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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 842 OF 2019

BETWEEN:

**JANET CHIKAFWA (Suing as an Administratrix and
beneficiary of the Estate of AFAKI MAONGA, Deceased) CLAIMANT**

AND

CHRISTOPHER MITINDA

1st DEFENDANT

**GENERAL ALLIANCE INSURANCE COMPANY
LIMITED**

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Kapoto, Counsel for the Claimant
Chipembere, 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 against the defendants for damages for loss of dependency by the claimant on the deceased as well as for the loss of expectation of life by the deceased and costs of obtaining a police and death report and costs of this action.

2. The claimant is the widow of the deceased, Afaki Maonga. The 1st defendant is the driver of the motor vehicle which was insured by the 2nd defendant. The defendants are sued in those capacities.
3. In her statement of case, the claimant indicated that on 7th April, 2018 around 9.00 hrs the 1st defendant was driving the motor vehicle herein from the direction of Mchinga towards Liwonde on the Machinga-Liwonde road. She indicated that on arrival or near Chabwera village, the 1st defendant drove the said vehicle so negligently that while trying to avoid hitting pedal cyclists who were riding in the same lane as he was that he ended up hitting the deceased from the back who was riding his bicycle in the same direction.
4. She indicated the particulars of negligence, namely, driving the said vehicle at an excessive speed, driving without due care and attention, failing to have any or any proper look out, failing to slow down, to stop, to swerve or in any way to control or maneuver the said vehicle so as to avoid the accident herein and generally failing to observe road traffic rules and regulations.
5. She stated that as a result of the said accident, the said Afaki Maonga who was aged 40 years sustained head injuries and died. And that thereby his estate and dependents have suffered loss and damage being loss of expectation of life and loss of dependency respectively. She indicated the list of the dependents being the four daughters of the deceased. She also indicated that she incurred a cost of K13 500 in procuring the police and death report. She therefore claims damages and costs as indicated.
6. On their part, the defendants admitted being driver and insurer of the motor vehicle herein respectively but denied that the 1st defendant was negligent. They asserted that it is the deceased who had been negligent and who caused the accident. They indicated the particulars, namely, having no regard for other road users and generally failing to follow road traffic rules and regulations. The defendants also deny the loss and damage claimed.
7. The 2nd defendant asserted that any liability on its part shall be subject to the insurance policy limit in this matter.
8. As correctly submitted by the claimant, the issue for determination before this Court is whether the 1st defendant was negligent in the manner he drove the vehicle herein resulting in the vehicle colliding with the deceased and killing him.

9. 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 deceased. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
10. At the trial of this matter, the claimant testified and called one witness to prove her claim herein. The defendants called one witness in its defence.
11. The claimant stated in her witness statement, that she is the widow of the deceased who died aged 40 years and was survived by four daughters.
12. She indicated that on 7th April, 2018 at around 9.00hrs she received the news that her husband now deceased was involved in a road traffic accident. She indicated that the deceased was coming from the Community Day Secondary School and had crossed the road towards Mawila while pushing his bicycle when the 1st defendant driving at excessive speed hit him. She exhibited a police report marked JC2. She indicated that her husband died whilst receiving treatment for the injury he sustained herein. She exhibited a copy of the death report marked as JC1. She indicated that the demise of her husband is a great loss to her and her children as they depended on him to take care of them as she is not working.
13. She indicated that she incurred a cost of K13 500 to obtain the police and death report.
14. The second witness for the claimant was Stain Chawala. In his witness statement, he indicated that is a kabaza (bicycle taxi) operator and was an eye witness to the accident herein. He indicated that on 7th April, 2018 he was at a bicycle taxi rank, 4 metres away from where the accident occurred. He indicated that the deceased was pushing a bicycle from the direction of the Community Day Secondary School to Mawila across the road. He added that the deceased duly checked both sides of the road for clearance and started crossing the road.
15. He then recalled that the deceased had already crossed the road when the motor vehicle herein which was being driven at excessive speed firstly hit the deceased's bicycle rear tyre and then the deceased fell on the tarmac and was also hit by the vehicle. He then indicated that together with other onlookers he took the deceased into the motor vehicle herein and it took the deceased to

the hospital where he died. He asserted that the vehicle was driving at very high speed and caught his attention even before the accident.

