IN THE MALAWI SUPREME COURT OF APPEAL AT BLANTYRE

M.S.C.A. CIVIL NO. 11 OF 1984

BETWEE:

YANU-YANU COMPANY LIMITED ..... APPELLANT

-and-

P.B. MBEWE ..... 1ST RESPONDENT

-and-

M.A. MBEWE ..... 2ND RESPONDENT

CORAM: The Honourable Mr. Justice Jere, J.A.
The Honourable Mr. Justice Banda, J.A.
The Honourable Mr. Justice Unyolo, J.A.

Nakanga of Counsel for the Appellant
Msisha of Counsel for the Respondent
Ngalu, Court Reporter
Kadyakale, Official Interpreter

JUDGMENT

Jere, J.A.

Yanu-Yanu Company Limited appeals against the decision of Villiera, Ag.J. as he then was and there is a cross appeal by the two respondents on costs only against the same decision.

The appellant is a limited liability bus company carrying on the business of passenger transportation. The first respondent was at all material times a driver employed by the respondent. The circumstances giving rise to the present litigation are that on the 19th of January, 1982 Harold Lenard Makhumula was driving a passenger vehicle ZA 2344, the property of the appellant company from Monkey Bay to Blantyre. As he was driving along Kamuzu Highway in the City of Blantyre he passed Martins and Noronha and through the traffic lights. He saw a lorry from a distance of eight yards entering the Blantyre/Limbe road, moving. He was travelling at 25 m.p.h. It was raining and the road was slippery. He tried to avoid collision by swerving; it was however too late. The lorry was hit a glancing blow before the bus crushed into the wall. The lorry as a result of this collision had its off-side front bumper bent and the off-side rear mirror broken. The bus had its whole front part torn out. The bus was off the road from 19th January to 24th February. During the period of 36 days therefore necessary repairs were carried out and the bus was once more in business completing a fleet of four buses.

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The claim in the lower court by the appellant was for K19,342.28 and damages for negligence. In his statement of claim he particularised the negligence complained of and claim for special damages as well as damages. The defendant by his defence denied negligence and in the alternative pleaded that the collision was caused solely or alternatively by the negligence of the plaintiff. The learned Judge in his judgment held that while the defendant were negligent the plaintiff did contribute to this negligence and he apportioned the degree of contributory negligence by the plaintiff at 50%. The material part of the judgment states:

> " .... It is the duty of a driver or rider of a vehicle to keep a good lookout. He must lookout for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him especially at cross roads, junctions or bends. See Charlesworth on Negligence 6th Edn. at paragraph 878. This duty is imposed on all drivers whether on the main road or those emerging from side roads. The plaintiff's driver in the instant case conceded that he had travelled along Kamuzu Highway on many occasions and that the scene of accident is a very busy place with big vehicles emerging from the side road. In addition, there are traffic lights and as I have stated earlier, the road was wet at the time. Those were circumstances which in my view would have obliged a prudent driver to use extra care. The plaintiff's driver however chose to drive at 25 m.p.h. and it seems to me inordinate speed in the circumstances contributed in large measure to the accident. I am confirmed in this view because the greater damage to the bus was caused not because of its collision with the lorry but because of the violent impact with the concrete fence.
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> I do not however feel that the lorry driver was entirely blameless. He was driving a big lorry with a high cab. This should have enabled him to have a clear view of both sides of the main road. If this driver had kept a proper lookout he would no doubt have seen the inordinate speed at which the bus was being driven and he would have forborne from entering the main road at that moment. I hold accordingly that both drivers were equally to blame and I apportion their degree of negligence at 50 per cent each. Whatever damages the plaintiff is to recover will be reduced by 50 per cent."

Mr. Nakanga has argued that the Acting Judge was wrong in law in that he was looking at the general law of negligence. He further submitted that the learned Judge did not consider the law of contributory negligence. He argued that when considering negligence a duty of care which is crucial in the general law of negligence does not arise. It was his view that in contributory negligence a driver has no duty towards other road users; he has only a duty to protect himself. In counsel's opinion the Judge's error caused miscarriage of justice resulting in the present decision. In his humble submission this court should reverse the decision and hold that there was no contributory negligence on the part of the appellant and that the respondent was solely to blame.

