

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC CIVIL CAUSE NUMBER 32 OF 2017

(Being Civil Cause No. 3321 of 2016 before the SRM Court at Blantyre)

BETWEEN:

GEORGE PHEZENG

CLAIMANT

AND

MRS PILIRANI GREENWELL MPONELA

1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED

2ND DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Sauti, Counsel for the Claimant
Chisale, Counsel for the Defendants
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is the decision of this Court on the trial of the claimant's claim for damages for personal injuries he suffered due to the alleged negligence of the 1st defendant who is the 2nd defendant's insured.
2. The claimant claims that he was at all material times a pedestrian along Kamuzu Procession road in Lilongwe. And that on or about 15th October, 2015, the 1st defendant was driving motor vehicle registration number KA 6594 Nissan March Saloon towards Lilongwe National Bank. And that or near National bank one of the 1st defendant's motor vehicle's tires run over

the foot of the claimant who was walking towards the same direction. The defendant filed a defence which denied the claimant's claim.

3. The issue for determination is whether a claim for negligence has been made out against the defendants.
1. As correctly submitted by the claimant, the rule is that in civil matters the burden of proof rests on he who alleges. The degree of proof is that it must carry a reasonable degree of probability but not as high as is required in criminal cases, namely, it must be on a balance of probabilities. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
4. The claimant's case comprised evidence of the claimant himself. He also filed submissions. The defendants did not give evidence but only cross-examined the claimant.
5. By his witness statement, the claimant stated that he formerly worked as a driver. And that on or about 15th October, 2015, he was a lawful pedestrian along Kamuzu procession road near National Bank in Lilongwe. And that the 1st defendant was at the material time a driver of motor vehicle registration number KA 6594 Nissan March Saloon whereas the 2nd defendant was the insurer of the aforesaid vehicle.
6. He stated that on the material day, he was walking along the said road going towards Lilongwe National Bank. And that the said road is a one way road. He stated further that whilst he was lawfully walking on the pavement, he heard people shouting that he should escape. And that he turned back, but it was too late for him to avert the vehicle that was very close. Further, that as a result, one of the vehicle's tyre run on his left foot.
7. He then stated that he was not aware of the vehicle's presence behind him because he was not given any signal. He stated that he noticed that the 1st defendant was busy chatting with a passenger in the vehicle such that she did not even notice that the vehicle had run on my foot. He added that he believes that she was caught up in their conversation such that it distracted her attention from the road.
8. He stated that since the vehicle was moving slowly he managed to stop it and approached the 1st defendant. He further stated that upon informing the 1st defendant, the passenger in her vehicle actually commented that she had noticed that the 1st defendant was about to hit him but that it was too late for her tell the 1st defendant to avert hitting him.

9. He stated that he then took the mobile number of the 1st defendant and managed to record the registration number of the vehicle which is KA 6594 Nissan March Saloon and the insurance disc on the vehicle was issued by the 2nd defendant, Prime Insurance Company Limited.
10. He stated that, later the same day, they went to Area 3 Police Station where he was given a letter and referred to the Central Hospital. And that at the Central Hospital he was told that he had sustained soft tissue injuries.
11. He posited that he later obtained a police report from the same Station which recorded the insurance of the motor vehicle, the registration number and details of the accident. He produced a copy of a police report showing the particulars of the vehicle afore-mentioned, exhibited it and marked it as "GP1".
12. He stated that he was still experiencing pain for about six months and his left leg began to shrink. And that he then decided to visit other hospitals since by then he had transferred to Blantyre. He stated further that at the hospitals he was told that his leg had developed a problem, but they could not identify the problem.
13. He then stated that later he went to College of Medicine where he met Dr Jasmin Fritz who identified the problem and stated that the injury that the claimant sustained due to the accident had caused a nerve damage to his left leg. He produced a copy of a letter from Dr Jasmin Fritz which he exhibited and marked as "GP2".
14. He narrated that he was then sent on to physiotherapy for one month at Queen Elizabeth Central Hospital. And that his left leg is weak and there is a nerve damage left lower limb. He produced a copy of a medical report which he exhibited and marked as "GP3".
15. He then pointed out that the injuries he sustained were quite serious and they affected his physical day to day life. He pointed out further that he has difficulties in walking and can no longer carry manual work as he previously did.
16. He believes that the accident occurred due to the 1st defendant's negligence, for failure keep a proper look out, driving without due regard to other road users, causing or permitting the vehicle to move very close to my foot on the pavement thereby running over it, and generally failure to take reasonable care. He therefore prays that this court awards him damages for pain and suffering, damages for loss of amenities of life, special damages as pleaded and costs of this action.

17. During cross examination, he confirmed that the accident occurred on 15th October, 2015 at National Bank Lilongwe Area 3. He added that it occurred at around 10:00 am. He explained that, on the material day, the vehicle was going the direction in which he was going. He confirmed the fact that he was previously working as a driver at Ernest and Young.
18. He stated that he knows how a pedestrian is supposed to move on the road and that at the material time, he was walking on the left as he intended to enter into the bank which was on the left side of the road. He further explained that it was a one-way road and that there was no vehicle in front of him and the road was not busy at the material time.
19. He stated that, since he was on the pavement and away from the road, he did not expect that the vehicle would find him where he was. He pointed out that the driver did not hoot except that he heard from people shouting that he should move away as there was a car coming. He further confirmed that the vehicle was a Nissan March Saloon.
20. During re-examination he explained that he did not have room to escape as the car was already close. And that the accident occurred because the driver as the passenger were busy chatting. He then added that he had to follow them and let them know that he was hit.
21. He confirmed that he was away from the road and the accident occurred on that spot. He added that the accident would have been avoided if the driver had given him a signal.
22. He also asserted that when he approached the 1st defendant, she started objecting but it was her passenger who confirmed to her that indeed the accident had taken place but that the 1st defendant was busy with the conversation and could not see the claimant.
23. He then submitted on whether the claim for negligence has been made out. He pointed out that negligence connotes the omission to do something which a reasonable man guided upon those circumstances which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. See *Blyth v Birmingham Waterworks Co.* (1856) Ex 781.
24. He then submitted that for a party to be liable in negligence, three essential elements must be satisfied. It must be shown firstly that the defendant was under duty of care, secondly that the defendant by his conscious acts or omissions has breached that duty of care and thirdly, that as a result of such breach, damage was suffered by the other party. See *Matewere v Prime*

Insurance Co Ltd Personal Injury Cause no. 117 of 2014 (High Court) (unreported).

25. He then submitted that in the present case he was walking on the pavement along the road in which the 1st defendant was driving. And that, such being the case, it goes without saying that the 1st defendant owed him a duty of care. Further, that as has been expounded in the case of *Banda and Others v ADMARC and Another* [1990] 13 MLR 59, a driver of a motor vehicle owes a duty of care to property or persons on or adjoining the road.
26. He asserted that the aforesaid duty was nonetheless breached by failure on the part of the 1st defendant to keep a proper look out and to have regard to the claimant's presence on the road. He asserted further that the evidence in this case clearly shows that the 1st defendant was busy conversing with a passenger in her vehicle such that it became impracticable for her to pay attention to what was happening on the road. Additionally, that failure to take heed of the claimant's presence on the road and the ultimate running on his foot connotes breach of duty on the part of the 1st defendant.
27. He recalled that he had testified that, at the material time, he was far from the main road as he intended to enter into the bank. He observed that from this evidence it cannot be assumed that there was contributory negligence on his part. He added that it is clear that the 1st defendant herein had missed the road and hit the claimant on the pavement.
28. He observed that recourse may be had to the case of *Dilla v Rajani* (1984-86) 11 MLR 113 (HC) at 116 which elucidated that, it is the duty of the driver or rider of a vehicle to keep a good lookout. That he must look out for the other traffic which is or may be expected to be on the road. That is, whether in front of him, behind him or alongside him, especially at cross roads, junctions and bends, and for traffic-light signals and traffic signs including lines marked on the highway.
29. The claimant submitted that, basing on the aforementioned facts and the authorities, it leads to the conclusion that the 1st defendant did not merely owe the claimant a duty of care but also breached that duty by failure to keep a proper look out. And that as a result of the breach of that duty, the claimant suffered damage. Further that according to his medical report, he sustained soft tissue injury with peripheral nerve damage lower limb. And that the effect is that his left leg has weakened, and atrophy of concepts left muscles. Permanent incapacity has been pegged at 40%.

30. In view of the foregoing, he submits that the 1st defendant herein was negligent, this is in consideration of the fact that all the elements required to establish a claim in negligence as highlighted in the case of *Matewere v Prime Insurance Co Ltd* cited herein have been satisfied. .
31. The claimant then observed that the injuries sustained by him in this case are as a result of a breach of duty on the part of the 1st defendant. And that, such being the case, this satisfies all elements required to be proved in a claim for negligence as outlined in the case of *Matewere v Prime Insurance Co Ltd* cited herein.
32. He then submitted on that basis that the claim for negligence has been made out. He observed that the evidence given by him has managed to prove that he was owed a duty of care by the 1st defendant by virtue of being a pedestrian along the road on which she was driving. And that the said duty was breached by failure on the part of the 1st defendant to keep a proper look out or taking reasonable care generally. And finally that as a result of the said breach, he suffered damage.
33. He invites this Court to take note that the defendants have not proffered any evidence to disprove his claims.
34. He then observed that section 148 of the Road Traffic Act allows an injured party to claim directly from the insurer in respect of any liability in regard to which a policy of insurance has been issued. And that it is on that basis that he is suing the 2nd defendant, Prime Insurance Company Ltd.
35. He pointed out that it is his evidence that the insurance disc on the vehicle of the 1st defendant indicated that the vehicle was insured by the 2nd defendant, Prime Insurance Company Limited. And that this has been supported by the police report which recorded that the vehicle was under insurance certificate number 010/025/1/481441/2014 issued by the 2nd defendant.
36. He submitted that the defendants having failed to prove anything to the contrary, it is proved that the said vehicle was insured by the 2nd defendant herein.
37. He submitted further that the said evidence from the police report is not caught under the rule against hearsay. And that this is because, according to Justice Mwaungulu as he then was, in *Mtaila v National Bus Company and Nico General Insurance* Personal Injury Claim No 295 of 2011 (High Court) (unreported), the report was made in the ordinary course of events. Further, that the exception to that is that the court is not bound by the

opinions expressed in the police report in so far as they relate to matters that are in the purview of the court as a trier court.

38. He added that, in the case at hand, the evidence relied upon is not in respect of the opinion given therein but rather the details of the motor vehicle which the police officer recorded, and which corresponds with the details he saw on the insurance disc.
39. In light of the foregoing, he submitted that the 2nd defendant herein is liable as the insurer of the said vehicle and that he is entitled to recover damages directly from the 2nd defendant pursuant to Section 148 of the Road Traffic Act.
40. He further submitted that the 2nd defendant has not adduced any evidence of any limit with regard to its liability in respect of this claim. Further, that the 2nd defendant has also failed to adduce the policy mentioned in pleadings in order to show extent of limit let alone the amount of money limited under the policy.
41. In light of the foregoing, he invited this Court to hold that he has proved his case and that the defendants are liable to pay damages for pain and suffering and loss of amenities of life, special damages and costs.
42. This Court agrees with the claimant on the statement of the law on the burden and standard of proof in matters like the instant one as posited in *Nkuluzado v Malawi Housing Corporation*.
43. Again, the claimant correctly states the law on the standard of care required of motorists as explained in *Banda and Others v ADMARC and Another* [1990] 13 MLR 59.
44. There is uncontroverted evidence that in this case the 1st defendant insured of the 2nd defendant run over the claimant's foot whilst driving from behind him and whilst he walked on a pavement on the side of the one way road in question.
45. There is no doubt that the 1st defendant drove without the requisite care and attention and put the claimant at peril. She was therefore negligent and caused the injury and loss occasioned to the claimant.
46. This Court therefore finds the 1st defendant liable for negligence as prayed for by the claimant. Her insurer the 2nd defendant is also liable in that capacity. The claimant is awarded damages as claimed and the same shall be assessed by the Registrar if not agreed within 14 days.
47. For the avoidance of doubt, this Court is however not prepared to accept that the insurer is liable beyond the policy limit because that is not

representative of the state of the law as provided for by Parliament in the Road Traffic Act. The liability is subject to the insurance policy limit. See Section 148 of the Road Traffic Act which provides that

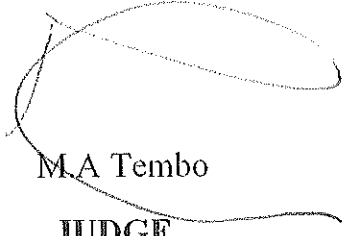
(1) Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued for the purposes of this Part shall be entitled in his own name to recover directly from the insurer any amount, not exceeding the amount covered by the policy, for which the person insured is liable to the person having the claim:

Provided that—

(a) the rights of any such person claiming directly against the insurer shall, except as provided in subsection (2), be not greater than the rights of the person insured against such insurer;

48. The claimant gets costs of this action.

Made at Blantyre this 1st October 2020.



M.A Tembo

JUDGE