



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1935 OF 2010

BETWEEN:

STANLEY MBEWE.....PLAINTIFF

AND

NICO GENERAL INSURANCE COMPANY

LIMITED.....DEFENDANT

CORAM: THE HON. JUSTICE MR. S.A. KALEMBERA

Mr Kambale, of Counsel for the Plaintiff

Mr Kauka, of Counsel for the Defendant

Nyirenda, Official Interpreter

JUDGMENT

Kalembera J

INTRODUCTION

The Plaintiff commenced this action against the Defendant by a writ of summons and statement of claim dated 7th September 2010 claiming for damages for personal injuries and costs. This claim arises from injuries suffered by the Plaintiff as a result of a road accident which occurred on the 22nd day of June 2010 involving motor vehicle registration number CZ 2452 Toyota Coaster driven by Mr



C. Njolomole which collided with Plaintiff as he was cycling along the said road. The accident was allegedly caused by the negligent driving and/or management of the said vehicle by the Defendant's insured.

PLEADINGS

The Plaintiff's statement of claim alleges as follows:

1. The Defendant is an insurance company and in the course of its business, it insured motor vehicle registration number CZ 2452 Toyota Coaster. The Defendant is sued pursuant to section 148 of the Road Traffic Act.
2. On 22nd day of June 2010 at or near Viphya Avenue Junction along Limbe/Thyolo Road, motor vehicle registration number CZ 2452 Toyota Coaster insured by the Defendant and being driven by one Njolomole collided with the Plaintiff as he was cycling along the said road.
3. The said accident was caused by the negligent driving and/or management of the said vehicle by the Defendant's insured.

Particulars of negligence

- a. Driving at an excessive speed in the circumstances.
 - b. Failure to have sufficient regard to other road users.
 - c. Emerging onto the main road without first ascertaining or ensuring that it was safe to do so.
 - d. Failure to slow down, stop or swerve the vehicle in such a way as to avoid colliding with the Plaintiff.
 - e. *Res ipsa loquitor*
4. By reason of the said negligence the Plaintiff sustained personal injuries and has been put to loss and expense.

Particulars of Injuries

The plaintiff sustained a supracondyle of the distal humerus. He was treated by open reduction and internal fixation. He can no longer lift heavy objects, he has stiff elbow up to 45°. He can do what he used before and his permanent incapacity was put at 25%.

Particulars of special Damages

- a. K2,000 cost of police report.
- b. K2,500 cost of medical report.
- c. K20,000 cost of the bicycle.

5. **And** the plaintiff claims;

- i. Damages for pain and suffering, loss of amenities of life, loss of earnings and disfigurement.
- ii. Special damages as pleaded.
- iii. Cost of this action.

DEFENCE

- 1. The defendant refers to paragraph 3 of the Statement of Claim, denies the allegations of negligence and puts the plaintiff to strict proof thereof.
- 2. The defendant repeats paragraph 1 hereof and states that, on the contrary, the accident was wholly caused or substantially contributed to by the negligence of the plaintiff.

Particulars of Negligence

- a) Cycling on the wrong side of the road.
- b) Riding a bicycle that had neither a dynamo lamp or reflectors.
- c) Riding a bicycle without having put on reflective clothing.

The defendant further states that it was the plaintiff who actually rode into the back of the motor vehicle in question.

And the plaintiff prays that the plaintiff's action be dismissed with costs.

EVIDENCE

Both parties had two witnesses each.

PW I was Stanley Mbewe, the plaintiff. During his sworn testimony *viva voce* he adopted his witness statement as part of his evidence. It was his evidence that he hails from Sumbuleta Village, in Chigumula, Blantyre District. On the material

day he was cycling along Thyolo Road. At St Theresa, he saw a minibus coming from the direction of Mulli Brothers. The minibus just entered the main road without due care and ended up colliding with him. He was taken by the same minibus to the police and then the hospital where he was admitted from 22nd June 2010 till 9th July 2010. He sustained the following injuries: cut wounds over the face, fracture of the distal radius and other soft tissue injuries. He was a professional bick moulder, but now his arm is very stiff and he can no longer mould bricks.

In cross-examination he told the court that he saw the front tyre of the minibus. He was cycling on the left, he saw the minibus and because there was a drain he failed to protect himself. He tried to break but the minibus was speeding. The minibus hit him and he fell into the drain.

In re-examination he told the court that he had right of way and that if he had been given right of way the accident would not have happened.

PW II was Manuel Chikagwa. He adopted his witness statement as part of his evidence. It was his testimony that he is employed by Mulli Brothers and that he lives at Chigumula Market. On the material day he completed his shift and was going home. This was at 5 am. When he reached a place called Viphya Junction, he was waiting to cross the side road that joins Limbe-Thyolo Road as a vehicle registration number CZ 2452 Toyota Coaster was coming from the direction of Mulli Brothers and heading towards the Limbe-Thyolo Road. The driver of the said vehicle joined the road without stopping or slowing down and turned towards the direction of Limbe. It was his further testimony that he also noticed that there was a bicycle on the said road that was coming from the direction of Thyolo and heading towards Limbe and was being ridden by someone who he discovered to be Stanley Mbewe, and he was carrying a bag of maize on the bicycle.

The said minibus just turned onto the road without checking and was driving fast. As he suddenly came onto the road, the cyclist had no time to react and went straight into the back of the minibus. The said collision occurred as the minibus had just finished entering the lane heading towards Limbe. The driver of the minibus slowed down after the collision but was still driving off, at which point he ran after the minibus and informed him that he had bumped into someone and he

must stop. The driver stopped the minibus and they took the plaintiff to the police and then Queen Elizabeth Central Hospital (QECH).

In cross-examination this witness told the court that indeed the minibus just turned onto the road without checking and was driving fast, and the cyclist had no time to react and went straight into the back of the minibus. He further insisted that the driver wanted to flee. He also told the court that he works as a guard and after night duty he knocks off at 4:30 am.

After the testimony of this witness the defence called two witnesses to testify.

DW I was Evance Pemba. He adopted his witness statement as part of his evidence. It was his sworn testimony that he hails from Mpemba Village, T/A Kapeni, Blantyre. He works at St Theresa Private Schools as a conductor in the school buses. On the material day he was in motor vehicle registration number CZ 2452 which was being driven by Mr Njolomole. They were coming from their Director's house in Chigumula Viphya Lines going to Chiwembe. When they got to the junction at Chigumula, the driver stopped to check traffic on the main road, and since he was on the front passenger seat he also checked on the left side. The road was clear and the driver entered the main road heading towards the direction of Limbe. After driving for some distance they heard a noise as if something had hit the car and they stopped to check. They found a man in a drain and a bicycle with a bag of maize on it, and some of their work colleagues who were in the car that was following behind them were helping the man. They learnt that the man had ran into the rear of their vehicle. They took the man to the police where they were referred to QECH.

In cross-examination he told the court that they reached the junction around 29 minutes to 6 to 22 minutes to 6. The left side was clear and there was nothing. They never saw the complainant. They were not speeding and had stopped before going onto the road. After driving for some distance they heard the noise/bang. He further told the court that it was not true that the driver wanted to flee.

DW II was Christopher Njolomole. He adopted his witness statement as part of his testimony. He told the court that he is employed as a driver by St Theresa Private School since 1st June 2009. On the material day he was driving the said minibus from their Director's residence who resides at Chigumula Viphya Lines. Upon

reaching the junction connecting to the main road he stopped to check if the road was clear. He looked left and right and was satisfied that it was clear. He then turned towards Limbe. After covering a distance of over 20 meters he heard a noise at the back of the vehicle. He liaised DW I and they stopped immediately to check what was wrong. He saw another St Theresa motor vehicle registration number CZ 2814 which was being driven by Malenga and was closely following him had stopped and the people in it were helping a man out of a drain. He also saw a bicycle which had a bag of maize on its the carrier. He took the man to Limbe Police where they were referred to QECH.

In cross-examination he told the court that he reached the junction around 5:30 to 5:35 am. He had good visibility. He stopped at the junction and he could see far on his left but he saw nothing suspicious. If there had been a cyclist he could have had right of way. He further told the court that he had gone onto the road when he saw the cyclist through the mirror glass at the junction. The vehicle behind had just joined the main road when he heard the noise. He did not see the cyclist.

In re-examination he reiterated that he stopped at the junction and can't remember his speed getting onto the main road he couldn't remember the speed but was doing about 15Km/hour.

After this witness, the defence closed its case.

