



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 682 OF 2017

BETWEEN:

**GERALD SONGOLO
BRAZIO LUCIOUS**

**1st CLAIMANT
2nd CLAIMANT**

AND

RICHARD MSESEYA

1st DEFENDANT

CO-OPERATIVE GENERAL INSURANCE LIMITED

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Mwabungulu, Counsel for the Claimants
Namasala, Counsel for the Defendants
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is this court's decision following a trial of this matter on the claimants' claim for damages for the personal injuries they 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 herein resulting in the motor vehicle hitting the claimants who were riding on a bicycle in the opposite direction along the Limbe-Chiradzulu road.

2. The claimants' claim is that the 1st claimant was a cyclist, who had the 2nd claimant as a passenger, and he was cycling on the Limbe-Chiradzulu road from the direction of Makanani village towards Nene Grocery.
3. They assert that 1st defendant was the driver of the motor vehicle registration number MG 164 AK that was insured by the 2nd defendant.
4. They then assert that on 20th August 2017, the 1st defendant was driving the motor vehicle herein from the direction of Limbe heading towards Phalombe on the Limbe-Chiradzulu road when at Makanani village the 1st defendant so negligently drove the motor vehicle that he caused or permitted the same to collide with the claimants.
5. It is alleged that the collision happened due to the negligence of the 1st defendant in driving, managing and controlling the said motor vehicle. The claimants particularized the negligence as driving too fast or over speeding, failing to stop or manage the vehicle to avoid the collision, failure to exercise control of the vehicle, failing to see the claimants in good time so as to avoid the collision, veering to the opposite lane of the road and colliding with the claimants, driving without due care and regard to pedestrians on the road and failing to stop and *res ipsa loquitur*.
6. The claimants assert that by reason of the foregoing they sustained injuries which they particularized.
7. On their part, the defendants admit being driver and insurer of the motor vehicle herein respectively. They however deny that the 1st defendant was negligent. They claim that the 1st claimant caused the collision as he was negligent in that he cycled on the wrong lane, cycled recklessly and entered the path of the 1st defendant, failed to pay sufficient heed to the presence of the motor vehicle on the road and failed to keep any or proper look out. They also deny the alleged injury and loss suffered by the claimants.
8. The issue for determination before this Court is whether the 1st defendant, 2nd defendant's insured herein, was negligent in the manner he drove the motor vehicle herein resulting in the car colliding with the cyclist claimants herein.
9. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by both 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.

10. This Court visited the scene of the events leading to the present claim and the claimants gave evidence in this matter and so too the defendants.
11. The 1st claimants evidence was as follows. He stated that on 20th August, 2017, he was cycling on the extreme left hand side of the Limbe-Chiradzulu Road from the direction of Chiradzulu heading to Limbe. And that upon arrival at Makanani village, a motor vehicle which was being driven at high speed from the opposite direction suddenly left its lane and swerved to the extreme right lane where it collided with his bicycle on the yellow line. He then stated that, according to the police report, which he tendered in evidence, the motor vehicle that collided with his bicycle was a Government vehicle which was insured by the 2nd defendant and was driven by the 1st defendant.
12. He stated that he fell unconscious and sustained injuries as a result of the collision, namely, severe pelvic pain and pain on the thigh as well as a couple of fractures. He produced a medical report to show these injuries.
13. During cross-examination, he confirmed the point of impact on the road being at the yellow line on the extreme right of the road as one faces Chiradzulu from Limbe. He indicated that the vehicle was initially on its left lane but then it veered to the right lane and to the extreme side and went on the dirt verge where there are some hedges and then collided with his bicycle as it drove back onto the road. He denied descending down the road onto the left lane where the vehicle was coming uphill.
14. He then agreed that the part of the vehicle which his bicycle collided with was on the front passenger side particularly the space between the passenger door and the bonnet.
15. The 2nd claimant's evidence was that on 20th August, 2017, he was a pillion passenger on a bicycle that was moving on the extreme left hand side of the Limbe-Chiradzulu Road from the direction of Chiradzulu heading towards Limbe. He similarly stated that upon arrival at Makanani village, a motor vehicle which was being driven at high speed from the opposite direction suddenly left its lane and swerved to the extreme right lane where it collided with the bicycle he was on and he got injured in the process as per the medical report that he produced. He indicated that the vehicle in question is the same one referred to by the 1st claimant.
16. During cross-examination, he reiterated what the 1st claimant said.

