

**Binwell Mandala vs Charles Mtandasha,
Blantyre Water Board and Britam Insurance
Company Limited Personal Injury Cause
Number 468 of 2022**

Judgment

Court: High Court of Malawi

Registry: Civil Division

Bench: Honourable Justice Allan Hans Muhome

Cause Number: Personal Injury Cause Number 468 of 2022

Date of Judgment: February 24, 2025

Bar: For the Claimant: Mr. Luciano Micheus
For the Defendants: Mr. Dumisani Mlauzi

The Claimant was a motor cyclist who was involved in an accident that occurred along the Limbe - Zomba road on 19th November 2021 around 10:00 hours. The 1st Defendant was driving a vehicle registered as BX 6101 which was owned by the 2nd Defendant and insured by the 3rd Defendant. The vehicle collided with the motor cycle on the passenger side when the vehicle was overtaking the motor cycle whilst the cyclist also made a sudden right turn. The Claimant alleges that the 1st Defendant was negligent and particularised the same. He

suffered various injuries, including loss of all of his toes on the right foot. The Defendants deny all the claims and contend that the accident was wholly or largely caused by the Claimant's own negligence by failing to indicate that he was making a right turn.

During trial, the Claimant adopted his witness statement as evidence in chief together with exhibits BM 1 (a Police Report stating that the accident was influenced by the Claimant himself by making a sudden turn to the right without giving a signal) and BM 2 (a medical report). In cross examination, the Claimant insisted that he indicated that he was turning right both by hand and by using the motor cycle's indicators. He admitted that he did not have a licence to operate a motor cycle. He also stated that the pillion passenger on the motor cycle was not injured as he jumped off the bike, before impact. He also agreed that the impact was on the passenger's side but was untruthful, stating that he was hit by the bumper of the vehicle and denying that the vehicle and the motor bike were side by side at the time of the accident. In re-examination, the witness maintained that he did not see that the vehicle had indicated that it was overtaking him.

The first Defendant testified that as he was overtaking the motor cycle, it suddenly made a right turn, without any notice. He tried to avoid it by swerving to the right but it was too late hence the collision. That the Claimant suffered his injuries because he was negligent himself. In cross-examination, he maintained that he was driving at a reasonable speed of 50Km/hr and managed to avoid a more serious accident by swerving as much as he could. His story was corroborated by the evidence of Cecilia Njoloma, who was a passenger in the

vehicle on the material day.

The main issue for determination before this Court is whether the first Defendant was negligent and if so whether the Defendants are liable to compensate the Claimant for the resultant injuries. The collateral issue is whether the Claimant himself contributed to his injuries by making a right turn without any warning. The standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative, in this case the Claimant: *see Tembo and Others v Shire Bus Lines Limited* [2004] MLR 405 at 406.

Negligence has been defined as 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: *see Blyth v Birmingham Waterworks Company* (1856) 11Ex Ch 781. The essential elements of actionable negligence are (a) a duty to take care owed to the Claimant by the Defendant, (b) a breach of that duty, and (c) damage suffered by the Claimant resulting from the breach of duty: *see J. Tennet and Sons Ltd v Mawindo* 10 MLR 366.

The Court has taken time to appreciate the oral and written arguments from both Counsel and finds that the accident was largely caused by the Claimant's own negligence. He cannot therefore succeed in claiming the replacement value of the motorcycle. This Court finds that it is more likely than not that the Claimant did not indicate that he was making a right turn. His pillion passenger sensed the danger and jumped off. The Court also observed that the Claimant was untruthful

on the spot of impact hence the weight that the Court attached to his evidence is diminished accordingly.

At law, both the Claimant and the 1st Defendant owed a duty of care to other road users and fellow passengers to drive with reasonable care. In *Banda and Others v ADMARC* [1990] 13 MLR 59 Hon. Justice Banda (as he was then) had this instruction: 'A reasonably skillful driver has been defined as one who avoids excessive speed, keeps a good look-out, and observes traffic signs and signals.' The fact that the Claimant made the right turn without caution shows that he was negligent. He failed to keep a good look-out. As admitted, he alleged that the motorcycle had both rear view mirrors but he did not notice that the 1st Defendant was overtaking him. This finding is in keeping with the dictum of Nriwa J. in *Galeta v Bruesson and Another* Personal Injury Cause Number 635 of 2019 at page 7, where he states 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.'

That said, this Court finds that the 1st Defendant may have also been negligent. According to Unyolo J, in *Mhango v Positi and National Insurance Company Limited* [1995] 2 MLR 402, 'a driver of a vehicle has a duty, when following another vehicle, to allow sufficient space between the vehicles in which to be able to stop safely if the vehicle in front slowed down or stopped suddenly.' There is a possibility that had the 1st Defendant been more careful in swerving further, either to the right or back to his lane on the left, the accident could have been avoided. There is no record that the 1st Defendant hooted to alert the

Claimant of the impending danger. In the foregoing case, Unyolo J. further held that a driver wishing to overtake has to ensure that it is safe to do so and should not overtake at or when approaching a road junction.

Having considered the totality of the evidence, this Court assigns 60% of the liability to the Defendants and the Claimant shall suffer 40% contribution. Costs shall be settled in the same proportion and if costs and damages are not agreed, within 14 days, the same shall be assessed by the Registrar.

Made in Open Court this 24th day of February, 2025.