



IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CIVIL DIVISION
CIVIL CAUSE NO 294 OF 2015

Between

Tufunde Ndovie.....Plaintiff

-and-

Pachalo Mfuno.....1st Defendant

United General Insurance Co. (Ltd)2nd Defendant

CORAM:
HONOURABLE JUSTICE D.A. DEGABRIELE

Mr. L. Mbulo	of counsel for the Appellant
Mr. S Kagundu & Ms. Towera Chatupa	of Counsel for the Respondents
Mr A. Kanyinji	Official Interpreter
Ms Msimuko	Court reporter

DeGabriele, J

JUDGEMENT

Introduction

The plaintiff commenced this action by way of a writ of summons issued on 4th November 2015. He is claiming damages for wrongful death, loss of expectation of life, loss of dependency, special damages and costs of this action. The defendant is denying liability stating that the deceased was negligent in his actions as he laid down to sleep in the middle of a busy road.

Brief Facts

The Plaintiff Tufunde Ndovie took an oath and stated that he resides Pembe in Karonga District. The plaintiff told the court that the 1st Defendant who was a driver, negligently drove his vehicle and run over a male pedestrian near Lupembe Trading Centre. The motor vehicle registration number KA 5357, a Suzuki Vitara was insured by the 2nd Defendant. He told the court that his son was hit by a vehicle driven by the

1st defendant and the deceased body was found 5 km from the point of impact. He tendered the police report and death certificate. He stated in cross examination that he was not present at the time of the accident. He told the court that his son was not a drunkard but that he had not lived with him since the year 2000.

The first defendant witness was Joseph Pacharo Mfune who hails from Kapiringiri Village Traditional Authority Chikulamayembe, Bolero in the district of Rumphi. He told the court that on the material day he was coming from Rumphi, from a burial ceremony of one of the students at their school. He told the court that on approaching Karonga, at a place before Lupembe Trading Centre he saw an object lying in the middle of the road and he run over the object. He was driving at around 100km per hour and it was night between 9pm and 10 pm. He stopped a few meters after the impact and on realisation that they were dragging the object. The police came 10 minutes later and took the body. The 1st defendant states that he was unable to avoid the object.

In cross examination, he told the court that he could not stop immediately due to fear of violence from the onlookers. He stated that he was approaching the trading centre and the accident happened just before signpost for a primary school. The 1st defendant acknowledged that he would have controlled the car better if he was going at the speed of 40/50km per hour. He told the court that he noticed the object was about 10 to 15 metres.

Issues for determination

The Plaintiff has indicated two main issues for determination, namely;

- I. Whether the Defendants are liable in negligence,
- II. Whether the Plaintiff is entitled to compensation.

The Law and analysis of evidence

It is an established fact that in civil matters the burden of proof is on the plaintiff or the person who is seeking to prove the matter, see *Robins v National Trust Co. 1927 AC 515*. If after both parties have adduced their evidence and the burden is not discharged, then the decision must be against him who was asserting the affirmative, see *Pickup v Thames Insurance Co. (1878) 3 QBD 594*. It is imperative therefore that the Plaintiff herein must discharge this burden on a balance of probabilities.

In a claim for negligence the plaintiff has to prove that the defendant owed him a duty of care, that the defendant breached the duty of care and that the defendant breached that duty of care and that the result of the breach caused the plaintiff to suffer injury. It has to be borne in mind that negligence is the breach of duty to take care by a person which results in damage being suffered by another person or property. It was held in the case of *Banda and others v ADMARC and another* 13 MLR 59 at p 63, where Banda J, as he was then stated that;

"A driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skilful driver would have exercised under all the circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look-out, and observes traffic signs and signals. A pedestrian also owes a duty of care to the other road users to move with due care".

Therefore, a driver of a motor vehicle breaches the duty of care, such a driver is liable for negligence and any damages that may occur to other road users as a consequence of such negligence. The duty of care expected of a driver is reasonable care which a competent driver would use in the circumstances and such a driver is expected to avoid excessive speed, keep a good outlook and observe traffic signs and signals, *see Dilla v Ragan*) 12 MLR 358. In the case of *Banda and Others v ADMARC (supra)* the pedestrian was held to have an equally important duty of care towards motorists and other road users. The pedestrian must at all times behave in such a manner that he does not block the flow of traffic.

The plaintiff herein alleges that the 1st Defendant was negligent as he drove his motor vehicle at an excessive speed. The 1st defendant told the court that he was driving at 100km an hour, at around 9:30 pm and the accident occurred just close to a trading Centre but before a primary school. The 1st Defendant does not dispute that had he been travelling at a reasonable speed, he would have been able to control his vehicle. The 1st defendant denies that he was negligent because the deceased had failed to take care of his own safety by failing to move out of the road after being warned. It is incumbent on the plaintiff to prove that the 1st defendant was indeed driving at a speed that was contrary to the speed that was acceptable at that time

and on that particular road. Here evidence of the actual distance from the signpost of the school or the trading centre in relation to the actual accident spot would have gone a long way in clarifying the matter. Again, calling traffic officers to testify would have helped the plaintiff's case. As it is, it is hard for the court to establish that the speed was excessive, bearing in mind that this was at night and school children were not up and about and that the business and bustle of a trading centre is normally at its peak during the day.

