

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO.273 OF 1987

BETWEEN:

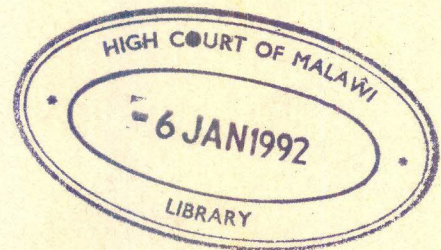
CHRISTINA BANDA AN INFANT BY  
H.T. BANDA HER NEXT FRIEND ..... PLAINTIFF

AND

ADMARC ..... 1ST DEFENDANT  
L.M. BANDA (MALE) ..... 2ND DEFENDANT

CORAM: BANDA, J.

Nakanga, Counsel for the Plaintiff  
Sidik, Counsel for the Defendant  
Chigaru, Court Interpreter  
Phiri, Court Reporter



JUDGMENT

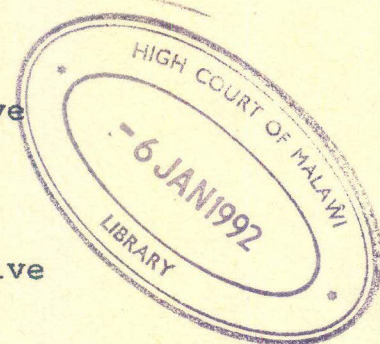
The first plaintiff is an infant and she is suing by her brother, her next friend. This is an action for damages in negligence.

It is alleged that on or about the 25th September, 1986 the infant plaintiff was lawfully walking along the Limbe/Machinjiri Road towards Machinjiri when, at Jumbe Bus Stop, the defendant's servant or agent so negligently drove, managed and controlled the defendant's motor vehicle along the said Machinjiri Road that he caused the vehicle BF 9361 to violently collide with the infant plaintiff. The particulars of negligence are set out in the statement of claim as follows:-

- (a) Driving at a speed which was too fast in the circumstances.
- (b) Driving on the wrong side of the road.
- (c) Driving in the path of the infant plaintiff.
- (d) Failing to keep any or any proper look-out or to have any or any sufficient regard for pedestrians on the said road.
- (e) Failing to see the infant plaintiff in sufficient time to avoid colliding with her or at all.



- (f) Failing to give any or any adequate warning of his approach.
- (g) Failing to heed the presence of the infant plaintiff in the said road.
- (h) Failing to stop to slow down to swerve or in any other way so to manage or control the said car as to avoid colliding with the infant plaintiff.
- (i) Driving the said vehicle with defective breaks.



The defendants deny any negligence and have contended that the accident occurred solely because the infant plaintiff herself was negligent. The only eye-witness to the accident was not able to tell the Court how the accident occurred.

PW.2 is a lady who was within the vicinity of the scene of the accident. She knows the infant plaintiff because they live in the same area and the witness goes to the same church as the parents of the plaintiff. It was the evidence of this witness that she saw the infant plaintiff and her brother coming towards her with loads on their heads. Later on she saw a motor vehicle coming from the same direction as the infant plaintiff and that afterwards she saw a cloud of dust and the loads which the children were carrying scattered on the road. She stated that after the dust had settled down she saw the plaintiff lying on the road. She stated that the motor vehicle stopped at some distance and reversed to the scene of the accident. It was the evidence of this witness that she informed the parents of the plaintiff and went back to the scene of the accident and accompanied the driver of the vehicle to the Queen Elizabeth Central Hospital where the plaintiff was taken. This witness stated that the motor vehicle was going very fast and she was able to say that because of the sound of the wind which she said was making a lot of noise. She stated that the plaintiff, in fact, when she first saw her, was walking on the right side of the pavement towards Nkolokoti from Limbe.

It was agreed by both parties that the distance from the point of impact at Jumbe bus stop to where the vehicle stopped was 135 yards. The accident happened about noon. The witness stated that she did not see how the accident happened and that she was surprised to see the child lying on the middle of the road on the right hand side of the vehicle. The witness could not say which side of the vehicle had hit the plaintiff. The witness could not say whether the infant plaintiff was crossing the road except to suggest that it was unlikely for her to cross the road at that spot because the plaintiff's houses were further down the road. From the sketch plan, which was drawn when the Traffic Constable went to the scene, it is shown that the motor vehicle was moving on its correct side of the road and certainly there is no evidence by PW.2 to suggest that the motor vehicle was moving on the wrong side of the road.



