

**REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
MZUZU DISTRICT REGISTRY  
CIVIL CAUSE NO. 68 OF 2013\_**

**BETWEEN**

**KENTAM  
PLAINTIFF**

**PRODUCTS.....**

-and-

**KENNETH MWESO  
DEFENDANT**

.....

**Coram: Honorable Mr. Justice D.T.K. Madise**  
Ms. T. Chatupa Counsel for the Plaintiff  
Mr. C. Ghambi Counsel for the Defendant  
Mrs. M. Lisiya Official Interpreter  
Mr. C.B. Mutinti Court Reporter

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**Madise, J**

**JUDGMENT**

## **1.0 Introduction**

**1.1** On 26 April 2013 the Plaintiff herein took out a writ of summons against the Defendant Mr. Kenneth Mweso, a driver who was working for the Plaintiff as a driver seeking damages for negligent driving outside official working hours. The Defendant disputed the claim. The particulars of the claim are in the statement of claim.

## **1.2 Statement of claim**

- 1) The Plaintiff was the employer to the Defendant until 27 October 2011 when the latter's employment of services was terminated.
- 2) The said Defendant, at all material times, was in the employ of the Plaintiff as a driver of a sales van and on Thursday, 8 September 2011 at or around 10 pm, the Defendant was involved in a road accident while driving the Plaintiff's vehicle registration Number RU 2894. In the process, the Plaintiff's vehicle got badly damaged.
- 3) The Plaintiff took the vehicle that the Defendant had damaged in the road accident to BJ Loga Transport for repair. The total cost value for repairs was K447, 400.00. The said vehicle stayed inoperative for 18 days of service.
- 4) In the said 18 days in which the vehicle was at service the Plaintiff lost sales amounting to K3, 847,357.00.
- 5) All losses that the Plaintiff had incurred were due to the Defendant's negligent driving of the Plaintiff's vehicle in a frolic of his own and in due disregard of the company's policy.

### **Particulars of negligence**

- a) Driving the vehicle outside working and permitted hours.
- b) Driving the vehicle without regard to company policies
- c) Driving the vehicle on a frolic of his own.

Wherefore the Plaintiff claims:

- a) Payment of K447, 400.00 as cost of repairs.
- b) Payment of K3, 847, 357, 00 as lost sales.
- c) Interest at the current banks' lending rate.
- d) Costs of this action.

### **1.3 Statement of Defence**

- 1) The Defendant admits the contents of paragraph 1 of the Plaintiff's statement of claim.
- 2) Paragraph 2 of the Plaintiff's statement of claim is also accepted.
- 3) Paragraph 3 of the statement of claim is denied and the Plaintiff is put to strict proof thereof.
- 4) The Defendant denies paragraph 4 of the Plaintiff's statement of claim and puts the Plaintiff to strict proof thereof.
- 5) The Defendant denies paragraph 5 of the Plaintiff's statement of claim and puts the Plaintiff to strict proof thereof.
- 6) The Defendant repeats paragraph 5 hereof and states that the accident was wholly contributed by Austin Kaondo who hit him and has been sued as such.
- 7) The said vehicle which was involved in an accident was duly insured by NICO General Insurance Company Limited under certificate of insurance number 10128218 issued on 17/01/2011 to 16/01/2012.
- 8) The Plaintiff just wants to unjustly enrich itself which is not allowed in law.
- 9) Save as herein expressly admitted, the Defendants deny each and every allegation of fact in the statement of claim as if each were herein set out and traversed seriatim.
- 10) The claim should be dismissed with costs.

### **Counter Claim**

- a) From statement 1 and 2 of the Plaintiff's claim the Defendant incurred injuries.
- b) The Defendant claims from the Plaintiff compensation for injuries incurred in the course of employment which left his body permanently deformed and incapacitated.
- c) The Defendant claims for costs of this action.

#### **1.4 Defence to Counter Claim**

- 1) The Plaintiff refers to paragraph (a) of the Defendant's counter-claim and puts the Defendant to strict as to any injuries incurred.
- 2) The Plaintiff refers to paragraph (b) of the counter-claim and denies that any injuries, if any were incurred by the Defendant in the course of his employment and puts him to strict proof thereof.
- 3) Still in reference to paragraph (b) of the counter-claim, the Plaintiff states that any injuries, if any, incurred by the Defendant were incurred outside the course of his employment, during a frolic of his own, in disregard of company policy and was negligent.

#### **Particulars of Negligence**

- a) Driving the motor vehicle in disregard of company policy.
  - b) Driving the motor vehicle outside working and permitted hours.
  - c) Driving the motor vehicle outside the scope or course of his employment.
  - d) Driving the motor vehicle while on a frolic of his own.
  - e) The Plaintiff, therefore, denies the Defendant's claims to compensation for any such injuries.
  - f) The Plaintiff denies the Defendant's claim to costs of the counter-claim.
- (4) Wherefore the Plaintiff prays that the Defendant's counter-claim be dismissed in its entirety with costs.

## **2.0 The Evidence**

**2.1** According to the evidence of Mariane Nsanga Gunda the then Sales and Marketing Officer for Kentam Products, between November 2008 and August 2013 she was the Defendant's immediate supervisor.

**2.2** She stated that Kentam products had a vehicle usage policy which guided all van salesmen. In particular paragraph 16 stipulated that employees are prohibited to drive at night that is between 6 am and beyond 6:30 pm.

**2.3** That the Defendant signed the company vehicle usage policy on 12 March 2010 (**MNG 1**). On 8 September 2011 the Defendant took the vehicle in issue and was involved in an accident at around 10 pm and he did not inform anyone that he was using the vehicle after 6:30 pm.

