

IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
PERSONAL INJURY CASE NUMBER 761 OF 2018

BETWEEN

ALICE KAMALA.....CLAIMANT

-AND-

TOP RANGE CIVIL ENGINEERING
CONTRACTORS.....DEFENDANT

CORAM: HONOURABLE JUSTICE JACK N'RIVA
Mr Chayekha for the claimant
Ms Mwandidya for the defendant
Ms Nkangala Court Clerk

Summary

Issue for determination - whether the claimant's husband death was as a result of the failure by the defendant to put up road warning signs that the road was under rehabilitation

Determination - The Court finds that the death was due to indeed negligence by the defendant in failing to put up warning signs that the road was under construction

Reasons - The claimant's witness proved that there were no road signs and the accident was as a result of the failure to put up warning signs

JUDGMENT

Background and issue for determination

1. The claimant commenced this action claiming that her husband died because of negligence on the part of the defendant. She alleged that her husband, a minibus driver, died because the defendant, while carrying out road maintenance exercise, failed to put road signs that the road was under construction. The vehicle the deceased was driving plunged into a ditch at the maintenance area leading to his death.
2. As will come out clearly, the dispute before me was whether the deceased died due to the negligence of the defendant. Put narrowly, the question is whether the defendant put danger warning signs or not.
3. The defendant denied the allegation of negligence. Actually, the defendant denied each and every allegation. Alternatively, though denying the occurrence of the accident and the subsequent death of the claimant's husband, the defence attributed the incident to negligence on the part of the deceased.

Summary of the evidence

4. The claimant was the first witness. The worth of her evidence was that her husband died in a road accident. He left three kids whom, in addition to her, was taking care of. Her late husband's salary was K50 000 per month. She was not in the minibus and did not know how the accident happened. She could not testify as to the police report as she did not know who wrote the police report.
5. The second witness was Gift Chikapa, a driver at Matours Bus Company. The deceased was his workmate. He said he witnessed the accident. On 13 October, 2018 around 4.40 a.m., he was driving from Kameza to Lunzu. The deceased was driving in front of him. Upon arrival at Mwalawoyera, he saw the vehicle driven by the deceased plunging into a ditch. He saw it trying to avoid the ditch and overturned.
6. He did not see any sign that there was a trench being dug.
7. In cross-examination, he was asked if he went to a driving school. He said he taught himself how to drive. He said he knew the highway code. He agreed

that he knew that the code gives different signs and speeds on the road. He said he knew that he was supposed to follow speed limits.

8. In re-examination, the witness stated that there were no road signs at the scene of the accident.
9. The defence called two witnesses.
10. The first was Macdonald Banda employed by the defendant as a Finance and Administration Manager since 2010. He has been responsible for the management of various road construction projects in Malawi and possessed experience in the requisite procedures of road construction. He attached the defendant's company profile. He said in 2018, the defendant was engaged by the Government of Malawi on the project called the Sectional Periodic Maintenance and Sectional Shoulder Reconditioning on Chileka Roundabout-Lunzu (M001) road. This project involved carrying out construction works on a stretch of about 200metres of the Chileka - Lunzu M1 road.
11. He said prior to the commencement of the project and in line with the recommended guidelines issued by the Roads Authority, the defendant hired a consultant, L. Gravam Consulting Services, to provide advice on the safety measures to be followed during the project.
12. Specifically, the Roads Authority requires that a constructor must erect appropriate and conspicuous road signage informing and warning road users about the state of the construction works on the road. L. Gravam Consulting Services instructed the defendant to put up reflective hazard tapes, recruit a Health and Safety Officer and to install billboards and banners that would ensure safety of road users. It was further recommended that during outside working hours the road be left in a safe and trafficable condition. He attached a copy of a letter from L. Gravam Consulting Services prescribing contractual issues such as the requirement for road signage.
13. He said upon receipt of the advice, and with the approval of the Roads Authority, the defendant procured and mounted the following signs on the sides of the Chileka-Lunzu M1 road:

Placards signalling road users to slow down;

placards showing a speed limit of 30 kilometres per hour,

Billboards and banners informing road users of the construction works on the road;

Traffic cones and drums wrapped with reflective tapes.

14. The defendant also procured flags which were to be used by flagmen to control traffic during normal working time. He attached a copy of certificate of payment issued by the Roads Authority.
15. When the project commenced, there was an excavation dug on a stretch of about 200 metres with a depth of 40 millimetres on both lanes including shoulders of the road. A team of human personnel led by a Health and Safety Officer were assigned to control traffic using reflective cones, drums, barrier tapes and traffic wardens during the day. In the evening, additional temporary warning signs were placed on the road directing road users to slow down and observe the speed limit of 30 kilometres an hour. There were also barrier tapes were placed on either side of the road to alert road users of construction works taking place at the site in the absence of traffic wardens. These signs were approved by the Roads Authority and are contained in the Highway Code that every driver learns before procuring a driver's license. He also attached a copy of the Highway Code.
16. He said on 12th October, 2018, he was on his way to Nkula Falls and used the Chileka-Lunzu M1 road. He was able to access the excavated stretch by following the signs on the road to slow down and drive at a speed 30 kilometres per hour. During the trip, he met other road users who were also able to access the excavated stretch without any accidents.
17. On 13th October, 2018, he was surprised to receive a report from the defendant's employees that the claimant's husband's motor vehicle had overturned near the campsite where the excavation had been made. He said he believed that the accident was wholly caused and/or contributed to by the claimant's husband for failing to take caution of the informative road signage and driving recklessly or over speeding. He said the defendant was not negligent in the manner in which it carried out construction works on the road.
18. In cross-examination, he said when he was working for the defendant, he was not involved in the construction work but he was responsible for recruitment of staff and procurement of materials at the site. He was asked about the

documents that he exhibited and he said that the first document was company profile. He said the second document was a bidding document. He said the document was instructions from the client, among others, to put road signs. He said they complied with the instructions because it was not possible not to comply.

19. He said the company profile did not show if they put signs on the road.
20. He agreed that his second document was a bidding document and it showed that they put road signs. As he was unable to pinpoint where that was shown, he agreed that it did not show that they put road signs. He further agreed that the document from L. Gravam Consulting Services, the third document, was a letter to the defendant. He said the instruction is to the defendant and the defendant complied. He again said it was impossible not to comply.
21. He said the fifth document was a driver training handbook. He agreed that the document did not show that the defendant put warning signs.
22. He agreed that the accident took place but he said he could not confirm if the claimant's husband got injured and died. He said there was no member of staff and he did not know the speed with which the deceased was driving. He said he passed by the scene after the accident. He said the minibus was already taken out and he did not take pictures at the scene.
23. He said he saw the police report and he challenged it. He said he had no proof that he challenged the report.
24. In re-examination, the witness stated that he did not take pictures because there were signs on the road and there was traffic.
25. The 2nd defence witness was Chawanangwa Munthali who, the time of the accident, was employed by the defendant as a site agent. He said that at the time of testifying, he was working for Roads Authority as a Roads Inspector. In 2018, he was assigned by the defendant as a site manager for the project called the sectional periodic maintenance and sectional reconditioning on Chileka Roundabout-Lunzu (M001) road. The project involved carrying out construction works on the road and his responsibilities included preparation of work schedule, recording site diary, quantifying progress of work and daily supervision of the road signage and machinery available to ensure compliance with the recommended the Roads Authority guidelines.

26. He said prior to the commencement of the project, the defendant procured and mounted

Placards signalling road users to slow down

Placards showing speed limit of 30 kilometres an hour

Billboards and banners informing road users

Traffic cones and drums wrapped with reflective tapes.

27. He said the defendant also procured flags which were to be used by flag men to control traffic during normal working hours. He attached a copy of certificate of payment issued by the Roads Authority.

28. He said that on 12 October 2018 an excavation on a stretch of 200 metres with a depth of 40 millimetres on both lanes including shoulder. Despite the excavation, the road was accessible and traffic was permitted to pass a speed limit of 30 kilometres per hour. At the end of the day, he inspected the road signage erected and recorded the same in the site diary.

29. He said that on the morning of the 13th of October 2018, he was surprised to be informed that the claimant's husband had been involved in an accident near the camp site where the excavation had been dug. He said that he visited the scene of the accident and discovered that the motor vehicle driven by the claimant's husband was already removed. Therefore, he was unable to appreciate the extent of the injuries sustained by the driver and the damage caused by the motor vehicle he was driving.

30. He said the accident was contributed to by the claimant's husband for failing to take caution of the informative road signage.

31. In cross examination he said that the excavation took place on 12 October 2018 and that the accident happened on Monday of 13 October 2018. He said that the documentary evidence put in the Court did not show that the signs were put on the roads.

Burden and Standard of Proof

32. The burden is on the claimant to prove, on a balance of probabilities, the claim against the defendant.

33. In *Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA), the Court observed as follows:

“Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of *Robins v National Trust Co* [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is ... the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in *Constantine Line v Imperial Smelting Corporation* [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but 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. However, in a civil action the burden of proof may be varied by the agreement of the parties – see *Bond Air Services Ltd v Hill* [1955] 2 QB 417.”

34. Denning J in *Miller v Minister of Pensions* [1947] 2 ALL ER 794 said

“the degree is well settled. It must carry a reasonable degree of probability, not so high as in a criminal case, but if the evidence is such that a tribunal can say ‘we think that it is more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.

Law on Negligence

35. Lord Esher (then Brett M.R.) in *Heaven v Pender* [1883] 11 Q.B.D. 503 broadly formulated the precursor to the modern doctrine of negligence by proposing a doctrine of foreseeability of consequences of one’s negligent acts:

“whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.”

36. Henceforth, Courts have developed the elements to prove negligence. Firstly, there must be a duty of care. Secondly, there must be a breach of this duty of care. Thirdly, there must be loss or damage and fourthly, there must be a causal link between the breach of the duty of care and the loss or damage suffered.

37. In *Lievre v Gould* [1893] 1 Q.B.D. 491, Lord Esher stated that “the question of liability for negligence cannot arise at all until it has been established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.”

38. The general principle is that one should not harm those people to whom they owe a duty of care by their acts or omissions. If they fail in the standard of care owed, they would be liable for their acts or omissions due to negligence. As regards the standard that is owed, it is that of the ‘reasonable person’ towards ‘a neighbour’-Lord Atkin in *Donoghue v Stevenson* [1932] A.C. 562.

39. In *Donoghue v Stevenson*, Lord Atkin stated that:

“The rule that you must love your neighbour becomes in law you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be liable to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected by my act that I ought to reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

40. This duty of care was later endorsed and developed in *Anns v Merton Urban District Council* [1978] A.C. 728, in which Lord Wilberforce established a two stage test.

“First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.”

Court’s Finding and Reasons for Determination

41. In this case the claimant asserted that the defendant was negligent. The allegation is that the defendant did not put in place warning signs that the road was under rehabilitation. Contrariwise, the defendant asserted that the

deceased was the one who was negligent. The assertion was that deceased did not take heed of the road signs and he was speeding.

42. The duty was on the claimant to prove that the defendant was negligent. Likewise, the defendant had a duty to prove that it was the deceased who was negligent. The Court has to conclude that it is more probable than not that the defendant or the deceased was negligent.

43. Being a civil action, the standard of proof is on a balance of probabilities. The Court has to conclude that it is more probable than not that the defendant breached the duty of care leading to the demise of the deceased. Again, the Court, in the other scenario, has to conclude that it was more probable than not that the deceased was negligent or was quite instrumental in causing the incident leading to his death.

44. For the claimant to prove that the defendant was negligent, she must prove all the three elements of negligence. She must show that the defendant owed the deceased a duty of care, the defendant breached the said duty of care and as a result of the said breach, the deceased suffered foreseeable damage. The claimant claims that the defendant had a duty to put warning signs after digging the road and or block the road so as to make it impossible to fall into the excavation.

45. It is without doubt that the defendant had a duty to put up warning signs. The evidence of the claimant's witness was that there were no road signs.

46. The witness said that he passed through the place the previous day and on the day of the accident and he never saw any warning signs. He said that there were no signs to reduce speed or that the road was dug. The cross-examination hardly impeached this assertion.

47. Attempt to attribute negligence on the claimant's witness and his level of competence was immaterial as he was a mere witness. The assertion by the claimant's witness that there were no road signs is stronger than the assertion, to the contrary, by the defence. On the point, the defence might well be said not to have paraded material witnesses if at all. Neither did the defence bring material evidence.

48. In its attempt to prove that it put up warning signs, the defence witnesses produced a number of documents. However, there was nothing in the documents proving that the defendant put road signs. As an example, the first defence witness said he procured signs and safety materials. He did not produce evidence of such procurement. Of course, procurement might not have automatically meant that they mounted the materials. Instead, the witness tendered proof of payment from the Roads Authority to the defendant in relation to the contract between the parties.

49. Simply put, the defence brought no evidence to rebut the assertion that they did not put signs on the site.

50. The documents the defendant's witnesses brought were:

Company profile, recommended guidelines by the Roads Authority, and proof of payment from the Roads Authority.

51. The other documents were the High Way Code and the bidding documents. None of these proves that the defendant mounted danger warnings on the construction site.

52. The defence, furthermore, did not bring any of the persons alleged to be controlling signs or who mounted the signs at the scene, the flagmen and the Health Safety Officer. These, if the assertion is true that they were working on the site, would have been material witnesses. The law is clear on the failure to call material witnesses.

53. In all this, the Court finds that the claimant has proved that the defendant breached its duty of care, towards the road users in particular the claimant's deceased husband, to put warnings on the road. The claimant put it in evidence that as a result of the accident, her husband died.

54. It should be a foreseeable fact that failure to put road signs on a construction site might have fatal consequences.

55. It follows that the resultant death was a foreseeable damage suffered by the claimant's husband.

56. The defendant pleaded negligence on the part of the deceased. There was no evidence, apart from conjecture, to prove the assertion.

57. In summary, the Court finds that the claimant has managed to show that the defendant was a constructor who was doing maintenance to the road in question. He was under a duty to put up road warning signs after digging the road where the accident happened. The claimant demonstrated that the defendant failed to put up the said warnings and this led to the accident in which the claimant's husband died. The claimant has managed to prove on a balance of probabilities that the defendant was negligent.

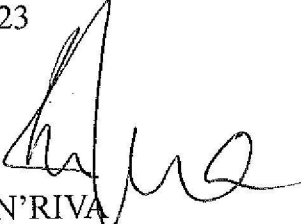
58. The claim succeeds.

59. Costs are for the claimant.

60. This Court awards the claimant costs to the claimant because it appears to me that the defence chose not to cooperate in this matter. As I said before, the defence denied everything alleged in this matter. They, for example, denied the occurrence of the accident. Yet the defence witnesses alluded to the very accident. This is contrary to the overriding objectives of the rules governing procedure in this Court. At least we could have agreed on some issues and only deal with the issue that would have been contentious.

61. The matter shall proceed to assess damages and costs payable to the claimant.

DELIVERED the 29th day of May 2023


J N'RIVA
JUDGE