



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO 792 OF 2014**

BETWEEN

FLORENCE NANSONGOLE 1ST PLAINTIFF

GRACE MWIWA 2ND PLAINTIFF

AND

REUNION INSURANCE COMPANY LIMITED 1ST DEFENDANT

THOM LEMANI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

Coram:

Hon. Justice R. Mbvundula

Chayekha, Counsel for the Plaintiffs

Nazombe, Counsel for the 1st Defendant

Chinyama, Counsel for the 2nd and 3rd Defendants

Mpasu, Official Interpreter

JUDGMENT

The plaintiffs were injured in a road accident involving a motor vehicle registration number 031 MG 1326, an ambulance, belonging to the Malawi Government which was being driven by the 2nd defendant, presumably an employee of the government, and insured by the 1st defendant. The vehicle overturned on its way from Zomba to Blantyre. The plaintiffs allege that the vehicle overturned as a result of the negligence of the driver in that he failed to maintain control of it, drove at an excessively high speed and failed to slow down or stop so as to avoid overturning. The plaintiffs also rely on the maxim *res ipsa loquitur*.

The 1st plaintiff is the 2nd plaintiff's mother. On the occasion the 2nd plaintiff's son had been taken ill. The two plaintiffs took him to Zomba Central Hospital from which they were further referred to Queen Elizabeth Central Hospital in Blantyre.

They were being ferried in the ambulance, as non-paying passengers, when the accident occurred.

Regarding how the incident occurred the plaintiffs' evidence was identical. They stated that on their way to Blantyre as they approached a place call Pa Miphika the driver lost control of the vehicle whereupon it left the road and overturned. They stated that there were no other vehicles on the road then and believed that nothing could have disturbed the driver. It was the plaintiffs' case that had the driver not driven at an excessive speed he would have managed to stop or control the vehicle and avoided overturning. Both plaintiffs stated that they could tell from their own observation that the vehicle was overspeeding but did not read the vehicle's speedometer. The 2nd plaintiff went further to state that if the driver had been driving slowly he would have managed to stop the vehicle.

For the defence there were also two witnesses, Salome Mdala, the Legal and Compliance Manager at Reunion Insurance Company Limited, the insurer of the vehicle, and Thom Lemani, the driver of the vehicle.

Mdala confirmed, in her evidence, that the vehicle was at the material time covered under a third party insurance policy issued by the 1st defendant, but sought to rely on an exemption clause contained therein, couched in the following terms:

“... The company shall not be liable ... in respect of death of or bodily injury to any person being carried in or upon or entering or getting onto or alighting from the insured motor car at the time of occurrence of any event out of which any claim arises.”

In this regard Mdala asserted that the plaintiffs having suffered loss and damage as a result of the accident involving the said vehicle in which they were carried as passengers, they were not covered by the policy. The Supreme Court decision in *National Insurance Company v Mzimu and others* [2002-2003] MLR 178 does not support this argument. It was held therein that on the interpretation of section 148(1) and (2) of the Road Traffic Act whilst an exclusion clause in an insurance contract clearly absolved the insurer from suits by the insured it did not do so as against suits by third parties; that section 148(1) gives a third party a right, in his own name, to sue or proceed directly against an insurer. The court further observed that the Legislature enacted section 148 advisedly and deliberately in order to give poor and innocent third parties due protection against risks arising out of the use of

motor vehicles on the public roads. On this basis the exemption clause aforesaid does not avail the 1st defendant.

Thom Lemani's evidence in chief was that along the way to Blantyre he noticed that the vehicle had started wobbling and when he tried to control it the steering wheel malfunctioned, so he was not able to control the vehicle resulting in its overturning over the edge of a rift. He stated that he had been travelling slowly at around 20 kilometres per hour so the accident did not arise from overspeeding. During examination in chief Lemani further stated that he established that the accident occurred because the tension bar of the vehicle was broken together with the shock maintain. However, later in cross examination he gave a different explanation, namely that the vehicle failed to stop because the steering and the brakes concurrently stopped functioning and that the brake fluid pipe was broken. No mechanical report on the condition of the vehicle was availed to the court. Mr Lemani admitted that it was his duty to control the vehicle and that a vehicle travelling at 20 km/hr should be able to stop in an emergency.

Mr Lemani did not seem truthful as was evident from the inconsistencies on the cause of the accident. Further, that the vehicle was travelling at 20 km/hr and yet he failed to control it when, and if, he noticed some malfunction, could not be true because a vehicle travelling at such a slow speed should safely be controlled. I am, in the circumstances, more inclined to accept as the cause of the accident that the vehicle was being driven at an excessive speed, in which case he was negligent. Otherwise the maxim *res ipsa loquitur* must apply. I therefore find all the defendants to be jointly and severally liable, and accordingly enter judgment for the plaintiffs. Damages are to be assessed if not agreed.

The plaintiffs shall also have costs.

Pronounced in open court at Blantyre this 9th day of October 2018.

R Mbyundula
JUDGE