17. The claimants brought a third witness who is Traffic Sergeant Mose. His evidence was that he went to the scene of the collision herein and assessed the situation. He took the particulars of the vehicle and its driver as indicated herein. He estimated that the collision occurred mid-way on the right lane across the white line as one faces the Chiradzulu direction. He pointed to a spot four metres from that was pointed at by the claimants. He added that according to the skid marks he observed the vehicle left the road and came back onto the road after about 35 metres.
18. During cross-examination, he stated that he observed blood spatters on the point of impact. He insisted that the collision occurred at the spot which he pointed to given that the vehicle impact point was on the passenger side. He also indicated that, according to an eye witness, the driver of the vehicle left his lane because he was avoiding a child who was entering his lane. He concluded that the driver was not in the wrong.
19. During re-examination he stated that in the circumstances it is possible both the cyclist and the driver were not negligent.
20. The fourth witness for the claimants was Mr Amasi Mwamadi who said he saw the collision take place as he was at his shop which is next to the road in question herein. He stated that the vehicle and the cyclists were going in opposite directions and were in their respective lanes. He then stated that at the point of impact the cyclist was near the white line, approximately 30 cm from the white line, and not on the extreme left of his lane as claimed. He also disputed the point of impact pointed out by the claimants.
21. He then stated that at the point of impact, the driver was trying to avoid hitting a child that went in the road. He added that the driver drove the vehicle to his right over the white line and to the verge of the road to avoid hitting the child. He added that there was an event and there were many people around. That marked the claimants' case.
22. The driver of the vehicle testified for the defendants. He stated that his actions in driving the vehicle were not affected by a child crossing the road. He however asserted that he observed that the cyclist was cycling on the vehicle lane as he came down the slope at a bend on the road and at a stretch that is approximately 80 metres long. As a result, he decided to avert a head on collision with the cyclist and so decided to accelerate to the right hand side and it was when he did that when the cyclist and the vehicle collided on the

passenger side as indicated earlier. He did not sound the vehicle horn to warn the cyclist. He insisted on this version during cross-examination and denied that he was speeding asserting that he was driving uphill at 70 or 80 km/hour. He added that he never applied brakes as he veered to his right to avoid the cyclist herein and there were no skid marks. He added that he stopped about 35 metres further up the road and left the scene for the police due to security fears in view of a gathering crowd.

23. The second witness for the defendants was a passenger in the vehicle herein, Mr Christopher Misomali. His evidence was mainly that he did not see the lane on which the cyclist was immediately prior to the collision. He said he was texting and only heard the driver of the vehicle express his surprise at how the cyclist was moving down ahead of them in the opposite direction. And that immediately after that he heard the collision on the passenger side. That marked the end of the defence.
24. Both parties have 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.
25. Indeed, as submitted by the parties, 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 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.

26. The claimants submitted that it is their story as adduced by way of evidence in Court that on or about 20th August, 2017, that the 1st claimant, was cycling a bicycle on the extreme left hand side of Limbe-Chiradzulu Road from the direction of Chiradzulu heading towards Limbe and that the 2nd claimant was