The evidence of the plaintiff herself was brief. She stated that she could not remember how the accident happened. All she could remember is that she gained consciousness and discovered that she was at the Queen Elizabeth Central Hospital. She did narrate the story of having gone to Limbe to collect sawdust up to the time when she reached Jumbe stage. She stated that the bag of sawdust which she was carrying on her head was blocking her vision and that she could not see sideways. She stated, though, that before she started crossing the road she looked both sides of the road and that there was nothing coming.

The evidence of the boy who accompanied the infant plaintiff and who was also carrying a bag of sawdust was that he did not see how the accident happened; all he saw was a cloud of dust and later on saw the infant plaintiff lying on the ground. After the accident the body of the plaintiff was found lying on the white dotted line and the point of impact is shown as being on the middle of the left-hand side lane of the carriageway towards South Lunzu. The distance between the point of impact and where the body was found lying is 3.6 metres. There can be no doubt, therefore, that the accident occurred on the correct side of the motor vehicle travelling towards South Lunzu. According to the evidence of the Traffic Constable who visited the scene of the accident, the motor vehicle was damaged on the off-side mudguard, which was bent. He also stated that the front number plate was also damaged.

The second defendant's evidence was that on the particular day he was engaged in making deliveries and that he had come from Ngabu. That having made those deliveries at the Regional Office and at the Head Office of ADMARC he proceeded to Nkolokoti to the house of his boss and that as he reached Jumbe stage, which was near his destination, he indicated that he was going to turn to his left. He stated that suddenly he heard something hitting his car and a cloud of dust erupted. He stopped to see what had caused the cloud, only to discover that there was a girl lying on the ground. He said he picked the girl and took her to the Queen Elizabeth Central Hospital. He admitted that his motor vehicle had insufficient brakes which only became effective after pumping twice or three times. He stated that he was not driving very fast because he was near to his destination and he was about to turn. He says he did not see the plaintiff as the accident, according to him, happened at the back of the car. He said he had seen people walking on the side road. He stated that had he seen the infant plaintiff in front of him he would have stopped. He said he saw people walking on the dirt road and that there was no one walking on the tarmac. His evidence was that the infant plaintiff came running and hit the car at the back. His evidence is that he was travelling between 30 and 35 mph; he was slowing down to turn to where he was going.

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 skilful driver would have exercised under all the circumstances. A reasonably skilful driver has been defined



as one who avoids excessive speed, keeps a good look-out, observes traffic signs and signals. A pedestrian also owes a duty of care to other road users to move with due care. Although a pedestrian is entitled to walk along the carriageway, he is only entitled to the exercise of reasonable care on the part of drivers of motor vehicles.

I have carefully reviewed the evidence in this case and have considered the arguments which both counsel have advanced on behalf of their respective clients. As I have already indicated earlier in this judgment, there was no single witness who could testify to how the accident actually happened. I have carefully evaluated the evidence of PW.2 when she stated that the motor vehicle was running very fast. The basis of her opinion was that the sound of wind was very fast. It seems to me that that cannot form a basis on which speed of a vehicle can be determined. There can be no doubt, in my judgment, that the defendant's driver was driving on his correct side of the road and I am satisfied that he was not speeding.

How then did the accident happen? The infant plaintiff herself stated that the bag of sawdust which she carried blocked her vision and could not see sideways. It is clear from the point where blood was found that the infant plaintiff had started crossing the road and as the vehicle was passing she must have, with her vision blocked, started running and in the process hit against the vehicle which was passing by. There is no evidence, in my judgment, to show that the defendant's driver saw or could have seen the infant at that point. The damage to the off-side mudguard is consistent with the suggestion that the infant child hit against the vehicle. While a pedestrian is entitled to walk along the carriageway, he is only entitled to the exercise of reasonable care on the part of drivers of vehicles. If, therefore, there is a pavement or a suitable foot-path the driver of the motor vehicle driving at a reasonable speed can keep a proper look-out and may reasonably expect that a pedestrian who is not crossing the road will be walking on the foot-path. The evidence of the driver, and it has not been contradicted, was that he saw people walking on the side of the road. Nobody was on the tarmac. It is true that there is evidence to show that the motor vehicle had insufficient brakes but I am satisfied that was not the cause of the accident. I am satisfied, in my judgment, that there is no evidence to show that the driver failed to exercise reasonable care when he was driving the motor vehicle on that day. The onus is on the plaintiff to prove that the defendant, through their servant, had failed to exercise due care.

In the circumstances I find that the plaintiff's claim has not been proved on a balance of probabilities and I would dismiss it with costs.

PRONOUNCED in open Court this 24th day of December, 1990 at Blantyre.

  
R.A. Banda  
JUDGE