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**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 421 OF 2019**

**BETWEEN:**

**ROSE ALFRED (Suing as wife of Musitafu Marko Asani  
(Deceased) and on behalf of other dependents  
of the Deceased)**

**CLAIMANT**

**AND**

**EDWIN GAMA**

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

**CAPITAL OIL REFINING INDUSTRIES LIMITED**

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

**BRITAM INSURANCE LIMITED**

**3<sup>rd</sup> DEFENDANT**

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

Mwabungulu, Counsel for the Claimant  
Chipembere, Counsel for the Defendants  
Mankhambere, 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 loss of dependency on the deceased as well as for the loss of expectation of life of 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 belonging to the 2<sup>nd</sup> defendant which was insured by the 3<sup>rd</sup> defendant. The defendants are sued in those capacities.
3. The facts of this matter are that on 6<sup>th</sup> October, 2018, the 1<sup>st</sup> defendant was driving the motor vehicle herein from the direction of Balaka towards Chingeni along the Balaka-Chingeni road. At or near St Louis Secondary School the deceased who was cycling in the opposite direction to the 1<sup>st</sup> defendant was involved in a collision with the vehicle driven by the 1<sup>st</sup> defendant. The deceased did not survive the collision hence the claimant's claim alleging negligence on the part of the 1<sup>st</sup> defendant in driving the motor vehicle.
4. The particulars of negligence are indicated by the claimant, namely, driving too fast, failing to consider other road users, failing to stop or in any way to avoid the collision and failing to exercise proper control of the motor vehicle. The claimant also intends to rely on the doctrine of *res ipsa loquitor* meaning that negligence must be implied in the circumstances of this case.
5. 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, failing to keep a proper look out, cycling on the wrong lane of the road, clinging onto the road and cycling into the 1<sup>st</sup> defendant's path and generally failing to observe road traffic rules and regulations. The defendants also intend to rely on the doctrine of *res ipsa loquitor*.
6. The 3<sup>rd</sup> defendant asserted that any liability on its part shall be subject to the policy limit that it indicated.
7. 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.
8. 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.

9. 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.

10. 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.

11. This Court visited the place where the collision between the deceased and the 1<sup>st</sup> defendant took place. It heard the evidence there.

12. The bone of contention at the trial was the manner in which the collision occurred. The witness of the claimant who was an eye witness to the collision made clear that he was cycling behind the deceased at the material time. He indicated that he and the deceased had carried some bales on their bicycles early that morning. He indicated that he then saw the 1<sup>st</sup> defendant drive on their lane presumably as he avoided some pot holes in his own lane. He added that in the process, the 1<sup>st</sup> defendant saw the deceased approaching in the opposite direction and as he attempted to get back on his lane the rear of the vehicle collided with the deceased who later dies from the impact.

13. The 1<sup>st</sup> defendant asserted the contrary. That in fact, the deceased cycled into his lane presumably after losing balance and that as he veered the motor vehicle to avert a collision the rear of the motor vehicle collided with the deceased.

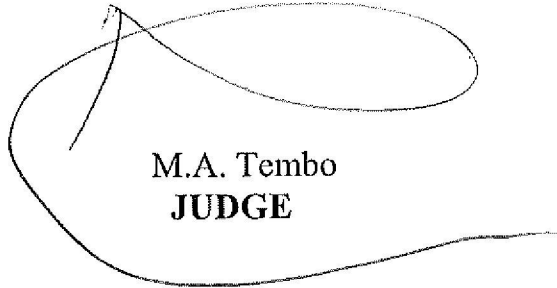
14. This Court was left with the impression that in fact the witness of the claimant was telling the truth, as submitted by the claimant. This fellow cyclist of the deceased was present at the time of the collision. He indicated that in the immediate aftermath of the collision some people came to the scene of the

collision. He indicated that these people came from a nearby house where there was loud music playing and some event going on that morning. He added that at the time a report of the collision was being made to the police he was at the hospital accompanying the deceased. The 1<sup>st</sup> defendant in his evidence attempted to show that there was no fellow cyclist. He however confirmed that there were indeed people who rushed to the collision scene from a nearby house where loud music was on. This fact of loud music at a nearby place was also alluded to by the deceased's fellow cyclist which shows that this fellow cyclist was present as indicated.

15. In the circumstances, this Court was left with the impression that the 1<sup>st</sup> defendant was not telling the truth that there was only the deceased cyclist and not a second cyclist present at the time of the collision herein. Having considered all the evidence of the 1<sup>st</sup> defendant and that of the deceased's fellow cyclist, this Court is left with the impression that the version of events of the cyclist is more probable than that of the 1<sup>st</sup> defendant. This fellow cyclist saw exactly what happened and narrated the same without getting impeached during cross-examination. There was however a major inconsistency on the part of the 1<sup>st</sup> defendant. He unsuccessfully tried to show that there was only one cyclist at the material time. This Court therefore does not find credible the 1<sup>st</sup> defendant's assertion that the deceased somehow lost control of his bicycle herein.
16. In the end, this Court finds that contrary to the submissions of the defence, the claimant has proved on a balance of probabilities that the 1<sup>st</sup> defendant failed to exercise due care as a skilled driver in this matter and caused the collision as a result by failing to consider other road users, failing to stop or in any way to avoid the collision and failing to exercise proper control of the motor vehicle. This led to the loss for which the claimant seeks redress now.
17. Of course, as submitted by the defendants, there is no proof that the 1<sup>st</sup> defendant was speeding. However, this is not fatal as the other particulars of negligence have been made out. The claimant has proved what was specified in her statement of case as required of her. See *Malawi Railways Ltd v Nyasulu* [1998] MLR 195 (SCA) alluded to by the defendants.
18. The claimant sought to rely on a police report. However, as submitted by the defendants, this Court will not have regard to the police report whose author never appeared to testify at trial.

19. The foregoing notwithstanding, 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. The defendants have failed to prove the contrary that they asserted.
20. The defendants are therefore found liable for the loss suffered by the claimant herein in their respective capacities as driver, owner and insurer of the motor vehicle respectively.
21. 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 seven days.

Made in open court at Blantyre this 6<sup>th</sup> April, 2022.



M.A. Tembo  
**JUDGE**