- a pillion passenger thereon. Further, that upon arrival at or near Makaanani Village, motor vehicle registration number MG 164 AK Toyota Hilux Double Cabin which was being driven by the 1st defendant herein from the opposite direction suddenly left its lane and swerved to the extreme right lane where it collided with the bicycle and the claimants sustained injuries in the process.
27. The claimants submit, correctly, that the fact that the accident took place on the said day and place is not in dispute. They submit further that the actual point of impact is, however, in dispute.
 28. They then submitted on the accident spot. They noted that they stated that they were cycling on the extreme left side of the road from the direction of Chiradzulu Hospital going towards Limbe Direction. And that, there and then, the 1st defendant driving motor vehicle Registration number MG 164 AK Toyota Hilux, left his side of the road veered to his extreme right side of the road and hit the claimants. The claimants observed that whilst they pointed to the extreme left side of the road, Amasi Mwamadi, an eye witness and Traffic Sergeant Mose pointed on a spot about 10 metres down the road and slightly inside the left lane from the middle white line as being the place of impact.
 29. The claimants then observed that, the defence witnesses stated that the accident happened right in the middle of the road on the white line. They submitted that Christopher Misomali's evidence on this point must be dismissed. They noted that according to his own evidence, he was busy on his phone when the impact occurred. And that the car then travelled about 30-35 metres before it came to a stop.
 30. They noted that the vehicle driver states that there was a crowd gathering at the scene and fearing damage to the car they left the scene and went to the police. They assert that when they came back the claimants had been moved from the spot. And that therefore we can as well discount the driver's evidence because he never stopped to check where indeed the accident occurred as he rushed to the police together with his colleague Christopher Misomali.
 31. They observed further, that the vehicle driver stated that he saw the cyclist and started turning to his right to the middle of the road from afar. They observed that how the driver started turning right from afar but still managed to hit the cyclists in the middle of the road is irreconcilable unless if the driver made an abrupt turn towards his right upon seeing the cyclists instantly.

32. They then submitted that leaves us with Amasi Mwamadi, the eye witness. They noted that he was in his shop at the time of the impact. They asserted that from the angle of his vision from the shop he could not have seen the impact unless he was anticipating the same. They noted that the shop is high up the road. They however observed that Amasi Mwamadi was the one who went to assist the victims. And that he found them in the middle of the left lane of the road before the white line.
33. The claimants then observed that the Traffic Sergeant came after the fact. And that he was obviously told of the point of impact. But that, however, he also deduced the point of impact from the blood in the middle left lane of the road. Further, that he also saw skid marks on the road clearly indicating that the motor vehicle skidded and veered off the road, travelled a few metres on the dirt verge and continued uphill before stopping about a 35 metres from the point of impact.
34. They submitted that, the accident occurred on the left lane of the road. And that this means the motor vehicle in question left its lane and veered to the other lane of the road. Further, that it is clear that the motor vehicle left its lane and went onto the other lane and hit the pedal cyclists.
35. The claimants then observed that there is a dispute as to what caused the accident. They observed that the vehicle driver stated that he saw a cyclist with a pillion passenger descending a hill at high speed coming straight towards his vehicle. And that the cyclist was moving on the right lane of the road (from the direction of Chiradzulu Hospital) and he tried to avoid the impact by swerving to his right (from the direction of Limbe).
36. The claimants then observed that they state the exact opposite, namely, that it was the driver who swerved the car from his lane onto their lane and hence the impact.
37. They then wondered as to who was telling the truth. They asked whether either of the parties would just swerve onto the other's lane without any explanation. They observed that, fortunately, there is an eye witness, Amasi Mwamadi, who stated that there was a child attempting to cross the road from his side of the grocery to the other side. They asserted that the 1st defendant was driving at a high speed and attempted to avoid hitting the child by swerving to the right (from the direction of Blantyre) thereby entering onto the opposite lane of the road where the claimants were cycling. They noted that the evidence in

form of a Police Report marked "M1" also carries the same story that the 1st defendant was trying to avoid hitting a child. Further, they assert that this version was not challenged. They also assert that, actually the 1st defendant conceded that, indeed, there was a child on the side of the road.

