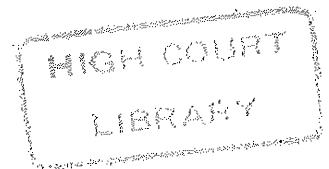




The Republic of Malawi



**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
PERSONAL INJURY CAUSE NO. 1041 OF 2019**

**BETWEEN**

**TAKONDWA BANDA ..... CLAIMANT**

**AND**

**PATIENCE CHINDIKANI MFUNE ..... 1<sup>ST</sup> DEFENDANT**

**AND**

**GENERAL ALLIANCE INSURANCE LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CORAM : HONOURABLE JUSTICE W.Y. MSISKA**

: Mr. Kausi, of Counsel for the Claimant

: Mr. Banda, of Counsel for the Defendant

: Mr. Matope, Court Clerk

**RULING**

This is the ruling of the Court following an application for summary judgment on a claim by the Claimant for damages for personal injuries sustained in a road accident. The Claimant commenced the proceeding by way of Summons seeking damages or compensation for personal injuries she suffered due to the negligence on the part of the 1<sup>st</sup> Defendant in the manner he controlled and managed motor vehicle registration under RU 9878. According to the statement of claim, the

particulars of negligence were: (i) failing to keep his rear side of the road; (ii) failing to stop, slow down to maneuver or in any other way so as to manage or control the vehicle as to avoid the accident; and (iii) driving without due regard of the safety and concern of other road users in particular the Claimant.

The Defendants filed a defence in which they state that the accident was wholly contributed to by the Claimant. The particulars of negligence are that the Claimant; (i) failed to have a proper look at; (ii) failed to stop so as to give way to oncoming traffic; and (iii) failed to take heed the presence of other traffic on the said road. As a result, the loss and damage suffered by the Claimant is being denied.

The Claimant then filed an application for summary judgment under Order 12 rule 23 (1) of the Courts (High Court) Civil Procedure) Rules, 2012 which provides as follows:

*"A Claimant may apply to the Court for summary judgment where the defendant has filed the defence but the Claimant believes that the defendant does not have a real prospect of defending the claim.*

The Claimant filed a sworn statement in support of the application for summary judgment. The sworn statement was made by Counsel Kausi. In the sworn statement he avers that the defence of the defendants contained several denials of the contents of the statement of claim. He also relied on the abstract of the Police Report which indicated that the 1<sup>st</sup> Defendant was wrong and fully influenced in the happening of the accident. To further prove that the 1<sup>st</sup> Defendant was in the wrong, he paid a spot fee of K5,000.00 for the offence of inconsiderate driving contrary to section 127 of the Road Traffic Act. Lastly, it was averred that the 2<sup>nd</sup> Defendant accepted liability when through a letter

dated 22<sup>nd</sup> November, 2019, the 2<sup>nd</sup> Defendant made an offer of compensation for the damage sustained by the claimant in the sum of K1,200,000.00 which the Claimant did not accept.

The Defendants oppose the application for summary judgment and they have done so by filing a sworn statement in opposition made by Counsel Banda. He stated that the Claimant contributed to the accident and that the particulars of her contributory negligence have also been pleaded as such the Defendants have complied with the requirements of Order 7, Rule 7 of the CPR. Further he averred that payment of a fine of K5,000.00 for inconsiderate driving does not rule out the fact that the Claimant contributed to the occurrence of the accident. Lastly, reliance on the offer by the Defendants to pay compensation of K1,200,000.00 for the damage caused should not be regarded as admission which would in turn be the basis of the application of Summary judgment.

Both parties filed skeleton arguments as is required by law. In their oral submissions both parties were brief and adopted all what is contained in the respective sworn statements and skeleton arguments. Except that Counsel for the Claimant conceded that he could not use as a basis for summary judgment the contents of a letter in which the Defendants offered K1,200,000.00 as compensation. It was the view of Counsel that it is a settled principle of law that if parties are exchanging letters or communication during negotiations in which one party makes an offer and the other party rejects that offer before commencement of proceedings, then those letters cannot be used in proceedings to the detriment of the other party.

This Court is in total agreement with this submission. **See Construction and Development Limited v Munyenymbe [1987-88] 12 MLR 292.** In the

present case, the result is therefore that the letter of offer of K1,200,000.00 cannot be used as a basis for summary judgment.

At this point, what remains is that the Court should determine whether or not the present application is merited. According to Order 7 Rule 6 of CPR a defendant is required to deal with each fact in the claim and shall not deny a claim generally. Under Rule 7, a defendant who does not agree with a fact that the Claimant has stated in the claim, the defendant is required to file and serve a defence that denies that fact and states what the defendant alleges happened.

The Court has considered the defence filed by the Defendants in light of the requirements of Order 7 rules 6 and 7. The Defendants have pleaded that the accident was wholly contributed to by the negligence of the Claimant. The particulars of negligence have also been pleaded.

This Court has looked at the spirit of Order 12 Rule 25. Summary judgment is entered by the Court where it is satisfied that: -

- (a) the defendant has no arguable defence to the claim or part of the claim;  
and
- (b) there is no need for a trial of the application or part of the application.

However, where there is a relevant dispute between the parties about a fact or a question of law, the Court shall not enter summary judgment.

Upon consideration of the application, this Court is of the considered view that the Defendants have pleaded contributory negligence with particulars in their defence. Contributory negligence raises a relevant dispute of facts between parties and therefore a *bona fide* defence.

Secondly, the defence has also raised an arguable question of law. The question of law raised is whether or not the payment of a fine for the offence of inconsiderate driving which is contrary to section 123 of the Road Traffic Act is proof of guilt on the part of the Defendants. It is the view of this Court that this is an issue that should be ventilated in a full trial.

In conclusion, this Court finds that this is not a proper case where it should enter summary judgment. The application is therefore dismissed with costs.

MADE in Chambers this 4<sup>th</sup> day of May, 2021 at Lilongwe.

A handwritten signature in black ink, appearing to read 'W.Y. Msiska', written in a cursive style.

**W.Y. Msiska**

**J U D G E**