ISSUES FOR DETERMINATION

The main issues for determination are:

- i. Whether the accident was caused by the negligence of the Defendant's insured?
- ii. Whether the Plaintiff was injured following the accident?
- iii. Whether the Defendant can be condemned to pay damages as pleaded by the Plaintiff?

LAW AND ANALYSIS

I am grateful to counsel from both sides for their detailed submissions.

I am mindful that in a civil matter like this one, the Plaintiff as the one who alleges or asserts, he bears the burden of proof. And the standard of proof in civil

proceedings is proof on a balance of probabilities. In the case of **Miller v Minister of Pensions** [1947] **ALL ER 372** at pages **373** and **374** Denning J had this to say:

“If the burden is such that the tribunal can say; we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not.”

And in the case of **Mike Mlombwa t/a Countrywide Car Hire v Oxfam, Civil Cause No. 2343 of 2003**, Manyungwa J had this to say:

“Aw ell settled law of ancient application is ‘ei incumbit probatio qui decit non qui negat.’ This essentially means that the burden of proof lies on the party alleging a fact of which correlative rule is that he who asserts a matter of fact must prove it but he who denies need not prove it...”

In the matter at hand, the Plaintiffs bears the burden of proving, through evidence, that which he alleges, that is, that the accident was caused by the negligence of the Defendant’s insured.

It is paramount that we reiterate from the outset that ‘it is trite law that an action founded upon negligence is based on the conception of duty of care which one person owes to the other person’ -Tembo JA in **Southern Bottlers Limited and another v Commercial Union Assurance Company Plc** [2004] **MLR 364** at p. **370**. As regards a driver of a motor vehicle the honourable JA quoted with approval Banda J in **Banda and others v ADMARC and another** [1990] **13 MLR 59** at **63** where he put that duty as follows:

“A driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skilful driver would have exercised under all the circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look –out , observes traffic signs and signals.”

And explain further what this duty entails, Mtegha J(as he then was). In the case of **Kachingwe v Mangwi Transport Motorways Company Limited** **11 MLR 362** and **367** had this to say:

*“Perhaps it would be prudent here to state briefly the duty of care which a driver of a motor vehicle owes to property adjacent to the road and to other road users. I can do no better than to quote the words of Macmillan in **Hay (or Bourhill) v Young (2)** when he said ([1943] AC at 104):*

“What duty then was incumbent on him?....[T]he duty of a driver is to use proper care not to cause injury to persons on the highway....Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on....

There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree.”

Thus the driver of a motor vehicle on a highway has a duty to use reasonable care to avoid causing damage to persons and other vehicles or property on or adjoining the road. And it has been said that reasonable care means care which an ordinary skilful driver would have exercised under all the circumstances. I am also mindful that a driver is not bound to foresee every extremity or folly which occurs on the road, he is however bound, nevertheless, to anticipate any act on the part of any road user which is reasonably foreseeable, whether negligent or not –see **Burgess vs Osman (1964-66)3 ALR Mal 475**. And the standard of foresight of the reasonable man was ably explained by Lord Macmillan in **Glasgow Corporation v Muir [1943] 2 ALL ER 44 at 48** as follows:

“The standard of foresight of the reasonable man is in one sense an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset by lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free from both over apprehension and from over-confidence.”

With the applicable law in mind, I have to examine the evidence before me. In the matter at hand, either party had two witnesses. And both sides gave different versions as to what caused the accident herein. Which version is highly probable? It is in the evidence of PW I, the plaintiff himself, that he was riding a bicycle along the Thyolo road. At St Theresa Junction, he saw a minibus coming from the

direction of Mulli Brothers. The minibus just entered the main road without due care and ended up colliding with him. PW II also told the court that he saw the said minibus join the main road, Thyolo-Limbe road, without stopping or slowing down and turned towards Limbe direction. It was also his testimony that he saw a bicycle coming from the Thyolo direction and as the minibus just entered the main road at high speed, the cyclist had no time to react and went straight into the back of the minibus.

The evidence of the defence witnesses is contrary to that of the plaintiff's witnesses. DW I told the court that he is a conductor, when they came to the junction, the driver stopped and checked if the road was clear before turning towards Limbe direction. He also checked the left side and it was clear. Only after twenty metres did he hear some noise and when they stopped they realized that the plaintiff had collided with the back of the minibus. They took him to the hospital. DW II, the driver of the said minibus, corroborated the testimony of DW I.