38. The claimants then asked why the 1st defendant who was driving a motor vehicle uphill failed to stop in time. They reasoned that the answer is simple. That he was driving at a high speed. They posited that it is easy to control a motor vehicle where a driver is driving at a reasonable speed and, even, more so when going uphill. They posited further that, however, the evidence of the Traffic Sergeant is more telling. They note that there were skid marks on the road signifying that the 1st defendant was speeding. Further, that the car failed to stop at the point of impact, it went on for about 35 metres before it could stop. And that this was all uphill. They reason that this clearly shows that the 1st defendant was driving at an excessive speed and this fact is buttressed by his car going uphill and skidding.
39. The claimants then submitted that if the 1st defendant was driving at a reasonable speed as required by law, he would have controlled his motor vehicle and not swerved to his right and hit the claimants.
40. The claimants submitted that even though the Traffic Sergeant stated in his report that nobody was negligent in the matter, it was just his opinion. And that this Court is not bound by his opinion. They submitted that this Court is a trier of facts and therefore not bound by the Police Report, see *Mtaila v National Insurance Company Limited and NICO General Insurance Company Limited*, Personal Injury Cause number 725 of 2011. Further, they asserted that they do not know why the Traffic Sergeant had to arrive at that opinion when it was clear that the driver was travelling at an excessive speed and failed to control his motor vehicle and ended up hitting the cyclists. They asserted that the Traffic Sergeant's conclusion in his report is not supported by the premises.
41. The claimants then submitted that, in regard to the 2nd claimant, it must be noted that he was not a pedal cyclist. And that he was just a pillion passenger and therefore not concerned who was in the right or wrong. Further, that the 2nd claimant was entitled to go against any joint tortfeasor, assuming there is joint liability (which is denied), as opposed to separate, liability. And that the 2nd claimant's action cannot be dismissed just like that because at law he can

- decide to sue any of the joint tortfeasors. see *Mtaila v National Insurance Company Limited and NICO General Insurance Company Limited*.
42. The claimants then submitted that the 1st defendant was clearly negligent and influenced the accident. They asserted that the 1st defendant failed to slow down, brake or in any other way to avoid any accident and that this clearly shows that he was driving the motor vehicle at a high speed under the circumstances such that he failed to exercise or maintain proper or effective control of the same when a child wanted to cross the road.
43. Further, that it is also clear that the 1st defendant failed to consider other road users thereby leaving his left lane and veering to the extreme right lane where he hit the 1st claimants' bicycle which was being lawfully cycled on the extreme left hand side of the road. And that, obviously, the 1st defendant failed to keep to his nearside.
44. The claimants then submitted that as a result of the 1st defendant's negligence they suffered injuries for which they ought to be paid damages by the 2nd defendant who is the insurer of the motor vehicle herein. They also seek costs for this action.
45. The defendants then made their submissions commencing with reference to the effect of the Road Traffic Act, the Highway Code and other Regulations on the duty of care.
46. They submitted that usage of public roads in Malawi is mainly regulated by the road Traffic Act and the several regulations made under it. And that while failure to follow the provisions of the Act, leading to an accident, gives rise to criminal offences under the Act, the same sets of facts may give rise to the tort of negligence, although the degree required to establish criminal liability is higher than that required to establish liability in negligence. See *Burges v Osman* [1964-66] 3 ALR Mal 475 at page 480 per Bolt J.
47. They asserted that a high way code is one of the regulations made under the Road Traffic Act which regulates the usage of public roads. They asserted further that, as Chimasula Phiri J (as he then was) observed, the duties incidental to the exercise of due care on the highway are in part determined by reference to detailed directions for the guidance of road users and known as Highway Code. See *Gaffar v Press Bakeries Limited and another Civil Cause No 2269 of 2002* (unreported).

