



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
PERSONAL INJURY CAUSE NO.99 OF 2015**

**BETWEEN**

**TAURAI GONDA ..... PLAINTIFF**

**-AND-**

**FARID ISMAIL..... 1<sup>ST</sup> DEFENDANT**

**AFRISHERE WORLDWIDE LIMITED.....2<sup>ND</sup> DEFENDANT**

**GENERAL ALLIANCE INSURANCE LIMITED.....3<sup>RD</sup> DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE CHIRWA  
Dr Nkhata of Counsel, for the Plaintiff  
The 2<sup>nd</sup> Defendant not present  
Mr O. Chitatu, Official Court Interpreter**

---

**JUDGEMENT**

By a Writ of Summons, Specially Endorsed, issued on the 9<sup>th</sup> day of March 2015, the Plaintiff brings this action against the above named Defendant's claiming (a) damages for the costs of repairing his motor vehicle registration No BL 8885, Mercedes Benz Saloon) (b) special

damages in the sum of K3, 000.00 being the costs of obtaining the Police Report, (c) damages for the loss of use and (d) costs of the action.

**Statement of the cases for the parties:**

It is the Plaintiff's case as per his Statement of Claim that on or about the 22<sup>nd</sup> of October, 2014, the 2<sup>nd</sup> Defendant's motor vehicle registration number MN 2817, DAF Truck, whilst being driven by the 1<sup>st</sup> Defendant from the direction of Chinyonga heading towards Chitawira along the Kenyatta Drive hit from behind the Plaintiff's said vehicle which was also going in the same direction as the 2<sup>nd</sup> Defendant said motor vehicle at Njamba Stage. It is the Plaintiff's case further that the said accident was solely caused by the negligence of the 1<sup>st</sup> Defendant who was at the material time the driver of the 2<sup>nd</sup> Defendant's vehicle. The particulars of the alleged negligence have been provided as follows:

- (i) Following the Plaintiff's' vehicle too closely in the circumstances;
- (ii) Failing to keep any or any proper look out or to have any sufficient regard to other users in particular the Plaintiff's said vehicle;
- (iii) Failing to slow down, stop, swerve, or in any way to manage or control the 2<sup>nd</sup> Defendant's vehicle, so as to avoid hitting the Plaintiff's vehicle.

It is the Plaintiff's case still further that as a result of the accident/collision his vehicle sustained extensive damage. The particulars of damage have been provided as follows:

- (i) Depressed boot



- (ii) Depressed bumper
- (iii) Depressed bumper brackets
- (iv) Depressed boot floor
- (v) Dislocation of the right leg
- (vi) Broken left hand tail lamp
- (vii) Broken right hand tail lamp

And the particulars of the special damages have also been provided as follows:

- ( i ) K3, 000. 00 being the cost of the police report.

By their joint Defence to the Statement of claim dated the 17<sup>th</sup> day of January, 2015, the 3<sup>rd</sup> Defendant, while admitting that it insured the 2<sup>nd</sup> Defendant's motor vehicle contends that any liability on its part arising from such insurance is limited to the maximum cover taken out under the policy. It is the 3<sup>rd</sup> Defendant's contention further that since the Plaintiff has not established that there is any amount due from the insured to the Plaintiff no cause of action has therefore accrued against it. In the alternative the Defendants have jointly denied that the accident/collision was caused by negligence on the part of the 1<sup>st</sup> Defendant as alleged in the case. It is the Defendants' case that the said collision was caused solely or contributed to by the negligence of the Plaintiff. The particulars of the alleged negligence have been provided as follows:

- “(i) Driving too fast in the circumstances;
- (ii) Failing to keep any or any proper look out or to have any or any sufficient regard for other motor vehicles along a busy road;

- (iii) Failing to heed the presence of the 2<sup>nd</sup> Defendant's vehicle along the road;
- (iv) Driving along a busy road without first ascertaining or ensuring that it was safe so to do and when he knew or ought to have known that it was unsafe so to do by reason of the presence of the 2<sup>nd</sup> Defendant's vehicle;
- (v) Abruptly stopping in the road in the path of the 2<sup>nd</sup> Defendant's vehicle without warning;
- (vi) Failing to swerve or in any other way to manage or control his vehicle so as to avoid the collision."

The Defendants have finally denied that the Plaintiff suffered the injury, loss of damage as alleged.

When this action was called for trial on the 24<sup>th</sup> day of May, 2018 only Counsel for the Plaintiff and the 3<sup>rd</sup> Defendant were present. This Court was advised by both Counsel that the 3<sup>rd</sup> Defendant had satisfied its liability under the policy of insurance. The 1<sup>st</sup> and the 2<sup>nd</sup> Defendants were not present and neither did they proffer any excuse for their absence. This Court being satisfied that the Notice of Hearing appointing the said date of hearing had been duly served on the 2<sup>nd</sup> Defendant, and given that Counsel for the Plaintiff had elected not to proceed against the 1<sup>st</sup> Defendant, proceeded to hear the Plaintiff's case after striking out the 2<sup>nd</sup> Defendant's Defence in terms of Order 16 Rule 7(1) C of the Courts (High Court) (Civil Procedure) Rules which provides as follows:

- "7 the Court may proceed with a trial in the absence of a party but  
(c) where a defendant does not attend, it may strike out his defence and dismiss his counter claim"

### **The Burden of Proof and Standard of proof:**

This Court is mindful, that the burden of proof in a civil action rests on the party who asserts the affirmative, hence the latin maxim: *ei qui affirmat non ei qui negat incumbit probatio*-see: **Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd** [1942] AC 154 at p.174 and **Limbe Leaf Tobacco v Chikwawa & Others** [1996] M.L.R. 480 at p484 per **Unyolo J.A.** (as he then was).

This Court is also mindful, that the standard of proof in a civil action is merely on a balance of probabilities- see: **Miller v Minister of Pensions** [1947] All E.R. 372 at p374 per **Denning M.R.** and **Chinyama v Land Train Haulage** [1999] M.L.R. 99 at p102 per **Ndovi J.**

### **Issues for determination:**

This being an action founded in negligence, for the Plaintiff to succeed he ought prove the following:

- (a) That there was a duty of care owed by the 1<sup>st</sup> Defendant to him,
- (b) That there was a breach of that duty by the 1<sup>st</sup> Defendant and
- (c) That damage resulted from that breach of duty, -



See: **Donoghue v Stevenson** [1932] A.C 562 quoted with approval by **Ndovie J** in **Kadawire v Ziligone and Another** [1997] 2 M.L.R 139 p 144.

### **The Evidence:**

To prove his case, the Plaintiff only called one witness, the Plaintiff himself PW1. PW1 adopted his written statement and produce Exhibit "P1", the Malawi Police Abstract Report dated the 8<sup>th</sup> of December, 2014, Exhibit "P2", a Quotation for Mercedes Benz Reg. No. BL 8885, from Fernando Motors dated the 24<sup>th</sup> of March, 2015, and Exhibit "P3" a Quotation dated March 24, 2015 for Mercedes Benz C180 BL8885 from City Motors Ltd as his evidence in-chief. There was no cross-examination. This Court will refer to the evidence before this Court in the determination of the various issues to be determined herein

### **Determination:**

The first issue to be determined is: "**did the 1<sup>st</sup> Defendant owe the Plaintiff a duty of care?**".

The authorities abound that a driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicle and property of anyone on or adjoining the road- see: **Banda & Others v ADMARC & Another** [1990] 13 M.L.R. 59 at 63) and **Kachingwe & Kachingwe & Company v Mangwiro Transport Motor Ways Company Limited** 11 M.L.R. 362 at p367.

Turning to the evidence before this Court PW1 the following was the evidence of PW1 as per his written statement:

"3. On or about the 22<sup>nd</sup> October, 2014, I was driving my said motor vehicle registration number BL 8885 Mercedes Benz Saloon, from the direction of Chinyonga heading towards the direction of Chitawira along Kenyatta Drive.

4. Upon arrival at or near Njamba Bus Stage my said motor vehicle was hit from behind by motor vehicle registration number MN 2817, DAF Truck which was travelling in the same direction as myself.

5. The said motor vehicle registration number MN 2817, DAF Truck which was being driven by the 1<sup>st</sup> Defendant and was owned by the 2<sup>nd</sup> Defendant,"

There was no evidence adduced to contradict this evidence and neither was there any cross examination to contradict the same.

From this evidence it is evident that the Plaintiff as a driver of motor registered number BL 8885 and the 1<sup>st</sup> Defendant as a driver of the said motor vehicle registration number MN 2817 were at the material time both road users. As such they both owed a duty of care to each other.

In answer to the issue above, it is the finding of this Court that the 1<sup>st</sup> Defendant as the driver of the said motor vehicle at the material time indeed owed the Plaintiff a duty of care.