Only one version ought to be believed. It is clear from the evidence on both sides, that the plaintiff collided with the back of the minibus. I am inclined to believe the version that the plaintiff collided with the back of the minibus. I am further fortified in this view considering that PW II, Manuel Chikagwa, is an innocent bystander who happened to witness the accident. He is/was not an interested party, and therefore had no reason/interest to fabricate his evidence. The plaintiff was already cycling along the Thyolo-Limbe road when the driver of the insured drove the minibus onto the said Thyolo-Limbe road. The said driver, DW II, wants this court to believe that before joining the said Thyolo-Limbe road he stopped at the junction and checked if the road was clear, and only joined the said road after satisfying himself that the road was clear. Only to be bumped into at the back by the plaintiff who was riding a bicycle. I fail to understand that the said bicycle collided with the minibus after the minibus had covered some twenty metres after joining the road. The accident is synonymous with a situation as described by the plaintiff and his witness. That is, the driver of the minibus joined the main road without confirming that the road was clear, and without giving the other road user, who had the right of way, his right of way.

It is difficult to believe the driver's version of events that he was bumped into or that the cyclist collided with the back of his minibus after he had driven some

twenty metres on the main road. I do find, despite what PW I said, that the accident occurred when the plaintiff collided with the back of the minibus. PW II, DW I and DW II agree on this point.

It has been submitted by counsel for the Defendant that the Plaintiff was reckless by neglecting to swerve and opting to be hit by a motor vehicle because he did not want to fall into the drain. It is further submitted that the accident could have been averted had the plaintiff opted to fall into the drain, and counsel has relied on the doctrine of last opportunity. Counsel has relied on the cases of **Anglo-Newfoundland Development Co. Ltd v Pacific Steam Navigation Co. [1924] AC 419, 420** and **The Eurymedon [1938] 49, 50** as authority that ‘if a plaintiff actually saw a dangerous state of affairs had been created by the negligence of the defendant and the plaintiff thereafter, by the exercise of reasonable care, could have avoided damage the plaintiff was solely liable if he failed to exercise that care.’

I have gone through several readings and judgments on this doctrine, and I can safely conclude that this doctrine is also referred to as the doctrine of Last Clear Chance and it is a doctrine in the law of torts that is employed in contributory negligence jurisdictions. It entails that ‘a negligent plaintiff in an action based on negligence can nonetheless recover if he is able to show that the defendant had the last opportunity to avoid the accident.’ Similarly, the defendant can also use this defense if the plaintiff has the last clear chance to avoid the accident. I also realize that the application of this doctrine is controversial to the core, in that different jurisdictions have different approaches to it. That is, other jurisdictions apply it others don’t. I wish to adopt the wisdom of the Supreme Court of the State of Washington’s Washington Formula in the case of *Leftridge v Seattle*, 130 Wash. 541, 228 P. 302 (1924) where it stated as follows:

“Where the defendant actually saw the peril of a traveler on the highway and should have appreciated the danger, and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the plaintiff’s negligence may have continued up to the instant of injury. Where the defendant did not actually see the peril of the plaintiff, but, by keeping a reasonably careful lookout commensurate with the dangerous character of the urgency and the locality, should have seen the peril and appreciated it in time, by the exercise of reasonable care, to

have avoided the injury, and failure to escape the injury results from failure to keep the lookout and exercise that care, the defendant was liable only where the plaintiff's negligence had terminated or culminated in a situation of peril from which the plaintiff could not, by the exercise of reasonable care, extricate himself." (emphasis supplied).

In the matter at hand, it is clear that the defendant created a situation from which the plaintiff could not, by the exercise of reasonable care, extricate himself. This could have been avoided if the defendant had kept proper lookout and exercised reasonable care. Thus, the plaintiff cannot be blamed for the accident. The defendant is liable for the accident and the injuries suffered by the plaintiff.

CONCLUSION

All in all, the driver of the minibus was negligent, and his negligence caused the accident and the resultant injuries suffered by the plaintiff. The defendant being the insurer of the said minibus is therefore found liable for the accident and the injuries suffered by the plaintiff. Consequently, the plaintiff's action for damages for personal injuries and special damages succeeds with costs. The damages payable to the plaintiff to be assessed by the Registrar.

PRONOUNCED this 17th day of May 2016, at the Principal Registry, Blantyre.



S.A. Kalembera

JUDGE