56. The defendants then submitted that a pedal cyclist is allowed by law to use public roads as such the question of negligence involving a pedal cyclist will depend on whether the pedal cyclist did not do what a reasonable cyclist would do in the circumstances. They added that while one point of reference in such cases would be the statutory duties of the of the pedal cyclist, the question of negligence involving a pedal cyclist will turn on the facts of each case.
57. The defendants noted that *Munyimbiri v Nico General Insurance Company Limited* MSCA Civil Appeal number 54 of 2008 (unreported) the Supreme Court of Appeal held that where there is a single lane going in the same direction of the road, it is wrong to say that the cyclist ought to give way: the cyclist has the right of way, and when a motorist wants to overtake the cyclist he ought to take due care the same way he overtakes a fellow motorist. They noted further that same position was taken by this Court in *Namomwe v Qaswa Bakery and others* Personal Injury Cause Number 108 of 2011 (unreported). They then submitted that, however, these two cases should be understood subject to rule 19 of the Highway Code which states that the cyclist should keep well to the left of the road and not cycle in the middle expect where he is turning.
58. The defendants then observed that there is a dispute on what caused the accident. They noted that the claimants state that the 1st defendant was avoiding hitting a child which could have been fatal and in the process hit the claimants. They observed that, on the other hand, the 1st defendant states that the claimants were cycling with high speed on the wrong lane, their right side, from top to down the road, and in desperate effort to avoid hitting them head on, he speeded up while swerving to the right and the claimants ended up hitting the right passenger's door of the vehicle.
59. The defendants pointed out that the question therefore is who is telling the truth. They submitted that it is more probable that the 1st defendant's version of events is correct for the following reasons: Firstly, that the claimants lied on the spot of impact. That they pointed the point of impact to be on the margin of the road while their witnesses, Amasi Mwamadi and the Traffic Sergeant pointed the same to be close to the middle of the road. The defendants submitted that there is no motivation for the claimants' witnesses to lie before the court. And that, on the other hand, the claimants themselves had to lie on

the point of impact to match their story that they were cycling on the margin of the road on their left side and that the 1st defendant's motor vehicle left its lane and the other lane too to hit them. The defendants observed further that it is rather interesting to note that the claimants' own witnesses contradicted each other on this very important aspect.

60. Secondly, that Amasi Mwamadi stated that he saw the claimants cycling in the middle of the road. Further, that he however stated that because of his impeded vision he could not know which side they were before the collision. And that the 1st defendant stated that the collision was in the middle or close to the middle of the road and that is the time that Amasi Mwamadi saw the claimants. The defendants wondered that, if the claimants were cycling on their left side how did they find themselves in the middle of the road? What motivated them to go to the middle of the road? The defendants reasoned that it is more probable and logical that the claimants were on their right hand side and moved to the left towards the middle of the road when they saw the 1st defendant's motor vehicle coming in the opposite direction to avoid a head on collision.
61. Thirdly, that the point of impact between the claimants and the motor vehicle was on the left side passenger's door. That it is very unlikely that the claimants were on their left side of the road which was the far right hand side of the motor vehicle. And that, if such was the case, the point of impact with the motor vehicle would have been most likely to the right hand side of the vehicle and not the left passenger's door. Further, that the claimants failed to explain properly why the motor vehicle got damaged on its left passenger's door if they were indeed on their left side which was far right to the motor vehicle. That it is therefore most probable that the claimants were not on their left side but rather on their right side which was a wrong lane.
62. In the alternative, the defendant reasoned that even if it can be found as fact that the 1st defendant hit the claimants in the process of avoiding killing a child who was crossing the road, the 1st defendant cannot be held negligent. That as stated by Amasi Mwamadi, he applauded the 1st defendant for swerving to the right which saved the life of the alleged child. And that the 1st defendant therefore did not negligently swerve to right where he hit the claimants according to the Traffic Sergeant.

