



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 810 OF 2018**

**BETWEEN:**

**FATSANAWO LIMBANI (Suing on her own behalf and  
on behalf of the dependents of the Estate of LIMBANI  
EDSON, Deceased)**

**CLAIMANT**

**AND**

**MR. FRED BRECK**

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

**BRITAM INSURANCE LIMITED**

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

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

Master, Counsel for the Claimant  
Mapemba, 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 on the deceased as well as for the loss of expectation of life by the deceased and costs of obtaining a police report and costs of this action.

2. The claimant is a widow of the deceased. The 1<sup>st</sup> defendant is the driver of the motor vehicle, a Scania Truck, which was insured by the 2<sup>nd</sup> defendant. The defendants are sued in those capacities.
3. The facts of this matter, as gathered from the evidence adduced at trial, are that on 7<sup>th</sup> November, 2018, at around 19:15 hours, the 1<sup>st</sup> defendant was driving the motor vehicle herein from the direction of Dedza heading towards Ntcheu along the Dedza-Ntcheu M1 Road. At or near Kabwazi Village the Scania Truck driven by the 1<sup>st</sup> defendant hit the deceased who was crossing the road from the left to the right side of the road. The deceased did not survive the collision.
4. The 1<sup>st</sup> defendant paid a fine for the offence of causing death by reckless driving herein and the claimant stated that she would also rely on this aspect to prove the allegation of negligence.
5. The deceased died aged 26 years old hence the claimant's claim that he suffered loss of expectation of life and that his dependents also suffered loss. The foregoing facts are undisputed. What is in dispute is how the collision happened.
6. The particulars of negligence are indicated by the claimant, namely, driving the motor vehicle at excessive speed in the circumstances, driving the motor vehicle without due care and attention, failing to take any or any sufficient regard for the safety of other road users more especially the deceased, failing to brake, steer, maneuver or control the said motor vehicle so as to avoid the accident herein and generally failing to observe road traffic rules and regulations.
7. On their part, the defendants denied that the 1<sup>st</sup> defendant was negligent. They asserted that it is the deceased who had been negligent and who caused the collision. They indicated the particulars, namely, standing in the middle of road when it was unsafe to do so, failure to give way to an approaching motor vehicle, failure to check whether the road was free from any oncoming motor vehicle before proceeding to cross the same, failure to give way to the oncoming motor vehicle and failure to take adequate precaution for his own safety and safety of other road users.
8. The 2<sup>nd</sup> defendant asserted that any liability on its part shall be subject to the policy limit in this matter.

9. As correctly submitted by the claimant, the issue for determination before this Court is whether the 1<sup>st</sup> defendant was negligent in the manner he drove the vehicle herein resulting in the vehicle colliding with the deceased and killing him.
10. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by the claimant. 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.
11. The claimant 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.
12. 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:

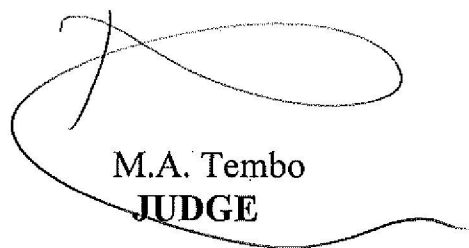
A driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skillful driver would have exercised under all the circumstances. A reasonably skillful driver has been defined as one who avoids excessive speed, keeps a good look-out, observes traffic signs and signals.
13. This Court heard the evidence of the four witnesses in this matter, two for each for either side to this matter. As already indicated, the bone of contention at the trial was the manner in which the collision occurred.
14. One of the witnesses of the claimant, who was an eye witness to the collision, made clear that there were three of them crossing the road at the material time from left to right. And that when he saw the oncoming vehicle herein he hurried to finish to cross the road and saw the deceased being run down by the vehicle herein on the verge of the road. He indicated that the deceased may have been run down because he was walking behind him. He added that had

the two of them not hurried up perhaps all three of them would have been killed.

15. The 1<sup>st</sup> defendant asserted the contrary. That in fact, the deceased and two others were standing in the middle of the road about 40-50 metres in front of his 30 tonne vehicle, which he was driving at a speed of 50 km/hr. And that he tried to apply brake but could not stop the truck. And that as he neared the three, he decided to swerve to his right lane so that the three could finish crossing the road on his left lane. He indicated that, however, the deceased went back to the right lane where he had swerved and the vehicle run down the deceased killing him instantly.
16. On the basis of the evidence and the submissions, this Court was left with the impression that in fact the witness of the claimant was telling the truth, as submitted by the claimant. He was insistent on the fact that the 1<sup>st</sup> defendant was driving at speed and ended up hitting the deceased as he was on the verge of the road after the three had crossed the road. Given the size of the vehicle herein it is inconceivable that the deceased may have crossed the road to the left and then turned back to cross over to the other lane, when his two friends proceeded to cross the road to the verge.
17. This Court agrees with the claimant that, the 1<sup>st</sup> defendant as a reasonably skilled driver, should have applied brakes to slow down so that he could avoid the collision given that he saw the three, including the deceased, in front of him at a distance of about 40-50 metres. The 1<sup>st</sup> defendant explained in this regard that he could not stop despite applying brakes. However, this Court is not persuaded by this explanation because there is no technical evidence to support his assertion as to the braking distance of his vehicle in this matter.
18. In the circumstances, this Court was left with the impression that the 1<sup>st</sup> defendant's version of the events leading to the fatality herein is not a credible one. The evidence suggests more likely than not that the 1<sup>st</sup> defendant was driving at such a speed that he failed to slow down by applying brakes to avert the collision. At the same time however, this Court finds that the three crossed the road when the vehicle was approaching at a much shorter distance and imperiled themselves. There must be a share of blameworthiness on their part as it is clear that the eye witness said they had to hurry up in crossing the road and the deceased was run down because he was walking behind and perhaps at a slower pace in crossing the road.

19. In the foregoing circumstances, the claimant has therefore proved negligence on the part of the 1<sup>st</sup> defendant driver in line with the requirement set in the matter of *Banda and others v ADMARC and another* 13 MLR 59. Contrary to the claimant's submission, the defendants have also proved some contribution on the part of the deceased in the manner he crossed the road.
20. This Court must therefore apportion liability to the respective parties bearing in mind that the 1<sup>st</sup> defendant was driving a vehicle which is an inherently dangerous article and ought to have done more to manage the situation by applying brakes to avert the collision. In the circumstances of this case the level of contribution on the part of the deceased is put at 30 per cent. The defendants are liable at 70 per cent.
21. The defendants are therefore found liable for the loss suffered by the claimant herein in their respective capacities as driver and insurer of the motor vehicle. And the liability of the insurer is subject to the policy limit herein since the law provides that a person having a claim against an insurer shall recover directly from the insurer any amount not exceeding the amount covered by the policy for which the insured is liable to the person claiming. See section 148 (1) Road Traffic Act.
22. Judgment is accordingly entered for the claimant for the damages she has claimed. She shall also get the costs sought. The Registrar shall assess the damages and costs, if not agreed by the parties within 14 days.

Made in open court at Blantyre this 22<sup>nd</sup> June, 2022.



M.A. Tembo  
**JUDGE**