**2.4** The evidence of PW1 was corroborated by Janet Thindwa the General Manager of Kentam Products. She told the Court that indeed on 8 September 2011 at around 10 pm the Defendant was involved in an accident while driving vehicle with reg. No. RU 2894. The vehicle got badly damaged after the accident (see police report **JT 2**). The vehicle was taken to BJ Loga for repairs and the total cost of repairs was K447, 400.00. The vehicle was out of usage for 18 days and the company lost K3, 847,357.40 in business bases on the vehicle daily sales.

**2.5** The Defendant on the other hand told the Court that he was indeed an employee of the Plaintiff at the material time as a Salesman/driver. That on 8 September 2011 while on duty the vehicle he was driving was involved in a road accident concerning another vehicle a Toyota Starlet reg. No. SA 3040 at Mbowe Filling Station along Kamuzu Procession road in Lilongwe. His vehicle overturned.

**2.6** He admitted that the Police blamed him for the accident. He however stated that he was at the Filling Station because he wanted to refuel his vehicle as fuel was scarce at that time and the only appropriate time to refuel was at night.

**2.7** He stated that he got injured and he sustained fractures on the right arm and two right fingers. The degree of permanent incapacity was assessed at 35% (see medical report **KM1**). The Defendant stated that the Ministry of Labour ordered the Plaintiff to compensate him for the injuries and the insurance company was also supposed to compensate him. On 20 October 2011 while still in hospital he was dismissed from employment. According to the Defendant he was only paid part by the insurance company and his pension remains unpaid by the Plaintiff.

### **3.0 The Law and Evidence**

#### **3.1 Burden and Standard of Proof**

**3.1.1** The burden and standard of proof in civil matters is this: He/she who alleges must prove and the standard required by the civil law is on a balance of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than a positive.

**3.1.2** Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than NOT must carry the day.

#### **3.2 Negligence**

**3.2.1** 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 ordinary regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.*

**3.2.2** Negligence as a tort has four elements 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.

**3.2.3** The law demands of us to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your 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.*

**3.2.4** 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 1<sup>st</sup> Defendant was negligent? Did he owe the Plaintiff a duty of care? Can it be said that the 1<sup>st</sup> Defendant breached

that duty of care? Lastly can it be said that as a result of that breach the Plaintiff suffered loss or damage? Lastly are damages payable in this matter?

#### **4.0 The Finding**

**4.1** It is not in dispute that the Plaintiff had engaged the services of the Defendant as a salesman/driver. It is not in dispute that the Plaintiff had a vehicle usage policy which the Defendant signed on 12 March 2010.

**4.2** It is not in dispute that the vehicle usage policy prohibited salesmen/drivers from using any company vehicle after 6:30 pm. It is not in dispute that on 8 September 2011 the Defendant was involved in a road accident at around 10 pm and his vehicle got badly damaged. It is not in dispute that the traffic police found that the Defendant was to blame for causing the accident.

**4.3** Why did the Defendant go outside the vehicle usage policy? His defence was that he wanted to refuel the vehicle as fuel was scarce at that time and the only appropriate time was in the evening hence he was found at Mbowe Filling Station where the accident took place.

**4.4** Janet Thindwa the General Manager and Mariane Gunda former Sales and Marketing Officer stated that the Defendant never sought permission to drive at night. That the Defendant had violated the company policy.

**4.5** What evidence is there that the Defendant had been permitted to drive at night to look for fuel? There is none. What evidence is there that the Defendant was at the accident spot for purposes of refueling? Is mere presence at a filling station evidence of refueling? I do not think so.

**4.6** The presence of the Defendant at a filling station notwithstanding, the question is whether the defendant violated company policy by driving after 6:30 pm. In my considered opinion the answer is in the affirmative. On a

scale of probabilities I'm of the view that the Plaintiff has made out their case against the Defendant.

#### **4.7 Damages**

The Plaintiff claims the cost of repairs which was K447, 400.00 according to a quotation from BJ Loga Transport. The authenticity of the same has not been disputed. I have already found that the Defendant was negligent on the material day. I therefore award the costs of repairs to the Plaintiff.

**4.7.1** The Plaintiff further claims loss of business for the 18 days the vehicle was immobile based on the daily sales the vehicle and the Defendant were making (**JT 4**). There is no dispute as to the figures. Again in the presence of negligence I also award the same to the Plaintiff.

#### **4.8 Counter Claim**

- 1) From statement 1 and 2 of the Plaintiff's claim the Defendant incurred injuries.
- 2) The Defendant claims from the Plaintiff compensation for injuries incurred in the course of employment which left his body permanently deformed and incapacitated.
- 3) The Defendant claims for costs of this action.

**4.8.1** The Plaintiff has challenged the Defendant on the premises that the injuries were sustained outside the course of employment and even if he was in the course of employment, he had driven the said vehicle negligently. Guidance must be sought from the law.

*Section 4 (2) (c) Workers Compensation Act.*

*(2) An employer shall not be liable to pay compensation under this Act*

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*(c) if it is proved that the injury to the worker is attributed to the serious and willful misconduct of that worker.....*

## **5.0 Conclusion**

**5.1** I have already ruled that the Defendant was injured outside the course of employment at 10 pm on 8 September, 2011. The vehicle usage policy which he signed on 12 March 2010 specifically prohibited him from driving after 6:30 pm. There can be no compensation as he got injured while he was specifically off duty. I do not see how the Defendant can claim any other sums of money when it was him who was at fault.

**5.2** The only money due to the Defendant is his pension which must be calculated and paid to him in 14 days. Any disagreements on the calculations of pensions shall be referred to the Assistant Registrar for assessment. This action must succeed with costs.

**Pronounced** in Open Court at Mzuzu in the Republic on 28<sup>th</sup> day of January, 2016.

Dingiswayo Madise  
**JUDGE**