Kadawire v Ziligone and Another Civil Cause Number 1132 of 1995

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice J. Ndovie
Cause Number:	Civil Cause Number 1132 of 1995
Date of Judgment:	June 30, 1997
Bar:	Mr. Nkhama, for the Plaintiff Mr. Jamu, for the first and second Defendant

Head Notes

Law Of Torts - Negligence – Standard of care – Duty of care – Driver of motor vehicle owed duty of care to road users

Law Of Torts - Negligence – Breach of duty – Reckless and wanton over-speeding at a bend in traffic constituted a breach.

Damages - Motor Vehicle – Indemnity – Insurer of negligent driver was liable to compensate the injured party.

Damages -Personal injury – Assessment of damages – Quantum of damages must provide fair compensation for injuries.

Damages - Personal injury – Aggravating factors – Unenviable defendant demeanour and lack of remorse justify higher award

Summary

The Plaintiff, Mrs V Kadewere, brought an action in the High Court claiming damages for personal injuries, pain and suffering, disfigurement, and loss of amenities arising from a road accident. The suit was brought against the First Defendant, G Ziligone, for negligent driving, and the Second Defendant, National Insurance Company Ltd, as the insurer liable by way of indemnity. The background facts reveal that on 5 February 1994, the Plaintiff was struck by a fast-moving car driven by the First Defendant as she was crossing Ndirande Ring Road. The driver did not stop or render assistance. As a result of the impact, the Plaintiff sustained serious injuries including a fractured leg, deep lacerations, bruises, and a sprained hip, which left her with permanent disfigurement and a lasting disability.

At trial, the First Defendant did not dispute that an accident occurred or that he was driving on the road, but he denied his involvement in the accident or any liability. The Court, however, considered the evidence of the Plaintiff and two eyewitnesses, which established that the First Defendant's vehicle was the one involved and that its windscreen was shattered in the accident. The First Defendant's testimony was found to be inconsistent and unbelievable. The Court then had to decide whether the First Defendant was negligent and if the Plaintiff was entitled to damages. The action was allowed, and the Court found that the First Defendant had been negligent and had breached his duty of care to the Plaintiff by speeding and failing to drive with reasonable care given the existence of a bend, a stationary bus, and many people on the road. The Court concluded that there was a direct causal link between the Defendant's negligent driving and the Plaintiff's severe injuries. The Court ordered damages of K69,000 to be paid to the Plaintiff, noting that this sum was fair and reasonable compensation based on awards in similar cases. The Court further held that, as the First Defendant's insurer, the Second Defendant was liable to pay the

damages by way of indemnity. The Court awarded the Plaintiff costs for the action.

Legislation Construed

N/A

Judgment

The plaintiff's claim is for damages for personal injuries, pain and suffering, disfigurement and loss of amenities. These injuries arose out of a road accident which occurred near the Ndirande Flats on 5 February 1994 at about 6:30 pm. The accident was due to the alleged negligent and/or careless driving of the first defendant, G Ziligone. She also claims costs for this action. The second defendant is joined because the vehicle involved was insured with it and claims by way of indemnity to the first defendant.

The facts of this case can be shortly stated. On 5 February 1994 at about 06:30 pm, Mrs V Kadewere left her house to dispose of some garbage in a pit across Ndirande Ring Road near the Ndirande flats. As she was about to finish crossing the aforesaid road, she averred that she was suddenly hit by a fast moving car registration number BG 5856, Toyota Corolla saloon, which was being driven by the first defendant. The car was coming from the direction of B and C towards Ndirande township. On the impact Mrs Kadewere sustained serious injuries, namely a fracture of the left leg near the knee, a deep laceration on the forehead, and on the buttocks, bruises on her back and arm. She also sprained her hip. Another car stopped by her husband, quickly picked her up and took her to Queen Elizabeth Central Hospital where she was hospitalised.