16. At the scene of the accident, he indicated that there is an intersection involving the main tarmac road and the dirt roads going in either direction off the tarmac road. He indicated that the Community Day Secondary school is in the direction of the dusty road opposite the dusty road on which the bicycle taxi rank is and where he was at the time of the accident herein on the Mawila side. He indicated that the collision herein happened on the side of the road on the Mawila side after the deceased had finished crossing the road from the Community Day Secondary School side and direction. He indicated that whilst he was at the bicycle taxi rank he heard a sound at the road side and then went there.
17. He reiterated that he saw the vehicle herein speeding towards the intersection and it hit the bicycle and the deceased. He said the speeding vehicle caused the collision.
18. During cross-examination, he was asked to check the yards from the bicycle taxi rank to the side of the road and indicated that it was 28 yards. He reiterated that he heard the screams of people at the road side whilst he was at the bicycle taxi rank about 50 metres away. He indicated that he came to the road side before the collision and said people were screaming due to the speeding of the vehicle. He then said he saw the vehicle coming at a distance while he was at the intersection after he had easily sprinted from the bicycle taxi rank to the intersection in seconds.
19. He then said that as he saw and paid attention to the vehicle herein come along the road at a speed, he did not pay attention to how the deceased was crossing the road. He explained that he did not see how the deceased crossed the road but only saw that the deceased had been down by the vehicle herein. He then asserted that he was present at the time of the accident.
20. He then said that he had been at the Kabaza rank since 2017. He could however not say who was the chairperson at the Kabaza rank in 2018 but that there was always a chairperson. He indicated that he did not know the chairpersons suggested by the defence like Jafali or Maida.
21. He then said the vehicle herein was a red van and that he saw it. He could not say who went to the hospital with the deceased in the vehicle herein. he also could not confirm anything about the passenger in the vehicle herein. he also

could not say whether the Kabaza chairperson went to the hospital with the deceased in the vehicle herein.

22. He then said he came to the side of the road at the intersection because women were shouting due to the oncoming speeding vehicle herein. he could not say whether the deceased heard the shouting women. He indicated that the deceased was on the bicycle carrying sugar and other items. He indicated that it was not true that the deceased and the bicycle were going in the same direction on the road.
23. During re-examination, he stated that when he had come to the kabaza rank he was told there was a chairperson but did not know him as he was new then. He then said he sprinted to the road from the kabaza rank after hearing noise at the road.
24. He then explained that when he said the motor vehicle herein had a van he meant that it had a covering at the back.
25. He then said the deceased came from the direction of Liwonde market but that the deceased came from the Community Day Secondary School side. He added that the deceased was coming from the market as he was carrying breakfast items. He clarified that the deceased had breakfast items but was coming from Community Day Secondary School direction. That marked the close of the claimant's case.
26. The witness for the defendant was Byron Luwemba and in his witness statement he stated that he works for the 2nd defendant as a Legal Associate. He indicated that at the time of the accident herein the 2nd defendant insured the motor vehicle herein and that the policy limit for third party damage was K5 million. He exhibited a copy of the policy of insurance. That was the defence evidence and closed the trial.
27. After the trial was closed the claimant made an application to amend her statement of case. The defendants opposed the application. This Court reserved its decision.
28. The claimant sought to amend her statement case to show that the deceased was not cycling in the same direction in which the 1st defendant was driving but rather that the deceased was crossing the road from the direction of the Community Day Secondary School towards Mawila whilst pushing the bicycle herein. The claimant contended that the amendment should be allowed, as per Order 7 rule 23 (1) of the Courts (High Court) (Civil

Procedure) Rules, as it is meant to correct a defect in the statement of case and that the defendants will not be prejudiced since the facts were contained in the evidence and the defendants cross-examined the claimant's witness. She added that the defendants were not calling any witness on how the accident happened herein.

