Mhango v Positi and National Insurance Company Limited Civil Cause Number: 1112 of 1990

Judgment

Court:	High Court of Malawi
Registry:	Principal Registry
Bench:	His Honourable Justice L Unyolo
Cause Number:	Civil Cause Number: 1112 of 1990
Date of Judgment:	December 08, 1995
Bar:	Mr. Mhango, Counsel for the Plaintiff Defendant unrepresented

On 24 November 1988, there occurred an accident along Blantyre-Lilongwe Road near the Ministry of Works Training Centre in the city of Lilongwe involving the plaintiff's car and the first defendant's pick-up. The two vehicles collided front to back and the plaintiff alleges that the driver of the pick-up, who was an employee of the first defendant, was negligent in the manner he drove the pick-up, hence the collision. The defendant denies the allegation and contends that the accident was caused solely, or alternatively, was contributed to, by the negligence of the plaintiff. The particulars of the alleged negligence are set out

by the parties in their respective pleadings.

I now move straight to the evidence. PW1 was the plaintiff himself. He told the court that having got a message on the material day that his uncle had passed away, he left Blantyre in his car, a Mercedes Benz, for Lilongwe where he would join some relatives and then proceed on to Karonga for the funeral. He was driving. He said that when he got to Lilongwe, he saw the pick-up going in the same direction. It was the plaintiff's evidence that he drove behind the pick-up for some distance and that when they came to a stretch, he decided to overtake. He said that he turned on the indicator, turned into the right lane and then accelerated to overtake. He said that as he was about to do so, the pick-up dashed into the right lane as well, without giving any warning or sign. He said that he immediately applied brakes and hooted to warn the driver of the pick-up who tried to get back to the left lane, but that this was too late, and the Mercedes Benz rammed into the back of the pick-up.

It was the plaintiff's evidence that at the time of the collision, the pick-up had just crossed the centre line by a few inches. In cross-examination, the plaintiff conceded that there was an access road in front, to the right. He stated that the said access road was, however, some distance away and that it was impossible to think the pick-up would turn to the right as it did, since the access road was still some distance away. The plaintiff also conceded in cross-examination that as a result of the impact, the pick-up was pushed off the road and it ended in the drain on the left side, facing the direction from which it was coming. The plaintiff tendered in evidence the sketch plan, exhibit P15, which the police drew at the scene shortly after the accident.

The plaintiff called three witnesses. Two of these gave evidence relating to the damage caused to the Mercedes Benz and the repairs done to it. For the moment, I want to deal with the evidence of the third witness, who gave his evidence as PW2. He was at the material time working for Bunda College of Agriculture as a driver. He told the court that on the relevant day he was driving from the College going to Lilongwe and that when he came to the main road, he saw the pick-up in front followed immediately by the plaintiff's car. He said that he followed the two vehicles for some distance up to the point of the accident. It was his evidence that before the accident, he saw the plaintiff's car giving a signal showing that it intended to overtake the pick-up and that as it began to do so, the pick-up also started going to the right. He said that the plaintiff braked and sounded the horn when he saw the pick-up turning back to the left and then he heard a bang. In cross-examination, the witness said that he did not see the pick-up giving any sign showing that it was turning to the right. The witness agreed that there is an access road near the place the accident occurred. According to him, the said road was, however, some distance away. Finally, the witness said that after the collision, the pick-up ended up blocking the left lane. He denied that it ended resting in the drain as stated by the plaintiff or as indicated in the sketch plan.

I now turn to the evidence called on the part of the defendant. Only one witness was called. I shall refer to him in this judgment as DW1. As earlier indicated, this was the person who was driving the pick-up on the material day. He told the court that he was driving from Dedza where he had gone in company of the defendant to buy Irish potatoes. He said that when they got to Lilongwe, they

had to branch to the Ministry of Works Training Centre in order to leave some potatoes there. It was the witness's evidence that when they approached the training centre, he checked in the mirror and saw the plaintiff's car coming some distance behind. He said that he then turned on the indicator to show that he was turning to the right, followed by a hand signal and that he then moved slightly to the right and then stopped a few metres before the access road to give way to a police vehicle which was coming in the opposite direction. It was his evidence that he was still stopped there, with the brakes on, when the plaintiff's car signalled that it was overtaking and then it came and rammed into the back of the pick-up to the right. He said that as a result of the impact, the pick-up was pushed off the road into the drain. It was his evidence that because the brakes were still on at the time, the tyres burst in the process. He said that the police vehicle stopped and after finding that nobody was injured, the officers went and brought a traffic constable who took measurements and asked the drivers to report to the police station the next day to give statements and show their driving licences.

Such was the parties' evidence as regards what happened on the material day.

It is unfortunate that the defendant did not testify in this case. As earlier indicated, he was in the pick-up at the time the accident occurred. His evidence would, therefore, have assisted the court to a great extent. The court was told that he was nowhere to be found, try as learned Counsel did, to find him. I must say that at first I found it difficult to believe this story, considering that Counsel continued to represent the defendant throughout the trial. It is to be noted, however, that the original writ was brought against two defendants, namely, the

defendant herein, as first defendant and the National Insurance Company (NICO) as second defendant. It is clear that it was NICO who brought in Counsel to represent them and the defendant. Later on NICO were discharged on the ground that the statement of claim did not disclose a cause of action against them. The matter did not, however, end there. In his subsequent amended statement of claim which cites the defendant as the only defendant in the matter, the plaintiff, apart from claiming damages against the defendants, also asks for a declaration that NICO are liable to satisfy any judgment that he may obtain against the defendant. We can, therefore, see why Counsel continued to appear in the case.