The driver of motor vehicle registration number BG 5856, she further averred, did not stop after the accident nor did he render any assistance to her as an injured person. The accident happened soon after a bend, where there was a stationary bus with a lot of people around. These are the background facts.

At the trial it was not disputed that an accident did occur on 5 February 1994. It was also not disputed that the first defendant drove his car on the pertinent road on that day. What was disputed was that he was involved in a road accident in which Mrs Kadewere was the victim or any accident at all. By the same token it followed that his insurers were, therefore, not liable at all.

It is significant that both the first and second defendants were represented by Mr Jamu, a corporate lawyer, from the second defendant's company. What is further of paramount importance in this case is the fact that Counsel for the two defendants declined to make any written submissions as originally undertaken. This overture will be commented on later in this judgment.

Some three witnesses were called to prove the case. Mrs V Kadewere, the plaintiff, was PW1. She testified to the fact that on 5 February 1994 she had just returned from the Staff College at Mpemba, where she was attending an upgrading course. The city people had not collected refuse from the garbage bins. As this caused a health hazard, she decided, wisely so in my view, to go and throw away the garbage across the road. Her husband was following behind her. He stopped on the nearside of the road waiting for his wife. As she was about to throw away the refuse, she was suddenly hit by a very fast moving car which never stopped. She stated that the car hit her after she

had already crossed the road. She was on the offside of the road. She became unconscious after the impact. The following morning she realised that she was in Queen Elizabeth Central Hospital. She said that she noticed that she had a broken left leg near the knee, deep cuts on the forehead and on the buttocks, some bruises on her right arm as well as on her back. Her hip was also sprained. She was in the hospital for three months receiving injections and pain killers. Her fractured leg was in plaster of paris for a long period. After recovery she continued to attend hospital as an out-patient for physiotherapy exercises up to 24 September 1994. She further stated that before the accident she used to do some sports, she ran a business selling rice and second hand clothing. She can no longer discharge some domestic chores as she used to. For instance, she can no longer lift a heavy load because of the nagging pain in the hips. She can no longer kneel. The persistent pains in the back have affected her menstruation and as a result, she has abnormal periods. She also experiences some headaches following the bump on the forehead from the impact.

The second witness (PW2) was traffic constable number A3286, Mr Mwale. In February 1994 he was stationed at Urban Command, at Chichiri Police regional headquarters. Following up on a telephone call from Ndirande, he visited the scene of the accident. He found the plaintiff had already been taken to the hospital. The motor vehicle involved was not found at the scene. He stated that the registration number BG 5856 belonging to a Toyota Corolla saloon was given by the bystanders, specifically the husband of the plaintiff. He traced the motor vehicle, albeit after a long period. Upon being traced, it was duly established that the owner was Mr G Ziligone. He contacted him and the latter admitted having been involved in that accident on that day and at that place. He deposed to the fact that Mr Ziligone stated that he could not stop for fear of being beaten up by the mob. The first defendant made a caution statement in which he admitted that he was driving from the direction of B and C towards Ndirande

township. That when he reached near Ndirande flats, he saw a stationary bus with a lot of people disembarking and some boarding it. Immediately after passing the bus he failed to negotiate the corner because he was very fast or high speed. The witness stated that he saw some broken glass from the windscreen scattered at the offside of the road. He tendered in evidence an accident report. The motor vehicle had no windscreen upon being located at the taxi rank.

The third witness was Mr MS Kadewere, the husband of the plaintiff. He stated that he was following his wife when he saw a white saloon Toyota Corolla registration number BG 5856 hit her and throw her into the bush on the offside of the road. That the owner of the vehicle with registration number BG 5856 ran away. He tried to stop cars. Someone stopped and picked up the plaintiff and took her to the hospital. She was x-rayed. She had a broken left leg near the knee. On the buttocks was a deep wound and one on the forehead. The police came and visited the scene. The following day, 6 February, he submitted a statement at the Police Urban Command, Chichiri, in which he gave the particulars of the motor vehicle involved. Mr Longwe was the person who phoned the police on 5 February 1994. He too gave the registration number to the police. The motor vehicle was only traced after some days at the taxi rank. The windscreen of the vehicle was shattered in the accident.

