



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**



CIVIL CAUSE NO 294 OF 2014

BETWEEN

**PATRICK SEMBA (suing on behalf of
FATIMA BANDE, Deceased) PLAINTIFF**

AND

DAVIE CHAIMA 1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. A. Mussa, of Counsel, for the Plaintiff

Defendants, absent

Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

The Plaintiff is claiming damages for personal injuries that she sustained in a road accident. The Defendants resist the action.

The Statement of Claim is brief and it is as follows:

- “1. *The Plaintiff brings this action on his own behalf and on behalf of other beneficiaries of the estate of Fatima Bande, the deceased.*
2. *The 1st defendant was at all material times the driver of Motor Vehicle Registration Number BR 1791 Toyota Hiace Minibus and the 2nd Defendant is being sued pursuant to the provisions of Section 148(1) of the Road Traffic Act as the insurer of the aforesaid Motor Vehicle.*
3. *On or about the 08th February, 2014 at about 09.00 hours, the 1st defendant was driving the said motor vehicle from the direction of Bangula heading towards*



Ngabu when upon arrival at Nyaikha village, he negligently permitted or caused the motor vehicle to violently hit the deceased who was lawfully crossing the road from right to left as a result the plaintiff sustained serious injuries and later died whilst receiving treatment at Chikwawa District Hospital.

4. *The accident occurred or was caused by the negligent driving of the 1st defendant.*

Particulars of Negligence

- (a) Driving at an excessive speed in the circumstances*
 - (b) Failure to keep any or any proper lookout*
 - (c) Failing to brake, to stop, to slow down, to swerve or in any other way so as to avoid the accident.*
 - (d) Failing to manage or control the motor vehicle so as to avoid the accident.*
 - (e) Driving the motor vehicle without regard to other road users especially the plaintiff*
 - (f) In so far as is applicable or, the plaintiff's will rely on the doctrine of res ipsa loquitur*
5. *In further alternative, the plaintiff will place reliance on the admission made by the 1st defendant of the charges of causing death by reckless driving contrary to Section 126(2) of RTA and paid a statutory fine of K5,000.00 under GR 762381.*
6. *As a result of the accident, the plaintiff suffered serious injuries and has suffered loss and damage.*

Particulars of loss and damage

- (a) Loss of dependency*
- (b) Loss of expectation of life*
- (c) Funeral expenses*

And now the Plaintiff claims:

- (a) Damages for loss of expectation of life*
- (b) Damages for loss of dependency*
- (c) Funeral expenses*
 - (i) Police report K5,000.00*
 - (ii) Death report K5,000.00*
- (d) Costs of the action"*

The Defendants contest the action and, accordingly, a defence was filed. The Defendants deny each and every allegation of fact contained in the Statement of Claim. The Defendants specifically deny that (a) the 2nd Defendant was an insurer of Motor Vehicle Registration Number BR 1791 Toyota Hiace Minibus (Minibus), (b) the accident was caused by the alleged or any negligence on the part of the Defendants. Further, the 2nd Defendant pleads that (a) its liability, if any, is subject to the owner of the Minibus (if he is proven to be the 2nd Defendant's insured) "*being found liable for the Plaintiff's injuries*" resulting from the use of the Minibus and (b) its liability, in any, is limited to indemnify the owner of the Minibus to the maximum liability contained in the insurance between itself and the owner of the Minibus which limit is K5 million and no more.

It is trite that a claimant has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**. It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities that Fatima Bande (Deceased) died as a result of the accident which was caused by negligence of the 1st Defendant: see **B. Sacranie v ESCOM, HC/PR Civil Cause No. 717 of 1991 [unreported]**.

The one and only witness for the Plaintiff's case was the Plaintiff himself. He adopted his Witness Statement and this formed his evidence in chief. His evidence is similar in material respects to the averments in the Statement of Claim. I will not, therefore, give a recount of the evidence save to mention that the Plaintiff tendered a police report and a death report the same were marked as Exhibits P1 and P2 respectively. The Defendants and their legal practitioners being absent, there was no cross-examination of the witness and this marked the Plaintiff's case.

The case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done"

For an action in negligence to succeed, the plaintiff must show that (a) there was a duty of care owed to him or her; (b) the duty has been breached; and (c) as a result

of that breach he or she has suffered loss and damage: see **Donoghue v. Stevenson [1932] AC 562** quoted with approval by Ndovi J., as he then was, in **Kadawire v. Ziligone and Another [1997] 2 MLR 139** at 144.

In **Banda and Others v. ADMARC and Another [1990] 13 MLR 59**, Justice Banda, as he then was, stated the duty of care owed by a driver of a motor vehicle 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 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, and observes traffic signs and signals.”

Further, the case of **Mhango v. Positi and National Insurance Company Ltd [1995] 2 MLR 402** is for the proposition that a driver of a motor vehicle has a duty to always keep a proper look out and to drive at such speed as would allow him to stop well within the distance he can see to be clear. This means that a driver of a motor vehicle must, among other matters, avoid driving at excessive speed: see **Mponda v. Air Malawi Limited and another [1997] 2 MLR 131**. Furthermore, it is a driver’s duty to drive at a speed which will allow him to stop in case of sudden emergency. In deciding reasonable speed, the courts will have regard to the nature, condition and use of the road in question, the amount of traffic on the road at the material time or which might be expected to be on it: see **Kadawire v. Ziligone and another, supra**.

I have considered the evidence herein and it is my finding that the 1st Defendant breached duty of care in that he was over-speeding and he did not keep proper lookout and, consequently, he failed in his duty of having due regard for other road users. There being no evidence from the Defendants, the Plaintiff has, on a balance of probabilities, succeeded in his claim for damages, funeral expenses and costs of this action, as pleaded. I thus find the Defendant wholly liable. I, accordingly, enter judgment in favour of the Plaintiffs and order that the collateral issue of assessment of damages be dealt with by the Registrar.

Pronounced in Court this 11th day of May 2017 at Blantyre in the Republic of Malawi.


Kenyatta Nyirenda
JUDGE