



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 557 OF 2020**

**BETWEEN:**

**LEVI JUMBE**

**1<sup>st</sup> CLAIMANT**

**WONDERFUL KANTHALO**

**2<sup>nd</sup> CLAIMANT**

**AND**

**MAJID MAKAWA**

**1<sup>st</sup> DEFENDANT**

**GENERAL ALLIANCE INSURANCE LIMITED**

**2<sup>nd</sup> DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Master, Counsel for the Claimants  
Dzimphonje, Counsel for the Defendants  
Mankhambera, Official Court Interpreter

**JUDGMENT**

1. This is this court's judgment following a trial of this matter on the claimants' claim for damages for the personal injuries they had suffered due to the alleged negligence on the part of the 1<sup>st</sup> defendant, who is the 2<sup>nd</sup> defendant's insured, in the manner he drove his motor vehicle resulting in the motor vehicle hitting the claimants who rode a bicycle along the Zomba-Machinga road from the direction of Zomba CBD towards Chinamwali.

2. The claimants testified at the trial of their claim and so did the defendants. Both parties filed written submissions after the trial.
3. The claimant's statement of claim indicates that, on 3<sup>rd</sup> June, 2020, the 1<sup>st</sup> defendant was driving his motor vehicle from the direction of Chinamwali towards Zomba CBD when upon arrival at Naminyowe Villa he hit the claimants who were cycling in the opposite direction.
4. The defendants deny that the 1<sup>st</sup> defendant was negligent as alleged. They asserted that the 1<sup>st</sup> claimant who was cycling, and carried the 2<sup>nd</sup> claimant as a passenger, wholly contributed to the accident by not taking precaution for his own safety.
5. The issue for determination before this Court is whether the 1<sup>st</sup> defendant was negligent in the manner he drove his vehicle herein resulting in him hitting the claimants.
6. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by the parties. And, the burden of proof lies on he who asserts the affirmative, in this case the claimant. The defendants bear the burden of proof on their claim of contributory negligence on the part of the 1<sup>st</sup> claimant. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
7. The parties correctly submitted on the duties of a driver of a motor vehicle on the road, which if breached, result in the driver being held liable for negligence and the resultant damage caused by such negligence to those other road users to whom the driver owed the said duties. See *Banda and others v ADMARC and another* 13 MLR 59, *Chuma and another v India and others* [1995] MLR 97, *Somani and Mulaga v Ngwira* 10 MLR 196 and *Sagawa v United Transport (Mw) Limited* 10 MLR 303.
8. In the case of *Banda and others v ADMARC and another* Banda CJ stated concisely the driver's duty of care 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, observes traffic signs and signals.

9. The claimants observed that a party to a case is bound by its statement of case, formerly pleadings, and that the Court has no jurisdiction to depart from such pleadings in the course of adjudication. They referred to the case of *Yanu Yanu v Mbewe* 10 MLR 417. Despite the assertion by the claimants that the evidence of the defendants was generally at variance with their statement of case, this Court agrees with the defendants that such is not the case. This is subject to the findings of this Court on the specific issue of the 1<sup>st</sup> defendant not having a driving licence.
10. This Court visited the place where the collision between the claimants and the 1<sup>st</sup> defendant took place.
11. The evidence given at the trial established that indeed the claimants were cycling down the road from Zomba CBD towards Chinamwali on the Zomba-Machinga Road. As they were about to pass the Naminyowe Villa junction on their left, the 1<sup>st</sup> defendant who was driving in the opposite direction and was turning to his right into the Naminyowe Villa junction drove in the way of the claimants and collided with them. They insisted that no other vehicle was involved in front of them. The 1<sup>st</sup> defendant took the claimants to hospital as they were injured.
12. On the other hand, the 1<sup>st</sup> defendant insisted that he had been given a go ahead, by another vehicle that was driving in the opposite direction in front of the claimants, to make his turn and that it is the claimants that failed to notice that the vehicle in front of them had stopped to let him pass and that as a result the claimants ended up causing the collision.
13. The claimants submitted that the 1<sup>st</sup> defendant failed in his duty of care to notice that the claimants were passing and had a right of way. On the other hand, the 1<sup>st</sup> defendant insisted that he had been given a right of way by the vehicle opposite to him and that the claimants ought to have paid attention and ought to have noticed that the vehicle in front of them had given way to the 1<sup>st</sup> defendant and should have given way too.
14. This Court observed that the driver of the vehicle allegedly in front of the claimants' vehicle that is alleged to have given way to the 1<sup>st</sup> defendant was never called to substantiate the allegations of the 1<sup>st</sup> defendant in that regard. This leaves the allegations of the claimants unchallenged, namely, that there was no other vehicle involved in this matter. This Court therefore finds doubtful, the allegation by the 1<sup>st</sup> defendant that he was in fact given a right

of way and that this is why he turned to his right where he collided with the claimants.

15. Even if it were given that the 1<sup>st</sup> defendant had in fact been given way to turn to his right into the junction, the impression of this Court is that he never ensured that it was safe to do so as regards other road users. As correctly submitted by both parties, a driver has a duty to ensure that he proceeds with reasonable care and skill in the circumstances of the case. In the present case, the 1<sup>st</sup> defendant appears to simply have turned on account of being given the right to do so by the driver from the opposite direction. He had a duty to ensure that the road was clear of other road users such as cyclists who usually cycle on the far side of the road. He failed to ensure that.
16. The arguments of the defendants to the contrary, pinning responsibility on the 1<sup>st</sup> claimant are untenable in the circumstances. Namely, that the 1<sup>st</sup> claimant should have ensured that he noted that the vehicle in front of him had stopped and that he should have stopped too.
17. In the foregoing circumstances, the claim of contributory negligence fails.
18. In the premises, this Court agrees with the claimants' version of events and finds that the claimants have proved to the requisite standard that they got hit by the 1<sup>st</sup> defendant's motor vehicle whilst he turned cutting in front of them and colliding with them on his passenger side of the vehicle.
19. The 1<sup>st</sup> defendant is liable as owner of the motor vehicle herein whereas the 2<sup>nd</sup> defendant is liable as insurer against third party risks. In its submissions, as was the case during trial, the 2<sup>nd</sup> defendant alluded to 1<sup>st</sup> defendant insured having no driving licence and that this impacted on the 2<sup>nd</sup> defendant's liability under the policy of insurance. This was never part of the defendants' statement of case. It cannot be considered by this Court. See the case of *Yanu Yanu v Mbewe* 10 MLR 417. This Court will therefore not belabor the point raised by the 2<sup>nd</sup> defendant of the implication, on third party claims, of its insured not having a driving licence.
20. The claimants are entitled to the damages that they have claimed since clearly they got injured as asserted by the 1<sup>st</sup> defendant himself during his testimony. The reference, in submissions, by the defendants to the medical reports herein tendered by the claimants as hearsay for being not tendered in evidence by the authors thereof or for being authored by unauthorized personnel makes no difference in the face of a clear admission of injury to the claimants as made

by the defendants. The damages shall be assessed by the Registrar if not agreed within 14 days.

21. The claimants shall also get the costs of these proceedings to be similarly assessed by the Registrar.

Made at Blantyre this 28<sup>th</sup> October, 2021.



M.A. Tembo  
**JUDGE**