The defendant vehemently disputed what the PW’s had said. He however, admitted that he owns a Toyota Corolla BG 5856. He said he bought it in October 1993 and sold it on 3 March 1996. He did not dispute that he had it on 5 February 1994. He argued that there were three other motor vehicles driving in the same direction at the scene of the accident. He stated that he was following a car in front of him. It was dark and around 6:30 pm. He further stated that the car in front of him hit a lady carrying

garbage. She fell to the nearside on the tarmac. He swerved avoiding the woman and stopped in front. He argued that the vehicle that hit the woman was travelling at a high speed. It never stopped. He argues that the car behind him stopped and took the woman to the hospital. People came with stones and sticks from beer drinking. They thought it was him that was involved in the accident. The other car in front had the windscreen broken. They rushed to that car. So the defendant drove off to Ndirande, then back to his house in Bangwe. He finally said that his motor vehicle was never damaged. He thereafter left for South Africa. When he came back, he found that his car had been impounded. He went to Police Urban Command and inquired why they had impounded his car. He was told that his car was involved in a serious accident on 5 February 1994. He made a statement and showed the police his insurance policy and his driving licence. He denied giving a statement to PW2, traffic constable Mwale. He said in cross-examination that he did not know the colour of the car that hit the plaintiff. He did not take the number of the car in front because he had no interest in the number. That basically was the defence case, since the defendant was the sole witness.

The court must now examine the law applicable to these facts. The law is that generally a driver owes a duty of care to other road users to drive with reasonable care. In the case of Western Scottish MT Co v Allan [1943] 2 All ER 742, the driver failed to exercise that duty of care and was held liable for the accident. In the present case, the evidence is that there was a bend and immediately after that bend was a stationary bus from which may people were disembarking. The first defendant should not have approached the bend in high speed. See Burgess v Osman (H) 3 ALR (Mal) 475 where it was held that proper speed is speed allowing the driver to stop within the limits of vision. By reason of the high speed, which I find as a fact, and the existence of the stationary bus and many people, he was forced to swerve to the offside where he

unfortunately hit the plaintiff. I, therefore, find that the first defendant failed to exercise the duty of care, thereby ramming into the plaintiff on the wrong side of the road at night when the limit of vision was clearly very short.

For an action in negligence to succeed, the plaintiff must show that (a) there was a duty of care owedto him; (b) that that duty has been breached; and (c) that as a result of that breach he has suffered loss and damage: Donoghue v Stevenson [1932] AC 562. The duty of care of a person who drives a motor vehicle on a highway is to use reasonable care to avoid causing damage to vehicles or property on the highway or on the adjoining highway. To the question whether the defendant owed the plaintiff a duty of care, the answer is no doubt in the affirmative. Equally to the question, did the defendant cause the accident, the answer is yes. I find it as a fact that, it was vehicle registration number BG 5856 that was involved in the accident. When located, vehicle registration number BG 5856 was found with the shattered windscreen in line with the witnesses' testimony. The registration number was quoted by Mr Kadewere and Mr Longwe, both of whom were eye witnesses. The question is, if that duty of care was owed, was it breached? If the plaintiff sustained serious injuries as alleged, were they as a result of that accident? Is the plaintiff entitled to damages as claimed? All these questions must be answered. The totality of the facts, evidence and the surrounding circumstances must be critically examined. In Limpus v London General Omnibus Co (1862) 1 H and C 526, the driver drove the omnibus across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. They did drive in that manner in order to prevent the other vehicle from overtaking him. The company had given him instructions not to obstruct any omnibus. The judge directed the jury that the master of the driver was responsible for the reckless and improper conduct of his servant in the course of his employment. The driver had acted recklessly, wantonly and improperly and was at fault. So too in the present case, I find as a fact that the

driver, the first defendant, had driven his car recklessly, improperly and wantonly at night and at a bend where there was a stationary bus with a lot of people about. By reason of speeding in these circumstances and at night, he was forced to swerve to the offside, where he hit the plaintiff. Clearly the defendant owed the plaintiff a duty of care. Lord Atkin in Donoghue v Stevenson (supra) stated that the rule that you are to love your neighbour becomes in law you must not injure your neighbour. And the lawyer's question, who is my neighbour, receives a restricted reply:

"you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to

injure your neighbour. Who, then is my neighbour? The answer seems to be persons who are so closely and

directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am

directing my mind to the acts or omissions which are called in question."

The court must determine whether there was sufficient proximity between the plaintiff and the defendant according to Lord Atkin's above formula. If the answer is in the affirmative, the court will find a duty of care. Unless there are other considerations which negate it or reduce or limit that duty, the court will find existence of such duty. The question of duty remains one of law for the judge. The test whether duty exists is that of foresight of a reasonable man. It is objective: Caparo Industrial PLC v Dickman 1990 1 ALR 668 (CA) is the authority, especially on the question of foreseeability. Foreseeability should be the guiding line when considering duty of care and injury caused in running down cases. Whether the injury to the plaintiff was a reasonably foreseeable consequence of the defendant's acts or omission is what is meant when, it

is asked whether a duty was “owed to” the plaintiff. Neighbours therefore are:

> “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation.”

In the present case, the driver should be taken to have reasonably anticipated that the plaintiff would be affected by his acts or omission which constituted the alleged breach. The test is objective. The court, therefore, rejects the driver’s explanation that he drove to the left hand side. The court also rejects his story that he stopped. He himself said he feared for his life from the mob which came with sticks and stones from their beer drinking place and he ran away. This is consistent with the evidence adduced by Mr Kadewere, traffic constable Mwale and Mr Longwe’s statement to the police. The police found some broken glass at the scene on the offside. In fact the defendant’s car was found with a shattered windscreen. These are very uncomfortable links which inexorably fix the first defendant with the liability. As it can be seen, the defendant was very evasive and showed no remorse at all. If anything he was demonstrably very contemptuous, to say the least. His demeanour in court was less than enviable.

The fact that the driver failed to stop in time to avert the accident is also in consonance with the fact that he was speeding. In the case of Rep v Sinambali 4 ALR (Mal) 191, 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. In deciding what is a reasonable speed, the courts have held that the nature, condition and use of the road in question, the amount of traffic actually on the road at the material time or which might be expected

to be on it, are matters which must be taken fully into consideration. In the present case, there was a bend; it was at night; there was a stationary bus with a lot of people alighting from and boarding the bus; and there were other cars both behind and in front of him. Above all, there was the plaintiff on the offside of the road. Taking all these factors fully into consideration and applying the objective test, the defendant, I find as a fact, was clearly at fault.

The court also finds that the driver was negligent. The burden of proof of negligence was squarely on the plaintiff. The plaintiff must show that the personal injuries and loss are attributable to the negligence of the defendant’s driving. The court in the present case is satisfied that the plaintiff has proved the existence of negligence or default to the requisite standard, ie on the balance of probabilities. The court also finds as a fact that there was direct nexus between the defendant’s driving and the accident in which the plaintiff sustained severe personal injuries.

Now it must be stressed that negligence comprises two main variables, namely (a) a breach of duty; and (b) damage suffered by the plaintiff. See Blundell v Rimiter [1921] 1 All ER 1072. The court in the present case finds that the driver breached the duty of care owed to the plaintiff and that the plaintiff suffered damage as a result. It is not in dispute that the accident occurred at Ndirande on 5 February 1994. That the driver was negligent is clearly proven. A vehicle travelling from the direction of B and C towards Ndirande could not have hit a person on the offside in the absence of negligence. When he saw a stationary bus with a lot of people around, he should have exercised extra care. He should have stopped or braked. The plaintiff was hit on the offside edge of the road. That this was as a result of negligence and over-speeding on his part is inescapable.

