they have asked the Court to dismiss this action with costs.

The Court heard one witness for the plaintiff, thus, Mr. Mponda himself. His evidence was to the effect that on 27th June, 1993, at about 5.30 in the evening he rode a motor cycle BH 7079, from Limbe to Chitawira along Kenyatta Drive; that then his motor cycle engine and light were on. That when he approached the Manda bus stage, thus about the road junction into Chitawira, he saw lights of a vehicle which was going towards Limbe direction from Kamba. That without indicating that the vehicle was turning right into the Chitawira road, it suddenly turned into his side, thus the left hand side of the road, when driving from Limbe to Kamba. Mponda was hit and he fell off the motor cycle. He was unconscious. He regained his consciousness in the hospital where he discovered that he had sustained a compound fracture of his right femur and loss of a tooth. He was hospitalized for three months and thereafter he attended hospital as an outpatient for another three months. He then walked with the aid of crutches for a period of six months. During his admission in the hospital, Mponda was operated upon and a nail was inserted into his leg, which is in him until now. Upon his discharge from the hospital Mponda obtained a medical report which was tendered in evidence as exhibit P1. The report dated 21st October, 1993, is to the following effect :

"Name of Patient : Epafania Mponda; Date admitted 27.6.93; nature of injuries: Fracture (R) femur developed non union and K nail was inserted till now; surgical operations were performed : Open reduction and internal fixation was done (K. Nail inserted); Permanent incapacity assessed at 40%; As a store keeper at times he goes upstairs, do other business, therefore, he can't manage properly as he used to do."

Mponda further told the Court that he had obtained a Police report on the accident which was tendered in evidence as exhibit P2. The following particulars of the accident were specified in exhibit P2 :

"Date 27th June, 1993; Time 18.00 hours; Place : along Kenyatta Drive at Chitawira road junction. Dyson Stewart Chimasula, driver of 11 SC 61; Epifania Mponda, rider of BH 7079. On the date and time mentioned



above, E. Mponda was riding BH 7079 Honda motor cycle along Kenyatta Drive from Limbe direction towards Blantyre. When he reached Chitawira road junction he got hit by a motor vehicle registration No. 11 SC 61 Toyota Pick up which was being driven by D.S. Chimasula from Blantyre direction and was now turning right to join Chitawira road. Mponda sustained a fracture of right femur and was taken to Q.E.C. Hospital by same vehicle where he was admitted. ....Police enquiries revealed that the accident was influenced by driver of 11 SC 61 by turning right without care. He will therefore be reported for a case of careless driving of a motor vehicle C/Section 118 of the R.T.A."

Mponda further told the Court that his employment with Kiwi Brands was terminated in July, 1993. That that was the last month for which he had received payment of a salary of K398. Thereafter he remained unemployed until 13th May, 1994, when he was employed by Stagecoach Bus Company Limited. He is in that regard claiming loss of salary for the months of August, 1993 to May, 1994. He also told the Court that he can neither do the job he used to do before the accident; nor cultivate land or indeed do any similar work.

In cross-examination, Mponda told the Court that he was employed by Stagecoach at a salary of K958 per month, since May, 1994; that the letter of termination of Mponda's employment with Kiwi Brands was tendered in evidence as exhibit P4. That Mponda's employment was terminated for the reason that Mponda was guilty of gross misconduct in that he had taken and drove away motor cycle BH 7079 without authority from Kiwi Brands' Management; that he did so outside the course of his employment. Mponda firmly maintained the view that he had the engine and light of his motor cycle on when the accident occurred. By that date he had used a motor cycle for two months. The licence was obtained on 24th June and the accident had occurred on 27th June. In that respect, Mponda maintained that prior to the acquisition of the licence he had only ridden the motor cycle within the premises of Kiwi Brands.

The Court heard two witnesses for the defendants : Chimasula, the driver of the motor vehicle registration 11 SC 61 and Mlendo, who was a passenger in that vehicle at the time of the accident.

Chimasula's evidence was to the following effect : that he had driven the vehicle from Air Malawi offices in Blantyre via the road to Kamba at about 5.45 p.m. That from Blantyre to Kamba, the street lights were on. That there was a blackout on the part of Kenyatta Drive, thus from Kamba until the spot where



the accident occurred. That then, there were three persons in the vehicle, including Chimasula, all of them seated in the cab. That when he approached the Manda bus stage, he had seen lights of a vehicle which was then travelling into the Blantyre direction from Limbe; he slowed down, stopped and indicated that his vehicle was intending to turn to the right into the Chitawira road; that upon that other vehicle going passed him, Chimasula told the Court that then there was none else in sight from Limbe direction. That he then commenced to execute his right turning into the Chitawira road, when he suddenly heard a bang onto his vehicle. By then Chimasula's vehicle had barely touched the white line on the middle of the road. He immediately stopped the vehicle and came out of it to check what was afoot. He saw a motor cycle and its rider lying by the driver's door - thus on the right hand side of the vehicle driven by Chimasula and on the dirt verge of Chitawira road. Upon checking the motor cycle, Chimasula found out that its engine was not on. He then took Mponda to the hospital. Chimasula, therefore, vehemently denied that at the time of the accident he had driven the vehicle fast. He maintained the view that it is Mponda who hit Chimasula's vehicle on the side of the road for vehicles going from Blantyre into Limbe direction. Chimasula had completed a motor vehicle insurance claim which he tendered in evidence as exhibit D1; and it reads as follows -