29. The defendants opposed the application arguing that it came late after they closed their case and that it will cause them prejudice as the amendment was a radical departure from the case of the claimant on how the collision herein happened. They alluded to the case of *Temani v Mwaiwathu Private Hospital* Personal injury cause number 449 of 2014 where the Court held that the current approach to litigation is to actively manage cases and that it is vital to identify issues early and that amendments cannot be allowed anyhow. They noted that the Court also held that where the amendment changes the claim then the amendment should not be allowed. Further, that an amendment coming after the parties had finished giving evidence would be prejudicial and dismissed the application to amend. The defendants also alluded to the case of *Mike's Trading Group Limited v NBS Bank and Attorney General* Commercial Case number 78 of 2014 (High Court) (Commercial Division) where the Court held that there has to be a limit as to the right to amend and that the right is not absolute.
30. This Court agrees with the observations in the decisions cited by the defendants but also agrees that the claimant has a right to amend the case to correct a mistake or defect. This Court observes that each case must be determined on its facts and that in fact laying inflexible rules on amendments will occasion injustice. The key is to remain steadfast to Order 7 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules.
31. On the facts of this case, the claimant presented evidence to the defendants in advance as to how the accident happened. The defendants had an opportunity to test that evidence and contest it. They never brought any witness on how the accident happened. The claimant is therefore entitled to correct a defect in her statement of case so that it reflects what her evidence is. This Court finds that no prejudice will be occasioned that cannot be remedied by costs. The amendment is accordingly granted and the claimant is condemned in costs.
32. This Court now considers the submissions of the parties herein.

33. 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.

34. 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:

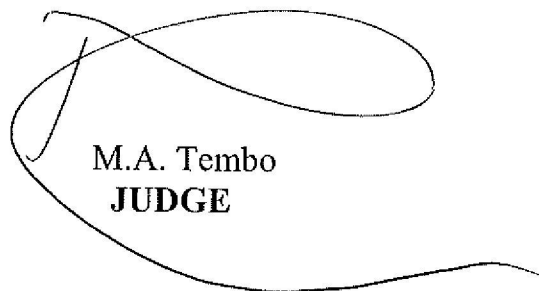
A driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skillful driver would have exercised under all the circumstances. A reasonably skillful driver has been defined as one who avoids excessive speed, keeps a good look-out, observes traffic signs and signals.

35. This Court has carefully considered the evidence and agrees with the submission by the defendants that the evidence of Satin Chiwala for the claimant, who claimed to be an eyewitness, was so discredited in cross-examination that it is so unreliable to support the claimant's claim to the requisite standard.

36. Contrary to the claimant's submission that the evidence of Stain Chiwala was not impeached, this Court agrees with the defendants that the evidence of Stain Chiwala is unreliable as to how the accident herein happened. As correctly submitted by the defendants, Stain Chiwala was clear during cross-examination that he did not see how the deceased crossed the road. He only saw that the deceased was run down. His evidence is also in much doubt when it is considered that he said the vehicle herein which is described as a saloon by the claimant in fact was a van. The other aspect that brings his evidence into serious question is that he says he heard women scream at the road and then he run there. Yet he says he was already near the side of the road at a distance of 4 meters when the vehicle herein came speeding down the road. This Court finds the evidence of the claimant's witness to have been so discredited during cross-examination that it is so unreliable.

37. The police report cannot be relied upon as to proof of its contents in relation to the question of negligence before this Court given that its author was not at trial and in all likelihood also relied on other information that cannot be verified here. It is hearsay. Authorities abound on that aspect. The claimant also did not follow protocols laid down under the Rules of procedure related to adducing of hearsay evidence. See Order 17 rule 55 of the Courts (High Court) (Civil Procedure) Rules. So the hearsay evidence in the police report is not ripe for consideration at all.
38. Since the claimant has no reliable evidence to show how the accident happened as a result of the alleged negligence of the 1st defendant this case must fail with costs.

Made in open court at Blantyre this 16th September, 2022.



M.A. Tembo
JUDGE