In Worsford v Howe [1980] 1 All ER 1120 a driver edged blind from a side road across stationary tankers and collided with a motor cyclist approaching on the main road passed the tankers. The Court of Appeal held that the defendant was negligent. Each case, however, must be treated on its own facts: Foskett v Humphrey [1984] LT 1.

"In running down claims, whether reasonable care had been taken, must be judged in light of all the facts of that particular incident. Citation of authorities could rarely be justified. It is a question of law whether the facts constitute sufficient evidence upon which to base a finding of fact that there was, in the circumstances, a breach of duty."

The facts and evidence of this particular case have sufficiently, in my view, proved a breach of duty. What remains to be said in this case is that the Counsel for the plaintiff supplied the court with written submissions. The Counsel for the defendants declined to remit written submission as already pointed out in this judgment. He had not made oral submissions either. The conclusion one makes of this scenario is that the defence by implication admitted all the allegations. This was not surprising, in my view, having regard to the fact that the defendant fared very badly in cross-examination. His testimony could not stand against the light of truth. So much for the proof of negligence and the breach of duty.

However, the court must decide on the question of indemnity by the second defendant. The motor vehicle, a Toyota Corolla saloon, registration number BG 5856 was insured with National Insurance Company Ltd, the second defendant. Since the

first defendant, the driver, has been found liable for breach of duty owed to the plaintiff and negligent in the manner of driving, which caused serious personal injuries to the plaintiff, the second defendant will be liable to pay damages by way of indemnity. In that behalf the insurer has to pay the damages and all the incidental claims directly to the plaintiff.

The court turns to the question of assessment of damages. In assessing damages for personal injuries, the court aims at a fair and reasonable compensation for the injuries the victim has sustained. The aims of an award of damages as Lord Hailsham LC in Cassell and Co Ltd v Broome [1972] 1 All ER 801 said:

"of the various remedies available at common law, damages are the remedy of general application at the present day, in actions for breach of contract and tort. They have been defined as 'the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract.' They must normally be expressed in a single sum to take account of all the factors applicable to each cause of action." (emphasis added)

It must be appreciated that in all actions of tort, the principle of restitution in the interim is an adequate and fairly easy guide to the estimation of damage, because the damage suffered can be, as already pointed out in this judgment, estimated by relation to some material loss. It has been stated by Happle and Mathews in their book on tort, Principles to policy of negligence that:

"in many torts the subjective element is more difficult. The pain and suffering endured, and the future loss of amenity, in a personal injuries case, (as in the present one) are not in the nature of things convertible into legal tender . . . nor so far as I can judge, is there any purely rational test by which the judge can calculate what sum, greater or smaller, is appropriate."

In all actions in which damages, purely compensatory in character, are awarded for suffering, from the purely pecuniary point of view, the plaintiff may be better off. The principle of tort compels the use of money as its sole instrument for restoring the status quo. This necessarily involves a factor larger than any pecuniary loss. Special damages denominate actual past loss precisely calculated and material damage actually suffered, like hospital bills, transport to and from hospital and the purchase of drugs etc.

This Court will adopt Lord Reid's rendering when considering damages for pain and suffering and of loss of amenity where he stated that:

"damages for any tort are, or ought to be, fixed at a sum which will compensate the plaintiff so far as money can do it, for all the injury which he has suffered."

For instance, where the injury is material and has been ascertained, it is generally possible to assess damages with some precision. This is, however, not true where he has been caused mental distress. It is almost impossible in those circumstances to equate the damage to a sum of money. There is a wide bracket in the judge's mind in which any sum could be regarded by him as not unreasonable. Different people will

come to different conclusions. So, in the end, there will probably be a wide gap between the sum which on an objective view could be regarded as the least, and the sum which could be regarded as the most to which the plaintiff is entitled as compensation. It has long been recognised that in determining what sum within that bracket should be awarded, a tribunal is entitled to have regard to the conduct of the defendant. He may have behaved, like in the present case, in a highhanded, malicious, insulting or oppressive manner in committing the tort and after. He or his Counsel may at the trial have aggravated the injury by what they there said. In this case both did that. It was apparent that they deliberately poured insult by deliberately putting blameworthiness on the plaintiff who was hit on the wrong side, as I have already found in this case, and who was not assisted as an injured person. That would justify to go to the top of the bracket and award as damages the larger sum that could fairly be regarded as compensation.

The medical report was exhibited. It showed that Mrs VM Kadewere suffered a fracture of the femur near the knee, multiple deep lacerations some of which have left ugly scars on the buttocks and the forehead, back and arm. She was admitted for nearly three months and thereafter continued to receive physiotherapy exercises up to about five months.

The question is has the plaintiff proved her case? The evidence to the effect that the defendant drove vehicle registration number BG 5856 on 5 February 1995 has not been controverted. Further, the fact that the defendant drove his car at a high speed is not in dispute. That he hit the plaintiff on the offside are areas of proof that convincingly indicate that the defendant was negligent. She has fully discharged her burden of proof on the balance of probability. She suffered the injuries alleged. These

are amply supported by the medical report. As regards her disfigurement, the court was able to physically and personally discern it in court.

Let me now turn to the question of relief sought. This Court finds on the facts and evidence of this case that she is entitled to the remedies as are consistent therewith: Stone v Smith [1887] 35 Ch 188. When computing the quantum of damages this Court will rely heavily on locally decided cases. The usual practice is to award damages for items such as pain and suffering, loss of earning capacity and loss of amenities. Thus in the case of Mpungula v Attorney–General Civil Cause No. 54 of 1993 (unreported), the court awarded K45 000-00 for pain and suffering for the plaintiff who remained in hospital for two weeks. It is significant that this case was decided in 1993 before the devaluation of the kwacha. In the present case the plaintiff was hospitalised for a period of three months and continued to attend hospital as an out-patient for about five months up to September doing physiotherapy exercises. She must have endured very excruciating pain.

What seems to be aggravating the damages here is that as a lady who was previously very presentable, active in sports, she is now completely and permanently disabled and disfigured. She has ugly scars on the forehead, buttocks, arms and back. These are not only disconcerting but also embarrassing. The majority of current cases have put awards in regard to similar injuries in the ranges of K60 000-00 upwards. See Siliya v Attorney–General Civil Cause No. 297 of 1992 (unreported), the plaintiff was awarded K65 000-00. In Lisunthi v Attorney–General Civil Cause No. 458 of 1994 (unreported), the plaintiff was awarded K70 000-00. Finally in the case of Namwiyo v Semu and two others Civil Cause No. 1336 of 1993 (unreported), the award for pain and suffering, loss of earning and loss of amenities was put at K100 000-00. In the

present case, K69 000-00 would appear to be a reasonable sum which, in my view, should fairly compensate the plaintiff. I so award her that sum. In that view I am fortified in the knowledge of the principle laid down in Avery v Miles [1964] AC 26 per Lord Diplock LJ who said:

"But since justice is not justice unless even-handed, so that one man gets roughly the same treatment from the courts as another in comparable circumstances, the courts are compelled to make pragmatic solutions. They have done so by fixing arbitrary standards of monetary compensation which are not susceptible of analysis. These standards have been evolved from such current consensus of damages-awarding tribunals as is manifested by amounts they have in fact awarded in broadly similar cases."

I also award the plaintiff costs for this action.