

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

PERSONAL INJURY CAUSE NUMBER 758 OF 2011

BETWEEN:

**ALICE MUCHAWA (Suing on her own behalf and On
behalf of the dependents of LIMBANI MUCHAWA, deceased CLAIMANT**

AND

MR KHAN 1st DEFENDANT

UNITED GENERAL INSURANCE COMPANY LIMITED 2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Mataka, Counsel for the Claimant
Machika, Counsel for the Defendant
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is the decision of this Court following a trial of this matter on the claimant's claim for damages for the loss of dependency on the deceased and for the deceased's loss of expectation of life arising from the demise of the deceased caused by the alleged negligence of the 1st defendant's driver who is insured by the 2nd defendant.
2. The claimant asserts that she was the wife of the deceased herein, Limbani Muchawa and she took out this action on her own behalf and on behalf of the dependents of the said deceased.

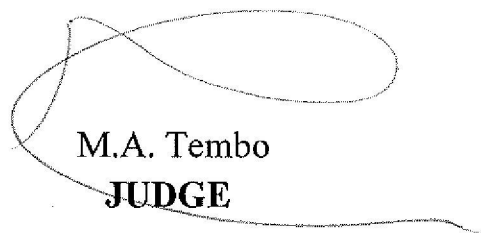
3. She asserts further that the 1st defendant is the owner of a truck which is insured by the 2nd defendant. And that, the deceased was an employee of the 1st defendant and on the material day, on 16th January, 2011, was sitting in front of the 1st defendant's truck. Further, that when the truck reached near Sanga Trading Centre in Nkhatabay, the driver of the 1st defendant's truck failed to control the truck at a bend and it overturned and killing the claimant's husband on the spot. The claimant asserts that the driver negligently lost control of the truck. Hence her claim for damages herein as well for the cost of a police and medical report.
4. The defendants generally denied the assertions made by the claimant. The 2nd defendant also asserted that the insurance policy on the truck herein, which has a limit, did not cover passengers carried for reward and that as such as the deceased was not covered by the policy of insurance.
5. As correctly submitted by both parties, the standard of proof in these civil matters is on a balance of probabilities as rightly noted by the defendant. And, the burden of proof lies on he who asserts the affirmative, in this case the plaintiff. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
6. As further correctly submitted by the parties, the duties of a driver of a motor vehicle on the road 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.
7. 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.

8. In her testimony, the claimant asserted that though she did not see the vehicle, she was told at the 1st defendant's office that the driver of the vehicle failed to control the vehicle and that led to the vehicle overturning killing her husband who was in the vehicle as the Driver's Assistant handling goods on the vehicle.
9. The defendants brought as their witness Ian Solomon, the 2nd defendant's Claims Manager. He accepted that the truck in issue herein was indeed insured by the 2nd defendant subject to a policy limit of K5 000 000. He however asserted that the policy of insurance did not cover employees of the insured injured in the course of duty. He stated that the 2nd defendant's investigations in the present matter revealed that the deceased was an employee of the 1st defendant and died in the course of duty and hence the 2nd defendant policy of insurance does not cover his loss.
10. He exhibited a copy of a tailor-made copy of insurance in question and said the signed one was not on the record.
11. The claimant submitted that the defendant did not bring any evidence to contradict the version of events as submitted by her. On their part, the defendants contended that the claimant did not assert any negligence on the part of the driver of the truck. The witness statement of the claimant is very categorical that the 1st defendant's driver failed to negotiate a bend and thereby caused the truck to overturn killing the deceased herein. The assertion by the defendants that negligent conduct has not been proved is therefore untenable. No contradictory evidence has been given by the defendants on that point which clearly points to the 1st defendant's office advising the claimant how her husband died in this matter. It is therefore found as a fact that the claimant has made out the claim of negligence against the 1st defendant. The truck driver failed to exercise the skill expected of a driver as decided in the case of *Banda and others v ADMARC and another* 13 MLR 59.
12. In view of the foregoing finding of this Court, this Court shall not belabor itself with the parties' submissions on the admissibility of the police report tendered in evidence herein by the claimant as this Court finds it will not make any difference. And further, because this Court is of the traditional view that without the author thereof testifying before this Court such a police report is only evidence of having been made and not as to the truth of its contents.

13. The defendants then submitted that the policy of insurance can exclude passengers in line with section 148 of the Road Traffic Act and as decided in the case of *White v Kaondo and another* [1993] 16 (2) MLR 909. They therefore asserted that the policy of insurance herein excluded employees of the 1st defendant like the deceased.
14. The claimant on her part contended that the assertion of the exclusion being made by the defendants in evidence and their submissions was not pleaded as a defence. The claimant correctly added that a party is bound by its pleadings and cited the case of *P.T.K. Nyasulu v Malawi Railways Limited* [1998] MLR 195.
15. This Court observes that indeed a party is bound by its pleadings. The defendants are therefore bound by their defence that the policy of insurance did not cover passengers. It cannot now lie in the mouth of the defendants now to state that the policy of insurance does not cover employees such as the deceased. The deceased was not a passenger in the 1st defendant's truck. The limitation sought to be brought in by the defendants is therefore untenable.
16. In the foregoing premises, the 2nd defendant is found liable as insurer since the 1st defendant has been found liable for negligence as its insured.
17. Judgment is accordingly entered for the claimant for damages as claimed with costs. The damages and costs shall be assessed by the Registrar, if not agreed by the parties within 14 days. Of course, the policy limit shall apply to the 2nd defendant's liability as pleaded.

Made at Blantyre this 15th February, 2021.



M.A. Tembo
JUDGE