IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 821 OF 2020

BETWEEN:

RICHARD GRACIOUS GADAMA **CLAIMANT**

AND

SAGIR HAMDANI **1st DEFENDANT**

LIBERTY GENERAL INSURANCE COMPANY LTD **2nd DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

C. Chayekha, Counsel for the Claimant
C. Machika, Counsel for the Defendants
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is this court's judgment following a trial of this matter on the claimant's claim for damages for personal injuries and damage to his motor vehicle suffered following a collision that is alleged to have been caused by the 1st defendant's negligence in driving another motor vehicle. The 2nd defendant is sued as insurer of the 1st defendant. The defendants denied the claim.
2. This Court must therefore determine whether the claimant has proved that the 1st defendant indeed negligently drove his motor vehicle and caused the

collision as alleged and caused the loss and damage as claimed by the claimant.

3. The case of the claimant is that, around 2.00 p.m. he was driving his motor vehicle from the direction of Blantyre City heading in the direction of Kameza roundabout along the Magalasi Road. He indicated that at the material time construction works were ongoing on the said road and the road was unmarked. He however indicated that he was driving on the right lane and left space on the left lane of the two lanes road towards Kameza.
4. The claimant indicated that when he was about to reach a junction to Ndirande Police, he put on the indicator showing his intention to turn right and subsequently started to slow down his vehicle. He asserted that he checked in the mirror and saw no vehicle coming behind and he proceeded to turn right aiming to drive across the two lanes, that go in the opposite direction, and to turn into Ndirande Police. He indicated that before he finished turning and fully joining the opposite lane, his motor vehicle was hit by the 1st defendant's vehicle that was driving from behind.
5. The claimant asserted that the 1st defendant caused the collision as a result of negligence in that he drove at excessive speed and failed to keep a proper look out among other things. He also asserted that, as a result, he got injured and his vehicle got damaged. He therefore claims damages for personal injuries and for damage to his motor vehicle.
6. On their part, the defendants admitted being insured and insurer respectively. They also admitted that the collision took place as the claimant drove in front of the 1st defendant on the road in question herein. They however denied that the 1st defendant was negligent. They asserted that the claimant is the one who caused the collision by suddenly switching lanes from the left lane to the right lane in front of the 1st defendant making the collision inevitable. The defendants therefore deny the claimant's claim to damages.
7. As correctly observed by the parties, the standard of proof in these civil matters is on a balance of probabilities. And, the burden of proof lies on he who asserts the affirmative, in this case the claimants. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
8. To prove his claim, the claimant testified and brought one witness. The 1st defendant testified for the defendants.

9. As a preliminary matter, the defendants contended that the evidence of the claimant and his statement of case are at variance. This Court is not persuaded. The case of the claimant is in line with what he set out to prove by his evidence, namely, that as he was about to turn right the 1st defendant hit his vehicle from behind.
10. The facts established from the evidence are that the claimant and the 1st defendant were driving on the road herein which road was not marked then due ongoing construction work. Both drivers were driving in the same direction. The drivers were able to follow the two lanes going in the same direction.
11. The evidence of the claimant and another driver who observed the collision from the opposite direction is compelling. That evidence shows that the claimant was indeed intending to turn off from his lane and to the right into Ndirande Police. At that point, the 1st defendant drove from behind the claimant at a considerable speed and ended up rear ending the claimant's vehicle.
12. There was fierce contention as to how the rear ending happened during the trial at the scene of the collision herein. The claimant insisted that the 1st defendant was speeding and did not notice that the claimant was turning right and ended up hitting the claimant's vehicle on the front driver's side. The 1st defendant's vehicle point of impact was the bumper on the left front side.
13. The 1st defendant insisted that the collision was inevitable because the claimant who was driving on the left lane suddenly switched to the right lane in which he was driving and he was forced to swerve to his right onto the middle of the road where he collided with the claimant.
14. This Court was given to the impression that the 1st defendant did not pay attention and was indeed speeding. Had the 1st defendant paid attention, he would have observed that the claimant had slowed down and was turning right, off the two lanes facing Kameza direction into the opposite lane. The fact of speeding is clear when one considers the extensive nature of the damage sustained by the claimant's vehicle and also the fact that the vehicles came to rest at a bit of a distance from the point of impact.
15. In the circumstances, this Court is unable to give any weight at all to the police report that shows that the claimant caused the collision and paid a fine. The said police report was made by a police officer who never witnessed the

collision and who only interviewed the claimant later after the 1st defendant had left the scene given that the claimant had to be rushed to hospital in the immediate aftermath of the collision herein. The police report is hearsay since its author never appeared to tender it and have his evidence tested in the usual fashion. see *Bauleni and others v Siku Transport and another* Personal injury cause number 299 of 2010 (High Court) (unreported).

16. The 1st defendant also asserted that he was told by the police that a passenger in the claimant's vehicle said the claimant lost his way to Ndirande Police and decided to make a u-turn a bit further down the road after the Ndirande Police direction. This is also hearsay and cannot be accepted in evidence.

17. The parties correctly submitted on the duty of care of a driver of a motor vehicle on the road which if breached result in the driver being held liable for negligence and the resultant damage caused by such negligence to those other road users to whom the driver owed the said duty. See *Banda and others v ADMARC and another* 13 MLR 59, *Chuma and another v India and others* [1995] MLR 97, *Somani and Mulaga v Ngwira* 10 MLR 196 and *Sagawa v United Transport (Mw) Limited* 10 MLR 303.

18. Indeed, in the case of *Banda and others v ADMARC and another* Banda CJ stated succinctly the driver's duty of care to other road users as follows

> 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 skillful driver would have exercised under all the circumstances. A reasonably skillful driver has been defined as one who avoids excessive speed, keeps a good look-out, observes traffic signs and signals.

19. In the circumstances of the present case, the claimant submitted that the 1st defendant drove without due care and attention, namely, by failing to notice that the claimant slowed down and indicated his intention to turn right and by speeding, among other things. And that consequently, the 1st defendant was negligent and caused the collision herein.

20. On their part, the defendants submitted that the 1st defendant was not negligent and that his evidence on how the accident occurred was not contradicted by the claimant.

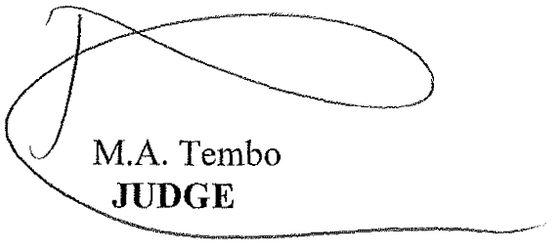
21. This Court visited the scene of the collision. It has indicated the impression that it got from the evidence. The impression that this Court got is that the 1st defendant failed to exercise due care and attention. He never noted that the claimant was turning right as he approached from behind. The case of the claimant is compelling as it is supported by the evidence of the driver of another motor vehicle who drove from the opposite direction and who observed the collision in real time.
22. In the circumstances, contrary to the submissions of the defendants, this Court finds that the 1st defendant drove negligently in the circumstances and caused the collision herein. Judgement is accordingly entered for the claimant considering the injury which he suffered in this matter and the damage his car sustained in the circumstances. This Court finds no evidence of contributory negligence.
23. The defendants in their submissions also relied on the claimant's admission of guilt to the traffic officers for causing the accident and paying a fine for a traffic offence as an indication that the claimant caused the collision. On this aspect, this Court finds the finding of the traffic officer to be hearsay as there is no way of verifying or testing the accuracy of that finding. Often times, people accept to pay such traffic fines under extreme pressure and for convenience and so, this Court cannot accept to base such admissions for findings of liability for huge sums of money in personal injury claims. For a detailed discussion of this issue see *Bauleni and others v Siku Transport and others* Personal injury cause number 299 of 2014 (High Court) (unreported).
24. The last issue to be considered concerns the insurance policy limit herein. At the end of the trial, the defendants suggested that the issue of the policy limit should be dealt with through submissions unless the claimant had questions for the witness who was intended to be called by the defendants on that aspect. The intended witness had a sworn statement on the record which indicated that the policy limit herein is K5 000 000 for death or bodily injury and K10 000 000 for damage to property. Further, that the limit is K100 000 for loss of use of motor vehicle. The claimant responded that he had no questions to the witness.
25. During submissions the claimant argued that there was no evidence on the third party insurance policy limit. This appears to be in contradiction to the suggestion of the defence that the issue of the policy limit be dealt with by

submissions without the need to call the relevant defence witness whose statement was on the record. This Court is of the view that in the circumstances of this matter it will not be just for the claimant to have agreed to deal with the issue of the policy limit by submissions without the need for the defence to call the relevant witness and then turn around during submissions to say that there is no evidence on the issue of the insurance policy limit. The understanding of this Court is that the claimant conceded the evidence of the defence concerning the policy limit.

26. The claimant then submitted that the policy limit herein only pertains to damages and does not cover party and party costs. That is an issue that this Court extensively dealt with in another case alluded to by both parties of *Kabotolo and others v Chirwa and another,* personal injury cause number 780 of 2015 (High Court) (unreported). There is an outstanding appeal on that matter where this Court found that the policy limit covers both damages and party and party costs. This Court is not persuaded to change its position now.

27. All in all, the claimant succeeds in this matter with costs. The Registrar shall assess the damages and costs.

Made in open court at Blantyre this 23rd December, 2021.



M.A. Tembo
JUDGE