IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NUMBER 396 OF 1998

BETWEEN
NATHAN CHIZOTELE KANTHAWALA MKANDAWIRE----
PLAINTIFF

AND

WYNN CHARLES CHALIRA----------
DEFENDANT

CORAM: SINGINI, J.
Chilenga, of counsel for the plaintiff
Likongwe, of counsel for the Defendant
Kaferaanthu, Court Official

JUDGMENT

As its civil cause number will show, this is an old matter commenced in this Court some ten years ago on 20th July, 1998. It arose from an incident that occurred the previous year on the night of 29th November, 1997. Since being commenced it has been characterised by motions of adjournment, change of counsel on both sides, and change of presiding officers until eventually it came before me for the first time on 23rd November, 2007, when I heard it in open court and both parties were represented. It is a claim by the plaintiff against the defendant and was initially grounded in the tort of negligence. The facts being not in dispute, I directed counsel to make their written submissions on the single legal issue of the defendant's liability. Counsel filed their submissions by 5th December, 2007, which I have had time to consider in delivering this judgment.

On the night of 29th November, 1997, the plaintiff was driving his car, No. BJ 7505, a Toyota Splinter saloon on the Presidential Way in City Centre, Lilongwe, when his car was hit by an overtaking car, No. NU1006, a Toyota Corolla saloon, belonging to the defendant but being driven at the time by one Mr. Limbikani Banda. The driver of the defendant's car, Mr Banda, was not known to the defendant before the accident, but was a friend

to the defendant's son. Earlier in the night the defendant's son and Mr. Banda and other young persons were at a party within the neighbourhood of the defendant's house in Area 47 in the City and were taking alcoholic drinks. From the party Mr. Banda, the defendant's son and three others decided to go places to continue with their drinking. None of the five owned a vehicle and none was with a vehicle at the time. None of them was licensed to drive and only Mr. Banda was taking driving lessons as a learner driver. On that night the defendant was away to Ntcheu with his wife and had been away for some two nights. He had travelled to Ntcheu in another of his cars. He had left his car No. NU 1006 at home parked in the garage of the house and he kept the car keys in his bedroom. After the party the defendant's son got the car keys from his parents' bedroom and gave them to Mr. Banda to drive the car taking the group to the places they wanted to go to continue with their driving. It was when Mr. Banda dared to overtake the plaintiff's car that the vehicles collided, causing damages to the plaintiff's car for which he took this action against the defendant as owner of the offending vehicle to claim for the cost of repairs and general damages. The driver of the defendant's car, Mr. Banda, was faulted on several grounds. He was not a licensed driver, he was over-speeding, he was overtaking when it was not safe to do so and he was driving while drunk. He admitted the offences to the police and paid to the police the prescribed spot traffic fine of K600. He was not however prosecuted for any of the offences he had committed.

The defendant's insurers, Citizen Insurance Company Limited, refused the plaintiff's claim on the ground that the insured vehicle was being driven by an unlicensed driver and the policy did cover such eventuality. The plaintiff then decided to proceed against the defendant personally in the present suit. The defendant denies liability in the circumstances.

Initially the plaintiff's claim was founded on the negligence of the driver of the defendant's car as if in the circumstances the driver could in law be regarded to have had the defendant's authorization to drive the car. That has since changed to a claim based on the strict liability of the defendant as owner of the car under the provisions of the Road Traffic Act in force at the time of the accident. That Act has since been repealed by the present Road Traffic Act of 1997 (Act No. 26 of 1997, which came into force on 15th January, 1998). For the strict liability claim against the defendant, the plaintiff relies on section 36(1) and section 59(1) of the repealed Act and on the decision in the case of *McGreevy v. Sattar* 12 MLR

258 by Mtegha, J. which applied the two provisions to the same effect of the strict liability being claimed by the plaintiff in this case. I reproduce the two provisions thus:

"Necessity to hold driving licence
36.—(1) No person shall drive a motor vehicle on a road unless he is the holder of a driving licence authorizing him to drive a vehicle of that class or description and no person shall permit or employ any person to drive any vehicle on a road unless that person is the holder of such a driving licence…

"Users of motor vehicles to be insured against third party risks
59.—(1) Subject to this Act, it shall not be lawful for any person to use or cause or permit any other person to use a motor vehicle or trailer on a road unless there is in force in relation to the use of such vehicle or trailer by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.

I should point out that section 59(1) is the same as section 141(1) of the present Act. While section 36(1) does not have an exact textual equivalent in the present Act, the same prohibition against driving a motor vehicle without a valid driving licence is laid down in section 18 of the present Act.