The second issue to be determined is: "**did the 1<sup>st</sup> Defendant breach the said duty of care.**"

On the duty of care which a driver of a motor vehicle owes to other road users Mtegha J (as he then was) in the case of Kachingwe & Company v Mangwiro Transport Motor –Ways Company Limited (*supra*) quoting with approval the following words of Lord Mac Millan in Hay or Bourhill v Young [1943] A.C. 92 at 104,

*"What duty then was incumbent on him? [T]he duty of a driver is to use proper care not to cause injury to persons the highway or in premises adjoining the highway proper care connotes a avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on ....*

*There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree,"*

went on to state as follows: -

*"It is the duty of a person who drives a motor vehicle on a highway to use reasonable care to avoid causing damage to persons and other vehicles on or adjoining the road. It has been further stated that reasonable care means care which an ordinary skilful driver would have exercised under all the circumstances ...."*

See also the case of Jussab vs Mussa & Another [1991] MLR 116 at p. 122 (cited in the Plaintiff's skeleton arguments at p3).

The evidence of PW1 as to how the accident was caused is as follows:



*"6. The accident was caused by the 1<sup>st</sup> Defendant by among others, following too close....."*

The foregoing evidence remained uncontroverted.

It has been held that when approaching potential danger, a driver of a motor vehicle is obliged to travel at a speed slow enough to enable him to stop in time if a sudden emergency arises (see: **Mandiwa & Others v Star International Haulage Company Ltd & Another** [1991] 14 M.L.R. 217 at p225). The general rule is that a vehicle should be driven at a speed which enables the driver to stop within the limits of his vision (see: **Burgess V Aisha Osman & Jimu** [1964 -66] ALR (Mal) 475). The fact that the 1<sup>st</sup> Defendant failed to stop in time to avert the accident is also in consonance with the fact that the 1<sup>st</sup> Defendant was speeding- see: **Kadawire v Ziligone & Another** (*supra*) relying on the case of **Republic v Sinambale** 4 A.L.R. (Mal) 191 where it was held that it is the driver's duty to drive at a speed which will allow him to stop in case of sudden emergency.

This Court is inclined to concur with Counsel for the Plaintiff in his submission that the fact that the 1<sup>st</sup> Defendant hit the Plaintiffs motor vehicle from behind is evident enough that the 1<sup>st</sup> Defendant was following too close behind the Plaintiff's motor vehicle and that the first Defendant was not driving at a speed slow enough to enable him to stop in case of an emergency.

In answer to the question at hand, this Court is inclined to find as a fact that the 1<sup>st</sup> Defendant as a driver of motor vehicle registration number MN 2817, DAF Truck, at the material time breached his duty of care to the Plaintiff as another road user.

The third issue for determination is: **"did the Plaintiff suffer damage as a result of the said breach of duty of care?"**

The evidence of the PW1 in support of this issue is to be found in paragraph 7 of his written statement and it is as follows:

"7. As the result of the collision referred to at paragraph 4 above, my said motor vehicle had its boot, bumper, bumper brackets and boot floor depressed; and the left and right tail lamps broken".

This evidence also remained uncontroverted. This Court has no reason to disbelieve the Plaintiff in his evidence on the extent of the damage caused to his motor vehicle.

In answer to the question at hand, this Court is inclined to find as a fact that the Plaintiff suffered damage as a result of the breach of his duty of care by the 1<sup>st</sup> Defendant.

The Plaintiff having successfully proved the three ingredients of negligence on the part of the 1<sup>st</sup> Defendant, this Court would, in the premises, not hesitate to find the 1<sup>st</sup> Defendant guilty of negligence. And since there is no dispute that the motor vehicle which the 1<sup>st</sup> Defendant was at the material time driving the property of the 2<sup>nd</sup> Defendant this Court would, in the further premises, enter a judgement for the Plaintiff against the 2<sup>nd</sup> Defendant as the owner of the said motor vehicle.

The judgment entered herein is for damages for the Plaintiff's said motor vehicle and loss of use. As regards the special damages in the sum of K3,000.00 alleged to be the cost for obtaining the Police Report

(Exhibit "P1"), the same being a claim for special damages ought to have been proved strictly - See: **The Registered Trustees of African International Church v The Registered Trustees of African Church** [1994] MLR 271 at p280. And since the Plaintiff has not strictly proved the same a judgment can thus not be entered for the same. This claim is consequently dismissed.

### **The Costs:**

The costs of an action are in the discretion of the Court (See: Section 30 of the Courts Act) and normally follow the event (See: Order 31 Rule 3 (2) of the Courts (High Court) (Civil Procedure) Rules and also the case of **Matanda v Sales Services Limited** [1990] 13 M.L.R 216 at 218. The 2<sup>nd</sup> Defendant being the unsuccessful party in this action this Court thus proceeds to exercise its discretion on costs by ordering the 2<sup>nd</sup> Defendant to pay the costs of the Plaintiff. It is so ordered.

Dated this 27<sup>th</sup> day of ~~May~~ <sup>June</sup>, 2018.

  
Chirwa J  
JUDGE