



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

PERSONAL INJURY CAUSE NO 739 OF 2014



BETWEEN

MWAIWAWO NANKUMBA 1ST PLAINTIFF

EMMANUEL KAITANO 2ND PLAINTIFF

**NYASA KAPALEPALE (a Minor suing by his next
friend, COLLEX NANKUMBA 3RD PLAINTIFF**

PATRICK CHALUNGAMA 4TH PLAINTIFF

COLEX NANKUMBA 5TH PLAINTIFF

AND

SAMMY'S TRANSPORT 1ST DEFENDANT

REAL INSURANCE COMPANY OF MALAWI LIMITED 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chancy Gondwe, of Counsel, for the Plaintiff

Mr. Alide, of Counsel, for the Defendants

Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction and Pleadings

The Plaintiffs are claiming damages for pain and suffering and disfigurement, damages for loss of amenities of life, special damages and costs of the action. The Defendants resist the action.



The Statement of Claim is brief and it is as follows:

- “1. The 1st, 2nd, 3rd and 4th Plaintiffs were at all material times passengers in an ox-cart which was heading from the direction of Chikhwawa heading towards Nchalo.
2. The 5th Plaintiff was at all material times the owner of the said ox-cart and a bicycle which was in the said ox-cart.
3. The 1st Defendant is being sued by virtue of being the employer of the driver of motor vehicle registration number MZ 6962 Leyland DAF who was at all material times acting in the course of the said employment.
4. The 2nd Defendant is being sued by virtue of being the insurer of the said motor vehicle under the certificate of insurance number 130155215 valid from 9th January 2014 until 8th January 2015.
5. On 12th May 2014 at about 19:00 hours, the said motor vehicle was negligently driven, managed and controlled from the direction of Chikhwawa heading towards Nchalo that when it reached Bereu Trading Centre the driver of the said vehicle failed to control the motor vehicle due to excessive speeding and hit the ox-cart which was carrying the 1st, 2nd, 3rd and 4th Plaintiffs, killing the cattle that were pulling the ox-cart and totally destroyed the 4th Plaintiff's ox-cart and bicycle that was in the ox-cart.
6. The said accident was caused by the negligence of the driver of the said motor vehicle as set out below:-

PARTICULARS OF NEGLIGENCE

- (i) Driving at an excessive speed in the circumstances;
- (ii) Failing to heed the ox-cart;
- (iii) Failing to steer, slow down, manage or otherwise control or maneuver his vehicle to avoid causing the accident; and
- (iv) Generally, driving his said motor vehicle without due regard or concern for the safety of other road users and in particular the Plaintiffs.
7. Further, and/or in the alternative, the Plaintiffs shall rely on the principles of *res ipsa loquitor*.
8. By reason of these matters, the Plaintiffs have suffered personal injury, loss and damage.”

The Statement of Claim proceeds to give particulars of (a) injuries sustained by the Plaintiffs, (b) special loss to do with cost of medical treatment, police report and medical report, and (c) special damages with regard to the killed cattle, damaged ox-cart, damaged bicycle and loss of business and/or use of the ox-cart and bicycle.

The Defendants contest the action and, accordingly, a defence was filed wherein each and every allegation of fact contained in the Statement of Claim is denied. The Defendant further state that if the said accident occurred, which fact is denied, the same was wholly caused or contributed to by the negligence of the Plaintiff who was controlling the ox-cart. The particulars of the negligence have been stated as being (a) failing to keep proper lookout, (b) failing to keep to their near side, (c) failure to give way to the motor vehicle on the road and (d) failure to observe the Road Traffic Rules and Regulations. The 2nd Defendant also pleads that its liability is limited to indemnifying the owner of the motor vehicle to the extent of maximum liability contained in the policy of insurance between itself and the owner of the motor vehicle.

Burden and Standard of Proof

It is trite that a claimant has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities. In the case of **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, the Court observed as follows:

*"Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of **Robins v National Trust Co [1927] AC 515** that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is *Ei qui affirmat non qui negat incumbit probatio* which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in **Constantine Line v Imperial Smelting Corporation [1943] AC 154**, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties – see **Bond Air Services Ltd v Hill [1955] 2 QB 417**."*

It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities that he sustained injuries and suffered damage as a result of the accident which was caused by negligence of the 1st Defendant: see **B. Sacranie v ESCOM, HC/PR Civil Cause No. 717 of 1991 [unreported]** wherein Villiera J had this to say:

"It is important to observe that the burden of proof never shifts from the Plaintiff to the Defendant except perhaps where the Defendant has pleaded contributory negligence. It is, therefore, not sufficient for the Plaintiff merely to prove that the Defendant was negligent. He must prove further that it was that negligence which caused the harm or loss suffered"

Evidence

The one and only witness for the Plaintiffs' case was the 2nd Plaintiff himself. He adopted his witness statement and this constituted his evidence in chief. The 2nd Plaintiff's evidence is similar in material respects to the averments in the Statement of Claim. I will, therefore, not give a recount thereof save to mention that the Plaintiff tendered a Police Report as Exhibit P1 and his Medical Report as Exhibit P2.

The Plaintiff went through a dosage of cross-examination by Counsel Alide. The 2nd Plaintiff stated that ox-cart had red reflectors pasted at its back. He stated that they also had two big bright torches in the ox-cart, one in front and the other at the back of the ox-cart. He insisted that there was enough light to enable an approaching traffic to notice the ox-cart at a good distance.

When it was put to him by Counsel Alide that his assertion to the effect that the motor vehicle was speeding was, according to his witness statement, based on the fact that the motor vehicle was hooting at the material time, the 2nd Plaintiff was adamant that there was massive evidence to prove that the motor vehicle was being driven very fast as exemplified by three facts, namely, (a) the motor vehicle stopped very far away from the point of impact, (b) the Ox-cart was badly damaged and (c) the two oxen pulling the ox-cart died, one ox died on the spot immediately after being hit and the other ox died a day later.

Regarding damage and injuries, the 2nd Plaintiff reiterated the extent of injuries and damages that were suffered by the Plaintiffs as a result of the accident. He mentioned that the 1st Plaintiff, 3rd Plaintiff and 4th Plaintiff and himself (2nd Plaintiff) sustained various bruises and cut wounds on different parts of their respective bodies, including abdominal pains.

The Defendants opted not to call witnesses.

The Law and Determination

The case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence:

"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. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable

person would have done, or did that which a person taking reasonable precautions would not have done”

For an action in negligence to succeed, the plaintiff must show that (a) there was a duty of care owed to him; (b) the duty has been breached; and (c) as a result of that breach he has suffered loss and damage: see **Donoghue v. Stevenson [1932] AC 562** quoted with approval by Ndovi J., as he then was, in **Kadawire v. Ziligone and Another [1997] 2 MLR 139** at 144.

In **Banda and Others v. ADMARC and Another [1990] 13 MLR 59**, Justice Banda, as he then was, stated the duty of care owed by a driver of a motor vehicle to other road users 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, and observes traffic signs and signals.”

Further, the case of **Mhango v. Positi and National Insurance Company Ltd [1995] 2 MLR 402** is for the proposition that a driver of a motor vehicle has a duty to always keep a proper look out and to drive at such speed as would allow him to stop well within the distance he can see to be clear. This means that a driver of a motor vehicle must, among other matters, observe traffic signs and signals and avoid driving at excessive speed: see **Mponda v. Air Malawi Limited and another [1997] 2 MLR 131**. Furthermore, it is a driver's duty to drive at a speed which will allow him to stop in case of sudden emergency. In deciding reasonable speed, the courts will have regard to the nature, condition and use of the road in question, the amount of traffic on the road at the material time or which might be expected to be on it: see **Kadawire v. Ziligone and another, supra**.

I have considered the evidence herein and it is my finding that the driver of the motor vehicle breached duty of care by failing to slow down and/or failing to overtake the ox-cart in such a way so as to avoid the accident. If he had slowed down, he would have been in a position to closely monitor the situation. He failed to use reasonable care of an ordinary skillful driver. He also failed to keep a proper look-out for other traffic on the road. The said failure, coupled with excessive speeding, was a recipe for disaster. It is, therefore, not surprising that the driver of the motor vehicle ended up bashing the motor vehicle into the ox-cart, causing the resultant injuries and damages. All in all, the driver of the motor vehicle was guilty of negligent driving.

There being no evidence from the Defendants, the Plaintiffs have, on a balance of probabilities, succeeded in their respective claims for damages and costs of this

action. I thus find the 1st Defendant and 2nd Defendant wholly liable. By parity of reasoning, the Plaintiff who was controlling the ox-cart was not guilty of any contributory negligence. Further, as there was no evidence to prove that the 2nd Defendant's liability is limited, the limits, if any, set out in the policy of insurance between the 1st Defendant and the 2nd Defendant in respect of the motor vehicle are not applicable. I, accordingly, enter judgment in favour of the Plaintiffs and order that the collateral issue of assessment of damages be dealt with by the Registrar.

Pronounced in Court this 16th day of February 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE