

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 2733 OF 1999

BETWEEN:

Alfred Harris Nda.....Plaintiff

- and -

Steven Sapua.....1st Defendant - and -

Right Price Wholesalers.....2nd Defendant

- and -

United General Insurance Company Ltd.....3rd Defendant

CORAM: TEMBO, J.

Msungama, of Counsel for the Plaintiff

Kalua, of Counsel for the Defendants

Balakasi, Court Clerk

JUDGMENT

TEMBO, J: By his writ and amended statement of claim, the plaintiff is claiming damages for loss of dependency and loss of expectation of life from the defendants. The plaintiff's action, therefore, is founded on the tort of negligence. It is the assertion of the plaintiff that on or about the 25th day of August, 1998, Nellie Alfred (deceased), who was the plaintiff's daughter, was lawfully standing on the dirt verge along Mbayani Road when she was hit to death by the motor vehicle Registration No. KU 2345; that the vehicle was then being driven by the 1st defendant; that the accident was caused by the negligence of the 1st defendant in that the 1st defendant (i) had failed to keep on his side of the road, (ii) drove the motor vehicle without due regard to other road users, (iii) drove the motor vehicle at an excessive speed, and (iv) had failed to break, slow down or so to manage the motor vehicle as to avoid the accident. On their part, the defendants deny any liability therefor in that they maintain that the accident was caused or contributed to by the negligence of the deceased. For that purpose, the defendants assert, in their defence, that the deceased (i) had failed to keep on the road's dirt verge, (ii) had failed to keep any or any proper look out for motorised traffic that was travelling on the road, (iii) had failed to notice the 2nd defendant's motor vehicle in time in order for the deceased to

have avoided the collision, (iv) had crossed the road at a run without first ensuring that it was safe to do so and when it was in fact unsafe for the deceased so to do.

The Court has heard five witnesses, four of whom have testified for the plaintiff. The 1st defendant is the only witness who has testified for the defendants. In the course of the trial, the Court had visited the alleged scene of the accident, whereat the Court received the testimony of the mother of the deceased, as the 4th and last witness for the plaintiff.

The following facts can readily be gleaned from the testimonies of all the witnesses in the instant case: The plaintiff has commenced this action on his own behalf, as the father of the deceased, and indeed on behalf of all the other dependants of the deceased. It is not disputed that the deceased was hit to death along Blantyre Mbayani road by a motor vehicle Registration No. KU 2345 on 25th August, 1998. The motor vehicle was then driven by the 1st defendant who was an employee or servant of the 2nd defendant. The 2nd defendant was and is also the owner of the motor vehicle in question. The motor vehicle was then insured by the 2nd defendant.

On that day and at the particular time in question, His Excellency the State President of the Republic of Malawi was proceeding to Chileka Airport through Blantyre Mbayani road. Obviously, there were many people on the side of the road, who had converged thereat in order to cheer and get a glimpse of the State President as his motorcade passed through that place. At the time the deceased together with her mother were also present at that place. They were proceeding to their village outside the City of Blantyre. They had intended to fetch transport for that purpose then. However, with the imminent passage through that place of H.E.'s motorcade, the deceased and her mother together with PW3 had joined in the crowd of people that had converged, thereat to cheer the State President as his motorcade passed through. The deceased together with her mother had, therefore, stood on the dirt verge. Traffic Police had motioned at the passing motorised traffic to be parked on the edge of the road so as to facilitate the passage of the Presidential motorcade.

The 1st defendant, in obedience to the Police instructions therefor, had also parked his vehicle on the edge of the road on the same side of the road where the deceased and her mother were. Yes, then the 1st defendant was proceeding in the direction of Chileka from Blantyre. And, in relation to the position maintained by the deceased and her mother to that of the 1st defendant's motor vehicle, the 1st defendant had parked the vehicle on the side of the City of Blantyre, thus to the right hand side of the deceased and her mother; thus some fifteen metres away. The Presidential motorcade then passed through that place and the people who had converged thereat for that purpose had started to go their own various ways. It is then when the fatal accident occurred. For that purpose, the account of three eye witnesses as to what had in fact happened is very relevant.

The three eye witnesses are expressly agreed in their testimonies that then the 1st defendant suddenly started to drive; that he drove and managed his motor vehicle so fast in the circumstances that in so doing the 1st defendant momentarily had caused a scare to other road users; thus the persons who had been on the dirt verge on the side of the road where the deceased and her mother were, then. By the way, this was on the same side of the road where the 1st defendant had parked his vehicle. To avoid being crashed, several people including the mother of the deceased jumped to safety off from the path of the menacing motor vehicle which was then driven and managed by the 1st defendant, along the dirt verge. However, the deceased could not have done so before she was hit from the dirt verge where she was standing. Thereafter, the deceased was thrown just over the white line on the other side of the road. Observably, the deceased met her death then on that spot. An examination of her body at the Queen Elizabeth's Central Hospital later on confirmed that fact.

The 1st defendant, the only witness for the defendants, has unsuccessfully attempted to impress upon the Court to embrace the view that the deceased had suddenly strayed into the road, whereat she was hit by the motor vehicle. For that purpose the 1st defendant had told the Court that a Salesman in the 1st defendant's motor vehicle had in fact seen the deceased dash into the road into the path of the 1st defendant's motor vehicle, at such a close range that the 1st defendant being driver of the motor vehicle was, even with due diligence, unable to have had sight of her. The Court was also told by the 1st defendant that the said Salesman is dead. In the face of the overwhelming testimonies of the three eye witnesses on this point, the Court, without any hesitation, accepts the fact that the deceased was hit from the dirt verge where she stood at the time. Thus, it is not true that the deceased had suddenly entered the road, then.

It was pointed out, at the outset, that the plaintiff's claim for damages was founded on a tort of negligence. For the plaintiff to succeed, he must prove on balance of probabilities that he has been injured by the breach of a duty owed to him in the circumstances by the defendants to take reasonable care to avoid such injury: **Donoghue -v- Stevenson** (1932) AC 562. In regard to the duty of a driver of a motor vehicle, it is trite law that a driver of a motor vehicle has a duty, among other things, to use reasonable care to avoid causing damage to persons or property on or adjoining the highway. In that regard, reasonable care means the care which an ordinarily skillful driver would have exercised under all the circumstances and entails an avoidance of excessive speed, keeping a good lookout and observing traffic signals. In determining what is reasonable in any particular case, the nature, condition and use of the road in question, and the amount of traffic, which is actually on the road at the time, or which might reasonably be expected to be on the road, are all important matters or factors to be taken into consideration.

Reverting to the facts in the instant case, the 1st defendant has admitted that at the time of the accident he had driven the motor vehicle at a speed of about 40 kilometres per hour. And the Court has found, as a fact, that then the 1st defendant had hit the deceased on the dirt verge. Further, it was not in dispute that there were a lot of people at the scene of the

accident then, in that many people had converged onto the road side to cheer and get a glimpse of His Excellency the State President as his motorcade drove through the place. In the view of the Court the 1st defendant was negligent in having driven his vehicle, as admitted by him, at 40 kilometres per hour in the circumstances; and yes, in thereby, knocking the deceased off from the dirt verge to a position just over the white line on the other side of the road. In fact, the fact that he did not see anyone on the road then, including the deceased, is a point or factor to be born against him, thus that he had in fact negligently knocked the deceased from the dirt verge where she stood, then. In the circumstances, the question of the deceased ever having contributed to the cause of the accident does not arise. The Court therefore holds the 1st defendant to be solely responsible for the cause of death of the deceased in the circumstances. The plaintiff's claim against the defendants, in that regard, must succeed. It is so ordered.

As to the damages sought, the plaintiff is praying for damages in respect of loss of dependency and in respect of loss of expectation of life. As may be gleaned from the authorities on the point, it is sufficient that the Court has been informed by the plaintiff that the deceased, aged 6 at the time of her death, had assisted the plaintiff in a variety of ways including the undertaking of some domestic chores and the running of errands at the instance of the plaintiff and his wife. Nellie Alfred, deceased, was a school going child. She would have become a useful citizen and, therefore, would have provided financial as well as social assistance to her parents in due course. Be that as it may, it has been held that in such cases, the Court merely ought to award a conventional amount without giving reasons. In that regard, an award of K15,000.00 had been made in respect of loss of expectation of life by our Courts in 1997 and 1998 in the cases of **Mlutha, Administrator of the Estate of Mlutha -v- Namwili and N.E. Company Limited** Civil Cause No. 124 of 1997 (unreported) and **Katoleza -v- Nkwanda and Prime Insurance Company Limited** Civil Cause No. 2954 of 1998 (unreported). As to what may be an appropriate award in the instant case; the Court ought to make such award which would be reasonable in all the circumstances of the case, in particular regard being had to the value of the Malawi kwacha at the time. In that respect, Lord Diplock in **Wright -v- British Rly Board** (1983) 2 A.C. 773 expressed the view that the level of awards of conventional amount, therefor, may be progressively increased over a period of time. That such increases ought to take into account the inflation and the decrease in the real value of the money. Thus, the assessment of such award must be made with reference to the money of the day.

Bearing the foregoing factors in mind, the Court makes an award of the amount of K25,000.00 as damages for loss of expectation of life and K15,000.00 as damages for loss of dependency. It is so ordered. Costs are for the plaintiff.

Pronounced in Open Court this Tuesday, 10th day of December, 2002, at Blantyre.

A.K. Tembo

JUDGE