"I was driving a motor vehicle namely Toyota Hi-lux registration No. 11 SC 61 along Kenyatta drive. As I neared mango stage, I slowed down and indicated my intention to turn to the right hand into Chitawira. After stopping, as I was about to start moving, I just heard a loud bang to my front. Suddenly I noticed a motor-bike with the rider falling down to my right hand side. The rider hit the front right hand part damaging front bumper, grill, bonnet, front flasher lamp R.H. interior mirror, battery and fuse block. The motor cycle had had no head lump on, and it looks like he was coasting in neutral because at the time of impact, the engine was not running with everything showing no sign of light. The time was six o'clock in the evening. My head lamps were on. At this time the street lights were off and it was already dark."

The evidence of Mlendo, who was a passenger in Chimasula's vehicle at the time of the accident, was to the following effect : he agreed with the testimony of Chimasula that from Blantyre to Kamba there were street lights, that it was about six o'clock in the evening and that then it was already dark. That as they joined Kenyatta Drive there were no street lights up to the place where the accident occurred. That as they approached the scene of accident, Chimasula had slowed down and indicated that he was turning right into the



Chitawira road. Before turning, Chimasula stopped for a while to allow a vehicle going into the opposite direction to pass, thereafter as Chimasula commenced to turn right, Mlendo heard a bang. All of them, in the cab of the vehicle, were surprised as to what must have happened. Upon coming out of it, they saw a motor cycle lying on the right hand side of the road, thus on the dirt verge of Chitawira road. Upon a further check, they found its rider two meters away from the cycle on the same side where the motor cycle was. Chimasula and the other passenger in the vehicle took the rider to the hospital. Mlendo remained at the scene of the accident for about fifteen minutes, then he left for Chimasula's house to report the fact of the accident to his wife. By the time of Mlendo's departure, no Police officer had come to the scene of the accident. Mlendo further told the Court that he did not check the condition of the motor cycle engine and its headlight as to whether these were on or not.

The crucial issue I have to determine in this case is whose negligence caused the accident? In doing so, I bear in mind the evidential rule that he who asserts must prove the claims and not he who denies. This rule, therefore, places the obligation of satisfying the Court, on any issue, upon the party who asserts the affirmative of the issue. On standard of proof required, Mr. Mponda should be entitled to the verdict if his evidence establishes a preponderance of probability in his favour, that is to say, if he persuades the Court of the fact that his version of the facts is more probable than that of Air Malawi and Commercial Union Assurance Company, in respect of any or all of the claims which Mponda has made against them.

The law on this point is as follows : a driver of a motor vehicle owes a duty of care to the other road users not to cause damage to a person, vehicle and property of anyone on the road. He must use reasonable care which an ordinary competent driver would have exercised under all circumstances. A reasonable competent driver has been defined as a driver who avoids excessive speed, keeps a good lookout, observes traffic signs and signals : Kingsly Chuma and Gestetner Limited -v- India, Maneya and National Insurance Company Civil Cause No. 1413 of 1992.

I now proceed to evaluate the evidence before the Court. From the stand point of both parties, it is clear that the accident occurred when it was already dark; that at the scene of the accident, by the time the accident occurred, there were no street lights. By then most vehicles which moved along Kenyatta Drive had their lights on, including the vehicle driven by Chimasula. If a driver of any car had not turn on its light, then, it would have been quite difficult to drive



on the road as it was dark. Parties appear not to be disagreed on the findings of fact I have just made.

On the other hand, Mponda maintains that he did not see any indicator lights of the vehicle driven by Chimasula showing that the vehicle was turning to the right into the Chitawira road; further that then Mponda's motor cycle had its headlight on. Such having been the case, Mponda told the Court, he simply rode on, when he suddenly was hit by Chimasula's vehicle as Mponda maintained his proper side of the road, as he rode towards Blantyre from Limbe. On his part, Chimasula and his witness maintained that Chimasula had indicated that he was turning right into the Chitawira road but that at that very same time another vehicle had first to go passed him into the Blantyre direction; soon thereafter, Chimasula did not see any lights of a motor vehicle from the Limbes direction. That he then decided to effect a right turn into the Chitawira road, when he suddenly heard a bang onto his car.

Having observed and heard all the witnesses in Court, it seems more probable to me that Mponda is the witness who is telling the truth on this point. It having been conceded by all witnesses that it was dark at the time when the accident occurred; that there were no street lights on that part of the Kenyatta Drive and further that most cars had their headlights on then, and that Mponda in fact also says he had his motor cycle headlight on, it is incredible that Mponda could have elected to move in the dark without any light. In any case, both in his statement to the Insurance Company and in Court, Chimasula seemed to have based his testimony on this point on an opinion which he expressed, that is that Mponda's motor cycle must have travelled in the neutral gear when the accident occurred. Further, Chimasula thought that after the accident the engine of the motor cycle ought to have continued to run and the head light to be on. In respect of that, the Police report had described BH 7079 to have suffered extensive damages. So too the dismissal letter, exhibit P4, had described the damage suffered by BH 7079 to have been extensive in that it was stated therein that the motor cycle was badly damaged. It seems to the Court that if indeed the motor cycle was badly damaged, after the impact of the accident, the engine and the headlight of the motor cycle would necessarily go out. In such a situation, the fact that after the accident the engine and the headlight of the motor cycle are not on would not of itself, without further evidence, represent that the rider had, prior to the accident, travelled in a neutral gear and, therefore, did not have its headlight on. In the particular circumstances of this case it is, therefore, the considered view of the Court that Mponda had his motor cycle engine and headlight on when the accident occurred.



Further, the Court would accept the version of the facts as put by Chimasula and his witness that Chimasula had slowed down so as to prepare himself for the execution of a right hand turn into the Chitawira road. However, it being a fact that Mponda's motor cycle had its light on, the fact that Chimasula commenced to turn before Mponda's motor cycle had safely gone passed his way, shows that Mr. Chimasula had not kept any proper look out for all the vehicles travelling in the opposite direction. True, he had allowed one vehicle to go passed him, but it seems thereafter, Chimasula simply turned right to go into the Chitawira road without a proper look out for more traffic from Limbe direction. The conclusion to be drawn, on the evidence before the Court, is that Chimasula failed to have a proper look out. It is further the view of the Court that the fact that Chimasula did not see the lights of the motor cycle from the Limbe direction at all and only heard the bang, does enforce the view of the Court that he failed to have any proper look out then. It is also the view of the Court that this was the sole cause of the accident. In the circumstances, I am satisfied and I do find that Chimasula was the party at fault. Mponda has, therefore, proved his case against the two defendants whom I accordingly find vicariously liable.

I now turn to the question of damages. Mr. Mponda has claimed damages in respect of loss of earnings in the sum of K3,980, being loss of salary from August 1993 to May, 1994 at K398 per month. Besides that, he is also claiming damages in respect of injury, pain, suffering and loss of amenities.

Regarding loss of earnings, it is the case of Mponda that Kiwi Brands effected last payment of salary to him in July, 1993 and that thereafter his employment was terminated on account of the accident. Thereafter he remained unemployed until May, 1994, when he got employed by Stagecoach Company Limited. In effect, he is claiming the loss of salary at K398 per month for the entire period during which he was unemployed following the termination of his employment with Kiwi Brands. In response to the claim, Mr. Msisha, counsel for Air Malawi and Commercial Assurance Union has submitted that the only damages Mponda should be entitled to should be general damages for injury, pain and suffering. That, this ought to be so because Mponda did not call evidence from his previous employers to support the fact that Mponda's contract of employment was terminated because Mponda could no longer work effectively as a storekeeper. Looking at exhibit P4, it is quite clear that the reasons for which Kiwi Brands had dismissed Mponda from his employment were that he took and drove away the motor cycle without due authority from Management and that he was, therefore, found guilty of gross misconduct. Besides that, the fact that Mponda was able to get, and is today in, gainful

employment for which he is better paid than then negates the claim for loss of earning capacity : Kalima -v- Mbeya 8 M L R p246, in particular at pages 251 and 252, where Chatsika, J had this to say on the claim for loss of earnings :

"I hold that the plaintiff is not entitled to recover prospective loss of earnings as general damages. Even if I had entertained a claim based on prospective loss, I would not have found the plaintiff entitled to any damages therefor. In the first place, he was able to secure employment after the accident at a considerably better salary than he had earned prior to the accident. Secondly, he has failed to convince me that the termination of his employment with Sugar Corporation was due to his physical disability to perform the duties required of him. Thirdly, he has failed to lead any evidence in support of his alleged efforts to find employment subsequent to the termination of his employment with Sugar Corporation and that his failure to secure employment is due to physical disability arising from the accident."

In the instant case, Mponda in fact was subsequently employed and is better paid in his current employment than he was then. In the circumstances, Mponda's claim for loss of earnings cannot be sustained; it is dismissed. However his claim for damages in respect of injury, pain, suffering and loss of amenities succeeds. I accept the submission of Mr. Mandala, counsel for Mponda that in awarding damages courts must take into account the erosion in the value of money and the rise in cost of living. That indeed, if these factors cannot be taken into account successful litigants would not be adequately compensated : Tseka Phiri -v- Chiponda Dudlye's New School of Driving Civil Cause No. 135 of 1989. Mponda, had suffered a fracture of his right femur which developed non union for which he was operated upon and a K nail was inserted in him. He was hospitalized for a period of about six months; during which time he only was able to walk with the aid of crutches. It is the considered view of the Court that an award of K50,000 would adequately compensate him.

In the result, I enter judgment for Mponda for the sum of K50,000. The defendants will pay the costs of the proceedings.



PRONOUNCED in open Court this 25th day of June, 1997, at Blantyre.

A handwritten signature in black ink, appearing to read 'A.K. Tembo', with a horizontal line above it.

**A.K. TEMBO**  
**JUDGE**