



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
PERSONAL INJURY CAUSE NUMBER 456 OF 2011

BETWEEN

PATRICIA CHINOMBA (Suing through
Father and Next Friend ELLIOT CHINOMBA PLAINTIFF

-and-

PRIME INSURANCE CO. LTD DEFENDANT

CORAM HONOURABLE JUSTICE ZIONE NTABA
Mr. I. Kamunga, of Counsel for the Plaintiff
Mr. N. Supedi, of Counsel for the Defendant
Mr. A. Nkhwazi, Official Interpreter
Mrs. G. Chilombo, Court Reporter

JUDGMENT

1.0 THE CASE

1.1 This was a personal injury claim which was commenced by a writ of summons. The Plaintiff, 12 year old (at the time of the incident) Patricia Chinomba was suing through her father and next friend, Elliot Chinomba is seeking damages for pain and suffering and loss of amenities of life, special damages for police and medical reports in the total sum of K4,000.00 and costs of the action.

1.2 The Plaintiff herself gave testimony as the only witness and adopted her witness statement as **Exhibit PD 1**. She testified that she was a lawful pedestrian aged 12 (then) on 26th April, 2011 at about 20:15 hours near St James Catholic Church along Chilomoni Ring road in Blantyre district where a Toyota Minibus, registration number CZ 2872 driven by the Defendant's insured hit her. She indicated that she sustained injuries namely: multiple bruises on the right elbow, bruises on the right knee and a cut on the head as endorsed in her medical report which was marked **Exhibit PD 2**. She further stated that the police report on her accident adduced as **Exhibit PD 3** indicated that Mr Gift Katole, the driver of CZ 2872 misjudged the distance, clearance and speed. It was her opinion that

the driver was driving at an excessive speed such that he failed to prevent the injury to her.

- 1.3 She argued that the law on negligence is clear in Malawi as pronounced by *Banda v Agricultural Development and Marketing Corporation and another*, Civ. Cause No. 273 of 1987(HC)(PR)(Unrep) which set the parameters of how a driver and pedestrian should behave on a road especially in terms of taking reasonable care and skill to avoid accidents. The driver by avoiding driving at excessive speeds, keeping a good lookout, observing traffic lights, The pedestrian by moving on the road with due care. She also indicated that courts will make a claim succeed if it is shown that there was a duty of care owed to her or him by the said driver, that duty was breached and the breach resulted in loss and damage as held in *Kadawire v Zilogone and another* [1997] 2 MLR 96.
- 1.4 The Plaintiff contended that the driver of CZ 2872 owed her a duty of care as he drove on the road where they were both users. Further it was his duty to drive at a speed that would allow him to stop in case of an emergency. Consequently, the court should in determining reasonable speed; look at the nature of, condition and use of the road in question or the amount of traffic on the road at the material time. In terms of the matter, herein, she was of the view that the driver drove negligently as he failed to brake due to excessive speed. This was further compounded by the fact that she was hit off the road, on the side where pedestrians walk. Such conduct was negligence to the extent of being reckless.
- 1.5 Lastly, since she through evidence had proved that the Defendant's insured was negligent, she under section 148 of the Road Traffic Act was claiming the compensation from the Defendant as per law. She prayed that the court find the Defendant liable and award her damages.
- 1.6 The Defendant did not call any witnesses and relied on the defence it had filed in the matter. The Defendant had indicated that they would file submissions but never did. The Defendant denied the Plaintiff's Statement of Claim as well as being the insurer of the alleged motor vehicle registration number CZ 2872. It further averred that the alleged insured motor vehicle was never involved in the alleged accident and put the Plaintiff to strict proof thereof. The Defendant pleaded that its liability was subject to the owner of the vehicle being found liable in respect of the accident. Further, that in terms of liability such was limited to one that will indemnify the owner of the vehicle to the maximum liability in the contract of insurance between it and the insured. It prayed that action be dismissed with costs.

2.0 DETERMINATION OF THE CASE

2.1 It is trite law that the burden of proof lies on the party who substantially asserts in the affirmative as in *Malawi Distillers Ltd v John Sichilima*, Civ. Cause No. 2869 of 2004(HC)(PR)(Unrep). Therefore, the burden herein lies on the Plaintiff to prove that the accident was caused by the Defendant's insured negligence. Further that the Defendant's insured owed the Plaintiff, a duty of care where when the said duty was breached resulted in her sustaining the said injuries.

2.2 This court in determining the above has to examine the evidence adduced in court to meet the requisite standard which is on a balance of probabilities as pronounced *Msachi v Attorney General* [1991] 14 MLR 287. The evidence must convince this court that it was more probable that not that that the accident occurred due to the negligence of the Defendant's insured so that damages can be awarded.

