IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL CAUSE NO. 267 OF 201

BETWEEN

ANNANIA MWAULAMBO ..... CLAIMANT

(suing as a next friend of Agnes Mwaulambo, a minor)

AND

THOKO SICHALI..... 1ST DEFENDANT

PRIME INSURANCE CO. LTD. ..... 2ND DEFENDANT

CORAM: **Honourable Justice T.R. Ligowe**

W. Chiwaya, Counsel for the Claimant

E. Mbotwa, Counsel for the Defendant

F. Luwe, Official Interpreter

J. Chirwa, Recording Officer and Court Reporter

JUDGMENT

Ligowe J,

1 The claimant pleaded that on 7th October 2013 at around 17:30 hours, the 1st defendant negligently drove a Nissan Caravan minibus registration number BS 5896, insured by the 2nd defendant, on the side road going to the 1st defendant's house, off the Karonga/ Chilumba road behind Mwanyembe rice mill at Karonga. The 1st defendant hit a girl, Agnes Mwaulambo, 4 years old, playing on the rice husks yard with her friends. She sustained serious injuries including a cut on her head 11 cm long which led to excessive bleeding. The 1st defendant's particulars of negligence are: failing to exercise much care on the road as required of a reasonable driver; driving

without taking care of other road users especially in the residential area; driving at an excessive speed in the residential area; and failure to control or otherwise handle the vehicle to avoid hitting Agnes Mwaulambo. So he claims K3 000 cost of a police report, cost of a medical report to be assessed, damages for pain and suffering, damages for loss of amenities, damages for disfigurement and costs of the action.

2 The defendants pleaded that the 1st defendant has never been a driver and the 2nd defendant has never been the insurer of the said motor vehicle at any point and so they deny any claim for negligence against them as pleaded by the claimant. They also state that Agnes did not sustain the injuries as pleaded by the claimant. The 2nd defendant pleads that its liability is conditional upon the 1st defendant being found liable and only to indemnify him up to the limit of the insurance policy.

3 During trial the claimant testified that his daughter, 3 years old at the time the accident occurred was playing at home when Thoko Sichali came with the minibus in speed near the house. Then the child was found under the minibus injured with a metal on the head and on both arms. He went to follow up the matter with Thoko Sichali after the child was discharged from hospital and he was advised to claim from Prime Insurance the insurers of the vehicle. After the accident the child experiences convulsions and has nose bleeding sometimes. He went with her to the hospital again in December 2017 with the nose bleeding problem. He adopted his witness statement which apparently repeats the facts as stated in his statement of claim and exhibit the abstract police report for the accident and the girl's medical report.

4 In cross examination he was quizzed if he witnessed the accident happening when the abstract police report does not show him as one of the witnesses but his wife. His response was that his wife Dora Nyasulu (Mwaulambo) was not present at the time the accident occurred. He was sitting at the veranda of his house chatting with his neighbour's wife Mrs Mogha when the accident happened. He reported it to police and he does not know what the 1st defendant discussed with the police for the police to omit his name as a witness in their report. He did not agree with the police abstract

report to that extent. He admitted having seen the minibus soon after the accident but could not tell how its front looked because he was so busy and concerned with the injured child.

5 Let me for the meantime register this court's dissatisfaction with the witness statement of the claimant. As earlier stated, it merely repeats the facts as pleaded in the statement of claim without offering any proof to them. Yet a statement of claim is only a statement in summary form of the material facts on which the party pleading relies for his/her claim but not the evidence by which those facts are to be proved. Let me state here that Para. 38/2A/8 R.S.C., the rules of procedure applicable at the time the witness statement was filed required among other things that it be in a clear, straightforward narrative form, and use the language of the witness, his *ipsissimma verba*. A witness statement is actually the witness's evidence in chief and if it only restates the pleadings, it would not be sufficient unless the facts pleaded do not require proof. In this case, in view of the defence, the facts that the 1st defendant is the one who was driving the motor vehicle in question, that it was insured by the 2nd defendant, that he drove it negligently as particularised and caused the injuries to the girl, need proof.

