



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

CIVIL CAUSE NO 647 OF 2015

BETWEEN

**CHRISSY VILILI (on her own behalf and on
behalf of the Beneficiaries of the Estate of
CATHERINE VILILI, Deceased) PLAINTIFF**

-AND-

PRIME INSURANCE COMPANY LIMITED DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Khan, of Counsel, for the Plaintiff

Defendant, absent

Mr. O. Chitatu, Court Clerk

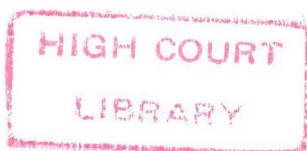
JUDGEMENT

Kenyatta Nyirenda, J.

The Plaintiff is the second born daughter of Chrissy Vilili [Hereinafter called the “Deceased”] and bring this action on her own behalf and on behalf of the beneficiaries of the Estate of the Deceased. The Defendants denies liability. It is, therefore, incumbent that the Court settles the issue of liability through full trial.

The Statement of Claim is brief and the substantive part thereof it is as follows:

- “2. *The Defendant was at all material times the insurer of Motor Vehicle Registration Number BQ 3769 Toyota Dyna Pick-Up which was at the material time insured under Certificate of Insurance Number 10475597 for the period of 04/01/12 to 03/04/12 and the Defendant is being sued in such capacity under Section 148 of the Road Traffic Act.*



3. *On or about 17th March, 2012 at around 9:00 hours, Mr. Gilbert Michase was driving Motor Vehicle Registration Number BQ 3769 Dyna Pick-Up from the direction of Liwonde towards Mtaja with twelve passengers on board and twenty bags of rice when upon arrival at or near Machinga Trading Centre he lost control of the said motor vehicle and it overturned once.*
4. *The said accident was wholly caused by the negligence of the driver of the said Motor Vehicle Registration Number BQ 3769 Dyna Pick-Up.*

Particulars of Negligence

- a. *Driving at an excessive speed in the circumstances.*
 - b. *Failing to have any or any sufficient regard of the plaintiff.*
 - c. *Losing control of the said motor vehicle*
 - d. *Failing to stop or slow down or swerve or so to control the said motor vehicle as to avoid this accident*
 - e. *Generally failing to observe road traffic rules and regulations.*
 - f. *In the alternative, the Plaintiff shall rely on the doctrine of res ipsa loquitor to prove negligence*
4. *As a result of the accident herein, Catherine Vilili, Deceased, sustained head injuries and died upon arrival at Machinga District Hospital*

And the Plaintiff claims:

- a. *Damages for loss of expectation of life.*
- b. *Damages for loss of dependency.*
- c. *Costs of this action"*

The Defendant contests the action and, accordingly, a defence was filed. The Defendant denies each and every allegation of fact contained in the Statement of Claim. The Defendant specifically denies being the insurer of Motor Vehicle Registration Number BQ 3769 Dyna Pick-Up (motor vehicle). The Defendant also pleads that its liability, if any, is (a) subject to the owner of the motor vehicle being found liable in respect of the accident and (b) limited to indemnifying the owner of the motor vehicle to the maximum liability in the contract of insurance between itself and the owner of the motor vehicle.

It is trite that a claimant has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**.

It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities that she sustained injuries and suffered damage as a result of the accident which was caused by negligence of the Defendant: see **B. Sacranie v. ESCOM, HC/PR Civil Cause No. 717 of 1991 (unreported)**.

The Plaintiff called two witnesses. The first witness was Robert Janatu. He adopted his Witness Statement whose material part reads:

- "1. On or about 17th March, 2012 at around 9:00 hours I was cycling my bicycle from Nsanama heading towards Liwonde.*
- 2. However, upon arrival at or near Nsanama Roadblock I saw a motor vehicle which was driving from the direction of Liwonde heading towards Ntaja. It was moving in the right lane of the road.*
- 3. As soon as the driver tried to swerve to his lane, the left lane, the said motor vehicle started moving abnormally. It was moving in zigzag fashion consequent which the said motor vehicle overturned since the driver failed to control the said motor vehicle.*
- 4. Consequently, the Deceased, whom I later on learnt to be Catherine Vilili, fell from the said motor vehicle but was hooked by the passenger door of the said motor vehicle.*
- 5. When the said motor vehicle came to a halt I went to see what happened and I confirmed that the Deceased and other people that were also travelling in the said motor vehicle were severely injured. I also discovered that the said Motor Vehicle's Registration Number was BQ 3769 Dyna Pick Up.*
- 6. I verily believe that the said accident was caused by the negligence of the driver of the said motor vehicle in that he was speeding which resulted in him failing to control or manage the said motor vehicle."*

The second person to testify was the Plaintiff himself (PW2). He adopted his witness statement, as his evidence in chief, and it is in the following terms:

- "1. I am the second born daughter of late Catherine Vilili, Deceased and I commenced this action on my own behalf and on behalf of the beneficiaries of the Deceased Estate herein. I am also an Administratrix with limited grant to the said Estate of Catherine Vilili, Deceased.*
- 2. I hail from Chabwera Village Traditional Authority Silola in Machinga District and currently am resident at Liwonde Township.*
- 3. I do the business of selling secondhand clothes at Liwonde Market.*

4. *My late mother used to do the business of selling secondhand clothes and used to travel more often due to the nature of her said business.*
5. *On or about 17th March, 2012 at around 09:00 hours Catherine Vilili, Deceased was going to Ntaja Market to sell her secondhand clothes. She boarded the Defendant's insured Motor Vehicle Registration Number BQ 3769 Dyna Pick Up at Liwonde en route to Ntaja.*
6. *However, upon arrival at or near Machinga Trading Centre the driver of the said motor vehicle lost control of the motor vehicle consequent which it overturned once. I exhibit hereto a copy of the Police Report marked as CV 1.*
7. *As a result of the said accident my late mother, Catherine Vilili, sustained head injuries and died upon arrival at Zomba District Hospital. I exhibit hereto a copy of the Medical Report marked as CV 2.*
8. *My late mother was survived by myself and my siblings, namely, Joyce, William, James, Silvia, McDonald, Violet, Chisomo, Esther and Upile. We were all dependent on her.*
9. *However, due to her wrongful and untimely death herein myself and the other siblings including the Deceased Estate have suffered loss of financial support and we are finding it extremely difficult to maintain ourselves.*
10. *I therefore commenced this action against the Defendant claiming damages for;*
 - i. *Loss of dependency.*
 - ii. *Loss of expectation of life,*
 - iii. *The sum of MK6, 000.00 for procuring the Police and Death Certificate.*
 - iv. *Costs of this action."*

PW1 tendered the Police Report and the Medical Report and the same were marked as Exhibits P1 and P2 respectively.

The Defendants being absent, there was no cross-examination of the witnesses.

The case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a

reasonable person would have done, or did that which a person taking reasonable precautions would not have done”

For an action in negligence to succeed, the plaintiff must show that (a) there was a duty of care owed to him or her; (b) the duty has been breached; and (c) as a result of that breach he or she has suffered loss and damage: see **Donoghue v. Stevenson [1932] AC 562** quoted with approval by Ndovi J., as he then was, in **Kadawire v. Ziligone and Another [1997] 2 MLR 139** at 144.

In **Banda and Others v. ADMARC and Another [1990] 13 MLR 59**, Justice Banda, as he then was, stated the duty of care owed by a driver of a motor vehicle 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 skilful driver would have exercised under all the circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look-out, and observes traffic signs and signals. ”

Further, the case of **Mhango v. Positi and National Insurance Company Ltd [1995] 2 MLR 402** is for the proposition that a driver of a motor vehicle has a duty to always keep a proper look out and to drive at such speed as would allow him to stop well within the distance he can see to be clear. This means that a driver of a motor vehicle must, among other matters, observe traffic signs and signals and avoid driving at excessive speed: see **Mponda v. Air Malawi Limited and another [1997] 2 MLR 131**. Furthermore, it is a driver’s duty to drive at a speed which will allow him to stop in case of sudden emergency. In deciding reasonable speed, the courts will have regard to the nature, condition and use of the road in question, the amount of traffic on the road at the material time or which might be expected to be on it: see **Kadawire v. Ziligone and another**, supra.

It is also important to bear in mind that if the driver strikes a person or object without seeing that person or object he may be placed in the dilemma that either he was not keeping a sufficient look-out or that he was driving too fast having regard to the limited look that could be kept: See **Evans v. Downer & Co Ltd (1933) 149 AC 264** per Scrutton LJ.

I have considered the evidence herein and it is my finding that the accident was caused by want of care on the part of the driver of the motor vehicle. He drove the motor vehicle at such an excessive speed that he failed to control it. Consequently, the motor vehicle overturned and resulted in the Deceased’s death. Had it been that the driver of the motor vehicle had driven at a reasonable speed, he could have managed to control the motor vehicle and avoided the accident herein. As the matter stands, the Defendant is bound under section 148 of the Road Traffic Act to

compensate the Plaintiff for the wrongful death that was inflicted on her mother as a result of the said accident.

I, accordingly, enter judgment in favour of the Plaintiff with costs and order that the collateral issue of assessment of damages in respect of the claim for loss of dependency and loss of expectation of life be dealt with by the Registrar.

Before resting, I wish to make a comment or two on the conduct of Messrs Russell, Smith and Associates. The Court record shows that they were retained by the Defendant to conduct defence of this case. It is Messrs Russell, Smith and Associates who acknowledged receipt of service of writ of summons on 12th November 2012, filed the Defence on 15th November 2012, accepted service of Summons of Directions on 21st February 2014, accepted service of Plaintiff's List of Documents on 23rd February 2014, accepted service of Plaintiff's Trial Bundle on 12 February 2015, filed the Defendant's Trial Bundle on 21st May 2015 and appeared for trial on 25th May 2015 and 19th October 2015.

When the case came for hearing on 27th April 2017, I pointedly asked Counsel Khan why is it that since 19th December 2016, court process was no longer being served on Messrs Russell, Smith and Associates but directly on the Defendant. Counsel Khan informed the Court that when Messrs Mbete & Co. sought to serve Notice of Hearing on Messrs Russell, Smith and Associates, the latter refused service on the ground that Messrs Russell, Smith and Associates had ceased to represent the Defendant.

Order 67 of the Rules of the Supreme Court (RSC) contains the procedure for changing, appointing or removing a solicitor on the record. Rules 1 and 2 of O.67 of RSC are relevant .

Order 67, r.1 of the RSC provides:

"1. – (1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until notice of the change is filed and copies of the notice are lodged and served in accordance with this rule, the former solicitor shall, subject to rules 5 and 6, be considered the solicitor of the party until the final conclusion of the cause or matter, whether in the High court or the Court of Appeal

Order 67, r.6 is as follows:

"(1) Where a solicitor who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with rule 1, or notice of intention to act in person in accordance with rule 4, the solicitor may apply to the Court for an order declaring that the solicitor has ceased to be the solicitor acting for the party

in the cause or matter, and the Court or Court of Appeal, as the case may be, may make an order accordingly, but, unless and until the solicitor-

- (a) serves on every party to the cause or matter (not being a party in default as to acknowledgment of service) a copy of the order, and*
- (b) procures the order to be entered in the Registry, and*
- (c) leaves at the Registry a copy of the order and a certificate signed by him that the order has been duly served as aforesaid,*

he shall, subject to the foregoing provisions of this Order, be considered the solicitor of the party till the final conclusion of the cause or matter whether in the High Court or Court of Appeal.

(2) An application for an order under this rule must be made by summons which must, unless the Court or the Court of Appeal, as the case may be, otherwise directs, be served on the party for whom the solicitor acted. The application must be supported by an affidavit stating the grounds of the application.

The general rule is that a retainer to conduct or defend an action continues till the client discharges the legal practitioner, or the legal practitioner discharges himself or herself, or till death or incapacity of either party or a change in the legal practitioner's firm, or till final conclusion of the cause or matter. Further, such a retainer is, as a general rule, an entire contract to conduct or defend the action to the end: see **Re Wingfield & Blew [1904] 2 Ch. 655, CA**, wherein Cozens-Hardy L.J., at page 684, stated the point in the following terms:

"When once a good retainer has been given at the commencement of an action, something definite, clear, and precise is required to withdraw that retainer and to get rid of the indivisible effect of that retainer."

Of course, a retainer is subject to implied terms enabling (a) a legal practitioner to withdraw for good cause and upon reasonable notice, and (b) the client to withdraw the retainer at any time. For example, a legal practitioner may withdraw for good cause where the client fails to provide a reasonable sum of money for disbursements, or the solicitor is being burdened and prevented by the client in properly conducting the action: see **Robins v. Goldingham (1872) L.R 13 Eq. 440**.

There is no notice on record of the fact that Messrs Russell, Smith and Associates had ceased to be legal practitioners for the Defendant. So long as a legal practitioner to a party in an action remains on record, service on that legal practitioner is good service: see **Lady de la Pole v. Dick (1885) 29 Ch. D. 301**. Further, a legal practitioner can only be discharged from liability to receive service

of proceedings by the substitution on the record of another legal practitioner, or of the party in person. Once such substitution is duly effected, the discharged legal practitioner

cannot be served, nor can he accept service; see **R. v. Justices of Oxfordshire (1893) 2 Q.B. 149**

In the present matter, there is nothing on record to indicate that Messrs Russell, Smith and Associates had adhered to the procedures laid out in O. 67 of RSC in relation to discharge of a legal practitioner. For example, there is neither an indication that M/s Messrs Russell, Smith and Associates applied by summons for an order declaring that they had ceased to act for the Defendant in this case nor evidence on record of such order being made by the Court.

As was observed by this Court in **Mustafi Ali v. Prime Insurance Company Limited, Personal Injury Cause No. 741 of 2013 (unreported)**, where a legal practitioner who has acted for a party in a matter has ceased so to act and the party has not given notice of change of legal practitioner, or notice of intention to act in person, it becomes incumbent on the legal practitioner to apply to the Court for an order declaring that he or she has ceased to act for the party in the matter. Such an application must be made with the same zeal as when filing a notice of appointment of legal practitioner.

Pronounced in Court this 22nd day of May 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE