



JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 174 OF 2016

BETWEEN

NANCY TAPELA.....CLAIMANT

-AND-

PRIME INSURANCE COMPANY LTD.....DEFENDANT

CORAM: THE HON. JUSTICE J. N'RIVA

Mr Mumba, of Counsel for the Claimant

Mr Chipembere, of Counsel for the Defendant

Ms Deliwe Mtegha, Official Interpreter

JUDGMENT

This is an action commenced by the claimant, against the defendant. It is alleged by the claimant that due to the negligence of the driver of motor vehicle (Iveco 3 Ton) registration number TWN 773 GP duly insured by the defendant, she

sustained injuries. The claimant therefore, claims damages for pain and suffering, special damages as pleaded but to be assessed by the Assistant Registrar. The claimant also claims for costs of this action. The claimant's action is vehemently resisted by the defendant who essentially denies all the allegations and averments in the claimant's statement of case. However, the defendant does not dispute the fact that it is the insurer of the Iveco 3 ton.

The following are the particulars of the defendant's negligence:

- (i) Driving at an excessive speed in the circumstance;
- (ii) Driving without any regard for the other road users;
- (iii) Failing to keep a proper look-out;
- (iv) Failing to stop, to slow down, to swerve or in any other way so to manage or control the motor vehicle to avoid the accident.

By the reason of the matters aforesaid, the claimant sustained severe personal injuries and suffered loss and damage.

The following are particulars of the injuries the claimant sustained in the aftermath of the accident:

- (1) Fracture of the left wrist;
- (2) Chest pains;
- (3) Cut wounds on both legs;
- (4) Bruises on the right thigh;
- (5) Painful left shoulder;
- (6) Pain left hip;
- (7) Bruises on the left shoulder;
- (8) Numbness of the left big finger.

#### Issues

- (i) Whether the accident herein was caused by the negligence of the defendant's insured driver?
- (ii) Whether the defendant is liable for the accident?

#### The Law

At the outset, this court reminds itself that these being civil proceedings, the required standard of proof is on balance of probabilities- see *Miller v Minister of Pensions* [1947] All ER 372; *Sivaswamy v Agason Motors Ltd* [1995] 1 MLR 274; *Mike Mlombwa t/a Countrywide Car Hire v Oxfam* Civil Cause Number 2343 of

2003. It is a lesser standard than that required in criminal proceedings which is proof beyond reasonable doubt. The burden is discharged once the evidence is such that the tribunal can say, "we think it is more probable than not," then the burden is discharged but if the probabilities are equal, it is not.

The court also duly bears in mind that as a general rule on evidential burden of proof, it is the party that alleges the existence of certain facts upon whom the burden of proof rests; but he who denies need not prove it. This duty is fixed at the very beginning of the trial by the pleadings- see *Joseph Constantine Steamships Line v Imperial Smelting Corporation Ltd* [1942] AC 154 at 174.

Sections 99(1) and (2) of the Road Traffic Act provide as follows:

"The driver of a motor vehicle shall not cross a public road unless the road is clear of moving traffic or sufficient distance to allow him to cross the road without obstructing or endangering any such traffic."

"The driver of a motor vehicle shall not enter a public road unless he can do so with safety to himself and other traffic."

#### The evidence

The evidence before this court is only from the claimant's side, the defendant having promised the court to bring witnesses but has failed to do so. The evidence of the claimant is to the effect that on or about 19<sup>th</sup> December, 2015, she was the passenger of motor vehicle registration number BU 8315 Toyota Hilux which was driving in the main road along the Chintheche/Dwangwa road. The claimant contends that their motor vehicle was driving in the main road when suddenly a motor vehicle registration number TWN 773 GP Iveco 3 Ton started off from the extreme left side of the road and joined the main road and thereby colliding with their motor vehicle which overturned three times.

#### Analysis

#### **Whether the accident was caused by the negligence of the defendant's insured driver.**

The blanket evidence from the claimant points to the fact that the accident occurred due to gross negligence on the part of the driver that was insured by the defendant.

In examination in chief, the claimant adopted her witness statement whose material part reads:



2-I was involved in a road accident on 19<sup>th</sup> December 2015. The accident occurred at Dwambazi along the Chintheche/Dwangwa road. It involved motor vehicle registration number BU 8315 Toyota Hilux Twin Cab in which I was a passenger and motor vehicle registration number TWN 773 GP Iveco 3 Ton which was insured by the defendant.

