

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 261 OF 2017

BETWEEN:

YAMIKANI MTHAMBALA

CLAIMANT

AND

JONES NYIRENDA

1st DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Kumwenda, Counsel for the Claimant
Mwandira, Counsel for the Defendants
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is this court's judgment following a trial of this matter on the claimant's claim for damages for the personal injuries he had suffered due to the alleged negligence on the part of the 1st defendant, who is the 2nd defendant's insured, in the manner he drove his motor vehicle resulting in the motor vehicle hitting the claimant who rode a motor cycle into the Lilongwe Salima road from left to right.
2. The claimant testified at the trial of his claim and so did the 1st defendant. Both parties filed written submissions after the trial.

3. The claimant's statement of claim indicates that he lawfully entered the road from left to right at Chezi Trading Centre in Salima. And that as he did so, the 1st defendant negligently drove his vehicle and hit him.
4. The defendants deny that the 1st defendant was negligent as alleged. They asserted that the claimant wholly contributed to the accident by entering the road without due care and attention and in total disregard of his own safety.
5. The issue for determination before this Court is whether the 1st defendant was negligent in the manner he drove his vehicle herein resulting in him hitting the claimant biker.
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. 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 succinctly 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 defendants observed that a party to a case is bound by its pleadings and the Court has no jurisdiction to depart from such pleadings in the course of adjudication. It referred to the case of *Yanu Yanu v Mbewe* 10 MLR 417.
10. At the trial, the claimant testified that he was riding the motor cycle herein in front of the 1st defendant's vehicle on the Salima to Lilongwe Road and that

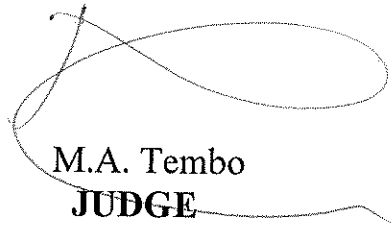
at the Trading Centre in question he signaled with his hand that he was turning right and the 1st defendant suddenly came from behind and hit him causing him serious injury.

11. The 1st defendant gave a contrary version of the events. He stated that he when he reached the trading centre in question he slowed down to park so that he could buy some vegetables. He then stated that he observed the claimant on a motor bike on the left side of the road and speaking to some people. He stated that the claimant suddenly entered the road and made a u-turn in the road in from of him. He stated the he swerved his vehicle to the right to avoid hitting the claimant but ended up hitting the claimant on the right side of the road.
12. The claimant submitted that he was hit from behind by the 1st defendant who drove without due care and in disregard of his signaling that he was turning right.
13. The defendants correctly submitted that the case of the claimant as pleaded is at variance with the case sought to be proved by the claimant. The claimant is indeed bound by his pleading as held in *Yanu Yanu v Mbewe* 10 MLR 417.
14. It is clear that the claimant in his statement of claim alleged that he lawfully joined the road from left to right and that is when he got hit by the 1st defendant's vehicle. That was the case he was supposed to prove. As correctly submitted by the defendants, the claimant sought to prove a different case by his evidence at trial. That is untenable.
15. This Court agrees with the submission by the defendant that, in the circumstances of the case, it appears that the 1st defendant's version of the events is the more probable one as it accords with the statement of claim by the claimant. That version is that the claimant entered the road in issue from left to right suddenly and without checking the presence of the 1st defendant oncoming vehicle. This is given that the claimant has not brought any evidence to prove his claim but sought to prove a claim that he never brought before this Court.
16. This Court finds the version of the 1st defendant credible in the circumstances. It appears more probable than not that the claimant suddenly entered the road without checking that it was safe to do so and thereby did so without regard to his own safety. The defendant had no driving licence and admitted not being familiar with road safety and road signals. This is regrettable as it always ends in tragedy. The attempts by the claimant to say that he was riding the motor

cycle in front of the 1st defendant and signaled that he would turn right appear to be not credible.

17. In the premises, this Court agrees with the defendants and finds that the claimant has failed to prove to the requisite standard that he got hit by the 1st defendant's motor vehicle whilst he entered the road lawfully from left to right. The claimant's claims therefore fail with costs to the defendants to be assessed by the Registrar if not agreed within 14 days.

Made at Blantyre this 15th February, 2021.



M.A. Tembo
JUDGE