



IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CIVIL CAUSE NO. 116 OF 2016



BETWEEN

ATUPELE MWAKIHANA(Suing on his own behalf and on behalf of all the dependants of
MEANFORD MWAKIHANA).....CLAIMANT

AND

SIKU TRANSPORT LTD. 1ST DEFENDANT

REAL INSURANCE CO. LTD. 2ND DEFENDANT

CORAM: **Honourable Justice T.R. Ligowe**
 G. Kadzipatike, Counsel for the Claimant
 K. Wawanya Dosi, Counsel for the Defendant
 F. Luwe, Official Interpreter
 J. Chirwa, Recording Officer and Court Reporter

JUDGMENT

Ligowe J,

- 1 The plaintiff suing on his own behalf and on behalf of dependants of Meanford Mwakihana (deceased) brought this action by way of a writ of summons claiming damages for wrongful death and loss of expectation of life, damages for loss of dependency, K3000 the cost of a police report and costs of the action. He stated in the statement of claim that Meanford Mwakihana was on or about 20th August 2015, a passenger on an ERF truck registration number SA 7996/ SA 6773 belonging to the 1st defendant and insured by the 2nd defendant. The truck was being driven by Mathews Kaliwa from Wiliro Chinese Road and Bridge Construction Camp towards Karonga. He was at that time employed by the 1st defendant as a driver. The driver so negligently drove the truck at an excessive speed that upon arrival at Tenenthe Hills,

he failed to negotiate a nearside bend and overturned on the extreme offside of the road. Meanford Mwakihana died from severe head injuries and multiple fractures.

- 2 In their defence, the defendants do not dispute being the owner and insurer of the said ERF truck. The 1st defendant does not dispute being the employer of the said Mathews Kaliwa (also deceased) as a driver and that he was driving it in the course of his duties. The defendants however state that Meanford Mwakihana was an unauthorised passenger. They also deny allegations of negligence against the driver as the cause of the accident and Meanford Mwakihana's death. Thus they deny the plaintiff's claim for damages and costs.
- 3 At trial this court heard evidence from Atupele Mwakihana, a brother to the late Meanford Mwakihana. We also heard evidence from Assistant Superintendent Christopher Chimatiro, the Station Traffic Officer at Karonga Police station at the time the accident occurred and the one who investigated the matter. On the part of the defendant we heard evidence from Martin Juma, Human Resources Manager for Siku Transport Limited and Mike Balawe, the branch Supervisor for Britam in Mzuzu formerly Real Insurance.
- 4 It was clear from the evidence given by both sides that the facts of the case are not in dispute. The late Mathews Kaliwawas employed by Siku Transport Ltd and was driving ERF truck registration number SA 7996/ SA 6773 on the material day, in the course of his duties. The truck was involved in an accident at which several people died including the driver himself and Meanford Mwakihana. The accident was caused by the driver's negligence by driving excessively fast considering the slope and the bend of the road and that he had carried metal pipes and people on the truck. The driver was under specific instructions not to carry passengers on the truck and the truck had a label to that effect. The policy of insurance of the truck between the 2nd defendant and the 1st defendant excluded the carrying of passengers from cover as it was insured as a goods carrying vehicle. The policy Mr Mike Balawe exhibited however, does not exclude passengers. It stipulates limitations as to use in the following terms:-

“Use only for social domestic and pleasure purposes and for the insured’s business. The policy does not cover use for hire or reward or for racing pace making reliability trial speed testing or use for any purpose in connection with the motor trade.”

Honestly, there is nothing in this clause excluding the use of the vehicle for carrying passengers.

5 Be this as it may, this action was brought against the 2nd defendant directly on the basis of section 148 of the Road Traffic Act which provides:

“(1) Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued for the purposes of this Part shall be entitled in his own name to recover directly from the insurer any amount, not exceeding the amount covered by the policy, for which the person insured is liable to the person having the claim:

Provided that—

(a) the rights of any such person claiming directly against the insurer shall, except as provided in subsection (2), be not greater than the rights of the person insured against such insurer;

(b) the right to recover directly from the insurer shall terminate upon the expiration of a period of two years from the date upon which the claimant’s cause of action against the person insured arose; or

(c) the expiration of such period as is mentioned in paragraph (b) of this proviso shall not affect the validity of any legal proceedings commenced during such period for the purpose of enforcing a right given under this section.

(2) In respect of the claim of any person claiming directly against the insurer by virtue of subsection (1), any condition in a policy purporting to restrict the insurance of the person insured thereby shall be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of the operation of this subsection may be recovered by the insurer from that person.”

6 Counsel for the claimant has argued that in view of subsection (2), the exclusion clause the 2nd defendant would like to rely on has no effect with respect to a claim by a third person. Counsel has cited the case of *Chingaipe and another (F Chingaipe Next friend) v. National Insurance Co. and another* [2000-2001] MLR 94 where the interpretation of subsection (2) was in issue. The court held that an insurer cannot disclaim liability on the basis of any exclusion in the policy of insurance with the insured in view of subsection (2). The exclusion is as between the insurer and the insured and it does not affect a third party. Justice Kapanda stated at page 100:-

“In my opinion section 148 is intended to offer third party protection. The Legislature’s intention is that third parties should be entitled to enjoy the benefit of compulsory third party protection conferred by statute. The insurer’s remedy is to recover from the person insured the amount paid to the third party.”

7 I entirely agree. Mr Mike Balawe actually exhibited a third party insurance policy.

8 In the circumstances I hold the 2nd defendant liable to pay the damages claimed plus costs of the action. All issues that the late Meanford Mwakihana was an unauthorised passenger or that the truck needed not carry any passenger at all, should according to section 148(2) of the Road Traffic Act, be dealt with as between the 2nd defendant and the 1st defendant.

- 9 One important issue to mention regarding the manner the present action was brought is that the Statute Law (Miscellaneous Provisions) Act in section 4 allows an action to be brought by and in the name of the executor or administrator of the deceased person, against the person who causes the death by negligence or default. This action is for the benefit of the wife, husband, parent and child of the deceased person. Child is defined in section 2 as a son, a daughter, a grandson, a granddaughter, a stepson and a stepdaughter. Parent is also defined as a father, a mother, a grandfather, a grandmother, a stepfather and a stepmother. The court will award damages proportionate to the injury suffered, as a result of the death, by the people in respect of whom the action has been brought. And will divide the damages among the people in such shares as by its judgment shall find and direct.
- 10 If there is no executor, section 7 states that the action may be brought by and in the names of all or any of the persons for whose benefit the action would have been brought.
- 11 I have noted Atupele Mwakihana is not an executor or administrator as the capacity in which he commenced the action was not disclosed in the statement of claim. No probate or letters of administration or letters of administration were exhibited to show that he is either an executor or administrator. He is actually a brother of the deceased, and not entitled to benefit from the action.
- 12 This is a thing that should have been picked by the parties at the very beginning. I will however, allow the matter to proceed as this is now the end of the proceedings. I direct that as the Registrar will be assessing the damages, the parties should ensure the rightful beneficiaries benefit from this action.
- 13 Made in open court this 11th day of April 2018.


T.R. Ligowe
JUDGE