Several other material witnesses did not testify in this case. To start with, it was the uncontradicted evidence of DW1 that certain police officers in a passing vehicle witnessed the accident and then went to inform the traffic police about it. However, none of the said police officers was called to testify. Worse still, neither did the traffic constable who visited the scene and took measurements and drew the sketch plan tendered in court, testify. With regard to this particular officer, the court was told that he passed away; but it is not known why the others were not called. Again, on the same subject, it was the plaintiff's evidence that he had two passengers travelling with him on the material day. None of these was called to testify. Clearly, the court was deprived of what might have been very useful evidence.

Another mishap relates to the said sketch plan. The copy that was actually tendered in evidence by the plaintiff does not show any skid-marks on it. However, the copy that was passed to the court as the plaintiff gave his evidence, shows skid-marks on it as having been made both by the plaintiff's car

and the pick-up. There was no explanation offered for the difference between the two copies. After considering the matter carefully, I think that it is safe to rely on the copy with skid-marks thereon, because I think that it was common cause that the plaintiff did apply brakes before the collision. And as I have earlier shown, it was DW1's evidence that he too had engaged the footbrake at the time the pick-up was hit. Still on this point, I wish to add that I do not think that the officer who visited the scene and drew the sketch plan really knew his work; if he did, then he did not do a good job in the present case. I say this with all the respect to him. From the evidence adduced, there can be no doubt that the headlamps of the plaintiff's car and other parts were smashed when the car rammed into the pick-up. The broken glass must have been at the scene; but surprisingly the sketch plan does not show any.

I have given the matter much thought. First, let me say something about PW2. With the greatest respect, the witness did not appear to be dispassionate and I was not impressed by his demeanour. Further, as I have already indicated, the witness was contradicted on a very material fact by the evidence of the plaintiff himself in regard to the position of the pick-up after the accident. All in all, I think that it is safe to ignore the witness's evidence in its entirety.

This leaves me, in essence, with the evidence of the plaintiff and that of DW1, the driver of the pick-up. So the question is: whose evidence should the court accept? The first observation to be made is that DW1 came out firm in his evidence that his intention, just before the collision, was to turn right into an access road that leads to the Ministry of Works Training Centre. And it is to be noted that there is indeed such a road about the place the accident occurred.

Actually, there is no dispute on this particular point. And it is to be noted from the sketch plan that there is indeed such a road.

I have recounted the evidence of the parties, that of the plaintiff and that of DW1. Just to recap, the plaintiff said that the access road was still some distance away when DW1, suddenly and without warning, moved into the right lane and then the collision occurred. On the other hand, DW1 said that he had actually come to the access road when he moved to the right a little, just a little over the centre line, and stopped to give way to an oncoming police vehicle before he could then turn into the access road. With respect, I am inclined to prefer DW1's evidence to that given by the plaintiff.

To start with, it doesn't sound plausible to me that the first defendant's driver would have turned into the right lane, a long distance before he came to the access road. Indeed, no reason was suggested why DW1 would have done so. Secondly, DW1's evidence, to the effect that the collision occurred at a point close to the access road, seems to be supported by the sketch plan. It is noted that the skids made by the pick-up started from the centre of the main road, very close to the mouth of the access road. Incidentally, the said skid-marks also confirm DW1's evidence that the brakes were on at the time the pick-up was hit. It is to be observed on this aspect that DW1 emerged uncontradicted in his evidence that the tyres of the pick-up burst as the pick-up skidded off following the collision. I would also find it difficult to accept that if the pick-up had been hit a long distance from the access road, it would have travelled all that long distance to where it finally rested.

Let me pause here and say something about the law. It is trite that a driver has a duty to use reasonable care to avoid causing damage to other road users or vehicles. Reasonable care has been defined as such care as an ordinary skilful driver would have exercised in the circumstances of the particular case. And on a more relevant note, it is the duty of a driver who wishes to overtake any vehicle to ensure that it is safe to do so; see Nicholson v Lennard 8 ALR (Mal) 364. In this context, the words of Roskill J in Clark v Wakelin (1965) 109 SOL JO 259, are apt. The learned Judge observed:

"A driver is entitled to assume he could overtake without danger if what he is overtaking gave not the slightest sign that it was going to do something other than what another ordinary careful motorist might expect."

On the same issue, it is to be noted that a driver should not overtake at or when approaching a road junction; see Highway Code, paragraph 47.

Still on the law, it has been held, on the other hand, that a driver who intends to turn right across the road has a duty to look out for traffic not only in front of him but also behind him, in particular, immediately before he makes the turn; see Somani v Ngwira 10 ALR (Mal) 196. It was also observed in that case that this duty is the greater when such driver already knows that there are vehicles behind him.

I have made significant findings of fact in the present case. In short, I have found that the pick-up had stopped in the centre of the road, slightly to the right, when the plaintiff's car rammed into it. On these facts, I cannot see how DW1 can be faulted. As regards the plaintiff, it is to be observed, in addition to what I have said earlier, that a driver of a vehicle has a duty to always keep a proper lookout and to drive at such a speed as would allow him to stop well within the distance he can see to be clear. Further, a driver of a vehicle has a duty, when following another vehicle, to allow sufficient space between the vehicles in which to be able to stop safely if the vehicle in front slowed down or stopped suddenly. And again, as I have pointed out, a driver should not overtake, or attempt to overtake, at or when approaching a road junction. As I understand the evidence in the present case, the plaintiff failed in his duty in all these matters, hence the collision. I sympathise with the plaintiff, considering the misfortune that had befallen him on the material day.

All in all, I find that the plaintiff has not proved his case against the first defendant, and the action is accordingly dismissed.

I will make no order as to costs, since the first defendant, as I have indicated, did not appear at the hearing of this case.