In the case of *McGreevy v. Sattar* the mother left the car keys of her car in the children's bedroom and the son, who was taking driving lessons at the time but did not have a driving licence, took the car keys and drove the car himself when he had the accident with another car the owner of which sued for damages. The learned Judge agreed with submissions by the plaintiff's counsel and held that the provisions of section 59(1), read with the

provisions of section 36(1), created strict liability on the part of owners of motor vehicles for third party risks if they cause or permit persons without an appropriate driving licence to drive their motor vehicles. In that case the learned Judge held that by leaving the car keys in the children's bedroom knowing that the son was taking driving lessons the mother had permitted or caused the car to be used or driven by her son who was not a holder of a driving licence and she thereby incurred strict liability for third party claims arising from the son's use of the car. In other words, the learned Judge held that the mother knew or ought reasonably to have known that there was the likelihood of her son being tempted to drive the car as he was already learning to drive. In fact in such case, it shouldn't even have been a factor in the learned Judge's mind that the mother left the car keys in the children's bedroom but that the son could access the keys wherever they may have been kept in the house. I doubt if the learned Judge meant to hold that the law requires parents to completely hide car keys from adolescent children in the household. Still in the end that case was decided on its facts that, somehow, the conduct of the mother as owner of the car amounted to causing or permitting her son to use or drive the car when he was not a holder of a driving licence contrary to the provisions of the Act.

Rather than disagree with the learned Judge's decision made on the facts of that case and indeed taking the approach in that case of applying the provisions of the Act to the facts of the case, I opt to distinguish the case before me on its facts from that case. In the present case, the son of the defendant, though also not a licensed driver, was not taking driving lessons, he was not the one who drove the car leading it the incident of the collision with the plaintiff's car, the defendant was away at the time and had kept the car keys, rather securely for most parents or households, in his bedroom, the learner driver who drove the car was not to him known to be a friend of his son or known to him at all. In my judgment to hold that the defendant should have anticipated that his son would take the car keys from the parents' bedroom for any of his unlicensed friends to drive the car or for the son who was not a learner driver to drive the car himself and should have taken greater care to deny the son access to the car keys would be to hold the defendant or any parent to an unreasonably high standard of care. Causing or permitting a person to use a motor vehicle is a factual occurrence and on the facts of this case I am not inclined to view that the conduct of the defendant in leaving the car keys in his bedroom amounted to causing or permitting his son or a friend to his son to use or drive the defendant's car. I would not hold the defendant to have failed to take reasonable steps to prevent the act

where it was within his power to prevent it, as was said to be part of the meaning of the word "permit" in the case of *Berton v. Alliance Econ. Inv. Co. Ltd* [1922] 1 K.B. 742 followed in the *McGreevy v. Sattar*.

In his changed or revised submissions filed after counsel appeared before me, counsel for the plaintiff has categorically argued that the plaintiff's claim is solely upon the principle of strict liability under the provisions of sections 36 and 59 of the repealed Act. He states: "The Defendant is not liable by virtue of agency or contract but the Road Traffic Act. The Defendant is not liable by virtue of master and servant relationship but by reason of sections 36 and 59 of the Road Traffic Act and Common Law. The Road Traffic Act has always protected third parties from risk like one in issue. The Defendant is at liberty to deal with Mr. Banda but the statute holds him liable.".

I take reference by counsel to "Common Law" to be referring to the court decision in the case of *McGreevy v. Sattar*, but that case essentially applied the two statutory provisions and therefore counsel has indeed based the plaintiff's claim on those provisions as he states in the quoted passage.

The language of the statute in sections 36 and 59 of the repealed Road Traffic Act is that a person is liable where he or she uses, or causes or permits to be used, on the road a motor vehicle contrary to the requirements of those provisions, that is, without the driver being a holder of an appropriate driving licence or without there being, in respect of that vehicle, appropriate insurance or other security cover for third party risks. The language of the two provisions is not about an owner whose motor vehicle has been used on the road in contravention of those provisions being liable for risks arising from such use, but it is about any person, whether an owner or not, who uses, or permits or causes to be used or driven, a motor vehicle in contravention of those provisions. This clearly calls for each case to be decided on its facts as to whether what the person has done amounts to causing or permitting such contravening or wrongful use of the motor vehicle for that person to be held liable; and to that extent, I disagree that the two provisions create strict liability, be it on the part of the owner of the motor vehicle or other person, in the sense advanced before me by counsel for the plaintiff.

The plaintiff's action based, as argued before me by counsel for the plaintiff in his revised submissions, on the liability under sections 36 and 59

of the repealed Road Traffic Act therefore fails as I am unable, on the facts of this case, to hold the defendant to a standard that his conduct amounted to permitting or causing the use of his car in contravention of those provisions.

I have considered the question of costs of this action and, taking the factor of the very long time of some ten years it has taken this case to come to judgment, my sense of justice is that each party is to bear its own costs, and I so order within the exercise of my judicial discretion as to ward of costs.

PRONOUNCED in open court at Lilongwe District Registry this 10th day of April, 2008.

E.M. SINGINI, SC

JUDGE