63. The defendants asserted that the 1st defendant was faced with a precarious situation in which saving a life was a paramount consideration for any decision he could take and he indeed took a decision that saved a life. They observed that it was stated in *Malida v Chiona and Another* [1964-66] 3 ALR Mal. 427 that where, however, the driver's duty of care to drive with reasonableness is disturbed by the negligent acts of another road user, for instance being placed in danger by the wrongful act of another, the driver is not negligent if he exercises such care as may reasonably be expected of him in the difficult position in which he is so placed. They submitted that, according to Amasi Mwamadi, the 1st defendant was placed in danger by the presence of the child in the road and he exercised all care reasonably expected from a driver to avoid hitting the child which could have been fatal but eventually hit the claimants with less severe consequences as compared to a scenario if he had hit the child.
64. The defendants then noted that the claimants argue that the accident was caused by 1st defendant's over speeding. They contended that this is not correct because of the following two reasons.
65. Firstly, that the 1st defendant stated that he was travelling at a speed between 70 and 80 km/hour. There is no speed limit sign post at the particular stretch of the road where the accident took place. The Traffic Sergeant never mentions anything about over speeding. They ask how then can it be said that the 1st defendant was over speeding when there is no speed limit at that specific stretch of the road? They assert that surely a speed of between 70 and 80 km/hour cannot be considered a high speed in the circumstances.
66. Secondly, that the 1st defendant stated that he speeded up while swerving to the right to avoid a head collision with the claimants. And that he was successful on that aspect because the claimants ended up hitting the right passenger's door and a head collision was avoided. Further, that if he did not speed up, it could have been a head collision with most likely fatal consequences. And that the 1st defendant therefore exercised care expected of reasonable driver.
67. The defendants submitted that the claimants were pedal cyclist and pillion passenger. They were coming from the opposite direction of the 1st defendant whilst cycling on the right side of the road clearly offending rule 19 of the Highway Code. And that clearly the claimants were negligent.

68. Further, that by reason of the claimants being on the wrong lane and at high speed, a collision was inevitable. And that the 1st defendant desperately speeded up while pulling the vehicle to the right in an attempt to avoid a head on collision consequently, the claimants ended up hitting the front left passenger door.
69. In the alternative, that even if it can be found that the 1st defendant hit the claimants while avoiding hitting a child, still the 1st defendant cannot be found to be negligent. And that it is also erroneous to argue that the 1st defendant was over speeding.
70. The defendants seek that the action be dismissed with costs.
71. This Court has considered the respective submissions by the parties. This Court has noted that the 1st defendant has rejected the impact of a child wanting to cross the road herein so that aspect will not be considered as a factor in causing the collision herein.
72. This Court observed that the evidence of the onlooker, Amasi Mwamadi, shows that the 1st claimant was cycling near the white line at the point of impact. This was close to the lane of the vehicle and contrary to the rules of the road which require cyclists to keep well to the left of their lane on the road as correctly submitted by the defendants.
73. The 1st claimant put himself and his passenger at risk. This understandably also alarmed the driver of the vehicle who was moving in the opposite direction. This set of facts lends credence to the allegation by the 1st defendant that he observed the cyclist coming down the slope in the vehicle lane.
74. However, on a stretch of about 80 metres, the 1st defendant driver of the vehicle did not hoot, did not slow down and accelerated to the adjacent right line. A reasonably skilled driver would have applied brakes to slow down and also should have sounded the horn to warn the oncoming cyclist. In the circumstances, the driver accelerated uphill and ended up hitting the claimants whilst they were in their lane. It appears the collision occurred near the white line and not on the far side of the road in the cyclist's lane. What is clear is that the vehicle had cut in front of the cyclists at the point of impact hence collision to the left hand front passenger side.
75. It appears things happened so fast as per vehicle passenger's description. But, whatever the case, the driver should have kept to his lane, slowed down and simultaneously sounded horn if he observed that the cyclist was moving

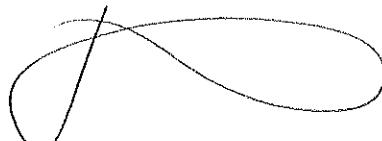
dangerously so as to allow the cyclist take corrective action. By accelerating and swerving to the right driver cut the cyclist path and contributed to the collision. He did not exercise reasonable skill expected of a driver as submitted by the claimants and as defined in the case of *Banda and others v ADMARC and another* 13 MLR 59.

76. This scenario leaves this Court to find that the 1st claimant cyclist contributed to the collision to a significant extent as submitted by the defendants. The driver can only be liable up to 50 per cent given his failure to slow down and stay in his own lane while sounding his horn upon being alarmed with the manner in which the cyclist dangerously came down the slope.

77. The defendants are therefore liable on a contributory basis at 50 per cent. Damages shall be assessed on that basis by the Registrar.

78. The claimants shall also recover only 50 per cent of their costs herein.

Made at Blantyre this 9th November 2020.



M.A. Tembo
JUDGE