As part of his evidence, the Plaintiff tendered the death report and police report as part of his evidence. The Defendants objected to the tendering of the same. Counsel for the Plaintiff relied on the case of *Jimu v NICO General Insurance Company Limited Civil Cause 984 of 2007 HC (unreported)* which held that a police report and a medical report are admissible in evidence if tendered by a person who did not author the reports because they are public documents written by public officers for public purposes. The Defendants have argued that this is no longer the position following the decision of the case of *Patrick Khaiya v United General Insurance Company Limited Personal Injury Cause No 34 of 2013 HC (unreported)* and *Harold Bauleni and 16 others –vs- Siku Transport and Real Insurance Company Limited, personal Injury cause No 299 of 2014 HC (unreported)* among others that a Police report or death report tendered by an Plaintiff are not to be admitted as evidence to prove the truth of his claim by their contents, but such reports are to be admitted to simply show that they were made. In this matter herein I therefore admit the police report and the death report to just show that they were made and they are in existence. In essence, the truthfulness of the reports can only be ascertained by the author testifying under oath in the court. This court therefore admits the police and medical reports for purposes of showing that these reports were made. It was incumbent on the plaintiff and his counsel to use these reports in a manner that would allow the court to admit the veracity of the contents of the reports.

I have looked at the evidence and the submissions of both counsel. The plaintiff was not at the scene of the accident so he cannot with certainty tell this Court where the deceased was in relation to the road. The 1st Defendant and his passenger states that the deceased was lying diagonally across the middle of the road and it looked like an 'object' in the road. The police report states that the deceased was sleeping along the road. A careful consideration of these facts leads me to conclude that the

deceased was indeed sleeping on the carriageway. If he was on the verge of the road, then the "crush accident" would have been for certain parts of his body. The description of the state of the body and the dragging effect leads me to conclude that he was asleep in the middle of the road. To this end, I find that the deceased did contribute immensely to the accident that led to his death and that the deceased failed to exercise reasonable duty of care towards himself and also the other road users.

The court is of the view that the evidence of the plaintiff does not carry much weight because he relied much on hearsay evidence. There is no evidence of excessive speed at all, regardless the statement of the 1st defendant under cross examination that had he been driving at a speed of 40/50 km he would have avoided the object. There is no evidence that the accident occurred in a speed controlled area and if so what speed was permissible. We must not lose sight that Road Traffic Rules does permit people to drive in certain areas at 100km/hour. Indeed, after any accident, any speed may seem fast and excessive.

Having stated thus, it is clear to me that there are a number of undisputed facts, and the Court would not need to rely on the evidence of police report or death report. The 1st Defendant and his witness do state that they were driving at 100/km/hour between 9 pm and 10 pm, while approaching a primary school which is before Lupembe Trading Centre. However, this was during the night and no learners were endangered at that particular time. It is not clear how many metres or kilometres are there between the primary school and the trading centre or the scene of the accident and trading centre. A articulated distance will clearly go to show the magnitude of negligence by the 1st Defendant. Again, such a clear distance will lead the Court to establish the extent of recklessness and apportion contributory negligence if any.

It is not undisputed that the deceased was lying in the carriage way, obstructing traffic. As stated in the case of *Banda –vs- ADMAC & another Civil Cause No. 273 of 1987 (unreported)* a pedestrian owes a duty of care to other road users. The deceased for whatever reasons, disregarded this duty and his own safety and was found in the middle of the road at night.

The Plaintiff has invoked the doctrine of *res ipsa loquitur* and claims that the vehicle that caused the accident was in the sole control of the 1st Defendant, that had the defendant been driving at a reduced speed he would have managed to control the

vehicle and avoid running over the deceased and finally that there is no evidence as to how and why the accident occurred. I do not agree with this submission. The accident occurred because the deceased was lying in the middle of the road and the report of police obtained by the Plaintiff which they sought to admit into evidence does state that he was asleep by the roadside. In any event the deceased caused the accident by sleeping near or in the middle of the road. I do not agree that this is a case where the doctrine of *res ipsa loquitur* can be properly invoked.

This Court is not satisfied that the Plaintiff has made out a case that the 1st defendant was negligent in the way he drove, and that such driving caused the death of Patrick Ndovie. The Plaintiff has failed to prove the case on a balance of probabilities and the claim must fail in its entirety.

Costs normally follow the event and shall therefore be for the successful defendants.

Made in Chambers at Mzuzu Registry this 19th day of June 2017



D.A. DeGabriele

JUDGE