6 The defendant's witness Patience Phiri testified only to the fact that Nissan Caravan minibus registration number BS 5896 could not be found in their system even after cross checking with their electronic as well as manual data base. The 2nd defendant therefore concluded that they had not insured the motor vehicle. He admitted in cross examination that such instances occur and so they rely on production of receipts and the policy of insurance by the owner of the vehicle. It was clear to this court that the 2nd defendant had not inquired with the 1st defendant or the owner of the vehicle about this. The last time he had been to Karonga to cross with the data base was Friday 12th January 2018 probably in anticipation of the trial on 16th January 2018.

7 In his final submission, counsel for the defendants objects to the admission of the police abstract report and the medical report for proof of the truthfulness of their

contents for having been tendered by a person who is not the author. He cites a lot of case authorities including *Patrick Khaiya v. United General Insurance Co. Ltd.* PI Cause No. 34 of 2013 (PR) (unreported), *Victoria Matemba v. Martin Banda*, Civil Cause No. 1750 of 2010 (PR) (unreported), *Sainani Nthala and others v. Real Insurance Co. Ltd.* PI Claim No. 564 of 2011(PR) (unreported).

8 These being High Court decisions, counsel for the claimant argues that they are only persuasive to this court and not binding. He cites *Jimu v NICO General Insurance Co. Ltd.* Civil Cause No. 984 of 2007 also by the High Court for the proposition that the police abstract reports and medical reports normally used in these cases are exempt from the rule against hearsay for being public documents.

9 It is clear from the reading of the cases cited by counsel for the defendant that they considered *Jimu v NICO General Insurance Co. Ltd.* and still held that such reports are not public documents exempt from the rule against hearsay.

10 The issue is what constitutes a public document or report exempt from the rule against hearsay. The authors of Phipson on Evidence, 13th Edition state that the rationale for exempting public records is the intrinsic reliability of such records[1] in that, (1) the statements and entries in public records are made by the authorized agents of the public in the course of official duty under a public duty to make the entries after satisfying themselves of their truth; and (2) the facts recorded are of public interest or notoriety. The records are kept under a legal duty for the benefit or information of the public. If kept under private authority or for the benefit or information of private individuals, they would not be exempted. Generally it is not only difficult but often impossible, to prove the facts of a public nature by means of actual witnesses examined upon oath.[2] With regard to public inquisitions, surveys, assessments and reports. These are allowed because they contain "results of inquiries made under competent public authority, and concerning matters in which the public

[1] J.H. Buzzard et al, *Phipson on Evidence, Thirteenth Edition*, (London, Sweet and Maxwell 1982) 345
[2] Ibid 508, 513, *Doe v. Andrews*, 15 Q.B. 756

are interested."[3] That is why in *Myers v DPP* [1965] AC 1001 it was held that a record is not a public record within the scope of the rule against hearsay evidence unless it is open to inspection by at least a section of the public.[4] This was followed by the courts of this country in *Rep v Kaipsya* 1966-68 ALR Mal 291 and *Careta v Rep* 1966-68 ALR Mal 285. It should be noted that this excludes other records which a court might be satisfied are trustworthy and that justice may require their admission. Lord Reid in *Myers v DPP* [1965] AC 1001 gave the example of records kept by public officers proved never to have been discovered to contain a wrong entry but frequently consulted by officials and not open to inspection by the public. The likes of police records and medical records which are said to be confidential and privileged. Lord Reid however said at 1024:-

> "No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded."

In my view *Sadik Jimu v Nico General Insurance Company Ltd.* (op cit) fails the test on account of the fact that while police and medical reports are made by public officers in discharge of a strict duty to enquire into, and satisfy themselves as to the truth of the facts, they are generally confidential and privileged and not open to inspection by the public. On that basis the medical reports tendered by the plaintiff in this case would not be admissible to establish the truthfulness of their contents.

11 Let me observe at this point that Lord Reid in *Myers v DPP* [1965] AC 1001 spoke of how highly and absurdly technical the law on hearsay evidence was in England. He said at page 1019-1020:-

> "It is difficult to make any general statement about the law of hearsay evidence which is entirely accurate, but I think that the books show that in the seventeenth century the law was fluid and uncertain but that early in the eighteenth century it had become the general rule that hearsay evidence was not admissible. Many reasons for the rule have been put forward, but we do not know which of them directly influenced the judges who established the rule. By the nineteenth century

[3] Ibid 529, *Sturla v. Freccia,* 5 App. Cas. 623
[4] Lord Reid at page 1023

> many exceptions had become well established, but again in most cases we do not know how or when the exception came to be recognized. It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle."