3- On the material day I was with my husband Mr Charles Twalibu who was driving motor vehicle registration number BU 8315 Toyota Hilux Double Cabin travelling from Mzuzu on our way to Blantyre. When we were approaching the place of the accident, we could see from afar that there was a motor vehicle registration number TWN 773 GP Iveco 3 Ton which was parked along the road on the left hand side.

4- Suddenly the driver of the motor vehicle which was parked along the road started driving the vehicle and he was turning right to join the road. In the process his motor vehicle collided with our motor vehicle and our vehicle overturned three times. As it was overturning, I was thrown out of the vehicle through the window and I fell down. The accident happened because the driver of motor vehicle registration number TWN 773 GP Iveco 3 Ton was turning right without ascertaining clearance of the road.

Negligence is defined as the breach of duty to take care by a person which results in damage being suffered by another person- see *Yanu Yanu Company Ltd v P.B. Mbewe & M.M. Mbewe* 11 MLR 40 at 408-410; see also *Nance v British Columbia Electricity Ry Co. Ltd* [1951] AC 601. See Osborn's Concise Law Dictionary, 8th Ed. Page 227. Thus, for a party to be liable for negligence, three essential elements must be satisfied. It must be shown firstly that the defendant was under duty of care; secondly that the defendant by his conscious acts or omissions has breached that duty of care and thirdly; that as a result of such breach, damage was suffered by the other party.

The position of the law is that it is the duty of every person who drives a motor vehicle on the highway to use reasonable care to avoid causing damage to other persons. See Charlesworth on negligence 5<sup>th</sup> Edition page 488 paragraph 812. The standard of care expected of a driver is reasonable care which a competent driver would use in the circumstances and there is a catalogue of case authority on this proposition among them *Mponda v Air Malawi and Another* [1997] MLR 131. In *Dilla v Rajan* 12 MLR 358, it was held that such a driver is expected to avoid excessive speed, keep a good look out and observe traffic signs and signals.

The witnesses' evidence in this case, as earlier on observed, indisputably shows that the accident happened when the Iveco 3 Ton suddenly entered the main road with full force without reducing speed to avoid hitting the motor vehicle which the claimant was driving in. Clearly, the driver of the Iveco 3 Ton was in breach of duty of care he owed the claimant. As a result of breach of such duty, the Iveco 3 Ton caused severe injuries to the claimant.

A driver of a motor vehicle owes a duty of care to other road users not to cause damages to persons, vehicle and property of anyone on or adjoining the road. He must use reasonable care which ordinary skillful driver would have exercised under all the circumstances. A reasonable and skillful driver has been defined as one who avoids excessive speed, keeps a good look out and observes traffic signals and signs. See *Banda & Others v ADMARC & Another* [1990] 13 MLR 59 at 63; see also *Kachingwe v Mangwiro Transport Motorways Company Ltd* 11 MLR 362 at 367.

Surely, the driver of the Iveco 3 Ton did not keep a good look out. His action was also contrary to sections 99(1) and (2) of the Road Traffic Act cited above.

The claimant has proved the required standard that the accident which led to her injuries was due to the negligence of the defendant's insured driver.

#### **Whether the defendant is liable for the accident.**

The claimant has proved that the Iveco 3 Ton was indeed insured by the defendant. The claimant proved this to the court by tendering a Police report which contained the particulars of the insurance policy. According to the Police Report, the certificate of insurance no. 100/028/04/507189 was issued on 26/1/2015 to 25/12/2015 by the defendant. In its defence as well, the defendant admits being the insurer of a motor vehicle registration number TWN 773 GP Iveco 3 Ton.

By virtue of the Section 148 (1) of The Road Traffic Act, the claimant is entitled to recover from the defendant. The Section is as follows:

'Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued for purposes of this Part shall be entitled in his own name to recover directly from the insurer any amount, not exceeding the amount covered by the policy, for which the person insured is liable to the person having the claim.'

I, therefore, find the defendant liable. I will refer the matter to a Registrar for assessment of damages.

I awards costs of these proceedings to the claimant.

PRONOUNCED the 13<sup>th</sup> day of September, 2018



J N RIVA

JUDGE