

REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL CAUSE NO 144 of 2009

BETWEEN

GOLIAT MWASE.....PLAINTIFF
(Father of Nelson Mwase Deceased)

AND

RAPHAEL CHIMBALA.....1ST DEFENDANT

CILCON..... 2ND DEFENDANT

CORAM: HON. Mr. JUSTICE D.T.K. MADISE

Mr. A. A, Chunga Counsel for the Plaintiff
Messrs Katundu & Company for the Defendant
Mr. R.S.D. Kahonge, Official Interpreter
Mrs., F. Silavwe Court Reporter

Madise, J.

JUDGMENT

Introduction

The Plaintiff in this matter took a writ of summons dated 23 August 2010 against the Defendants claiming damages for the loss of his son who died in a car accident. The Defendant filed a defence in which they denied the claim and called the Plaintiff to strict proof.

The only document filed by the Defendants is the statement of defence. On the appointed day for the hearing of the within matter, only the Plaintiff and his legal representative turned up. The Defendants and their Lawyer did not show up and no reasons were given for their absence. I now proceed to determine this matter on the merits.

The Statement of Claim

The Plaintiff filed a statement of claim which we reproduce as filed.

1. The Plaintiff is the father of Nelson Mwase (deceased) who died on the 9 June 2009 in a road accident and he brings this action for the benefit of the estate of the deceased.
2. The said accident was caused by the Defendants who carelessly drove motor vehicle Reg. No. BP 2688 Tata Tipper and hit the deceased to death.

From the statement of claim the Court is able to bring out the issues as follows.

Particulars of Negligence

- a) Failure to maintain any or any adequate control of the said the vehicle.
- b) Drove too fast in circumstances.
- c) Failed to brake, swerve, slow down or manage the said motor vehicle so as to avoid the said accident.

Particulars of Damage

- a) Loss of life expectancy

- b) Loss of life dependency.

Particulars of Damages

- a) Damages for loss of life and loss of expectation of life
- b) Damages for loss of dependency
- c) Special damages
- d) Costs of this action

There was only one witness Mr. Goliat Mwase, the father of Nelson Mwase (deceased) of Box 375, Mzuzu, the Plaintiff in this matter. He told Court that on 9th June 2009 his son Nelson Mwase was hit to death by a motor vehicle registration number BP 2688 Tata Tipper driven by the 1st Defendant and owned by the 2nd Defendant. He tendered in a Court a death report from Mzuzu Central Hospital. The cause of death was crushed syndrome.

The Plaintiff told Court the accident was wholly caused by the 1st Defendant due to his negligent driving. The Plaintiff also presented to Court an Abstract Police Report. According to the opinion of the author T/Sgt Mfungwe, the accident was influenced by the driver of the truck due to over speeding. He was charged with the offence of causing death by reckless driving contrary to section 126, Road Traffic Act.

The Defence

The Defendants filed their defence which we reproduce as filed.

1. The Defendants refer to paragraph 1 of the statement of claim and put the Plaintiff to strict proof of the allegation that the Plaintiff is the father of one Nelson Mwase (deceased) who and on the 9th day of June involved in a road accident.
2. The Defendants refer to paragraph 2 of the statement of claim and deny that the accident alleged therein was caused by the Defendant's negligence as pleaded or at all.

3. Paragraph 5 of the statement of claim (which should read paragraph 3) is denied.
4. The Defendants pray that the action herein be dismissed with costs.

The Issues

There are basically four issues for determination before this court.

1. Whether the 1st Defendant was negligent.
2. Whether the 1st Defendant owed the deceased a duty of care.
3. Whether the 2nd Defendant is vicariously liable as an employer.
4. Whether damages are payable.

The Law and Evidence.

Burden and standard of proof

It is trite law that in civil actions like the one before me, the burden of proof rests upon the one alleging or asserting the claim and/or want the court to believe that a particular fact exist i.e. the burden of proof is upon the party who would fail if no evidence at all is adduced on which he bases his claim.

The standard of proof is on a balance of probabilities. In simple language he who asserts a matter or fact must prove but he who denies need not prove. If the claimant is to succeed the court must think his story to be more probable than the other. If however the probabilities are equal the claim must fail.

The Determination

There is no dispute that on 9 June 2009 the Plaintiff's son was involved in an accident near Matabwa Market in the City of Mzuzu. He lost his life. The driver of the vehicle a Tata Tipper was Raphael Chimbala, the 1st Defendant. There is no dispute that as a result of the accident Nelson Mwase was crushed to death. The Plaintiff is suing on behalf of the estate of the deceased and claims that the 1st Defendant was negligent a thing the

Defendants have vigorously denied. The Defendants have also asked for proof that the Plaintiff must show that he is the father of the deceased.

The Plaintiff did present himself before Court as the father of the deceased. He had in his possession the death certificate and a police report. In my view this was evidence enough that he was the father because how else could he have come into possession of those documents. If the defence were disputing these facts they could have led evidence to disprove that fact. He who alleges must prove.

Negligence

Lord Alderson gave perhaps the best description of the definition of negligence in the case of *Blyth vs. Birmingham Water Works Company* (1856) Ex. 781 at 784.

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.

Negligence as a tort has four requirements namely:

1. The existence in law of a duty of care which the law attaches liability to carelessness.
2. Breach of the duty of care by the defendant.
3. A casual connection between the defendant's careless conduct and the damage.
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

Once this is established the next question is to consider whether the Defendant is liable in damages and for how much. Looking at the evidence before us, can it be said that the 1st Defendant was negligent? Did he owe the deceased a duty of care? Can it be said that the 1st Defendant breached that duty of care? Lastly can it be said that as a result of that breach the Plaintiff as a parent has suffered loss or damage? Lastly, are damages payable in this matter?

As stated the Plaintiff read and tendered his witness statement. He further made reference to an Abstract Police Report. In her opinion T/Sgt Mfungwe stated that according to the evidence gathered at the scene and statements obtained from witnesses, the accident was caused by the negligent driving of Raphael Chimbala. He was over speeding and he failed to control and slow down his vehicle. As a result he hit the deceased.

The law demands of us to take reasonable care to avoid acts or omissions which we can reasonably foresee would be likely to injure our neighbour. Guidance in this matter has been sought from Lord Atkins LJ when he decided Donoghue vs. Stevenson (1932) AL 562.

Who then in law is my neighbour? Neighbours are people who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I'm directing my mind to the acts or omission which are called in question.

The deceased was lawfully walking along the M1 road (Mzuzu to Karonga) opposite Matabwa Market. Was he entitled to be there at the material time? The answer is yes. Could the deceased have lost his life without the accident? Did the 1st Defendant owe a duty of care to the deceased as a pedestrian? I'm of the view that the answer to former question is in the

negative and the answer to the latter question is in the affirmative. I therefore find that the 1st Defendant caused the accident which occurred on 9 June 2009 due to his negligent acts.

Cause of Death

Nelson Mwase died on the spot on 9th June 2009. He was only 5 years old. I need not go any further in search of the truth. I find as a fact that Nelson Mwase died prematurely because Raphael Chimbala drove his motor vehicle without due care to other road users to wit, pedestrians. I therefore find that the 1st Defendant caused this death due to his negligent act and therefore liable in damages.

Vicarious liability

According to the doctrine of vicarious liability an employer is liable for the negligent acts of his employee. For the employer to be liable, the Plaintiffs must prove that there was a master/servant relationship and that the employee committed a tort in the course of employment. The employer must therefore be liable for the wrongful acts of his employee as it is the duty of the employer to ensure that the employee conducts his business with due care.

Several tests are used to determine the relationship between an employee and an employer. But the most important one is control. What power does the employer has over the employee.

- a) The master's power of selection.
- b) The payment of remuneration
- c) The right to control the method of doing the work
- d) The master's right of suspension or dismissal.

Once there has been established an employee/employer relationship, the next question is whether the employer can be liable for the torts of the employee. The answer is simple. As long as they are committed in the course of employment. The act of the employee must be tortuous and the same done while on duty. All these are questions of facts and no single test is appropriate to cover all cases.

In Salmond and Heuston on law of torts (21st Ed...1996) p 443:

It is either (1) a wrongful act authorized by the master or (2) a wrongful and unauthorized mode of doing some act authorized by the master But a master is liable even for acts which he has not authorized provided they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes of doing them.

The 2nd Defendant did authorize the 1st Defendant to drive this vehicle although he did not authorize him to over speed. Unfortunately or unfortunately the two are well connected only that the 1st Defendant had used an improper mode of carrying out the original instruction of driving the motor vehicle.

The 1st Defendant was a driver of the 2nd Defendant. At the material time he was driving a vehicle belonging to his employer. He was on duty and the 2nd Defendant had the responsibility to ensure that the 1st Defendant was driving the vehicle keeping in mind the security and safety of other road users. On a balance of probabilities this version seems more plausible. The Defence has not led evidence in rebuttal to suggest that such a relationship did not exist.

I therefore find that the 2nd Defendant is vicariously liable for the negligent act of the 1st Defendant.

Death as a cause of action

The old position at law was explained in the case of *Baker vs. Bolton* (1808) Camp 493 commonly called "*The Rule in Baker vs. Bolton*":

That no one can recover damages in tort for the death of another. The death of a human being cannot be compensated of as an injury."

The position has now changed with the enactment of statute. As to who may sue the list is not exhaustive. Apart from a spouse, a parent may also sue on behalf of the estate. Does this cause of action survive the death of Nelson Mwase? The answer is in the affirmative. An action may be brought for the benefit of the dependants of any deceased person against a person who wrongly caused the death. The position in section 3 Statute Law (Miscellaneous Provisions) Act (cap. 5:01), Laws of Malawi is that;

Whenever death of a person is caused by an wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensured) have entitled the person injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensured shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as to amount in law to a felony.

It is therefore the finding of this court that the parents of Nelson Mwase have the right to sue for damages for the wrongful death of the deceased as provided for under sections 4 as read with section 7 Statute Law (Miscellaneous Provisions) Act.

Conclusion

I have already found the 1st Defendant liable in damages for his negligent acts which caused the death of Nelson Mwase. The Plaintiff has suffered loss of dependency and loss of expectation of life. I have already found the 2nd Defendant liable in claim for being the employer of the 1st Defendant. They must compensate the Plaintiff in damages.

Damages

The assessment of specific damage as a particular head must be specifically pleaded. Although general damage is presumed by law to flow from the wrong complained of, it must still be averred and the court must be satisfied that such damage has been suffered.

Special damages must be specifically pleaded in order to warn the other party so that they are not ambushed at trial, since they are over and above those that would reasonably be expected to flow from the wrongful act. I therefore order that the Plaintiff being the father to the deceased in this matter should be awarded damages in the following terms:

- a) Damages for loss of life and loss of expectation of life.
- b) Damages for loss of dependency.
- c) Special damages.

The Plaintiff must file summons for assessment of damages within 14 days before the Hon. Registrar.

This action must succeed.

Costs

Award of costs is the exclusive preserve of the Court. I condemn the Defendants in costs.

Pronounced in Open Court at Mzuzu in the Republic this 17th April 2012.

Hon. Mr. Justice D.T.K. Madise

JUDGE