IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 894 OF 2015

BETWEEN:

LOVEMORE CHILENGA	**PLAINTIFF**
AND	
ANDREW RAJAB	**1st DEFENDANT**
PRIME INSURANCE COMPANY LIMITED	**2nd DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Domasi, Counsel for the Plaintiff
Banda, Counsel for the Defendants
Kakhobwe, Official Court Interpreter

JUDGMENT

This is this court's judgment following a trial of this matter on the plaintiff's claim for damages for loss of expectation of life of his deceased nephew in this matter and for loss of dependency on the said deceased nephew who was killed when the motor vehicle allegedly negligently driven by the 1st defendant and insured by the 2nd defendant hit and killed the deceased.

The defendants denied the allegation of negligence.

The matter went to trial and the deceased's uncle testified as the only witness for the plaintiff. The defendants did not bring any witness.

The facts of this uncontested matter are not complicated. On 7th September 2015, the plaintiff was near Ntaja filling station along the Umbwa-Ntaja road.

The plaintiff's nephew, now deceased Owen Phiri, was cycling coming from the direction of Umbwa heading towards Ntaja and behind him was the motor vehicle driven by the 1st defendant.

The deceased signaled that he would be turning right off the road and it is at that point that the 1st defendant drove the car and hit the deceased causing him to fall and subsequently die from his injuries.

It appears to this Court that if the 1st defendant had paid attention to what was going on in front of him, he would have noted the deceased's signaling and would have taken appropriate action to slow down and let the cyclist to turn off the road to the right.

In the circumstances of this case, the plaintiff cited the correct law on negligence in road traffic cases. That law is summarized in the case decided by the Supreme Court of Appeal and which is reported as *Southern Bottlers Limited and another v Commercial Union Assurance Company plc* [2004] MLR 364 (SCA). In that report of the case the Supreme Court of Appeal said, at page 370-371, that

> It is indeed trite law that an action founded upon negligence is based on the conception of a duty of care which one person owes to the other person. Respecting a driver of a motor vehicle, in *Banda and others v ADMARC* and another [1990] 13 MLR 59 and 63, Banda J as he then was, put that duty as follows:
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> "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 skillful driver would have exercised under all the circumstances. A reasonably skillful driver has been defined as one who avoids excessive speed, keeps a good look – out, observes traffic signs and signals."
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> On his part, Mtegha J, as he then was, in *Kachingwe v Mangwiro Transport Motorways Company Limited* 11 MLR 362 and 367, put it as follows:
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> "Perhaps it would be prudent here to state briefly the duty of care which a driver of a motor vehicle owes to property adjacent to the road and to other road users. I cannot do better than to Quote the words of Lord Macmillan in *Hay [or Bourhill] v Young* [1943] AC 92 when he said at 104

'What duty then was incumbent on him? . . . The duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway . . . Proper care connotes avoidance of excessive speed, keeping a good look – out, observing traffic rules and signals and so on . . . There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree.'

It is a duty of a person who drives a motor vehicle on a highway to use reasonable care to avoid causing damage to persons and other vehicles or property on or adjoining the road. It has been further stated that reasonable care means care which an ordinary skillful driver could have exercised under all the circumstances."

Lastly, but not least, we would like to refer to the applicable law, on the point, as was enunciated by this Court in *Yanu Yanu Company Limited v Mbewe [PB] and Mbewe [MM]* 11 MLR 405, 408–410:

"We feel that learned Counsel has misunderstood the law. It is accurately stated in *Nance v British Colombia Elec Ry Co Limited* [2] per Viscount Simon. He states [1951] AC at 611:

'. . . The statement that when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.'

This Court has to determine whether in the circumstances of this matter the 1st defendant driver exercised the skill required of him in driving the motor vehicle herein to avoid hitting the plaintiff's nephew herein.

The plaintiff submitted that the 1st defendant driver was negligent because he failed to exercise reasonable care having failed to notice his nephew's signal that he was turning off the road to the right and then hitting the plaintiff's nephew with the motor vehicle.

This Court is satisfied that the 1st defendant drove his motor vehicle in such a manner that he breached his duty of care to the plaintiff's nephew. This is because the 1st

defendant failed to notice the plaintiff's nephew's signal that he was turning right off the road in front of the 1st defendant.

If the 1st defendant had noted the signal of the plaintiff's nephew's signal, he would have slowed down to allow the plaintiff's nephew to turn off the road on his bicycle and then drive safely without harming the plaintiff's nephew.

Upon hitting the plaintiff's nephew the plaintiff's nephew eventually died from his injuries. The 1st defendant therefore caused the death of the plaintiff's nephew which resulting in the loss that the plaintiff is claiming in this matter.

The plaintiff's claim for his nephew's loss of expectation of life and for the loss of dependency on the nephew therefore succeeds as against the 1st defendant as driver of the motor vehicle and as against the 2nd defendant who is the insurer of the motor vehicle in issue.

Damages are therefore awarded to the plaintiff as against both defendants and the same shall be assessed on a date to be appointed by the Registrar. This includes special damages sought.

Costs normally follow the event and shall therefore be for the successful plaintiff to be similarly assessed by the Registrar.

Made in open court at Blantyre this 12th November 2018.

M.A. Tembo
JUDGE