I think it is not wrong to say that this is still the position regarding the law on hearsay evidence in Malawi. This is evident in how the Judge in *Prince Enock v Smith Macheso and Prime Insurance Co. Ltd.* Personal Injury Cause No. 583 of 2012 (Principal Registry)(unreported) grappled with the matter. He stated at page 5:-

> "To an extent, the court also agrees with the submission of counsel for the plaintiff that police records about the place of the accident, the parties involved, the driving licence number and type/class of the driver, the insurance details of the vehicle [if so insured] etc are the only, *prima facie,* conclusive records unless there is evidence to the contrary. Conclusive because it is the police who collect the details from the parties involved, the vehicles involved and documents presented. This in the courts view, would apply where there is no contestation on such details. Having said that, it is the considered view of the court that where it is clear from the pleadings, in this case, the defence, that such details are being contested or are in issue, then they cannot be conclusive in which case the onus lies on the party seeking to rely on them, in this case, the plaintiff to bring ample proof as to their truthfulness."

Strictly speaking this approach would not be allowed under the authorities of *Myers v DPP* [1965] AC 1001, *Rep v Kaipsya* 1966-68 ALR Mal 291 and *Careta v Rep* 1966-68 ALR Mal 285. Lord Reid's suggested solution to the difficulties of the law on hearsay evidence was legislation following on a wide survey of the law,[5] and I agree. Eventually in England the Civil Evidence Act 1995 and the Criminal Justice Act 2003

[5] *Myers v DPP* [1965] AC 1001, 1022

were passed which addressed the issues. It is high time Malawi also did the same, than clinging to the "most complex and most confusing exclusionary rules of evidence."[6]

12 Having so settled the issue with regard to the police abstract and the medical reports, this court is now left with the oral evidence given by the claimant and the defendants to determine this matter.

13 What comes out is that the claimant personally knows the 1st defendant and he saw him driving the minibus that hit his daughter. He was told by the 1st defendant that the minibus was at the material time insured by the 2nd defendant to whom the claim had to be directed. The 1st defendant however turned around to join with the 2nd defendant in denying insurance of the vehicle by the 2nd defendant. It is hearsay for the plaintiff to rely on the fact that he was told by the 1st defendant that the vehicle was insured by the 2nd defendant. The law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue as it is just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. *Commercial Bank of Malawi v. Mhango* [2002-2003] MLR 43.

14 As regards the negligence, the pleading is that the 1st defendant failed to exercise much care on the road as required of a reasonable driver; he drove without taking care of other road users especially in the residential area; he drove at an excessive speed in the residential area; and failed to control or otherwise handle the vehicle to avoid hitting Agnes Mwaulambo. The claimant's evidence is that the child was playing at home when Thoko Sichali came with the minibus in speed near the house. Then the child was found under the minibus injured with a metal on the head and on both arms. This evidence was not controverted by the defendant's witness. For this reason this court holds the 1st defendant liable to pay damages in this case to be assessed by the Registrar. It was held in *Mponda v. Air Malawi Ltd and another* [1997] 2 MLR 131

[6] C. Tapper, *Cross and tapper on Evidence, Eleventh Edition,* (Oxford University Press 2007) 587

citing *Chuma and Gestetner Ltd. v. India, Maneya and national Insurance Co.* Civil Cause No. 1413 of 1992 (unreported) at 135 that:

> "... a driver of a motor vehicle owes a duty of care to 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, [and] observes traffic signs and signals."

I would add that there is need for even extra care when driving in a residential area among houses.

15 There however has not been legitimate proof that the vehicle in issue was insured by the 2nd defendant, so the 2nd defendant is not liable. If indeed it was, the 1st defendant will personally claim indemnity from the insurer.

16 This action succeeds against the 1st defendant with costs.

17 Delivered in open court this 1st day of March 2018.

T.R. Ligowe

JUDGE