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We feel that learned counsel has misunderstood the law. It is accurately stated in Nancy v. British Columbia Electric Railway Company Limited (1951) A.C. 601 at page 611 per Viscount Simon. He states:

> " ..... With this conflict of judicial opinion before them their Lordships must now deal with the objection to the summing-up and consider whether the conclusion reached by the jury was affected by any mistake in it. The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in Davies v. Swan Motor Co. (Swansea) Ld. (19), to which the Chief Justice referred.
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> This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, e.g., if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if the sentence of Denning, L.J.'s judgment in the Davie's case (20), where he says, "when a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down", is to be interpreted in a contrary sense, their Lordships cannot agree with it."

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It is clear from the above that the learned Judge did have in mind the correct law. We do not therefore agree that there was a misdirection in so far as the law of contributory negligence is concerned. However, even if the argument was that there was misdirection it is abundantly clear from the evidence that properly directed, the learned Judge would have come to the same conclusion. This naturally leads us to the next ground of appeal which is to the effect that the learned Judge was wrong in holding that a speed of 25 m.p.h. was inordinately excessive. We remind ourselves about the salient facts on that day of 19th January: it was raining or drizzling, the lorry was joining the Limbe/Blantyre road. The bus had just passed the road. All the time, at this stage, he should have realised well in advance what was in front of him. He did not however do so until only eight yards from the lorry. At this stage he realised the danger that was in front of him. It was drizzling, he therefore wanted to avoid collision. He swerved. There is evidence that he was zigzagging. These facts clearly show that he did not take a proper lookout. Such was a failure on his part to take ordinary care while travelling on the road. Why he did not realise, in good time, that there was such an obstacle in front of him is difficult to know. What becomes of vital importance is that he failed to stop in order to avoid a collision. The speed therefore comes in. If he had taken a proper lookout, he should have stopped in good time. Whilst it cannot be said that an ordinary speed of 25 m.p.h. is inordinately excessive, but coupled with these other factors it becomes excessive. In these circumstances, therefore, we do not think that the learned Judge was in error in holding that the speed was inordinately excessive.

We now come to the damages. The appellant has taken three points regarding damages. First he complains that the learned Judge refused to award the appellant the sum of K320, being salaries paid to the employees after the bus had been involved in the accident. The evidence however is that after the accident the driver was given another truck to drive by the company itself and the other employees were given light duties. It is clear in our judgment therefore that the company got value for the work that was done by these employees. Can it be said therefore that there was loss. In our view there was no such loss; therefore the learned Judge was right in dismissing this aspect of the claim.

The next item was that of spare parts. It was contended that the learned Judge ought to have at least awarded the sum of K306.20 for the price of the spare parts. Again we think it was merely a question of proof. The evidence is that the bus had gone for estimates to a reputable garage. The estimates showed that spare parts worth K306.20 should be bought. There is no direct proof that these spare parts were bought but that the bus was repaired by the appellant company itself. In other words, we are being asked that in so far as there was damage and that the vehicle is back on the road, this means that the spare parts had been bought. He stated:

> "The bus is moving. That, to me, is sufficient proof that the parts were bought".

Mr. Msisha insisted that he must produce the proper invoice for the purchase of these spare parts. It is common ground that he failed to do so.

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We very much doubt that this evidence is such that one can say that he has proved that he bought spare parts worth K306.20. Here again the learned Judge, it appears to us, was correct.

The other claim is that the court was mistaken in holding that the appellant had five buses. In so holding, the court reduced the amount that should have been awarded to the plaintiff. It is contended in this court that the court should have taken the fact that the appellant company had four buses instead of five buses. If that was the case then the court would have awarded a much higher sum than the present one. Learned counsel is asking us to use, for average purposes, that the plaintiff had four buses. In these circumstances the amount would have come to around K8000 instead of K5000 as awarded by the court. Again we do not agree. The evidence was such that one would not make such an assumption. We very much regret but we quote the words of Lord Goddard C.J. in Bonham-Carter v. Hyde Park Hotel Ltd. (1948) 64 TLR, 177 at page 178:

> "Plaintiffs must understand that, if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

In these circumstances therefore the appeal fails.

We now come to the cross appeal. Mr. Msisha said that the plaintiff succeeded to a very small extent on the amount claimed. In these circumstances, while conceding that the costs are in the discretion of the court he thought this was a proper case where the defendant should have paid a part of the costs and not the entire amount. We sympathise with the argument raised by Mr. Msisha but having studied the record we are of the view that the discretion of the learned Judge cannot be faulted. The cross appeal is also therefore dismissed. We order that each party bears its own costs.

DELIVERED at Blantyre this 12th day of February, 1986.

(Signed) _____
Jere, J.A.

(Signed) _____
Banda, J.A.

(Signed) _____
Unyolo, J.A.