2.3 In *Blyth v. Birmingham Water Works Co.* (1856) 11 Ex Ch 781 the Court defined negligence as -

"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."

2.4 Apart from the negligence, the Plaintiff needs to also establish causation as held in *Hughes v Lord Advocate* [1963] 1 ALL ER 705 Lord Guest said as follows:

"In order to establish a coherent claim of causation it is not necessary that the precise details leading up to the accident should have been reasonably foreseeable; it is sufficient if the accident should have been foreseeable by a reasonable careful person."

2.5 The Plaintiff argued that 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 as held in *Banda and Others v ADMARC and Another* [1990] 13 MLR 59 at 63 and this statement of the law was cited with approval by the Malawi Supreme Court of Appeal in *Southern Bottlers Limited and Another v Charles Chimdzeka* MSCA Civil Appeal No. 41 of 1997. It was further cited with approval in *Yanu Yanu Bus Company v Mbewe* [1984-86] 11MLR 415 which said that -

*"a driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do, albeit negligently per Slade J. in *Berrill v. Road Haulage Executive* [1952] 2 Lloyd's Rep 490."*

2.6 Notably as held in the *Banda* case, a reasonable skillful driver is the one who avoids excessive speed, keeps a good look out, observes traffic signs and

signals, and so on. Furthermore, this duty of care is owed to persons so placed that they may reasonably be expected to be injured by the omission to take such care. Therefore it is the duty of a driver of a vehicle to travel at a speed which is reasonable under the circumstances. In determining what is reasonable, the nature, condition, and use of the road in question, and the amount of traffic which is actually at the time, or which might reasonably be expected to be on it, are all important matters to be taken into consideration.

- 2.7 From the case herein, it can be established that the driver used excessive speed which was contrary to how any prudent driver ought to have conducted himself in the circumstances. Excessive speeding is an act of negligence because there is foreseeability of harm which a prudent driver must be aware of before the occurrence of the actual accident which leads to loss or damage. Conversely, the driver herein, ought to have known that excessive speeding is contrary to what a reasonable driver ought to conduct himself. As such any act of excessive speeding without any justification is a breach of duty of care and such conduct amounts to negligence. Therefore, a driver of the said vehicle can be said to have been negligent with regard to the accident that occurred in such circumstances.
- 2.8 Firstly it should be observed that the accident occurred at night, at around 20:15pm. This means that there was a duty on the part of the driver to make sure that he maintained a good look out. He also had a duty not to drive at an excessive speed. The Police report (which was issued after thorough investigation) shows that the driver was driving the vehicle at an excessive speed. The accident having happened during the night, clearly calls for the driver unlike in the daytime to be cautious and avoid excessive speed because they hindered by there being no natural light. Therefore driving an excessive speed especially at night is a clear breach of duty.
- 2.9 Secondly, the facts also show that the Plaintiff was hit off the road. It is known to every reasonable person that pedestrians are more likely to be found on the sides of the road and therefore, when stopping a vehicle on the side of a road, it follows that there's a duty on the driver to maintain a good lookout. Failure to do so is tantamount to breach of duty of care by the driver. This court is of the opinion that had the driver maintained a good look out plus not driving an excessive speed, the accident would not have occurred. Therefore I hold the view that the driver was in breach of his duty to the Plaintiff. It is also clear from the medical report that the Plaintiff suffered injuries as a result of the accident that was caused the driver's breach of duty of care as established. Therefore the injuries were caused by the negligence of the driver.
- 2.10 Having established that the driver was negligent and the injuries were a result of tis negligence, this court hold the Defendant's driver liable. In conclusion, where negligence is proved against an insured, the insurer is held liable to indemnify its insured as per section 148 of the Road traffic Act which gives an


injured party the right to sue the insurance company directly. It therefore follows hereto that the Defendant is hereby found liable for the damages suffered by the Plaintiff due to the negligence of the Defendant's insured.

3.0 CONCLUSION

- 3.1 This court finds on a balance of probabilities that the evidence adduced by the Plaintiff has proven that the Defendant's insured driver negligently caused the accident in which the Plaintiff sustained injuries and thus suffered.
- 3.2 The court holds the Defendant's insured driver vicariously liable for special and general damages pleaded in the specially endorsed writ.
- 3.3 The court orders that judgment on liability is therefore entered for the Plaintiff against the Defendant for the special and general damages claimed to be assessed as well as for the costs for this action to be taxed by the Registrar.

I order accordingly.

Dated this 13th day of February, 2017 at Zomba.


Z.J.V Ntaba
JUDGE