



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI PRINCIPAL  
REGISTRY  
CIVIL CAUSE NO 1709 OF 2007

BETWEEN

DR G.C. BHUPTANI ..... PLAINTIFF

and

ISMAIL ANIZ SULEMAN ..... 1ST DEFENDANT

PRICE WHOLESALERS ..... 2ND DEFENDANT

ROYAL INSURANCE COMPANY  
OF MALAWI LTD..... 3RD DEFENDANT

CORAM: HON. JUSTICE J.M. CHIRWA

Mr. Kara, Counsel for the Plaintiff

Mr. Chisanga SC & Dziwani, Counsel for the 1st and 2<sup>nd</sup> Defendants

Mr. Nkuna, Counsel for the 3rd Defendant  
Messrs Cossam & Amosi, Official Interpreters

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**Chirwa, J**

## **JUDGMENT**

### **Introduction:-**

The Plaintiff's claim is for special damages in the sums of SAR 88,680.80 and MK138,000.00 being the medical expenses in South African Clinics and medical expenses at Mwaiwathu Private Hospital, respectively, total expenses to and from South African clinics on divers occasions with ancillary accommodation and food expenses, general damages, interests and costs of this action.

### **Background:-**

At all material times the Plaintiff was the driver of motor vehicle registration number BN4278, a Toyota Carina, and the 1st Defendant was the driver of motor vehicle registration number LA2 I 98, a Toyota Corolla, owned by the 2nd Defendant and insured by the 3rd Defendant. On or about the 15th day of March, 2007, whilst driving the said Toyota Carina at or near the traffic lights at HHI along the Old Chileka-Magalasi Road in the City of Blantyre, the Plaintiff collided with the said Toyota Corolla. As a result of the said collision he sustained injuries and suffered pain, loss and damage. The Plaintiff has attributed the cause of the collision to the negligence on the part of the 1st Defendant. The Defendants on the other hand have denied liability and instead have attributed the cause of the collision to the negligence on the part of the Plaintiff. Alternatively, they allege that it was contributed to by the negligence of the Plaintiff.

### **Issues for Determination:-**

- 1) Was the accident caused by the negligence of the Plaintiff or the 1st Defendant?

2) Did the Plaintiff in any way contribute to the cause of the said accident?

### **The Law**

The parties hereto are generally agreed on the law applicable to this action. They are also agreed on what constitutes negligence, to wit, that negligence is the omission to do something which a reasonable man would, guided upon those circumstances which ordinarily regulate the conduct of human affairs, do or doing something that a prudent man would not do - See Blyth v Birmingham Waterworks Co.(1856) 11 Ech 781 at p. 784 per **Alderson B.**

For an action in negligence to succeed, it is necessary for the party alleging such negligence to prove that (a) there was a duty of care owed to him; (b) that that duty has been breached; and (c) that as a result of that breach he has suffered loss and damage - See Donoghue v Stevenson [ 1932] A.C. 562 cited with approved by Ndovi J in Kadawire v Ziligone and another [1997] 2 M.L.R. 139 at p. 144.

### **Determination:-**

1) The duty of care:-

Both the parties to this action have cited the case of Banda and Others v Admarc and Another [1990] 13 M.L.R . 59 as an authority on the duty owed by a driver of a motor vehicle. In his judgment in the said case, Banda J (as he then was) at page 63 put the duty of a driver 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 ordinary skilful drivers 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.... "*

Now, given that the Plaintiff and the 1st Defendant were both at the material time drivers of motor vehicles, it follows therefore, that each owed a duty of care to the other.

2) The Breach of that duty of care

The position of the Plaintiff is that the accident was caused by the 1st Defendant when he "so negligently drove, managed and controlled his motor vehicle Toyota Corolla Registration Number LA 2198 that he caused or permitted the same violently to collide with the Plaintiff s said motor vehicle ---." The particulars of the alleged negligence on the part of the 1st Defendant are stated as follows:

" 1.1 Driving at an excessive speed;

1.2 Driving on the wrong side of the road and thereby colliding with the Plaintiff;

1.3 Fai ling to keep any or any proper look-out or to have any sufficient regard for other traffic, particularly on-coming traffic, on the road;

1.4 Overtaking or attempting to overtake a Toyota Sprinter motor vehicle Registration Number MHG 2230 along the said road without first ascertaining or ensuring that it was safe so to do;

1.5 Failing to have or to keep any or any proper control of the said motor vehicle;

1.6 Failing to stop, to slow down, to swerve or in any other way so to manage or control the said motor vehicle as to avoid the said collision."

The position of the Defendants on the other hand is that "the said accident was caused or contributed to by the negligence of the Plaintiff." The Defendants have also given the particulars of their alleged negligence as follows:

"(i) Driving at a speed which was excessive in the circumstances;

(ii) Failing to keep any or any proper look out or to have any or any sufficient regard for users of the said road;

(iii) Failing to keep to the nearside of his lane;

(iv) Driving onto the wrong side of the road and there colliding with the Plaintiff;

(v) Failing to have or to keep any proper control of motor car;

(vi) Failing to stop, slow down, to swerve or in any other way so to manage or control his said motor vehicle so as to avoid the collision."

From the totality of the evidence before this Court it is the finding of this Court that the accident herein was caused wholly by the negligence on the part of the 1st Defendant. This Court has found the evidence of PW 1, Alexander Kachisa, more credible than the evidence of DW 1, Ishmail Aniz Suleman, the 1st Defendant in this action. PW1 impressed this Court as a very truthful witness. He remained firm as to what he saw on this material day despite the lengthy

cross-examination by Counsel for the Defendants. It was his evidence that on Thursday 15th March, 2007 he was driving from Chileka Airport towards Blantyre along the Magalasi Road at around 08:30pm. He slowed down his car at the traffic lights at Henry Henderson Institute and a Toyota Corolla which was being driven at a very high speed and in the right hand side lane overtook his car. The said Toyota Corolla then collided 'head-on' with Dr. Girish Bhuptani's Toyota Carina which was being driven in the left hand lane going towards Nyambadwe.

The witness maintained his story in cross- examination. He reiterated that DW 1 overtook the vehicle he was driving just after the HHI robots close to the road going to HHI Secondary School and St Michael and All Angels Church. He disputed the point of impact put to him as not being correct. He stated that the point of impact was completely and clearly in the Plaintiff s lane. He did not also agree with the suggestion that the Plaintiff drove on the wrong side of the road and hence faulted the findings and conclusion of the police on who caused the accident. PW I also stated in cross-examination that at some time his car and the 1st Defendant's car were running parallel with each other, a clear indication that the 1st Defendant was indeed overtaking the witness' (PW1's) motor vehicle. This Court finds this testimony a plausible explanation as to why the accident happened on the Plaintiff s lane. At least no reason has been advanced by any of the Defendant's witnesses to explain why the Plaintiffs car could have been found in the 1st Defendants' lane. The road in question being a single carriage road, the 1st Defendant thus could only have been overtaking in the right hand side lane, which, in this case, was the Plaintiff s correct side of the road.

Exhibit P I , the Royal Insurance Motor Vehicle Accident Report Form dated the 16th March, 2007 signed by the 1st Defendant 's father, according to the

1st Defendant's evidence, on behalf of the 2nd Defendant as the insured shows the point of impact/ collision to be on the Plaintiff's correct side of the road. The Defendants can not now be allowed to turn around and attempt to disown a document which they prepared. This position was also confirmed by the 1st Defendant as DW I during his cross-examination. This Court however, found the evidence of DW3, Traffic Sub-Inspector Dan Nakari, quite unreliable. The witness kept on contradicting himself from time to time during his cross examination. For example, while earlier in his testimony he had told this Court that he interviewed both the drivers involved in this accident soon after the accident at Mwaiwathu Private Hospital, he later changed, only to say that he interviewed the Plaintiff on the 16th of March, 2007 at 7:30 am, i.e. the following day, because of the condition in which the Plaintiff was soon after the accident, i.e. unconscious. He then went on to concede that he did not interview any witness to the accident. It is, in the premises, questionable how he came to make his findings in Exhibit D4, the Malawi Police Abstract Report. Further, the witness claims to have prepared a statement purportedly signed by PW I. PW I disowned the alleged statement because he (PW1) had not given any statement to DW3, a fact also conceded by DW3.

From the evidence before this Court, this Court is inclined to make the following findings in relation to the manner of the 1st Defendant's driving at the material time, (1) that he was driving at a speed which was excessive in the circumstances. The evidence of PW I in this regard is fortified by the fact that the 1st Defendant was trying to overtake two motor vehicles, that is to say, PW1's and Mr. Masiku's, at the same time when there was at the material time the Plaintiff's oncoming motor vehicle. It is common place that for one person to overtake another vehicle that one person must be driving at a speed which is faster than the speed of the vehicle he is overtaking. According to the evidence of PW1, which this Court believes, it was easy for him to know that the 1st

Defendant was at the material time driving at an excessive speed because they were driving in the same direction. The extensive damage caused to both the motor vehicles (see Exhibit D4) is also indicative of a heavy impact resulting from an object moving at an excessive speed; (2) that he drove on the wrong side of the road i.e. the Plaintiff's lane, contrary to Section 96(1) of the Road Traffic Act which provides as follows:

*"96(4) Any person driving a vehicle on a public road shall do so by driving on the left side of the roadway and, where such roadway is of sufficient width, in such manner as not to encroach on that half of the roadway to his right, provided that such encroachment shall be permissible ... where it can be done without obstructing or endangering other traffic or property which may be on such half and for a period and distance not longer than is necessary and prudent and provided that it is not prohibited by a road traffic sign. "*

(3) that he had failed to keep any proper look-out or to have any sufficient regard for other traffic that may be found on the road, contrary to Section 96 (4) of the Road Traffic Act; (4) that he was overtaking or attempting to overtake PW I 's and the other vehicle along the road without first ascertaining if it was safe so to do, contrary to Section 96(1) of the Road Traffic Act and finally(5), that he failed to stop, to slow down, to swerve or in any other way so to manage or control his said motor vehicle as to avoid the collision with the Plaintiff's motor vehicle which was on-coming. There is no doubt in this Court's mind that had the 1st Defendant done any of the aforesaid acts, he could have averted the collision.

According to Lord MacMillan in Hay(or Bourhill) v Young [1943] A.C. 92 at p. 104 quoted with approval by Mtegha J (as he then was) in Kachingwe and Kachingwe and Company v Mangwiro Transport Motorways Company



Limited 11 M.L.R. 362 at p. 367 the duty of care which a driver of a motor vehicle owes to property adjacent to the road and to other road users is as follows:

*"---- [T] he duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining 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. "*

This being the nature of the duty of care of a driver the 1st Defendant was thus clearly in breach of his duty of care. It is so found. It is apparent from the available evidence that the Plaintiff was at the material time driving lawfully in his correct lane of the said road and at a speed which was not excessive in the circumstances. This Court thus finds no basis for attributing any negligence for the cause of the accident to the Plaintiff.

(3)The Damage:-

There is sufficient evidence before this Court to prove that the Plaintiff suffered personal injuries, loss and damage as a result of the said accident.

**Conclusion:-**

It being the finding of this Court that the accident herein was wholly caused by the negligent driving of the 1st Defendant, it thus follows that the 1st Defendant as the driver of the said motor vehicle Registration Number LA 2198, Toyota Corolla, is liable to the Plaintiff as such a driver and the actual tortfeasor, the

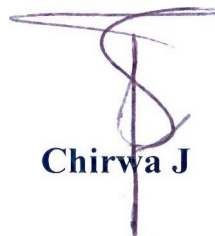
2nd Defendant as the owner of the said motor vehicle is vicariously liable to the Plaintiff as such an owner of the said vehicle which he permitted to be driven on the road, and the 3rd Defendant as the insurer thereof is also liable to the Plaintiff pursuant to Section 148 of the Road Traffic Act. All the Defendants herein are consequently liable to compensate the Plaintiff for the personal injuries, loss and damage occasioned as a result of the said accident.

The parties hereto having agreed that they wanted this Court to determine only the question of liability between the parties, it is now the order of this Court that the quantum of damages payable to the Plaintiff be assessed by the Registrar of this Court in the event that the parties are not able to reach an amicable settlement on the same. It is so ordered.

**The Costs:-**

The costs are in the discretion of the Court (See Section 30 of the Court Act) and normally follow the event (see Order 62 of the Rules of the Supreme Court and Matanda v Sales Services Limited [1990] 13 M.L.R. 216 at p. 218 per Mtegha J (as he then was). The Plaintiff having succeeded in his action against the Defendants, this Court thus proceeds to exercise the Court's discretion on costs by awarding the same to him. It is so ordered.

Dated 14<sup>th</sup> day of December 2016.



Chirwa J